CMA
Competition & Markets Authority

Annual report on concurrency

2015

1 April 2015
CMA43

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Foreword

by Alex Chisholm, Chief Executive, the Competition and Markets Authority

This is the first annual concurrency report that the CMA is obliged by statute to publish, to assess – and be held accountable for – the 'concurrency' arrangements for enforcing competition law in this country's regulated sectors. Under those arrangements, in a number of essential services for which there are relevant sector regulators (such as energy, water and sewerage, telecoms, post, broadcasting, rail in Great Britain, airports, air traffic services, healthcare services in England and, from April 2015, financial services and payment systems), the CMA and the particular sector regulator responsible[1] concurrently hold the power to apply competition law in the sector concerned.

It is a year since, on 1 April 2014, the CMA acquired its functions as the United Kingdom's primary competition and consumer authority. On the same day, newly-enhanced concurrency arrangements came into force, designed to strengthen co-operation between the CMA and sector regulators, with a view to greater competition law enforcement activity in these sectors, and more generally the promotion of competitive outcomes in respect of these key services that are essential to every household and business in the country, and to the overall economy. The Government, in proposing the enhanced concurrency arrangements, had expressed concern that, until then, in the regulated sectors 'competition law may not be being enforced as proactively as it could be'.[2] When it established the CMA, the Government gave us a strategic steer which included a request that we 'should engage in broad strategic dialogue with the regulators and look for opportunities to promote effective competition'.[3]

The aim is to make these markets work better, for the benefit of consumers. More effective competition in these markets, providing a downward pressure on price and a spur to quality and innovation, is particularly important given that these are key services on which virtually every household and every business in the country depends. They are important to the economy as a whole; in themselves they represent a significant proportion of our GDP, and, moreover, many of these essential services are part of the fundamental infrastructure underpinning overall economic activity.

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[1] See footnote 6 for a list of the relevant sector regulators.
[2] Department for Business, Innovation and Skills, *Growth, competition and the competition regime – Government response to consultation*, March 2012, paragraph 8.1.
[3] Department for Business, Innovation and Skills, '*Strategic steer for the Competition and Markets Authority 2014-17'*, in Annex 1 to its 'Response to consultation on statement of specific priorities for the CMA', 1 October 2013, paragraphs 6 and 9.

In addition, because many of these sectors have involved former monopolies, and in parts may be natural monopolies, there is a particular role for competition law in protecting against market power.

On that first day of the new arrangements, 1 April 2014, we chose to publish (although we were not obliged to do so) a 'baseline' concurrency report against which we and the regulators could measure ourselves in future years.[4]

One year on, we can ask: What has happened since then? Have there been improvements? What remains to be done?

Key messages

On the whole there are grounds for some encouragement, with considerable credit due to sector regulators, along with an appreciation that these are early days and that continued and greater efforts are required on the part of us all. As the evidence in this report shows, an interim assessment, one year into the new enhanced concurrency arrangements, would suggest that:

- The building blocks, for more effective competition enforcement in the regulated sectors, have been put in place.
- There is good and productive cooperation between the CMA and sector regulators, and the UK Competition Network is working well.
- There is a serious commitment to competition case work and to competitive outcomes in the regulated sectors as a core element in protecting consumers.
- There has been increased focus on case work in the regulated sectors:
  - there have been major market studies and market investigations into energy (involving Ofgem and the CMA) and into retail banking (with the Financial Conduct Authority having worked alongside the CMA in the market study into SME banking);[5]
  - the statistics for the year under review show a material increase in enforcement activity under the prohibitions on anti-competitive agreements and abuse of dominance in the Competition Act 1998, compared with previous years. As recorded in the baseline concurrency report of April 2014, in the period 2005 to 2013, an average of 2.9 Competition Act

[4] CMA, 'Baseline' annual report on concurrency – 2014, CMA24, 1 April 2014.
[5] Other market investigations have involved the regulated sectors, including our work on implementing the findings of the market investigations on private motor insurance (final report, September 2014) and on payday lending (final report, February 2015), on both of which there has been close liaison with the Financial Conduct Authority.

investigations per year were launched, whereas in this first year of the new concurrency arrangements, six Competition Act investigations have been launched, and there have been a total of five ongoing Competition Act investigations, including in the water, airports, rail, post, broadcasting, telecoms, energy and healthcare sectors.

- There remains much to be done to embed these improvements and build on them, with a view to achieving the fundamental change the legislation intended.

It is a positive start, and a sound basis for moving forward, in the interests of consumers, business and the economy that these key sectors serve.

Alex Chisholm
Chief Executive, Competition and Markets Authority April 2015

This annual concurrency report, in respect of the CMA's financial year to 31 March 2015, is prepared and published pursuant to section 25(4) of the Enterprise and Regulatory Reform Act 2013, read with paragraph 16 of Schedule 4 to that Act.

A. Introduction

1. This annual concurrency report assesses how the 'concurrency arrangements' for competition law enforcement in the regulated sectors have operated in the period 1 April 2014 to 31 March 2015.

2. The 'concurrency arrangements' are the arrangements for co-operation between the Competition and Markets Authority (CMA) and certain sector regulators[6] in respect of competition law functions exercisable concurrently by the CMA and those sector regulators.

3. The period concerned, the year from 1 April 2014 to 31 March 2015, has been the first year of operation of the CMA, which took over the competition law functions of the former Office of Fair Trading and the former Competition Commission. It has also been the first year in which the enhanced concurrency arrangements in the Enterprise and Regulatory Reform Act 2013 (ERRA13) have had effect.

4. The background to the enhanced concurrency arrangements in ERRA13 was the policy position set out in a March 2012 paper issued by the Department for Business, Innovation and Skills concerning the Government's proposals to reform the UK competition system. The paper said:

> There have been few Competition Act 1998 cases[7] or Market Investigation References[8] in the regulated sectors, and the Government is concerned that general competition law may not

[6] The sector regulators for this purpose are: the CAA (Civil Aviation Authority), in respect of air traffic services and airport operation services; Ofcom (Office of Communications), in respect of communications (telecommunications, broadcasting and postal services); Ofgem (Gas and Electricity Markets Authority), in respect of electricity and gas in Great Britain; the FCA (Financial Conduct Authority), in respect of financial services; the PSR (Payment Systems Regulator), in respect of participation in payment systems (from April 2014 for Enterprise Act 2002 market studies and market investigation references and from April 2015 for enforcement of the prohibitions in the Competition Act 1998); Monitor, in respect of health care services in England; the ORR (Office of Rail Regulation), in respect of railway services; Ofwat (Water Services Regulation Authority), in respect of water and sewerage services in England and Wales; and the NIAUR (Northern Ireland Authority for Utility Regulation), in respect of electricity, gas, and water and sewerage services in Northern Ireland.

[7] That is, cases under the UK competition prohibitions in the Competition Act 1998 - the Chapter I prohibition on anti-competitive agreements and the Chapter II prohibition on abuse of a dominant position in the Competition Act – and the EU equivalents in, respectively, Article 101 and Article 102 of the Treaty on the Functioning of the EU.

[8] That is, market investigation references under the Enterprise Act 2002.

> be being enforced as proactively as it could be, and that the cases that are brought may not be always be managed well.[9]

5. When the CMA was established, the Government sent it a 'strategic steer', which included the suggestion that:

> the CMA should engage in a broad strategic dialogue with the regulators and look for opportunities to promote effective competition through either carrying out its own work or actively supporting regulators' analysis, enforcement and markets activity;
>
> the CMA should work with sector regulators, including the Financial Conduct Authority, to build up its sector capabilities and continuing to share competition expertise, including through joint enforcement work (within the legal framework), training and research.[10]

6. A year ago, on 1 April 2014, the CMA published a 'baseline' concurrency report (although there was no obligation to do so) describing the state of competition, and of competition law enforcement, in the regulated sectors as at that date, with a view to this being the baseline against which developments could be compared in future annual concurrency reports.

7. In this annual concurrency report, we have an opportunity to assess progress since then, and also to consider how we work to build on that progress.

8. An interim assessment, one year into the new enhanced concurrency arrangements, could be summarised as:

- the building blocks have been put in place – see paragraphs 10 and 11*;*
- so far there has been good and productive cooperation between the CMA and sector regulators, and the UK Competition Network is working well– paragraph 11;
- there appears to be a serious commitment to competition case work and to competitive outcomes in the regulated sectors as a core element in protecting consumers – paragraphs 11 to 14;

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[9] Department for Business, Innovation and Skills, *Growth, competition and the competition regime – Government response to consultation*, March 2012, paragraph 8.1.
[10] Department for Business, Innovation and Skills, '*Strategic steer for the Competition and Markets Authority 2014-17'*, in Annex 1 to its '*Response to consultation on statement of specific priorities for the CMA'*, 1 October 2013, paragraph 9.

- there has been increased focus on case work in the regulated sectors – with major CMA market studies and market investigations in these sectors (notably energy and banking, but also payday lending and private motor insurance), which have involved cooperation with the relevant regulators – and, on the statistics for the year under review, a material increase in enforcement activity under the prohibitions on anti-competitive agreements and abuse of dominance in the Competition Act 1998 compared with the preceding few years – paragraphs 16 to 21*;* and

- there remains much to be done to embed these improvements and build on them, with a view to achieving the fundamental change the legislation intended – paragraphs 22 to 30.

Putting in place the building blocks

9. In this first year of the new concurrency arrangements, the CMA has worked with the sector regulators to put in place the building blocks from which we are endeavouring to establish improvements in competition, and competition law enforcement, in the regulated sectors.

10. As we explained in the baseline concurrency report, the period up to the start of the new arrangements in April 2014 saw:

    - the enactment of ERRA13 including its provisions to enhance concurrency (described in section A paragraph 5 of the baseline concurrency report);

    - the issuance by the Secretary of State of the Concurrency Regulations – formally, 'The Competition Act 1998 (Concurrency) Regulations 2014',[11] a statutory instrument made under ERRA13 – which set out the mechanics of many of the new arrangements, including as to allocation of cases between the CMA and the relevant regulator, and the sharing of relevant information in respect of a case;

    - the issuance by the CMA of guidance on the operation of the new arrangements;[12] and

    - the formation, by the CMA and the sector regulators, of the UK Competition Network, an enhanced forum for cooperation to enable them

[11] The Competition Act 1998 (Concurrency) Regulations 2014 SI 2014 No 536.
[12] CMA, *Regulated industries: Guidance on the concurrent application of competition law to regulated industries*, CMA10, March 2014.

to work together to ensure the consistent and effective use of competition powers across all sectors.[13]

11. In this first year of the new arrangements:

- **Memoranda of Understanding**: We have agreed new 'Memoranda of Understanding' (MoUs) with most of the regulators. These set out in some detail the practicalities of the new concurrency arrangements, and have been published on the websites of the CMA and each regulator concerned. They are intended to be living documents, to be reviewed and updated from time to time in the light of practical experience of operating the new arrangements. Work is also under way to agree MoUs with the two regulators which acquire full concurrent competition law powers on 1 April 2015 (ie the Financial Conduct Authority and the Payment Systems Regulator).

- **Case allocation**: We have sensibly and swiftly agreed the allocation of new cases as between the CMA and the regulators, without having to invoke the mechanism in the Concurrency Regulations that applies in the event of disagreement. There have been 6 such cases since April 2014, involving the CAA, Monitor, Ofcom (twice) and Ofgem (twice). It is particularly encouraging that sector regulators have taken primary responsibility for most of these: 5 of the 6 were allocated to the relevant sector regulator, and one to the CMA, having regard to the principles in paragraph 3.22 of the Concurrency Guidance.

- **Information sharing**: As provided for in the Concurrency Regulations, Concurrency Guidelines and MoUs, the authority handling a particular case has shared key information on the case, including emerging thinking and draft decisions, with the 'supporting' authority, and the 'supporting' authority has provided comment and shared know-how. This process is intended to make optimal use of the complementarity of skills between the CMA and the sector regulators (economy-wide competition experience complementing sector-specific expertise) and seems to be working well. The time limits in the Guidance and MoUs have been observed. But the authorities have gone beyond the obligations laid down there and augmented the prescribed information-sharing process with more informal, and practical, discussions and exchanges of views.

- **Sharing know-how and best practice**: One consequence of different authorities concurrently holding competition powers has been that we can

[13] Monitor has chosen to be an observer, rather than a full member, of the UK Competition Network.

observe and learn from each other's experience, expertise and best practice. In addition to structured steps such joint training as between the CMA and sector regulators, there have been less formal, *ad hoc*, discussions in which we have been able to share the experience drawn from case work, in the interests of achieving a more effective competition system overall.

- **Support on cases**: There has also been direct assistance on individual case work, making most effective and efficient use of the resources at our disposal, and the complementarity of skills between the CMA's economy-wide competition experience and the regulators' sector-specific knowledge and expertise. This has included secondments of staff with relevant experience to assist on cases and, in one case of an on-site inspection by a sector regulator, active advice and involvement by CMA officials with relevant experience.

- **Policy**: There is also mutual support between the CMA and the relevant regulators on policy work aimed at achieving more competitive outcomes in regulated sectors, for example in the water and rail sectors as described in paragraph 29 below.

- **UK Competition Network**: We and the sector regulators have put the new UK Competition Network on a firm footing. Under the old concurrency arrangements that applied before April 2014, the then Office of Fair Trading and the sector regulators had a forum for cooperation between them known as the 'Concurrency Working Party', which (as the name suggests) involved working-level meetings of officials from the various authorities. This cooperation has now been stepped up, in the form of the UK Competition Network:

- Regular meetings of the UK Competition Network are held at various levels, including between Chairs of the CMA and the regulators, between the Chief Executives, and between officials at working level. Depending on the level of meeting, discussions consider major issues of strategy about competition in the regulated sectors, issues concerning the principles and practicalities of concurrency, and issues and know-how of common interest. The continuing effectiveness of the UK Competition Network depends on participants attending regularly and contributing constructively; so far, the signs are good.

- In January 2015 we launched a UK Competition Network website containing relevant legislation, guidance documents, cases and policy statements in the regulated sectors as well as links to the sector regulators' websites.

- **Regular bilateral meetings**: We have established quarterly bilateral meetings at working level between the CMA and each regulator. There are also meetings at chair and chief executive level between the CMA and each regulator, as well as *ad hoc* contacts as the need arises.

- **CMA Sector Regulation Unit**: Within the CMA, a dedicated 'Sector Regulation Unit' has been established with responsibility for coordinating the concurrency arrangements and for the promotion of competition more generally. The Unit coordinates the CMA's dealings with sector regulators (including through the UK Competition Network) as well as activities across the CMA which relate to competition in the regulated sectors.

- **EU dimension**: The concurrent regulators' powers to apply the prohibitions on anti-competitive agreements and abuse of a dominant position relate to those prohibitions under EU law, to the extent that the practices in question 'may affect trade between Member States' of the EU, as well as under UK national law. Case law of the EU Court of Justice (including the EU General Court) and, to a lesser extent, decisional practice of the European Commission, have implications for the way in which both the CMA and the sector regulators exercise those powers. In practice, the CMA and the sector regulators have engaged with the European Commission, and with the European Competition Network (consisting of the European Commission and EU national competition authorities), in connection with some of the issues they have faced in applying the competition regime.

12. In addition to these activities, the CMA has worked with regulators on individual projects. For example, during 2014/15, the CMA supported the Civil Aviation Authority, the Financial Conduct Authority (which acquires competition powers in April 2015 – see below), the Payment Systems Regulator (which also acquires its full competition powers in April 2015) and the Northern Ireland Utility Regulator in the development of new competition guidance which each of them was preparing for future publication. These documents describe the particular regulator's approach to applying competition law.

13. The Financial Conduct Authority and the new Payment Systems Regulator have not had full concurrent competition law powers during the period under review,[14] but acquire them on 1 April 2015. In the period leading up to

[14] Other than, in the case of the Payment Systems Regulator, the powers to conduct market studies and make market investigation references under the Enterprise Act 2002, which were exercisable by the PSR from 1 April 2014. The PSR was incorporated on 1 April 2014 but launched operationally on 1 April 2015. In the case of the Financial Conduct Authority and the Payment Systems Regulator, the power to issue guidance in relation to the enforcement of competition law was exercisable from 1 November 2014.

concurrency, each has engaged actively and intensively with the CMA about how they will apply competition law, with a view to enabling the new arrangements to work effectively from 'day one' on 1 April 2015. Both authorities have been members of the UK Competition Network. In addition, the Financial Conduct Authority and the CMA have adopted measures to pool know-how, training and so on which, if successful, could serve as a model for cooperation in relation to other regulated sectors too.

14. The experience of cooperation between the CMA and the sector regulators, at the UK Competition Network and otherwise, is that there seems to be real impetus, enthusiasm and commitment towards making a success of the new concurrency arrangements and, more generally, to protecting and promoting competition[15] in the regulated sectors, in the interests of consumers of the services concerned. The aim in the coming years is to maintain that, and harness it to good effect.

15. So what is there to show for all this activity in the first year? Have the concerns which underlay the reforms of the concurrency regime – described in paragraph 4 above – been addressed?

Significant investigations in the regulated sectors: 2014/15

Market investigations

16. It is significant that two of the most important pieces of work undertaken by the CMA in its first year have been in the regulated sectors. In both, encouragingly, the CMA has worked alongside the relevant sector regulator.

- **Energy**: On 26 June 2014, Ofgem made a market investigation reference to the CMA's panel of independent members, requiring them to conduct a market investigation into the supply and acquisition of energy in Great Britain. This followed a joint assessment of competition in the energy market by Ofgem, the Office of Fair Trading and the CMA, the results of which were published on 27 March 2014. Provisional findings are expected to be published in the summer of 2015, and the final report by the end of 2015.

- **Retail banking**: On 6 November 2014, the CMA made a market investigation reference to the CMA's panel of independent members, requiring them to conduct a market investigation into the supply of retail banking services to personal current account customers and to SMEs.

[15] It should be noted that, unlike the other sector regulators with concurrent competition law powers, Monitor does not have a statutory duty to promote competition.

This followed two market studies which were published in July 2014 – into personal current accounts, conducted by the CMA, and into SME banking, conducted jointly by the CMA (and previously the Office of Fair trading) and the Financial Conduct Authority. Provisional findings are expected to be published in September 2015, and the final report by April 2016.

17. These are the first two market investigations to have been initiated at the CMA. The fact that both are in the regulated sectors is not mere chance.

- Regulated sectors often have formerly involved monopolies, and may still have elements that are 'natural monopolies'.

- These sectors are industries that provide essential services to virtually every household and business in the country, as well as being critical underpinnings of the economy as a whole. This is certainly true of energy and retail banking; there has been considerable public interest in the functioning of the markets concerned and widespread concerns that they are not working as effectively as they might for the benefit of consumers.

18. Other market investigations have involved the regulated sectors, including those on private motor insurance (final report, September 2014) and on payday lending (final report, February 2015), on both of which there has been close liaison with the Financial Conduct Authority.

Competition prohibitions

19. In addition, there have been a number of investigations in the regulated sectors under the prohibitions on anti-competitive agreements and abuse of dominance in the Competition Act 1998, including some initiated in the year 2014/15. In this first year of the new concurrency arrangements, six Competition Act investigations have been launched – a marked increase on the average of 2.9 Competition Act investigations launched per year in the period 2005 to 2013 – and in the year there were five other ongoing Competition Act investigations, of which two were brought to a conclusion during the year (one on the basis of no grounds for action, and the other on the basis of commitments to terminate an infringement). It remains to be seen whether this uptick in competition enforcement activity in the regulated sectors will be maintained in the coming years.

20. These Competition Act investigations have been conducted mainly by the sector regulators, although one is being conducted by the CMA. Details of those cases already in the public domain are in the relevant sector chapters, but in summary:

- In rail, the ORR is conducting an investigation into suspected infringements of the prohibitions in connection with the carriage of freight by rail. This was opened in November 2013, and the ORR estimates that it will conclude the investigative phase, and be in a position to make a decision on the outcome of the investigation, in the course of 2015.

- In water, Ofwat is engaged in two investigations under the prohibitions:

  - In March 2013, Ofwat launched a formal investigation into a suspected infringement of the prohibition on abuse of a dominant position. This concerned alleged discriminatory conduct by Bristol Water affecting the contestable market of providing new developer services business, so as to weaken competition to its own water connections from rival 'self-lay' organisations. In May 2014, Ofwat announced that Bristol Water had offered commitments to make changes to both its structure and processes to address the specific competition concerns identified by Ofwat. Having publicly consulted on these, in March 2015, Ofwat formally decided to accept Bristol Water's commitments as binding.

  - Ofwat is also conducting an investigation into a suspected infringement of the prohibition on abuse of a dominant position. This concerns an allegation that Anglian Water engaged in a 'margin squeeze' in relation to the pricing of essential inputs to a competing provider contesting the contract to supply a new housing development in Anglian Water's area of appointment. In April 2014, Ofwat issued Anglian with a supplementary statement of objections.

  These issues, concerning alleged attempts by incumbents to foreclose competition in contestable markets, are likely to become increasingly important as the industry moves towards greater competition under the Water Act 2014 – including the opening of competition in non-domestic retail supplies in England – and Competition Act enforcement action is an important way of giving guidance to the industry of what types of conduct are, and are not, acceptable.

- In the postal sector, in April 2014, Ofcom opened a new investigation into a suspected infringement of the prohibition on abuse of a dominant position. This followed a complaint about changes in the prices, terms and conditions offered by Royal Mail for access to its letter delivery service network to a competing postal operator, TNT (now known as Whistl). This was the first launch of an investigation under the enhanced concurrency arrangements which came into force in April 2014, and agreement was quickly reached between the CMA and Ofcom that the case should be allocated to Ofcom in accordance with the principles in the CMA's

Concurrency Guidance.[16] The investigation is ongoing and a provisional decision is expected in spring 2015.

- In broadcasting, in November 2014, Ofcom opened a new investigation into a suspected infringement of the prohibition on anti-competitive agreements. This concerns the way the Football Association Premier League collectively sells the live broadcasting rights in the UK to matches in the English Premier League and follows a complaint by Virgin Media that this restricted competition in downstream broadcasting markets. Agreement was quickly reached between the CMA and Ofcom that the case should be allocated to Ofcom in accordance with the principles in the CMA's Concurrency Guidance. The investigation is ongoing.

- In telecoms, in October 2014, Ofcom issued its final decision on its investigation, opened in May 2013, of a suspected infringement of the prohibition on abuse of a dominant position. It had been alleged, in a complaint made by TalkTalk, that BT had operated a margin squeeze in the supply of superfast broadband by failing to maintain a sufficient margin between its upstream costs and its own retail arm's downstream prices. This was the first decision published by a sector regulator under the new concurrency arrangements. Ofcom's decision was that there were no grounds for action against BT.

- In airports, in March 2015, the Civil Aviation Authority made a decision to launch a new investigation into a suspected infringement of the competition prohibitions. This was the first case allocated to the CAA in accordance with the principles in the CMA's Concurrency Guidance.

- In healthcare, in July 2014, the CMA opened a new investigation into a suspected infringement of the prohibition on anti-competitive agreements. Agreement was reached between the CMA and Monitor, the health services regulator for England that the case should be allocated to the CMA.

- In energy, the regulator Ofgem has opened two new investigations:

  - In January 2015, Ofgem opened a new investigation into a suspected infringement of the prohibition on abuse of a dominant position by SSE, in respect of its Distribution Network Operator (DNO) activities in electricity connections. A customer seeking an electricity connection to his or her premises may request it either from a DNO or from an

[16] CMA, *Guidance on concurrent application of competition law to regulated industries, CMA10*, March 2014, paragraph 3.22.

independent connection provider. An independent provider needs to procure certain non-contestable services, including a point of connection, from the DNO in order to be able to offer a connection to the end-customer. In this case, Ofgem has received evidence (in the context of a market review that it conducted on competition in network connections) that SSE may have abused a dominant position as a DNO by putting its competitors at a disadvantage in the contestable connections market, and Ofgem is investigating on this basis.

- In February 2015, Ofgem announced a new investigation into a suspected infringement of the prohibition on anti-competitive agreements by two or more companies providing a supporting service for the energy industry.

- In both cases, agreement was quickly reached between the CMA and Ofgem that the case should be allocated to Ofgem in accordance with the principles in the CMA's Concurrency Guidance.

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015.	
Number of new complaints[17]	6
Number of investigations formally launched	6
Number of those cases in the year to date in which:	
- information gathering powers were used	6
- powers to enter premises/conduct dawn raids were used	1
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	
- the giving of commitments or undertakings to change conduct	1
- an exemption or clearance decision (or equivalent)	1
- case closure without full resolution	
Number of cases that are ongoing	8
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[18]	0
Number of studies/reviews in the year to date that resulted in	
- the giving of undertakings	
- a market investigation reference to the Competition and Markets Authority	1[19]

[17] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the sector regulators which they regarded as raising competition law issues under those prohibitions and met their guidelines for the submission of formal complaints.
[18] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.
[19] Ofgem made an ordinary reference to the CMA for a market investigation into the supply and acquisition of energy in Great Britain. This was not as a result of a formal market study under the Enterprise Act 2002.

21. In all of these there has been fruitful liaison between the CMA and the relevant sector regulator, optimising the complementary skills between each regulator's sector-specific expertise and the CMA's economy-wide competition experience.

Promoting competitive outcomes

22. Some commentators have expressed a concern about the new arrangements, and about the annual concurrency report in particular, that the success of the arrangements should not be measured by the number of cases, and that relying on numbers alone is crude and gives a distorted impression of the reality. It is said that numbers of cases are an inappropriate and misleading measure, which is often the product of chance (whether there happens to be a complaint about anti-competitive activity in the year concerned, and whether it is well-evidenced), whereas what really matters is the achievement of competitive outcomes in the regulated sectors.

23. We cannot ignore numbers, and nor should we. The CMA is required by statute[20] to record, in this annual concurrency report, information about case work, specifically:

- the CMA's exercise during the year of its functions under the competition prohibitions[21] in the Competition Act 1998 (and the EU equivalent) and under the markets provisions in the Enterprise Act 2002;

- each concurrent sector regulator's exercise during the year of its functions under the competition prohibitions in the Competition Act 1998 (and the EU equivalent) and under the markets provisions in Enterprise Act 2002; and

- any decision made during the year by a concurrent sector regulator, in respect of a case in which the regulator considers that its functions under the competition prohibitions were exercisable, that it was more appropriate to exercise other functions instead (eg direct regulatory functions such as licence enforcement). This is relevant to the obligation on each sector regulator that, before they can use specified direct regulatory powers in a particular case, they must consider whether it would be more appropriate to proceed by using their powers to apply the competition prohibitions in the Competition Act 1998 (and the EU equivalent) instead.

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[20] ERRA13 Schedule 4 paragraph 16(3).
[21] That is the prohibition on anti-competitive agreements in the Chapter I prohibition of the Competition Act 2002 and Article 101 of the Treaty on the Functioning of the EU, and the prohibition on abuse of a dominant position in the Chapter II prohibition of the Competition Act 2002 and Article 102 of the Treaty on the Functioning of the EU.

24. In any event, quantitative metrics have the merit of being objective and easily measurable, but of course they have the drawback of giving an incomplete picture. Qualitative descriptions do give a fuller and more nuanced picture, but at the expense of being, necessarily, somewhat subjective. There is also a time consideration: individual case work, enforcing competition law, can produce tangible and specific results in the relatively short term – whereas the achievement of more competitive outcomes overall is necessarily a longer term, and less tangible, process, albeit of great importance.

25. In the interests of presenting as comprehensive an account as reasonably possible to Parliament and the public, we have chosen in this report to do both: to provide data on the numbers of cases in each regulated sector, under the competition prohibitions and the markets regime – these may be found in section (7) of each chapter – but supplementing this with a description of what is being done more generally to achieve competitive outcomes in each sector.

26. In our view, the number of cases taken on by the CMA and the sector regulators to apply competition law in their sectors is a key factor in protecting and promoting competition in those sectors, to the benefit of consumers.

27. But it is not the only factor.

28. Clearly the outcomes of cases matter, and in the annual concurrency report we shall describe how cases have been resolved, and anti-competitive outcomes addressed – for example, this year, the commitments being secured by Ofwat in respect of alleged foreclosure of downstream competitors in the self-lay connections market in the Bristol Water case (see chapter H).

29. Moreover, other tools – besides competition law casework – are available to achieve more competitive outcomes in the regulated sectors, including regulators' sector-specific direct regulatory powers, legislation at national and at EU level, and policy work. For example:

    - We will be assisting Ofwat with advocacy on competition law compliance to ensure that the liberalisation of retail water and sewerage services to non-household customers, as provided for in the Water Act 2014, is implemented successfully.

    - In the rail sector, in January 2015, we announced that we will be examining what steps might support greater in-market competition in passenger rail services (building on the existing competition 'for' the market through the competitive tendering of franchises), working with interested parties, including the ORR.

30. In our annual concurrency reports we will describe – and encourage and support – the use of a whole range of tools available to regulators to achieve more competitive outcomes in these key sectors, which are so essential to households and businesses across the country and more generally to our economy and society.

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

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

32. The aviation sector was progressively liberalised during the 1980s and 1990s through both national and EU legislation. As a result, the CAA does not regulate airline competition.[22] However, the CAA has competition and sectoral powers for two particular elements of the aviation sector:

- airport operation services (AOS) as defined in the Civil Aviation Act 2012, which conferred concurrent competition powers effective from April 2013; and

- air traffic services (ATS) under the provisions of the Transport Act 2000, which conferred concurrent competition powers in 2001.

Airport operation services

33. In addition to the CAA's competition powers, airport operators are required to obtain an economic licence if the CAA determines that the 'market power test' under the Civil Aviation Act 2012 is met. Heathrow and Gatwick airports continue to be subject to economic regulation through licences after the CAA concluded in January 2014 that both airports had substantial market power.

Air traffic services

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

35. NATS En route plc is the single supplier of en route ATS in the UK's airspace (and over parts of the eastern Atlantic Ocean) and is the only entity currently licensed under the Transport Act 2000 for such services.

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[22] Instead, airlines have to comply with competition law for which either the CMA or, in some cases given the cross-border implications, the European Commission has responsibility.

36. NATS Holdings Limited also provides terminal services through its subsidiary NATS Services Limited (NSL). There are other TANS providers, including airports themselves which often self-supply this function.

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

The legal/regulatory framework

37. There have been no changes in the legal or regulatory frameworks for AOS or ATS since April 2014. The CAA's sectoral and competition powers and functions remain those conferred by the Civil Aviation Act 2012 and the Transport Act 2000 for AOS and ATS, respectively.

38. In relation to AOS, no new market power assessments have been made since April 2014 and no new licences issued. In October 2014, the CAA consulted on the regulatory policy for the recovery of the main construction and implementation costs of runway expansion in the South East of England.[23] The CAA expects to publish its conclusions in spring 2015.

Market developments

39. There have been a number of market developments in airports and air traffic services since April 2014, reflecting the dynamic nature of the aviation sector. The key developments are outlined below.

40. The Airports Commission is continuing its assessment of the shortlisted proposals to expand runway capacity in the South East, two of which are at Heathrow and one of which is at Gatwick. The Commission's assessment includes analysis of the cost of each proposal, the effect on communities of noise, property loss and construction, and the economic benefits and environmental impacts. In November 2014, the Commission presented its analysis of the shortlisted proposals and invited public comment.[24] The Commission is expected to publish its final recommendations after the General Election in May 2015.

41. In the past year, a number of bilateral commercial arrangements have been agreed between major airports and airlines. Typically such arrangements provide airlines with discounts on published airport charges in return for passenger growth and airline cooperation in developing airports' non-aeronautical revenues. The CAA welcomes the development of effective

[23] The CAA's consultation document on economic regulation of new runway capacity can be found on its website.
[24] ibid.

commercial partnerships between airports and airlines as long as they comply with competition law.

42. From April 2014, the CAA's new regulatory regime went live. Through this the CAA has sought to drive more commercial outcomes. The CAA maintained the more traditional regulatory structures at Heathrow airport. At Gatwick airport, however, it has taken a commercial market-driven approach through licence backed commitments. Through this approach, the airport is encouraged to negotiate directly with airlines in a similar way to that observed at airports facing competition. The licence regulation underpins these contracts aiming to drive benefits for users in areas such as resilience. As a result of the new flexible regime the CAA was able to deregulate Stansted airport, which since deregulation in April 2014 has seen investment in terminal redevelopment and passenger growth.

43. In October 2014, Heathrow Airport Holdings (formerly BAA) agreed to sell Aberdeen, Glasgow and Southampton airports to a consortium formed by Ferrovial and Macquarie. Heathrow Airport Holdings will now concentrate solely on Heathrow, having previously divested Gatwick, Stansted and Edinburgh as a result of remedies imposed by the Competition Commission (now the CMA) in 2009. The CAA continues to monitor information provided by Aberdeen airport as part of the undertakings given to the Competition Commission and to advise the CMA accordingly.

44. Due to financial losses, Manston airport closed in May 2014 and Blackpool airport closed to commercial passenger traffic in October 2014, but still accepts other flights.

45. In ATS, the major market development was the award of new contracts by Gatwick, Manchester, Stansted and Luton airports to provide TANS at the airports. At Manchester and Luton, the contracts were retained by the incumbent supplier, NSL. However, at Gatwick, the contract was awarded to the German ATS provider, Deutsche Flugsicherung, which is due to begin services at the airport in 2016. Elsewhere, Birmingham airport decided to develop its own TANS provider as an alternative to the incumbent, NSL, and took over operations in early 2015.

2. Significant developments in the CAA's approach to competition since April 2014

46. In June 2014, a Memorandum of Understanding between the CAA and the CMA was signed. The Memorandum of Understanding sets out the working

arrangements in relation to concurrent competition law powers in AOS and ATS.[25]

47. In October 2014, the CAA published for consultation a series of guidance documents covering its draft prioritisation principles,[26] the application of the CAA's competition powers in relation to AOS and ATS[27] and the enforcement of licences.[28] As part of the consultation process, the CAA held a workshop with a range of stakeholders in the industry in December 2014 and expects to publish its final guidance documents in spring/summer 2015.

3. Cases under the competition prohibitions since April 2014

48. Since April 2014, the CAA has been formally allocated one case of a suspected breach of the competition prohibitions by an airport. The CAA has carried out an initial assessment of the case and has taken the decision to launch an investigation.

4. Market studies since April 2014

49. There were no market studies opened or closed since April 2014 and none which is ongoing.

5. Decisions taken since April 2014 to use the CAA's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

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

6. Other steps taken to promote competition since April 2014

51. In relation to ATS, under the European Commission's Single European Sky regulation, charges for TANS are exempt from regulation provided that there are conditions for the market to be competitive. The CAA's previous analysis of the UK's TANS market was published in February 2013 and advised that market conditions were not present.[29] However, since the CAA's advice was published, as mentioned above, there have been a number of developments

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[25] CMA and CAA memorandum of understanding.
[26] *CAP 1233: Draft Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation work*.
[27] *CAP 1235: Guidance on the Application of the CAA's Competition Powers*.
[28] *CAP 1234: Draft Economic Licensing Enforcement Guidance.*
[29] *CAP1004: SES Market Conditions for Terminal Air Navigation Services in the UK.*

in the TANS market and the Secretary of State for Transport has therefore asked the CAA to review its previous analysis of the market.

52. The CAA issued a call for evidence on the provision of TANS in September 2014. In February 2015, the CAA published for consultation a review and update of its earlier advice to the Department for Transport on how the market for terminal air navigation services was working.[30] The CAA expects to issue its final advice to the Government in spring 2015.

7. Data on cases for the year to date since 1 April 2014

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015.	
Number of new complaints[31]	1
Number of investigations formally launched	1
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises / conduct dawn raids were used	
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	0
- an infringement decision	
- the giving of commitments or undertakings to change conduct	
- an exemption or clearance decision (or equivalent)	
- case closure without full resolution	
Number of cases that are ongoing	1
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

[30] *CAP 1261: Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK*.
[31] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the CAA which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[32] Number of studies/reviews in the year to date that resulted in - the giving of undertakings - a market investigation reference to the Competition and Markets Authority	0 0

8. Looking ahead

53. As noted above, the CAA will complete its assessment of whether market conditions are present for the provision of TANS.

54. During 2015, the CAA plans to update its guidance on undertaking market power assessments for airports. It also plans to consult on and then publish guidance on the enforcement of the Airport Charges Regulations 2011.[33]

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

[32] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.
[33] The Regulations implement European Directive 2009/12/EC on airport charges into UK law and establish a common framework by which airports consult their airline customers about airport charges, service level agreements and major infrastructure projects.

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

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

57. Ofcom's principal duties, set out in the Communications Act 2003, are to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.[34]

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

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

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

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

61. There have been no significant changes which relate to Ofcom's exercise of its concurrent powers, either in the markets Ofcom regulates or in the legal or regulatory framework in the communications sector since April 2014. For further details of Ofcom's wider work to promote competition in the communications sector, see its website at www.ofcom.org.uk and its latest annual report.[35]

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[34] Communications Act 2003, section 3(1).
[35] Ofcom Annual Report and Accounts 2013/14.

2. Significant developments in Ofcom's approach to competition since April 2014

62. There have been no significant developments in Ofcom's approach to competition law enforcement since April 2014.

3. Cases under the competition prohibitions since April 2014

Broadcasting

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

63. On 14 June 2013, Ofcom opened an investigation under the Chapter II prohibition on abuse of a dominant position (and the equivalent EU law prohibition) into a complaint from BT which alleges that the terms on which Sky offered wholesale supply of Sky Sports 1&2 to BT's YouView platform amount to an abuse of dominance. The complaint alleges that Sky is making wholesale supply of Sky Sports 1 and 2 to BT's YouView platform conditional on BT wholesaling BT Sport channels to Sky for retail on Sky's satellite platform.

64. As part of the complaint, BT requested that Ofcom should consider whether to grant interim measures relief under section 35 of the Competition Act 1998. On 31 July 2013, Ofcom decided to refuse BT's application for interim measures.

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

65. On 18 November 2014, Ofcom opened an investigation into the sale of live UK audio-visual media rights to Premier League matches. This followed a complaint from Virgin Media Limited against the Football Association Premier League (PL). Virgin Media's complaint alleges that the arrangements for the 'collective' selling of live UK television rights by the PL for matches played by its member clubs is in breach of competition law. Under the PL membership rules, which are an agreement between each of the PL clubs and the PL, the PL has authority to enter into contracts for the sale of rights to PL matches. In particular, the complaint raises concerns about the number of PL matches for which live broadcasting rights are made available.

66. Virgin Media argues that the proportion of matches made available for live television broadcast under the current PL rights deals – at 41% – is lower than

some other leading European leagues, where more matches are available for live television broadcast.

67. The complaint alleges that this contributes to higher prices for consumers of pay TV packages that include premium sport channels and for the pay TV retailers of premium sports channels.

68. Ofcom held a State of Play meeting with the Premier League in the week commencing 15 December 2014 and met with the complainant, Virgin Media, and with interested parties BT and Sky in the week commencing 5 January 2015.

69. On 28 January 2015, Virgin Media made an application requesting that Ofcom grant interim measures relief under section 25 of the Competition Act. On 4 February 2015, Ofcom decided to refuse Virgin Media's application for interim measures.

Electronic communications

Complaint from TalkTalk Telecom Group plc against BT Group plc about alleged margin squeeze in superfast broadband pricing

70. On 21 October 2014, Ofcom concluded its investigation of a complaint from TalkTalk Telecom Group plc against BT Group plc about alleged margin squeeze in superfast broadband (SFBB) pricing. The investigation was opened on 1 May 2013.

71. The investigation was carried out under both Article 102 of the Treaty on the Functioning of the EU and Chapter II of the Competition Act 1998 on abuse of a dominant position.

72. Ofcom investigated allegations that BT was operating an abusive margin squeeze by failing to maintain a sufficient margin between the prices it charged its competitors for wholesale SFBB access products and the prices it charged for retail SFBB products, such that an equally efficient operator would be unable to compete in the retail provision of SFBB products.

73. Ofcom's analysis assessed whether the margin between BT's upstream and downstream prices for particular SFBB offers (the February 2013, May 2013 and January 2014 offers) was sufficient to cover its downstream costs.

74. As BT's SFBB offer had changed over the period of the assessment, Ofcom presented the results separately for the periods covered by the February 2013 offer, the May 2013 offer and the January 2014 offer. In relation to the May 2013 offer and the January 2014 offer Ofcom also took into account the net

costs of providing BT Sport to BT's SFBB customers, which it calculated by taking the total costs of BT Sport less BT's direct revenues. In considering how these costs should be allocated to SFBB for the purposes of its analysis, Ofcom identified a number of possible approaches.

75. In relation to all three offers, Ofcom considered BT's margins on its entire SFBB portfolio, including all Infinity and SFBB Plusnet products, and all additional products and services included in bundles except BT Sport. First, Ofcom calculated BT's revenues and ongoing and upfront costs per customer, and the monthly margin BT would make on each SFBB customer. It then determined whether BT would recover its upfront costs over a reasonable average customer lifetime.

76. For the February 2013 offer, Ofcom identified positive monthly 'headroom' per SFBB customer, over the customer lifetime. For the May 2013 and January 2014 offers, it considered that BT would be achieving a positive monthly margin for both offers under any of the allocation approaches it identified.

77. On this basis, Ofcom concluded that it did not have sufficient evidence to support a finding that BT's conduct amounted to an abusive margin squeeze in relation to the provision of BT's SFBB products. Given that it found that BT had sufficient margin to cover its downstream costs (such that an equally efficient operator would be able to compete with BT), it did not undertake a further separate assessment of whether any margin squeeze could have had actual or potential anti-competitive effects. Ofcom therefore issued a no grounds for action decision.

Postal services

Complaint from TNT Post UK Limited (now Whistl) in relation to the prices, terms and conditions on which Royal Mail Group Limited is offering to provide access to certain letter delivery services

78. On 21 February 2014, Ofcom opened an investigation into a complaint from TNT (now known as Whistl) in relation to certain prices, terms and conditions offered by Royal Mail for access to certain letter delivery services (known as 'D+2 access'). This followed announcements from Royal Mail in November 2013 and January 2014 of changes to these prices, terms and conditions.

79. On 9 April 2014, Ofcom announced that its investigation would be conducted under section 25 of the Competition Act 1998 and would consider whether Royal Mail had abused a dominant position under both Article 102 of the Treaty on the Functioning of the EU and Chapter II of the Competition Act 1998.

80. On 15 December 2014, Ofcom held a state of play meeting with Royal Mail.

81. The investigation is ongoing and a provisional decision is expected in spring 2015.

4. Market studies since April 2014

82. There were no market studies opened or closed since April 2014 and none which is ongoing.

5. Decisions taken since April 2014 to use Ofcom's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

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

6. Other steps taken to promote competition since April 2014

84. Ofcom's principal duty, set out in the Communications Act 2003, is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.[36] Promoting competition is therefore at the heart of everything Ofcom does.

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

- reviewing markets to assess whether they are effectively competitive and, where they are not, to impose direct regulatory *ex ante* remedies; and
- resolving disputes between communications providers in order to ensure (among other things) interconnection on reasonable terms.

86. Since 1 April 2014, Ofcom has exercised functions, in relation to its market review duties, in the Business Connectivity market, the Fixed Access markets and the Mobile Voice Termination markets.[37]

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[36] Communications Act 2003, section 3(1).
[37] Information regarding Ofcom's market reviews can be found on its website. See also: *Business Connectivity Market Review: Timetable and initial call for inputs* and Mobile call termination market review 2015-18.

87. Since 1 April 2014, Ofcom has exercised functions in relation to its dispute resolution duties in eight disputes.[38]

7. Data on cases for the year to date since 1 April 2014

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU equivalent): for the year 1 April 2014 to 31 March 2015	
Number of new complaints[39]	2
Number of investigations formally launched	2
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises / conduct dawn raids were used	4
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	1
- case closure without full resolution	0
Number of cases that are ongoing	3
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

[38] Information regarding Ofcom's ongoing disputes and closed disputes can be found on its website.
[39] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by Ofcom which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[40] Number of studies/reviews in the year to date that resulted in - the giving of undertakings - a market investigation reference to the Competition and Markets Authority	0 0 0

8. Looking ahead

88. Ofcom's annual plan for 2015/16 categorises planned work under five strategic purposes, of which the most relevant to concurrency is Ofcom's purpose to promote effective competition and informed choice. Under this strategic purpose, Ofcom has identified three priority areas:

- undertake a Strategic Review of Digital Communications;
- ensure effective competition in the provision of communications services for businesses, particularly SMEs; and
- improve the process of switching providers for consumers.

89. In addition to these priority areas, Ofcom has also identified the following significant work areas for 2015/16 under the strategic purpose to promote effective competition and informed choice:

- work to ensure fair and effective competition in broadcasting services, including Ofcom's review of the 'wholesale must offer' obligation;[41]
- implement the review of the framework for regulatory reporting in telecommunications;
- commence the fixed access and narrowband market reviews;
- promote effective choice for consumers by ensuring that clear, relevant information is readily available; and

[40] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.
[41] Ofcom, Review of the pay TV wholesale must-offer obligation.

- undertake market impact assessments in support of Public Value Tests by the BBC Trust.[42]

90. Ofcom has identified the following programmatic work as an important part of fulfilling its duties:

- enforce competition, eg through resolving disputes, investigating complaints under the Competition Act 1998 and imposing penalties where appropriate; and

- implement measures to ensure availability of geographic numbers and conduct further work as required on non-geographic numbers.

91. Ofcom has also announced that it will undertake work in the following areas:

- concluding its review of the regulation of Royal Mail's access pricing;[43] and

- finalising the auction design, licence conditions and competition assessment for the release of 190 MHz of radio spectrum in the 2.3 GHz and 3.4 GHz bands.[44]

[42] Under the BBC Royal Charter and Agreement, the BBC Trust must apply a Public Value Test before a decision can be taken to make any significant changes to the BBC's UK public services. The decision on whether to authorise such a change is then made by the Trust. In reaching its conclusion on a public value test, the Trust must take account of both a public value assessment carried out by the Trust and a market impact assessment), carried out by Ofcom.
[43] ibid.
[44] Ofcom, Public Sector Spectrum Release (PSSR): Award of the 2.3 GHz and 3.4 GHz bands.

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

92. The Gas and Electricity Markets Authority (Ofgem) is the regulator for the gas and electricity markets in Great Britain and is the designated national regulatory authority for Great Britain under the EU's Third Energy Package.[45] Ofgem is also a national competition authority with concurrent powers with the CMA to enforce competition law in respect of specified activities in energy markets[46] under the Competition Act 1998 and the Enterprise Act 2002.

1. Significant changes in the market(s) and changes to the legal/regulatory framework since April 2014

RIIO-ED1 price control

93. In November 2014, Ofgem published its settlements (final determinations) for the next electricity distribution network price control (RIIO-ED1) which will come into effect in April 2015 and run for eight years until 2023. The settlements apply to five of the six electricity distribution companies[47] that run Britain's local electricity network, which transports energy into homes and businesses. Ofgem published a statutory consultation on the licence conditions to implement these final determinations in December 2014.[48]

Electricity Market Reform

94. Electricity Market Reform (EMR) is a government programme that seeks to incentivise investment in secure, low-carbon electricity, improve the security of Great Britain's electricity supply, and improve affordability for consumers. The Energy Act 2013 introduced several initiatives to achieve this. The Capacity Market policy, a series of auctions of capacity contracts, has been introduced to help ensure security of electricity supply at the least cost to the consumer. It is designed to provide investment in the overall level of reliable capacity (both supply and demand side response). It will be administered by National Grid Electricity Transmission plc (NGET), alongside a number of delivery partners. The Capacity Market is implemented by the Electricity

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[45] The Third Energy Package comprises a number of EU Directives and Regulations, the majority of which came into force or were to be implemented by member states by 3 March 2011. Directives relating to unbundling were required to be implemented by 3 March 2012, with actual unbundling to take effect before 3 March 2013.
[46] Ofgem's functions with regard to competition are set out in the Gas Act 1986, section 36A, and the Electricity Act 1989, section 43.
[47] The settlement for Western Power Distribution was finalised in February 2014 after it was fast-tracked through the price control process.
[48] In March 2015, British Gas (a supplier) appealed the final terminations of ten slow track licences and Northern Powergrid (holder of two of the fourteen electricity distribution licences) appealed the final determinations of its two slow track licences.

Capacity Regulations 2014[49] (the Regulations) and the Capacity Market Rules[50] (the Rules).

95. Ofgem has several important roles in EMR, including: the power to make changes to the Rules from the day after the results of the first auction were published; determining certain disputes where participants disagree with a decision made by NGET; enforcing compliance with the Rules and Regulations, concluding its first case in this area in March 2015;[51] and reporting on the effectiveness of the Capacity Market generally and on NGET's performance. The Regulations came into force on 1 August 2014 and contain provisions allowing amendments to the Rules.[52] The Department of Energy & Climate Change is now working towards including capacity providers in other member states in the EMR regime, in order to comply with requirements of the European Commission's state aid clearance.

REMIT

96. Ofgem was given powers to enforce the EU Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) in June 2013 and is using these powers to conduct investigations. In 2014, the Government consulted on making certain breaches of REMIT criminal offences in Great Britain, with the possibility of imprisonment for those convicted. The relevant legislation is expected to become law in April 2015. REMIT prohibits market abuse in the form of insider trading and market manipulation in wholesale energy markets. REMIT itself recognises the possibility of close interaction between these prohibitions and the competition law prohibitions. The current REMIT regime in Great Britain provides, among other things, for unlimited financial penalties when a person is found to have engaged in prohibited conduct.

Unbundling of Transmission System Operators

97. The EU's Third Energy Package[53] made following the European Commission's sector inquiry into energy includes obligations relating to the unbundling of transmission system (ie network) operators from supply and production/generation activities. These are implemented in Great Britain through the requirement for relevant electricity transmission, gas transportation and interconnector licensees to be certified on an applicable

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[49] SI 2014/2043.
[50] *Electricity: The Capacity Market Rules 2014*.
[51] Ofgem, Notice of Decision into whether UK Capacity Reserve Limited (UKCR) complied with the requirements of Rule 5.13.1(b) of the Capacity Market Rules.
[52] Ofgem, *The Change Process for the Capacity Market Rules: Guidance*.
[53] The Electricity Directive: 2009/72/EC; The Gas Directive: 2009/73/EC; The Electricity Regulation: (EC) No 714/2009; The Gas Regulation: (EC) No 715/2009; The ACER Regulation: (EC) No 713/2009.

ground. The majority of such persons are certified on the ownership unbundling ground. In order to be certified on this ground, the relevant licensee or applicant for certification must pass five tests. These tests refer to specific relationships between (a) the applicant, its senior officers and controlling person or majority shareholder; and (b) a 'relevant producer or supplier'.

98. In September 2014, the Government issued a call for comment noting its concern that the transposition of the ownership unbundling requirements might be unduly constraining investment because Ofgem might not be able to certify certain cases that, in the Authority's opinion, do not present a risk of discriminatory treatment. Government therefore consulted on whether Ofgem should be given further discretion in its assessment of applications for certification, noting that this was consistent with the approach set out in the European Commission's most recent working paper on the subject. Government has decided to proceed with these amendments and they came into effect in January 2015.

Liquidity

99. At the beginning of the financial year, Ofgem introduced a new licence condition into the generation licences of the eight largest electricity generating companies – Centrica, Drax, EDF Energy, E.On, GDF Suez, RWE npower, SSE, and ScottishPower – to improve access to the wholesale electricity market. The licence condition requires these companies to follow a set of 'Supplier Market Access' (SMA) rules when trading with small independent suppliers. The SMA rules are a set of minimum service standards for trading between eligible suppliers and the generation licensees. Suppliers that are small enough by definition under Secure and Promote guidance[54] can be considered eligible on application to Ofgem. There are currently nine eligible suppliers. The SMA rules include obligations on the licensees to ensure negotiations proceed in a timely manner, respond to trading requests within a specified period, and offer proportionate credit and collateral arrangements. The rules mean that negotiating with small suppliers is not treated as a low priority. The new licence condition also aims to ensure that the market provides the products and price signals needed for competition to be effective, through a market making obligation on the six largest vertically integrated companies – Centrica, EDF Energy, E.On, RWE npower, SSE and ScottishPower, so the benefits of greater competition can be delivered to

[54] Ofgem, Wholesale power market liquidity: decision letter.

consumers. This follows from Ofgem's consultation last year on proposals to increase liquidity in the wholesale electricity market.

Retail gas and electricity supply

100. Since August 2013, Ofgem has been implementing a retail market reform programme designed to enable stronger consumer engagement and intensify competition in the market. The reforms have been fully in place since June 2014. Measures to reduce the number of tariffs and to simplify tariffs and tariff structures, improve consumer information and introduce new standards of conduct (to ensure that suppliers treat customers fairly) seek to deliver a simpler, clearer and fairer market. These measures are coupled with reforms to improve wholesale market liquidity (see above) and market transparency and, in turn, to promote scope for more intense competition and opportunities for small providers to engage in the market.

Integrated Transmission Planning and Regulation

101. Ofgem's Integrated Transmission Planning and Regulation project is a review of the Great Britain electricity transmission arrangements for system planning and asset delivery. This helps ensure that in the long term the regulatory framework remains able to develop the overall network in an efficient, coordinated and economic way. Ofgem published its initial conclusions on system planning and asset delivery options in September 2014, with a period for consultation. Ofgem expects to publish its final conclusions in spring 2015 and then begin to implement changes to the regulatory framework. Ofgem also published a decision in August 2014 on the regulatory regime for interconnection. This will help to facilitate timely, economic and efficient interconnector investment. In October 2014, Ofgem noted that five potential interconnector projects were eligible for assessment under the regime. In December 2014, Ofgem published a consultation on its initial project assessment of the NSN interconnector to Norway, and published its decision on the initial project assessment of the NSN interconnector in March 2015. Ofgem also published a consultation on its initial project assessment for the remaining four in March 2015.[55]

[55] Press release: 'Ofgem proposes approving three new electricity interconnectors'.

2. Significant developments in Ofgem's approach to competition since April 2014

102. Ofgem has continued to be committed to promoting competition in the energy sector, where appropriate, since April 2014, as set out in its 2014/15 Forward Work Programme, and through the work explained in this document.

103. With the conclusion of its Enforcement Review programme, Ofgem has implemented new processes and procedures – which incorporate the new concurrency regime – to deliver increased impact and efficiency in its enforcement work. As part of the programme, Ofgem published its revised Enforcement Guidelines[56] on 12 September 2014. The Guidelines set out Ofgem's approach to enforcing sectoral, competition and consumer protection legislation and describe the key stages of the investigation process that Ofgem will usually follow.

104. Ofgem has also introduced a new Enforcement Decision Panel. This Panel has been created to allow cases to be decided by dedicated specialists, including competition experts, with an easily visible separation between the investigation and decision-making functions.

3. Cases under the competition prohibitions since April 2014

105. In January 2015, Ofgem announced an investigation under Chapter II of the Competition Act 1998 and/or Article 102 of the Treaty on the Functioning of the EU, into SSE plc in respect of its Distribution Network Operator (DNO) activities.[57] A customer seeking an electricity connection to his or her premises may request it either from a DNO or from an independent connection provider. An independent provider needs to procure certain non-contestable services, including a point of collection to the electricity network, from the DNO in order to be able to offer a connection to the end-customer. The purpose of Ofgem's investigation is to determine whether SSE plc has abused a dominant position in the electricity distribution connections (contestable) market by putting its competitors at a disadvantage. Ofgem is currently in the evidence gathering phase of the investigation.[58]

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[56] The Enforcement Guidelines do not include REMIT investigations which are the subject of separate guidelines.
[57] Ofgem, Investigation into whether SSE has infringed the requirements of Chapter II of the Competition Act 1998 and/or Article 102 Treaty on the Functioning of the European Union in respect of points of connection.
[58] The fact that Ofgem has launched an investigation does not imply that SSE has breached competition law. The purpose of the investigation is to examine whether there has been an infringement of competition law. Further, information on the investigation process and the possible outcomes can be found in Ofgem's enforcement guidelines.

106. The investigation is a direct outcome of Ofgem's review of competition in electricity distribution connections, which it launched in June 2014. A more detailed explanation of the review is set out below, in paragraph 117.

107. In February 2015, Ofgem announced an investigation under the Chapter I prohibition in the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the EU.[59] This is an investigation into a suspected infringement of the prohibition on anti-competitive agreements by two or more companies providing a supporting service for the energy industry. Ofgem is currently in the evidence gathering phase of the investigation.[60]

108. Ofgem's data on Competition Act 1998 cases and complaints is detailed in section (7).

4. Market studies since April 2014

109. There have been no market studies opened under the Enterprise Act 2002 since April 2014 and none which is ongoing. Ofgem completed its review of competition in energy markets, leading to a Market Investigation Reference to the CMA in June 2014, as set out below, in paragraph 114. Ofgem has also launched two market reviews under its sectoral powers, which are also detailed in section (6), below.

5. Decisions taken since April 2014 to use Ofgem's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

110. Ofgem has a positive duty to consider the extent to which the interests of consumers would be protected by the promotion of competition and whether alternative ways of exercising its functions would better protect the interests of consumers, such as introducing or enhancing regulatory measures.

111. Ofgem has opened a number of investigations in the period since April 2014. The majority of those investigations were alleged breaches of licence conditions and did not involve breaches of competition law. Ofgem launched one case under the Chapter I prohibition in the Competition Act 1998, and one case under the Chapter II prohibition of the Competition Act 1998 and the EU equivalents, as detailed above.

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[59] Ofgem, Investigation under Chapter I of the Competition Act 1998 and/or Article 101 Treaty on the Functioning of the European Union.
[60] As with the case above, the fact that Ofgem has opened this investigation does not mean there has been a breach of competition law.

112. Ofgem has also imposed financial penalties and secured consumer redress in more than 10 investigations[61]. These decisions were taken under Ofgem's sectoral powers as they did not involve competition law concerns.

6. Other steps taken to promote competition since April 2014

113. Since April 2014, Ofgem has continued work to promote competition across the energy sector, including in monopoly network activities, retail and wholesale markets, and by optimising conditions for competition using new technology.

Market investigation reference

114. In June 2014 Ofgem referred[62] the energy market in Great Britain to the CMA for investigation. The investigation will examine whether there are any market features that are having an adverse effect on competition and, if so, whether there are any reforms which could make competition in the market more effective.

115. The statutory deadline for the investigation is 25 December 2015. In line with Ofgem's statutory duties, it will provide the CMA with any appropriate information in its possession which relates to the scope of the investigation, and will also provide any other assistance which the CMA requires in relation to the investigation.

Competition in electricity distribution connection

116. Ofgem has been working to facilitate competition in electricity connections since 2000. Competition continues to grow in parts of this market, in part due to measures that Ofgem has put in place to encourage DNOs to remove barriers to competition. However, there are sections of the market where competition has developed less well. In view of this, Ofgem launched a review of the electricity connections market in June 2014. The findings were published in January 2015.[63] As a result of evidence received during the review, Ofgem opened an investigation under the Competition Act 1998 (see paragraph 105).

117. Following the review, Ofgem proposes to create an enforceable code of practice (CoP) for DNOs and a new licence obligation for compliance with the

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[61] For the latest investigations and enforcement data see: www.ofgem.gov.uk/investigations/investigations-and-enforcement-data.
[62] Press release: 'Ofgem refers the energy market for a full competition investigation'.
[63] Ofgem, *The findings of our review of the electricity connections market*.

CoP. The CoP will seek to address directly the issues that were identified by stakeholders through Ofgem's market review. It will require DNOs to reduce the extent to which competitors depend on them for essential services. Where the DNO is required to provide these services, it will need to do so on the same basis to both its competitors and its own connections business. DNOs will also need collectively to harmonise their input services. Ofgem consulted on the remedy in the early part of 2015. The CoP is expected to be developed through an industry led consultation process during the first half of 2015. Ofgem hopes to approve the CoP in June. It was made clear in Ofgem's published findings document, that failure to develop an acceptable CoP – in reasonable time – would lead Ofgem to further consider whether a consultation on a Market Investigation Reference is appropriate.

Non-domestic gas metering

118. In February, Ofgem announced plans to undertake a market review of non-domestic gas metering products and services in 2015/16. These comprise meter provision, meter management and automatic meter reading equipment and service provision, although these products and services are frequently provided as a package. The provision of non-domestic gas meters has been open to competition for ten years but concerns have been raised with Ofgem about the effectiveness of competition in relation to these products and services.[64]

Smarter Markets Programme

119. Ofgem has established a 'Smarter Markets Programme' to protect and empower consumers in the rollout of smart meters. The programme will also help to ensure that consumers benefit from the wider market developments facilitated by smart meters. The programme has four key strands which include change of supplier processes and electricity settlement arrangements. During 2014, Ofgem has progressed projects through the programme that will promote competition by facilitating faster switching between suppliers, and improving the accuracy of cost allocation between suppliers.

Customer switching

120. In June 2014, Ofgem consulted on proposals to introduce reliable next-day switching for consumers. This measure aims to improve competition by making it faster and easier to switch to a new supplier. Ofgem envisages that this should be delivered by a new registration service that replaces the

[64] Ofgem, *Review of the non-domestic gas metering market in Great Britain*.

current, separate, gas and electricity arrangements as a single dual fuel service covering both markets. Ofgem set out in February 2015 how this programme will be delivered.[65]

121. During 2014, Ofgem also worked with industry and approved changes to industry codes that will see switching timescales halve to 17 days from the current five weeks (which includes a 14 day cooling off period) by the end of 2014. Ofgem also regulates the new central Data and Communications Company, which will play an important role in improving the efficiency of market processes and enabling interoperability of equipment and processes.

Settlement arrangements

122. The settlement process determines how much each supplier's customers use in each half hour of the day. This process relies on estimates and is used to work out the costs that suppliers pay for energy and for using the network. Unlike today's meters, smart meters can record half-hourly consumption data. Using this data in settlement would promote retail competition by improving the accuracy of cost allocation between suppliers. In particular, this would encourage them to manage their costs efficiently by encouraging demand-side response among their customers. In October 2014, Ofgem approved a change to the settlement process that will require all larger non-domestic customers to be settled using their half-hourly consumption data. Ofgem is also exploring how the rest of the market could be settled in the same way.

[65] Ofgem, *Decision on moving to reliable next-day switching*.

7. Data on cases for the year to date since 1 April 2014

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015.	
Number of new complaints[66]	3
Number of investigations formally launched	2
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises / conduct dawn raids were used	2
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	
- the giving of commitments or undertakings to change conduct	
- an exemption or clearance decision (or equivalent)	
- case closure without full resolution	
Number of cases that are ongoing	2
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[67]	0
Number of studies/reviews in the year to date that resulted in	
- the giving of undertakings	
- a market investigation reference to the Competition and Markets Authority	1[68]

[66] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by Ofgem which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.
[67] A market study, for the purposes of this table, is one that has been formally initiated by the publication of a market study notice under section 130A of the Enterprise Act 2002. This does not include any market studies or reviews under sectoral legislation.
[68] Ofgem made an ordinary reference to the CMA for a market investigation into the supply and acquisition of energy in Great Britain. This was not as a result of a formal market study under the Enterprise Act 2002.

8. Looking ahead

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

124. Ofgem is consulting on proposals to increase the role of competitive tendering for onshore network transmission projects where it can drive efficiency. Ofgem considers that using tendering to select a party to construct and own some new onshore transmission assets is likely to create benefits for consumers. Ofgem would like to apply this to new large assets that can be easily identified and separated from the surrounding network. Subject to consultation responses, in 2015/16 it will develop the design of the regime and associated proposals for changes to legislation and licences, working with the Department of Energy & Climate Change as appropriate.

125. Through its offshore transmission competitive tender process run to appoint Offshore Transmission Owners, Ofgem will also continue to support the offshore wind developments by bringing new capital into the offshore sector which can be used to support new investments. Ofgem's other main role is to regulate Offshore Transmission Owners to make sure they meet their obligations, including the 98% availability target for their transmission systems. In 2015/16, Ofgem will work towards achieving financial close and licence grants for the remaining projects its second and third tender rounds. Ofgem will also work closely with wind farm developers to identify the next round of projects that will go through the tendering process.

126. Ofgem will report annually on the state of competition in the retail markets. The evaluation of the impact of the retail reforms will be a key part of Ofgem's next report, expected to be published in summer 2015. This will allow Ofgem to keep these policies under review and take action if needed.

127. In the year ahead, Ofgem will continue to support the CMA's investigation into the Great Britain energy market.

128. Ofgem is consulting on, with a view to implementing, its proposed remedies to improve conditions for competition in the process of getting connected to the electricity distribution network.

129. Ofgem will continue to monitor how the Great Britain wholesale electricity market complies with the Transmission Constraint Licence Condition which prohibits generators from obtaining an excessive benefit from electricity generation in relation to a period of transmission constraint.

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

E.1 Financial Conduct Authority

130. The Financial Conduct Authority (FCA) inherited responsibility for conduct regulation in the provision of financial services following the division of the Financial Services Authority into the FCA and the Prudential Regulation Authority. It was created in April 2013 to ensure that financial markets function well. This means ensuring that the financial services industry is run with integrity, that firms provide consumers with appropriate products and services and that consumers can trust that firms have their best interests at heart.

131. The financial services industry is wide, diverse and comprises multiple products, services, firms and service providers at multiple levels active in a range of markets. Since the conditions of competition vary across each of these products and markets, the FCA tackles issues on a case-by-case basis.

132. The FCA has a single strategic objective, which is to ensure that the relevant markets function well (section 1B(2) Financial Services and Markets Act 2000 (FSMA)). This is supported by three operational objectives:

- to secure an appropriate degree of protection for consumers (section 1B(3)(a));
- to protect and enhance the integrity of the UK financial system (section 1B(3)(b)); and
- to promote effective competition in the interests of consumers (section 1B(3)(c)).

133. The FCA also has a duty to promote effective competition (under section 1(B)(4)), which states that so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, the FCA must discharge its general functions in a way which promotes effective competition in the interests of consumers.

134. On 1 April 2015, the FCA became a concurrent competition regulator, which means it will be able to enforce competition law in the provision of financial services concurrently with the CMA (see further below).

135. The FCA supervises the conduct of over 70,000 financial service firms in the UK and regulates the prudential standards of those firms not covered by the Prudential Regulation Authority.

136. The FCA draws its powers mainly from FSMA and its subordinate legislation and has a range of tools at its disposal that it deploys in its authorisation, supervision and enforcement functions:

- **Authorisation:** Firms and individuals can only conduct regulated financial service activities in the UK if they are authorised or approved by the FCA to do so. A payment services provider or an electronic money institution may qualify to be registered rather than authorised.[69] Both authorised and registered firms must meet certain standards and provide the FCA with information for it to monitor the firms' business.

- **Supervision:** The FCA regularly assesses firms' conduct, varying the intensity of assessments depending on the nature and size of the firm. This includes continuous conduct assessment for large firms and regular assessment for smaller firms, monitoring products and other issues to ensure firms operate fairly and do not compromise consumer interests, responding quickly and decisively to events or problems that threaten the integrity of the industry and ensuring firms compensate consumers.

- **Enforcement:** The FCA uses enforcement activity to change commercial behaviour by making it clear that there are adverse consequences for those firms or individuals who do not meet the required standards of conduct. Depending on the circumstances, the FCA may take criminal, civil and/or regulatory actions against firms and individuals. Credible deterrence remains central to the FCA's enforcement approach.

- **FCA Handbook:** Alongside primary legislation, the FCA may make rules or issue guidance. The FCA Handbook sets the standards against which firm conduct is supervised and may form the basis for enforcement action where these standards are not met.

137. The FCA can use its powers under FSMA to advance its competition objective (see paragraph 133). When approaching competition issues under FSMA, the FCA analyses the markets it regulates and targets its resources on areas that it considers carry the greatest potential harm to consumers, and where it believes it can intervene and help consumers most effectively and efficiently.

138. Over the coming months, the FCA intends to undertake more market studies using either its powers under FSMA or the Enterprise Act 2002, broaden reviews to previously unvisited sectors and take proportionate and decisive

[69] Registered firms do not have to provide the FCA with as much detail about their business or safeguard the funds received from customers for payment services.

early action to mitigate harm to consumers and to benefit the financial services industry as a whole.

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

139. On 1 April 2015, the FCA obtained new competition powers, which operate concurrently with the CMA in relation to the provision of financial services. The FCA can now:

- conduct market studies and make market investigation references to the CMA under the Enterprise Act 2002; and
- take enforcement action against breaches of the prohibitions on anti-competitive agreements and abuses of a dominant position set out in the Competition Act 1998 and Treaty on the Functioning of the EU.

140. From 1 April 2015, the FCA also has a duty to consider whether it would be more appropriate to use its Competition Act 1998 powers rather than certain FSMA powers (often referred to as the 'primacy' obligation).

141. The FCA's primacy obligation will apply to some of its regulatory functions, including its powers to vary or cancel a firm's permission and to impose or vary requirements on a firm. By way of example, if the FCA suspected a firm to have engaged in anti-competitive information exchange, it would consider first, before using its regulatory powers to require that firm to stop such conduct, whether it would be more appropriate to investigate the firm under the Competition Act 1998.[70]

2. Significant developments in the FCA's approach to competition since April 2014

142. To enable it to deliver its competition mandate, the FCA has built a competition department of nearly fifty people with the right skills and experience, including staff experienced in competition law and economics.

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[70] The FSMA powers covered by the primacy obligation are:
(a) s55J(2) FSMA to vary or cancel a Part 4A permission (to carry out regulated activities);
(b) s55L FSMA to impose or vary a requirement on an authorised person with a Part 4A permission;
(c) s88E FSMA to take action against a sponsor firm (to advance our operational objectives);
(d) s89U FSMA to take action against a primary information provider to advance our operational objectives;
(e) s192C FSMA to give a direction to a qualifying parent undertaking; and
(f) s196 FSMA to impose a requirement (intervention in respect of incoming firms).

143. To provide guidance on how the FCA intends to enforce its concurrent competition powers, it has undertaken a public consultation exercise of the following documents:

- a guide to the FCA's powers and procedures under the Competition Act 1998;
- a guide to the FCA's powers and procedures to conduct market studies and make market investigation references under the Enterprise Act 2002; and
- a legal instrument to make minor amendments to the FCA Handbook.[71]

144. In December 2014, the FCA set out details of how it intends to meet the regulatory challenges ahead following a detailed review of its strategy, priorities and ways of working.

145. The FCA's approach to meeting the regulatory challenges is shaped by a strategy that will provide a sharper focus on how firms are regulated and on delivering the right outcome for consumers and the markets. It recognises the differences in approach required across the industry given its size and variety, based on emphasising sector and market-wide work and reflecting the FCA's competition duties.

146. It also aligns the data and intelligence gathered from all sources to present a consistent FCA-view on what is happening in the market and what behaviour is expected from firms. Several structural changes to how the organisation works will complement this new approach.[72]

3. Cases under the competition prohibitions since April 2014

147. The FCA did not have concurrent powers to enforce the Competition Act 1998 until 1 April 2015.

4. Market studies since April 2014

148. The FCA did not have the power to conduct market studies under the Enterprise Act 2002 until 1 April 2015. However, the FCA has carried out, or is

[71] These documents underwent a public consultation exercise in 2015. The draft documents are available on the FCA website.
[72] Further details on the FCA's review of its strategy, priorities and ways of working are available on the FCA website.

currently carrying out, several market studies using its powers under FSMA as set out in section (6) below.

5. Decisions taken since April 2014 to use the FCA's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

149. The FCA did not have concurrent powers to enforce the Competition Act 1998 until 1 April 2015.

6. Other steps taken to promote competition since April 2014

150. The FCA has carried out, or is currently carrying out, several market studies using its powers under FSMA:

- Retirement Income market study, which covered products purchased from a pension pot to provide an income during retirement. In this market study, the FCA looked specifically at annuity and income drawdown products to determine whether any obstacles to competition are preventing competition from working more effectively for consumers. The FCA looked at firm conduct, the behaviour of consumers and the structural features of this market. An interim report was published in December 2014 for public consultation and the final report was published in March 2015.[73]

- Cash Savings market study, which looked at consumer behaviour as well as supplier conduct to determine whether consumers shop around and switch their savings accounts and the factors that may reduce the willingness of consumers to engage in this activity. The FCA's final report was published in January 2015.[74]

- General Insurance Add-ons market study, which looked into the wide range of general insurance products sold alongside, or on the back of, 'primary products'. The FCA's final report in July 2014 confirmed that selling a product as an add-on often led to consumers purchasing products that were of poor value and not what they needed.[75] On 12 December 2014, the FCA set out proposed changes to the guaranteed asset protection insurance market and is currently reviewing responses to the public consultation exercise.[76]

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[73] More information is available at www.fca.org.uk/news/market-studies/retirement-income-market-study.
[74] More information is available at www.fca.org.uk/news/cash-savings-market-study.
[75] More information is available at www.fca.org.uk/news/general-insurance-add-ons-market-study.
[76] More information is available at www.fca.org.uk/news/cp14-29-guaranteed-asset-protection-insurance.

- Credit Card market study, which covers three areas of interest: consumer switching, the way in which firms recover costs across consumer groups and the extent of unaffordable lending. The FCA took over regulation of consumer credit from the Office of Fair Trading in April 2014 and formally launched a market study in November 2014. The FCA found that nine million Britons are considered to be in serious debt and that a considerable number of people, so called 'survival borrowers', often feel that they have no option but to borrow money, either through a payday loan or using a credit card, in order to help pay their bills.[77]

- Wholesale Sector strategic review – a call for inputs, which aimed to identify any areas that might merit further investigation through a market study. The review focuses primarily on competition in wholesale securities and investment markets, and activities that are related to these including markets and market infrastructure, investment banking, asset management and corporate banking. The FCA's call for inputs closed on 9 October 2014 and a feedback statement was issued in February 2015 whereupon the FCA announced its intention to launch a market study on investment banking and corporate banking services in spring 2015.[78]

151. Additionally, in October 2014, the FCA launched 'Project Innovate', which includes introducing an 'Innovation Hub' through which new and established businesses (this can include both regulated and non-regulated businesses) are able to introduce innovative financial products and services to the market. The support offered to eligible businesses includes:

- a dedicated team and contact for innovator businesses;

- help for these businesses to understand the regulatory framework and how it applies to them;

- assistance in preparing and making an application for authorisation, to ensure the business understands the FCA's regulatory regime and what it means for the business; and

- a dedicated contact for up to a year after an innovator business is authorised.

152. Along with the Bank of England and HM Treasury, the FCA is conducting a joint review (named the 'Fair and Effective Financial Markets Review') into fixed income, currency and commodity (FICC) markets. This review has

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[77] More information is available at www.fca.org.uk/news/credit-card-market-study.
[78] More information is available at www.fca.org.uk/your-fca/documents/feedback-statements/fs15-02.

focused on trading practices, the scope of regulation, the impact of forthcoming regulation and the implications for supervision. As part of its work, the review is also considering the relationship between the level of competition in FICC markets and the fairness and effectiveness of those markets.

153. In March 2015, the FCA published its findings on the effectiveness of the Current Account Switching Service (CASS) and the initial evidence it gathered on account number portability (ANP). The main findings were that CASS addresses the main practical barriers to switching, and that while CASS has led to a small increase in switching volumes, it needs to be seen in the context of the existence of other barriers to switching, such as consumer inertia. Nonetheless, there are a small number of areas in which further enhancements to CASS could be made, including measures to raise awareness of and confidence in the service; and finding a solution to the problem that may arise when the redirection service ends. The evidence the FCA has gathered in relation to ANP indicates that further work to quantify the potential benefits and costs of these options would be appropriate. The FCA has handed the evidence it has gathered on ANP to the PSR to consider (via its proposed Payment Strategy Forum) in the context of its wider strategy for payment systems.

154. The FCA also participated in OECD roundtable discussions and seminars, which included a discussion on the importance of behavioural and consumer research, the way consumers handle their financial issues and how such insights help to further our understanding of consumers.

155. Although not undertaken to promote competition, but pursuant to its objectives in relation to consumer protection and market integrity, the FCA has concluded enforcement cases that have run in parallel to antitrust investigations in relation to misconduct relating to the London Interbank Offered Rate (LIBOR), failure to control business practices in G10 spot foreign exchange trading operations and failure to manage conflicts of interest in relation to the Gold Fixing.[79] These cases complement competition interventions in other jurisdictions.

[79] See FCA press releases: 'Lloyds Banking Group fined £105m for serious LIBOR and other benchmark failings'; 'FCA fines five banks £1.1 billion for FX failings and announces industry-wide remediation programme' and 'Barclays fined £26m for failings surrounding the London Gold Fixing and former Barclays trader banned and fined for inappropriate conduct'.

7. Data on cases for the year to date since 1 April 2014

156. The FCA did not have concurrent competition law powers until 1 April 2015 but, as described in section (6), it has conducted market studies and enforcement activities using its powers under FSMA.

8. Looking ahead

157. The FCA issues a Business Plan each year that sets out the goals for the financial year ahead. The 2015/16 Business Plan is available on the FCA website.[80]

158. Amongst other work, the 2015/16 Business Plan announces the FCA's intention to launch market studies looking at competition in four areas. These are:

- Corporate and investment banking services (as previously announced);
- Asset management, including looking at the charges paid by investors and the factors driving such charges;
- Mortgages – building on from the FCA's assessment of how firms are implementing the FCA's post-Mortgage Market Review rules, from autumn 2015 the FCA will begin a wider assessment of barriers to competition (such as factors affecting consumers' ability to access credit and ability to switch providers, and barriers to entry and/or expansion) with a view to launching a market study in early 2016 on those aspects of the mortgage market that are not working to the benefit of consumers;
- Technology and Big Data, looking at how insurance firms use Big Data. The FCA will identify potential risks and benefits to consumers, including whether the use of Big Data creates barriers to access products or services, and examine the regulatory regime to ensure it does not unduly constrain beneficial innovation in this area.
- The scope of each market study will be announced as part of its terms of reference when it is launched.

[80] FCA Business Plan 2015/16.

E.2 Payment Systems Regulator

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

160. The major payment systems in the UK are generally owned and controlled by the banks, which have developed them in an incremental manner, often on a collaborative basis. While this has led to relatively resilient payment systems, it has also led to a degree of inertia and concerns regarding ownership as well as competition and the pace of innovation, at least in the case of the interbank payment systems.

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

162. In setting up the PSR, the Government highlighted four aims for UK payment systems:

- UK payment networks that operate for the benefit of all users including consumers;
- a UK payments industry that promotes and develops new and existing payment networks;
- UK payment networks that facilitate competition by permitting open access to participants or potential participants on reasonable commercial terms; and
- UK payment systems that are stable, reliable and efficient.

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

- to promote effective competition in the markets for payment systems and for services provided by those systems, including between operators, payment service providers and also infrastructure providers, in the interests of service-users;
- to promote the development of and innovation in payment systems, in particular the infrastructure used to operate payment systems, in the interests of service-users; and

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

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

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

165. The PSR regulates those payment systems designated by HM Treasury. These are the largest and most important payment systems which, if they were to fail or to be disrupted, would cause serious consequences for their users. In March 2015, HM Treasury announced its decision to designate the following eight payment systems: Bacs, CHAPS, Faster Payments Scheme, LINK, Cheque & Credit, Northern Ireland Cheque Clearing, Visa Europe and MasterCard.[81] For each designated system, all the participants in that payment system fall under the PSR's remit. Participants in a payment system include the operator that manages or operates that system, the payment service providers (PSPs) using that system, and the infrastructure providers to the payment system.

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

- require or prohibit a specific action or set standards;
- require operators to establish or change rules of payment systems, require them to notify the PSR of changes, or require that operators secure the PSR's approval before making rule changes;
- require the operator of a regulated payment system or a PSP with direct access to grant access to that payment system;
- vary the fees, charges, terms and conditions of agreements relating to payment systems;
- require the disposal of an interest in the operator of a regulated payment system; and

[81] HM Treasury, Designation of payment systems for regulation by the Payment Systems Regulator.

- provide guidance.

167. From 1 April 2014, the PSR became a concurrent competition regulator in respect of powers under the Enterprise Act 2002. From 1 April 2015, the PSR became a concurrent competition regulator in respect of powers under the Competition Act 1998. This means that the PSR will be able to apply competition law concurrently with the CMA, if an issue relates to participation in payment systems. The PSR can:

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

    - conduct market studies and make market investigation references under the Enterprise Act 2002.

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

169. The PSR also expects to be the competent authority for Article 28 of the Payment Services Directive (implemented in the UK by Part 8 of the Payment Services Regulations 2009) which is currently the responsibility of the CMA.

2. Significant developments in the PSR's approach to competition since April 2014

170. As noted above, the PSR has (as one of its three statutory objectives) the objective of promoting effective competition in the market for payment systems, or the markets for services provided by payment systems, in the interests of service-users (section 50 of FSBRA).

171. FSBRA stipulates that promoting effective competition includes promoting effective competition between different operators, PSPs and infrastructure providers.

172. The PSR's aim is to develop and protect competitive markets and outcomes as a whole, rather than to protect individual competitors. It will consider where collaboration can enhance competition in the interests of service-users. For example, collaboration between PSPs at the operator level may be justified where it facilitates competition between PSPs at the service level, and may therefore be in the interests of service-users. A recent example of collaboration between PSPs is the development and launch of the Faster Payments Scheme.

173. The PSR has a duty to consider whether it would be more appropriate to use its Competition Act 1998 powers rather than certain direct regulatory powers.[82] This duty does not arise in all circumstances. Where the PSR intends to exercise its power to give a general direction or to issue a generally-imposed requirement,[83] it is not obliged to consider whether it would be more appropriate to proceed under the Competition Act 1998. However, where the PSR intends to give a specific direction or issue a specifically-imposed requirement (for example, a direction or requirement addressed to an individual payment system operator),[84] it must consider its Competition Act 1998 powers first. The PSR's duty to consider its Competition Act 1998 powers also arises in connection with its powers to require the granting of access to a payment system,[85] to vary agreements relating to payment systems,[86] or to require the disposal of an interest in the operator of payment system.[87]

174. Where the PSR decides that it is more appropriate to use its direct regulatory powers, in preference to its Competition Act 1998 powers, it will state its reasons for this. The PSR will take account of the evidence in its possession and its Administrative Priority Framework.[88] Starting a Competition Act 1998 investigation or using its Competition Act 1998 powers will not preclude the PSR from later deciding to take action using its direct regulatory powers.

175. To provide guidance on how the PSR intends to enforce its concurrent competition powers, it has recently completed a public consultation exercise[89] and will issue finalised versions of the following documents as soon as possible after its 1 April 2015 operational launch:

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

[82] Section 62 FSBRA.
[83] Sections 54 and 55 FSBRA.
[84] Sections 54 and 55 FSBRA.
[85] Section 56 FSBRA.
[86] Section 57 FSBRA.
[87] Section 58 FSBRA.
[88] Available on the PSR's website: www.psr.org.uk.
[89] See PSR CP 15/1: PSR competition concurrency guidance.

3. Cases under the competition prohibitions since April 2014

176. The PSR did not have concurrent competition law powers under the Competition Act 1998 until 1 April 2015 and has therefore not undertaken any Competition Act 1998 activity in the period covered by this concurrency report.

4. Market studies since April 2014

177. While the PSR has had concurrent competition powers under the Enterprise Act 2002 since 1 April 2014, enabling it to undertake market studies, it has not undertaken any Enterprise Act 2002 activity during the period covered by this concurrency report. However, as set out in section (6) below, the PSR has announced the launch of two market reviews to be carried out using its FSBRA information gathering powers.

5. Decisions taken since April 2014 to use the PSR's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

178. The PSR did not have concurrent powers to enforce the Competition Act 1998 until 1 April 2015.

6. Other steps taken to promote competition since April 2014

179. In its Policy Statement of March 2015[90] (and following its November 2014 consultation on its policy proposals), the PSR announced the launch of two market reviews that will be carried out using its FSBRA information gathering powers:

- **Infrastructure market review:** The provision of infrastructure is central to both payment systems and the PSR's innovation and competition objectives. To support industry collaboration, it is important that payments infrastructure is able to support new developments and innovations. The PSR's market review will examine the ownership and competitiveness of the provision of infrastructure and aims to give the PSR a greater understanding of whether the current structures provide the right incentives to encourage innovation and provide the best outcomes for those businesses and consumers who use the systems.

- **Indirect access market review:** Access to payment systems is an important driver of competition and innovation in the provision of payment

[90]Available on the PSR's website: www.psr.org.uk.

services. The PSR's market review is intended to give the PSR a deeper understanding of the economics of the supply of indirect access generally, and whether current arrangements deliver good outcomes for all people and organisations that use payment systems. The review will consider the implications for competition arising from the structure of the market, what factors limit the degree of choice available to different types of indirect PSPs and what a competitive indirect access offering looks like.

180. In July 2013, the European Commission published a proposal for a Regulation of the European Parliament and Council on interchange fees for card-based payment transactions (the 'Interchange Fee Regulation' or 'IFR'). The IFR will be adopted during 2015. Interchange fees in card payment systems have been the subject of sustained competition law and regulatory scrutiny across Europe and globally for many years, including through the CMA's (and Office of Fair Trading's) own investigations of UK domestic interchange fee arrangements.[91]

181. The PSR expects to be the competent national authority for monitoring and enforcing the IFR when it is adopted and comes into force. More information on the PSR's approach can be found in its Policy Statement of March 2015.

7. Data on cases for the year to date since 1 April 2014

182. The PSR did not have concurrent powers to enforce the Competition Act 1998 until 1 April 2015. While the PSR had concurrent powers to conduct market studies under the Enterprise Act 2002 since 1 April 2014, it has not done so during the period covered by this report. The PSR became fully operational on 1 April 2015. As noted in paragraph 179 above, the PSR has announced the launch of two market reviews that will be carried out using its FSBRA information gathering powers.

8. Looking ahead

183. The PSR launched operationally on 1 April 2015. In November 2014, the PSR consulted on a package of proposals[92] and, in March 2015, published its Policy Statement on the regulatory framework it has put in place.[93] In summary, the PSR's framework for the regulation of payment systems in the UK, post 1 April 2015, includes the following elements:

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[91] In November 2014, the CMA announced that it had decided not to progress its investigation into MasterCard's and Visa's interchange fee arrangements towards deciding whether or not to issue statements of objections at the present time. See the Interchange fees - Mastercard and Visa case page.
[92] See PSR CP14/1 ('A new regulatory framework for payment systems in the UK').
[93] Available on the PSR's website: www.psr.org.uk.

- **A new approach to industry strategic development to drive industry collaboration and deliver innovation:** The PSR will take control of the strategy development and setting process by setting up a new Payments Strategy Forum with broad representation of industry and service-users.

- **Specific measures to address key concerns relating to ownership, governance and control of payment systems:** The PSR will require all operators of interbank payment systems[94] to ensure that the interests of service-users are appropriately represented in decision-making at board level and will require certain conflicts of interest to be removed (so that no individuals are simultaneously directors of an interbank payment system operator and of central infrastructure provider to the same payment system). It will also require interbank payment system operators to publish board minutes and votes. The PSR will also carry out a market review into the ownership and competitiveness of infrastructure provision (see paragraph 179 above).

- **Specific measures to address key concerns in relation to direct and indirect access to payment systems:** In terms of direct access, the PSR will require that operators of certain payment systems must have objective, risk-based and publicly disclosed access requirements, which permit fair and open access. Some operators are already subject to an access rule under Article 28 of the Payment Services Directive, but they too will be required to disclose publicly their access requirements. The PSR will also require all operators to report to it on compliance with their applicable access rule. In terms of indirect access, the PSR will require that sponsor banks publish information on the sponsor services they offer (including access criteria and processes) and will be responsible for approving an industry-developed Code of Conduct. The PSR will also carry out a market review into indirect access (see paragraph 179 above).

- **A programme of work around card systems**: The PSR will begin a programme of work to ensure that it has the evidence it needs to take informed decisions in its capacity as the competent authority for monitoring and enforcing the IFR. The PSR will also consider whether it is necessary for it to take any other action to promote competition, innovation or the interests of service-users in card systems.

[94] Except Belfast Bankers' Clearing Committee Limited, the operator of cheque clearing in Northern Ireland.

184. More details on the PSR's regulatory framework and the package of measures it is implementing to advance its statutory objectives, functions and duties can be found in its Policy Statement of March 2015.

185. Further information on the PSR's activities for the financial year ahead can be found on its website at www.psr.org.uk.

F. Healthcare services in England – Monitor

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

- public sector providers are well led so that they can provide high-quality care to local communities;
- essential NHS services continue if a provider gets into difficulty;
- the NHS payment system rewards quality and efficiency; and
- procurement, choice and competition operate in the best interests of patients.

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

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

188. There have not been any significant changes in the legal and regulatory framework governing healthcare services in England since April 2014.

2. Significant developments in Monitor's approach to competition since April 2014

189. The past year has seen Monitor continue to pursue its strategy to educate and inform patients, commissioners, providers and the wider health system about how the rules on procurement, choice and competition affect them and why they benefit patients. Alongside this, Monitor has pursued focused action to enforce the rules relating to procurement, choice and competition.

190. In particular, the CMA and Monitor agreed a new approach to provide early stage support to NHS Foundation Trusts considering mergers. Relevant

guidance was issued jointly by the two authorities, while Monitor and the CMA have each published guidance separately on NHS mergers.[95]

3. Cases under the competition prohibitions since April 2014

191. There were no cases under the EU or UK competition prohibitions opened or closed by Monitor in the year from April 2014.

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

4. Market studies since April 2014

193. There were no market studies opened or closed by Monitor since April 2014 and none which is ongoing.

5. Decisions taken since April 2014 to use Monitor's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

194. There were no decisions taken since April 2014 to use Monitor's direct regulatory powers instead of powers under the competition prohibitions where those competition prohibition powers could have been exercised.

6. Other steps taken to promote competition since April 2014

195. Monitor does not have a duty to promote competition and, as such, focuses on preventing anti-competitive behaviour where that is not in the interests of patients. Monitor has worked to prevent anti-competitive behaviour when it is in the interests of patients to do so through the informal and formal application of its sector regulatory powers. This includes not only preventing anti-competitive behaviour where it is not in the interests of patients but also ensuring that procurement, choice and competition work well for patients.

196. Monitor's advocacy work has included:

- publication of guidance on its co-operation and competition functions, including joint guidance with the CMA on NHS mergers;

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[95] Guidance published with respect to NHS mergers: Monitor, *Supporting NHS providers: guidance on merger benefits*, August 2014.
CMA, *CMA guidance on the review of NHS mergers*, July 2014. Monitor/CMA, *Competition review of NHS mergers: A short guide for managers of NHS providers*, July 2014.

- seminars and other bilateral meetings with the healthcare sector to build understanding about the competition rules; and

- development and publication of hypothetical case scenarios about the application of competition rules in the healthcare sector.

197. This advocacy work has aimed at developing understanding within the sector about the competition rules and how they can be used as a framework to drive change that benefits patients. This forms an important foundation for work within the sector to introduce new models of care, as set out in the Five Year Forward View for the NHS.[96]

198. Monitor's regulatory action has included the following.[97]

A formal investigation into the commissioning of radiosurgery services in Yorkshire and Humber

199. Monitor conducted an investigation into the commissioning of radiosurgery services after receiving a complaint from Thornbury Radiosurgery Centre Limited (Thornbury), a provider of gamma knife radiosurgery services. The complaint related to the conduct and procurement practices of the North of England Specialised Commissioning Group and of its successor from 1 April 2013, NHS England. The essence of the complaint was that NHS England would not enter into a contract with Thornbury despite that provider having previously provided services to the NHS. During the course of the investigation, NHS England decided to enter into a contract with Thornbury and Monitor took the decision that the best result for patients would be to close the case and issue guidance to commissioners about the issues involved. Monitor issued its decision on 4 April 2014 along with a publication that set out the learning from that case to offer guidance to commissioners facing similar circumstances in the future.

A formal investigation into the commissioning of elective services in Blackpool and Fylde & Wyre

200. Monitor investigated a complaint into the commissioning of elective services in Blackpool and the surrounding area. This had important implications for patient choice. An independent hospital complained that local Clinical Commissioning Groups (CCGs) had directed patients away from its hospital

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[96] NHS, *Five Year Forward View*, October 2014.
[97] Competition prohibition powers were not exercised in these cases because competition law does not apply to commissioners of care, who are governed by sector-specific rules about preventing anti-competitive behaviour that is not in the interests of patients.

and towards a local NHS Foundation Trust as a result of the CCGs entering into a block contract[98] with the local Foundation Trust. Monitor analysed patient referral data for the relevant period and sought information about the CCGs approach to commissioning services from Blackpool Teaching Hospitals NHS Foundation Trust. The analysis did not support the complaint that patients had been directed away from Spire Fylde Coast Hospital and towards Blackpool Teaching Hospitals NHS Foundation Trust. However, Monitor did find that Blackpool CCG and Fylde and Wyre CCG had not ensured that patients were being offered choice and that patient choice was being publicised and promoted. As a result, Monitor is consulting on remedies that will ensure that patients are able to exercise choice of provider in these areas.

201. Monitor chose to undertake these investigations where enforcement action would be in the best interests of patients. As well as resolving specific local issues, Monitor has publicised the lessons learned from these investigations, particularly for commissioners when they decide whether to enter into a contract with a provider and for the purpose of supporting and enabling patient choice.

202. Other relevant work has included the following.

A project looking at how well general practice services are working for patients

203. Monitor issued a call for evidence in August 2013 to determine the extent to which the commissioning and provision of general practice (GP) services is operating in the best interests of patients.

204. Following the call for evidence, Monitor published a discussion document in February 2014 setting out its findings. In the discussion document, further work was identified that would enable Monitor to develop its role in ensuring that the commissioning and provision of GP services is working well for patients.

205. The objectives of Monitor's project are to gain a better understanding of:

- whether the quality of GP services varies across England, including in terms of patients' ability to get an appointment with a GP and the quality of diagnosis and treatment provided by GP practices;
- whether any factors limit patients' ability to make choices about their care;

[98] A block contract allows a healthcare provider to receive a lump sum payment to provide a service irrespective of the number of patients treated or the type of treatment provided.

- whether any factors limit providers' ability to expand their GP services, or potential providers' ability to begin offering high-quality GP services; and

- to identify how Monitor could work with its partners to enhance patient choice and remove any factors new and existing providers face in delivering high-quality services to patients.

A project investigating commissioning plans for community services

206. Commissioners currently have an important opportunity to commission community services in a way that will support this shift to more coordinated care for patients closer to home. Many of the community services contracts put in place three to five years ago are expiring, giving commissioners an opportunity to:

    - move to new ways of working or new models of care that are better for patients;

    - test which providers are most likely to achieve the changes that commissioners want for patients; and

    - move to new contracts that provide greater transparency and account-ability for community services provision, as well as greater incentives for providers to improve services for patients.

207. Monitor has reviewed community services commissioning to understand the extent to which commissioners are seizing this opportunity.

A project examining how well patient choice is working in adult hearing services

208. Many people with suspected or diagnosed age-related hearing loss are today able to choose who provides their care. This is because, in 2013, over half of commissioners chose to extend patient choice into NHS adult hearing services.

209. Action on Hearing Loss, the leading hearing loss charity, contacted Monitor in 2014 raising questions about whether choice in adult hearing services is working in the best interests of patients.

210. Consistent with its duties, Monitor decided to review the provision of adult hearing services in England. Specifically, Monitor launched its project to:

    - understand how patient choice is working in relation to adult hearing services funded by the NHS;

- understand whether current arrangements serve the interests of patients effectively and whether there is scope for improvement; and
- offer insights for commissioners when deciding whether and how to extend patient choice.

211. Monitor's report was published in March 2015. The report found that, although patients valued having choice as it put them in control of their care and choice helped improve access to services, very few patients were actually being offered choices.

7. Data on cases for the year to date since April 2014

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015.	
Number of new complaints[99]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises / conduct dawn raids were used	
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	
- the giving of commitments or undertakings to change conduct	
- an exemption or clearance decision (or equivalent)	
- case closure without full resolution	
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[100]	0
Number of studies/reviews in the year to date that resulted in	0
- the giving of undertakings	
- a market investigation reference to the Competition and Markets Authority	

[99] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by Monitor which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.

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

8. Looking ahead

212. Monitor will continue to:

- provide advice on how the rules on procurement, choice and competition apply in specific local situations to assist providers and commissioners in making good decisions in the best interests of patients;
- investigate potential breaches of the rules and take formal action where that will have greatest benefit for patients;
- ensure it does all it can to support NHS providers planning a merger that works well for patients to navigate as swiftly as possible through the statutory merger review process; and
- undertake and promote research to establish how different participants in healthcare markets respond to incentives established through choice and competition and what this means for Monitor's regulatory approach.

G. Railway services – the Office of Rail Regulation

213. The Office of Rail Regulation (ORR) is the main safety and economic regulator of railways in Great Britain.

214. In exercising its functions under the principal legislation, the Railways Act 1993, the ORR must consider and achieve an appropriate balance between its 24 statutory duties, one of which is to 'promote competition in the provision of railway services for the benefit of users'[101] of railway services. The ORR has no primary duty relating to the consumer or to competition.

215. Since April 2014, however, the ORR has been under an obligation, before exercising its direct regulatory powers of licence enforcement, to consider whether it would be more appropriate to proceed under the Competition Act 1998 (ie using its competition prohibition powers).

216. In this regard, the ORR has powers to enforce the competition prohibitions in the Competition Act 1998, and to make market investigation references to the CMA under the Enterprise Act 2002, in relation to the supply of services relating to railways.[102]

217. The rail industry is split into various separate elements:

- **The network (track and related infrastructure, including the largest main line stations):** this is owned and operated by the monopoly Network Rail, a statutory corporation classified as being in the public sector for statistical purposes. Network Rail derives its revenue primarily from charges for access to its network and stations and from a direct financial 'network grant' from government.

- **Train operators:** subdivided into passenger train operating companies (TOCs), the majority of which have been granted franchises to operate by the Government, and freight operators which have open access to the market.

- **Providers of rolling stock:** train operators typically lease rolling stock, primarily from three rolling stock companies (ROSCOs) that inherited rolling stock from British Rail on privatisation. There is a degree of competition between these companies which are not subject to direct regulation.

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[101] The concept of 'users' of the railways includes passengers but is not limited to them.
[102] Railways Act 1993, section 67.

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

EU law

218. In January 2013, the European Commission proposed a wide-reaching package of legislation, designed to open the EU market for domestic passenger rail services and which may have limited consequences for the market in Great Britain if adopted.

219. The 'market pillar' of this package includes proposals to strengthen the separation between infrastructure management and service operations through, for example, information barriers and mandatory competitive tendering for public service obligation operations. These proposals have been discussed at length and are currently subject to negotiations between member states in the EU Transport Council.

220. Having one of the more liberalised rail markets within the EU, the UK is already broadly compatible with the 'direction-of-travel' of the proposals. This may result in potential benefits for UK operators seeking to capitalise on their experience to grow their business throughout Europe.

221. During 2014, the ORR has monitored the progress of the proposals and actively contributed to the development and articulation of the UK's position on them. This has included submitting drafting suggestions and commenting on the potential regulatory impact of the package. The ORR also actively participated in the preparation of several position papers from IRG-Rail, the independent forum of European rail regulatory bodies. This close scrutiny of the proposals, as they develop, will continue into 2015.

222. Elsewhere, the ORR has continued working to help remove barriers to market entry and competition in the EU rail market. The ORR is working closely with other regulatory bodies to influence the development of legislative proposals on service facilities, freight corridors, and access charges.

Network Rail reclassification

223. Network Rail was created in 2002 as a private sector not-for-dividend company limited by guarantee.

224. A change in European reporting rules[103] led to Network Rail's reclassification on 1 September 2014. The company and its subsidiaries are now classified by the Office of National Statistics as a central government body. The effect of this reclassification was to bring the company's debt and any future borrowings onto the public sector balance sheet.

225. The ORR continues as the economic, competition and safety regulator for the railway.

2. Significant developments in the ORR's approach to competition since April 2014

226. The ORR and the CMA have had no cause formally to exchange information pursuant to Regulation 9 of the Concurrency Regulations during the last year. The ORR has, however, been proactive in sharing information with the CMA where it considered this would deliver benefits to the effective conduct of a case or where such sharing of information was permitted by law and, was in its opinion, within the spirit of the MoU. This has resulted in open dialogue between the CMA and the ORR designed to deliver advantages to the competition regime as a whole.

227. The CMA and the ORR have also met regularly at all levels, bilaterally and through the UK Competition Network. Both bodies have appointed a relationship manager to communicate on a regular basis. A number of highly engaged meetings have been held at senior level on the benefits of competition advocacy for this sector and the ORR is supportive of, and involved in, the work that the CMA announced in January on options for increasing competition in passenger rail services.

228. The ORR has also taken advantage of a number of training opportunities provided by the CMA and, although there have been no formal secondments between the two organisations, the CMA has allocated staff time to provide advice on the ORR's review of the Rolling Stock Order 2009.

3. Cases under the competition prohibitions since April 2014

Rail freight – 2013

229. In November 2013, the ORR launched a competition investigation into the carriage of freight by rail based on a suspected infringement of the Chapter I

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[103] The new European System of National and Regional Accounts which became enforceable from 1 September 2014 onwards.

prohibition on anti-competitive agreements and the Chapter II prohibition on abuse of a dominant position, and the equivalent EU prohibitions.

230. The investigation was initiated by an unannounced inspection of business premises under section 27 of the Competition Act 1998. This was a joint exercise involving both the ORR and the OFT officers.

231. In May 2014, the ORR held a state of play meeting with the target of the investigation and, in July 2014, the ORR decided to focus its investigation on the allegations relating to abuse of a dominant position.

232. The ORR expects to reach a decision on the investigation in the course of 2015. Further information on the indicative timescales of the case is available on the ORR's website.

4. Market studies since April 2014

233. There were no market studies opened or closed since April 2014 and none which is ongoing.

5. Decisions taken since April 2014 to use the ORR's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

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

6. Other steps taken to promote competition since April 2014

Transparency

235. The ORR continues to use transparency as a reputational incentive, as a means by which comparative analysis can be carried out at an increasingly granular level and to build public understanding of the way in which the industry is financed and how it operates.

236. Some examples of progress include the following:

- The ORR has published the third in the series of GB Rail Financials, which contains detailed analysis of the costs and revenues of the UK rail industry. Of particular note in this year's edition was new analysis of the breakdown in fare box income, particularly the share accounted for by unregulated discount fares.

- The ORR has continued to support its statistical release programme with a tailored communications strategy aimed at increasing engagement with the statistics by a wider audience, for example, with the use of infographic and social media techniques.

- The ORR has made increasing use of its website to publish more information about the structure of the rail industry. For example, the ORR has published a graphic device which will enable the public to find out region by region the performance of the railway, details of the major enhancement projects in the region and also safety information.

237. The ORR has also continued to work with the industry to encourage it to adopt a more open data approach to the release of information. The ORR has been particularly focused on real time train information which provides significant opportunities for third party developers to develop information apps which provide a real benefit for consumers. Over the course of 2014, the industry agreed to provide access on much less onerous terms than previously.

Retail review

238. Since launching the project in February 2014, the ORR continues to take forward its review of the retail market for rail tickets. The purpose of the review is to consider whether the regulations and industry arrangements and practices are promoting competition and facilitating innovation through collaboration for the benefit of passengers.

239. Throughout 2014, the ORR has focused on understanding the current regulations and industry arrangements for ticket selling and the associated benefits and issues. This involved extensive stakeholder engagement (including an industry workshop attended by over 50 industry representatives) and a consultation in September 2014.

240. The ORR identified four potential benefits of the current regulations and industry arrangements and practices:

    - they help passengers in buying tickets given that, for example, retailers are obliged to sell on an impartial basis (meaning train operating companies cannot favour their own services over their competitors when selling fares to passengers) and that train operating companies are prohibited from charging a transaction fee for selling tickets;

- they provide passengers with the flexibility and convenience of an integrated, national network given that train operating companies are required to create and sell inter-available and through tickets, for example;

- they provide the framework for retailers to collaborate to improve their services to passengers given the existence of governance arrangements, rules and processes around how retailers must work together, including in the development of network-wide products; and

- given the framework for selling tickets, they may provide clarity to new entrants, potentially encouraging more parties to sell tickets.

241. However, the ORR also identified four potential issues with the regulations and industry arrangements and practices:

- The costs and benefits are not necessarily distributed equally. The system is applied at a national level but different retailers make use of it to varying extents.

- They may inhibit innovation at the expense of improved services to passengers. Retailers are not always incentivised to work together.

- They may constrain retailers' commercial flexibility in how they sell tickets given that, for example, commission for selling train operating companies' tickets are set centrally by all train operating companies rather than bilaterally between the train operating company and the retailer.

- They may create conflicts of interest among retailers as the governance arrangements are made-up of train operating companies (rather than all retailers) who determine many of the rules (including commission rates).

242. The ORR intends to consult on its emerging views of what options are necessary to promote competition and facilitate collaboration in the ticket retail sector in late spring 2015.

Codes of Practice

243. The ORR's work over 2014 focused on working with the industry in the development of codes of practice to promote transparency and industry best practice.

244. For example, the ORR worked with the industry to update the code of practice regarding passenger information during disruption in July 2014. The ORR is also working with retailers of rail tickets to develop a code of practice on the information passengers should be provided with when buying a ticket. The

ORR consulted in September 2014 to seek stakeholders' views on the information that is material to passengers. The Code is expected to be in place by spring 2015.

245. The ORR has also consulted all freight operators to understand the extent to which the remedies proposed in response to its 2011 market study into access to rail freight sites have been implemented effectively and have brought about more competitive outcomes. The consultation ended in November and the ORR is expecting to publish its response in April 2015.

Competition 'in' the market

Open access applications

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

247. During 2014 the ORR approved extensions to the track access rights held by two open access train operators competing on the East Coast Main Line. These operators were Hull Trains Company and Grand Central Railway Company.

248. For one operator, First Hull Trains Company, the ORR approved a three-year extension of its contract from December 2016 to December 2019. The ORR also approved a ten-year extension of access rights for the other open access operator, Grand Central Railway Company, from 2016 to 2026, in order to secure its business and underpin investment in rolling stock and stations. This should entail performance and other passenger benefits.

249. In December 2014, the ORR rejected an open access application from Great North Western Railway Company Limited for the right to operate daily off-peak return services between London and Blackpool and London and Leeds using the West Coast main line. The ORR recognised the benefits that additional competition could bring but, in line with its statutory duties, also had to give consideration to the effect that the services might have on the funds available to the Secretary of State, amongst other factors.

CMA policy review

250. In January 2015, the CMA announced a policy project to examine the desirability and feasibility of increasing the scope for on-rail competition (ie more competition '*in*' the market) in passenger rail services. The CMA is working closely with the ORR on this, and is engaging with a range of interested parties, including franchisees, open access operators, potential entrants, industry groups, passenger groups, relevant government departments and sector specialists. As the CMA's announcement made clear, this project is examining policy options for the future; it will not be a commentary on how the current framework is applied at present, and has no bearing on, for example, the Government's current programme of franchise awards or the ORR's assessments, within the current framework, of open access applications that are made to it. The intention is to publish a report of interim findings in mid-2015, on which there will be a full consultation.

Rolling Stock Market Investigation Order 2009

251. The Competition Commission concluded a market investigation of the rolling stock leasing market in 2009. The CC identified a number of adverse effects on competition during the investigation and devised a package of remedies including an enforcement order, which requires ROSCOs to provide TOCs with certain standardised information when a TOC is considering leasing rolling stock. The ORR committed to monitoring the enforcement order, most recently in its 2014/2015 business plan. Therefore, in December 2014, the ORR wrote to a number of interested parties asking for representations on the state of the rolling stock leasing market and the operation of the order to date. The ORR completed its review of the responses in March 2015. After considering next steps in light of the information gathered, the ORR is expecting to announce its position in the spring of 2015.

7. Data on cases for the year to date since 1 April 2014

Use of powers under the Chapter I and Chapter II prohibition in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015.	
Number of new complaints[104]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises / conduct dawn raids were used	1
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	
- the giving of commitments or undertakings to change conduct	
- an exemption or clearance decision (or equivalent)	
- case closure without full resolution	
Number of cases that are ongoing	1
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0
Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[105]	0
Number of studies/reviews in the year to date that resulted in	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

[104] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the ORR which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.

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

8. Looking ahead

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

- developing indicators to measure Network Rail's system operator capability (ie how well Network Rail plans and timetables the network and balances competing customer needs). This is intended to lay the foundations for better use of network capacity in the future. Effective system operation may also mean that the ORR has to intervene less in decisions on network access. The first set of indicators in this area is expected to be published in the first half of 2015;

- the review of the retail market, launched by the ORR in February 2014. The ORR expects to set out its views on the market, and to propose some emerging thinking on possible options to address any issues, in late spring 2015. The ORR's objective is to address any material barriers to operators working effectively together in the development of new products and services for consumers and barriers that have an impact on the existence of new entry into ticket retail;

- the next periodic review of access charges payable to Network Rail. As set out in the ORR's Long Term Regulatory Statement, this includes work to identify ways to improve the regulation and performance of Network Rail's system operation functions, as well as exploring the benefits that might be realised from greater comparison between routes. In addition to the potential for cost reductions and performance improvements, the work on system operation functions has the potential to improve the information available to new entrants about the availability of capacity to support additional services;

- working with industry stakeholders to review the structure of charges, with a view to improving the overall effectiveness of the network in terms of cost, performance and capacity. This work will also consider the interactions between the structure of network charges and competition between passenger rail services, including open-access operators;

- working closely with the CMA on its policy project to identify ways to improve the prospects for greater on-rail competition in the medium and longer-term;

- continuing to influence the development of EU proposals to liberalise the passenger rail market;

- revising the ORR's current guidelines on competition enforcement and market studies; and
- developing a prioritisation framework relating to the exercise of the ORR's competition powers.

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

253. The Water Services and Regulation Authority (Ofwat) is the independent economic regulator for water and sewerage services in England and Wales.[106] Ofwat's primary objectives are set out in the Water Industry Act 1991. One of these objectives is to protect the interests of consumers, wherever appropriate by promoting effective competition.

254. To achieve this, Ofwat has direct regulatory powers to introduce and enforce conditions in each water company's licence. Ofwat also has concurrent powers alongside the CMA to apply and enforce competition law.[107]

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

256. Steps have been taken to introduce retail competition into the sector over a number of years. In England and Wales the introduction of the 'Water Supply Licensing' framework created competition for some, usually very large, non-household consumers. The 'New Appointment and Variations' regime, where companies can apply to take over as the monopoly provider for a specific region in place of the former provider also provides a degree of competition 'for' the market. However these legislative arrangements, for a range of reasons explained in Martin Cave's 2009 review,[108] have had limited success in developing competition in the sector.

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

257. On 14 May 2014, the Water Act 2014 received Royal Assent. The Water Act 2014 will bring significant reforms to the water industry. Amongst other measures, it will introduce greater competition. The Water Act 2014 enables

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[106] The Water Industry Commission for Scotland are the independent economic regulator for Scotland. However the Water Industry Commission for Scotland do not have concurrent competition law application and enforcement powers alongside the CMA.
[107] This includes the enforcement of the Chapter I and Chapter II prohibitions in the Competition Act 1998 and of Articles 101 and 102 of the Treaty on the Functioning of the EU.
[108] Professor M. Cave, 2009, Independent Review of Competition and Innovation in Water Markets: Final Report.

reform of the Water Supply Licensing scheme to allow all non-household customers in England to switch their water and sewerage retailer, it makes it easier for water companies to trade water and it allows businesses to provide new sources of water or sewerage treatment services.

258. To enhance competition, the reforms of the Water Supply Licensing scheme will also open the wastewater market to competition for non-household consumers and unbundle the combined licence to create scope for new entrants to provide only upstream water services.[109] The Water Act 2014 also facilitates the creation of a cross-border retail market. A new entrant will be able to apply for one licence application to supply retail water or sewage services for both Scotland, England and Wales.[110]

259. Alongside this, the Water Act 2014 enables reform of both price and non-price terms of access to the network. Under the current regime the terms of access to the network of each regional monopoly is negotiated bilaterally by each retail water supplier. This acts as a significant barrier to entry. The amount a regional monopoly charges the water supplier to access the network must follow the 'costs principle' methodology.[111] The costs principle has been widely identified as creating a barrier to competition. In part this is because it limits the margins available to new entrants and does not allow for transparent pricing for wholesale services.

260. For a 'common carriage' model of competition[112] to be effective, it is important that new entrants have fair and transparent access to the incumbent's network. The reforms in the Water Act 2014 remove the 'costs principle' from existing legislation. Price and non-price terms of access to the network will be replaced with regulated access through the creation of a set of market codes developed by Ofwat.

261. The Water Act 2014 also enables regulations to be created which allow existing water companies already in the market (appointed companies) to apply to the Secretary of State to exit retail non-household market (retail exit). The Department for Environment, Food and Rural Affairs (Defra) is responsible for developing the regulations on retail exit to allow incumbent

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[109] Under the current licensing arrangements, it is not possible for a water supplier to introduce water into a regional monopolies network without having an end user consumer to supply.
[110] The Welsh Government has so far chosen not to take forward the provisions in the Water Act 2014, therefore competition in Wales will continue to apply to only a small number of very large users.
[111] The 'costs principle' is a form of pricing methodology known as 'retail minus'. The price an entrant pays for wholesale services is equal to the price which the incumbent would otherwise have received from the customer, less any costs that the incumbent avoids by not having to supply the customer in question.
[112] 'Common carriage' as a method for competition in relation to the water and sewerage sector is when a new entrant water supplier is granted access to an incumbent's network and water treatment works in order to deliver water to their customers.

firms to exit the non-household market from April 2017. Retail exit is discussed further in section (2) below.

262. The reforms to the non-household retail market are due to be implemented by April 2017. However, the UK Government indicated that reforms to the upstream market will not be made before 2019. The 'Open Water programme', with input from the 'High Level Group' established by Defra is currently responsible for designing the market architecture, codes and any central systems necessary to implement the reforms. The programme management of non-household retail market opening is moving across to Ofwat soon, and the delivery of the market architecture is moving across to Market Operator Services Ltd, a private entity, which is expected to become a market operator. The UK Government is taking forward the opening of these markets but the Welsh Government has decided not to at present.

263. To implement aspects of the Water Act 2014, Defra and the Welsh Government will be consulting on proposed changes to the water companies' licences produced by Ofwat in summer 2015.

2. Significant developments in Ofwat's approach to competition since April 2014

264. Outside of the work by Defra to implement the reforms and the Open Water programme to build market architecture, Ofwat itself has over the last 12 months made progress in a number of workstreams central to implementing the reforms.

A level playing field

265. Ahead of further competition being introduced in the non-household retail market in England, Ofwat has been considering options to promote a level playing field between appointed companies, and those firms entering the market (new entrants). Without a level playing field, there is an opportunity for appointed companies which operate the water network to discriminate in favour of their own services and customers, disadvantaging new entrants.

266. Following a consultation in 2013, Ofwat came to the broad view that a combination of concurrent enforcement of competition prohibitions and the use of direct regulation would be sufficient to ensure a level playing field.[113]

267. The price control that was completed in December 2014, Price Control 2014 (PR14), is a significant step in ensuring that new entrants are able to compete

[113] Ofwat, *A level playing field for the water market – a discussion document,* September 2013.

on an equal footing with vertically-integrated incumbent providers. PR14 introduced separate price controls for wholesale and retail elements. The wholesale price control comprises separate controls for water supply and sewerage. Within retail, the price controls are further separated for household and non-household customers.[114] Using separate price controls in this way requires companies to gather information which is necessary to ensure that costs and prices are more transparent for alternative providers. In order to improve price transparency further, PR14 has also required that companies publish their wholesale charges in a standardised format.[115]

268. In addition to the measures within PR14 which will lay the foundation for greater competition, Ofwat considered options concerning its enforcement approach going forward to ensure water companies compete on a level playing field for non-household consumers.

269. Ofwat considered a broad range of options from introducing further *ex ante* regulation to place requirements on companies to comply with competition law, to requiring forms for company separations to avoid conflicts.

270. Ofwat came to the view that the measures within the price control, combined with a communications strategy reminding all companies of their responsibilities under competition law, and a willingness to use them, was the appropriate approach to take at this time.

271. Ofwat's new strategy reflects that, where appropriate, Ofwat will undertake targeted enforcement using the full range of investigative tools available to it under the Competition Act 1998, from agreeing commitments and reaching settlements, to finding infringement decisions. In addition to these important backstops to a well-functioning market, Ofwat will also monitor the industry and may apply more controls if a level playing field does not materialise.

Charging: Default tariffs

272. As mentioned, as part of the price review process, Ofwat has, for the first time, set separate price controls for wholesale water, wholesale sewerage, and household and non-household retail. Among other things, this is intended to remove the potential for cross-subsidy between households and the soon to be contestable non-household retail market in England from April 2017 –

[114] Ofwat, *Setting price controls for 2015-20 – final methodology and expectations for companies' business plans*, July 2013.
[115] ibid.

thus helping to ensure a level playing field between incumbents and new entrants.

273. In April 2014, Ofwat published guidance on the process for setting the default tariffs which each water company proposes for its non-household customers. The approach has given companies flexibility in developing their non-household retail proposals. During the year, Ofwat chose not to challenge heavily companies' proposed non-household retail costs (as to do so could result in there being insufficient margin for effective competition to develop) instead intervening where companies proposed unjustified increases in their costs from today's levels. Ofwat's price limits will act as a back-stop level of protection until competition has suitably developed. Ofwat will keep the market under review and will remove these protections when able to do so.

Retail exit

274. Extending competition in the non-household retail market will expose water companies to market forces. Defra's policy is to ensure that water companies are able to make informed decisions about their retail strategies – including exiting the non-household retail market – to ensure the competitive market functions effectively.[116]

275. Defra published a consultation in December 2014 which outlined the policy which will inform the implementation of the retail exit reforms.[117] This included proposing to introduce deemed contracts[118] for those non-household consumers who have not negotiated a contract, amending the existing supplier of last resort scheme (where a water supplier is assigned to serve a non-household consumer after their existing supplier leaves the market) and introducing a new supplier of first resort scheme (where a water supplier is assigned to serve those consumers in an area where a former regional monopoly has exited the market). Ofwat has predominately been working with Defra on the development of the applications process which companies will have to go through to seek the right to exit.

276. Defra will consult on the draft retail exit regulations in summer 2015. It is Defra's intention to ensure that those water companies who wish to exit the non-household retail market can do so when it is fully opened to competition in April 2017. Ofwat will be working closely with Defra on the development of

[116] Defra, Retail Exit factsheet, 10 December 2014, p3.
[117] Defra, *Retail exits consultation document,* 10 December 2014.
[118] In the context of the water and sewerage market, a 'deemed contract' refers to a contract for retail services between any non-household consumer and a water supplier licensee where the consumer has not negotiated a contract with that licensee.

the price and non-price terms of the deemed contract and the development of the draft regulations.

Abstraction reform

277. Introducing competition in the upstream market could provide an important mechanism to manage water resources by creating a value for water and allowing water to be effectively traded between companies and allowing others with water resources to supply them into public supply. An essential element of water trading is the abstraction of water from water sources. Following a number of studies, it is broadly recognised that the current system does not help abstractors to trade water effectively, nor does it provide an incentive for abstractors to manage water efficiently. For instance, most abstractors are given a licence to take a fixed volume of water, regardless of availability. Much of the water that is licensed is not actually used, but Ofwat cannot make it available to others who may need it.[119]

278. In June 2011, the UK Government outlined its intention to reform the water abstraction management system in England in the Natural Environment White Paper.[120] This was followed by an update in the Water White Paper, 'Water for Life', in December 2011.

279. Defra opened a 14-week consultation on the long-term reform of the abstraction system in December 2013 and published responses in July 2014.[121] The Government's proposed reforms are designed to make the system more flexible and resilient to future pressures by better harnessing market forces.

280. Defra initially identified two main options for reform (Current System Plus and Water Shares) and further formulated a third (Hybrid) option as a compromise between the two:

- The 'Current System Plus' option aims to refine the current system to make it more flexible and capable of supporting abstractors as they adapt to changing water availability. This option uses the current approach of annual and daily volumetric abstraction controls and hands off flow conditions.

[119] Defra, *Making the Most of Every Drop: Consultation on Reforming the Water Abstraction Management System,* December 2013.
[120] Defra, *The Natural Choice: securing the value of nature*, 7 June 2011.
[121] Defra, *Making the Most of Every Drop: Consultation on Reforming the Water Abstraction Management System,* December 2013.

- The 'Water Shares' option explicitly embeds the principle that abstractors have a share in the available water resource rather than an absolute allowance whatever the water resources available in catchments.

- The 'Hybrid' option is based on the principle applied in the 'Water Shares' option that abstractors have a share in the available water resource rather than an absolute allowance once there is no water available. However, under this option, short-term fixed allocations as used in the Water Shares option will only be implemented initially in a very small number of catchments where there are likely to be most benefits.

281. The three reform implementation options are currently being refined by Defra and a full impact assessment was submitted to the Regulatory Policy Committee[122] for review in December 2014. The impact assessment contained an extensive stakeholder risk assessment with regard to unintended Competition Act 1998 compliance issues moving forward. Defra speculates that there may be generic risks around increased market power of large extractors which may lead to anti-competitive behaviour in catchments where a large proportion of the permitted water is held by a small number of abstractors and tacit collusion which could lead to anti-competitive agreements between abstractors.

282. Ofwat anticipates continuing to work with Defra to identify any risks associated with Competition Act 1998 compliance and the reforms, as well as longer term work with suppliers to understand their future obligations.

3. Cases under the competition prohibitions since April 2014

Ongoing Competition Act 1998 investigation: Chapter II prohibition on abuse of a dominant position

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

283. In April 2014, Ofwat sent Anglian Water a supplementary statement of objections setting out an alleged infringement by Anglian Water (an incumbent monopoly provider) of the Chapter II prohibition on abuse of a dominant position. Ofwat's preliminary view had been that Anglian Water's pricing for the Fairfield site resulted in a margin squeeze and excluded competition.

[122] The Regulatory Policy Committee is a non-departmental independent public advisory body which was set up in 2009. For more information see the Regulatory Policy Committee webpages.

Following Ofwat's statement of objections in December 2011, the investigation has continued alongside consultation with parties. Oral hearings were held in 2012 and update meetings took place in 2013.

284. The supplementary statement of objections set out Ofwat's updated provisional view of the case, additional evidence it had collected in response to representations put forward by the parties in their previous written and oral representations, and updated proposed next steps in the case.

285. Competition to provide water and sewerage services to new developments was one of the only areas of contestable activity in the sector, as facilitated by the 'New Appointment and Variation' regime (see paragraph 256 above) when this case was taken. Potential new entrants must generally obtain 'upstream' off-site supplies from the surrounding appointed monopoly company, which in the case of the Fairfield site was Anglian Water. Moving forward, this issue remains of strategic value to Ofwat as the sector moves toward market opening in 2017.

286. A draft decision is due to be issued in 2015. This investigation is the first Ofwat case to be considered by its new Board Casework Committee whose membership consists of two Non-Executive Directors from the Ofwat Board and one independent decision maker (a position previously held by Philip Marsden, formerly of the Office of Fair Trading's Board who has since become Inquiry Chair at the CMA).

287. The Committee will make the final decision on whether there has been an infringement of the Competition Act 1998.

New water connections – Bristol Water Competition Act 1998 commitments

288. Ofwat's other enforcement case under the Competition Act 1998 relates to Bristol Water, a vertically-integrated incumbent water company appointed under the Water Industry Act 1991. The case followed complaints from two self-lay organisations that Bristol Water was abusing its upstream dominant position as an appointee (to supply water services) in order to foreclose downstream contestable services to provide new water supply connections. The complainants alleged that Bristol Water discriminated in the price and non-price terms it offered, for equivalent transactions, compared to the terms offered to its own downstream developer services business, which provides new connections under the statutory provisions of the Water Industry Act 1991.

289. The provision of new water connections is currently one of only a few areas of competition in the water and sewerage sector. Ofwat opened this case

because it considered the issues it raises to be strategically significant and relevant to the sector as a whole. These issues will grow in importance as more competition occurs in the sector as a result of the pro-competition clauses in the Water Act 2014.[123] Ofwat considered that an investigation could potentially bring direct benefits to self-lay organisations and their customers in Bristol Water's area, as well as indirect benefits for customers in other areas arising from the awareness and deterrence effects it could have for the wider sector.

290. During the early stages of its investigation, Ofwat identified four competition concerns related to Bristol Water's conduct (including pricing and non-pricing behaviours) that could potentially restrict entry and expansion of competitors in the new water connections market in Bristol Water's area. In July 2013, Bristol Water notified Ofwat that it wished to offer commitments to address these concerns.

291. Bristol Water offered a comprehensive set of commitments in January 2014. Ofwat paused its investigation during its discussions with Bristol Water about the proposed commitments. This pause allowed the discussions to focus on the appropriateness of the proposed commitments, to progress the commitments process as quickly as possible, and to avoid abortive work in the event that the commitments were accepted as binding. As a result, at the point of pausing the investigation, Ofwat had not gathered complete evidence from the parties, completed its market definition exercise, nor reached any decision on whether Bristol Water had infringed the Chapter II prohibition on abuse of a dominant position under the Competition Act 1998. Ofwat is, however, satisfied that it has gathered sufficient information to enable it to assess whether accepting binding commitments would be appropriate and whether the commitments offered by Bristol Water fully meet the competition concerns identified.

292. Ofwat considered that the package of commitments offered by Bristol Water fully addressed the competition concerns identified for this case; were capable of being implemented effectively and within a short period of time; and that accepting them would not undermine deterrence. As a result, Ofwat publicly consulted on its intention to accept the binding commitments between 22 May and 18 July 2014. This was an extended consultation period given the significance of the issues for the wider sector. The consultation was run alongside the early phases of Bristol Water's proposed implementation

[123] Further details about the Water Act 2014 can be found on Defra's webpages.

timetable. This meant interested parties could reasonably consider whether the commitments were visible and having their intended effect.

293. Ofwat received seven responses to its public consultation, including comments on specific issues relating to Bristol Water's conduct and its proposed commitments, and more general comments about the effectiveness of the new water connections market in the water and sewerage sector and Ofwat's role. None of the responses raised concerns that, if implemented, the framework of commitments offered by Bristol Water would not address the competition concerns identified. Respondents noted that some improvements were already visible and taking effect as Bristol Water started to implement the commitments.

294. A number of respondents said that the monitoring arrangements for the commitments were unclear. The consultation document had also sought views on the types of information Bristol Water should provide to Ofwat to evidence its implementation of and compliance with the commitments. Ofwat required Bristol Water to strengthen and further detail how and when it would provide updates to Ofwat to demonstrate its implementation and ongoing compliance with the commitments.

295. Having considered the consultation responses, Ofwat was satisfied that the commitments offered by Bristol Water address the competition concerns identified, are capable of being implemented effectively and within a short period of time, and would not undermine the deterrence if accepted. In line with its prioritisation principles, Ofwat also considers that accepting the commitments represents the most appropriate and timely use of Ofwat's resources.

296. A formal decision to accept the commitments as binding was taken by Ofwat in March 2015. This decision means that Ofwat has closed its investigation and has not proceeded to a decision on whether or not Bristol Water infringed the Chapter II prohibition on abuse of a dominant position.

4. Details of any market studies that have been opened or closed since April 2014, or which are ongoing

297. There were no market studies opened or closed since April 2014 and none which is ongoing.

5. Decisions taken since April 2014 to use the Ofwat's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

298. There were no decisions taken since April 2014, to use Ofwat's direct regulatory powers instead of competition prohibition powers, where those competition prohibition powers could have been exercised.

6. Details of any other steps taken to promote competition (including by way of regulatory powers and advocacy)

299. During the second half of 2014, Ofwat undertook work with water and sewerage companies and their developer and self-lay customers to identify and address a number of concerns in this customer relationship. Although this work has focused primarily on improving levels of service, it has also included further highlighting the role of competition in the market for new connections.

300. In September 2014, Ofwat published an information notice and related webpages on the provision of, and charging for, new connections services. This highlighted the choice available in this market, the need for monopoly companies to have a strong understanding of the services they offer in their capacity as monopoly provider and as a market competitor, and the importance of this for ensuring compliance with their competition law obligations.

7. Data on cases for the year to date since 1 April 2014

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015	
Number of new complaints[124]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to ender premises / conduct dawn raids were used	
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	
- the giving of commitments or undertakings to change conduct	1
- an exemption or clearance decision (or equivalent)	
- case closure without full resolution	
Number of cases that are ongoing	1
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[125]	0
Number of studies/reviews in the year to date that resulted in	
- the giving of undertakings	0
- a market investigation reference to the Competition and Markets Authority	0

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

8. Looking ahead

301. Over the next year and beyond the water and sewerage industry will be focusing on implementing the Water Act 2014, which includes the reforms focused on opening the non-household market to competition. In particular Ofwat will:

- continue to focus on issues related to the introduction of competition to the new non-household market in 2017 including modifications to water companies licenses, considering which consumers are eligible to switch supplier, and creating standards for developers to allow competitive retailers to provide whole connections process themselves or outsource it;
- consult on removing the 'in-area' trading ban from the Water Supply Licence in February to support further liberalisation of the retail non-household market;
- develop additional guidance for the water and sewerage sector to support compliance to competition law and help ensure a level playing field;
- work closely with Defra to develop the applications process and deemed contract necessary for retail exit;
- assist Defra to develop and implement the retail exit regulations;
- work with industry and stakeholders to develop the charging rules and codes more broadly to introduce regulated access to the network;
- assist Defra to develop policy to reform water abstraction and trading, including identifying any risks to compliance; and
- continue the enforcement of competition law, including a focus on concluding the current Competition Act 1998 cases.

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

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

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

- **Electricity:** The principal objective in electricity is to protect consumers, where appropriate by promoting effective competition.[126]

- **Gas:** The principal objective in gas is to 'promote the development and maintenance of an efficient, economic and co-ordinated gas industry in Northern Ireland...'. Subject to the principal objective, the NIAUR is obliged to carry out its functions in a manner which it considers is best calculated to facilitate competition.[127]

- **Water and sewerage:** The principal objective in water and sewerage is to protect consumers, where appropriate by facilitating effective competition.[128]

304. The NIAUR has powers to enforce the competition prohibitions in the Competition Act 1998 in relation to the activities for which it is responsible and to make market investigation references under the Enterprise Act 2002 to the CMA in relation to those activities.[129] Since April 2014, the NIAUR has been under an obligation, before exercising its direct regulatory powers of licence enforcement, to consider whether it would be more appropriate to proceed under the Competition Act 1998 (ie using its competition prohibition powers).

305. The nature of the Northern Ireland markets differ somewhat from the equivalent markets in Great Britain. For example, there are around 850,000 electricity consumers and around 200,000 gas consumers in Northern Ireland.

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

Unlike in Great Britain, oil is the primary home heating fuel in Northern Ireland.

306. In addition, the gas and electricity retail markets have only been opened up to new market entrants in recent years. Competition exists now in the domestic and non-domestic sectors of both the electricity and gas markets in Northern Ireland. Active domestic competition – in both gas (Greater Belfast' gas network area) and electricity (entire market) – started in mid-2010.

307. The 'Ten Towns'[130] gas network area is open to competition for domestic and small non-domestic consumers with effect from April 2015.

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

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

1. Significant changes in the market(s) and the legal/regulatory framework since April 2014

Electricity

310. Following market analysis, the NIAUR removed end-user price control coverage on the former monopoly incumbent supplier in the 50–100 and 100–150 MWh per annum sectors, thereby relying more on general market

[130] In Northern Ireland there are two distinct distribution areas for natural gas. These are the Greater Belfast area and the Ten Towns area. In the Greater Belfast Market there are approximately 170,000 customers; and in the Ten Towns approximately 22,000 customers. In the Ten Towns area, the incumbent supplier holds a licence to supply gas which grants them a period of exclusivity for supplying gas to customers within the Ten Towns area, making it the only company allowed to supply gas to these customers during that period. This period of exclusivity ended on 30 September 2012 in respect of customers using more than 25,000 therms per annum, typically large industrial and commercial customers. The period of exclusivity in respect of all customers (including domestic) using less than 25,000 therms per annum ended on 31 March 2015.

conditions and its *ex post* competition powers in these retail sectors. This change to the regulatory framework was effective from 1 April 2014.

311. In addition to this, a 'roadmap' has also been set out that will automatically trigger a further consultation on the reduction or removal of the former supply incumbent's price control in the 0–50 MWh per annum non-domestic market. In summary, the criteria that will automatically trigger a consultation on further end-user price control deregulation of the 0–50 MWh per annum non-domestic sector are:

- the former supply incumbent has a market share (by consumed units) of less than 50% for two consecutive quarters; and
- at least three independent suppliers each have a market share of 10% or more. What this means in practice is the former incumbent plus two other suppliers and this condition is currently being satisfied.

312. As regards domestic customers, the work on a roadmap for the removal of price controls is more complicated and other concerns, such as the impact of competition for vulnerable customers, require further assessment and consideration. No change to the domestic market has been proposed at this point. The former supply incumbent still retains a significant market share in the domestic market, slightly over 70%.

Gas

313. Competition for non-domestic customers in the Greater Belfast area commenced in 2006 while competition for domestic customers in the Greater Belfast area commenced in July 2010. The former supply incumbent retains significant market share (slightly over 70%) of the domestic and small non-domestic connections so they remain subject to price regulation. No change to the domestic market has been proposed at this point.

314. In the Ten Towns area, the incumbent is the sole monopoly provider in respect of those consumers using less than 732,000 kWh per annum. The costs of the incumbent are controlled through a distribution price control. The domestic market and small non-domestic market (using less than 732,000 kWh per annum) will open to competition in April 2015 and, at this stage, the incumbent will be subject to a supply price control for customers using less than 732,500 kWh per annum. This price control will result in a regulated tariff for the customers of the supply incumbent. However, customers of a 'new' entrant will not be subject to end-user price regulation while the incumbent remains in a dominant position.

Water and sewerage

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

316. Continued subsidy of water service provision has meant re-classification of the local monopoly provider with dual status, both as a government owned company with the Department for Regional Development as shareholder and Non-Departmental Public Body. The local monopoly provider is subject to a network price control.

2. Significant developments in the NIAUR's approach to competition since April 2014

Energy (electricity and gas)

317. In April 2014, the NIAUR started a review of the effectiveness of competition in the Northern Ireland retail energy market. The purpose of this review is to establish the basis for assessing the current state of competition and, in turn, highlight areas that may require intervention, further guidance for market participants, monitoring frameworks or changes to the regulatory framework as the sector opens up. The NIAUR Board agreed that the review would be a 2014/15 'Flagship project'.

318. There are two distinct phases to this project:

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

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

319. This regulatory policy review will take place in 2015 and will be based on the findings of the first phase. It will look at a wide range of regulatory roles in

retail markets (price controls, consumer protection licence conditions, requirements from the regulatory framework in different market sectors).

320. This review of the effectiveness of competition is being carried out for the whole retail market (domestic and non-domestic) for electricity, and likewise for gas customers in the Greater Belfast area. Therefore the assessments cover the entire market and not just those markets where the former incumbent may or may not be subject to end-user price control regulation at present.

321. The NIAUR has engaged, and continues to engage, with the CMA at the various stages in the project on the issues involved. The NIAUR also benefitted from CMA review of and comments on the publications in phase 1 of the project, including the final phase 1 report. The NIAUR review is consistent with the Ofgem/CMA/OFT review parameters for Ofgem's State of the market assessment[131] report. However, some additional analysis, based on the specific features of the Northern Ireland market, was obviously required.

322. The Ten Towns domestic gas market opens to retail competition in April 2015. Until April 2015, there has been a monopoly provider for those consumers using less than 732,000 kWh per annum. As competition has not so far existed in most of the Ten Towns gas market, this area was not subject to the assessment of the effectiveness of competition at this stage.

NIAUR competition guidelines

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

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

325. The position for Northern Ireland, and therefore for the NIAUR, differs from that of the rest of the United Kingdom due to the physical land border that

[131] Ofgem, *State of the market assessment,* published March 2014.

Northern Ireland shares with another EU member state, the Republic of Ireland.

326. The Competition and Consumer Protection Commission is the national competition authority in the Republic of Ireland. Further consideration continues to take place to assess the use of information-sharing in the context of EU and the respective domestic competition legislation. This is being led with the Competition and Consumer Protection Commission by the CMA as the competition considerations do not relate solely to the sectors where the NIAUR has concurrent competition powers.

3. Cases under the competition prohibitions since April 2014

327. There were no cases under the EU or UK competition prohibitions opened or closed by the NIAUR in the year from April 2014.

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

4. Market studies since April 2014

329. There were no market studies opened or closed since April 2014 and none which is ongoing.

5. Decisions taken since April 2014 to use the NIAUR's direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised

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

6. Other steps taken to promote competition since April 2014

331. As outlined above, the NIAUR commenced a strategic exercise to review the effectiveness of competition and the implications for the regulatory policy framework and the regulatory tools to be adopted by the NIAUR in that context.

332. In January 2014, the NIAUR, in its draft corporate strategy and draft forward work programme for 2014 to 2019, declared its first two objectives to be:

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

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

Contestability in electricity connections

333. In Northern Ireland, the functions of electricity transmission system operation are currently shared between the owner of the transmission assets (and the distribution system operator) and the transmission system operator.

334. Third party access rules*:* Open and non-discriminatory access to the networks by those who do not own the physical network infrastructure, known as third party access, is fundamental in facilitating greater competition and making energy markets work effectively. Owners and operators of the electricity networks, the transmission system operator and the distribution system operators, and the owners/ operators of interconnectors, are obliged to provide non-discriminatory access to their lines, pipes and other facilities to third parties. The NIAUR has a formal role in approving proposed access rules submitted to it by the relevant licensee.

335. The NIAUR has also been developing a work stream to introduce contestability in network connections in Northern Ireland.

336. In September 2014, the NIAUR published a call for evidence paper on how contestability should be introduced into the connections market in Northern Ireland. The connections industry currently operates as a monopoly with Northern Ireland Electricity providing all connection offers and constructing all elements of construction in Northern Ireland.

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

338. The NIAUR will have to understand what the implications of introducing contestability into the connections market within Northern Ireland, and monitor how effective competition is when policies are implemented. The NIAUR is at an early stage with this project and has planned stakeholder workshops and a consultation which will aim to have a decision paper by the end of Q2 2015.

Wholesale electricity

339. The Single Electricity Market (SEM) is a cross-jurisdictional wholesale electricity market which operates on the island of Ireland and is regulated by the SEM Committee. The SEM Committee is a statutory committee made up

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[132] NIAUR, *Draft Corporate Strategy 2014-19 and draft Forward Work Programme 2014-15*, p14.

of both the NIAUR in Northern Ireland and the Commission for Energy Regulation in the Republic of Ireland.

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

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

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

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

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

Retail Energy Market Monitoring

345. Retail Energy Market Monitoring (REMM) is aimed at ensuring the NIAUR meets its legislative requirements around retail market monitoring and licence compliance, as well as giving it the information to ensure it can align regulatory policy to market developments going forward and protect consumers. Good information flows between suppliers and regulators are an absolute necessity for the NIAUR to meet its statutory duties and market and regulatory deficiencies can result if not in place.

346. To allow proper time for project development, stakeholder engagement and supplier integration of findings, the NIAUR plan that the monitoring requirements of REMM will be put into place in a two-phase approach, with phase 1 due to be completed in 2014/15, and phase 2 in 2015/16.

347. In developing REMM, the NIAUR remains mindful of the key principles of regulation and will apply these appropriately. Proportionality will be a core principle of REMM. The NIAUR will only ask for information which will help it to discharge its statutory duties. This will further and more consistently enable it to ensure suppliers are compliant with their licences and obligations under competition law. An organised system of data collection will be developed.

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

Gas to the West

349. The NIAUR has recently run a competition on the grant of gas conveyance licences for the 'Gas to the West'[133] area which requires an investment of around £200m. The competition was based on the criteria published by Northern Ireland's Department of Enterprise Trade and Investment which allowed multiple parties to compete on their proposals, including cost and quality.

350. The competition resulted in eight applications received including from parties who do not currently hold conveyance licences in Northern Ireland. Four applications were made for the high pressure licence and four for the low pressure licence. Preferred applicants for each conveyance licence were determined in November 2014. In line with its statutory obligations, the NIAUR consulted on the licence conditions in each licence and then finalised the conditions, following consideration of the response it received. Separate gas conveyance licences were granted to Scotia Gas Networks NI Limited and to Northern Ireland Energy Holdings Limited in February 2015.

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

7. Data on cases for the year to date since 1 April 2014

Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition): for the year 1 April 2014 to 31 March 2015.	
Number of new complaints[134]	0
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises / conduct dawn raids were used	
- a Statement of Objections was issued	
Number of those cases in the year to date that resulted in:	
- an infringement decision	
- the giving of commitments or undertakings to change conduct	
- an exemption or clearance decision (or equivalent)	
- case closure without full resolution	
Number of cases that are ongoing	0
Number of cases in the year to date in which the decision was appealed to the CAT	0
Decisions taken to use direct regulatory powers instead of competition prohibition powers where those competition prohibition powers could have been exercised	0

Use of powers for the year to date since 1 April 2014 under the market provisions in Part 4 of the Enterprise Act 2002	
Number of market studies initiated[135]	0
Number of studies/reviews in the year to date that resulted in	0
- the giving of undertakings	
- a market investigation reference to the Competition and Markets Authority	

[134] Note: 'Complaints' under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or equivalent EU prohibitions) refers to evidenced complaints received by the NIAUR which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.

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

8. Looking ahead

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

- completing the review of the effectiveness of competition in retail electricity and gas markets and implementing required regulatory policy changes;
- completing the implementation of the REMM to monitor retail markets, inform policy and protect consumers;
- continuing to undertake a programme of work to facilitate a smooth transition when the market for the supply of gas in the Ten Towns area is opened fully to competition from April 2015. The NIAUR will also have to ensure that participants are ready to operate within the market;
- identifying and undertaking required work streams to allow retail competition in gas distribution areas to ensure consumers in the Ten Towns and Gas to the West market areas can avail of natural gas and a choice of supplier;
- following up on the responses to the NIAUR's recently published call for evidence paper on how contestability should be introduced into the connections market in Northern Ireland by planning stakeholder workshops and a consultation. The NIAUR aim to have a decision paper by Q2 2015;
- work in relation to the I-SEM detailed design and implementation is now underway. The current Project Plan anticipates a delivery date for Go-Live of I-SEM in Q4 of 2017;
- participating effectively in the UK Competition Network and other regulatory bodies including the Network of European Water Regulators and the Centre on Regulation in Europe; and
- completing and publishing competition guidelines.