

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

Summary of responses to the consultation

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1 Introduction and summary

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition and authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT) are transferred to the CMA and those bodies abolished. The CMA's primary duty is to seek 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. These include, in particular, the ability to:
- investigate individual businesses to determine whether they have breached UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position under the Competition Act 1998 (CA98), and
 - conduct studies and investigations under the Enterprise Act 2002 (EA02) into particular markets where there are suspected competition and/or consumer problems, or into practices that impact more than one market, and to require market participants to take steps to address these problems.
- 1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. *Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10con) (the Draft Guidance)* was one of a number of draft guidance documents published for public consultation on 17 September 2013.¹ The CMA's consultation (the Consultation) on these documents closed on 11 November 2013.
- 1.4 The Draft Guidance forms part of the advice and information published under section 52 of the CA98. It is intended to provide general information and advice to companies and their advisers on the procedures and approach of

¹ These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2.

the CMA and the Regulators (as defined in the Draft Guidance)² in applying competition law in the regulated sectors.

Key changes

- 1.5 The ERRA 13 introduced a number of changes including the power to apply and enforce competition law by the CMA and the Regulators. Sectoral regulators have concurrent powers with the CMA to enforce competition law within their industries.
- 1.6 The Draft Guidance 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. It was decided that the existing text of the OFT's previous detailed guidance on the application of competition law in the concurrent sectors (OFT Concurrency Guidance)³ would be amended to reflect the changes being introduced by the ERRA13 and the additional improvements to policies and procedures which have been made by the OFT and Regulators since the OFT Concurrency Guidance was published. The final published version of *Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10)* (the Guidance) will supersede and replace the OFT Concurrency Guidance.

Purpose of this document

- 1.7 The consultation document accompanying the Draft Guidance (Consultation Document) sets out a series of specific questions on which views of respondents were sought. This document sets out a summary of the responses received to each of those questions, and the CMA's views on those responses.

Responses to the Consultation

- 1.8 15 written responses to the Consultation were received.⁴ The Draft Guidance was also discussed at a launch event for the CMA draft guidance on 1

² See paragraph 2.1 of the Draft Guidance; i.e. the CAA, Monitor, NIAUR, Ofcom, Ofgem, Ofwat, ORR (the Regulator or Regulators (where referred to collectively)).

³ *Concurrent Application to Regulated Industries (OFT405)* available at: www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft405.pdf.

⁴ Annexe A provides a full list of respondents.

October 2013 attended by members of the legal, academic and business communities.

Consultation questions

1.9 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised and the CMA's views on them set out.

Question	Chapter
Q1. 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.	2
Q2. 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.	3
Q3. 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.	4
Q4. 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.	5
Q5. Do you consider that the CMA and 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.	5
Q6. 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.	6
Q7. Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance?	6

	Please give reasons for your view.	
Q8.	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.	7

1.10 This document should be read in conjunction with the Consultation Document and cross refers to relevant sections of the Consultation Document throughout. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on www.gov.uk/cma. Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures on applying competition law in the regulated sectors. Parties seeking guidance on the CMA's approach to the concurrent application of competition law in regulated sectors should refer to the final published version of *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10) itself, also available on www.gov.uk/cma.

2 Exercise competition powers in favour of sectoral powers

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.

Summary of responses

2.1 While there were a number of comments received and requests for clarification made in relation to the proposed approach, respondents expressed general support.

‘More appropriate’ test

2.2 The majority of respondents requested further guidance on the application of the ‘more appropriate’ test. In particular, respondents suggested identifying factors the Regulators would consider when deciding whether their CA98 or sector specific powers would be more appropriate. It was also submitted that, to assist Regulators with their decision-making, practical examples should be included in addition to an indication of the level of detail required by a Regulator to explain the rationale for its decision to apply either CA98 or sector specific powers.

2.3 Conversely, one respondent highlighted a number of practical difficulties associated with imposing specific criteria/factors for the Regulators to consider and suggested instead that the Guidance encourage the Regulators to make decisions in a consistent, transparent and predictable manner including through:

- explicitly encouraging consultation with the CMA during the decision making process
- requiring the CMA and the Regulators to agree in bilateral memoranda of understanding (MOUs) the relevant factors that each specific Regulator will take into account when making its decision.

2.4 A number of respondents also requested further information regarding the content and anticipated timing of entry into force of the individual MOUs intended to be concluded between the CMA and individual Regulators.

Timing of the decision

- 2.5 A number of respondents suggested that there should be greater emphasis in the Guidance on a Regulator making its decision as to which powers to apply at the earliest possible opportunity. The respondents felt that this would ensure the parties are informed in a timely manner of the possibility of investigation under the CA98.

Presumption in favour of the use of CA98 powers

- 2.6 One of the respondents noted a perceived bias for Regulators to use their sector specific powers over their CA98 powers. Similarly, a number of respondents felt that if the CMA's intention is for Regulators' CA98 powers to take precedence over sector specific powers in enforcing competition, the Guidance should make it clear why those powers are favoured.

Consultation and transparency

- 2.7 Certain respondents felt that when weighing up the appropriateness of exercising CA98 or sector specific powers, the Regulators should do so in consultation with the CMA. Some went further to suggest that once a decision is made, there should be an express requirement in the Guidance for the relevant parties to be informed of the Regulator's decision.

Risk of double jeopardy

- 2.8 Three respondents felt further clarification was necessary to prevent the risk of 'double jeopardy', that is, the situation where a Regulator has pursued an action using its sector specific powers and a different Regulator or the CMA then pursues the same action under CA98.

The CMA's views

- 2.9 The CMA notes that numerous respondents requested further detail on, or clarification of, a number of issues, and, in particular, inclusion of criteria for the Regulators to determine whether CA98 or sectoral power are more appropriate.
- 2.10 The CMA considers that it is not possible at this stage to provide extensive detail on the factors relevant to the Regulators' determination of which powers are 'more appropriate', or to outline practical examples. It may be that, in the light of experience accumulated over the coming months or years in applying this provision, it will be possible to develop more general principles that could serve as useful guidance in future cases, perhaps

through the forum of the UK Competition Network⁵ (UKCN) and perhaps also to make such principles public whether in the annual concurrency report or otherwise.⁶

- 2.11 With respect to the MOUs to be concluded between the CMA and the Regulators, each of these will be published on the CMA webpage as they are concluded. The Guidance sets out key elements of what the CMA intends to be included in each of these MOUs.

⁵ The UKCN brings together the CMA with the Civil Aviation Authority, Financial Conduct Authority, Ofcom, Ofgem, Ofwat, Office of Rail Regulation and the Utility Regulator for Northern Ireland. These sector regulators all have a duty to promote competition in the interests of consumers. The healthcare regulator, Monitor, which has a different statutory duty, not to promote competition but to prevent anti-competitive behaviour, will attend the Network with observer status.

⁶ Moreover, it may be that there are parallel CA98 and regulatory cases between the CMA and the relevant regulator. However, this is likely to be rare and will depend on the CMA's priorities, among other things.

3 Draft revised guidance consultation –proposed approach to case allocation

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.

Summary of responses

- 3.1 Six respondents agreed that the proposed approach in the Draft Guidance to case allocation is clear and appropriate.
- 3.2 The majority of respondents, however, sought further clarification in relation to the principles the CMA will consider when allocating a case; and inclusion of additional criteria such as:
- whether the activity of the regulated business under investigation is not a regulated activity or is an activity tangential to the regulated business
 - whether there is need for the relevant Regulator to be more involved in competition law to develop a competition culture in the sector concerned
 - administrative priorities and current case loads
 - views of interested and affected parties.

Use of Part 1 and prescribed functions

- 3.3 Three respondents sought clarification regarding the exercise of Part 1 and prescribed functions.⁷ In particular, certain respondents felt that the Guidance should expressly state that the CMA’s ability to exercise its Part 1 functions during the case allocation phase is limited to only those Part 1 functions that are not prescribed functions.
- 3.4 Furthermore, if the CMA does opt to use its Part 1 functions during the case allocation phase, one respondent suggested that if the case is subsequently

⁷ ‘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 Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations)). ‘Prescribed functions’ arise from the CA98 and are defined in Regulation 2 of the Concurrency Regulations.

allocated to a Regulator, there should be measures in place to ensure a smooth transition to the relevant Regulator.

Timeframes for case allocation

3.5 The majority of respondents who answered this question indicated that the two month time period within which a case allocation decision is to be made is too long.

Regulation 8 powers⁸

3.6 Generally, respondents felt that, although the Draft Guidance states that the circumstances in which the CMA will exercise its power to take over a case are rare, there is insufficient explanation as to the circumstances in which the exercise of this power will be appropriate.

3.7 Accordingly, several respondents suggested that the Guidance be amended to include further information on this.

3.8 One respondent suggested that the factors set out in chapter 3 of the Government's '*Consultation on Draft Secondary Legislation – Part 2*' should be included in the Guidance,⁹ while others suggested that the following factors be included:

- the potential harm to competition caused by the delay
- the balance of convenience
- additional expense and delay that may be caused and whether it is proportionate
- the written representations of the appointed Regulator.

⁸ 'Regulation 8 powers' refer to the CMA's power to take over a case that has been allocated to a Regulator under Regulation 8 of the Concurrency Regulations.

⁹ Paragraph 3.4 of the Government's *Consultation on Draft Secondary Legislation – Part 2* states: '...The power will be exercisable where (consistent with the EU Commission's powers to take cases from National Competition Authorities) for example the CMA considers itself best placed to: make a decision that sets the appropriate precedent, in particular when similar issues arise across different sectors or parts of the United Kingdom; or enforce the CA98 prohibitions more effectively, for example because the regulator lacks the necessary resources or is unable to take a decision in a timely manner.'

- 3.9 Similarly, one respondent sought guidance on the circumstances in which the Secretary of State would exercise his power under section 52 of the ERA to remove a Regulator's concurrent jurisdiction entirely.

Exceptional circumstances

- 3.10 Given the potential cost and delays associated with the CMA exercising its power to take over a case from a Regulator, a number of respondents have commented that more emphasis should be placed on the CMA only exercising its power in '*exceptional circumstances*'. Further, the ability of the CMA to exercise its power should be proportionate to the stage that the investigation has reached. Thus, the further through the investigation, the higher the standard of '*exceptional circumstances*' should be to justify the exercise of this power.
- 3.11 One respondent also asked for further guidance on what will constitute '*exceptional circumstances*'.

The CMA's views

- 3.12 The CMA notes the suggestions made by respondents. Once it is operational, the CMA may consider whether, as part of its wider review of its portfolio of guidance and based on any relevant developments in practice, practical experience or case law, providing further examples regarding case allocation criteria would be appropriate.
- 3.13 The CMA notes the concerns raised by respondents regarding the timeframe within which an agreement will be reached as to which United Kingdom authority is better or best placed to deal with a particular complaint. In light of these, the CMA wishes to clarify (and has now noted this expressly in the Guidance) that the two month period is intended generally to operate as a longstop by which agreement must ordinarily be reached.
- 3.14 Similarly, as regards the comments received concerning the use of Regulation 8 powers and the requests for further clarification, the CMA has amended the Guidance to include examples of the use of the case removal power that have been envisaged by the Government in its consultation on the draft Concurrency Regulations.

4 Draft revised guidance consultation –approach to secondments and cooperative working

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.

Summary of responses

- 4.1 The majority of respondents support the proposed approach to secondments and cooperative working.

Procedural Officer

- 4.2 Additional clarification was sought in respect of the circumstances in which the Regulators will have access to the CMA’s Procedural Officer.
- 4.3 One respondent also queried whether complainants will be permitted to request access to the Procedural Officer.

Decision making powers and senior staff

- 4.4 One respondent sought further guidance on how the secondment process will affect decision making powers. In particular, the respondent felt that secondments should be reserved for case handlers or subject specialists rather than senior decision makers so as to maintain clarity as to which body is ultimately the decision maker on the case.
- 4.5 Conversely, one respondent suggested that in order to maximise the benefits of the secondment regime, some secondees should be at a senior level to ensure the CMA and the Regulators benefit from the knowledge of experienced individuals.

The CMA’s views

- 4.6 The CMA acknowledges respondents’ suggestions in relation to the Procedural Officer. The CMA notes that it is possible that the CMA Procedural Officer could be seconded to a Regulator, pursuant to the Regulation 10 of the Concurrency Regulations. However, such a secondment would only be considered following a request from a Regulator. Whether to make such a request would be at the discretion of the Regulator.

4.7 As regards secondments more generally, the CMA considers that the manner in which secondees are integrated into the relevant Regulator is a matter for the Regulator's internal governance. For its part, the CMA would ordinarily indicate to the relevant parties whether any members of a CMA case team were secondees to the CMA from a Regulator.¹⁰

¹⁰ As set out in *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*, the CMA will seek to ensure that parties are aware of the decision making procedures which apply to their case, which include the identity of the person or persons within the CMA who will be responsible for key decisions during the course of the case (see paragraph 3.14).

5 Draft revised guidance consultation – information sharing between Regulators and the CMA

Question 4: Do you consider that the Transition Team’s proposed approach to information sharing between the CMA and the Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

Summary of responses

5.1 Comments received in response to this question were generally positive. However, a number of concerns were raised with regard to the potentially inappropriate use of information and disclosure of confidential information.

Inappropriate use of information

- 5.2 Respondents expressed concerns that information obtained using CA98 powers which is then shared with Regulators could potentially be used inappropriately by Regulators exercising their sector specific regulatory functions.
- 5.3 Accordingly, it was suggested that the Guidance be amended to make it clear that, notwithstanding Part 9 of the EA02, information obtained by the CMA or Regulators in the context of their investigatory powers under the CA98 should not be used by Regulators in the exercise of any other powers.
- 5.4 Similarly, it was also suggested that the Guidance should expressly state that information should only be disclosed in so far as it is necessary for the recipient to exercise its functions.

Confidential information

- 5.5 A number of respondents were concerned that the Draft Guidance does not contain sufficient safeguards for the sharing of confidential information, such as adopting the use of a secure online system for information exchanges, and requiring the CMA and Regulators to prepare and maintain lists of persons provided with access to any confidential information shared.
- 5.6 One respondent suggested that the Guidance should provide that confidential information can only be shared with the consent of the party to whom the information belongs.

The CMA's views

- 5.7 The CMA notes concerns expressed by respondents regarding potential inappropriate use of information by Regulators exercising sector specific powers. However, the CMA believes that it is in the public interest for statutory information sharing gateways to be used, as appropriate and lawful, for the efficient and effective functioning of law enforcement.
- 5.8 As regards restrictions on the use of information, the CMA notes, as was already highlighted in the Draft Guidance, the provisions of Part 9 of the EA02 which restrict disclosure and use of information by the CMA or a Regulator. Similarly, the CMA refers respondents to *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6) which sets out the information disclosure principles which the CMA will follow, including in disclosing to UK public authorities specifically (chapter 6 of CMA6).
- 5.9 Nevertheless, the CMA has clarified in the Guidance that leniency information, including in respect of concurrency cases, will be dealt with in accordance with the principles set out in OFT1495, *Applications for Leniency and No-Action in Cartel Cases*, which has been adopted by the CMA.

Question 5: Do you consider that the CMA and 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.

Summary of responses

- 5.10 All respondents agreed that categories of information to be shared are appropriate and no further suggestions were put forward in respect of additional categories of information to be shared, nor for the information outlined in the Draft Guidance to be shared at different times.

The CMA's views

- 5.11 The CMA welcomes the positive comments received in response to this question.

6 Draft revised guidance consultation – annual concurrency report

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.

Summary of responses

- 6.1 The majority of respondents agreed that the proposed approach to the annual concurrency report is clear and appropriate.
- 6.2 Two respondents felt that the report should not be overly burdensome.
- 6.3 In respect of the content of the report, one respondent suggested that the information requirements in paragraph 3.57 of the Draft Guidance should be mandatory.
- 6.4 One respondent requested further information on the quality parameters on which the CMA will comment when discussing the nature and quality of cooperation between the CMA and Regulators.

The CMA’s views

- 6.5 The CMA welcomes the general agreement of respondents with the proposed approach. As regards the suggestions above, the CMA on balance considers that the approach taken in the Draft Guidance provides appropriate, succinct and accessible guidance.

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.

Summary of responses

- 6.6 Respondents generally appeared to agree with the proposed categories of information. One respondent suggested that the categories of information in the report should not be fixed and should evolve over time. Another respondent suggested that the report should contain details setting out whether the CMA has exercised its powers under Regulation 8 to take over a case or whether a case has been transferred from a Regulator to the CMA.

The CMA's views

- 6.7 The CMA welcomes the general agreement of respondents with the proposed categories of information. As regards the suggestions above, given the use of the word '*may include*', the CMA does not consider the categories of information set out to be fixed and envisages that they may evolve over time. Nor does the CMA consider it necessary to include whether it has exercised its powers under Regulation 8 as this is merely an indicative list.

7 Draft revised guidance consultation – transitional arrangements

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.

Summary of responses

- 7.1 Respondents largely agreed that the proposed approach to transitional arrangements in the Draft Guidance, to account for changes introduced by the ERRA13, is appropriate.
- 7.2 However, a number of respondents requested further information in the Guidance in respect of how cases in progress will be treated. For example, whether the case allocation rules will still apply if a Regulator has initiated proceedings before 1 April 2014.
- 7.3 Similarly, some respondents highlighted references in the Draft Guidance to the individual MOUs and sought clarification of their content and the timescales for implementation. In particular, one respondent felt that the drafting process of the MOUs should be undertaken as transparently as possible, and ideally by way of a public consultation process.

The CMA’s views

- 7.4 The CMA acknowledges respondents’ requests for further clarification of the transitional arrangements and that there is no express transitional period set out in the Concurrency Regulations. The CMA takes the view that the Regulations will apply from their commencement on 1 April 2014, including with regard to cases that commenced prior to 1 April 2014. As regards the MOUs, each of these will individually specify a date for their commencement as appropriate.
- 7.5 For the further discussion of the MOUs, the CMA refers to paragraph 2.11 above.

Annexe (s)

A. List of respondents

- Allen and Overy LLP
- Ashurst LLP
- Baker McKenzie LLP
- Clifford Chance LLP
- Economic and Social Research Council
- EDF Energy
- Edwards Wildman Palmer LLP
- Energy UK
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Hogan Lovells LLP
- Professor Paul A. Grout
- Simmons and Simmons LLP
- The City of London Law Society
- Virgin Media