CMA
Competition & Markets Authority

Annual report on concurrency

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Foreword

This is the second annual concurrency report to be published by the Competition and Markets Authority (CMA) in accordance with its statutory obligation[1] to assess the operation of the concurrency arrangements. Under those arrangements, the CMA and the sector regulators for key sectors of the economy (specifically, airports and air traffic services, telecoms, post, broadcasting, spectrum, energy, water and sewerage, rail in Great Britain, healthcare services in England, financial services and payment systems) have concurrent powers to apply competition law in the relevant sector.

The enhanced concurrency arrangements, which came into effect on 1 April 2014, aim to increase competition law enforcement activity in the regulated sectors by strengthening cooperation between the CMA and the sector regulators and, more generally, to promote competitive outcomes for the benefit of consumers, business and the overall economy.

As set out in last year's report,[2] the first year of the regime saw the 'building blocks' of the new regime – those processes, documents, policies and other mechanisms required in order to implement the enhanced concurrency arrangements and to facilitate cooperation between the CMA and the sector regulators – put into place. Over the past year, these arrangements have been working well and cooperation within the regime has extended beyond competition enforcement activity to broader policy and markets work. As a result, there has been improved coordination between the CMA and the sector regulators, as noted in the recent National Audit Office report[3] on the UK competition regime.

Key messages

Overall, the concurrency arrangements are working well, with significant progress being made across the sectors during the past year:

- In terms of competition enforcement activity, there has been a clear focus on delivery of the ongoing competition cases within the regulated sectors, with two decisions taken (one infringement and one non-infringement decision), the acceptance of commitments in another case and the issue of a Statement of Objections in a fourth. In addition, two new competition cases have been opened during the year. The first of these was launched

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[1] Enterprise and Regulatory Reform Act 2013, section 25(4), read together with paragraph 16 of Schedule 4 to the Act.
[2] CMA (1 April 2015), *Annual report on concurrency 2015* (CMA43).
[3] National Audit Office (6 February 2016), *The UK competition regime*.

by Ofgem in the energy sector and the second is the first case to be opened by the Financial Conduct Authority in financial services.

- Alongside competition enforcement, there has also been significant markets work undertaken in the regulated sectors, with the CMA progressing its two major ongoing market investigations into energy and retail banking and a number of market studies conducted by the regulators within their sectors. There has also been extensive policy work by the CMA and the regulators to promote competition in the regulated sectors, including a CMA-led project on passenger rail services and Ofwat's work on market opening for non-household water customers.

- Since the new concurrency arrangements came into effect, there has been a clear increase in joint working between the CMA and the sector regulators across the competition toolkit. For example, in the past year, there have been secondments of specialist staff from the regulators to provide sector-specific input in the CMA's market investigations into the energy and retail banking markets, as well as in relation to merger activity in the healthcare, telecoms and financial services sectors.

- There has also been good cooperation between the CMA and the sector regulators, with new Memoranda of Understanding agreed by the CMA and the sector regulators, the sharing of information in accordance with the Concurrency Regulations[4] and more informally, and the work undertaken by the UK Competition Network, including the sharing of expertise where common issues arise across different sectors.

Despite this good progress, we recognise that there is more to be done. For example, as noted by the National Audit Office, we need to improve our collective record of decision-making in competition cases.[5] We also acknowledge that the number of cases opened during the period of the report is below the level that we would like it to be. The CMA and the sector regulators will need to work together to address such issues in order to ensure that the ambitious aims behind the enhanced concurrency arrangements are met over the next few years.

Alex Chisholm
Chief Executive, Competition and Markets Authority April 2016

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[4] Competition Act 1998 (Concurrency) Regulations 2014, SI 2014/536.
[5] See 'Key findings' section, National Audit Office (6 February 2016), *The UK competition regime*.

A. Introduction

1. The purpose of this annual concurrency report is to assess the operation of the arrangements for concurrency in the regulated sectors.[6] These arrangements provide for cooperation between the Competition and Markets Authority (CMA) and the sector regulators in relation to their powers, exercisable concurrently by the CMA and one or more of the regulators, to enforce competition law and investigate markets. This is the second annual concurrency report to be published by the CMA and relates to the operation of the concurrency arrangements during the period 1 April 2015 to 31 March 2016.[7]

2. In December 2015, the government published a non-binding 'strategic steer' to the CMA,[8] setting out the government's view that the CMA should continue to focus on 'playing a leadership role with regulators that have competition powers, especially those that are new to the concurrency regime. The CMA should encourage those regulators to make greater use of their competition powers and to tackle anti-competitive actions in regulated markets'. It also confirmed that the CMA should build 'a strong dialogue with sectoral regulators using the UK Competition Network to ensure that the overall competition regime is coordinated and regulatory practices complement each other'.

3. Consistent with both the steer and the concurrency arrangements, the CMA and sector regulators have worked effectively together over the past year. The assessment of the operation of the concurrency arrangements during the period of the report can be summarised as follows:

   (a) there has been a clear focus on delivery of the ongoing competition cases within the regulated sectors, with the issue of one infringement decision, one decision to accept commitments and a Statement of Objections (SO), as well as the opening of two new competition cases (see paragraph 4);

   (b) the CMA and the regulators have undertaken significant markets work in the regulated sectors. The CMA's two major ongoing market

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[6] The concurrency arrangements were introduced in their current form by the Enterprise and Regulatory Reform Act 2013 (the 2013 Act) and took effect from 1 April 2014. They created a framework within which the CMA and sector regulators might more effectively work together to improve competition and competition law enforcement in the regulated sectors.

[7] The CMA has a statutory obligation to prepare and publish an annual report on the operation of the concurrency arrangements, pursuant to section 25(4) of the Enterprise and Regulatory Reform Act 2013, read with paragraph 16 of Schedule 4 to that Act. Practical aspects of the concurrency arrangements relating to, for example, the allocation of cases between the CMA and the relevant regulator and the sharing of relevant information in respect of cases are set out in the Competition Act 1998 (Concurrency) Regulations 2014.

[8] This replaced the previous non-binding government steer, which had been in place since October 2013.

investigations both focus on the regulated sectors, namely energy and retail banking (see paragraph 7); in addition, a number of regulators have conducted market studies[9] in their sectors, for example, in the financial services and payment systems sectors (see paragraphs 13 to 16);

(c) the CMA and the regulators have been engaged in extensive policy work designed to promote competition in the regulated sectors, including a project on passenger rail services, and market opening for non-household water customers (see paragraphs 10 to 11 and 23);

(d) there has been extensive joint working between the CMA and the regulators, including the secondment of staff in relation to the market investigations into the energy market and retail banking (see paragraph 7) and in relation to mergers in the regulated sectors (see paragraph 20);

(e) there has also been good cooperation between the CMA and the sector regulators in relation to the publication of new Memoranda of Understanding (MoUs) with the Payment Systems Regulator (PSR) and Financial Conduct Authority (FCA), which acquired their full concurrent competition powers in April 2015, and the updating of the existing MoUs which were signed by the CMA and the other sector regulators in 2014; the sharing of information, in accordance with the Concurrency Regulations, the MoUs and more informally; and the work undertaken by the UK Competition Network (UKCN) (see paragraphs 25 to 34); and

(f) where common issues arise across different sectors, the CMA and regulators have shared learning as to how these might be addressed in different sectors (see paragraphs 35 to 50).

Significant investigations in the regulated sectors

Competition prohibitions

4. At the beginning of the period of this report, a significant number of current cases were ongoing within the regulated sectors, with the majority of the regulators having at least one case underway. In addition, since the beginning of the period of this report, two new cases have been opened in the regulated sectors. All of these cases are described in greater detail in the sector-specific chapters of this report but in summary:

[9] To date, these have been conducted under sectoral legislation, rather than under the Enterprise Act 2002.

(a) **Rail**: In December 2015, the ORR accepted commitments in its investigation into suspected infringements of the competition prohibition on the abuse of a dominant position in connection with the carriage of freight by rail. Following its acceptance of the commitments, the ORR closed its investigation.

(b) **Water**: In December 2015, Ofwat issued a 'no grounds for action' decision in relation to its investigation of an alleged margin squeeze by Anglian Water regarding the provision of water and sewerage services to new developments. Ofwat found that there was insufficient evidence of actual or potential anti-competitive effects sufficient to justify a finding of abuse.

(c) **Communications**: During the period of this report, Ofcom has been progressing three competition cases:

(i) In the postal sector, Ofcom issued a SO to Royal Mail in July 2015, in relation to its investigation into prices offered by Royal Mail for access to certain letter delivery services. The SO set out Ofcom's provisional view that Royal Mail had breached the competition prohibitions by engaging in conduct that amounted to unlawful discrimination against postal operators competing with Royal Mail in delivery. The case remains ongoing.

(ii) In the broadcasting sector, Ofcom's investigation into a suspected infringement of the prohibition on anti-competitive agreements, in relation to the sale of live broadcasting rights in the UK to Premier League matches by the Football Association, remains ongoing.

(iii) Additionally in the broadcasting sector, Ofcom announced in February 2016 that it had decided to close its investigation into an alleged abuse of a dominant position by Sky regarding the wholesale supply of Sky Sports 1 and 2, on the grounds of administrative priorities. In reaching this decision, it took account of the fact that BT had obtained access to Sky Sports 1 and 2 on a non-reciprocal basis for its YouView platform. As this was the remedy sought by BT in the complaint, Ofcom considered that the principal risk to the interests of the consumers identified in the complaint had been brought to an end.

(d) **Aviation**: The CAA's investigation into a suspected infringement of the competition prohibitions, in relation to airport operation services, is in the information-gathering phase. The investigation concerns allegations of price fixing and price information exchange in relation to access to facilities at an airport and the suspected abuse of a dominant position in relation to the provision of access to facilities.

(e) **Healthcare**: As reported in last year's annual concurrency report, the CMA opened an investigation into anti-competitive information exchange and pricing agreements within the private ophthalmology sector in June 2014, the allocation of the case to the CMA having been agreed with Monitor as sector regulator for the healthcare sector. In August 2015, the CMA issued an infringement decision against the Consultant Eye Surgeons Partnership Limited in relation to its investigation and imposed a fine of £500,000 on the company, which was reduced to £382,500 following settlement and the adoption by the company of a comprehensive compliance programme.

(f) **Energy**: During the period of this report, Ofgem has been progressing three competition cases:

(i) In October 2015, Ofgem launched a new investigation into a suspected infringement of the prohibition on anti-competitive agreements by two or more companies in relation to paid online search advertising, having discussed the case with the CMA and the CMA having agreed to allocate it to Ofgem.

(ii) In March 2016, Ofgem closed an investigation into whether third party intermediaries/price comparison sites had engaged in an anticompetitive agreement and/or concerted practice through sharing of commercially-sensitive information including on commission rates. Ofgem closed this investigation on administrative priority grounds and sent advisory letters to relevant companies, as this was considered an appropriate way to achieve pro-competition outcomes from the investigation and devote resources to other areas of work.

(iii) Ofgem's other existing investigation, relating to a suspected infringement of the prohibition on abuse of a dominant position by a Distribution Network Operator in relation to electricity connections, remains ongoing.

(g) **Financial services**: The FCA opened its first investigation under the Competition Act 1998 during the period of this report, following discussions with the CMA and agreement that it should be allocated to the FCA. As at 31 March 2016, formal CA98 powers had not yet been exercised.

5. There have been fewer cases opened within the regulated sectors during the period of this report than during the first year of operation of the concurrency arrangements, when six new cases were launched. While we would like to see last year's uptick in the number of new cases continue, it is perhaps not

unexpected that, with significant resources already allocated to existing cases, the regulators' focus has moved to delivery, with regulators making use of their information-gathering powers, the issue of an SO and the resolution of five cases. However, we hope to see a greater number of cases opened during the year ahead.

6. The table below collates the numerical data in respect of newly launched and ongoing cases across the regulated sectors.

Table 1: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[10]	5
Number of investigations formally launched	2
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	6
- a Statement of Objections was issued	1
Number of those cases in the year to date that resulted in:	
- an infringement decision	1
- the giving of commitments or undertakings to change conduct	1
- an exemption or clearance decision (or equivalent)	1
- case closure without full resolution	2
Number of cases that are ongoing	6
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Markets investigations

7. As noted in last year's report, it is significant that two of the most important pieces of work launched by the CMA in its first year focused on regulated sectors. The market investigations into energy and retail banking continued during the period of this report and involved extensive joint working between the CMA and relevant regulators, including the secondment to the CMA of a number of staff with particular expertise from those regulators:

(a) **Energy**: In June 2014, Ofgem made a market investigation reference to the CMA's panel of independent members, requiring them to conduct a market investigation into the supply and acquisition of energy in Great Britain. The CMA notified its provisional findings and possible remedies in July 2015 and will publish its final report in June 2016.

(b) **Retail banking**: In November 2014, the CMA made a market investigation reference to the CMA's panel of independent members,

[10] 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the sector regulators which they regarded as raising competition law issues under those prohibitions and met their guidelines for the submission of formal complaints.

requiring them to conduct a market investigation into the supply of retail banking services to personal current account customers and to SMEs. The CMA notified its provisional findings and possible remedies in October 2015 and will publish its final report in July/August 2016.

8. There have been no new market investigation references to the CMA in respect of the regulated sectors during the period of the report.

Markets studies and policy work

9. In November 2015, the CMA announced that it would be carrying out future markets work on digital comparison tools. Among other inputs, it will incorporate the results of work on price comparison websites being carried out by the UK Regulators Network.

10. In January 2015, the CMA launched a policy project looking at the desirability and feasibility of introducing greater competition between passenger train operators. The CMA reviewed evidence, including examples of 'on-rail' competition in Great Britain and other European countries and in other transport markets such as the rail freight sector, air transport and airports. In July 2015, the CMA published a discussion document for consultation which set out both the potential benefits of greater on-rail competition and the potential obstacles that would need to be addressed. The CMA engaged with a wide range of stakeholders including ORR, other government departments, Network Rail, train companies and passenger groups. In January 2016, ORR published an impact assessment of the options.

11. The CMA published its final policy document in March 2016. The CMA found that an increase in on-rail competition could result in benefits for passengers and taxpayers, including lower fares, growth in passenger numbers, greater incentives for operators to improve service quality and to innovate, greater efficiency by train operators and more effective use of network capacity. The policy document recommended that increasing the number of 'open access' services or splitting franchises would offer the most immediate benefits from increased competition – but that a move towards a system of multiple licensed operators replacing franchises would merit consideration in the future.

12. Although there have been no market studies conducted by the regulators under their Enterprise Act 2002 powers, a number of market studies and market reviews carried out by the regulators using sectoral powers have focused on competition issues within their sectors.

13. The FCA has initiated several market studies using its powers under the Financial Services and Markets Act 2000 (FSMA) in order to determine whether markets are working well for consumers. These include:

(a) a credit cards market study – looking at whether consumers drive effective competition, how firms recover costs across different cardholder groups and the extent of unaffordable credit card debt;

(b) an investment and corporate banking market study – examining issues around choice of banks and advisers for clients, transparency of the services provided by banks, and bundling and cross-subsidisation of services; and

(c) an asset management market study – to understand whether competition is working effectively to enable investors to get value for money when purchasing asset management services.

14. The PSR has two market reviews currently underway under its Financial Services (Banking Reform) Act 2013 powers. The first of these is looking at the supply of indirect access to payment systems and whether competition is working well for service-users; the second is investigating the ownership of infrastructure provision and whether the current infrastructure ownership arrangements and market structure restrict competition or innovation. Final reports in respect of both market reviews are expected in summer 2016.

15. Ofgem has conducted a market review of gas metering services, including meter provision, meter management and automatic meter reading equipment and service provision. The review focused on the non-domestic sector and followed concerns raised with Ofgem about the effectiveness of competition in relation to these products and services. The final report was published in March 2016 and found that competition has not evolved as quickly as it might have, that there are high switching costs and that the quality and availability of information in the market is generally poor. Ofgem is calling on industry to take a number of actions to address the issues identified in order to improve the health of competition in this market.

16. In January 2016, the CAA initiated a sector review of surface access to UK airports, focusing on the market structure for surface access, in particular how competitive conditions for road and forecourt access at individual UK airports affect outcomes for consumers, and the extent to which consumers are well informed about the options and charges to access UK airports. The CAA has published a consultation document, presenting its initial findings, suggesting next steps and seeking views and information from stakeholders on the sector.

17. There is also work going on in the non-concurrent, regulated sectors. For example, the CMA is carrying out a market study into the provision of legal services. The CMA is also working closely with the Prudential Regulation Authority (PRA). In addition to regular bilateral meetings between the CMA and the PRA, the PRA is assisting the CMA on the retail banking market inquiry, in particular in relation to the inquiry team's work on the impact of the capital requirements regime. A member of CMA staff has been seconded to the Bank of England to support the implementation of the PRA's Secondary Competition Objective when it designs prudential policy which affects PRA authorised deposit takers, insurers and major investment firms as well as assisting the Bank on the decision-making processes for the Bank and PRA's enforcement cases.

Promoting competitive outcomes

18. Although the number of cases opened by the CMA and the sector regulators to apply competition law in their sectors is a key factor in assessing the success of the concurrency arrangements, it is, as noted in last year's report, not the only factor. What really matters is the achievement of competitive outcomes in regulated sectors. These outcomes can be achieved in part through effective and efficient enforcement. However, there are also other ways to achieve competitive outcomes: for example, softer enforcement tools, such as warning and advisory letters, can, in appropriate circumstances, be effective. The CMA and regulators have issued a number of warning and advisory letters over the past year, which promote a competitive outcome for consumers: in the case of warning letters, this is achieved by requiring a change in the behaviour of companies and, in the case of advisory letters, by recommending that companies carry out a self-assessment of their practices to ensure compliance with competition law. The FCA and the ORR have issued warning letters to businesses within their respective sectors during the period of this report, and Ofgem sent advisory letters in respect of one of its Competition Act cases (see paragraph 4(f)(ii), above).

19. Much can also be achieved through advocacy and compliance work. There have been discussions between the CMA and regulators about how to promote the lessons from enforcement cases by working closely with trade and professional associations to raise awareness of competition law amongst businesses and encourage them to review their practices to ensure that they are compliant. The CMA and regulators are in the process of sharing the compliance approaches and materials that have been developed for these purposes.

20. The CMA has undertaken other work to promote competitive outcomes for the benefit of consumers within the regulated sectors. It has conducted significant activity in relation to mergers in the regulated sectors during the past year:

(a) In telecommunications, the CMA cleared the proposed acquisition of EE Limited by BT Group plc following an in-depth phase 2 investigation. The CMA and Ofcom worked closely in relation to the merger, with a member of Ofcom staff seconded to the CMA on a part-time basis to provide specialist technical advice. Also in the telecoms sector, the CMA worked closely with Ofcom on an Article 9 request to the European Commission in September 2015 to refer the proposed acquisition of Telefonica Europe plc, which owns the O2 UK mobile network, by CK Hutchison Holdings Ltd, the owner of the mobile network Three in the UK, to the CMA for investigation. The request was made on the grounds that the transaction threatened to affect significantly competition in the UK retail mobile and wholesale mobile markets, but the European Commission decided not to refer the matter. Since then, the CMA has made submissions to the Commission, with assistance and input from Ofcom, both on the remedies and the substantive aspects of the merger.

(b) In rail, the CMA launched a merger inquiry in January 2016 into the acquisition by First TransPennine Express Limited, a subsidiary of FirstGroup plc, of the TransPennine Express franchise. The decision to clear the award of the franchise to FirstGroup was announced in March 2016. A second merger inquiry, into the proposed acquisition by Arriva Rail North Limited of the Northern Rail franchise, was also launched in January and remained ongoing as at 31 March 2016.

(c) In healthcare, the CMA launched a phase 2 investigation in February 2015 into the proposed merger of Ashford and St Peter's Hospitals NHS Foundation Trust and Royal Surrey County. Again, the merger involved close working between the CMA and regulator, with a member of Monitor staff seconded to the CMA to provide expert advice on specific aspects of the merger. In December, the inquiry group cleared the merger, concluding that it may not be expected to result in a substantial lessening of competition.

(d) In financial services, the CMA launched a phase 1 investigation into the completed merger between Intercontinental Exchange and Trayport in February 2016. The merger involved discussions between the CMA, Ofgem and the FCA who provided their respective expertise on the energy trading market and the firms involved. As at 31 March 2016, the phase 1 process was ongoing.

21. The CMA has also reviewed remedies imposed following historic merger assessments (and some historic market investigations).The CMA issued a provisional decision in March 2016 to vary the undertakings given in relation to Centrica's 2002 acquisition of the Rough gas storage facility. The CMA is also evaluating the impact of the remedies imposed by the Competition Commission's BAA airports market investigation in 2009. This evaluation will consider the evidence available relating to the impact, proportionality and effectiveness of the remedies and the remedies implementation process, and identify lessons learnt from this market investigation.

22. Relevant policy work conducted by the CMA includes an evaluation of the impact of competition interventions as compared to no intervention, or to *ex ante* regulatory intervention. In conducting this work, the CMA has gathered views from academics and other regulators, and the project has been discussed at UKCN.

23. The regulators have been engaged in work to promote competitive outcomes in their own sectors. During the past year, Ofwat has focused on the regulatory changes needed to prepare the licensing framework for retail market opening for non-household customers in April 2017, following reforms introduced by the Water Act 2014. In June 2015, Ofwat consulted on licensing and policy issues involved in market opening and is now working to deliver the changes needed to achieve an effective market. The FCA recognises that innovation is critical in terms of competition and has done much work through its Innovation Hub to support new and established businesses in the financial services sector that wish to introduce innovative products to the market.

24. These projects are set out in more detail in the sector-specific chapters which follow. Other examples of policy work undertaken by the CMA and regulators are outlined in the section on cross-cutting themes, below.

General co-operation

25. As well as the joint working on mergers and policy projects already mentioned, the CMA and the sector regulators have cooperated in line with the concurrency arrangements during the period of the report.

26. **Memoranda of Understanding (MoUs)**: Following the acquisition of their full concurrent powers on 1 April 2015, the FCA and PSR agreed MoUs with the CMA, setting out working arrangements relating to: the allocation of cases under the Competition Act 1998 (Concurrency) Regulations 2014 (the Concurrency Regulations); information sharing, both generally and in relation

to specific cases; pooling resources, and general co-operation.[11] At the same time as negotiating the new MoUs, revisions were made to the MoUs signed in 2014 with Ofwat, Ofcom, CAA, ORR, Ofgem and NIAUR to reflect recent developments and our collective experience of working together since the introduction of the new concurrency arrangements. Changes were also made to increase consistency between the MoUs and to take on board points raised during the negotiation of the new MoUs which have wider relevance across the regulated sectors.

27. **Information-sharing**: The CMA and sector regulators have continued to share key information in respect of the particular cases that they have been investigating, including emerging thinking and draft decisions, with the relevant 'supporting' authority (ie any other authority which would be competent to exercise concurrent competition powers in relation to the case in question). In return, the supporting authority has provided comment on those draft decisions, as provided for in the Concurrency Regulations, and in accordance with the time limits for the process set out in the CMA's *Regulated industries: Guidance on concurrent application of competition law to regulated industries* (CMA10) (the Concurrency Guidance) and the MoUs. Additionally, the CMA and the sector regulators have augmented the prescribed information-sharing process with more informal discussions and the sharing of know-how and relevant expertise, as appropriate; for example, Monitor provided views with regard to the development of compliance materials following the CMA's infringement decision in relation to its investigation into the private ophthalmology sector, while the CMA has provided advice to various regulators in relation to various issues such as access to file, confidentiality and disclosure as well as on the use of warning and advisory letters.

28. **Case allocation**: During the period of this report, case allocation was agreed in respect of two new investigations under the Competition Act 1998 between the CMA and the relevant sector regulators,[12] having regard to the principles in paragraph 3.22 of the Concurrency Guidance, and without recourse to the mechanism in the Concurrency Regulations which applies in the event of disagreement over which authority should exercise its concurrent competition functions in respect of a case.

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[11] For completeness, it should be noted that, on 1 April (ie before publication of this report, but immediately after the end of period covered by it), an MoU was signed with NHS Improvement on the use of concurrent competition powers and co-operation with respect to UK merger control. As explained further in the chapter on Monitor below, NHS Improvement launched on 1 April 2016, bringing together Monitor and the NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change team and the intensive Support Teams.

[12] ie Ofgem and the FCA.

29. **Support on casework**: The CMA and sector regulators provide each other with direct assistance on casework, whether by sharing relevant policy or practical experience (eg sharing internal guidance and template documents) or active involvement of officials at a certain stage of an investigation.

30. **UKCN**: The UKCN has continued to work well throughout the period of the report and there have been regular meetings of the UKCN Chief Executives as well as of senior director and working level officials. The CMA and regulator Chairs also meet regularly to discuss competition and regulatory issues. The UKCN provides a valuable forum for discussion and the sharing of experience and best practice. During the past year, the work of the UKCN has included: working on arrangements for the handling of leniency applications in the context of concurrency (on which work is ongoing); holding a know-how sharing event on access to file and disclosure; contributing to a CMA roundtable on the use of commitments, and inputting to the development of CMA guidance on the approval of voluntary redress schemes for competition infringements. In addition to these work streams, there have been discussions at UKCN meetings on a variety of procedural and substantive issues, for example the protection of consumers in the digital environment; the sharing of legally privileged documents between regulators; the restrictions on the use of leniency information shared between the regulators and the use of digital forensics and other tools in investigations.

31. **Regular bilateral meetings**: Alongside the interactions taking place in the context of the UKCN, bilateral meetings are held on a quarterly basis at working level between the Sector Regulation Unit of the CMA and each sector regulator. There are, additionally, meetings at Chair and Chief Executive level between the CMA and each regulator as well as *ad hoc* contacts as the need arises. The Sector Regulation Unit exists within the CMA to facilitate day-to-day contact with the sector regulators, co-ordinate the UKCN and undertake policy work aimed at achieving more competitive outcomes for consumers within the regulated sectors.

32. **Support on policy work**: There is mutual support between the CMA and sector regulators on policy work; for example, the CMA provided views to the CAA in connection with its recent review of surface access to UK airports, and the ORR has provided support in relation to the CMA's competition policy project on passenger rail services.

33. **Guidance**: the CMA has worked with the sector regulators on the development of guidance. The CMA has commented on the guidance that was developed and subsequently adopted respectively by the FCA in July 2015 and by the PSR in August 2015 to explain how they intended to exercise their new concurrent competition powers. The CMA has also worked with the

CAA, NIAUR and ORR in the development of their respective guidance documents dealing with the application of competition law to their particular sectors.

34. **European dimension:** The CMA and sector regulators have also worked cooperatively on issues arising in connection with their concurrent powers to apply the competition prohibitions under EU law. The CMA has engaged with the European Commission, and with the European Competition Network (consisting of the European Commission and EU national competition authorities), during the period of this report in connection with the Commission's proposals on governance of national competition authorities and on a 'model leniency programme' in the context of its review of Regulation 1/2003. In addition, the CMA and sector regulators have liaised with DG Competition on specific cases of mutual interest.

Cross-cutting themes

35. Despite the obvious differences between the regulated sectors, and the very different duties and priorities of the regulators, there are, as mentioned above, various current themes which are common to a number of authorities' work. The CMA and sector regulators have coordinated with each other during the past year, in particular via the UKCN, to share experiences of dealing with the same issues and to ensure that they can learn from each other's approaches. We consider three of these themes, and the work done by the regulators in connection with these, below.

36. **Low consumer engagement**: In many cases the earlier stages of economic regulation focused on the supply side – ensuring access to monopoly assets, introducing competition to retail markets, or ensuring efficient investment by suppliers where market forces were not sufficient to do so. But for a market to work effectively, competitive supply has to be met by customers who are willing to engage in the market, potentially switching suppliers and thereby driving lower prices and higher quality. A number of sector regulators and the CMA are wrestling with the challenge of how to deal with sectors where customers do not appear to be engaging in the market as much or as effectively as we would hope.

37. This is a major issue in the CMA's market investigations within the regulated sectors. Across those investigations, we provisionally found that a range of factors contributed to low levels of engagement, including the homogenous nature of goods and services, a lack of suitable 'trigger points', a general lack of awareness, actual and perceived barriers to switching, structural barriers to switching and the complexity of available information. In our initial proposals on remedies, we proposed a number of ways to tackle this low customer

engagement: in energy, facilitating data sharing relating to prepayment meter customers, various measures to prompt customers on default tariffs to engage in the market, and a transitional safeguard tariff for disengaged prepayment customers, among other possibilities. In banking, proposals included prompts for customers to consider switching current accounts at times when they are more likely to consider a change, and increasing public awareness of the potential benefits from switching.

38. Sector regulators have been carrying out work both jointly and in a number of individual cases on this subject. The UK Regulators Network published a statement on the subject of consumer engagement and switching in late 2014, comparing barriers across energy, financial services, communications and healthcare, and is following this with a piece of work on online intermediaries. The CAA has recently launched investigations into two leading online travel agents in relation to, among other things, price transparency. The FCA has been keen to understand the behaviour of consumers when making decisions to select financial products and has done much to integrate behavioural economics into its work. Looking at communications with consumers specifically, it published a discussion paper in June 2015[13] with the aim of challenging firms to consider innovative ways of engaging and communicating with consumers about products and services. It has also done a range of work on consumer engagement and switching, for instance in research on the Current Account Switch Service (CASS), and is continuing to develop and implement remedies to address competition concerns identified in previous market studies on cash savings, retirement income and general insurance add-on products.

39. Ofgem is carrying out a variety of work which is expected to improve customer engagement, such as the smart meter programme and its work on third party intermediaries. NIAUR is working closely with the Consumer Council for Northern Ireland on projects such as a new independent energy tariff comparison website and a switching awareness programme to increase consumer engagement in the energy market. Monitor has published figures about the number of patients offered a choice of provider when they are referred by their GP for treatment,[14] patient awareness and uptake of choice of GP,[15] and has also worked closely with local commissioning groups to enable and support patient choice by providing better information and building choice into newly redesigned services.[16] A significant focus for the ORR has

[13] FCA (July 2015), DP15/5: Smarter consumer communications - Financial Conduct Authority.
[14] NHS England & Monitor (July 2015), Outpatient Appointment Referrals.
[15] Monitor (1 June 2015), Improving GP services: commissioners and patient choice.
[16] Monitor (10 November 2015), Making choice work well in NHS adult hearing services: resources for commissioners.

been to ensure that passengers have the information they need to make the right purchase for their journey needs and to know what to do when things go wrong; for instance it worked with the industry to create a retail code of practice.

40. Government is also carrying out work in this area, through BIS's proposed switching principles.

41. Finally, the CMA has announced its intention to do a piece of cross-sector work on price comparison websites in 2016, with the aim of understanding whether problems exist in the sector and if so what changes might be needed to make sure it operates competitively and in the best interests of consumers.

42. **Promotion of competition for the benefit of small and medium-sized enterprises (SMEs)**: SMEs make up the vast majority of the number of businesses in the UK. As referenced in the government's competition plan,[17] they contribute disproportionately for job creation in the UK, but can struggle with access to finance. However, it can be difficult to ensure that they are well served by regulation and competition. They may share characteristics with household consumers in regulated markets – for instance disengagement, whether through lack of time, ability or inclination – but may or may not be permitted to use household-focused services. On the other hand, as suppliers, they may also feel barriers to entry more keenly than bigger firms, whether as a result of credit access or even regulation itself - they are often subject to the same regulation as larger firms, but may lack dedicated compliance departments to deal with it. Finally, SMEs are a very varied group, as are the services that are available to them, making it harder for regulators or competition authorities to understand their requirements and respond appropriately.

43. Many authorities are increasingly alive to this challenge. SMEs are within scope of both of the CMA's major current investigations, into energy and banking. In energy, the CMA provisionally found that SMEs were not well served either by price comparison websites or by intermediaries more broadly; in banking, the CMA provisionally found a number of features which were affecting competition in lending to SMEs, such as the difficulty in comparing services and the links between business current accounts and lending. A number of remedies have been proposed to tackle this. The FCA's own work has shown that SMEs in the financial services sector can experience poor outcomes and it published a discussion paper in November

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[17] HM Treasury (November 2015), A better deal: boosting competition to bring down bills for families and firms (Cm 9164).

2015 which reviews the way in which SMEs that use financial services are treated in its rules.

44. Meanwhile the water sector is being opened up to retail competition for non-household customers in 2017, as part of which Ofwat is looking at how customers can best be protected. Ofcom has produced a guide for business customers explaining how the General Conditions protect them, with a specific summary of additional rights for microbusinesses (ie businesses with ten employees or fewer). It also produced in June 2015 an assessment and action plan for broadband for SMEs. One of the core aims of the PSR's package of work on direct and indirect access to payment systems is to promote competition in the interests of those people and businesses who use the services provided by these systems, including a range of SMEs.

45. **Balancing cooperation and competition**: The purest competition perspective might encourage firms to be fighting each other tooth and nail for customers' business. In the real world, however, there may be other priorities at play. In some circumstances, customers' needs can be served better in aggregate if firms cooperate on some particular issues. This is an area where firms and competition authorities need to be very careful – cooperation should not drift into exchanging information on prices, for instance.

46. This challenge has arisen in a number of diverse sectors.

47. Monitor has a particular focus on encouraging effective co-operation between providers to benefit patients; its work includes, for instance, supporting NHS organisations to explore how collaboration can deliver high quality, sustainable services. Additionally, Monitor has published a toolkit to help GPs who are considering working together to improve quality, increase the scope of services provided to patients, and enable services to be delivered more efficiently in line with the vision of the Five Year Forward View.

48. The PSR has set up the Payments Strategy Forum with a view to overcoming the coordination challenges in a sector characterised by network effects and a slow pace of change, but without harming competition. In the context of its retail market review, the ORR is looking to ensure that the benefits of co-ordination in delivering a national network of services for consumers do not act against innovation in new products and services by denying access to potential third party suppliers.

49. As part of its market investigation into the energy market, the CMA has provisionally decided to introduce remedies which seek to recalibrate the roles of Ofgem and certain industry bodies within the industry-led governance framework of the energy codes. The CMA provisionally found that the current

governance arrangements were not fit to keep pace with technical and commercial developments. This is due to misaligned incentives between industry participants and between the industry and consumers. However, it also recognised that the engagement of industry participants in the development of code changes was essential to ensure that these are delivered on a timely basis and are effective in promoting competition and consumers' best interests. In light of the above, the CMA's proposed remedy package seeks to increase coordination between stakeholders and improve the delivery of code changes, among other things, by recommending that Ofgem produce a 'Strategic Direction' for code development and by introducing other measures that incentivise parties to deliver against that Strategic Direction.

50. The CMA has also looked at cooperation between competing bus operators and recommended to the Secretary of State for Business, Innovation and Skills that he renew for ten years the existing block exemption for certain bus ticketing schemes (which the Secretary of State has accepted). In reaching its decision, the CMA recognised that such schemes can raise competition concerns, for example by facilitating the agreement of prices between competing transport operators. The CMA considered that the potential for harm to consumers was outweighed by the various benefits to travellers that ticketing schemes provide, such as through tickets and travel cards with different operators.

B. Airport operation services and air traffic services – the Civil Aviation Authority

51. The Civil Aviation Authority (CAA) is a public corporation responsible for regulating the UK's aviation sector. The CAA's core responsibilities are founded in primary legislation (principally the Civil Aviation Act 1982, the Transport Act 2000 (TA00) and the Civil Aviation Act 2012 (the 2012 Act)), European legislation and in secondary legislation (notably the Air Navigation Order 2009).

52. The aviation sector was progressively liberalised during the 1980s and 1990s through both national and EU legislation. Consequently, the CAA does not regulate airline competition. However, the CAA has competition and sectoral powers for two particular sectors in the aviation sector:

(a) airport operation services (AOS) under the 2012 Act, which conferred concurrent competition powers from April 2013; and

(b) air traffic services (ATS) under the TA00, which conferred concurrent competition powers with the CMA in 2001.

Airport operation services

53. AOS are defined in the 2012 Act and are generally those services provided at an airport other than air transport services, air traffic services (see below) or services provided in shops or other retail businesses. In addition to the CAA's competition powers, it also has powers to grant economic licences to airport operators where it determines that the 'market power test' under the 2012 Act is met. Heathrow and Gatwick airports continue to be subject to economic regulation through licences after the CAA determined in January 2014 that both airports had substantial market power and that the other elements of the statutory test were met.

Air traffic services

54. ATS consist of both 'en route' services, which provide air traffic control while an aircraft is cruising, and terminal air navigation services (TANS), which control aircraft during take-off and landing, together with ground movements at airports. While en route services are provided by a single supplier for safety reasons, airports can and do put TANS out to periodic competitive tender.

55. NATS (En Route) plc (NERL) is the single supplier of en route ATS in the UK's airspace (and over parts of the eastern Atlantic Ocean) and is the only entity currently licensed under the TA00 to provide such services.

56. NATS also provides terminal services at some airports under contract through its subsidiary NATS Services Ltd (NSL). There are other TANS providers, including airports which often provide this function themselves.

Significant changes in the market(s) and the legal/regulatory framework since April 2015

Market developments

57. The key market developments in airports and ATS since April 2015 are outlined below.

58. The Airports Commission finalised its assessment of the shortlisted proposals to expand runway capacity in the South East, of which two are at Heathrow and one is at Gatwick. The Commission concluded that the proposal for a new northwest runway at Heathrow Airport, combined with a significant package of measures to address its environmental and community impacts, presented the strongest case and offered the greatest strategic and economic benefits. In December 2015, however, the government decided to undertake a package of further work which it expects to conclude over the summer of 2016 before making a final decision on new runway capacity. In the meantime, passenger growth and expansion projects are underway at other London airports where capacity is less constrained.[18]

59. The CAA continues to monitor information provided by Aberdeen airport as part of the undertakings given to the Competition Commission following its market investigation into the BAA airports and to advise the CMA accordingly. The CAA is also assisting the CMA in its current review of the various remedies that resulted from the BAA investigation which is expected to report in May 2016.

60. Work has started in preparation for the next price controls at Heathrow airport from 2019. In March 2016, the CAA published a scene setting document.

61. In 2014, the CAA adopted a new approach to regulating Gatwick airport, based on a set specific commitments on the charges and services that Gatwick Airport Limited offered to its airlines. In March 2016, the CAA issued

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[18] Between 2014 and 2015, Stansted Airport's passenger numbers grew by 13%, Luton's by 17% and London City Airport's by 18%. Luton Airport has begun a £110 million revamp to increase capacity from 12 million to 18 million passengers a year and improve services. It is also looking at speeding up transport to the terminal to boost the airport's appeal to business travellers. Stansted Airport is spending £260 million improving its airport facilities and will be seeking permission to increase its current planning cap of 35 million passengers a year to allow the airport to grow to its full potential of 45 million. London City Airport also wants to expand, although plans for a £200 million development that would increase the number of passengers the airport can handle to 6 million by 2023 have stalled because of noise concerns.

a consultation document seeking views on the scope of a mid-term review of the commitments framework. The mid-term review will be carried out in the second half of 2016.

62. In ATS, work has continued on the transfer from NSL to a subsidiary of Deutsche Flugsicherung of the contract to provide TANS at Gatwick. The transfer took place on 1 March 2016.

The legal/regulatory framework

63. There have been no changes in the legal or regulatory frameworks for AOS or ATS since April 2015.

64. In relation to AOS, no new market power assessments have been made since April 2015 and no new licences issued. In March 2015, the CAA published its conclusions on the regulatory policy for the recovery of the main construction and implementation costs of runway expansion in the South East of England, followed by a policy update in September 2015. The CAA expects to publish a further consultation document, addressing more detailed aspects of the economic regulation of new runway capacity, after a government decision has been made on the new runway.

Significant developments in the CAA's approach to competition since April 2015

Guidance documents

65. In May 2015, the CAA finalised a series of guidance documents on the application of its enforcement powers in relation to its competition, consumer and regulatory functions. These covered:

- Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation Work (CAP 1233);
- Economic Licensing Enforcement (CAP 1234);
- The CAA's Competition Powers (CAP 1235); and
- Consumer Enforcement (CAP 1018).

66. The Prioritisation Principles explain the CAA's approach to deciding which pieces of work to take forward in the areas of consumer protection, competition law and economic regulation. They allow the CAA to target its resources and enforcement actions to those areas that will bring the greatest

benefits for consumers, deter behaviour that harms aviation consumers and encourage businesses to compete and trade fairly.

67. The Economic Licensing Enforcement Guidance explains the CAA's approach to enforcing airport and air traffic services licences. The guidance covers four of the CAA's enforcement activities:

- Airport licences under Chapter 1 of the 2012 Act; applies to airport operating licences issued by the CAA under the 2012 Act.
- The NERL licence under Chapter 1 of the TA00; applies to licences issued under section 6 of the TA00, of which NERL is the only current licensee.
- Information powers under Chapter 1 of the TA00; applies to the CAA's information requests by notice under section 25 of the TA00 for the purpose of licence enforcement action.
- Information powers under Chapter 1 of the 2012 Act; applies to the CAA's information notices issued under section 50 of the 2012 Act.

68. The Guidance on the Application of the CAA's Competition Powers explains the CAA's powers to enforce the competition law prohibitions in relation to AOS and ATS which it exercises concurrently with the CMA. The guidance covers:

- the breadth of the powers - sector reviews to understand more about a sector of the aviation industry, market studies, market investigation references, investigations under the Competition Act 1998 and super complaints;
- the relationship between the sectoral powers including the Airport Charges Regulations, the Airports (Groundhandling) Regulations and sector review powers and the requirement to carry out market power determinations set out in the 2012 Act;
- the concept of primacy of competition law over licence enforcement as enshrined in the Enterprise and Regulatory Reform Act 2013; and
- concurrency and case allocation under the Concurrency Regulations.

69. The Consumer Enforcement Guidance sets out the CAA's powers and processes to enforce consumer law. It includes a new process for dealing with urgent and unusual cases that are not well suited to the CAA's existing enforcement powers, which allows the CAA to act quickly, minimise consumer harm and focus on ensuring media statements do not mislead consumers.

70. As signalled in the previous concurrency report, in October 2015, the CAA published guidance on the application of its powers under the 2011 Airport Charges Regulations.

71. In November 2015, the CAA Board approved a resolution to enable the Enforcement Decision Panel, established by Ofgem, to take decisions on behalf of the CAA with respect to the enforcement of the Competition Act 1998.

72. In December 2015, the CAA published a guidance document for consultation outlining its future approach to the application of the market power test in the 2012 Act. This guidance sets out how the CAA intends to approach Market Power Determinations to determine whether airports should be subject to economic regulation. The draft guidance is based on the methodology used in the 2014 Market Power Determinations for Heathrow, Gatwick and Stansted airports.

73. The CAA has confirmed that it does not intend to issue separate guidance on voluntary redress schemes and will use the CMA's guidance.

74. In February 2016, a revised Memorandum of Understanding between the CAA and the CMA, in respect of their concurrent competition powers, was published.

Cases under the competition prohibitions since April 2015

75. The CAA is currently investigating an alleged breach of both the Chapter I and II prohibitions of Competition Act 1998 at an airport in the UK in relation to AOS.

76. Since April 2015 the CAA have received one new formal complaint in relation to access to facilities at an airport, which was also sent to the CMA. It was agreed that the CMA was best placed to handle the complaint as it was not clear whether it fell within the CAA's concurrent powers.

Market studies since April 2015

77. The CAA has not opened or closed a market study since April 2015 and none are ongoing.

Decisions taken since April 2015 to use the CAA's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

78. The CAA has taken no enforcement decisions using its regulatory powers instead of its powers under the competition prohibitions where those powers could have been exercised.

Other steps taken to promote competition since April 2015

79. In January 2016, the CAA initiated a sector review under section 64 of the 2012 Act on the surface access sector at UK airports. The aim of this review is to understand more about the passenger experience of travelling to and from UK airports. Surface access to airports is a key part of the consumer experience of air travel, so any issues passengers face in these areas when using the UK's airports are of considerable importance. Surface access covers a range of modes: private car, train, cycle, private hire vehicles and taxis.

80. This review is concentrated primarily on road and forecourt access and on two main topics:

(a) The market structure for surface access, in particular how competitive conditions for road and forecourt access at individual UK airports affect outcomes to consumers.

(b) The extent to which consumers are well informed about the options they have to access UK airports and the charges they face.

81. In January 2016, the CAA published a consultation document to present its initial findings and suggested next steps. The initial findings are based on views expressed by some of the key stakeholders in this sector: airport operators, consumer organisations and representatives of independent surface access operators.

82. The CAA has also published a working paper reviewing a series of judgments and decisions in the aviation sector, relating to market power assessment and the enforcement of competition law and other sectoral legislation.

83. In relation to ATS under the European Commission's Single European Sky regulation, charges for TANS are exempt from regulation provided that there are conditions for the market to be competitive. In May 2015, the CAA advised the Secretary of State that the market conditions test was now passed for the provision of TANS in the UK. In its report, the CAA considered that there were still steps required to embed effective competition within the industry.

84. The Department for Transport submitted the report to the European Commission in summer 2015. The CAA received notification in December 2015 that the European Commission was likely to accept its findings of market conditions in the TANS sector and therefore a derogation from more detailed regulation could be granted for the current reference period to 2019. A further assessment will be required in time for the start of the third reference period beginning on 1 January 2020. In December 2015 the CAA published an advisory letter to industry informing them of its expectations for the continuation of the development of the TANS market.

Data on cases for the year to date since 1 April 2015

Table 2: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[19]	1
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	1
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing	1
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 3: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[20]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

[19] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the CAA which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.
[20] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.

Looking ahead

85. During 2016, the CAA is planning to:

- complete its current investigation under the Competition Act 1998;
- complete the sector review of surface access at UK airports, which may inform further work by industry, the CAA or other bodies;
- finalise guidance on undertaking market power assessments for airports taking into account the consultation responses received;
- assist the CMA in finalising its review of the BAA remedies;
- publish a report providing an overview of competitive conditions in the aviation industry;
- launch a review of its sectoral powers in relation to the ground handling market at UK airports; and
- complete a short focused review of the performance of the current licence-based commitments at Gatwick Airport, to ensure that the commitments and the associated monitoring framework are operating in passengers' interests.

86. The CAA will continue to publish occasional working papers on important or novel competition issues in the aviation sector that it considers will facilitate the discharge of its statutory duties.

C. Communications (broadcasting, electronic communications and postal services) – Office of Communications

87. The Office of Communications (Ofcom) is the independent national regulatory authority for the UK communications industries, with responsibilities across broadcasting (television and radio), telecommunications, spectrum and postal services.

88. Ofcom's principal duty, set out in the Communications Act 2003, is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

89. In relation to postal services, Ofcom's duty is to carry out its functions in a way that it considers will secure the provision of a universal postal service. Where it appears to Ofcom that, in relation to the carrying out of any of its functions in relation to postal services, any of the general duties (including the principal duties set out above) conflict with its duty under section 29(1) of the Postal Services Act 2011 to secure the provision of a universal postal service, Ofcom must give priority to that latter duty.

90. Ofcom has powers to enforce the competition prohibitions in the Competition Act 1998 in relation to activities connected with communications matters (including broadcasting, telecommunications and postal services) and to make market investigation references, under the Enterprise Act 2002, to the CMA in relation to commercial activities connected with communications matters (including broadcasting and postal services).

91. Postcomm, Ofcom's predecessor as regulator of the postal sector, did not have concurrent powers or duties under the Competition Act 1998.

Significant changes in the market(s) and the legal/regulatory framework since April 2015

92. There have been no significant changes which relate to Ofcom s exercise of its concurrent powers, either in the markets Ofcom regulates or in the legal or regulatory framework in the communications sector since April 2015. For further details of Ofcom's wider work to promote competition in the communications sector, see its website at www.ofcom.org.uk and its latest annual report.

Significant developments in Ofcom's approach to competition since April 2015

93. Ofcom entered into a revised memorandum of understanding with the CMA in February 2016.

94. On 30 March 2016, Ofcom published its decision to adopt the CMA's guidance on voluntary redress schemes.

Cases under the competition prohibitions since April 2015

Broadcasting

Complaint from British Telecommunications plc against British Sky Broadcasting Group plc alleging abuse of a dominant position regarding the wholesale supply of Sky Sports 1 and 2

95. In February 2016, Ofcom closed an investigation under the Chapter II prohibition on abuse of a dominant position (and the equivalent EU law prohibition) into a complaint from BT which alleged that the terms on which Sky offered wholesale supply of Sky Sports 1 and 2 to BT's YouView platform amounted to an abuse of dominance. The complaint alleged that Sky was making wholesale supply of Sky Sports 1 and 2 to BT's YouView platform conditional on BT wholesaling BT Sport channels to Sky for retail on Sky s satellite platform.

96. BT has now obtained access to Sky Sports 1 and 2 on a non-reciprocal basis for its YouView platform. As this was the remedy sought by BT in its complaint, Ofcom considered that the principal risk to the interests of the consumers identified in the complaint had therefore been brought to an end.

97. In light of the fact that the principal risk to the interests of consumers had been brought to an end, Ofcom considered that it was no longer appropriate to commit its limited resources to a continued investigation of the issues raised in BT's complaint and closed the case. Ofcom did not reach any conclusions on the merits of the complaint.

Complaint from Virgin Media against the Football Association Premier League about selling of live Premier League TV rights

98. In November 2014, Ofcom opened an investigation into the sale of live UK audio-visual media rights to Premier League matches. This followed a complaint from Virgin Media Limited against the Football Association Premier League (PL). Virgin Media's complaint alleges that the arrangements for the 'collective' selling of live UK television rights by the PL for matches played by

its member clubs is in breach of competition law. Under the PL membership rules, which are an agreement between each of the PL clubs and the PL, the PL has authority to enter into contracts for the sale of rights to PL matches. In particular, the complaint raises concerns about the number of PL matches for which live broadcasting rights are made available.

99. Virgin Media argued that the proportion of matches made available for live television broadcast under the current PL rights deals – at 41% – is lower than some other leading European leagues, where more matches are available for live television broadcast.

100. The complaint alleged that this contributes to higher prices for consumers of pay TV packages that include premium sport channels and for the pay TV retailers of premium sports channels. In January 2015, Virgin Media made an application requesting that Ofcom grant interim measures relief under section 25 of the Competition Act. In February 2015, Ofcom decided to refuse Virgin Media's application for interim measures.

101. In March 2015, Ofcom provided the PL with a case update, responding to a request for more detail on Ofcom’s assessment and analysis to date. Since this time, Ofcom has undertaken consumer research in order to further understand how consumers benefit from the way the PL sells its rights and continues to progress the investigation.

Electronic communications

102. Ofcom has not undertaken any new enforcement activity under the Competition Act in the electronic communications sector since April 2015.

Postal services

Complaint from Whistl UK Limited in relation to the prices, terms and conditions on which Royal Mail plc is offering to provide access to certain letter delivery services

103. In February 2014, Ofcom opened an investigation into a complaint from Whistl (formerly known as TNT Post) in relation to certain prices, terms and conditions offered by Royal Mail for access to certain letter delivery services (known as 'D+2 Access'). This followed announcements from Royal Mail in November 2013 and January 2014 of changes to these prices, terms and conditions.

104. In April 2014, Ofcom announced that its investigation would be conducted under section 25 of the Competition Act 1998 and would consider whether

Royal Mail had abused a dominant position under Article 102 of the Treaty on the Functioning of the EU and Chapter II of the Competition Act 1998.

105. In July 2015, Ofcom announced that it had issued to Royal Mail a Statement of Objections which set out the provisional view that Royal Mail breached competition law by engaging in conduct that amounted to unlawful discrimination against postal operators competing with Royal Mail in delivery.

106. Royal Mail has provided written and oral representations on the matters and evidence set out in the Statement of Objections. Ofcom is carefully considering Royal Mail's representations. This will inform the next steps in the investigation.

Market studies since April 2015

107. There were no market studies opened or closed since April 2015 and no market studies which are ongoing.

Decisions taken since April 2015 to use Ofcom's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

108. There were no decisions taken to use Ofcom s regulatory powers instead of powers under the competition prohibitions, where those competition prohibition powers could have been exercised.

Other steps taken to promote competition since April 2015

109. Ofcom's principal duty, set out in the Communications Act 2003, is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. Promoting competition is therefore at the heart of everything Ofcom does.

110. Ofcom has a number of statutory functions which it must carry out pursuant to its duties. These include:

(a) reviewing markets to assess whether they are effectively competitive and, where they are not, to impose direct regulatory *ex ante* remedies; and

(b) resolving disputes between communications providers in order to ensure (among other things) interconnection on reasonable terms.

111. Since 1 April 2015, Ofcom has exercised functions, in relation to its market review duties, and published a draft statement in relation to the Business Connectivity Market Review in March 2016.

112. Since 1 April 2015, Ofcom has exercised functions in relation to its dispute resolution duties in three disputes.

Data on cases for the year to date since 1 April 2015

Table 4: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[21]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	2
- a Statement of Objections was issued	1
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	1
Number of cases that are ongoing	2
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 5: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[22]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

Looking ahead

113. In February 2016, Ofcom published its initial conclusions from its Strategic Review of Digital Communications.[23] The review sets out Ofcom's approach to regulating communications markets for the next decade, explaining how it will promote investment and competition to ensure that people and businesses get the phone, broadband and mobile services they need in

[21] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by Ofcom which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.
[22] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.
[23] Ofcom (25 February 2016), Making communications work for everyone.

coming years, wherever they live and work. It sets out the following key proposals:

- **A strategic shift to large-scale investment in more fibre** – Ofcom will help create more choice for people and businesses, while reducing the country's reliance on Openreach. A major strategic shift will encourage the roll-out of new 'fibre to the premise' networks to homes and businesses, as an alternative to BT's planned innovation in copper-based technologies. As part of this, BT will be required to open up its network, allowing easier access for rivals to lay their own fibre cables along BT's telegraph poles and in its underground cable 'ducts'.

- **A step change in quality of service** – Ofcom will publish service quality performance data on all operators, and look to introduce automatic compensation for consumers and small businesses when things go wrong. Ofcom intends to introduce tougher minimum standards for Openreach with rigorous enforcement and fines for underperformance.

- **Reforming Openreach** – Ofcom intends to reform Openreach's governance and strengthen its independence from BT. In future, Openreach should be governed at arm's length from BT Group, with greater independence in taking its own decisions on budget, investment and strategy. Openreach management will be required to serve all wholesale customers equally, and consult them on its investment plans. Greater independence could be achieved by 'ring-fencing' Openreach (for example, Openreach becoming a wholly owned subsidiary with its own purpose and board members). Full 'structural' separation remains an option.

- **The right to broadband** – Ofcom will work with the UK government to make decent, affordable broadband a universal right for every home and small business in the UK. The universal right should start off at 10Mbit/s for everyone, and then rise in line with customer demand over time. Ofcom will work with the government to deliver it. Ofcom will also look to improve mobile coverage by including new obligations on operators seeking new licences for spectrum (the radio airwaves which transmit mobile signals).

- **Empowering consumers to make informed choices** – Ofcom will give consumers real power to exercise choice through much more accessible and engaging information on the services available to them. Ofcom will continue to make switching easier for more services so customers really can exercise choice.

- **Deregulate and simplify whilst protecting consumers.**

114. Ofcom will step back from regulation where people and businesses no longer need it, including when there is a real prospect of competition. Ofcom's ultimate goal is to improve communications services for everyone, not to increase regulation.

115. Many of the proposals will be delivered through Ofcom's normal process of regular reviews of individual telecoms markets, involving consultation on the detailed implementation. Where the proposals do not fall within a specific market review, they will be taken forward through a series of dedicated projects.

116. Ofcom's annual plan for 2016/17[24] sets out three high-level, long-term goals, of which the most relevant to concurrency is Ofcom's goal to promote competition and ensure that markets work effectively for consumers. Under this goal, Ofcom has highlighted six areas:

- Creating the opportunity for large-scale deployment of more ultra-fast networks.
- Implementing Ofcom's proposals to increase Openreach's independence.
- Ensuring that European regulatory frameworks work for the UK.
- Supporting competition in fixed-line services, through Ofcom's market reviews.
- Improving consumers' and businesses' ability to make informed choices.
- Monitoring price increases, providing advice and information on pricing, and making sure all consumers receive value from their communications providers.

[24] Ofcom (30 March 2016), Annual Plan 2016/17.

D. Electricity and gas in Great Britain – Gas and Electricity Markets Authority

117. The Gas and Electricity Markets Authority (Ofgem) is the regulator for the gas and electricity markets in Great Britain and is the designated national regulatory authority for Great Britain under the EU's Third Energy Package. Ofgem is also a national competition authority with concurrent powers with the CMA to enforce competition law in respect of specified activities in energy markets under the Competition Act 1998 and the Enterprise Act 2002.

Significant changes in the market(s) and changes to the legal/regulatory framework since April 2015

RIIO-ED1 price control

118. In April 2015, the settlements (final determinations) for the next electricity distribution network price control (RIIO-ED1) came into effect and will run for eight years until 2023. The settlements apply to the six electricity distribution companies that run Great Britain's local electricity network, which transports energy into homes and businesses.

119. In March 2015, British Gas Trading (a supplier) appealed the final determinations of ten slow track licences and Northern Powergrid, holder of two of the 14 electricity distribution licences, appealed the final determinations of its two slow track licences. The appeals were diametrically opposed. This was the first use of the new appeal framework. The CMA published its final determinations in September 2015. It dismissed two of the three grounds of Northern Powergrid's appeal and upheld one ground in relation to Ofgem's adjustments to reflect potential savings available from the introduction of smart grids and other technological innovations. In the British Gas Trading appeal, the CMA dismissed four of the five grounds of appeal. The CMA upheld, in part, one ground which sought to challenge the adjustment that Ofgem made to the up-front rewards and penalties for Distribution Network Operators (DNOs) in its Information Quality Incentive scheme.

Electricity Market Reform (EMR)

120. EMR is a government programme that seeks to incentivise investment in secure, low-carbon electricity, improve the security of Great Britain's electricity supply and improve affordability for consumers. The Energy Act 2013 introduced several initiatives to achieve this. The Contracts for Difference were introduced to incentivise low carbon generation by giving a guaranteed price to the electricity sold by generators. The Capacity Market was

introduced to help ensure security of electricity supply at the least cost to the consumer. It is designed to provide investment in the overall level of reliable capacity (both supply and demand side response) by auctioning capacity agreements. Both of these policies are administered by National Grid Electricity Transmission plc (NGET), alongside a number of delivery partners.

121. Ofgem has several important roles in EMR, including: where necessary, making changes to the Capacity Market Rules (the Rules) which govern the operation of the Capacity Market; determining certain disputes where participants disagree with a decision made by NGET; enforcing compliance with the Rules and Regulations; and annually reporting on the effectiveness of the Capacity Market and NGET's performance.

122. Ofgem made several amendments to the Rules in June 2015. These included simplifying the application process to participate and making the Rules clearer.

123. Since April 2015, Ofgem has opened and concluded five enforcement investigations relating to EMR. Three of these closed without a finding of breach. In the other two investigations, GEMA found that two companies submitted false and misleading information when applying to be part of the T-4 2014 Capacity Auction, which is a Prohibited Activity under the Capacity Market Rules. As a result GEMA found that these two companies had contravened a relevant requirement set out in Rule 5.13.1(b) of the Capacity Market Rules. One unit, which secured a capacity agreement after prequalifying for the auction on the basis of information which was false and misleading had its Capacity Agreement terminated and the company will be banned from entering that unit into Capacity Auctions in the next two delivery years.[25]

REMIT

124. Ofgem has certain obligations under the EU Regulation on Wholesale Energy Market Integrity and Transparency (REMIT). This regulation seeks to improve transparency and integrity in wholesale energy markets. It prohibits market abuse, puts obligations on market participants to register and report trades and inside information, and provides for monitoring and enforcement regimes.

125. Ofgem was given civil powers to enforce breaches of REMIT in June 2013. These provide for, among other things, unlimited financial penalties when a person is found to have engaged in prohibited conduct or not met their

[25] See Ofgem's investigations webpage for more details.

obligations under REMIT. This enforcement regime was strengthened in April 2015 when market manipulation and insider trading in contravention of REMIT were made criminal offences in Great Britain.

126. From October 2015, market participants trading wholesale energy products which are standard contracts have an obligation to register with their National Regulatory Authority (NRA) before entering into and reporting any trades to the Agency for the Cooperation of Regulators (ACER) – the NRA for Great Britain is Ofgem. From April 2016, those trading non-standard contracts will also have to register with their NRA and then report to ACER.

127. Ofgem actively uses its monitoring and investigation powers to seek to ensure the integrity of the market through proactive monitoring, external referrals and suspicious transactions reports from persons professionally arranging transactions. REMIT itself recognises the possibility of close interaction between these prohibitions and the competition law prohibitions and Ofgem has engaged with the CMA to establish cooperation in this regard. Related to this, at the end of January, DECC closed a consultation on the possibility of creating an information gateway from the CMA to Ofgem in relation to REMIT information. REMIT already requires that the National Competition Authority should be informed when there are reasonable grounds to suspect that acts are being or have been carried out on wholesale energy markets which are likely to constitute a breach of competition law. This requirement helps ensure a coordinated and consistent approach to market abuse on wholesale energy markets.

Retail gas and electricity supply

128. The retail energy market is undergoing a period of far-reaching changes. Rapid technological change, including the rollout of smart meters across Great Britain, should increasingly enable retail energy suppliers to provide new products, services and pricing options to consumers. It is expected that new business models will challenge the established way of doing things. Coupled with the ongoing revolution in online and mobile technology, the consumer experience in the energy market is undergoing remarkable change.

129. In the face of this potentially rapid and significant change, Ofgem's role is to maintain a regulatory framework which delivers positive outcomes for consumers by protecting them from poor supplier behaviour, while allowing them to enjoy the benefits from innovation. To this end, Ofgem has committed over time to rely more on general principles rather than detailed rules about how companies should run their businesses. This aims to better protect consumers' interests by focusing Ofgem's efforts on good consumer outcomes and more effective and comprehensive consumer protection,

creating room for suppliers to innovate, and putting much greater onus on suppliers to treat consumers fairly. Ofgem published a consultation on how to transition to an increased reliance on principles in December 2015.[26]

130. In September 2015 Ofgem published its Retail Energy Market report.[27] This report provided an overview of key trends in the supply-side and demand-side of the retail energy markets over the last year. It also discussed key developments in the retail energy markets' contribution to four of the consumer outcomes set out in Ofgem's corporate strategy: lower bills, better quality of service, benefit for society as a whole and reduced environmental damage. This report will be published on an annual basis.

Integrated Transmission Planning and Regulation

131. Following publication in March 2015 of final conclusions of a review of the Great Britain electricity transmission arrangements for system planning and asset delivery, Ofgem has made licence modifications.[28] Ofgem is also taking forward work to introduce competition for the construction and operation of high value, new and separable assets in the onshore transmission network. Ofgem published a consultation on possible tender arrangements for these assets in October 2015. Subject to consideration of responses, Ofgem expects to publish its decisions and consult on further details regarding the proposed tender arrangements in mid-2016. Ofgem aims to be in a position to run the first competitive tender for onshore transmission assets in 2017.

Significant developments in Ofgem's approach to competition since April 2015

132. Ofgem has continued to be committed to promoting competition in the energy sector, where appropriate, since April 2015, as set out in its 2015-16 Forward Work Programme,[29] and through the work explained in this document.

Cases under the competition prohibitions since April 2015

Supporting services for the energy industry

133. In October 2015, Ofgem announced an investigation under Chapter I of the Competition Act 1998 and/or Article 101 of the Treaty on the Functioning of the EU into a suspected infringement by two or more companies providing a

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[26] Ofgem (18 December 2015), The future of retail market regulation.
[27] Ofgem (9 September 2015), Retail Energy Markets in 2015.
[28] Ofgem (17 March 2015), Integrated Transmission Planning and Regulation (ITPR) project: final conclusions.
[29] Ofgem (25 March 2015), Forward Work Programme 2015-16.

supporting service for the energy industry. This investigation was opened to look at whether some price comparison websites had breached competition law in relation to paid online search advertising.

134. Ofgem has also progressed its existing Competition Act 1998 investigation, opened in February 2015, into whether two or more companies providing supporting services for the energy industry have breached competition law by sharing information on the commission rates they charge to energy suppliers. This case was closed in March 2016 on administrative priority grounds so that Ofgem's resources could be allocated elsewhere. Advisory letters were sent to the parties reminding them of their obligation to comply with competition law.

Connections

135. Ofgem has also progressed its Competition Act 1998 investigation into whether SSE has infringed Chapter II of the Competition Act 1998 and/or Article 102 Treaty on the Functioning of the European Union by abusing a dominant position and putting its competitors at a disadvantage in the electricity connections market. This case was opened in January 2015, following Ofgem's review of competition in electricity distribution connections.

136. Ofgem's specific data on Competition Act 1998 cases and complaints is detailed in Table 6 below.

Market studies since April 2015

137. There have been no market studies opened under the Enterprise Act 2002 since April 2015 and none which is ongoing. Ofgem launched one market review under its sectoral powers in February 2015 which is detailed in paragraph 141, below.

Decisions taken since April 2015 to use Ofgem's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

138. There have been no occasions on which Ofgem has decided to use its regulatory powers, instead of its competition powers, where it was open to Ofgem to use its competition powers.

Other steps taken to promote competition since April 2015

139. Since April 2015, Ofgem has continued work to promote competition across the energy sector, including in monopoly network activities, retail and

wholesale markets, and by optimising conditions for competition using new technology.

Market investigation reference

140. In June 2014 Ofgem referred the energy market in Great Britain to the CMA for investigation. As outlined in the introduction, the investigation which is ongoing seeks to examine whether there are any market features that are having an adverse effect on competition and, if so, whether there are any reforms which could make competition in the market more effective.

Non-domestic gas metering

141. During the period of this report, Ofgem has been conducting a review of non-domestic gas metering products and services. These comprise meter provision, meter management and automatic meter reading equipment and service provision, although these products and services are frequently provided as a package. The provision of non-domestic gas meters had been open to competition for ten years but concerns had been raised with Ofgem about the effectiveness of competition in relation to these products and services.

142. Ofgem published its final report in March 2016.[30] The review found that competition has not evolved as quickly as it might have, that there are high switching costs associated with the need often to replace meters to switch provider and that quality and availability of information about each meter point is generally poor. Ofgem is calling on industry to take a number of actions to address the issues identified.

Competition in electricity distribution connection

143. Ofgem has been working to facilitate competition in electricity connections since 2000. Competition continues to grow in parts of this market, in part due to measures that Ofgem has put in place to encourage DNOs to remove barriers to competition. However, in light of the fact that there were sections of the market where competition had developed less well, Ofgem launched a review of the electricity connections market, publishing its findings in January 2015. The review found that the DNOs' role, as the sole providers of several essential services needed to make a connection, was restricting the development of effective competition.

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[30] Ofgem (7 March 2016), Review of the non-domestic gas metering market in Great Britain - Final Report.

144. To address the issues identified in the market review, Ofgem approved an enforceable code of practice (CoP) in July 2015 and introduced a new licence obligation in October 2015. The CoP requires DNOs to reduce the number of these essential services that are only available from them. Where DNOs are required to provide these services, the DNOs need to provide them on the same basis to both their competitors and their own connections business. The DNOs also need to harmonise the provision of these services across all DNO areas. Ofgem has committed to undertaking a further review of the electricity distribution connections market in spring 2017 to determine the success of this remedy.[31]

Customer switching

145. Ofgem is leading a major programme to improve customers' experience of switching by designing and implementing a new switching process that is reliable, fast and cost-effective. The aim is to facilitate greater engagement in the retail energy market in order to build consumer confidence and facilitate competition, delivering better outcomes for consumers. The programme is an opportunity for the regulator, the government and industry participants to work in partnership to design and deliver new arrangements that help rebuild consumer trust and engagement in the energy market.

Settlement arrangements

146. The settlement process determines how much each supplier's customers use in each half hour of the day. This process relies on estimates and is used to work out the costs that suppliers pay for energy and for using the network. Unlike today's meters, smart meters can record half-hourly consumption data. Using this data in settlement would promote retail competition by improving the accuracy of cost allocation between suppliers. In particular, this would encourage them to manage their costs efficiently by encouraging a demand-side response among their customers. Ofgem implemented a new requirement in November 2015 to expand the number of larger non-domestic customers who must be settled half-hourly. This requirement is being implemented in a phased way, with consumers moving to half-hourly settlement as they renew their contracts or switch suppliers. All relevant customers will be moved to half-hourly settlement by April 2017.

147. Ofgem published an open letter in December 2015 setting out its plans to extend half-hourly settlement to domestic and smaller non-domestic

[31] As a consequence of the review, Ofgem also opened a Competition Act 1998 investigation into SSE plc's activities as a DNO – see paragraph 139, above.

customers. The immediate priority will be to improve industry processes so that suppliers can choose to settle domestic and smaller non-domestic customers half-hourly in a cost-effective way. This is a competition-led approach, starting with the suppliers and new entrants who want to offer innovative products to consumers.

Flexibility

148. Ofgem has identified energy system flexibility (including new sources of flexibility such as storage, demand side response and distributed generation) as integral to the transition to a cost-effective, dynamic, efficient and low-carbon competitive market. In 2015, Ofgem undertook work to review the existing and potential uses of flexibility in the energy system and to identify barriers to the efficient deployment of diversified forms of flexibility across the supply chain.

149. Ofgem published a position paper in September 2015 which set out priority work areas to deliver benefits from flexibility, which it is now taking forward. This work focuses on facilitating new roles for industry parties (DNOs and industrial and commercial customers), to increase their opportunities to use or provide flexibility, and removing barriers for new business models (aggregators and electricity storage) with a view to enabling a more flexible and competitive market.

Data on cases for the year to date since 1 April 2015

Table 6: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[32]	3
Number of investigations formally launched	1[33]
Number of those cases in the year to date in which:	
- information gathering powers were used	3[34]
- powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	1
Number of cases that are ongoing	2
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 7: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[35]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

Looking ahead

150. Alongside its sectoral powers, Ofgem will keep a strong focus on challenging anti-competitive behaviour and working closely with the CMA and other sectoral regulators to develop and strengthen competition policy for the benefit of consumers now and in the future.

151. Ofgem is currently developing policies and processes that will enable it to tender onshore transmission assets on a competitive basis. Ofgem is working with DECC to develop a robust legal framework and is aiming to start first tenders in 2017.

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[32] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by Ofgem which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.
[33] The new case launched was not based on a new complaint but on evidence obtained from a separate investigation.
[34] This number represents the number of cases in which Ofgem has exercised its information gathering powers.
[35] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.

152. Ofgem manages the competitive tender process, through which offshore transmission licences are granted to Offshore Transmission Owners. Through this tender process new capital is brought into the offshore transmission sector in support of investments and offshore wind generators are partnered with the most efficient and competitive players in the market. This should result in lower costs and higher standards of service for such generators and, ultimately, consumers. Ofgem regulates Offshore Transmission Owners including monitoring compliance with their regulatory obligations, and their performance against the 98% availability target for their transmission systems under their offshore transmission licence. In 2015-16, Ofgem has been working towards achieving financial close and licence grant for the remaining offshore transmission project in its third tender round. Ofgem expects to launch round four in the first half of 2016. Ofgem will also work closely with wind farm developers to identify the projects that will go through the next tender round.

153. In the year ahead, Ofgem will continue to support the CMA's investigation into the Great Britain energy market and to work with the CMA to give effect to the remedies put into place following the investigation.

154. Ofgem has been actively monitoring how the Great Britain wholesale electricity market complies with the Transmission Constraint Licence Condition. This licence condition prohibits generators from obtaining an excessive benefit from electricity generation, or a reduction in generation in relation to a period of transmission constraint. This licence condition is undergoing review by DECC and Ofgem in consideration of whether or not to extend it beyond July 2017.

155. Ofgem has also begun thinking about how distribution network tariffs should change over time, balancing the objectives of cost-reflectivity, practicality and support for effective competition. Ofgem is taking these work areas forward as part of a broader programme with DECC, to seek to ensure that regulation supports an efficient, flexible energy system that delivers benefits for consumers.

156. In the year ahead, Ofgem will progress its work on half-hourly settlement. It intends to deliver cost-effective elective half-hourly settlement for small sites by early 2017. Subject to the responses to its recent consultation, Ofgem will also decide whether to launch a Significant Code Review to work towards mandatory half-hourly settlement for all consumers. This Significant Code Review would be launched early in 2016/17.

E. Financial Services – Financial Conduct Authority/Payment Systems Regulator

E.1 Financial Conduct Authority

157. The Financial Conduct Authority (FCA) has a strategic objective to ensure that relevant markets work well. To advance this objective, the FCA has three operational objectives. These are to secure an appropriate degree of protection for consumers, to protect and enhance the integrity of the UK financial system, and to promote effective competition. The FCA also has a duty to promote competition in the interests of consumers.

158. Since April 2015, the FCA has had powers to (i) enforce the prohibitions in the Competition Act 1998 and Treaty on the Functioning of the EU concurrently with the Competition and Markets Authority (CMA) and (ii) conduct market studies and make market investigation references to the CMA under the Enterprise Act 2002 with regards to the financial services sector. The FCA's activities pursuant to these powers from April 2015 are outlined further in this section.

Significant changes in the market(s) and the legal/regulatory framework since April 2015

Retail banking

159. The EU Payment Accounts Directive (PAD) requires the FCA to develop a list of key services linked to payment accounts that are subject to a fee in the UK.[36] Following consultation, the FCA published a provisional list of these together with suggested terms and definitions used to describe them. This list has been submitted to the European Commission and the European Banking Authority (EBA). The EBA will standardise the terms and definitions for the services that appear on the lists of at least a majority of EU Member States.

160. The Financial Services (Banking Reform) Act 2013 set out a number of requirements intended to implement recommendations contained in the Independent Commission on Banking Report of 2011.These include a ring fence around core deposits held by UK banks, with the aim of separating certain core banking services critical to individuals and SMEs from other banking services. In March 2016, the FCA published guidance on its

[36] FCA (15 September 2015), Terms and definitions for services which are linked to payment accounts and subject to fees.

approach to the implementation of ring-fencing and ring-fencing transfer schemes in this context.[37]

Retail lending

161. In October 2015, the FCA issued its response to the CMA's final report on its Payday Lending market investigation.[38] The CMA had recommended that the FCA use its regulatory tools to raise standards for price comparison websites which display payday loans, before a CMA order requiring all payday lenders to list their products on at least one PCW that is authorised by the FCA comes into effect. The FCA's response consulted on proposed additional conduct standards. It is now reviewing responses and will publish feedback in due course.

Retail investments and investment management

162. In August 2015, the UK government along with the FCA announced a Financial Advice Market Review (FAMR) which will examine how financial advice could work better for consumers. A final report was published in March 2016 and includes measures aimed at stimulating the development of a market that provides affordable and accessible financial advice and guidance. It also contains proposals designed to increase consumer engagement with financial advice.[39]

Wholesale banking

163. The Fair and Effective Markets Review (FEMR) was established by the Chancellor in June 2014, to conduct a forward-looking assessment of the way wholesale financial markets operate. On 10 June 2015, a final report was published which contains 21 recommendations, aimed at improving the quality, clarity and market-wide understanding of Fixed Income, Currencies and Commodities (FICC) trading practices and strengthening regulation of FICC markets in the UK. The Review's Chairs will provide a full implementation report to the Chancellor and the Governor of the Bank of England by June 2016.

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[37] FCA (4 March 2016), Guidance on the FCA's approach to the implementation of ring-fencing and ring-fencing transfer schemes.
[38] FCA (28 October 2015), Consumer credit: proposals in response to the CMA's recommendations on high-cost short-term credit.
[39] FCA (14 March 2016), Financial Advice Market Review: final report.

General Insurance and Protection

164. Solvency II is an EU legislative programme which introduces a harmonised EU-wide insurance regulatory regime. It came into effect for firms from 1 January 2016. The FCA is responsible for transposing those articles of the directive concerned with conduct and it published final rules in March 2015 with which relevant firms must comply.[40]

Pensions and Retirement Income

165. Profound changes to UK pensions came into force on 6 April 2015. These changes affect how people access the money in their pension when they reach the age of 55. Traditionally, savers with a defined contribution pension were obliged to buy an annuity (an insurance product that pays an annual guaranteed income for the rest of a person's life). The new rules mean this purchase is no longer necessary and instead, pension savings can be accessed from the age of 55.

166. In January 2016, the UK government announced proposals to place a duty on the FCA to cap early exit charges in contract-based pension schemes for consumers aged 55 or over wishing to access the pension freedoms introduced in April 2015. The FCA is responsible for setting the level of the cap on these charges and will set out its proposals in a consultation paper that will be published in due course.

167. In March 2016, the FCA published a report on the fair treatment of long-standing customers in the life insurance sector. This includes a consultation on guidance on the actions firms should be taking to treat those customers fairly.[41]

Significant developments in the FCA's approach to competition since April 2015

168. The FCA has a range of tools to investigate and if necessary, remedy competition issues. Against this background, significant developments in the FCA's approach to competition since April 2015 are as follows.[42]

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[40] FCA (27 March 2015), Solvency II.
[41] FCA (3 March 2016), Fair treatment of long-standing customers in the life insurance sector.
[42] This section excludes details of steps taken by the FCA to promote competition, which are set out at paragraphs 24-29 below.

Internal expertise

169. The FCA has assembled a Competition Division of some 90 staff, with a range of skills, including expertise in competition law, economics and financial services.

Working with the CMA and other concurrent regulators

170. The FCA is committed to cooperating closely with other regulators and competition authorities, to ensure experiences and best practice is shared so as to make markets work better and improve outcomes for consumers. A current example of FCA/CMA collaboration is in relation to the CMA's investigation into the supply of personal current accounts and retail banking services to SMEs.

171. In December 2015, a new Memorandum of Understanding between the FCA and the CMA with regard to competition was published.[43]

Competition Act-related developments

172. In July 2015, the FCA published advice and information on how it intends to enforce its competition powers, namely:

- a guide to the FCA's powers and procedures under the Competition Act 1998;[44] and
- a guide to the FCA's powers and procedures to conduct market studies and make market investigation references under the Enterprise Act 2002.[45]

173. At the same time, the FCA published a legal instrument to make minor amendments to the FCA Handbook.[46] These reinforce the obligation under Principle 11 on authorised firms to report significant infringements of applicable competition law to the FCA.

174. The FCA has recruited the first panel members of its Competition Decisions Committee (CDC), the body that takes final decisions in cases under the Competition Act 1998. The CDC exists to ensure decisional separation between the FCA staff who decide whether to take on a Competition Act case,

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[43] FCA (22 December 2015), Memorandum of understanding between the Competition and Markets Authority and the Financial Conduct Authority – concurrent competition powers.
[44] FCA (15 July 2015), The FCA's concurrent competition enforcement powers for the provision of financial services.
[45] FCA (15 July 2015), Market studies and market investigation references.
[46] FCA (15 July 2015), FCA Competition Concurrency Guidance and Handbook amendments: Feedback on CP15/01, finalised guidance and rules.

investigate it and decide whether there is sufficient evidence to propose to make an infringement decision (ie issue a statement of objections) and those individuals who will finally decide the case.

175. The FCA has also appointed David Saunders, FCA Senior Advisor and a former chief executive of the Competition Commission, to act as Procedural Officer for investigations under the Competition Act 1998.[47]

176. In March 2016, the FCA published guidance on approval of voluntary redress schemes under the Competition Act 1998.[48] Redress schemes under the Competition Act 1998 provide firms with an opportunity to offer and administer redress to those affected by a breach of the competition prohibitions by those respective firms, thereby reducing the risk of lengthy and costly court proceedings.[49]

Embedding competition

177. An important part of the FCA's competition work is to ensure competition considerations feature across the range of its work. This is a key element of the FCA becoming a more markets-based regulator, as described in its Strategy Paper published in December 2014.[50]

178. An example of this approach in practice is how the FCA assesses the impact on barriers to entry and expansion when developing policy and new rules. In this regard, it has undertaken an internal review of regulatory rules inherited from the FSA and considered where changes could be made that would promote effective competition in the interests of consumers. This has raised a number of issues that are being taken forward, including its work on Smarter Consumer Communications.[51] A key element of this project is a consultation to see if changes can be made to certain FCA Handbook disclosure requirements to improve their effectiveness.

179. Other work where regulatory barriers to entry are examined includes in the context of "Project Innovate": an FCA initiative to help firms looking to introduce beneficial innovative financial products and services to the market (see further below at paragraph 28)). Project Innovate helps the FCA identify

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[47] As set out in the Competition Act 1998 (Competition and Markets Authority s Rules) Order 2014, the Procedural Officer hears procedural complaints in an investigation under the Competition Act 1998, chairs the oral hearing following the issuing of a statement of objections in a Competition Act case and certifies the procedural fairness of the oral hearing. The Procedural Officer is not otherwise involved in the investigation.
[48] FCA (30 March 2016), Guidance on voluntary redress schemes under the Competition Act 1998.
[49] The FCA also has a number of powers under FSMA to require authorised firms (ie firms regulated by the FCA) to pay redress or provide restitution.
[50] FCA (8 December 2014), Our strategy - December 2014.
[51] FCA, Smarter consumer communications.

where parts of the regulatory framework may be impeding market development. The aim is to encourage innovation without eroding consumer protection or the integrity of the financial system in the UK.

Other

180. Other developments in the context of the FCA's approach to competition include assisting, along with the CMA, in the preparation of an annex to the June 2015 FEMR final report (see above). This provides a high-level summary of the competition law framework and the means by which it is enforced. One of the recommendations contained in the FEMR final report is to improve firms' and traders' awareness of the application of competition law to FICC markets, including through the communication by the FCA of material presented in that annex to authorised firms active in FICC markets. Following publication, the FCA directed FICC firms to this annex by email, encouraging them to review it and to ensure that they understood their obligations under competition law.

Details of any cases under the Competition Act 1998 that have been opened or closed since April 2015 or which are ongoing

181. The FCA opened its first investigation under the Competition Act 1998 during the period of this report.

182. In addition, and for the first time, the FCA issued two 'on notice' letters to firms:[52]

- The FCA's on notice letters are similar to the CMA's warning letters, where the evidence suggests there may be a potential infringement of competition law, but where the significance of the case (including its deterrence effect), impact on direct or indirect consumers, or other factors (such as strength of the evidence) does not warrant opening an investigation.

- While these letters are not formal decisions by the FCA relating to infringements of competition law, they set out the behaviour of potential concern, give the firms involved an opportunity to exercise due diligence and to consider whether the activity of concern adheres to their obligations under competition law. The letters request that the firms in question

[52] The FCA's warning letters are known as 'on notice' letters. This is to avoid possible confusion with the 'private warnings' letters which are issued under FSMA.

respond with what action they propose to take in order to address the concerns raised.

- In the case in question, which arose out of work undertaken as part of the Retirement Income market study, the FCA subsequently met with the relevant firms to whom the on notice letters had been sent.

- As a result of the FCA's on notice letters, the firms have undertaken a number of initiatives to strengthen competition compliance.[53]

183. The FCA also issued three advisory letters during the period of this report. These letters are educational and intended to increase awareness of competition law to achieve greater compliance by the firms in question.

184. The FCA's commitment to its programme of Competition Act-related work also includes working closely with external parties and other regulators and competition authorities. For example, the FCA is liaising with DG Competition in relation to a number of cases of mutual interest.

185. Finally, the FCA notes that it has received a greater number of notifications under Principle 11 from firms relating to competition issues than in the previous reporting period, which may be attributable to the clarificatory change to its rules mentioned in paragraph 8 above.

Details of all decisions taken since April 2015 to use the FCA's regulatory powers instead of competition prohibition powers, in cases where those competition prohibition powers could have been exercised

186. The FCA has taken no decisions since April 2015 to use its regulatory powers instead of competition prohibition powers in cases where those competition prohibition powers could have been exercised.

Details of any market studies that have been opened or closed since April 2015, or which are ongoing

187. The FCA can conduct market studies under either Enterprise Act 2002 or the Financial Services and Markets Act 2000 (FSMA). The FCA decides which route is most appropriate on a case by case basis. It may also be appropriate, depending on the circumstances, to proceed under a different power than that originally used. For example, if a FSMA market study indicates that the FCA

[53] FCA (11 March 2016), We welcome action taken by a number of pension providers to review and strengthen their competition compliance.

should study firms or activities falling outside the FSMA regulatory perimeter, it may use its Enterprise Act powers.

188. The FCA has not opened or closed any market studies under the Enterprise Act 2002 since it gained its competition powers concurrent with the CMA in April 2015. However, it has opened and continues to conduct a number of market studies using its powers under FSMA. This work is explained in more detail below.

Details of any other steps taken to promote competition

189. In this section, the FCA sets out some of the main steps it has taken since April 2015 to promote competition, pursuant to its competition mandate set out in FSMA.

Market studies and other reviews

190. First, the FCA is currently carrying out the following market studies:

- **Credit Card market study** – This market study is focused on credit card services offered to retail consumers by credit card providers (including banks, mono-line providers and retailers) through a range of distribution channels. Interim findings were published in November 2015, which set out that, in most of the market, competition is working fairly well for consumers.[54] The FCA also set out an outline of its early thinking on remedies in order to make the market work better, including giving consumers more control over credit limits. The FCA aims to publish its final report mid-2016.

- **Investment and Corporate Banking market study** – In May 2015, the FCA published terms of reference and launched its Investment and Corporate Banking market study.[55] The FCA is examining issues around choice of banks and advisers for clients, transparency of the services provided by banks, and bundling and cross-subsidisation of services, focusing on primary market and related activities provided in the UK. The FCA expects to publish its interim report in April 2016.

- **Asset Management market study** – In November 2015, the FCA published terms of reference and launched its Asset Management market study. The aim of the study is to understand whether competition is

[54] FCA, Credit Card Market Study: Interim Report.
[55] FCA (22 May 2015), Investment and corporate banking market study: Terms of reference.

working effectively to enable investors to get value for money when purchasing asset management services. The FCA aims to publish an interim report in summer 2016 and a final report in early 2017.

191. In addition, the FCA is continuing to develop and implement remedies to address competition concerns identified in previous market studies, including the following:

- **General insurance add-ons market study** – The FCA looked into a range of general insurance products sold alongside, or on the back of, "primary products". The FCA's final report in July 2014 confirmed that competition for add-ons is often not effective and that consumers are often unaware they own add-ons at all or buy products that are poor value and do not meet their needs. The FCA has introduced a number of remedies in response, including tackling specific competition concerns in the market for add on Guaranteed Asset Protection (GAP),[56] banning pre-ticked boxes (so called opt-out selling) and guidance on how firms can help consumers make better choices.[57] The FCA will also launch a pilot in 2016 on its proposal to address poor value in GI markets more broadly by publishing claims frequencies, claims acceptance rates and average payouts for GI products.[58]

- **Cash Savings market study** – The FCA published final findings in its Cash Savings market study in January 2015.[59] These set out that, for many consumers, competition in the £700 billion sector was not working as effectively as it could. In December 2015, the FCA finalised a first package of measures (to come into force in December 2016) to help make switching cash savings accounts quicker and easier.[60] The FCA expects to consult on a second package of measures in 2016.

- **Retirement Income market study** – In March 2015, the FCA published the final findings of its Retirement Income market study and proposed remedies.[61] The final findings set out that competition in this market was not working well for consumers. The FCA proposed remedies which are designed to help consumers make choices in this market and testing of these proposals has been underway since the final report was published.

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[56] FCA (10 June 2015), Guaranteed Asset Protection insurance: competition remedy.
[57] FCA (28 September 2015), General Insurance Add-Ons Market Study – Remedies: banning opt-out selling across financial services and supporting informed decision-making for add-on buyers.
[58] FCA (1 March 2016), Feedback Statement on DP15/4 – general insurance value measures.
[59] FCA (20 January 2015), Cash savings market study report: Part I: Final findings Part II: Proposed remedies.
[60] FCA (8 December 2015), Cash savings remedies: Feedback and Policy Statement to CP15/24 and next steps.
[61] FCA (26 March 2015), Retirement income market study: Final report.

The FCA expects to report on its findings and any proposed rule changes later this year.

192. The FCA has also announced the following initiatives in the relevant period to consider whether markets are working well for consumers:

- *Mortgages*:
  - *Responsible Lending Review*: This review commenced in April 2015 and is assessing the impact of the implementation of responsible lending rules introduced in April 2014. The FCA will report in the first half of 2016.
  - *Assessment of barriers to competition:* In October 2015, the FCA announced its intention to consider a wider assessment of barriers to competition in the mortgages sector. A call for inputs was issued to help identify potential areas where competition in the interests of consumers may not be working well and could be improved (or conversely if competition is working well).[62] In spring 2016, the FCA will publish a feedback statement setting out any further action.
- *Retirement outcomes*: The final report in the FCA's Retirement Income market study published in March 2015[63] identified a number of future risks as the market adapts and develops in light of pension reforms. In October 2015, the FCA set out the key issues that it was proposing to consider through a retirement outcomes review as a follow-up to the market study. In its Business Plan 2016/17, the FCA confirmed that it expects to launch this review in the second to third quarter of 2016.
- *Big Data*: In November 2015, the FCA published a call for inputs on the use of Big Data in the general insurance sector.[64] The FCA will use its findings to determine its next steps, including whether a market study, adjustments to policy or guidance or any other form of intervention is appropriate. A feedback statement will be published in mid-2016.

Work on innovation

193. The FCA's mandate is to promote competition that is effective. Where businesses compete effectively, the results for consumers are lower prices, new and better products or services, better customer services and wider

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[62] FCA (October 2015), Call for Inputs on competition in the mortgage sector.
[63] See footnote 26 above.
[64] FCA (24 November 2015), Call for Inputs: Big Data.

choice. Innovation is also critical: competition stimulates innovation and innovation in turn drives competition. Related FCA's initiatives since April 2015 in this context include the following:

- The FCA has continued to provide support through 'Project Innovate' which includes an Innovation Hub, by which new and established businesses, both regulated and non-regulated, are supported in introducing beneficial innovative financial products and services to the market. The support offered includes help for these businesses to understand the regulatory framework and how it applies to them. In its first sixteen months, Project Innovate has assisted or is assisting 230 innovative businesses, 18 of which have now been authorised to undertake regulated activities.

- The FCA published a report in November 2015 setting out its plans to expand Project Innovate by implementing a regulatory sandbox, ie a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of pilot activities.[65] The regulatory sandbox will launch in spring 2016.

- The FCA and the PRA launched a New Bank Start-Up Unit on 20 January 2016. The new Unit provides firms with named case officers at both the PRA and FCA to give dedicated supervisory resource to assist new banks to enter the market and through the early years of authorisation.[66]

- In March 2016, the FCA published a feedback statement on a call for input related to regulatory barriers to innovation in digital and mobile solutions. The FCA found that there are a number of perceived barriers that are preventing greater use of all the available technology and set out next steps in this context.[67]

Regulated benchmarks

194. Other work pursuant to the FCA's competition mandate includes that in relation to regulated benchmarks. In February 2016, the FCA made rules (to come into force on 1 April) in respect of access to regulated benchmarks.[68] The FCA has addressed concerns regarding the lack of constraints on the ability of administrators to set the prices of benchmarks. As a result, the

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[65] FCA (November 2015), Regulatory sandbox.
[66] See FCA press release (20 January 2016): New Bank Start-up Unit launched by the financial regulators.
[67] FCA (9 March 2016), Feedback Statement on Call for Input - regulatory barriers to innovation in digital and mobile solutions.
[68] FCA (8 February 2016), Fair, reasonable and non-discriminatory access to regulated benchmarks.

FCA's rules require the provision of fair, reasonable and non-discriminatory access to regulated benchmarks by benchmark administrators for certain users, namely central counterparties (ie clearing houses who need the benchmarks to price instruments linked to the relevant benchmark) and other trading venue users such as regulated markets and multilateral trading facilities.

Data on cases for the year to date since 1 April 2015

Table 8: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[69]	0
Number of investigations formally launched	1
Number of those cases in the year to date in which:	
- information gathering powers were used	0
- powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing	1
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 9: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[70]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

Looking ahead

195. The FCA issues a Business Plan each year that sets out the activities that it intends to carry out in the financial year ahead. The FCA Business Plan 2016/17 was published on 5 April 2016.[71]

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[69] 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the sector regulators which they regarded as raising competition law issues under those prohibitions and met their guidelines for the submission of formal complaints.
[70] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.
[71] FCA (5 April 2016), Business Plan 2016/17.

196. Looking across the financial services sector more broadly, notable and forthcoming changes to the legal and regulatory framework that are due to come into effect after April 2016 are as follows:

- Retail banking:

  — The Payment Services Directive harmonises the regulatory regime for payment services across the EU. The European Commission published a proposal for a second Payment Services Directive in July 2013 and it came into force in January 2016. Member States must transpose the second Payment Services Directive into national law by early in 2018.

  — The CMA will publish the final report in its retail banking market investigation in July/August 2016 and its provisional decision on remedies in May 2016. The CMA has suggested that it may make recommendations to the FCA to implement a number of the final proposals. The FCA expects this to be a key element of its work to improve the effectiveness of competition in retail banking.

- Wholesale banking:

  — The Markets in Financial Instruments Directive is focused on introducing competition to the EU trading landscape and various investor protection measures. Revisions to this legislation, commonly described as MiFID II, are aimed at taking account of developments in the trading environment, including advances in technology. Much of MiFID II takes the form of regulations which are directly applicable and do not need to be converted into domestic laws. The FCA expects to publish final rules on related changes to the FCA Handbook by summer 2016.

  — From July 2016, the principal legal requirements relating to market abuse in the UK will be set out in the EU Market Abuse Regulation and its implementing measures.

  — The European Parliament and the Council of the European Union are in the final stages of agreeing a Regulation on financial benchmarks which may come into effect in 2017.

- General Insurance and Protection:

  — In 2015, the European Institutions reached agreement on the Insurance Distribution Directive, which introduces measures to facilitate insurance distribution across the EU. EU member states have

two years to transpose the directive and the FCA is currently working to an implementation timeline of the first quarter 2018.

— In December 2015, the FCA set out proposals to introduce new rules and guidance for firms on steps they should take when renewing general insurance policies.[72] This work follows an announcement made in the July 2015 Budget by the Chancellor of the Exchequer and the FCA is aiming to provide finalised rules and guidance by mid-2016.

— The Insurance Act 2015 will come into force in August 2016. The changes in the Act will apply only to business (ie non consumer) insurance and it re-calibrates certain aspects of the relationship between insurer and policyholder, including replacing the duty of disclosure with a duty of fair presentation.

— The European Commission is considering the application and future of the Insurance Block Exemption Regulation and published a report on its functioning in March 2016, suggesting that the exemption is no longer necessary for information exchange and pools.[73] The FCA has carried out informal consultations with several UK market participants to understand the extent to which the UK insurance industry relies on IBER and the likely impact in the UK of its non-renewal. The FCA is liaising with the European Commission with a view to contributing to their renewal assessment.

- Pensions and Retirement Income:

— The UK government confirmed in December 2015 that from 6 April 2017, tax restrictions for people looking to sell their annuities will be removed, creating a secondary annuity market. This will give people with an existing annuity and those who purchase an annuity in the future, the freedom to sell their right to future income streams for an upfront cash sum.

— In its publication of final rules for Independent Governance Committees published in February 2015, the FCA stated that it intends to conduct a review in 2017 of the effectiveness of these bodies.[74]

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[72] FCA (3 December 2015), Increasing transparency and engagement at renewal in general insurance markets.
[73] This is a legal instrument that allows (re)insurers to benefit from an exemption to the prohibition of anti-competitive arrangements laid down in Article 101 (1) of the TFEU. It is due to expire in March 2017.
[74] FCA (4 February 2015), Final rules for independent governance committees, including feedback on CP14/16.

- Other:

  — The European Commission published a Green Paper on financial services in December 2015. The Green Paper seeks views on how to improve choice, transparency and competition in retail financial services to the benefit of European consumers. The Commission envisages publishing an action plan to follow its consultation around summer 2016.

E.2 Payment Systems Regulator

197. Payment systems form a vital part of the UK's financial system, underpinning the services that enable funds to be transferred between people and institutions. In 2013, these payment systems processed some 21 billion transactions, worth more than £75 trillion.

198. The Payment Systems Regulator (PSR) was incorporated in April 2014 and became fully operational on 1 April 2015. The PSR is a subsidiary of the Financial Conduct Authority, but it is an independent economic regulator, with its own objectives and governance.

199. The PSR has three statutory objectives. These are:

(a) to promote effective competition in the markets for payment systems and for services provided by those systems, including between operators, payment service providers and also infrastructure providers, in the interests of service-users;

(b) to promote the development of and innovation in payment systems, in particular the infrastructure used to operate payment systems, in the interests of service-users; and

(c) to ensure that payment systems are operated and developed in a way that considers and promotes the interests of service-users.

200. The PSR's aim is to ensure payment systems and the regulatory framework operate in the best interests of service-users and the wider UK economy – promoting rather than constraining innovation and competition.

201. The PSR regulates those payment systems designated by HM Treasury. These are the largest and most important payment systems which, if they were to fail or to be disrupted, would cause serious consequences for their users. The eight payment systems currently designated are: Bacs, CHAPS, Faster Payments Scheme, LINK, Cheque & Credit, Northern Ireland Cheque Clearing, Visa Europe and MasterCard. For each designated system, all the participants in that payment system fall under the PSR's remit. Participants in a payment system include the operator that manages or operates that system, the payment service providers (PSPs) using that system, and the infrastructure providers to the payment system.

202. The PSR draws its direct regulation powers from the Financial Services (Banking Reform) Act 2013 (FSBRA) and has a range of powers over participants in regulated payment systems to support its functions.

203. From 1 April 2014, the PSR became a concurrent competition regulator in respect of powers under the Enterprise Act 2002. From 1 April 2015, the PSR became a concurrent competition regulator in respect of powers under the Competition Act 1998. The PSR can:

(a) enforce against breaches of the UK and EU prohibitions on anti-competitive agreements and abuses of a dominant position; and

(b) conduct market studies and make market investigation references under the Enterprise Act 2002.

204. The above concurrent competition powers apply wherever there are issues relating to participation in payment systems and not just those payment systems designated by the Treasury in respect of the PSR's direct regulatory powers

Significant changes in the market(s) and the legal/regulatory framework since April 2015

205. In the period covered by this report, the PSR acquired important new powers deriving from EU payments legislation.

206. In April 2015, the PSR became the competent authority in the UK for the enforcement of Article 28 of the Payment Services Directive on access to payment systems, which was implemented in the UK by Part 8 of the Payment Services Regulations 2009. The 2009 Regulations previously conferred these enforcement functions on the CMA (and the Office of Fair Trading before it).

207. In December 2015, the PSR became the lead competent authority in the UK for monitoring and enforcing compliance with the Interchange Fee Regulation (IFR), which brings major changes to the way card payment systems operate in Europe. The IFR introduces caps on the interchange fees on debit and credit card transactions where both the issuer and acquirer are located in the EEA. Interchange fees in card payment systems have been the subject of sustained competition law and regulatory scrutiny across Europe and globally for many years, including through the CMA's (and Office of Fair Trading's) own previous investigations of UK domestic interchange fee arrangements.[75]

[75] In May 2015, the CMA announced that it had closed its investigations into MasterCard's and Visa's UK domestic interchange fee arrangements on the grounds of administrative priorities in light of the IFR soon coming into force. See CMA news story (6 May 2015): CMA closes MasterCard and Visa investigations following EU regulation.

208. The IFR also requires the separation of card scheme and processing entities, prohibits territorial restrictions on licensing and imposes various other changes to scheme business rules. Affected parties will be required to amend their business practices (unless their current practices already comply with these provisions).

209. In September 2015, the trade group Payments UK, working with the largest providers of indirect access to payment systems, published a code of conduct setting out a range of measures and commitments to improve indirect access. The PSR welcomed this code of conduct, noting that it was 'a positive and significant step in the right direction towards improving access to payment systems'.[76]

Significant developments in the PSR's approach to competition since April 2015

210. In August 2015, following consultation, the PSR issued finalised guidance on:

(a) its powers and procedures under the Competition Act 1998; and

(b) its powers and procedures in relation to market studies and making market investigation references under the Enterprise Act 2002, and to market reviews carried out under its FSBRA powers.[77]

211. In December 2015, it entered into an MoU with the CMA in relation to its concurrent competition powers.

212. In the period covered by this report, the Payments Strategy Forum came into operation to develop a strategy for payment systems in the UK. The Forum is leading on a process that identifies, prioritises and develops strategic, collaborative initiatives that promote innovation for the benefit of those who use payment systems. The Forum has a chair independent of industry and 22 members, including consumers, charities, government, businesses and payment service providers. It met for the first time in October 2015 and four initial working groups have been established, including one which will examine whether and how payment systems can be developed to simplify access to the markets. More information on the work of the Forum is available on the PSR's website.[78]

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[76] See PSR press release (1 September 2015): Industry code of conduct for indirect access - our response.
[77] PSR (13 August 2015), Final Guidance - Competition Act 1998 & Market Reviews, Market Studies and Market Investigation References.
[78] See the PSR's Payment Strategy Forum webpages.

213. In the period covered by this report, all aspects of the PSR's initial package of regulatory measures entered into force. These measures were all consulted upon in November 2014 and were set out in the PSR's Policy Statement of March 2015.[79] Of most relevance to this report are those specific measures which the PSR implemented to address concerns relating to ownership, governance and control of payment systems, and concerns in relation to direct and indirect access to payment systems. These measures, implemented through directions given by the PSR under section 54 of FSBRA, are explained below.[80]

The PSR's governance package

214. The PSR's general direction requiring that all operators of interbank payment systems[81] ensure that the interests of service-users are appropriately represented in the decision-making processes of their governing bodies came into force in September 2015. This direction is expected to limit the extent to which decisions taken by directors appointed by large PSPs can give those PSPs a potential competitive advantage. It is further expected to make the governing bodies of payment system operators more aware of new and innovative approaches which service-users would value, which may improve the efficiency and operation of payment systems.

215. The PSR's general direction requiring that all operators of interbank payment systems[82] take all reasonable steps to avoid certain conflicts of interest between operators of payment systems and providers of central infrastructure to those same payment systems came into force in April 2015. This direction is expected to prevent the awarding of infrastructure contracts based on undue preference of one provider, when this is not in the best interests of the operator, increasing the likelihood that other suppliers participate in any tendering process.

216. The PSR's general direction requiring that all operators of interbank payment systems[83] publish the minutes of their governing bodies came into force in April 2015. This direction is expected to increase the certainty of PSPs and other service-users regarding future developments in payment systems, which may mean that they are more willing to make investments including in innovative new services.

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[79] PSR (27 March 2015), A new regulatory framework for payment systems in the UK.
[80] Detailed information can be found on the PSR's website.
[81] Except Belfast Bankers' Clearing Committee Limited, the operator of cheque clearing in Northern Ireland.
[82] See previous footnote.
[83] See previous footnote.

The PSR's access package

217. The PSR's general direction requiring that operators of certain payment systems must have objective, risk-based and publicly disclosed access requirements, which permit fair and open access, came into force in June 2015.[84] Improved and potentially broader access to payment systems is likely to increase competition between different PSPs. In addition, there should be improved negotiating power for those PSPs for whom direct access would now be a viable option, even if they choose to remain indirect participants in the payment systems.

218. In terms of indirect access, the PSR's specific direction requiring the four main sponsor banks to publish information on their indirect access offerings came into force in June 2015. This direction, is expected to increase the competitive pressures on sponsor banks as indirect PSPs will be able to evaluate more effectively the relative merits of choosing and changing sponsor banks.

219. In December 2015, the PSR reported on compliance with its governance and access directions. The report shows some significant improvements, including:

(a) clearer and fairer information being provided to new applicants;

(b) faster times for securing access - one operator has said it significantly reducing its 'onboarding' time for new direct members;

(c) greater transparency on how boards of payment system operators make decisions; and

(d) better representation of the payment systems users' views during decision making.

220. The PSR also expects the number of PSPs who have direct access to payment systems to increase in 2016. However, the report also identifies areas that operators must continue to focus on:

(a) making onboarding faster and simpler still;

(b) doing more to help smaller banks and PSPs that are not banks; and

[84] Some operators were already subject to an access rule under Article 28 of the Payment Services Directive, but they too have been required to disclose publicly their access requirements by another PSR general direction which came into force at the same time. In both cases, the PSR has required the operators to report to it on compliance with their applicable access rule.

(c) never losing sight of the PSPs, businesses and people that rely on payment systems

221. In its provisional findings in its retail banking market investigation (published in October 2015), the CMA stated that it considers that the PSR is best placed to address issues regarding indirect participation (by mostly new and smaller banks) in payment systems and whether indirect members are at a competitive disadvantage compared with direct members. The CMA noted that the PSR was already looking at these issues. See further paragraph 226 below on the PSR's market review activity.

222. In April 2016, the PSR will publish guidance on the approval of voluntary redress schemes for infringements of competition law.

Cases under the competition prohibitions since April 2015

223. Since becoming a concurrent regulator in respect of powers under the Competition Act 1988 in April 2015, the PSR has not yet opened any cases under the competition prohibitions.

Market studies since April 2015

224. The PSR has not undertaken any Enterprise Act 2002 activity during the period covered by this report. However, as set out in paragraph 226, the PSR has taken forward two market reviews which it is carrying out under its FSBRA powers.

Decisions taken since April 2015 to use the PSR's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

225. During the period of the report, there have not been any occasions on which the PSR has decided to use its regulatory powers, instead of its competition powers, where it was open to the PSR to use its competition powers.

Other steps taken to promote competition since April 2015

226. Throughout the period covered by this report, the PSR has been taking forward two market reviews which it is carrying out using its FSBRA powers:

(a) **Infrastructure market review** – The provision of infrastructure is central to both payment systems and the PSR's innovation and competition objectives. To support industry collaboration, it is important that payments infrastructure is able to support new developments and innovations. The

PSR's market review examines the ownership and competitiveness of the provision of infrastructure and aims to give the PSR a greater understanding of whether the current structures provide the right incentives to encourage innovation and provide the best outcomes for those businesses and consumers who use the systems. The PSR published its interim report in February 2016[85] and expects to publish its final report in summer 2016.

(b) **Indirect access market review** – Access to payment systems is an important driver of competition and innovation in the provision of payment services. The PSR's market review is intended to give the PSR a deeper understanding of the economics of the supply of indirect access generally, and whether current arrangements deliver good outcomes for all people and organisations that use payment systems. The review considers the implications for competition arising from the structure of the market, what factors limit the degree of choice available to different types of indirect PSPs and what a competitive indirect access offering looks like. The PSR published its interim report in March 2016[86] and expects to publish its final report in summer 2016.

227. During the relevant period the PSR has also undertaken a programme of work around card payment systems. This principally allowed the PSR to have the evidence it needs to take informed decisions in its capacity as the competent authority for monitoring and enforcing the IFR. However, it was also intended to allow the PSR to consider whether it is necessary for it to take action on indirect access to, or the governance of, card systems to promote competition, innovation or the interests of service-users. More information is available on the PSR's website.[87]

[85] PSR (25 February 2016), Interim report: market review into the ownership and competitiveness of infrastructure provision.
[86] PSR (10 March 2016), Interim report: market review into the supply of indirect access to payment systems.
[87] See the PSR's card payment systems webpages.

Data on cases for the year to date since 1 April 2015

Table 10: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[88]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers were used	0
- powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 11: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[89]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

Looking ahead

228. The PSR's programme of policy work for 2016/17 will include ongoing monitoring and enforcement of its governance and access directions described above. The PSR will publish the final findings of its two market reviews (into infrastructure and indirect access) and take forward any regulatory initiatives or remedies proposed in those reports. The Payments Strategy Forum will continue its work, and is scheduled to meet at least four times in 2016.

229. In its provisional findings in its retail banking market investigation (published in October 2015), the CMA stated that it considers that the PSR is best placed to address issues regarding indirect participation (by mostly new and smaller banks) in payment systems and whether indirect members are at a

[88] 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the sector regulators which they regarded as raising competition law issues under those prohibitions and met their guidelines for the submission of formal complaints.
[89] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.

competitive disadvantage compared with direct members. The CMA and the PSR will continue to work closely on these issues.

230. The Payment Accounts Regulations 2015 (PARs) were made in December 2015. The PARs transpose the EU Payment Accounts Directive (PAD) into UK law and will come into force on 18 September 2016. The PSR has been appointed as the competent authority responsible for the designation of account switching services as 'alternative arrangements' and monitoring their compliance with the PARs.

231. The PSR will also have competency over those Articles of the EU's revised Payment Services Directive (PSD2), when implemented into UK law, which relate to access to payment systems.

232. Further information on the PSR's activities for 2016/17 can be found on its Annual Plan for 2016/17.[90]

[90] See the PSR's Annual Plan for 2016/17.

F. Healthcare services in England – Monitor

233. In April 2013, Monitor was established as the sector regulator for health services in England under the Health and Social Care Act 2012. As sector regulator, Monitor has the duty to protect and promote the interests of patients by ensuring that the whole sector works for their benefit. Specifically, Monitor seeks to ensure that:

(a) public sector providers are well led so that they can provide high-quality care to local communities;

(b) essential NHS services continue if a provider gets into difficulty;

(c) the NHS payment system rewards quality and efficiency; and

(d) procurement, choice and competition operate in the best interests of patients.

234. Since April 2013, Monitor has had concurrent powers with the CMA to enforce competition law in respect of the provision of healthcare services in England under the Competition Act 1998 and the Enterprise Act 2002. It also has other powers to enable it to protect choice and prevent anti-competitive behaviour. However, unlike other sector regulators, Monitor does not have a duty to promote competition.

235. From April 2016 Monitor will become part of NHS Improvement, the new body in charge of improvement in the NHS. NHS Improvement brings together Monitor, the NHS Trust Development Authority plus groups from three other organisations: from NHS England both the Patient Safety Team and the Advancing Change Team, from NHS Interim Management and Support two Intensive Support Teams, together with the National Reporting and Learning System. NHS Improvement is an operational name for the organisation which formally comes into being on 1 April 2016.

236. NHS Improvement's role is to define the strategic goals for the sector on issues such as finance and system-wide change, and offers support in meeting them. It then holds providers to account for achieving this improvement.

Significant changes in the market(s) and the legal/regulatory framework since April 2015

237. There have not been any significant changes in the legal framework governing healthcare services in England since April 2015. However, there has been change in the regulatory framework and, from April 2016, Monitor,

the sector regulator, will become part of NHS Improvement. Monitor will continue to exist as an organisation and will retain its statutory functions.

238. NHS Improvement is responsible for overseeing foundation trusts, NHS trusts and independent providers. It offers the active support these frontline providers need to give patients consistently safe, high quality, compassionate care within local health systems that are financially sustainable. By holding providers to account and, where necessary, intervening, NHS Improvement will help the NHS to meet its short-term challenges and secure its future.

Significant developments in Monitor's approach to competition since April 2015

239. As was the case last year, Monitor has continued to pursue its strategy to educate and inform patients, commissioners, providers and the wider health system about how the rules on procurement, choice and competition affect them and why they benefit patients. Alongside this, Monitor has pursued focused action such as the investigations outlined below to enforce the rules relating to procurement, choice and competition.

240. Further details about Monitor's work over the past year are set out in paragraphs 248 to 256 below.

241. Following the launch of NHS Improvement on 1 April 2016 (ie before publication of this report, but immediately after the end of period covered by it), an MoU was signed by the CMA and NHS Improvement on the use of concurrent competition powers and co-operation with respect to UK merger control.

Cases under the competition prohibitions since April 2015

242. There were no cases under the EU or UK competition prohibitions opened or closed by Monitor in the year from April 2015.

243. There are currently no ongoing investigations under the competition prohibitions by Monitor.

Market studies since April 2015

244. There were no market studies opened or closed by Monitor since April 2015 and none which is ongoing.

Details taken since April 2015 to use Monitor's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

245. There were no decisions taken since April 2015 to use Monitor's direct regulatory powers instead of powers under the competition prohibitions where those competition prohibition powers could have been exercised.

Other steps taken to promote competition since April 2015

246. Monitor's objective is to ensure that procurement, choice and competition work well for patients.

247. Monitor does not have a duty to promote competition and, as such, focuses on preventing anti-competitive behaviour where that is not in the interests of patients. Monitor has worked to prevent anti-competitive behaviour when it is in the interests of patients to do so through the informal and formal application of its sector regulatory powers. Additionally Monitor has focused on encouraging good commissioning to ensure that services are high quality and good value.

248. In particular Monitor has worked with the sector to achieve the vision for transformation set out in the Five Year Forward View.[91] This includes the adoption of new models of care that are more integrated around the needs of patients.

249. Monitor has conducted work building on its informal investigations into the provision of GP services and adult hearing services. This has included communication with the sector about specific lessons from the reports which has covered scenarios for GPs on working together to improve the quality and efficiency of general practice. In hearing services, Monitor has been working closely with individual Clinical Commissioning Groups (CCGs) to help make choice work more effectively by providing better information to patients. Monitor has also been contributing to the wider NHS England Commissioning Framework for Hearing Loss.

250. Monitor's advocacy work in this area has included:

(a) seminars and other bilateral meetings with the healthcare sector to build understanding about the competition related rules; and

[91] NHS (October 2014), Five Year Forward View.

(b) publication of guidance on the competition and integrated care conditions of the Monitor provider licence.

251. Monitor's regulatory action has included the following:[92]

A formal investigation into the commissioning of complex adult community services in East Devon

252. Monitor investigated a complaint into the commissioning of community services by North, East and West Devon Clinical Commissioning Group (NEW Devon CCG). The investigation was opened in January 2015 and a final decision was published in August 2015. Northern Devon Healthcare NHS Trust complained that NEW Devon CCG's decision to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider of community services for adults with complex care needs in eastern Devon, and its decision-making process, were not consistent with the CCG's obligations under the Procurement, Patient Choice and Competition Regulations. The complaint related to the fairness and adequacy of NEW Devon CCG's process including equal treatment and non-discrimination, transparency and conflicts of interest.

253. Monitor investigated the commissioning process and found that there had been no breach of the Regulations. However, the investigation found that the CCG should undertake further work to:

(a) determine the scope and pricing arrangements of the proposed contract; and

(b) satisfy itself, and be able to satisfy the public, that proceeding in this way is the best way to secure the needs of patients, improve the quality and efficiency of the services and provide best value for money in doing so.

A formal investigation into the commissioning of elective services in North East London

254. Monitor is investigating the commissioning of elective care services in North East London by Barking and Dagenham Clinical Commissioning Group, Havering Clinical Commissioning Group, Redbridge Clinical Commissioning Group and Waltham Forest Clinical Commissioning Group (together

[92] Competition prohibition powers were not exercised in these cases because competition law does not apply to commissioners of care, who are governed by sector-specific rules about preventing anti-competitive behaviour that is not in the interests of patients.

the CCGs) and the proposed pricing arrangements for those services. The investigation was opened in July 2015.

255. This follows a complaint by Care UK Clinical Services Limited that the process carried out by the CCGs to select Barking, Havering and Redbridge University Hospitals NHS Trust to provide elective care services from the North East London Treatment Centre in Ilford was not consistent with the CCGs' regulatory obligations and that the national tariff was not complied with when agreeing prices for those services.

256. This case raises important questions about whether the CCGs' actions in commissioning the elective care services were in the interests of patients. No decision has been reached in this case.

Data on cases for the year to date since April 2015

Table 12: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[93]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers were used	0
- powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 13: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[94]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

[93] 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the sector regulators which they regarded as raising competition law issues under those prohibitions and met their guidelines for the submission of formal complaints.
[94] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.

Looking ahead

257. From April 2016, Monitor will be working as part of NHS Improvement, which is one of the lead agencies overseeing the NHS in England and which ensures that providers deliver what the public needs.

258. This will involve working alongside providers to urgently tackle the immediate challenges facing NHS trusts and foundation trusts on finance, clinical quality and patient safety, and targets such as waiting lists.

259. Additionally, NHS Improvement will also help make certain that the sector is in shape for long-term, sustainable success. Its approach is to be supportive, taking regulatory action only where there is an immediate need.

260. To tackle these challenges, NHS Improvement will:

(a) build up leadership and other capability in the sector;

(b) ensure local problems are tackled at local health system level; and

(c) ensure the NHS 'learns to learn' better so that striving for improvement is in its DNA.

G. Railway services – Office of Rail and Road

261. The Office of Rail and Road (ORR) is the main safety and economic regulator of railways in Great Britain.[95]

262. ORR has powers to enforce the competition prohibitions in the Competition Act 1998, and to make market investigation references to the CMA under the Enterprise Act 2002, in relation to the supply of services relating to railways.[96] In addition, pursuant to section 69 of the Railways Act 1993, ORR has a responsibility to keep the provision of railways services under review.

263. As set out in further detail below, under the Railways Infrastructure (Access and Management) Regulations 2005[97], ORR is responsible for monitoring competition in rail markets and is also the appeal body over the arrangements for access to railway infrastructure and services.

264. In exercising its functions under the Railways Act 1993, ORR must consider and achieve an appropriate balance between its 24 statutory duties, one of which is to 'promote competition in the provision of railway services for the benefit of users'[98] of railway services.

265. The rail industry is made up of the following:

(a) **The network (track and related infrastructure, including the largest main line stations)** – this is primarily owned and operated by Network Rail,[99] Network Rail derives its revenue primarily from charges for access to its network and stations and from a direct financial 'network grant' from government. There are also light and heavy maintenance depots and various railway facilities such as depots and sidings.

(b) **Train operators** – these include passenger train operating companies, the majority of which have been granted franchises to operate by the government, and freight operators which have open access to the market.

(c) **Providers of rolling stock** – train operators typically lease rolling stock, primarily from three rolling stock companies that inherited rolling stock

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[95] In 2015 ORR also become the independent monitor of Highways England.
[96] Railways Act 1993, section 67.
[97] Which is the domestic transposition of numerous pieces of European legislation relating to the arrangements for access and management of railway infrastructure.
[98] The concept of 'users' of the railways includes consumers.
[99] Although the mainline network is owned and operated by Network Rail, there are other networks owned and operated by other parties such as freight operators and other third parties.

from British Rail on privatisation. There is a degree of competition between these companies which are not subject to direct regulation.

266. The key focus for ORR this year has been:

- the development of new competition guidelines and development of prioritisation criteria and entry into a revised MOU with the CMA;
- the successful conclusion of ORR's Competition Act 1998 investigation into the transport of freight by rail;
- the development of a number of PR18 work streams with the potential of either protect or develop competition); and
- the conclusions arising from the Which? super-complaint.

Significant changes in the market(s) and the legal/regulatory framework since April 2015

Changes in the regulatory landscape

267. During 2015, the government launched a number of reviews which may shape the future of the railways, namely the following:

(a) **The Bowe review** – the government asked the Department for Transport's (DfT) non-executive director, Dame Colette Bowe, to report on lessons learnt from the planning process for Network Rail's 'Control Period 5' rail enhancement programme. The report which was published in November 2015 made a number of recommendations concerning the planning and delivery of new rail infrastructure.

(b) **The Hendy review** – the purpose of this exercise was to re-plan the delivery of Control Period 5 enhancements by Network Rail, based on an assessment of the company's capacity by its newly appointed chairman, Sir Peter Hendy. His report was published on Network Rail's website on 25 November 2015 as part of the government's Spending Review announcements.

(c) **The Shaw report** – the purpose of this report was to develop recommendations for the future structure and financing of Network Rail in light of its reclassification to the public sector in 2014. The report team led by Nicola Shaw, the CEO of High Speed 1, published a scoping report in November 2015 and its final recommendations in March 2016. ORR welcomed the focus on ensuring the needs of local passengers and businesses are at the heart of the sector, which reinforces the relationship

Network Rail has with its customers. ORR will now work alongside Network Rail, government and industry partners to implement the recommendations as it develops the strategic framework for the railways for 2019 to 2024.

(d) **Call for evidence** – in parallel with the Shaw report, the DfT issued a 'call for evidence' on the effectiveness of the regulatory regime for the railways. A consultation period ran from 10 December 2015 to 15 January 2016. The DfT announced its preliminary findings in March 2016. ORR welcomed the clarity that the review brought and the recognition of the 'close co-operation' that exists between ORR and DfT. The consultation demonstrated clear support for strong independent regulation to put customer needs at the heart of rail. ORR will work with DfT and industry partners to further clarify roles so that working relationships are even more effective in the future.

Transposition of Directive 2012/34EU[100]

268. The principal objective of the Directive is to improve the efficiency and competitiveness of railway transport against other modes of transport. It in particular seeks to ensure that there is a clear distinction between the operation of trains and the operation of infrastructure. Measures within the Directive, therefore, ensure that these two activities are managed separately and it provides for a regulatory oversight role to ensure that any residual vertical integration between these two functions does not lead to a conflict of interest that distorts competition in the downstream markets of the carriage of passengers and goods by rail.

269. The Directive is in the process of being implemented in the UK. Once the Directive is transposed, ORR will have a new duty, where appropriate to give directions to correct market distortions or undesirable developments in the competitive situation in the rail services markets.

Significant developments in the ORR's approach to competition since April 2015

Competition guidance

270. In March 2016, ORR published its revised Competition Act 1998 guidance.

[100] See Directive 2012/34/EU of 21 November 2012 establishing a single European railway area.

271. The Competition Act 1998 guidance provide information on how ORR exercises its powers under the Competition Act 1998 in relation to services relating to railways. The revised guidance incorporate changes to statute which have occurred since ORR's 2005 guidelines and draw on its experience of applying competition law in the context of the railways since that date.

ORR's prioritisation criteria

272. In December 2015, ORR published prioritisation criteria that apply across all of its economic and competition functions. These criteria are designed to ensure that ORR intervenes where the impact is likely to be most effective in securing outcomes that will achieve the most value for consumers and the taxpayer and importantly send the appropriate signals by way of deterrence.[101] These prioritisation criteria apply to:

- economic enforcement (Railways Act 1993);
- competition enforcement (Competition Act 1998);
- powers and functions under the Railways Infrastructure (Access and Management) Regulations 2005;
- market studies and market investigation references (Enterprise Act 2002); and
- consumer enforcement (Consumer Rights Act 2015 and Part 8 of the Enterprise Act).

Memorandum of understanding

273. In February 2016, ORR and the CMA agreed to a revised version of the Memorandum of Understanding (MoU) between both organisations.

Information exchange

274. ORR and the CMA have continued to exchange information pursuant to Regulation 9 of the Concurrency Regulations during the last year. ORR met regularly with the Sector Regulation Unit to support mutual understanding of developments in economic and competition policy. For example, presentations were delivered on ORR's consultation on its draft enforcement policy and the CMA presented its thinking on competition impact

[101] ORR, How we prioritise our activities.

assessments. ORR also exchanged information in order to seek the CMA's advice and guidance in relation to a warning letter which it issued to London Underground in October 2015 in lieu of opening a formal investigation. On a more formal level and pursuant to information exchange obligations set out in Regulation 9 of the Concurrency Regulations, ORR exchanged information in the context of its Competition Act 1998 investigation into the transport of deep sea containers by rail which culminated in the formal acceptance of commitments under section 31A of the Competition Act 1998.

275. The CMA and ORR have also met regularly at all levels, bilaterally and through the UKCN.

Voluntary redress guidance

276. In its Competition Act 1998 guidance, ORR clarified that, where it is deemed best placed to deal with an application for approval of a voluntary redress scheme, it will follow the CMA's guidance on the approval of such schemes.[102]

Cases under the competition prohibitions since April 2015

Rail freight

277. In November 2013, ORR opened an investigation pursuant to section 25 of the Competition Act 1998 into Freightliner Limited and Freightliner Group Limited (Freightliner) in relation to its arrangements with its customers for the provision of deep sea container (DSC) rail transport services between certain ports and key inland destinations in Great Britain.

278. In May 2014 and January 2015, ORR held state of play meetings with Freightliner to provide an update on the progress of the investigation.

279. In July 2015, Freightliner proposed commitments which, in ORR‟s preliminary view, fully addressed the competition concerns identified by its investigation

280. In December 2015, following two public consultations, ORR accepted commitments offered by Freightliner relating to its arrangements with its customers for the provision of DSC rail transport services between certain ports and key inland destinations in Great Britain.

[102] Paragraph 5.36 of ORR's Competition Act 1998 guidance.

281. The DSC transport sector plays a pivotal role in the efficient operation and competitiveness of the economy. DSCs, which are also known as intermodal containers, are used in the import and export of a wide range of freight, including: white goods, consumer electronics and perishables. The commitments relate to markets for the inland rail transport of DSCs arriving from and departing to locations outside Northern Europe (in particular the Far East). Such DSCs arrive in Great Britain at DSC ports on large container ships operated by international shipping lines.

282. In ORR's preliminary view, certain arrangements Freightliner Limited had with its customers might have restricted competition or were otherwise capable of having that effect, by foreclosing access to customers for actual or potential rail freight operating company competitors. The commitments offered by Freightliner directly addressed ORR's competition concerns by prohibiting all forms of exclusivity arrangements with its customers.

283. ORR considered that the final commitments would create a more level playing field for freight train operators competing for this traffic.

284. Following acceptance of the commitments, ORR discontinued its investigation. Both through the reporting requirements built into the commitments and pursuant to its wider statutory duties, ORR will continue to monitor developments in the DSC rail transport sector.

Provision of safety critical staff and safety training

285. In February 2015, a number of businesses complained to ORR about the changes to the provision of safety critical staff and safety training introduced by London Underground. Namely it was alleged that the changes introduced may have restricted competition in these markets.

286. In October 2015, ORR issued a warning letter to London Underground in lieu of opening a formal investigation. The warning letter was issued for the purpose of assisting London Underground to critically assess its ongoing and future conduct and to provide an indication of the type of conduct which ORR considers may constitute an infringement of competition law particularly in relation to markets involving safety services.

Market studies since April 2015

287. There were no market studies opened or closed since April 2015 and none which are ongoing.

Decisions taken since April 2015 to use ORR's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

288. There were no decisions taken to use ORR's regulatory powers instead of powers under the competition prohibitions where those competition prohibition powers could have been exercised.

Other steps taken to promote competition since April 2015

Retail market review

289. Train operators and third party retailers (such as Trainline) are subject to certain rules and practices when selling tickets to passengers. This relates to, for example, the shared IT systems they use when accessing information about tickets and the commission they receive for selling a ticket (where it is not for its own services).

290. While passengers now have more choice in where (eg train operator or third party retailer) and how (eg online or through a ticket vending machine) to buy their ticket and what format that ticket is in (eg orange credit card-sized ticket or ticket on a mobile phone), ORR's retail market review considered whether these rules and practices are enabling sufficient competition and innovation to benefit passengers in the way they buy their tickets.

291. In March 2015, ORR published its initial findings on the functioning of the retail market. ORR found that the market is working well in some respects: passengers enjoy an integrated, national network that enables them to make use of inter-available and through fares; they can access a wide range of information on fares from a choice of retailer; and there is some choice in where and how they buy tickets. However, ORR found that, compared with experiences in other sectors, there is limited innovation and competition, for example:

- passengers could have a wider choice of retailer, such as being able to buy through smaller retailers (eg newsagents) or from a wider choice of online retailers (eg existing travel websites);
- the pace of innovation and technological development is slow, as illustrated by the limitations in ticket vending machine and (to a lesser extent) websites;

- the orange credit card-sized ticket remains the only universally accepted ticket format, with limited integrated smart or mobile-ticketing across operators; and

- there could be a wider choice of products, such as more flexible fares (eg part-time Seasons and carnet) and ancillary products (eg financial products to spread the cost of a Season).

292. To help address this, ORR proposed a set of nearer-term recommendations for industry and governments to take forward. This includes, for example, ensuring that train operating companies have stronger incentives through their franchising agreements to introduce new products; making industry processes for introducing products efficient and quick; and improving the arrangements for third party retailers to encourage competition in the market. ORR also proposed some possible longer-term options for consideration that may unlock further benefit, for example, allowing the price of the ticket to vary by sales channel to reflect the relative cost of sale.

293. ORR continues to work with governments and with industry in the development of these options.

Rail compensation super-complaint

294. In December 2015, Which? submitted a super-complaint to ORR raising concerns that most delayed rail passengers are not aware of, nor apply for, the compensation to which they are entitled and that there are features of the passenger rail market in Great Britain, including certain conduct by train operating companies and the limited competition to franchised operators on many lines, that contribute to this.

295. Which? asked ORR to make enquiries into:

(a) the extent to which train operating companies are contributing to a low proportion of passengers securing their rights to compensation for delays;

(b) the drivers of train operating company behaviour, and the pervasiveness of these drivers within the sector; and

(c) changes that are needed in regulation, and ultimately by train operating companies, to ensure that passengers are aware of and are able to secure their rights to compensation.

296. ORR sought information from stakeholders including train operating companies, franchising authorities (including the Department for Transport and Transport Scotland), the Welsh government, consumer bodies, and other

interested parties. ORR also undertook several strands of research to help inform its view on the issues raised.

297. In March 2016, ORR published its response and proposed actions which include:

(a) a coordinated, national promotional campaign by the train companies to increase passenger awareness of compensation available;

(b) clearer, plain English forms, website information, and other written communication to make the process of claiming compensation simpler;

(c) better training to support staff in providing better information;

(d) review of consistency between train company, franchise agreements to ensure compensation is promoted more prominently and more often at the time of delay; and

(e) clarification around an existing licence condition for train companies so that explaining compensation is considered and enforced as a key element of good passenger information.

Open access applications

298. Franchisee train operating companies face a degree of competition *in* the market from non-franchisee operators who are granted the right to compete on certain routes or networks as 'open access' operators; ORR grants such rights only if the new entrant would not be primarily abstractive, ie it would generate sufficient new-to-rail business rather than merely abstracting business from existing operators.[103]

299. When exercising its powers under the Railways Act, in directing access contracts, ORR will balance a number of statutory duties which include the duty to promote competition in the provision of railway services for the benefit of users of railway services and the duty to have regard to the funds available to the Secretary of State.

300. In August 2015, ORR granted access rights to Great North Western Railway to run passenger services between London and Blackpool in early 2018. These services will consist of six off-peak services from Monday to Saturday

[103] ORR's 'not primarily abstractive' test, commonly known as the 'NPA rule', is currently interpreted to require an 'open access' operator to generate three units of new revenue for every ten units that it abstracts from the franchisee(s) operating on the same routes. See ORR, *Criteria and procedures for the approval of track access contracts*. December 2011.

and five services on Sundays. ORR considered that the significant passenger benefits in terms of competition, new journey opportunities, some improved journey times, and substantial investments in rolling stock and stations outweighed the potential abstraction and the effect this would have on the funds available to the Secretary of State.

301. During 2015 and early 2016, ORR continued to assess four open access applications from three different train operators to run a variety of services on the busy East Coast main line. There is insufficient capacity to accommodate all the proposals and therefore further work is required, including economic analysis of some of the costs and benefits of the proposals, which will be one input to ORR's decision making process.

Appeals under the Access and Management regulations

302. In October 2015, ORR issued a decision which involved an appeal by DB Schenker for access to Freightliner's terminal at Southampton (Maritime terminal) under regulation 29 of the Railway Infrastructure (Access and Management) Regulations 2005.[104] Following a full assessment of the evidence provided by both parties, ORR considered that Freightliner's refusal of access on capacity grounds was justified and therefore it decided to reject the appeal.

Passenger rail services: competition policy project

303. In January 2015, the CMA announced a policy project to examine the desirability and feasibility of increasing the scope for on-rail competition (ie more competition 'in' the market) in passenger rail services. The CMA has worked closely with ORR on this, and engaged with a range of interested parties, including franchisees, open access operators, potential entrants, industry groups, passenger groups, relevant government departments and sector specialists.

304. In July 2015, the CMA published a discussion document consulting on the possibilities for greater competition between train operators in GB's passenger rail services.

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[104] Pursuant to regulation 29, an applicant has a right of appeal to ORR if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service provider or, as the case may be, a railway undertaking.

305. In November 2015, ORR commissioned an impact assessment of the options for increasing competition between passenger rail operators that were set out in the CMA's July 2015 discussion document. The impact assessment was published in January 2016 and the CMA invited further comments on the options.

306. In March 2016, the CMA published its final policy document outlining how greater competition could benefit rail passengers on key intercity routes. The CMA recommended a significantly greater role for 'open access' operators in competing with franchised train operating companies on intercity routes, subject to the introduction of a public service obligation levy but highlighted that a move towards a system of multiple licensed operators replacing franchises would merit consideration in the longer term. Moreover, the CMA made a number of general recommendations to enable full realisation of the benefits of greater on-rail competition, ie, reforming the structure of track access charges in order to create a level playing field and reflect underlying costs; continuing to reduce the level of specification of franchise contracts on routes where there is on-rail competition; improving Network Rail's 'system operator' function; and encouraging the use of smart ticketing. ORR will work with the CMA to take forward the report's recommendations.

Transparency

307. The benefits of transparency include better information for more informed choices on the part of funders and consumers, enhanced planning, improved public understanding and accountability. Transparency also provides enhanced reputational levers where there is limited competition.

308. Train operating companies are working to harness open information in order to provide a better service for passengers, either themselves or via third party developers. As a result, there are now more new products for passengers, for example, a new free 'My Journey' app and website will let people check the punctuality and reliability record of any service up and down the country, giving customers more information to help them choose which train to catch or route to take.

309. In April 2016, ORR will be publishing a new yearly report, showing train operating companies and Network Rail's performance towards their key passenger facing commitments, including those on passenger information during disruption, complaints handling procedures, disabled persons protection policies and the code of practice on ticket selling. The report will inform the industry stakeholders how train operating companies and Network Rail are fulfilling their regulatory and consumer law obligations.

310. In February 2016, ORR published a detailed analysis of train operators costs and revenues. The report provides greater insight into recent trends and gives industry and funders more information to plan work. ORR has also published comparative information across Network Rail's routes for expenditure, income, financial performance and asset management for the first time. This is enabling a more detailed examination of relative performance, helping identify issues which may be emerging at route level to improve future performance for passengers and taxpayers.

Rolling Stock Market Investigation Order 2009

311. In July 2015, ORR published its conclusions of a review of the Competition Commission's Rolling Stock Order and associated remedies.[105]

312. In light of the evidence available and the consultation responses, ORR reached the following conclusions:

(a) The Order has, in at least the large majority of cases, been complied with and been broadly successful on its own terms.

(b) Relatively few responses suggested to it a widespread belief that the Order, without other changes, has the potential to deliver materially better outcomes than it has done already.

(c) Stakeholder views on the impact of the removal of non-discrimination are in the main fairly positive.

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[105] The package of remedies encompassed:

- recommendations to the franchising authorities to make changes to the franchise system, wherever consistent with their other functions and objectives, to:
    - introduce longer franchise terms (in the region of 12 to 15 years or longer), which would allow train operating companies to realize the benefits and recover the costs of switching to alternative new or used rolling stock over a longer period, which should increase the incentives and ability for train operating companies to exercise choice;
    - assess the benefits of alternative new or used rolling stock proposals beyond the franchise term and across other franchises when evaluating franchise bids. This will encourage a wider choice of rolling stock to be considered in franchise proposals, irrespective of franchise length; and
    - ensure that franchise invitations to tender (ITTs) are specified in such a way that franchise bidders are allowed a choice of rolling stock;
- requiring the ROSCOs to remove non-discrimination requirements from the Codes of Practice,1 which would provide greater incentives for the Train operating companies to seek improved terms from the ROSCOs; and
- requiring rolling stock lessors to provide Train operating companies with a set list of information when making a lease rental offer for used rolling stock, which would give Train operating companies the ability to negotiate more effectively.

313. Given the first two of these points, ORR has decided not to commission an audit of ROSCO compliance with the Order but will keep this position under review.

Codes of practice

314. Over 2015, ORR continued to focus on working with the industry on the development of codes of practice to promote transparency and best practice.

315. The industry adopted a code of practice on retail information in March 2015, the development of which was overseen by ORR. In May 2015, ORR wrote to train companies asking them what they do, or planned to do, to comply with the code (and the consumer law that underpins it) and ensure that passengers get the information they need to help them buy and use tickets. Having reviewed the responses ORR received, it then published an update report[106] in September 2015 setting out some of the key issues.

316. In 2014, ORR consulted with all freight operators to understand the extent to which the remedies proposed in response to its 2011 market study into access to rail freight sites had been implemented effectively and brought about more competitive outcomes. In May 2015, ORR published its response to the consultation and decided to close the review. An important factor in ORR's decision to close the review was the imminent transposition of Directive 2012/34EU (described above) which placed a number of obligations of owners of facilities who also operated in the downstream markets for the carriage of freight. ORR will continue to monitor developments including though its role under the implementing Regulations.

Price review 2018

317. ORR has started work towards the next periodic review of Network Rail. This work includes a range of initiatives that have potential to promote and protect competition, in particular the following:

(a) Greater use of **route based comparison** to improve the information available to ORR and encourage greater rivalry between Network Rail's routes. As with water and some energy regulation, this will allow some of the benefits of competition to be realised through comparison.

(b) ORR is also working to improve the regulation and performance of **Network Rail's system operation functions**. This would support

[106] ORR (September 2015), Retail information code of practice and next steps.

performance improvements, better timetabling and an improved understanding of the capability of the network, thereby increasing opportunities for new services.

(c) ORR's review of **Network Rail's structure of charges** is aimed at improving the understanding of what causes costs on the network, and improving the cost-reflectivity of charges. The charges review will be considering what reforms might support greater on-rail competition, including the potential for open-access operators to make a greater contribution to network costs, which would then allow them to have greater access to the network and support more competition than is possible today.

Internal awareness of competition

318. In March 2016, ORR launched a structured programme to raise internal awareness of competition across the organisation. This programme includes online training, talks and seminars. These initiatives are ancillary to one of ORR's strategic objectives: to be a high-performing regulator. They will also enable ORR to remain well placed to discharge its competition duties effectively.

Data on cases for the year to date since 1 April 2015

Table 14: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[107]	1[108]
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	1
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

[107] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by ORR which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.
[108] In relation to this complaint, ORR decided in October 2015 to issue a warning letter in lieu of opening a formal investigation.

Table 15: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[109]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

Looking ahead

319. Issues in relation to railways services which will continue to be a focus of consideration in the year ahead and beyond include:

(a) **Retail market review** – ORR will continue to focus on developing proposals for the third party retailing arrangements, including the idea that decisions made by train operating companies affecting third party retailers should be subject to some independent oversight (reflecting the potential conflict of interest in train operating companies' overseeing arrangements affecting their competitors). ORR intends to set out its proposals in this area in late spring 2016.

(b) **Rail compensation super-complaint** – following from the announcement of its recommendations in January 2016, ORR will actively engage and closely monitor train companies to make sure improvements are delivering for passengers.

(c) **Passenger rail services: competition policy project** – ORR will continue to work closely with the CMA on its policy project to identify ways to improve the prospects for greater on-rail competition in the medium and longer-term.

(d) **Guidance on the Access and Management Regulations 2016** – following consultation with its stakeholders, ORR will publish guidance on the operation of the regulations which will implement Directive 2012/34EU. This guidance will cover, among other aspects, the assessment of dominance in the context of the regulations. ORR intends to publish the final guidance in summer 2016.

(e) **ORR's approach to reviewing markets** – ORR will consult with its stakeholders and subsequently publish its guidance on the way in which it will exercise its market monitoring powers under the Enterprise Act 2002

[109] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.

and the Access and Management Regulations 2016. ORR intends to publish the final guidance in summer 2016.

(f) ORR continues to promote and protect competition across the range of its functions on the following PR18 work streams:

(i) Development of route based comparison - leading to greater route based price controls from 2019.

(ii) Development of the system operator function; ORR will continue to focus on developing a dashboard of indicators on the effectiveness of system operation activities (which refers to both long-term network planning and nearer-term activities around managing capacity, producing the timetable and signalling, including those activities undertaken by parties under than Network Rail). The dashboard is intended to show the progress of system operator related outputs and activities and is to be used to aid better decision-making and support greater awareness, particularly among funders and passenger-representative groups. Working closely with ORR, Network Rail consulted on the first form of a dashboard in August 2015 and intends to follow this up with a revised version in spring 2016.

(iii) Development of structure of charges work to facilitate greater on-rail competition.

(g) **Code of Practice on Retail Information** – ORR will continue to focus on issues with self-service ticket vending machines including information about the range of tickets available and key restrictions that apply to tickets, the use of jargon, and the presentation of search results.

(h) **Transparency** – in April 2016, ORR will publish a new annual report showing for the first time industry performance against the key obligations it has for passengers. This will include new information and analysis on assistance for disabled passengers, management of complaints handling processes, and provision of information to passengers.

H. Water and sewerage services in England and Wales – Water Services and Regulation Authority

320. The Water Services and Regulation Authority (Ofwat) is the independent economic regulator for water and sewerage services in England and Wales.[110] Ofwat's primary objectives are set out in the Water Industry Act 1991. One of these objectives is to protect the interests of consumers, wherever appropriate by promoting effective competition.

321. To achieve this, Ofwat has direct regulatory powers to introduce and enforce conditions in each water company's licence. Ofwat also has concurrent powers alongside the CMA to apply and enforce competition law.[111]

322. Competition in water and sewerage services is relatively limited in Great Britain with varying degrees of liberalisation between England, Scotland and Wales. Since privatisation, the delivery of water and sewerage services to customers in the UK has been split between a series of regional statutory monopoly providers each with an appointed area of exclusivity given to them as 'undertakers' by the Water Industry Act 1991. The retail supply of water and sewerage services was, and remains, subject to price controls set by Ofwat.

323. Steps have been taken to introduce retail competition into the sector over a number of years. In England and Wales, the introduction of the 'Water Supply Licensing' framework created competition for some, usually very large, non-household consumers. The 'New Appointment and Variations' regime, under which companies can apply to take over as the monopoly provider for a specific region in place of the former provider, also provides a degree of competition 'for' the market. However these legislative arrangements, for a range of reasons explained in Martin Cave's 2009 review,[112] have had limited success in developing competition in the sector.

324. However, as discussed in last year's annual concurrency report, the Water Act 2014 will bring significant reforms to the water industry and amongst other measures, it will introduce greater competition.[113] As a result of these reforms

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[110] The Water Industry Commission for Scotland are the independent economic regulator for Scotland. However the Water Industry Commission for Scotland do not have concurrent competition law application and enforcement powers alongside the CMA.
[111] This includes the enforcement of the Chapter I and Chapter II prohibitions in the Competition Act 1998 and of Articles 101 and 102 of the Treaty on the Functioning of the EU.
[112] Professor M. Cave, 2009, Independent Review of Competition and Innovation in Water Markets: Final Report.
[113] For example once implemented the Water Act 2014 enables reform of the Water Supply Licensing scheme to allow all non-household customers in England to switch their water and sewerage retailer, it makes it easier for water companies to trade water and it allows businesses to provide new sources of water or sewerage treatment services.

Ofwat is working with industry and government to allow all non-household customers in England to switch their water and sewerage retailer from April 2017.

325. Alongside this work, in July 2015, Ofwat launched its 'Water 2020' project. Through this work Ofwat is considering more broadly how competitive markets could be used to deliver services to customers at both the retail and the wholesale level.

326. Following on from this project, in November 2015, the HM Treasury announced in its 'A better deal: boosting competition to bring down bills for families and firms'[114] that Ofwat will produce an assessment by the summer 2016 of the costs and benefits of introducing competition for household consumers. It is Ofwat's view that conducting this assessment now will enable it to factor the UK government's conclusions on whether to introduce household competition into its next price review in 2019 and to consider how any move to household competition might follow on from the work currently being undertaken to deliver non-household retail market opening in April 2017.

Significant changes in the market(s) and the legal/regulatory framework since April 2015

Retail market opening

327. The UK government is committed to delivering the new retail non-household market in 2017. It set up 'Open Water', a single programme of work that brings together all of the key organisations to design and deliver the new market. These include the Department for Environment Food and Rural Affairs (Defra), Ofwat and Market Operator Services Limited (MOSL) – a private company owned by market participants.

328. Defra has overall responsibility for retail market reform in England, MOSL and Ofwat are responsible for the regulation of the market, including adapting licences, developing rules for charging, creating codes of practice, including the development of the Retail Exit Code and Interim Supply Code.

329. Opening the new market is a complex challenge but the market is on track to open in April 2017. The design is almost complete and work is now being carried out to deliver the technical systems, checks and ways of working that are needed to get the market right for customers. Over the last year Ofwat

[114] HM Treasury (November 2015), A better deal: boosting competition to bring down bills for families and firms.

has made significant progress in implementing the market design including developing new licensing requirements, working with Defra to introducing a retail exit mechanism, developing an appropriate consumer protection framework and introducing new charging rules. More information on these areas can be found below.

Licensing

330. In June 2015, Ofwat consulted on the introduction of new retail supply licenses and some associated policy issues required to deliver the future non-household market. One such policy issue which was signalled in the June consultation was Ofwat's intention to remove the 'in area trading ban'. Currently, existing retailers are banned from trading in their own area of appointment to prevent any discrimination in favour of their own retailer. Ofwat has also consulted on requirements for companies to update their compliance codes[115] to make sure that the requirements for arm's length trading and non-discrimination continue to be effective.

331. **Retail exit**: Effective competition requires customers to have the freedom to switch or negotiate better deals. Having sufficient protection in place for those customers that choose not to switch retail supplier, or those that are allocated to a retailer if, for example, their existing retailer leaves the market, will best help to maintain the trust and confidence of customers in line with Ofwat's new strategy – 'Trust in water'.

332. The Water Act 2014 allows Defra to make regulations to provide for retail exit – that is, for an appointed company to apply for permission to stop providing retail services to non-household customers and transfer them to one or more licensees following the opening of the non-household retail market. Defra consulted on its proposed policy in December 2014 and has recently consulted on the draft Exit Regulations in November 2015.

333. Under the proposed Exit Regulations, Ofwat would be required to issue a Retail Exit Code, which among other things, might include provisions about the terms and conditions to be offered to customers affected by retail exit. The retail exit applications process is expected to take place in the second half of 2016, with the Secretary of State deciding on applications in December 2016.

334. **Consumer protections:** To prepare for the opening of the retail market, Ofwat has started to consider the customer protection issues that might arise

[115] See Ofwat consultation (17 March 2016): Protecting customers in the non-household retail market – a consultation on final proposals and a draft customer protection code of practice.

in the new market, and what steps are needed to address those issues. This is in accordance with Ofwat's statutory duties to protect customers and promote effective competition where appropriate and its shared vision for the water sector that customers and wider society have trust and confidence in vital public water and wastewater services.

335. Ofwat is currently considering the appropriate customer protection arrangements that need to be put in place for when the new retail market opens. The information notice 'IN 15/12: Opening a new retail market for non-household customers - protecting customers' summarises the customer protection issues that Ofwat is currently considering. Ofwat consulted on proposed changes to the Guaranteed Standards Scheme[116] to make sure that all non-household customers continue to be protected under the Scheme. There will be a further consultation in November 2015 on wider customer protection issues, including mis-selling and other sales and marketing issues. In addition, in November 2015, Ofwat also consulted on its review of non-household retail price controls.

336. The other aspect of customer protection which Ofwat consulted on at the end of 2015 covers schemes for terms and conditions that are to apply in certain defined circumstances where there is no agreed contract with a customer. These terms and conditions are sometimes referred to as 'deemed contracts'.

Charging rules

337. **Charging rules**: Previously each water company published charges schemes which set out incumbents' charges for end-users.[117] Ofwat was required to approve each company's charges scheme before it could take effect. However, the Water Act 2014 removed the approval requirement and replaced it with a framework of rules and guidance. The government's objective is to reduce red-tape and to make the companies accountable to their customers for the charges they set.

338. In setting the rules, Ofwat must have regard to guidance issued by the UK and Welsh government's and consult the relevant persons about its draft rules. On 9 July 2015, the UK government issued a draft set of charging guidance to Ofwat for consultation.

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[116] See Ofwat consultation (4 September 2015): Customer protection in a retail market: Guaranteed Standards Scheme – a consultation.

[117] This includes the charges the incumbent has set for customers as well as other businesses which use the network such as licensees, inset appointees, self-lay operators and developers

339. In November 2015, following an earlier consultation, Ofwat published the final rules on charging schemes for retail customers, and indicated that Ofwat intends to publish a set of wholesale charging rules later in 2016. [118] Further information on retail, wholesale and new connection charges is set out below.

340. **Retail charges:** Ofwat published its intended approach[119] to wholesale and retail charging in September 2015. The approach represents a progressive shift in focus from a framework of *ex ante* regulation (where Ofwat checks compliance in advance), to *ex post* action falling back on concurrent competition powers if necessary. These rules came into effect in November 2015.[120]

341. **Wholesale charges**: Ofwat continues to develop rules to be issued in 2016 for wholesale charges to be published in a transparent manner that helps facilitate effective competition in the non-household market. This should encourage a degree of industry-led standardisation to help enable an effective retail market, while leaving space for company ownership and innovation.

342. **New connection charges**: Ofwat is also developing rules to be published in 2016 for new connections charges to address known issues with the current framework which is hoped will support a level playing field in contestable markets.

Significant developments in Ofwat's approach to competition since April 2015

343. In July 2015, Ofwat published the discussion document, 'Towards Water 2020', which set out the possible ways in which future challenges to the sector could be met by all stakeholders collectively.[121] In particular, it addressed the role that Ofwat, as the independent economic regulator in England and Wales, could play.

[118] Ofwat (November 2015), Final charges scheme rules and summary of responses to our draft charges scheme rules.
[119] See Ofwat consultation (September 2015): Consultation on charges scheme rules for 2016-17 and future developments.
[120] Ofwat (17 November 2015), Final charges scheme rules and summary of responses to our draft charges scheme rules.
[121] Ofwat (December 2015), Water 2020: Regulatory framework for wholesale markets and the 2019 price review.

344. Ofwat considered that there was more scope to make a greater use of competition in relation to sludge and water resources to help deliver more for less:

(a) in relation to sludge, evidence suggests that there is scope for increased optimisation of activities across the companies – and, looking further ahead, greater participation from firms operating in wider waste markets;

(b) in relation to water resources, trading is below its optimal level, and taking steps to mitigate identified barriers to this could result in efficiency benefits of up to £1 billion for customers.

345. Again, looking further ahead, there is also scope for third party participation, whereby wholesale providers of resource negotiate directly with water retailers as the retail non-household market develops in line with the Water Act 2014.

346. The July 2015 discussion document stimulated a high level of interest and debate. Since then, Ofwat has had productive and wide-ranging discussions about the ideas set out in the document with customers, water companies, potential new third party providers, investors, governments and other interested parties. Ofwat has listened carefully to, and considered, the views and evidence put to it.

347. Accordingly, in December 2015, Ofwat consulted[122] on its proposals for better use of markets and how it will regulate both to facilitate these markets and continue to protect all customers in England and Wales.

348. Following the consultation, Ofwat will set out its finalised proposals in a decision document, which Ofwat intends to publish in May 2016.

Competition Act 1998 guidance

349. As stated in previous annual concurrency reports, the direction of travel in retail water and waste water has been set for some time. Ofwat's new strategy reflects that, where appropriate, Ofwat will undertake targeted enforcement using the full range of investigative tools available to it under the Competition Act 1998, from agreeing commitments and reaching settlements, to finding infringement decisions.

[122] Ofwat (15 December 2015), City briefing 10 December 2015 – Water2020: Regulatory framework for wholesale markets and PR19.

350. To support this, Ofwat will consult in 2016 on draft Competition Act 1998 procedural guidance, in conjunction with the CMA, to give more certainty to the sector as to how it will approach Competition Act issues in new non-household retail markets and more generally in the sector. The guidance updates Ofwat's approach to enforcing the Competition Act 1998 in light of the recent and evolving concurrent competition regime.

Details of any cases under the Competition act 1998 that have been opened or closed since April 2015, or which are ongoing

Alleged margin squeeze – Anglian Water's pricing to the 'Fairfield' development in Milton Keynes

351. In December 2015, Ofwat gave notice of its 'no grounds for action' decision for the purpose of Rule 10(4) of the Competition and Markets Authority's Competition Act 1998 Rules. Ofwat has decided to close its investigation into whether Anglian Water Services Limited (Anglian) infringed the prohibition imposed by section 18 of the Competition Act 1998.

352. In December 2011, Ofwat produced a Statement of Objections (SO) in which it provisionally found that a margin squeeze had taken place in November 2007 in relation to the price terms offered to Independent Water Networks Limited (IWN) for the bulk supply of water and discharge of sewerage services to a residential development site in Milton Keynes (the Fairfield site).

353. In April 2014, Ofwat issued a Supplementary Statement of Objections (SSO). The SSO set out Ofwat's provisional view that there had been an infringement of the Competition Act 1998 on the narrower basis of a margin squeeze in relation to the provision of sewerage services. Anglian provided submissions in response to the SSO in July 2014.

354. Throughout its investigation, Ofwat applied the relevant margin squeeze case law, which suggests that a margin squeeze occurs if an EEO would not have been able to trade profitably (taking into account both costs and revenues), when faced with the dominant undertaking's conduct and pricing.

355. In the SSO, Ofwat provisionally concluded that there were separate and distinct product markets for water and sewerage services at both the upstream and downstream levels, and that the relevant geographic market was limited to the Fairfield site. However, considerations of market definition were not critical in this case: as the regional incumbent, Anglian was undoubtedly dominant at the upstream level regardless of the precise product and geographic market definitions used.

356. Ofwat went on to carry out separate margin squeeze assessments for water and sewerage services. It also assessed whether Anglian had engaged in a margin squeeze at two distinct periods during the competitive bidding processes: first, when Anglian submitted a (revised) commercial offer to the customer, Redlawn, in November 2007; and second, when Anglian provided draft bulk supply and discharge agreements to IWN in early February 2008.

357. As a result of its investigation and analysis, Ofwat concluded there was not sufficient evidence of a margin squeeze in respect of water services alone, or water and sewerage services when considered on a combined basis. However, Ofwat's provisional view in the SSO was that there had been a margin squeeze in relation to the provision of sewerage services alone.

358. Following the SSO, however, Ofwat reconsidered whether a margin squeeze in respect of a single service was likely to have had an actual or potential effect on the competitive process at Fairfield. Ofwat took into account, in particular, Anglian's submissions in response to the SSO and evidence received from Redlawn.

359. This evidence indicated that, on the particular facts of this case, the developer would have been highly reluctant to appoint separate companies to provide water and sewerage services and, as a result, would have evaluated bids on a combined basis. It therefore appears unlikely that any margin squeeze implemented in respect of sewerage services only (or water services only), but not in respect of water and sewerage services on a combined basis, would have made it materially more difficult or impossible for IWN to secure the appointment at the Fairfield site.

360. Accordingly, and having regard to the need for strong and compelling evidence to prove an infringement, Ofwat closed its investigation in December 2015 on the basis that that there was insufficient evidence to find that any margin squeeze in respect of sewerage services (or water services) on its own would have generated actual or potential anti-competitive effects sufficient to justify a finding of abuse.

361. Ofwat emphasised, however, that this conclusion turned on the particular facts of this case. Where a developer was willing to appoint separate companies to provide water and sewerage services, Ofwat would consider whether any margin squeeze implemented in respect of one service might have generated anti-competitive actual or potential effects.

Details of any market studies that have been opened or closed since April 2015, or which are ongoing

362. There were no market studies opened or closed since April 2015 and none which is ongoing.

Details of all decisions taken since April 2015 to use Ofwat's regulatory powers instead of competition prohibition powers, in cases where those competition prohibition powers could have been exercised

363. There were no decisions taken since April 2015 to use Ofwat's direct regulatory powers instead of competition prohibition powers, where those competition prohibition powers could have been exercised.

Details of any other steps taken to promote competition

A Better Deal: boosting competition to bring down bills for families and firms

364. In December 2015, the UK government publicised the document 'A Better Deal: boosting competition to bring down bills for families and firms' which sets out, among other things, that the UK government has asked Ofwat to provide an assessment of the costs and benefits of extending retail competition in England to household customers.

365. Ofwat expects the review to consider the costs and benefits of competition for household customers in England taking into account different models of household customer competition, options for different timescales of implementation, and to identify further policy issues that may maximise benefits. The evidence will be drawn from a broad base including evidence from the process of opening up the non-household market in England to competition and evidence from the sector and its stakeholders on the costs and benefits that would be expected from opening up the household market. However, it will also include evidence from other sectors and internationally.

366. Ofwat has published a call for evidence and is currently reviewing submissions with a view to finalising its methodology for assessing costs and benefits. Ofwat will consult on this in July 2016 with a view to publishing (in line with government expectations, to report in summer 2016) to enable the government to make a decision in time, depending on the substance of that decision, for the transition to a competitive retail market in England by the end of this Parliament.

Data on cases for the year to date since 1 April 2015

Table 16: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of new complaints[123]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers were used	0
- powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	1
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 17: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated[124]	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

Looking ahead

367. Ofwat will be continuing to build on its stated strategy and seeking to explore ways of promoting competitive where appropriate to increase outcomes for customers and trust and confidence in water and wastewater markets. As discussed above, the direction of travel and evolution of the water and waste water markets is developing fast but over the next 12 months Ofwat will be looking to:

    - conclude the outstanding elements of market architecture needed to open an effective non-household market in 2017. This includes a review of non-household retail price controls;

[123] 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the sector regulators which they regarded as raising competition law issues under those prohibitions and met their guidelines for the submission of formal complaints.
[124] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.

- build on the proposals outlined in its Water 2020 consultation process and develop detailed proposals to develop markets in sludge and water resources; and

- deliver an assessment to the UK government of the costs and benefits of extending retail competition in England to household customers.

I. Utility services (electricity, gas, and water and sewerage services) in Northern Ireland – the Northern Ireland Authority for Utility Regulation

368. The Northern Ireland Authority for Utility Regulation (NIAUR) is a non-ministerial independent government department responsible for regulating Northern Ireland's electricity, gas, water and sewerage industries.

369. Where the NIAUR is considering exercising its functions, it is generally required to carry out those functions in a manner it considers best calculated to further the 'principal objective', wherever appropriate by either promoting or facilitating competition:

(a) **Electricity** – the principal objective in electricity is to protect consumers, where appropriate by promoting effective competition.[125]

(b) **Gas** – the principal objective in gas is to 'promote the development and maintenance of an efficient, economic and co-ordinated gas industry in Northern Ireland...'. Subject to the principal objective, the NIAUR is obliged to carry out its functions in a manner which it considers is best calculated to facilitate competition.[126]

(c) **Water and sewerage** – the principal objective in water and sewerage is to protect consumers, where appropriate by facilitating effective competition.[127]

370. The NIAUR has powers to enforce the competition prohibitions in the Competition Act 1998 in relation to the activities for which it is responsible and to make market investigation references under the Enterprise Act 2002 to the CMA in relation to those activities.[128]

371. The nature of the Northern Ireland markets differ somewhat from the equivalent markets in Great Britain. For example, there are around 855,000 electricity consumers and around 215,000 gas consumers in Northern Ireland. Unlike in Great Britain, oil is the primary home heating fuel in Northern Ireland.

372. In addition, the gas and electricity retail markets have only been opened up to new market entrants in recent years. Competition exists now in the domestic

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[125] The Energy (Northern Ireland) Order 2003 article 12.
[126] The Energy (Northern Ireland) Order 2003 article 14.
[127] The Water and Sewerage Services (Northern Ireland) Order 2006 article 6.
[128] The Electricity (Northern Ireland) Order 1992 article 46; The Gas (Northern Ireland) Order 1996 article 23; The Water and Sewerage Services (Northern Ireland) Order 2006, article 29.

and non-domestic sectors of both the electricity and gas markets in Northern Ireland. Active domestic competition in both gas ('Greater Belfast' gas network area) and electricity (entire market) started in mid-2010.

373. The 'Ten Towns'[129] gas network area has been open to competition for domestic and small non-domestic consumers since April 2015.

374. Monopoly owners of the electricity transmission and distribution network and the gas networks in Northern Ireland are subject to a network price control to ensure customer protection. Although supply price controls have been removed in the regulated energy sector in Great Britain and recently in the Republic of Ireland, this was in the context of significantly more mature markets and competition levels, as well as much greater market size and potential for truly effective competition to protect consumers.

375. The NIAUR retains end-user price regulation only in those areas of the market where the former monopoly incumbent retains significant market power. The price regulation of the former incumbent, which is the market's price leader, removes the potential for abuse of dominance and ultimately avoids unjustified increases in customer bills. Alternative suppliers are not subject to end-user price regulation.

Significant changes in the market and the legal/regulatory framework since April 2015

Electricity

376. Following the removal of end-user price control coverage on the former monopoly incumbent supplier in the 50-100 and 100-150 MWh per annum sectors in April 2014, a 'roadmap' was set-out that will automatically trigger a further consultation on the reduction or removal of the former supply incumbent's price control in the 0-50 MWh per annum non-domestic market. In summary, the criteria which, if met, will automatically trigger a consultation

[129] In Northern Ireland there are two distinct distribution areas for natural gas. These are the Greater Belfast area and the Ten Towns area. In the Greater Belfast Market there are approximately 184,000 customers and approximately 26,000 customers in the Ten Towns. In the Ten Towns area, the incumbent supplier holds a licence to supply gas which grants it a period of exclusivity for supplying gas to customers within the Ten Towns area, meaning it is the only company allowed to supply gas to these customers during that period. This period of exclusivity ended on 30 September 2012 for customers using more than 25,000 therms per annum, typically large industrial and commercial customers. The period of exclusivity for all customers (including domestic) using less than 25,000 therms per annum ended on 31 March 2015.

on further end-user price control deregulation of the 0-50MWh yearly non-domestic sector are the following:

(a) The former supply incumbent must have a market share (by consumed units) of less than 50% for two consecutive quarters.

(b) There is a minimum of three independent suppliers with a market share of 10% each. For clarity, what this means in practice is the former incumbent plus two other suppliers and this condition is currently being satisfied.

377. As regards domestic customers, the work on creating a roadmap for the removal of price controls is more complicated and other concerns, such as the impact of competition for vulnerable customers, requires further assessment and consideration. No change to the domestic market has been proposed at this point. The former supply incumbent still retains a significant market share in the domestic market, with around 66%.

Gas

378. Competition for non-domestic natural gas customers in the Greater Belfast area commenced in 2006 while competition for domestic customers in the greater Belfast area commenced in July 2010. The former supply incumbent retains significant market share of the domestic and small non-domestic connections (around 73%) so they remain subject to price regulation. No change to the domestic market has been proposed at this point.

379. In the Ten Towns area, the natural gas market opened fully to competition in April 2015. To date, the former incumbent supplier remains the only supplier in the domestic market; however, there are a number of suppliers competing in the non-domestic market. The former incumbent remains subject to price control while it remains dominant in this market.

Water and sewerage

380. Currently the incumbent is the sole monopoly provider of both water and sewerage services and there have been no moves towards introducing competition into the local marketplace. The Northern Ireland Assembly continues to subsidise local provision of services to domestic consumers, with full charging in place for non-domestic customers.

381. Continued subsidy of water service provision has meant re-classification of the local monopoly provider with dual status, both as a ‘GoCo’ (government owned company with the Department for Regional Development as

shareholder) and NDPB (Non-Departmental Public Body). The local monopoly provider is subject to a network price control.

Significant developments in the NIAUR's approach to competition since April 2015

Energy (electricity and gas)

382. In November 2014, the NIAUR completed the first phase of its review of the effectiveness of competition in the Northern Ireland retail energy market.

383. The first phase undertook a formal review of the effectiveness of retail competition in the Northern Ireland retail energy markets and the factors which might limit that competition. It considered the information requirements necessary to monitor the effectiveness of competition (and fed these back into the Retail Energy Market Monitoring (REMM) framework going forward to allow ongoing review). The report on the first phase of the project was published in November 2014 on the NIAUR's website.[130]

384. Building on the findings of the first phase of the project, the second phase of the project is to define the appropriate NIAUR policy response and regulatory framework to deal with the issues identified and assess if there is any change required to the current regulatory regime.

385. The NIAUR began Phase II of this project in April 2015. The project's core objective is to assess the options for a future regulatory framework in a market where competitive forces are limited, but the current regime of price controlling the former supply incumbents only may no longer be appropriate.

386. Any revised regulatory framework is likely to be implemented after a cessation of the prevailing electricity and gas price control regimes which apply to dominant former incumbent suppliers only.

387. The scope of Phase II covers the Northern Ireland electricity and gas domestic and small industrial and commercial retail markets only. The larger end of the I&C energy markets was not within the scope of Phase II, as these markets were found on balance to be sufficiently competitive in Phase I.

388. The outcomes of this project will sit alongside other important initiatives the NIAUR is undertaking to ensure, as far as possible, that retail energy markets

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[130] Utility Regulator (18 November 2014), Competition in retail energy markets in Northern Ireland report published.

are working to the benefit of consumers now and into the future (such as the commencement of REMM and the Consumer Protection Strategy).

389. The NIAUR has published a consultation paper which discusses the potential regulatory options which could be implemented. This will be followed with a final report later in 2016 which takes into account the stakeholder response to the consultation.

390. It was indicated in the initial Information Paper[131] (published in May 2015) that the anticipated timing for this final report to be issued was December 2015. However, in light of the delay in the publication of the CMA final report into the GB energy market (now scheduled for June 2016), the NIAUR intends to delay the issue of its final report until it is clear if the CMA's findings could have an impact upon any approach the NIAUR may take.

391. The NIAUR has engaged and continues to engage with the CMA at the various stages in the project on the issues involved. As highlighted above, the NIAUR has taken into consideration the CMA's findings in the review of the GB energy markets and intends to delay its final report until the CMA final report is issued.

NIAUR competition guidelines

392. In late 2014, the NIUAR began the process of producing its competition guidelines. The NIAUR has worked on this alongside the CMA to ensure the guidelines are consistent with the approach of the CMA and of other members of the UKCN.

393. Work on the guidelines is ongoing. The NIAUR needs to ensure that the guidelines reflect the fact that they share a cross-jurisdictional wholesale electricity market with the Republic of Ireland and the implications for potential investigations on an all-Ireland context are fully considered.

394. The position for Northern Ireland, and therefore for the NIAUR, differs from that of the rest of the United Kingdom due to the physical land border it shares with another EU Member State, the Republic of Ireland.

395. The Competition and Consumer Protection Commission is the national competition authority in the Republic of Ireland. Further consideration continues to take place to assess the use of information-sharing in the context of EU and the respective domestic competition legislation. This is being led by

[131] Utility Regulator (1 May 2015), Information note - Effectiveness of competition in NI Phase 2 – Regulatory Implications.

the Competition and Consumer Protection Commission with the CMA as the competition considerations do not relate solely to the sectors where the NIAUR has concurrent competition powers.

396. In February 2016, the NIAUR signed a revised MoU with the CMA in respect of its concurrent competition powers.

397. The NIAUR will be detailing its approach to voluntary address schemes within its competition guidelines. Additional information along with an application form for a person wishing to apply for approval of a voluntary redress scheme from the NIAUR will be made available on the NIAUR's website – once the competition guidelines have been published.

Cases under the competition prohibitions since April 2015

398. There were no cases under the EU or UK competition prohibitions opened or closed by the NIAUR in the year from April 2015.

399. There are currently no ongoing investigations under the competition prohibitions being undertaken by the NIAUR.

Market studies since April 2015

400. There were no market studies opened or closed since April 2015 and none which is ongoing.

Decisions taken since April 2015 to use the NIAUR's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

401. There were no decisions taken to use the NIAUR's regulatory powers instead of powers under the competition prohibitions where those competition prohibition powers could have been exercised.

Other steps taken to promote competition since April 2015

402. As outlined above, the NIAUR commenced Phase II of the review of effectiveness of competition in the Northern Ireland energy retail market – regulatory implications earlier in 2015.

403. In June 2014, the NIAUR, in its corporate strategy for 2014-19, declared its first two objectives to be:

- 'to promote effective and efficient monopolies' (ie where there is currently no competition); and

- ‘to promote competitive and efficient markets’.[132]

404. In March 2015, the NIAUR also published its Forward Work Programme for 2015/16[133] which highlighted its statutory duty to promote competition where appropriate and the fact that its work includes the encouragement of competition in the electricity and gas markets in Northern Ireland.

Contestability in electricity connections

405. In September 2014, the NIAUR published a call for evidence paper on how contestability should be introduced into the connections market in Northern Ireland. The connections industry currently operates as a monopoly with Northern Ireland Electricity Networks (NIEN), providing all connection offers to the distribution network, and the licensed independent electricity Transmission System Operator, SONI, providing all connection offers to the transmission network. NIEN is responsible for constructing all elements of infrastructure in Northern Ireland that form the electricity network. Further papers that have been published by the NIAUR include a Consultation Paper in December 2014,[134] a Next Steps paper in May 2015[135] and a Decision Paper in July 2015.[136] NIEN and SONI have produced draft implementation guidelines.[137] NIEN is adopting a phased approach to contestability in connections. Phase one of the rollout is due by May 2016 for connections greater than 5MW and phase two by 2017. However, the NIAUR will continue to work with NIEN and SONI to expedite the delivery of contestable connection quotes for all applicants as soon as possible. A working group has been established to support the ongoing development of contestability.

406. The NIAUR is seeking to promote a competition-based regime where possible, in line with its duties. Contestability in connections has been established in the energy markets in the Republic of Ireland and Great Britain.

407. There will be an ongoing requirement for the NIAUR to monitor how effective competition is when policies are implemented. A review of the first phase of implementation is planned prior to finalising the plans for full introduction of contestability.

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[132] Utility Regulator (3 June 2014), Corporate Strategy 2014-2019.
[133] Utility Regulator (31 March 2015), Forward Work Programme 2015/16 published.
[134] See Utility Regulator press release (2 December 2014): Consultation on the introduction of contestability in electricity connections commences.
[135] See Utility Regulator Contestability webpage.
[136] See Utility Regulator Contestability webpage.
[137] Utility Regulator (14 October 2015), Contestability Implementation Guidelines.

Wholesale electricity

408. The Single Electricity Market (SEM) is a cross-jurisdictional wholesale electricity market which operates on the island of Ireland and is regulated by the SEM Committee. The SEM Committee is a statutory committee made up of both the NIAUR in Northern Ireland and the Commission for Energy Regulation in the Republic of Ireland.

409. The NIAUR has a Market Monitoring Unit whose job it is to monitor the SEM to ensure that generation licensees are submitting bids to the Market Operator which are cost-reflective. The NIAUR also monitors market power by using measures such as Pivotal Supplier Index and the Herfindahl-Hirschman Index.

410. Where the Market Monitoring Unit considers that a licensee may be submitting bids which are not cost-reflective, an investigation will be opened into the issue.

411. A programme of work is now underway to design and implement changes to SEM to facilitate the implementation of the requirements of the European target model for cross border capacity and congestion management.

412. The NIAUR is currently working on the Integrated-SEM (I-SEM) project in conjunction with the Commission for Energy Regulation in the Republic of Ireland. A key aim of this project is to ensure compliance with the European Electricity Target Model. A high level design for I-SEM has been produced and detailed design and implementation is now underway.

413. The SEM currently requires generators to submit bids to the market in accordance with provisions set out in licences. I-SEM is expected to facilitate a different competitive focus that may lead to a greater emphasis on competition powers for enforcement as opposed to compliance with specific licence provisions.

REMM

414. The NIAUR implemented an enhanced framework, REMM, to monitor the retail market began during 2015. The ultimate objective of REMM is to put into operation an effective and proportionate enhanced market monitoring framework for the electricity and gas supply sectors in NI. REMM is aimed at ensuring that the NIAUR meets its legislative requirements around retail market monitoring and licence compliance, as well as giving it the information to ensure that it can seek to align regulatory policy to market developments going forward and protect consumers. Good information flows between suppliers and regulators are an absolute necessity for the NIAUR to meet its

statutory duties; and can lead to market and regulatory deficiencies if not in place.

415. To allow proper time for project development, stakeholder engagement and supplier integration of findings, the NIAUR plans that the monitoring requirements of REMM will be put into place in a two-phase approach, with Phase 1 to be completed and implemented in 2015/16; and Phase 2 to be completed in 2016/17.

416. Throughout the development of REMM, the NIAUR has been mindful of the key principles of regulation, and has applied these appropriately. Proportionality is a core principle and the framework includes information requests which will enable it to discharge its statutory duties. This will further and more consistently enable it to ensure suppliers are compliant with their licences and obligations under competition law.

417. REMM is an organised system of data collection which has been well received by stakeholders; many of the NIAUR's stakeholders have commented positively on its approach to the implementation. The NIAUR is currently in the testing phase and it is reviewing the first set of REMM submissions. REMM will achieve improved data flows between the regulated companies and the NIAUR. The companies will benefit from further clarity around information requirements and associated timelines for return. Consumers will benefit from enhanced regulation capabilities within the NIAUR based on consistent and high quality data returns and from increased transparency of retail energy market information.

418. Following the testing phase and corroboration of the data, the NIAUR will decide how, and in what format, to publish the information received from suppliers. In doing so, it will take into consideration potential confidentiality issues and will take action to mitigate them. However, it seeks ultimately to provide useful information to consumers to allow them to understand and engage more actively with energy suppliers. The NIAUR will of course publish any information which is mandatory under the supply licence conditions, and other information which it deems necessary for increased consumer protection.

Gas to the West

419. The 'Gas to the West'[138] project continues to progress with a 4.2km of construction now complete in Strabane. The NIAUR is engaging with Scotia Gas and gas suppliers on arrangements for gas supply to the new Gas to the West area. It is working with Scotia Gas to implement similar arrangements to the other gas distribution areas in terms of the appointment of a 'commissioning supplier' who will be the default supplier for domestic customers at the time of a connection.

Data on cases for the year to date since 1 April 2015

Table 18: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2015 to 31 March 2016

	Total
Number of complaints	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers were used	0
- powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Table 19: Use of powers under the market provisions in Part 4 of the Enterprise Act 2002 for the year 1 April 2015 to 31 March 2016

	Total
Number of market studies initiated	0
Number of studies/reviews in the year to date that resulted in:	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

[138] 'Gas to the West' is the project name of the process of awarding two exclusive gas conveyance licences, one for each the high pressure and low pressure gas network. Gas to the West will create a third gas network area in Northern Ireland in addition to the existing Greater Belfast and the Ten Towns network areas. The Gas to the West network will bring gas to the towns of Strabane, Omagh, Enniskillen including Derrylin, Dungannon including Coalisland, and Cookstown including Magherafelt.

Looking ahead

420. Issues in relation to utility services in Northern Ireland that will be a focus of consideration in the year ahead and beyond include:

- completing the review of the effectiveness of competition in retail electricity and gas markets and implement required regulatory policy changes;
- completing the implementation of REMM to monitor retail markets, inform policy and protect consumers;
- delivering competitive gas supply arrangements for the new “Gas to the West” area of Northern Ireland;
- work in relation to the I-SEM detailed design and implementation is now underway. The current Project Plan anticipates a delivery date for Go-Live of I-SEM in Q4 of 2017;
- participating effectively in the UKCN and other regulatory bodies including the Network of European Water Regulators and the Centre on Regulation in Europe; and
- completing and publishing competition guidelines.