

**Competition and Markets
Authority (CMA)**

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

Consultation document

September 2013

CMA10con

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Any enquiries regarding this publication should be sent to us at: CMA Transition Team on behalf of the CMA, Department for Business, Innovation and Skills, 3rd Floor, 1 Victoria Street, London SW1H 0ET, or email cmaconsultation@bis.gsi.gov.uk.

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

Scope of this consultation

Topic of this consultation

This consultation seeks views on the attached draft: Regulated Industries: Guidance on concurrent application of competition law to regulated industries.

This consultation and the accompanying draft guidance have been drafted by the Transition Team which has been appointed by the Competition and Market Authority (CMA) Chair Designate and Chief Executive Designate, and consists of individuals from the Office of Fair Trading (OFT), the Competition Commission (CC) and elsewhere.¹

The CMA Transition Team, in consultation with the OFT and the CC, proposes to issue the draft guidance in relation to reforms to the concurrency regime under the Competition Act 1998 (CA98) and Enterprise Act 2002 (EA02) introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA13), which will come into force on 1 April 2014. The draft guidance reflects the principal administrative and legal changes to cooperation and enforcement of competition law in the concurrent sectors in the United Kingdom.

In parallel with this consultation, the Department for Business, Innovation and Skills (BIS) has published for consultation proposed secondary legislation relevant to the UK concurrent competition law regime. Although referred to in this document, the proposed secondary legislation falls outside the scope of this consultation, and specific comments on it should be submitted to BIS as part of that separate consultation.

Geographical scope

There is no specific geographical dimension to this consultation.

How to respond

We would welcome your comments on any aspect of the guidance contained in this document. In particular, your feedback is sought on the specific questions indicated in this document, and summarised at Section 4 of this document. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate.

¹ Pending formal creation of the CMA on 1st October 2013, the OFT and CC act on behalf of the CMA through the Transition Team.

You can respond to this consultation:

By email to cmaconsultation@bis.gsi.gov.uk

By post to:

The CMA Transition Team on behalf of the CMA
(c/o Easha Lam)
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
London
SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

Enquiries

If have any questions relating to this consultation please contact Easha Lam on the email address above or by telephone on 020 7215 2044.

Closing date

Responses should be received by 5pm on 11 November 2013.

Next steps

The Transition Team will consider the responses to this consultation document and make amendments to the guidance where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance, to be published in advance of 1 April 2014.

Compliance with the Cabinet Office Consultation Principles

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe A.

Consultation period

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the proposed approach to the draft guidance, Regulated Industries: Guidance on concurrent application of competition law to regulated industries. Furthermore, the timetable for the formation of the CMA requires that consultation on numerous proposed guidance documents be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway
Department for Business, Innovation and Skills
Consultation Coordinator
1 Victoria Street
London
SW1H 0ET

Telephone John on 020 7215 6402 or e-mail to: john.conway@bis.gsi.gov.uk.

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the EA02. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the EA02.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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1 INTRODUCTION

Background

Statutory changes to the United Kingdom competition regime

- 1.1 The CMA will be established under the ERRA13 as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets:
 - under the EA02, the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
 - the EA02 will also enable the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
 - the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008
 - the CMA will also take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations such as under section 193 of the Communications Act 2003
 - the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under section 188 of the EA02, and under the CA98 the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may

be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.

- 1.3 The ERRA13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT) in order to improve the robustness of decision making, increase the speed and predictability of the CMA's activities and strengthen the UK's competition regime as a whole.²
- 1.4 The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA and is consulting publicly on them.

Purpose of this consultation

- 1.5 The ERRA13 introduces a number of changes to the CMA's and the Regulators' powers to apply and enforce competition law in the concurrent sectors.
- 1.6 The purpose of this document is to consult on the proposed approach to the application of competition law in the concurrent sectors, and the arrangements for cooperation between the CMA and the Regulators as set out in the draft publication Regulated Industries: Guidance on concurrent application of competition law to regulated industries set out at Annexe B of this consultation (Draft CMA Concurrency Guidance). Details of the changes introduced by the ERRA13 are also outlined in Section 3 of this consultation document.³
- 1.7 The Draft CMA Concurrency Guidance forms part of the advice and information published under section 52 of the CA98. It is designed to provide general information and advice to companies and their advisers on the procedures and approach of the CMA and the Regulators in applying competition law in the regulated sectors.

² An overview of the changes is contained in the (Towards the CMA (CMA1)) document, available at: (www.gov.uk/cma).

³ For completeness, it is noted that the Draft CMA CA98 Guidance has been drafted as assuming that the CMA has been established and is exercising its functions.

1.8 In seeking to create effective new processes and policies for implementing the new procedures and powers introduced by the ERRA13, the Transition Team has sought to build on the past experience of the OFT and the Regulators in applying and enforcing competition law in the regulated sectors, and to implement incremental improvements to the OFT's and the Regulators' existing practice where appropriate.

1.9 To that end, the Transition Team:

- has adopted as its starting point for the Draft CMA Concurrency Guidance the existing text of the OFT's previous detailed guidance on the application of competition law in the concurrent sectors (OFT Concurrency Guidance)⁴
- proposes to update the OFT Concurrency Guidance to reflect:
 - the changes being introduced by the ERRA13
 - incremental improvements to policies and procedures which have been made by the OFT and the Regulators since the OFT Concurrency Guidance was published, or which are intended to capture the benefits of the CMA's unitary nature
- will not implement immediate changes to existing OFT guidance on other aspects of the concurrency competition law regime (including with regard to the substantive assessment of whether an undertaking has infringed one or more of the prohibitions under Chapter I and Chapter II of the CA98 and Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU)). The Transition Team is consulting separately (see CMA12con) on its proposal to put existing OFT and CC guidance documents to the CMA Board (once established) for adoption.⁵

⁴ 'Concurrent Application to Regulated Industries' (OFT405) available at:

www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act.

⁵ As those pre-existing documents were published prior to the amendments to the EA02 made by the ERRA13, they will (if and when adopted) need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERRA13 (for example, reading references to the OFT as referring in each case to the CMA). See further Annexe A of the Draft Guidance.

Those adopted guidance documents will, however, be kept under review once the CMA is in operation, in the light of its developing practice and case experience

- 1.10 The Transition Team considers that this approach ensures that the current experience and practice of the OFT and the Regulators are built upon, while also serving to reduce uncertainty and transition costs for parties and for the CMA.
- 1.11 The CMA has issued the Draft CMA Concurrency Guidance as an entirely new guidance document, which will supersede and replace the OFT Concurrency Guidance.

2 LEGAL FRAMEWORK

Concurrent competition enforcement

- 2.1 The TFEU and the CA98 both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.
- 2.2 In the UK, competition law is currently applied and enforced principally by the OFT and the CC.⁶ From 1 April 2014, the CMA will take over competition law enforcement responsibilities from the OFT and CC and will have primary responsibility for investigating and enforcing suspected infringements of the CA98. In particular, the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 2.3 However, for a number of industries the application and enforcement of Article 101 (Article 101) of the TFEU and Article 102 (Article 102) of the TFEU in the United Kingdom and of Chapter I and Chapter II of the CA98 is carried out by the sectoral regulators listed in paragraph 2.1 of the Draft CMA Concurrency Guidance (Regulator or Regulators (where referred to collectively)) concurrently with the CMA.⁷ Throughout this consultation document, references to the CMA should be taken to include the Regulators in relation to their respective industries, unless indicated otherwise.
- 2.4 As noted in paragraphs 2.2 to 2.3 of the Draft CMA Concurrency Guidance, the Regulators have all the powers of the CMA to apply and enforce Article 101 and Article 102 and the CA98 in order to deal with anti-competitive agreements or abuses of a dominant position which relate to activities in

⁶ However, it is open to any person to bring a standalone action in the High Court for an injunction and/or damages as a result of an alleged infringement of competition law. In relation to the regulated sectors (being, as at the date of publication of this document, communications and postal services, gas, electricity, healthcare services, railways, air traffic and airport operation services, water and sewerage), the respective sectoral regulators have concurrent powers with the CMA to apply and enforce the legal provisions.

⁷ Section 54 and Schedule 10 of the CA98 provide that, in relation to the regulated sectors described in paragraph 2.1, the same provisions are applied and enforced, concurrently with the CMA, by the Regulators for communications matters, gas, electricity, water and sewerage, railway, air traffic, airport and healthcare (in respect of England only) services.

relation to their respective sectors. Further details about these powers are given in [Competition Act 1998: Guidance on the CMA's investigation procedures (currently in draft and being consulted on (CMA8con))⁸ (CMA8con draft CA98 Guidance).

- 2.5 The CMA alone, however, has powers to issue guidance on penalties, to issue guidance on commitments and to make procedural rules (the CMA Draft CA98 Rules).⁹ The CMA Draft CA98 Rules set out the procedures to be followed in carrying into effect the provisions of the CA98.¹⁰ In issuing guidance on penalties, in issuing guidance on commitments and in making and amending the CMA Draft CA98 Rules, the CMA is required to consult publicly and with the Regulators.¹¹
- 2.6 Under EU legislation,¹² as 'designated national competition authority', when the CMA or a Regulator applies national competition law to agreements or to abuse of a dominant position which may affect trade between Member States, the CMA or Regulator is also required to apply Articles 101 or 102 of the TFEU, as the case may be.
- 2.7 The CMA's powers of investigation and enforcement in respect of the prohibitions under Chapter I and Chapter II of the CA98, and Article 101 and Article 102 of the TFEU, are set out in Chapter III of Part 1 of the CA98.

Amendments to the CMA's powers introduced by the ERRA13

Introduction

- 2.8 The ERRA13 introduces a number of changes to the CMA's power to investigate and enforce the prohibitions under Chapter I and Chapter II of the CA98, and Article 101 and Article 102 of the TFEU. The ERRA13 also

⁸ Competition Act 1998: Guidance on the CMA's investigation procedures [currently in draft and being consulted on (CMA8con)], available at www.gov.uk/cma.

⁹ The procedural rules are currently set out in (The Competition and Markets Authority (Competition Act 1998 Rules) Order, SI 201(•) (currently in draft and being consulted on (CMA8con), available at: www.gov.uk/cma)

¹⁰ Subject to the minimum procedural requirements that Regulators must follow in CA98 investigations as set out in the CMA CA98 Rules, each Regulator may conduct investigations in accordance with its own procedures.

¹¹ In addition, only the CMA and the Serious Fraud Office may prosecute suspected infringements of the criminal cartel prohibitions under Part 6 of the EA02.

¹² Article 3 of Council Regulation (EC) No 1/2003 (OJ L1, 4.1.2003, p.1), as amended.

reforms the concurrent competition enforcement regime by allowing for the enhancement of cooperation and information sharing arrangements between the CMA and the Regulators, strengthening the primacy of competition law in the regulated sectors, and providing for the CMA to play a central coordination and support role in the application of competition law to the regulated sectors.

- 2.9 These amendments will come into effect on 1 April 2014¹³ and are principally implemented through amendments to relevant provisions of the CA98. The ERRA13 also introduces a number of amendments to the EA02. Only those amendments to Part 4 of the EA02 will impact the application of competition law in the concurrent sectors.

Amendments to the CA98 antitrust regime

- 2.10 The amendments to the antitrust regime are set out in Chapter 3 of Part 4 of the ERRA13. Further detail on the range and impact of the substantive legal and procedural amendments to the CA98 are set out in CMA8con draft CA98 Guidance.¹⁴ The majority of provisions outlined in CMA8con draft CA98 Guidance will apply to the Regulators' exercise of concurrent competition law under the CA98.

Amendments to the EA02 market investigation regime

- 2.11 The amendments to the market investigation regime are set out in Chapter 2 of Part 4 of the ERRA13. Further detail on the range and impact of the substantive legal and procedural amendments to the EA02 are set out in (Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (currently in draft and being consulted on (CMA3))¹⁵ (draft Markets Guidance). The majority of provisions outlined in the CMA's draft Markets Guidance will apply to the Regulators' exercise of concurrent competition law under the EA02.

¹³ The Schedule 14 ERRA13 duty will not be applied to Monitor at this time, however the Secretary of State may commence this duty at a future date upon Government agreement.

¹⁴ Competition Act 1998: Guidance on the CMA's investigation procedures (currently in draft and being consulted on (CMA8con)), available at www.gov.uk/cma.

¹⁵ Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (currently in draft and being consulted on (CMA3)), available at: www.gov.uk/cma.

Amendments to the concurrent competition law regime

- 2.12 The amendments to the concurrent competition regime are set out in Chapter 5 of Part 4 of the ERRA13 which will facilitate and encourage greater cooperation between the CMA and the Regulators and the proactive use by the Regulators of their concurrent competition powers.
- 2.13 In particular, the ERRA13 makes the following changes to the concurrent competition regime:
- a. requiring Regulators to consider whether the use of their CA98 powers is more appropriate before using their licence enforcement powers ¹⁶
 - b. requiring the CMA to report annually on the use of concurrent powers in the regulated sectors
 - c. extending the Secretary of State's existing power to make regulations regarding concurrency arrangements, so that the regulations can require competition authorities to enter into arrangements to share more information about possible antitrust cases and case management decisions
 - d. giving the CMA the power to decide which body should lead on a case ¹⁷
 - e. giving the CMA the power to take over a case from a Regulator, even if a Regulator is already investigating that case¹⁸
- 2.14 The Transition Team has reflected the changes summarised in points a – e in paragraph 2.13 above in the Draft CMA Concurrency Guidance as appropriate. Section 3 of this consultation document outlines the changes in more detail, and explains how the concurrency provisions of the ERRA13 have been incorporated in the Draft CMA Concurrency Guidance.

¹⁶ Note that this duty will not be applied to Monitor at this time, however the Secretary of State may commence this duty at a future date upon Government agreement.

¹⁷ This will not apply however to cases that principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England, in which case Monitor will lead on the case, unless otherwise agreed.

¹⁸ This will not apply however to cases taken by Monitor that are principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

3 PROPOSED OPERATION OF ERRA13 CONCURRENCY PROVISIONS

Introduction

- 3.1 The Draft CMA Concurrency Guidance builds on the OFT's and the Regulators' current approach to applying competition law in the concurrent sectors as described in the OFT Concurrency Guidance.
- 3.2 The Transition Team has also taken the opportunity afforded by the changes under the ERRA13 to review certain other aspects of the OFT Concurrency Guidance generally. As a result, the Transition Team proposes to implement certain clarifications on the procedures and practices for the operation of the concurrent competition enforcement.

Summary of concurrency key changes as set out in the Draft CMA Concurrency Guidance

Institutional changes

- 3.3 The Draft CMA Concurrency Guidance reflects the transition of the competition law duties of the OFT and CC to the CMA by replacing references to the OFT and CC with references to the CMA as appropriate. At the date of this consultation, the detailed organisational structure of the CMA and the specific job titles of its staff have not been finalised.¹⁹ Where the Draft Concurrency Guidance refers to specific roles within the CMA, these references remain provisional pending the CMA Board's final decisions on these matters.
- 3.4 The Draft CMA Concurrency Guidance also reflects substantive changes to the concurrency framework by reflecting the extension of the Civil Aviation Authority's existing concurrent competition powers,²⁰ and the granting of

¹⁹ The final decision will be for the CMA Board, when it is constituted. A diagram showing in overview the currently proposed organisational structure of the CMA can be found in Towards the CMA (CMA1), published as part of the Tranche 1 CMA guidance consultation, available at: www.gov.uk/cma.

²⁰ The OFT Concurrency Guidance included the Civil Aviation Authority as a concurrent Regulator in respect of the supply of air traffic services under the Transport Act 2000. The Draft CMA

concurrent competition powers to Monitor²¹ (see paragraph 2.1 of the Draft CMA Concurrency Guidance), as well as the replacement of the Concurrency Working Party (CWP)²² with the United Kingdom Competition Network (UKCN) (see paragraphs 3.15 to 3.19 and 3.42 and Annex B of the Draft CMA Concurrency Guidance.²³

CA98 investigation and procedural changes

- 3.5 Chapter 3 of Part 4 of the ERRA13 introduces a number of substantive changes to the antitrust investigation and enforcement regime under the CA98. These changes apply equally to the Regulators (with the exception of the preparation and publication of guidance on penalties and the making of procedural rules under the CA98, which are duties of the CMA alone). Further detail on the range and impact of the substantive legal and procedural amendments to the CA98 are set out in (CMA8con draft CA98 Guidance).
- 3.6 The Draft CMA Concurrency Guidance reflects the introduction of new powers and procedures under the CA98 by updating the document as appropriate to include references to the CMA's and the Regulators' powers to exercise powers under the following provisions of the CA98: sections 25A, 26A, 35, 40A and paragraphs 1A, 13A, 13B and 13C of Schedule 9 of the CA98 (see paragraphs 2.3 to 2.5, 3.12, 3.13, 3.32 to 3.40 and 3.49 of the Draft CMA Concurrency Guidance).

EA02 changes to Part 4 (markets regime)

- 3.7 Chapter 2 of Part 4 of the ERRA13 introduces certain reforms to the markets regime under Part 4 of the EA02. These reforms apply equally to the Regulators (with the exception of the maintenance of a register and

Concurrency Guidance reflects the extension of the Civil Aviation Authority's concurrent powers to the provision of airport operation services under the Civil Aviation Act 2012.

²¹ Monitor was granted concurrent competition powers in respect of the provision of health care services in England under the Health and Social Care Act 2012.

²² The CWP was formed in 1997, amongst other things, to facilitate a consistent approach by the Regulators and the OFT in the exercise of their functions and powers under the CA98. The UKCN is a successor body to the CWP and shares many of the aims and structures of the CWP. Further information is set out in paragraphs 3.15 to 3.19 of the Draft CMA Concurrency Guidance.

²³ The UKCN Strategy Document is expected to be annexed to the final version of the guidance published by the CMA at Annexe B. However, this Strategy Document is currently being drafted and is not available for inclusion in this Draft CMA Concurrency Guidance.

preparation and publication of guidance on the markets regime, which are duties of the CMA alone). Further detail on the range and impact of the substantive legal and procedural amendments to the EA02 are set out in Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (currently in draft and being consulted on (CMA3)).²⁴

3.8 The Draft CMA Concurrency Guidance reflects the introduction of new powers and procedures under the EA02 by updating the document as appropriate to include references to the Regulators' functions under Part 4 of the EA02 (primarily in paragraphs 2.7 to 2.8 and 4.17 to 4.21 of the Draft CMA Concurrency Guidance).

Requiring Regulators to use CA98 powers where more appropriate²⁵

3.9 Each Regulator will be responsible for applying the 'more appropriate' requirement on a case-by-case basis.²⁶ The CMA will apply the standard case allocation procedure under Regulation 4 of (Competition Act 1998 (Concurrency) Regulations [•] (SI 2004, No. [•]) (currently in draft and being consulted on by BIS (Concurrency Regulations), where a Regulator has commenced an investigation using its sector-specific powers, but considers that it would be more appropriate to proceed under the CA98 (see paragraphs 4.2 to 4.7 of the Draft CMA Concurrency Guidance). As a matter of policy, the Regulator which is best placed to deal with the case will be allocated the case under Regulation 4.²⁷

Question 1:

Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators' exercise competition powers in favour of sectoral powers is clear and appropriate? Please give reasons for your view.

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

²⁵ Schedule 14 of the ERRA13 amends the relevant sector-specific legislation under which each Regulator is granted concurrent powers to investigate and enforce infringements of the prohibitions under Chapter I and Chapter II of the CA98, and Article 101 and Article 102 of the TFEU. This duty will not be applied to Monitor at this time. However, the Secretary of State may commence this duty at a future date upon Government agreement.

²⁶ This duty will not be applied to Monitor at this time, however the Secretary of State may commence this duty at a future date upon Government agreement.

²⁷ This would not preclude the CMA from exercising its discretion to take over a case under Regulation 8 of the Concurrency Regulations (and in accordance with the procedures which the CMA proposes to follow in taking over a case, as set out in the Draft CMA Concurrency Guidance).

Case allocation under the Concurrency Regulations²⁸

- 3.10 Regulation 5 of the Concurrency Regulations sets out the process for resolving disputes as to who should exercise Part 1 functions in relation to a case, including specifying the circumstances in which the CMA must decide which competent person is to exercise Part 1 functions in relation to a case.²⁹ Regulation 7 of the Concurrency Regulations provides a process for the transfer of a case from one authority to another. Regulation 8 of the Concurrency Regulations provides the CMA with the power to take over a case from a Regulator, even where the Regulator has been allocated a case.³⁰
- 3.11 The CMA will build on the OFT's and the Regulators' current approach to case allocation as a starting point and update the procedures and factors to be taken into account when determining which of the CMA or Regulators deal with a case under Regulation 4 (determination of case allocation by agreement) and Regulation 5 (determination of case allocation by the CMA in circumstances of dispute) of the Concurrency Regulations (see further paragraphs 3.21 to 3.24 of the Draft CMA Concurrency Guidance). The Draft CMA Concurrency Guidance also outlines the minimum procedural steps for the CMA to follow where it proposes to take over a case from a Regulator under Regulation 8 (see paragraphs 3.25 to 3.28 of the Draft CMA Concurrency Guidance). The CMA may not exercise Part 1 functions or permit a Regulator other than Monitor to exercise Part 1 functions in any case which is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England, without the agreement of Monitor.

²⁸ Section 51 of the ERA13 introduces new subsections 54(6)(a) and 54(6A) of the CA98, permitting the Secretary of State to make regulations under which the CMA may decide which of it or a Regulator will have jurisdiction over a case and to take over a case from a Regulator even where that Regulator has already been allocated the case.

²⁹ See paragraph 2.5 of the Draft CMA Concurrency Guidance for further detail on the meaning of 'Part 1 functions'.

³⁰ Though note that this provision will not apply where the regulator is Monitor and the case is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

Question 2:

Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

Secondments and cooperative working between the CMA and Regulators

- 3.12 The Transition Team has taken the opportunity provided by the introduction of new concurrency provisions under Chapter 5 of Part 4 of the ERA13 to review the OFT's and the Regulators' approach to use of secondments and other forms of cooperative working in CA98 investigations and proposes to build on the OFT's and the Regulators' current approach to cooperative working in CA98 investigations.
- 3.13 The CMA will play a leading role in promoting and coordinating the effective application of competition law in the regulated sectors through a variety of means. As set out in Section 3 of the Draft CMA Concurrency Guidance, the CMA will work with the UKCN to ensure effective cooperation of enforcement of competition law and development of competition policy (paragraphs 3.15 to 3.19), and expand on the provisions of Regulation 10 of the Concurrency Regulations, which permit use of staff between the CMA and Regulators. Staff will be available for any such duration and purpose as agreed between the relevant authorities (including investigation, sharing expertise and insight, decision making and dealing with complaints about procedure. See paragraphs 3.32 to 3.35). The Draft CMA Concurrency Guidance also outlines how the CMA and Regulators will cooperate in relation to complaints about suspected infringement of the CA98 (paragraphs 3.36 to 3.39) and share information between each other (see paragraphs 3.15 to 3.16 of this consultation document).
- 3.14 In addition to the proposed approach set out in the Draft CMA Concurrency Guidance, each of the CMA and Regulators will agree individual Memoranda of Understanding, which outline in detail a framework for cooperation and coordination between the CMA and each Regulator within the relevant regulated sector (paragraph 3.6 of the Draft CMA Concurrency Guidance).

Question 3:

Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate? Please give reasons for your view.

Information sharing between the CMA and Regulators or between Regulators³¹

- 3.15 Regulation 9 of the Concurrency Regulations requires that each of the CMA and Regulators must put in place arrangements for sharing with each other certain minimum kinds of information in connection with concurrent CA98 cases.
- 3.16 Full details of the information sharing arrangements between the CMA and the Regulators will be outlined in individual Memoranda of Understanding between the CMA and each Regulator within the relevant regulated sector (see paragraphs 3.6 and 3.42 to 3.43 of the Draft CMA Concurrency Guidance). However, the Draft CMA Concurrency Guidance discusses the basic information sharing arrangements that the CMA proposes be put into place between the CMA and the Regulators in paragraphs 3.40 to 3.53 of the Draft CMA Concurrency Guidance. In particular, the CMA will establish systems for the regular and timely exchange of information in relation to suspected infringements of the CA98 from the point at which the relevant authority considers that it has reasonable grounds to suspect that such an infringement may have taken place.³² Information will be shared at key points during an investigation (for example, prior to, and in order to permit comments in respect of, any proposed Statement of Objections and any preliminary or final decision or notice of the type provided for in Regulation 9 of the Concurrency Regulations).

³¹ Section 51 of the ERRA13 introduces new subsections 54(6B) and 54(6C) of the CA98, permitting the Secretary of State to make regulations under which the CMA and the Regulators are permitted or required to share information in relation to concurrent cases.

³² The exchange of information between the CMA and Regulators connected with the exercise of concurrent competition functions is subject to limits on disclosure under Part 9 of the EA02. In addition, the CMA and Regulators will put in place procedural safeguards to ensure that the information shared is stored securely and treated as confidential.

Question 4:

Do you consider that the Transition Team’s proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

Question 5:

Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times? Please give reasons for your view.

Annual concurrency report³³

3.17 The Transition Team proposes to recommend that the CMA adopt the approach outlined in paragraphs 3.54 to 3.61 of the Draft CMA Concurrency Guidance when interpreting and applying the requirement for the CMA to prepare an annual concurrency report. Consistent with its general commitment to transparency,³⁴ the CMA include additional information over and above the minimum information requirements of paragraph 16(3) of Schedule 4 of the ERRA13. While the content of each annual report will be determined annually, each report is likely to contain information of the type outlined in paragraphs 3.56 to 3.60 of the Draft CMA Concurrency Guidance.

³³ Paragraph 16 of Schedule 4 of the ERRA13 requires the CMA to prepare an annual report containing an assessment of how the concurrency arrangements have operated during the prior year. This report must include information about the activities of the CMA and the Regulators in relation to the exercise of all concurrent functions, including under both the CA98 and EA02.

³⁴ (Transparency and disclosure: Statement of the CMA’s policy and approach (currently in draft and being consulted on (CMA6con)), available at: www.gov.uk/cma).

Question 6:

Do you consider that the Transition Team's proposed approach to the annual concurrency report is clear and appropriate? Please give reasons for your view.

Question 7:

Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance? Please give reasons for your view.

Transitional arrangements

- 3.18 In order to provide clarity and certainty to affected parties, the approach outlined in the Draft CMA Concurrency Guidance will take effect from the date on which final guidance is published. The changes introduced by the ERRA13, as they affect the concurrency regime under the CA98 and EA02 and as outlined in this guidance, will apply to all ongoing and future cases from 1 April 2014.³⁵
- 3.19 Whilst the policy of these transitional arrangements form part of the Transition Team's CMA Guidance consultations, the Secretary of State is responsible for incorporating the transitional arrangements in law where necessary. The legislative drafting will reflect the proposed transitional arrangements as set out in paragraph 3.18 above. As a general principle, all powers and/or procedures will come into force as of 1 April 2014 and will be applied prospectively.

Question 8:

Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 of Part 4 of the ERRA13? Please give reasons for your view.

4 QUESTIONS FOR CONSULTATION

- **Question 1:** Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators' exercise competition powers in favour of sectoral powers is clear and appropriate? Please give reasons for your view
- **Question 2:** Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view
- **Question 3:** Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate? Please give reasons for your view
- **Question 4:** Do you consider that the Transition Team's proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.
- **Question 5:** Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times? Please give reasons for your view
- **Question 6:** Do you consider that the Transition Team's proposed approach to the annual concurrency report is clear and appropriate? Please give reasons for your view
- **Question 7:** Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance? Please give reasons for your view
- **Question 9:** Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 of Part 4 of the ERRA13? Please give reasons for your view

ANNEXE(S)

A CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
- departments will need to give more thought to how they engage with and consult with those who are affected
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy
- the principles of the Compact between government and the voluntary and community sector will continue to be respected

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

B DRAFT CMA CONCURRENCY GUIDANCE

Competition and Markets Authority (CMA)

Regulated Industries

**Guidance on concurrent application of competition
law to regulated industries**

[2014]

CMA10con

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

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1 INTRODUCTION

- 1.1 For a number of industries the application and enforcement of Article 101 (Article 101) of the Treaty on the Functioning of the European Union (TFEU) and Article 102 (Article 102) of the TFEU in the United Kingdom and of Chapter I and Chapter II of the Competition Act 1998 (CA98) (as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13)) is carried out by the sectoral regulators listed in paragraph 2.1 (Regulator or Regulators (where referred to collectively)) concurrently with the Competition and Markets Authority (CMA).³⁶ EC Regulation 1/2003 (Modernisation Regulation)³⁷ requires the designated national competition authorities of the Member States (NCAs) and the courts of the Member States to apply and enforce Article 101 and Article 102 as well as national competition law when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 102. The CMA and the Regulators with concurrent competition powers under the CA98 are designated as NCAs with the power to apply Articles 101 and 102. Throughout this guidance, references to the CMA should be taken to include the Regulators in relation to their respective industries, unless otherwise specified.
- 1.2 The CMA has set out in this guidance document general information for the business and legal communities and other interested parties on the application and enforcement of Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 in the United Kingdom by the CMA and the Regulators.
- 1.3 In particular, this guidance sets out information about which regulated sectors are affected by the concurrency provisions and the scope of the concurrent powers and explained the way in which the concurrent application and enforcement of competition law works in practice.
- 1.4 Chapter 2 of this guidance sets out the concurrent powers of the Regulators.
- 1.5 Chapter 3 describes the operation of the concurrency regime. In particular, it outlines:

³⁶ Section 54 of the CA98 (combined with sector-specific legislation) provides that, in relation to the regulated sectors described in paragraph 2.1, the same provisions are applied and enforced, concurrently with the CMA, by the Regulators for communications matters, gas, electricity, water and sewerage, railway, air traffic, airport and healthcare (in respect of England only) services.

³⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (OJ L1, 4.1.2003, p.1).

- the procedures for making complaints and the way in which they are dealt with under concurrent powers
- the coordination and leadership role of the CMA in relation to concurrent competition law application and enforcement, for the purpose of enhancing the efficient application and enforcement of Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 in the regulated sectors.³⁸ This includes the forms of support that may be available to the Regulators and the availability of the CMA's collective case decision making model and procedural complaints procedure to the Regulators³⁹
- the circumstances in which the CMA or a Regulator may decide to investigate a suspected infringement of competition law and the procedure for agreeing case allocation between the CMA and the Regulators
- the procedures for sharing information in respect of the application of Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 between the CMA and the Regulators, including the categories of information that will be shared and when, and how that information will be dealt with by the CMA and the Regulators
- the process for and possible content of the annual report on the operation of the concurrency regime that the CMA is required to prepare⁴⁰
- the operation and role of the United Kingdom Competition Network (UKCN). The UKCN is a forum which enables the Regulators and the CMA to share expertise, ideas and experience for the purpose of ensuring a consistent and high-quality approach to competition policy and enforcement in the regulated sectors, and to coordinate matters relating to concurrency⁴¹
- how the Regulators work with the CMA and with each other, using the powers in the CA98, including under the (Competition Act 1998

³⁸ See section 54 of the CA98 (as amended by the ERR13) and the Concurrency Regulations.

³⁹ For further information on the CMA's approach to investigating and enforcing suspected infringements of Chapter I and Chapter II of the CA98 see CMA guideline [Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases] [currently in draft and being consulted on] CMA8con], available at: (www.gov.uk/cma).

⁴⁰ See paragraph 16 of Schedule 4 of the ERR13.

⁴¹ The UKCN Statement of Intent document is currently being drafted.

(Concurrency) Regulations (•) (SI 2004, No. (•)) – currently in draft and being consulted on by BIS (Concurrency Regulations)),⁴²

- how the CMA and the Regulators will work in the European Union (EU) with other NCAs who have been given the responsibility of applying Article 101 and Article 102 in their territories
- 1.6 Chapter 4 explains how the use of these powers interacts with the Regulators' sectoral powers and duties and the powers under the Enterprise Act 2002 (EA02).
- 1.7 Chapter 5 describes the restrictions on the disclosure of information which are set out in the Modernisation Regulation and within the EA02.
- 1.8 Annexe A contains the Concurrency Regulations.
- 1.9 A UKCN Statement of Intent document, which provides further information about the UKCN, is expected to be included in Annexe B of the final version of this guidance.
- 1.10 This guidance document supersedes the OFT's previous guide on concurrent competition law enforcement entitled 'Concurrent Application to Regulated Industries' (OFT405).⁴³ You may find it useful to read this document alongside other CMA, OFT and/or CC documents, including CMA guideline Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (currently in draft and being consulted on) (CMA8con) (CMA CA98 Procedures Guidance)],⁴⁴ 'The Application of the Competition Act in the Telecommunications Sector' (OFT417), 'The Application of the Competition Act in the Water and Sewerage Sectors' (OFT422), 'Application in the Energy Sector' (OFT428), 'Application in Services Relating to Railways' (OFT430), and 'Application to the Northern Ireland Energy Sectors' (OFT437), (Regulated Sector Publications).⁴⁵
- 1.11 This is the CMA's current practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and the CMA's developing experience. Please refer to the CMA website to ensure you have the latest version of this guidance.⁴⁶

⁴² See Annexe A. (The Concurrency Regulations are available to download at www.gov.uk/cma).

⁴³ 'Concurrent Application to Regulated Industries' (OFT 405), available at: (www.gov.uk/cma).

⁴⁴ (CMA CA98 Procedures Guidance (currently in draft and being consulted on) (CMA8con) available at: (www.gov.uk/cma).

⁴⁵ Regulated Sector Publications are available at: (www.gov.uk/cma). Their content is not substantively affected by the ERA13.

⁴⁶ www.gov.uk/cma.

- 1.12 This guidance is intended to explain these provisions to those who are likely to be affected by them and to indicate how the CMA expects them to operate. Further information on how the CMA has applied and enforced competition law in particular cases may be found in the CMA's decisions, as available on its website from time to time.⁴⁷
- 1.13 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with suspected competition law infringements in the regulated sectors but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.
- 1.14 This guidance will take effect from 1 April 2014. The new approach established by the ERRA13 and outlined in this guidance will apply to all ongoing and future cases.
- 1.15 This document is not a definitive statement of, or a substitute for, the law itself. A range of publications on how the CMA carries out this substantive assessment is available on the CMA website. In particular, this guidance is not a substitute for the TFEU, nor for regulations made under it. Neither is it a substitute for European Commission (Commission) notices and guidance. Furthermore, this guidance is not a substitute for the CA98 or the EA02 and the regulations and orders made under those Acts. It should be read in conjunction with these legal instruments, EU case law and United Kingdom case law. Anyone in doubt about how they may be affected by the TFEU, the CA98 or the EA02 should seek independent legal advice.

⁴⁷ The CMA maintains a register of CA98 decisions, available at: (www.gov.uk/cma).

2 THE CONCURRENT POWERS

2.1 The industry sectors where the Regulators have concurrent powers with the CMA as at 1 April 2014⁴⁸ are⁴⁹:

Agreements⁵⁰ or conduct relating to:	Statute	Regulatory Body
The provision of airport operation services	The Civil Aviation Act 2012	CAA ⁵¹
The supply of air traffic services	The Transport Act 2000	CAA
The provision of health care services in England	The Health and Social Care Act 2012	Monitor
Commercial activities connected with the generation, transmission or supply of electricity in Northern Ireland	The Electricity (Northern Ireland) Order 1992	NIAUR
Commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services in Northern Ireland	Water and Sewerage Services (Northern Ireland) Order 2006	NIAUR
The conveyance,	The Gas (Northern	NIAUR

⁴⁸ The identity of the concurrent regulators and scope of their concurrent powers may be subject to change. Please refer to the CMA's website for an up to date summary of all concurrent regulators and their concurrent powers (www.gov.uk/cma).

⁴⁹ The table is organised alphabetically by reference to each Regulator's acronym.

⁵⁰ References in this guidance to 'agreement' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

⁵¹ See CAA publication 'The CAA's concurrent competition powers for airport operation services and air traffic services' (CAP 1016) for more information on the meaning of 'airport operation services' and air traffic services', as well as on the CAA's concurrent competition powers.

Agreements⁵⁰ or conduct relating to:	Statute	Regulatory Body
storage or supply of gas in Northern Ireland	Ireland) Order 1996	
Activities connected to electronic communications, broadcasting and postal services matters	The Communications Act 2003	OFCOM
The shipping, conveyance or supply of gas and activities ancillary thereto	The Gas Act 1986	OFGEM
Commercial activities connected with the generation, transmission or supply of electricity	The Electricity Act 1989	OFGEM
Commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services	The Water Industry Act 1991	OFWAT
The supply of services relating to railways	Railways Act 1993 (as amended by the Transport Act 2000)	ORR

2.2 The Regulators have all the powers of the CMA to apply and enforce Article 101 and Article 102 and the CA98 in order to deal with anti-competitive agreements or abuses of a dominant position which relate to activities in relation to their respective sectors, with the exceptions noted in paragraph 2.4 below. In many cases, the undertakings whose agreement or conduct is relevant will be licensees, franchisees or similar right holders under one of the

statutes listed above, although it is the subject matter to which the agreement or conduct relates rather than the identity of the undertakings involved which will determine whether there is concurrent jurisdiction.

2.3 A Regulator may:

- consider complaints about possible infringements of any of Article 101, Article 102, the Chapter I prohibition and the Chapter II prohibition
- impose interim measures to prevent significant damage
- carry out investigations both on the Regulator's own initiative and in response to complaints. The Regulators have the same powers as the CMA to require the production of documents and information, to interview individuals that have a connection with a business under investigation and to search premises. Further details about these powers are given in the CMA guideline (CMA CA98 Procedures Guidance (CMA8con))⁵²
- impose financial penalties, taking account of the statutory guidance on penalties issued by the CMA⁵³
- give and enforce directions to bring an infringement to an end
- accept commitments that are binding on an undertaking
- adopt confidential informal advice and publish an opinion
- agree to settle a case where the business under investigation is prepared to admit that it has breached Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition in the United Kingdom and to agree to a streamlined administrative procedure to govern the remainder of the investigation, in return for which the Regulator may agree to impose a reduced penalty on the business.⁵⁴

2.4 The CMA alone, however, has powers to issue guidance on penalties, to issue guidance on commitments and to make procedural rules (the CA98

⁵² (CMA CA98 Procedures Guidance (currently in draft and being consulted on) (CMA8con), available at: www.gov.uk/cma).

⁵³ See 'Guidance as to the appropriate amount of a penalty' (OFT 423) and the CMA guideline (Administrative Penalties: Statement of policy on the CMA's approach – currently in draft (CMA4)), available at: www.gov.uk/cma).

⁵⁴ See the CMA guideline (CMA CA98 Procedures Guidance (currently in draft and being consulted on) (CMA8con) for more details on settlement, available at: www.gov.uk/cma).

Rules).⁵⁵ The CA98 Rules set out the procedures to be followed in carrying into effect the provisions of the CA98.⁵⁶ In issuing guidance on penalties, in issuing guidance on commitments and in making and amending the CA98 Rules, the CMA is required to consult publicly and with the Regulators.⁵⁷

2.5 Once it has been decided which United Kingdom authority will exercise **Part 1 functions** in relation to a case,⁵⁸ no other authority can exercise any of the **prescribed functions** in relation to that case. ‘Part 1 functions’ are any functions under Part 1 of the CA98 which are or would be exercisable concurrently (see definition in Regulation 2 of the Concurrency Regulations). ‘Prescribed functions’ arise from the CA98 and are defined in Regulation 2 of the Concurrency Regulations. They include:

- the exercising of the formal powers of investigation in sections 25 to 29 of the CA98
- the withdrawal of an exclusion from the Chapter I prohibition in relation to an individual agreement
- the making of certain formal decisions, including requiring that an infringement be brought to an end, ordering interim measures, accepting commitments by decision and imposing fines

2.6 Once jurisdiction in relation to a case has been allocated to a particular authority, Regulation 6 of the Concurrency Regulations prevents another authority from exercising Part 1 functions in relation to that case unless the case is formally transferred to that authority (Regulation 7 of the Concurrency Regulations) or the CMA decides to take over a case from a Regulator under Regulation 8 of the Concurrency Regulations.⁵⁹

2.7 While not the subject of this guidance, the Regulators also have the power to carry out Market Studies and make Market Investigation References in their respective sectors under Part 4 of the EA02 (see CMA guideline Markets

⁵⁵ See (The Competition Act 1998 (Competition and Markets Authority’s Rules) Order, SI 201(•) – currently in draft and being consulted on], available at: (www.gov.uk/cma).

⁵⁶ See further paragraph 3.12 below. Subject to the minimum procedural requirements that Regulators must follow in CA98 investigations as set out in the CA98 Rules, each Regulator may conduct investigations in accordance with its own procedures.

⁵⁷ In addition, only the CMA and the Serious Fraud Office may prosecute suspected infringements of the criminal cartel prohibitions under section 190 of the EA02.

⁵⁸ See paragraphs 3.22 to 3.35 for further information on case allocation.

⁵⁹ See further paragraphs 3.25 to 3.28 for information on the CMA’s power to take a case under Regulation (8) of the Concurrency Regulations.

Studies and Market Investigations: Supplemental guidance on the CMA's approach) currently in draft (CMA3))⁶⁰.

- 2.8 In addition, the Regulators may make regulatory references to the CMA or be appealed to the CMA in relation to certain price controls, access charges and other licence modifications (Regulatory Cases).⁶¹ The CMA is also required to review qualifying mergers in certain regulated sectors (Regulatory Mergers). This guidance does not consider Regulatory Cases or Regulatory Mergers further. Should you wish to find out more about the procedure for Regulatory Cases or Regulatory Mergers, please refer to the CMA's website and, where it exists, to the relevant sector-specific guidance document.

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⁶⁰ Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (currently in draft (CMA3, available at: (www.gov.uk/cma).

⁶¹ As at 1 April 2014 the CMA has responsibility for Regulatory Cases in the aviation, communications, energy, railways, health and water sectors. Please refer to the CMA's website for the latest guidance in respect of these duties: www.gov.uk/cma.

3 CONCURRENCY IN PRACTICE

- 3.1 The CMA will play a leading role to promote and coordinate the effective application of competition law in the regulated sectors. Cooperation between the CMA and the Regulators is central to the effective operation of the concurrency regime. The CMA's leadership role will facilitate the efficient allocation of resources, the appropriate sharing of information between the Regulators and the CMA, and the development of high standards of excellence in the application and enforcement of Article 101, Article 102, Chapter I and/or Chapter II within the regulated sectors.
- 3.2 The Concurrency Regulations contain provisions for the co-ordination of the performance by the CMA and the Regulators of their concurrent functions under the CA98. These provisions include:
- allowing for the exchange of information between the CMA and the Regulators, both for the purpose of determining who has jurisdiction to exercise Part 1 functions⁶² in relation to a case under the CA98 and/or EU law (Regulation 3) and, generally, for the purpose of facilitating the performance by the CMA and the Regulators of their Part 1 functions
 - determining who should exercise Part 1 functions in relation to a case (Regulation 4)
 - resolving disputes as to who should exercise Part 1 functions in relation to a case, including specifying the circumstances in which the CMA must decide which competent person is to exercise Part 1 functions in relation to a case (Regulation 5)
 - preventing the simultaneous exercise by more than one authority of Part 1 functions in relation to a case (Regulation 6)
 - transfer of a case from one authority to another (Regulation 7)
 - providing the CMA with the power in certain circumstances to take over a case that has been allocated to a Regulator (Regulation 8)⁶³
 - requiring the putting in place of information sharing arrangements between the CMA and the Regulators for the purpose of enhancing

⁶² See paragraph 2.5 above for an explanation of this term.

⁶³ The exercise of this power would prevent the Regulator from investigating (or continuing to investigate) the case unless and until the CMA transferred the case back to the Regulator.

transparency and coordination in relation to the concurrent application of Article 101 and Article 102 of the TFEU and Chapter I and Chapter II of the CA98 generally and in relation to any particular case (Regulation 9)

- use of staff of the CMA or a Regulator by the CMA or another Regulator allowing for staff to be shared between the CMA and Regulators, or between Regulators (not involving the CMA). This includes the secondment of any officer⁶⁴ of the CMA or a Regulator by the Regulator or the CMA or another Regulator for any duration agreed between the relevant authorities (Regulation 10)
- 3.3 The Concurrency Regulations set out the process for determining which of the United Kingdom authorities will act in any particular case. The Concurrency Regulations also set out the procedure that the CMA will follow when determining that it is to exercise Part 1 functions in relation to a case where concurrent powers apply.
- 3.4 Where Article 101 and/or Article 102 may apply, the case will also be subject to the case allocation principles for determining whether the United Kingdom NCA or an NCA from another Member State is well placed to act. The case allocation principles for determining which NCA in the European Competition Network is well placed to act are set out in the Commission's Notice on 'Cooperation within the Network of Competition Authorities'.⁶⁵ Further details on case allocation within the European Competition Network are provided in the competition law guidance 'Modernisation' (OFT442).⁶⁶
- 3.5 The Concurrency Regulations are not intended to deal comprehensively with all aspects of the relationship between the CMA and the Regulators. Matters which are not addressed specifically in the Concurrency Regulations are dealt with by means of Memoranda of Understanding between the CMA and the individual Regulators.
- 3.6 This document does not provide guidance on the Memoranda of Understanding between the CMA and the Regulators. However, Memoranda of Understanding outline in detail a framework for cooperation and coordination between the CMA and each Regulator within the relevant regulated sector in relation to various issues that are likely to include the:

⁶⁴ 'Officer' is used in this guidance to mean any member of staff of the CMA or a Regulator, any board member of the CMA or a Regulator, or any Panel member of the CMA

⁶⁵ OJ C101, 27.04.2004, p.43.

⁶⁶ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

- the concurrent application and enforcement of competition law by the Regulator and the CMA
- the prevention of anti-competitive behaviour and/or promotion of competition within the relevant regulated sector
- the exchange of information between a Regulator and the CMA for the purpose of facilitating effective cooperation and coordination of activities and enforcement within the relevant regulated sector
- the exchange of staff between the CMA and a Regulator for the purpose of enhancing the effective application and enforcement of competition law and other legal powers as appropriate
- the procedure for sharing experience and expertise between the CMA and a Regulator, including through the use of meetings, joint training and the exchange of research, analysis, guidance and similar documents
- the procedures for cooperation between the CMA and a Regulator in respect of a Regulatory Case or Regulatory Merger

3.7 The Memoranda of Understanding may be reviewed from time to time by the CMA and a Regulator to ensure that they remain effective and appropriate. The Memoranda of Understanding are available on the CMA's website⁶⁷ and the website of each relevant Regulator.

Ensuring consistency of decision-making

Primacy of EU Law

3.8 In applying Articles 101 and 102 the CMA, the Regulators and the national courts are bound by the fundamental principle of the primacy of EU law and must follow the case law of the European Court interpreting EU legislation, and must have regard to any relevant decision or statement of the Commission. As a consequence, and in addition to the Article 3 obligations set out in Chapter 4 below, an agreement or conduct prohibited by Article 101 or Article 102 cannot be permitted under national law. The CMA and the

⁶⁷ www.gov.uk/cma.

Regulators cannot therefore permit an agreement or conduct which is otherwise prohibited under Article 101 or Article 102.⁶⁸

- 3.9 The Modernisation Regulation contains further provisions to ensure consistency in the application of EU law by NCAs. Article 16(2) of the Modernisation Regulation provides that where the Commission has taken a decision on an agreement or conduct under Article 101 or Article 102, NCAs (including the CMA and the Regulators) cannot take a decision under Article 101 or Article 102 in respect of the same agreement or conduct which would run counter to the decision adopted by the Commission.
- 3.10 Chapter 4 provides further details on Article 3 of the Modernisation Regulation.

Consistency provisions under United Kingdom Law

- 3.11 In addition, section 60 of the CA98 sets out principles for ensuring that the United Kingdom authorities deal with questions arising in relation to the application of the Chapter I and Chapter II prohibitions of the CA98 in such a way as to ensure consistency with the treatment of corresponding questions arising in EU law in so far as this is possible, having regard to any relevant differences between any of the provisions concerned. This is considered in more detail in the competition law guidance 'Modernisation' (OFT442).⁶⁹

Decision-making procedure

- 3.12 Where the CMA exercises Part 1 functions in relation to a case within a regulated sector, it will apply its procedures for making any decisions in relation to that case in accordance with the CA98 and the CA98 Rules.⁷⁰
- 3.13 Where a Regulator exercises Part 1 functions in relation to a case, that Regulator must make any decisions in relation to that case in accordance with the relevant requirements of the CA98, the CA98 Rules and any relevant sector-specific legislation applicable to the Regulator's exercise of Part 1

⁶⁸ The CMA and the Regulators may exercise their discretion either not to investigate, or to close an investigation into, conduct that is otherwise prohibited under Article 101 or Article 102 of the TFEU on administrative priority grounds.

⁶⁹ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

⁷⁰ See CMA guideline [CMA CA98 Procedures Guidance (CMA8con)] for more details on settlement and (CA98 Rules) (both available at: (www.gov.uk/cma)) for further detail on the CMA's investigation and decision-making procedure in relation to any investigation conducted under Chapter I and/or Chapter II of the CA98.

functions,⁷¹ will do so based upon their own procedures. These procedures may, under the CA98 Rules applicable to the Regulators, include provisions for a decision-making role for CMA staff, CMA board members or CMA panel members.⁷² In imposing any penalties under the CA98, the Regulators must have regard to the CMA's penalties guidance (see competition law guideline 'OFT's guidance as to the appropriate amount of a penalty' (OFT423)).⁷³

Appeals

3.14 Most final decisions taken by the CMA or a Regulator under Article 101, Article 102 and/or under the CA98 are subject to appeal to the Competition Appeal Tribunal (the CAT) on both the substance of the decision and on any penalties imposed.⁷⁴

UKCN practice and procedure

3.15 The CMA and each Regulator are members of the UKCN.⁷⁵ Meetings of UKCN are chaired by a representative of the CMA. The UKCN is a new forum to promote competition and assist in deterring anti-competitive behaviour in regulated sectors⁷⁶ by:

- facilitating a consistent approach by the Regulators and the CMA in the exercise of their functions and powers under the CA98 and Part 4 of the EA02
- developing the practical working arrangements between the Regulators and the CMA
- providing a forum for discussion of matters of common interest and the sharing of information where appropriate and where legally permitted and required

⁷¹ Relevant sector-specific legislation may include, for example, legislation under which a Regulator is granted concurrent powers (see further the table at paragraph 2.1 above), and which outline a Regulator's duties in relation to the prevention of anticompetitive behaviour and/or promotion of competition (or similar duty) within their sector.

⁷² Similarly, where the CMA may use Regulators' staff, board or panel members (or equivalent) when making decisions in relation to a concurrent case.

⁷³ OFT guideline 'OFT's guidance as to the appropriate amount of a penalty', available at: (www.gov.uk/cma).

⁷⁴ See sections 46 and 47 of the CA98.

⁷⁵ The Regulators and the CMA are members of the UKCN. Other sectoral regulators with a competition remit may also be invited to join the UKCN.

⁷⁶ Note however that Monitor has a duty to exercise its functions with a view to preventing anti-competitive behaviour which is against the interests of people who use health care services in England, but not to promote competition.

- coordinating the provision of advice and information on the application of the Chapter I prohibition and the Chapter II prohibition and Article 101 and Article 102 of the TFEU to the public
- 3.16 A UKCN Statement of Intent document is currently being drafted and is expected to be set out in Annexe B of this guidance.
- 3.17 The UKCN deals with issues such as:
- **the development and application of competition policy in the regulated sectors** – the UKCN provides a forum for the Regulators and the CMA to share expertise, ideas and experience for the purpose of preventing anti-competitive behaviour and/or promoting competition in the regulated sectors for the benefit of consumers and users of regulated services, by ensuring a consistent and high-quality approach to competition policy and enforcement in those sectors
 - **general principles and information sharing** – subject to the obligations under the Modernisation Regulation and/or Part 9 of the EA02, information about cases in progress is shared. This includes matters of general policy and the way in which Articles 101 and 102 and the prohibitions in the CA98 are interpreted, applied and enforced. In each instance, this is with a view to ensuring consistency of decision-making. Information about CA98 complaints received and investigations in progress or contemplated is also shared to facilitate the performance by the CMA and the Regulators of their functions under Part 1 of the CA98, for example to ascertain whether there is concurrent jurisdiction.
- 3.18 The UKCN may form working groups as appropriate in order to consider specific issues of the application of competition law, and/or the promotion of competition and tackling anti-competitive practices in one or more regulated sector.
- 3.19 At all times, the members of the UKCN are mindful of the confidentiality provisions of the EA02 and their obligations to safeguard information provided by other NCAs which are contained in the Modernisation Regulation (see Chapter 5 below).

Case handling

General principles of case allocation

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

3.21 Under the concurrency arrangements, the general principle is that the CMA or the relevant Regulator will be responsible for a case depending on which of them is better or best placed to do so.⁷⁷ The factors considered in determining which of the CMA or Regulators deals with the matter will be assessed by the CMA and relevant Regulator as appropriate and include:

- the sectoral knowledge of a Regulator and the CMA
- whether the case affects more than one regulated sector and/or non-regulated sectors not subject to concurrent competition law⁷⁸
- previous contacts between the parties or complainants and a Regulator or the CMA
- experience in dealing with any of the undertakings which may be involved in the proceedings
- experience in dealing with any similar issues which may be involved in the proceedings
- whether the CMA considers it necessary to exercise Part 1 functions in relation to a case in order to develop United Kingdom competition policy or to provide greater deterrent and precedent effect for the benefit of competition and consumers, either within the relevant regulated sector, or more widely

⁷⁷ In contrast to the other concurrent sectors (where either the CMA or the relevant Regulator may take responsibility for a case depending on which one is better or best placed to do so), under the Concurrency Regulations Monitor will normally be responsible for any case that is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England, though Monitor may nevertheless agree with the CMA that the CMA shall act in a case.

⁷⁸ This may include, for example, a case affecting a regulated sector across the United Kingdom, including any nations which benefit from devolved powers.

- whether the case being allocated to the CMA and supported by the relevant Regulator (or vice versa) will provide the best combination of competition and sector-specific expertise

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

- 3.22 When a complaint has been made to the CMA or a Regulator and it gives rise to concurrent jurisdiction between two or more United Kingdom authorities, the complainant will be informed, as a matter of policy, which authority is handling the complaint. In line with the information sharing arrangements between the CMA and the Regulators, the CMA and the relevant Regulator may engage in discussions as they consider appropriate in relation to any particular complaint or matter.⁷⁹
- 3.23 It is expected that agreement will generally be reached as to which United Kingdom authority is better or best placed to deal with a particular complaint within two months of receipt of the complaint by the first authority to receive it. In circumstances where Regulation 4 of the Concurrency Regulations applies and agreement cannot be reached between the relevant authorities within a reasonable time (which may differ from the two-month period above), the CMA will decide which United Kingdom authority should deal with a case (Regulation 5) and it will have regard to the principles set out in paragraph 3.21 in doing so. The CMA may decide in some circumstances that it is to exercise Part 1 functions in relation to that case during the initial case allocation process. Where there is dispute, the CMA may not however decide that it or another Regulator other than Monitor is to exercise Part 1 functions in any case which is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.⁸⁰ The CMA will follow the process outlined in paragraphs 3.25 to 3.28 below in making such a decision.
- 3.24 Where either the CMA or a Regulator proposes to commence a competition investigation on its own initiative into a regulated sector, the CMA or the relevant Regulator will inform the other of that investigation and engage in discussions as they consider appropriate in respect of the investigation. As a general principle, the authority which is best placed to deal with the case will have jurisdiction over that case in accordance with the case allocation principles under Regulation 4 of the Concurrency Regulations.

⁷⁹ See further paragraphs 3.40 to 3.53 below for further information.

⁸⁰ Though the CMA and Monitor may nevertheless agree that the CMA is to act in such a case: see Regulation 4(2) of the Concurrency Regulations.

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

- 3.25 Pursuant to Regulation 8 of the Concurrency Regulations, where a Regulator has been allocated a case under Regulation 4, the CMA may nonetheless take over that case where it is satisfied that doing so would further the promotion of competition within any market or markets in the United Kingdom for the benefit of consumers, for example to develop competition policy or ensure effective competition enforcement. However, the CMA may not take over a case from Monitor under Regulation 8 where the case is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.
- 3.26 The CMA may make such a decision after consultation with the Regulator, the undertaking concerned and any other persons likely to be materially affected by the transfer at any stage before a Regulator has issued a Statement of Objections.⁸¹ After a Statement of Objections has been issued, the CMA cannot exercise Part 1 functions in relation to that case, unless the Regulator wishes to transfer the case to the CMA.⁸²
- 3.27 The CMA will consult with the relevant Regulator(s) in respect of its proposed decision to take over a case as soon as it reasonably can after reaching such a view and will give reasons for that proposed decision (Regulation 8 of the Concurrency Regulations). The CMA and the Regulator(s) will also discuss potential arrangements for further cooperation in relation to the case in the event that the CMA does take over that case. If, following such consultation, the CMA still proposes to take over the case, it is required under Regulation 8 to notify each of the following interested parties that it is taking over a case: the relevant Regulator(s), the undertaking(s) being investigated, and any other person likely to be materially affected by the transfer (which may include the complainant(s)). The CMA will work closely with the relevant Regulator(s) and interested parties in reaching a decision on whether it is to exercise Part 1 functions in relation to a case. In practice, the CMA expects that the circumstances in which it would take over a case under Regulation 8 are likely to be rare.
- 3.28 Any decision by the CMA to exercise Part 1 functions pursuant to Regulation 5 or Regulation 8 of the Concurrency Regulations is not irreversible. While

⁸¹ A Statement of Objections outlines the CMA's or Regulator's provisional conclusions in relation to the suspected infringement of competition law. The Statement of Objections is a formal procedural step in a case pursuant to Rule 5 of the CA98 Rules.

⁸² Regulation 8 of the Concurrency Regulations.

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

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

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

Procedure for transferring cases between authorities

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

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

Cooperative working between the CMA and the Regulators

- 3.32 The CMA and each Regulator may agree arrangements for the use of staff or members of the CMA or a Regulator by the CMA or another Regulator, allowing for staff to be shared between the CMA and Regulators, or between Regulators (not involving the CMA). This includes through the secondment of any officer of the CMA or a Regulator by the Regulator or the CMA or another Regulator for any duration agreed between the relevant authorities.
- 3.33 Such secondments may be agreed on a case by case basis for any duration and for the purposes agreed between the CMA and the Regulator and/or between Regulators. Under Regulation 10, secondments may be for the purpose of exercising any function under Part 1 of the CA98. For example, the CMA and a Regulator may agree to share staff in this way to provide case support, investigatory expertise, specialist guidance (such as may be provided by economically or legally qualified staff of either the CMA or a Regulator) or to make any decision in relation to a case. The CMA may also agree to the use by a Regulator of the CMA's procedural complaints process, including providing a Regulator with access to the Procedural Officer to determine any dispute or complaint that falls within the competence of the Procedural Officer under Rule 8 of the CA98 Rules.⁸³
- 3.34 In addition to the use of staff by a Regulator or the CMA, the CMA and each Regulator may agree arrangements for the provision of training, guidance, advice or any other form of support on a case by case basis, or more generally.
- 3.35 The full provisions for the use of staff and provision of support by the CMA and/or a Regulator are outlined in Memoranda of Understanding between the CMA and each Regulator.

Complaints

- 3.36 Complaints about breaches of competition law may be made either to the CMA and copied to the relevant Regulator, or directly to the relevant

⁸³ Rule 8 of the CA98 Rules sets out the CMA's procedural complaints process. Further guidance on the procedural complaints process and the role of the Procedural Officer is set out in Chapter 15 of the CMA guideline (CMA CA98 Procedures Guidance) (currently in draft and being consulted on) (CMA8con) for more details on settlement and CA98 Rules, both available at: (www.gov.uk/cma).

Regulator and copied to the CMA.⁸⁴ Complainants should only make one complaint in relation to any particular agreement or conduct, unless the complainant has access to substantial new factual evidence which it did not possess at the time of the original complaint. The principles relating to case handling will apply as outlined above. Complainants will be told as soon as is practicable which authority is dealing with the case. They will also be notified of any subsequent change.

3.37 The principles of case allocation set out in the Commission's 'Notice on Cooperation within the Network of Competition Authorities'⁸⁵ will also be taken into account where Article 101 and/or Article 102 may apply. Pursuant to those case allocation principles, a United Kingdom NCA can be considered well-placed to act in relation to a complaint where the following three cumulative criteria are met:

- the agreement or conduct has substantial, direct, actual or foreseeable effects on competition and is implemented within or originates from within the United Kingdom
- the United Kingdom NCA is capable of bringing effectively to an end the entire infringement
- the United Kingdom NCA can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement

3.38 It follows that the CMA or a Regulator will only deal with a complaint where there exists a material link between the infringement and the United Kingdom.⁸⁶ For further details on case allocation within the European Competition Network see the competition law guidance 'Modernisation' (OFT442).⁸⁷

3.39 Submissions that urgent interim measures are needed to prevent 'significant damage' as a result of a breach of Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition will be treated in the same way as complaints. That is, the CMA or a Regulator with jurisdiction over the case will require there to be a material link between the infringement and the United

⁸⁴ Complaints about breaches of sector legislation alone should be sent directly to the relevant Regulator.

⁸⁵ OJ C101, 27.04.2004, p.43.

⁸⁶ The CMA or a Regulator will determine whether there is a material link between the suspected infringement and the United Kingdom on a case by case basis, and will assess whether the suspected infringement may affect trade within the United Kingdom, and/or prevent, restrict or distort competition within the United Kingdom.

⁸⁷ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

Kingdom in order to consider the use of interim measures. The CMA or a Regulator will apply the legal framework to the facts of the case in determining whether the legal test for interim measures is met.⁸⁸ Further guidance on interim measures and the CMA and Regulators' approach to seeking interim measures is given in the competition law guidance (CMA CA98 Procedures Guidance (CMA8con)).⁸⁹

Information sharing

Purpose of sharing information

3.40 The timely and appropriate exchange of information between the Regulators and between each Regulator and the CMA for the purpose of exercising concurrent functions is essential for the efficient and effective functioning of the United Kingdom concurrency regime, for example to:

- establish transparent, cooperative and effective working practices between the CMA and the Regulators, or between the Regulators
- facilitate the effective allocation or reallocation of complaints or investigations pursuant to the Concurrency Regulations
- enable the CMA or a Regulator to provide effective support and guidance in the context of a case or more generally
- facilitate the effective sharing or secondment of any officer of the CMA or a Regulator by the Regulator or the CMA or another Regulator, including for the purpose of making decisions in relation to the exercise by that Regulator of Part 1 functions
- facilitate the efficient use by a Regulator of the CMA's Procedural Officer, where a Regulator wishes to make use of the CMA's procedural complaints process⁹⁰

⁸⁸ Section 35 of the CA98.

⁸⁹ CMA CA98 Procedures Guidance (currently in draft and being consulted on) (CMA8con), available at: (www.gov.uk/cma).

⁹⁰ Rule 8 of the CA98 Rules sets out the CMA's procedural complaints process. Further guidance on the procedural complaints process and the role of the Procedural Officer is set out in Chapter 15 of the CMA guideline (CMA CA98 Procedures Guidance) (currently in draft and being consulted on) (CMA8con) for more details on settlement and CA98 Rules, both available at: (www.gov.uk/cma).

Information sharing in practice

- 3.41 Regulation 9 requires that each competent person must put in place arrangements for sharing with other competent persons certain kinds of information in connection with concurrent cases under the CA98. A 'competent person' means each of the CMA or any of the Regulators.⁹¹
- 3.42 The full arrangements for the sharing of information are outlined in individual Memoranda of Understanding between the CMA and each of the Regulators. However, each Memorandum of Understanding provides for regular, timely and appropriate exchange of information between Regulators and the CMA connected with the exercise of concurrent competition functions, and that there will be adequate safeguards in place in relation to the information exchanged.⁹² Regulators and the CMA will maintain open lines of communication through the UKCN and by way of strong bilateral partnerships.
- 3.43 In particular, the Memoranda of Understanding specify that each competent person will provide the details of any information in their possession that Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition may have been infringed to any other competent person who has or may have concurrent jurisdiction in respect of the possible infringement. This information will be shared even if the competent person in possession of the information does not propose to exercise any prescribed functions in respect of the case.
- 3.44 Such notification will take place in a timely manner and, in all cases, within 10 working days of the competent person receiving any information causing them to have reasonable grounds to suspect that such an infringement may have taken place.⁹³ In addition, each competent person may share information in respect of any complaint or case prior to undertaking an assessment as to whether that competent person has reasonable grounds to suspect that a competition law infringement may have taken place.
- 3.45 Following any such notification, the competent person(s) in receipt of such information may request further information in relation to the case from the other competent person. In practice, most such information exchanges are

⁹¹ See Regulation 2 of the Concurrency Regulations and section 54(7) of the CA98.

⁹² Further detail on confidentiality and disclosure of information is set out in Chapter 5 of this guidance.

⁹³ The notification requirements will apply where the threshold for a CA98 investigation is met. Section 25 of the CA98 sets out the legal test for the CMA or a Regulator to commence an investigation of a suspected infringement of the prohibitions under Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU.

likely to occur between the Regulators and the CMA and vice versa, since the CMA shares concurrent jurisdiction with each Regulator. Nevertheless, there may also be exchanges between Regulators in appropriate circumstances, for example if a case raises issues in more than one regulated sector.

- 3.46 Neither the competent person providing the information, nor any competent person in receipt of that information is required to take any further action in respect of the possible infringement and the exchange of information between the CMA and a Regulator does not imply that a case or complaint will be prioritised or investigated. Furthermore, these information sharing arrangements are without prejudice to the procedure for determining which competent person will exercise prescribed functions in relation to a case discussed in paragraphs 3.22 to 3.28 above.
- 3.47 In addition to information on potential infringements, the CMA and Regulators will share certain information connected with the exercise of concurrent competition functions at appropriate stages in a case, in accordance with Regulation 9 of the Concurrency Regulations. The details of these arrangements are contained in each Memorandum of Understanding.
- 3.48 However, in summary, where the CMA or a Regulator has opened an investigation into a suspected infringement pursuant to section 25 of the CA98⁹⁴ and proposes to take any of the following steps in relation to that investigation, it will share information with each other competent person who would, but for the allocation of the case under the Concurrency Regulation to another competent person, have concurrent jurisdiction in the case⁹⁵:
- **Statement of Objections** – where the CMA or a Regulator proposes to issue a Statement of Objections to a party in relation to a suspected infringement of Article 101, Article 102, the Chapter I prohibition or the Chapter II prohibition, it will share a draft of its proposed Statement of Objections with each other competent person who had concurrent jurisdiction in the case, prior to the case being allocated under the Regulations. Such information will be shared no later than 15 working days prior to the date on which the investigating competent person

⁹⁴ Section 25 of the CA98 sets out the legal test for the CMA or a Regulator to commence an investigation of a suspected infringement of the prohibitions under Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU. The information sharing arrangements do not apply to any complaint or preliminary investigation in which the investigating competent person concluded that there were no reasonable grounds for suspecting that there has been an infringement of the prohibitions under Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU in accordance with section 25 of the CA98.

⁹⁵ See paragraphs 3.22 to 3.28 for a discussion of the case allocation process under the Regulations.

proposes to issue the Statement of Objections to a party. The CMA and any other competent person in receipt of such information may, but is not required to, provide comments or guidance to the investigating competent person in response to the information shared with it. Any such comments will be made no later than 10 working days following receipt of the proposed Statement of Objections. Where the CMA or any other competent person provides comments, the investigating competent person will consider those comments prior to finalising any Statement of Objections. The investigating competent person will not issue any Statement of Objections for a period of 15 working days after sharing information with each other competent person in relation to that draft Statement of Objections. Irrespective of the level of engagement between the CMA and a Regulator in any case, the decision to issue a Statement of Objections will be taken by the competent person with jurisdiction over the case⁹⁶

- **Notice or decision** – similarly, where the CMA or a Regulator proposes to issue any preliminary or final commitment decision or notice, infringement decision or notice, no grounds for action decision or notice, or decision or notice not to proceed with a case (including in relation to any case closure decision or notice based on administrative priority grounds) (Proposed Decision or Notice),⁹⁷ it will share a draft of its proposed decision or notice with each other competent person who would, but for the allocation of the case under the Concurrency Regulation to another competent person, have concurrent jurisdiction in the case.⁹⁸ Such information will be shared no later than 15 working days prior to the date on which the investigating competent person proposes to issue any Proposed Decision or Notice. The CMA and any other competent person in receipt of such information may, but is not required to, provide comments or guidance to the investigating competent person in response to the information shared with it. Any such comments will be made no later than 10 working days following receipt of the Proposed Decision or Notice. Where the CMA or any other competent person provides comments, the investigating competent person will consider those comments prior to finalising any Proposed Decision or Notice. The investigating competent person will not issue the proposed decision or

⁹⁶ Subject to the CMA exercising its discretion to take over a case under Regulation 8 of the Concurrency Regulations. For more information see paragraphs 3.25 to 3.28 above.

⁹⁷ See Regulations 9(1)(b) to 9(1)(j) of the Concurrency Regulations for a description of the range of notices and decisions to which the information sharing requirements relate.

⁹⁸ See paragraphs 3.22 to 3.28 for a discussion of the case allocation process under the Regulations.

notice for a period of 15 working days after sharing information with each other competent person in relation to that draft Proposed Decision or Notice

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

- information in relation to any CA98 complaint received by the CMA or a Regulator and any investigation undertaken at the CMA or a Regulator's own initiative, or in response to a complaint
- details of any notices issued pursuant to sections 26, 26A and 27 of the CA98, and the use of powers to enter premises pursuant to sections 28 and 28A of the CA98
- before commencing an investigation into any suspected infringement of Article 101, Article 102, the Chapter I prohibition or the Chapter II prohibition, notification of a proposed decision to commence an investigation, including the information on which the proposed decision to open an investigation was made⁹⁹
- before issuing a case opening notice pursuant to section 25A of the CA98
- any application or request received by the CMA or a Regulator to seek interim measures to prevent 'significant damage'¹⁰⁰ in relation to any case¹⁰¹
- a regular summary of the progress and substance of any investigation into any suspected infringement of Article 101, Article 102, the Chapter I prohibition or the Chapter II prohibition conducted by the CMA or a Regulator. Subject to confidentiality considerations, this may include providing information of the CMA's or the Regulator's working assumptions and general approach to the investigation, beginning in the month immediately after the month in which the CMA or a Regulator commenced an investigation

⁹⁹ See further Regulation 3 of the Concurrency Regulations.

¹⁰⁰ Section 35(1) of the CA98. Further details about these powers are given in the competition law guidance CMA guideline (CMA CA98 Procedures Guidance) (currently in draft and being consulted on) (CMA8con), available at: (www.gov.uk/cma).

¹⁰¹ See Regulation 9(1)(d) of the Concurrency Regulations.

- 3.50 The CMA or a Regulator may request information that they may reasonably require from any other competent person relating to an individual investigation at any stage during the investigation to facilitate the performance of its functions under the CA98. Such information is likely to be similar to that set out in paragraph 3.49 above. The competent person to whom the request is made will respond appropriately to such a request for further information.
- 3.51 The exchange of information between the CMA and the Regulators does not imply that any infringement of Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition has taken place. Similarly, such information sharing does not impose an obligation on each competent person to consider a matter in more detail than it would otherwise have done.
- 3.52 The exchange of information between the CMA and the Regulators connected with the exercise of concurrent competition functions is governed by Part 9 of the EA02, which ensures that adequate safeguards are in place to prevent the unlawful disclosure of information by the CMA or a Regulator. Further details on Part 9 of the EA02 are set out in paragraphs 5.5 to 5.7 below.
- 3.53 In addition to these obligations, the exchange of information between the CMA and the Regulators is subject to procedural safeguards, including the use of:
- electronic facilities for the secure storage of information, including a secured shared-electronic storage database
 - confidentiality obligations that restrict the distribution and use of the information received

Annual concurrency report

- 3.54 The CMA is required to prepare an annual report containing an assessment of how the concurrency arrangements have operated during the prior year.¹⁰² This report must include information about the activities of the CMA and the Regulators in relation to the exercise of all concurrent functions (that is, under both Part 1 of the CA98 and Part 4 of the EA02).¹⁰³
- 3.55 The report evaluates the operation of competition concurrency and key competition issues in concurrent sectors in the United Kingdom. It is intended to facilitate continuing improvement to the concurrency regime, the promotion

¹⁰² See paragraph 16 of Schedule 4 of the ERRA13.

¹⁰³ Paragraph 16(3) of Schedule 4 of the ERRA13 prescribes the information that must be included in the annual report.

of competition in the regulated sectors (or the preventing of anti-competitive behaviour in health-care services in England, in the case of Monitor), and to strengthen transparency and accountability within the Regulators and CMA.

- 3.56 In each report, the CMA will outline the landscape of the CMA's and the Regulators' duties, powers and general market conditions in each concurrent sector. The report will outline the actions taken by the Regulators and CMA during the reporting period to promote competition in the concurrent sectors (or, again, the preventing of anti-competitive behaviour in health-care services in England, in the case of Monitor¹⁰⁴). The report will set out and assess the relevant outcomes in relation to promotion of competition and/or the preventing of anti-competitive behaviour and application of competition law to the concurrent sectors achieved during the reporting period.
- 3.57 The CMA may include the following type of information in the report in respect of the operation of concurrency under the CA98. This information will be aggregated and presented, as appropriate, in relation to each Regulator and the CMA:
- the number (and description) of decisions in which the use of competition powers under Part 1 of the CA98 was considered by a Regulator to be more appropriate than regulatory powers
 - the number (and description) of decisions in which the use of regulatory powers was considered to be more appropriate than competition powers under Part 1 of the CA98 (in cases where competition powers could have been exercised)
 - the number of formal investigations under the CA98 commenced in each concurrent sector
 - whether the CMA and/or a Regulator issued any notices pursuant to sections 26, 26A and 27 of the CA98, or used powers to enter premises pursuant to sections 28 and 28A of the CA98 in those sectors
 - whether the CMA and/or a Regulator accepted any commitments in relation to a case pursuant to section 31A of the CA98

¹⁰⁴ Monitor has a duty to exercise its functions with a view to preventing anti-competitive behaviour which is against the interests of people who use health care services in England, but not to promote competition.

- the number of notifications between the Regulators and the CMA (and vice versa) that an infringement of any or all of the Chapter I and/or Chapter II prohibitions or Article 101 and Article 102 TFEU may have taken place
- the number of statements of objection/statements of competition concerns issued in concurrent sectors by the CMA and the Regulators
- the number (and description) of final decisions notified by the CMA and the Regulators
- summaries of infringement decisions pursuant to Part 1 of the CA98 made in concurrent sectors, including a description of any financial penalty and/or other remedies imposed
- whether there have been secondments and/or joint projects between the CMA and the concurrent Regulators (or between the Regulators) and if so, how many people were involved, for what purpose and for how long
- whether any appeals have been brought to the CAT in respect of decisions under Part 1 of the CA98 in any of the concurrent sectors and the outcomes of any such appeals

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

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

- whether the CMA and/or any Regulator has exercised any powers to issue a market study notice pursuant to section 130A of the EA02 in any of the concurrent sectors
- whether the CMA and/or any Regulator has exercised any powers to make a market investigation reference pursuant to section 131 of the EA02 in any of the concurrent sectors

- whether the CMA and/or any Regulator has accepted undertakings in lieu of a market investigation reference pursuant to section 154 of the EA02 in any of the concurrent sectors
 - whether the CMA and/or any Regulator has, following an issue of a market study notice pursuant to section 130A of the EA02 in any of the concurrent sectors, decided not to make a market investigation reference in any of the concurrent sectors at the conclusion of that market study
- 3.60 The annual report will generally not refer to any Regulatory Case or Regulatory Merger made to, or determined by, the CMA during the relevant reporting period.
- 3.61 The CMA will cooperate and consult with the Regulators in preparing the annual report. The CMA will prepare a draft report that it will send to the Regulators asking them to provide any comments or suggestions on the content or conclusions of the annual report. The CMA will consider any comments or suggestions it receives from a Regulator and may seek further clarification on those comments or suggestions as appropriate. The CMA will prepare a final version of the annual report for publication that takes account of its consultation with the Regulators as appropriate. The annual report will be made available on the CMA website.

4 REGULATORS' OTHER POWERS AND DUTIES

Statutory sectoral duties

- 4.1 The duties of the Regulators under the individual statutes listed in the table in Chapter 2 above are set out in those statutes. In general, the Regulators must ensure that there is sufficient provision of the regulated service throughout the United Kingdom, they must promote or facilitate competition,¹⁰⁵ and they must protect the interests of customers, consumers or users. The Regulators are not generally required to have regard to those sectoral duties when exercising Part 1 functions¹⁰⁶ under the CA98. However, they may have regard to matters covered by their sectoral duties if they are matters to which the CMA could have regard in exercising its powers under the CA98.

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

- 4.2 In some circumstances, a particular agreement or practice may fall within the scope of a Regulator's sector specific legislation as well as within the Chapter I prohibition, the Chapter II prohibition, Article 101 and/or Article 102. Regulated companies may, for example, have licences which prevent them from showing undue preference to, or undue discrimination against, any class of persons. Some types of price discrimination, for example, may also infringe the Chapter II prohibition and/or Article 102. Further details are given in the competition law guidance 'Abuse of a dominant position' (OFT402).¹⁰⁷
- 4.3 In some circumstances, sector-specific legislation requires a Regulator to enforce a licence condition or a statutory provision; sometimes, however, it may be more effective or provide greater deterrent and precedent effect for the benefit of competition and consumers to use the powers available under the CA98. Before making any final or provisional enforcement order, a Regulator must consider whether, in a particular case, it is more appropriate to proceed under the CA98 (and take action in relation to an infringement of the Chapter I prohibition, the Chapter II prohibition, Article 101 and/or Article 102). Where a Regulator considers that it would be more appropriate to proceed under the CA98, they cannot then proceed with licence enforcement

¹⁰⁵ Note however that Monitor has a duty to exercise its functions with a view to preventing anti-competitive behaviour which is against the interests of people who use health care services in England, but not to promote competition.

¹⁰⁶ See paragraph 2.5 above for an explanation of this term.

¹⁰⁷ OFT guideline 'Abuse of a dominant position' (OFT402), available at: (www.gov.uk/cma).

under sector-specific regulation; they must instead use their legal powers under the CA98.¹⁰⁸

- 4.4 Each Regulator will determine whether it may be more appropriate to proceed under the CA98 on a case-by-case basis. In order to ensure the efficient and effective allocation of resources, a Regulator will consider which potential investigation and enforcement route would be most appropriate in a particular case when it commences an investigation in its sector. A Regulator will also keep under review the question of which route of investigation and enforcement is the most appropriate during the course of any investigation.
- 4.5 Where a Regulator has commenced an investigation or enforcement action pursuant to sector-specific powers but concludes during the course of that investigation or enforcement action that it would be more appropriate to proceed under the CA98 in respect of the relevant facts and evidence, they may begin proceedings under the CA98. In these circumstances the Regulators and the CMA will follow the case handling procedures for determining jurisdiction in a concurrent case as described in paragraphs 3.20 to 3.39 above. As a general principle, the authority which is best placed to deal with the case will have jurisdiction over that case in accordance with the case allocation principles under Regulation 4 of the Concurrency Regulations.
- 4.6 Where a Regulator proceeds under the CA98, they will be required to bear in mind their obligations as NCAs under the Modernisation Regulation, in particular under Article 3(1) in cases where trade between Member States may be affected (see paragraph 4.8 below) and those as Regulators under national law. The Regulators' approach to this process will be set out in their sector-specific guidance on the application of competition law to their particular sectors. If it appears during an investigation by a Regulator using its sector-specific powers that action under the CA98 is more appropriate (or, in the reverse case, under its sector-specific powers), the parties will be informed.
- 4.7 A decision by a Regulator to make any enforcement or penalty order under that Regulator's relevant sector powers does not prohibit the CMA from

¹⁰⁸ This duty will not be applied to Monitor at this time. However, the Secretary of State may commence this duty at a future date upon Government agreement.

undertaking an investigation under the CA98 in relation to the same or similar facts.¹⁰⁹

Relationship between EU competition law and sector specific legislation

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

¹⁰⁹ In the event that any such CMA investigation resulted in directions, interim measures and/or financial penalties being imposed on the relevant undertaking, any such enforcement action would be subject to the statutory requirements under Chapter III of Part 1 of the CA98.

different from that pursued by Article 101 and Article 102 of the Treaty (the protection of competition on the market). The interaction of Article 3 and national competition law is dealt with in more detail in the competition law guidance 'Modernisation' (OFT442).¹¹⁰

Exceptions in the CA98 for services of 'general economic interest'

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

- where an undertaking has either been entrusted with a service of general economic interest, or has the character of a revenue-producing monopoly (that is, an undertaking that has been granted monopoly powers by the State to raise money for the State)¹¹¹
- insofar as the application of the prohibitions in the CA98 would obstruct the performance of the particular task assigned to the undertaking

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

4.15 The fact that the CA98 may not apply to certain activities of a regulated business in these circumstances does not, however, mean that the Regulators cannot apply their sectoral powers to those activities. Indeed it is precisely in these situations that the Regulators' ability to ensure services are available to consumers throughout the United Kingdom on reasonable terms through use of their sectoral powers is particularly relevant. Further information on the exclusions under the CA98 and Article 106(2) of the TFEU can be found in the competition law guidance 'Services of general economic interest exclusion' (OFT421)¹¹²

Regulators and the European Competition Network

4.16 The CMA and the Regulators are designated as NCAs with the responsibility to apply Articles 101 and 102 in accordance with the provisions in the Modernisation Regulation in relation to their respective sectors. They are obliged to apply EU competition rules in close cooperation with the Commission and other NCAs. To this end, the Commission and designated

¹¹⁰ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

¹¹¹ For further details see competition law guidance 'Services of general economic interest exclusion' (OFT 421), available at: (www.gov.uk/cma).

¹¹² OFT guideline 'Services of general economic interest exclusion' (OFT 421), available at: (www.gov.uk/cma).

competition authorities of the Member States have formed the European Competition Network (the ECN) which facilitates close cooperation in the enforcement of Articles 101 and 102 in the EU. Further details on the ways in which the Regulators can participate in the work of the ECN can be found in the Commission's 'Notice on Cooperation within the Network of Competition Authorities'¹¹³ and the competition law guidance 'Modernisation' (OFT442).¹¹⁴

Market Studies and Market investigation references

- 4.17 The EA02 makes provision for a system of market investigations by the CMA. Under the EA02, as amended by the [Statutory Instrument] made under the ERR13, the CMA and the Regulators may undertake market studies, and may make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the United Kingdom. In the case of the Regulators, market investigation references may only be made in relation to their respective sectors. Regulators may make single market or cross-market references within their respective sectors where the test for such a reference is met.¹¹⁵ The purpose of these investigations is to examine the market(s) and (where required) implement appropriate remedies where the CMA determines that the structure of the market(s) or the conduct of the suppliers or customers is harming competition.
- 4.18 When making a reference, the CMA or the Regulator concerned must have reasonable grounds for suspecting that any feature or combination of features of a market or markets in the United Kingdom prevents, restricts or distorts competition in relation to the supply or acquisition of any goods or services in the United Kingdom (or a part of the United Kingdom).
- 4.19 Before initiating a market study or making a market investigation reference to the Chair of the CMA for the constitution of a CMA group, the CMA or the Regulator concerned will first consider whether a matter warrants investigation as an infringement of Article 101, Article 102, the Chapter I prohibition or the Chapter II prohibition.¹¹⁶ Regulators may, in addition, wish to exercise their

¹¹³ OJ C101, 27.04.2004, p.43.

¹¹⁴ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

¹¹⁵ For further information on single market and cross-market references, including the threshold for making a market investigation reference under the EA02, see further CMA guideline (Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach) (currently in draft (CMA3)), available at: (www.gov.uk/cma).

¹¹⁶ This duty will not be applied to Monitor at this time, however the Secretary of State may commence this duty at a future date upon Government agreement.

discretion to consider whether it would be more appropriate to deal with an issue under any sector specific legislation or rules (subject to concluding that it would be more appropriate to deal within an issue under the CA98, in which case the Regulator must proceed under the CA98).

4.20 Where the CMA or a Regulator identifies any conduct and/or receives information that an infringement of the CA98 or Article 101 or Article 102 of the TFEU may have taken place and believes it has sufficient grounds to conduct an investigation under the CA98, the CMA or the Regulator will proceed under the CA98 in the first instance. Any decision to conduct an investigation under the CA98 will not prevent the CMA or the Regulator from reviewing the same or similar market(s), conduct or arrangements pursuant to its market studies and market investigations powers under Part 4 of the EA02 if such a review is appropriate and reasonable. Any such action is only likely to occur in unusual circumstances, for example where:

- proceeding under the CA98 is not likely to address adequately the competition concerns identified
- the CMA or relevant Regulator considers that the legal threshold for such an investigation is met
- such an investigation would be proportionate and appropriate in the circumstances¹¹⁷

4.21 Further details concerning these powers under the EA02 can be found in the CMA guideline Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (currently in draft (CMA3))¹¹⁸ and in the competition law guidance 'Modernisation' (OFT442).¹¹⁹

Concurrent super-complaints

4.22 The EA02 provides for a super-complaint to be made by a designated consumer body that any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers.¹²⁰

¹¹⁷ Please see footnote 83 above.

¹¹⁸ Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (currently in draft (CMA3)), available at: (www.gov.uk/cma).

¹¹⁹ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

¹²⁰ Section 11 of the EA02.

4.23 The Regulators with concurrent competition powers have a duty to respond to super-complaints made to them under the EA02 if the complaint concerns a regulated sector in relation to which that Regulator has functions (as set out in the table in Chapter 2).¹²¹ The coordination of super-complaint duties will be based on policies agreed and applied through the UKCN. Information on the super-complaint process can be found in the guidance 'Super-complaints: guidance for designated consumer bodies' (OFT514).¹²²

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¹²¹ The Enterprise Act 2002 (Super-complaints to Regulators) Order 2003, SI 2003/1368.

¹²² OFT guideline 'Super-complaints: guidance for designated consumer bodies' (OFT514), available at: (www.gov.uk/cma).

5 CONFIDENTIALITY AND DISCLOSURE OF INFORMATION

- 5.1 In the course of any investigation under the CA98, the CMA or the Regulator will indicate the purpose for which any requested document or information is required, and under which powers they are sought. Further detail on the information seeking powers is given in the competition law guidance 'Powers of investigation' (OFT404).¹²³

Disclosure under the Modernisation Regulation

- 5.2 The power of all members of the ECN to exchange and use information which has been collected for the purpose of applying Article 101 or 102 is important to the functioning of the ECN. Regulators will fulfil their role as NCAs in relation to their sectors, as described in paragraph 4.16 above.
- 5.3 Information on the exchange and use of confidential information within the Network can be found in the Commission's 'Notice on Cooperation within the Network of Competition Authorities'¹²⁴. Information on confidentiality and the disclosure of information can be found in the competition law guidance 'Modernisation' (OFT442).¹²⁵
- 5.4 The exchange between the CMA and the Regulators of information obtained by them under Part I of the CA98 is governed by Part 9 of the EA02 rather than the Modernisation Regulation. Further details on Part 9 of the EA02 are set out in paragraphs 5.5 to 5.7 below.

Confidentiality and disclosure under national law

- 5.5 The Concurrency Rules provide for broad information sharing between the CMA and a Regulator in respect of investigations under the CA98.¹²⁶ In all cases, the CMA and the Regulators will treat any information so disclosed in accordance with their legal duties.
- 5.6 The EA02 sets out the requirements for safeguarding certain information and lays down the requirements that have to be met before public authorities, including the CMA and the Regulators, may disclose such information. These are set out in Part 9 of the EA02 which applies to information which has been gathered for the purpose of the CMA's and the Regulators' EA02 functions,

¹²³ OFT guideline 'Powers of investigation' (OFT404), available at: (www.gov.uk/cma).

¹²⁴ OJ C101, 27.04.04, p. 43.

¹²⁵ OFT guideline 'Modernisation' (OFT442), available at: (www.gov.uk/cma).

¹²⁶ For further information on the information sharing provisions, see paragraphs 3.40 to 3.53 above.

and for the purposes of the CMA's and the Regulators' competition and consumer functions under specified legislation (including the CA98). Further information on confidentiality and the disclosure of information can be found in the CMA guideline (Transparency and disclosure: Statement of the CMA's policy and approach) (currently in draft (CMA6))¹²⁷, as well as the CMA guideline 'CMA CA98 Procedures Guidance' (CMA8con).¹²⁸

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

¹²⁷ CMA guideline (Transparency and disclosure: Statement of the CMA's policy and approach) (currently in draft (CMA6), available at: (www.gov.uk/cma).

¹²⁸ (CMA CA98 Procedures Guidance (currently in draft and being consulted on) ((CMA8con)), available at: (www.gov.uk/cma).

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A THE COMPETITION ACT 1998 (CONCURRENCY) REGULATIONS 2014

(Concurrency Regulations subject to a separate consultation by BIS – see www.gov.uk/government/publications?publication_filter_option=consultations)

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

- B.1** (UKCN Statement of Intent document is expected to be included when finalised)

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