CMA
Competition & Markets Authority

Annual report on concurrency

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Foreword

This is the third annual concurrency report to be published by the Competition and Markets Authority (CMA) in accordance with its statutory obligation[1] to assess the operation of the new concurrency arrangements, which came into effect on 1 April 2014.[2]

In the first two years, the 'building blocks' of the new regime were put in place and cooperation within the regime extended beyond competition enforcement activity to broader policy and markets work. Cooperation has deepened this year: in addition to cooperation on information sharing, case allocation, case and policy work through the UKCN, this year has seen a notable increase in secondments which further the sharing of competition enforcement expertise and address resource gaps, as well as joint work by the CMA and the regulators on a series of actions designed to increase the volume and effectiveness of Competition Act 1998 enforcement in the regulated sectors.

Key messages

Overall, the concurrency arrangements continue to work well, with progress being made across the sectors during the past year.

- Delivery of existing cases under the Competition Act 1998 has continued with the resolution of four cases across the communications, energy and airport services sectors, one of which culminated in an infringement decision and one in a commitments decision, while two were closed on the grounds of administrative priority, of which one had been transferred to the CMA. In addition, one new case has been opened in the energy sector and another has been opened in the financial services sector.

- The CMA and the regulators have undertaken significant markets work including publication by the CMA of the Energy and Banking market investigation final reports and the design and implementation of remedies which, in both market investigations, involved the CMA working closely with the relevant sector regulators. The regulators have undertaken a variety of market reviews under their sector-specific powers. The FCA consulted on whether to make a market

[1] Enterprise & Regulatory Reform Act 2013, section 25(4), read together with paragraph 16 of Schedule 4
[2] The enhanced concurrency arrangements aim to increase competition law enforcement activity in the regulated sectors by strengthening cooperation between the CMA and the sector regulators and, more generally, to promote competitive outcomes for the benefit of consumers, business and the overall economy. Under those arrangements, the CMA and the sector regulators for key sectors of the economy (specifically, airports and air traffic services, telecoms, post, broadcasting, spectrum, energy, water and sewerage, rail in Great Britain, healthcare services in England, financial services and payment systems) have concurrent powers to apply competition law in the relevant sector.

investigation reference to the CMA on the investment consultancy market as part of its Asset Management market study.

- The CMA and the regulators have been engaged in extensive policy work relevant to the regulated sectors, including the CMA market study into Digital Comparison Tools and work undertaken by Ofwat on the architecture for retail market opening for non-household water customers in April 2017.

- There has been deepening cooperation between the CMA and the regulators on cases. As noted above, there has been a marked increase in secondments of staff between the CMA and the regulators. On competition work more generally, there has also been good cooperation between the CMA and the regulators, such as some regulators' development of competition guidance, regular UKCN discussions on policy and procedural issues and a major UKCN project on consumer remedies.

While progress has been made on the delivery of cases, the number of new cases remains below the level that we would like to see. The CMA undertook a project to understand the barriers and opportunities to case opening and whether more should be done to increase competition enforcement. We found that regulators remain keen to use their Competition Act powers where appropriate. The project did, however, identify that features of the UK's sector regulation framework may mean that issues tackled by competition law in other jurisdictions were often not present, or not to the same degree, in the UK. The project also revealed some of the specific and common challenges the regulators face.

The CMA and regulators are working together to address these challenges. Actions include the sharing of insights into the effective delivery of cases. In particular, the CMA has shared the steps that it has been taking to improve the delivery of cases. We have shared experience on how to identify and generate intelligence for new competition investigations, and on the resources required to deliver Competition Act 1998 cases and a set of secondment principles has been developed. Finally, we have begun more significant engagement between the CMA and regulators at an earlier stage in competition investigations.

However, as indicated in previous reports, the number of new cases is only one factor in assessing the impact of the concurrency arrangements. Furthermore, competition enforcement is only one part of sector regulators' work to harness competition and promote competitive outcomes. Indeed, the CMA and the regulators have delivered extensive markets and policy work during this year. Our engagement with the regulators has highlighted the value and importance of the concurrency arrangements and, in particular, how they harness the complementary expertise of the CMA and the regulators. Continued sharing of this expertise should drive consistency and the success of competition enforcement, thus promoting the

benefits of competition in the regulated sectors and complementing the work conducted by the regulators in promoting competition and innovation through their sector-specific regulatory powers.

Andrea Coscelli
Acting Chief Executive, Competition and Markets Authority April 2017

A. Introduction

1. The purpose of this annual concurrency report is to assess the operation of the arrangements for concurrency in the regulated sectors.[3] 'Concurrency' is the regime under which competition law is applied in the regulated sectors, not only by the Competition and Markets Authority (CMA), but also by the sector regulators exercising competition law powers in the sectors for which they are responsible, specifically their powers:

   (a) to apply the UK and EU law prohibitions on undertakings engaging in anticompetitive agreements or on the abuse of a dominant market position;[4] and

   (b) to conduct market studies, and if appropriate, to make a market investigation reference under which the CMA conducts an in-depth investigation into whether any feature, or combination of features, of a market in the UK for goods or services prevents, restricts, or distorts competition.[5]

2. The concurrency arrangements provide for cooperation between the CMA and the sector regulators in relation to their concurrent powers to enforce competition law and investigate markets. This is the third annual concurrency report to be published by the CMA and relates to the operation of the concurrency arrangements during the period 1 April 2016 to 31 March 2017.[6]

3. Consistent with both the concurrency arrangements and the strategic steer issued to the CMA by government,[7] the CMA and sector regulators have

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[3] The concurrency arrangements were introduced in their current form by the Enterprise and Regulatory Reform Act 2013 and took effect from 1 April 2014. They created a framework within which the CMA and sector regulators might more effectively work together to improve competition and competition law enforcement in the regulated sectors.
[4] The UK prohibitions are in Chapters I and II of the Competition Act 1998, and the equivalent EU prohibitions are in Articles 101 and 102 of the Treaty on the Functioning of the EU.
[5] The market investigation provisions are in Part 4 of the Enterprise Act 2002.
[6] The CMA has a statutory obligation to prepare and publish an annual report on the operation of the concurrency arrangements, pursuant to section 25(4) of the Enterprise and Regulatory Reform Act 2013, read with paragraph 16 of Schedule 4 to that Act. Practical aspects of the concurrency arrangements relating to, for example, the allocation of cases between the CMA and the relevant regulator and the sharing of relevant information in respect of cases are set out in the Competition Act 1998 (Concurrency) Regulations 2014. The CMA published a 'baseline' report in March 2014, and produced its first 'full' report in March 2015, in accordance with the statutory requirement.
[7] In December 2015, the Government issued a revised non-binding 'strategic steer' to the CMA setting out the Government's view that, in relation to the regulated sectors, the CMA should continue to focus on: "playing a leadership role with regulators that have competition powers, especially those that are new to the concurrency regime. The CMA should encourage those regulators to make greater use of their competition powers and to tackle anti-competitive actions in regulated markets". It also confirmed that the CMA should build: "a strong dialogue with sector regulators using the UK Competition Network to ensure that the overall competition regime is coordinated and regulatory practices complement each other".

worked together effectively over the past year. In summary, the following has been achieved:

(a) Delivery of existing cases under the Competition Act 1998 has continued with the resolution of four cases across the communications, energy and airport services sectors, one of which culminated in an infringement decision and one in a commitments decision, while two were closed on the grounds of administrative priority, of which one had been transferred to the CMA. In addition, one new case has been opened in the energy sector (see paragraph 6c) and another has been opened in the financial services sector (see paragraph 6d);

(b) The CMA and the regulators have undertaken significant market investigations work in the regulated sectors (see paragraphs 8 to 9). The CMA issued the final reports in the Energy and Banking market investigations and has designed appropriate remedies with input from the relevant sector regulators; many of these remedies are now being taken forward by the relevant sector regulators with support from the CMA as appropriate. As part of its Asset Management market study, the FCA consulted on whether to make a market investigation reference to the CMA on the investment consultancy market;

(c) The CMA and the regulators have been engaged in extensive markets and policy work relevant to the regulated sectors (see paragraphs 10 to 20), including the CMA market study into Digital Comparison Tools (DCTs), and a variety of market reviews that have been undertaken by the regulators under their respective sector-specific powers, such as the PSR market review of ownership and competition in the provision of infrastructure services for three interbank UK payment systems. Other work has been undertaken to promote competitive outcomes (see paragraphs 21 to 27), for example, by Ofwat to put in place the market architecture needed for retail market opening for non-household water customers in April 2017 and to develop future markets in other parts of the value chain;

(d) There has been close co-operation on cases and extensive joint working between the CMA and the regulators, including a marked increase in secondments of staff (see paragraph 38 below);

(e) There has also been good cooperation between the CMA and the regulators more generally, for example in relation to the development of competition guidance by some regulators to which the CMA has contributed, regular UKCN discussions on policy and procedural issues

and work on a project on consumer remedies (see paragraphs 33 to 39 below).

4. This year the report incorporates two enhancements which were announced in HM Treasury's Budget 2016[8] and required the sector regulators, first, to 'cover new regulations put in place during the year which might significantly affect competition and innovation' and, second, to 'propose areas where changes to regulation might allow competition and innovation to work better'. These enhancements are reflected in the sector-specific chapters of this report.

5. Last year, we identified and discussed with UKCN the discrepancy that exists between the reporting obligation set out in Schedule 4 of the Enterprise and Regulatory Reform Act[9] and the so called 'primacy obligation', which requires that regulators with concurrent powers under Competition Act 1998 must first 'consider whether it would more appropriate' to proceed under competition law prohibitions before taking regulatory enforcement action that is specified for each regulator. This year, the regulators have reported against both the Schedule 4 reporting obligation and the primacy obligation in their respective chapters. This has given the regulators an opportunity to illustrate how they take their Competition Act 1998 powers into account when deciding whether to pursue certain of their direct regulatory powers.

Significant investigations in the regulated sectors

Competition prohibitions

6. At the beginning of the period of this report, there were six ongoing cases across the regulated sectors, with the majority of the regulators having at least one case underway. During this period, three of those cases have concluded. This means that across the regulators, most have now opened or are running a competition case, with the exception of some of those regulators that have most recently gained competition powers.[10] New investigations have been opened in the energy and financial services sector. All these cases are

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[8] HM Treasury, Budget 2016, paragraph 7.53.
[9] Under Schedule 4 of the Enterprise and Regulatory Reform Act, the CMA is required to report in the Annual Concurrency Report any decision by a regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of Competition Act 1998.
[10] For example, NHSI has not yet run a competition case but it was involved in the CMA's investigation into anti-competitive information exchange and pricing agreements within the private ophthalmology sector and provided two secondees to work on the investigation and assist with technical aspects of the case. The case settled in August 2015 and the infringing company was fined £382,500.

described in greater detail in the sector-specific chapters of this report, but in summary:

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

(i) In the postal sector, in July 2015, Ofcom issued a Statement of Objections to Royal Mail, which set out the provisional view that Royal Mail breached competition law by engaging in conduct that amounted to unlawful discrimination against postal operators competing with Royal Mail in delivery. Ofcom is carefully considering Royal Mail's representations. This will inform the next steps in the investigation;

(ii) In broadcasting, Ofcom's investigation into a suspected infringement of the prohibition on anti-competitive agreements, in relation to the sale of live broadcasting rights in the UK to Premier League matches by the Football Association, was closed on the grounds of administrative priority. Ofcom decided that its resources could be used more effectively on other priorities to benefit consumers and competition, having regard to the Premier League's decision to increase the number of matches available for live broadcast in the UK, the fact that the next auction would include a 'no single buyer' rule and the significant further consumer research required to conclude the investigation.

(b) **Aviation**: The CAA has conducted an investigation under Chapters I and II of Competition Act 1998 into allegations of price fixing and price information exchange in relation to access to facilities for the provision of car parking services at an airport, and the suspected abuse of a dominant position in relation to the provision of access to facilities. In December 2016, the CAA published an infringement decision in respect of the Chapter I prohibition. The investigation under Chapter II remains ongoing.

(c) **Energy**: During the period of the report, Ofgem has progressed two competition cases and opened one new case:

(i) In October 2015, Ofgem launched a new investigation into a suspected infringement of the prohibition on anti-competitive agreements by two or more companies in relation to paid online search advertising. The case was transferred to the CMA in June

2016.[11] Following a period of assessment, the CMA decided that the case was no longer an administrative priority and closed the case with a case closure statement which explained the factors taken into account in closing the case. These included the fact that remedies from the Energy market investigation, which were in the process of being implementing, sought to increase the level of competition between price comparison websites in the energy market and that the CMA had launched a market study into digital comparison tools which would explore further the nature of competition between price comparison websites and their relationship with service providers. The case closure statement also identified potential competition concerns with agreements restricting bidding behaviour in paid online search advertising.

(ii) In November 2016, Ofgem closed its ongoing investigation into whether SSE (a Distribution Network Operator) had infringed Chapter II of the Competition Act 1998 by abusing a dominant position and putting its competitors at a disadvantage in the electricity connections market. Ofgem decided to accept commitments offered by SSE as it was satisfied that they fully addressed the competition concerns identified.

(iii) In August 2016, Ofgem opened a new investigation into whether there had been an infringement of Chapter I of the Competition Act 1998 which concerned anti-competitive agreements and concerted practices affecting the energy sector. A decision to continue with the investigation was taken in December 2016. Ofgem is planning a further review of the case by the end of April 2017.

(d) **Financial services**: The FCA opened an investigation under the Competition Act 1998 in March 2017. The FCA has also continued to progress its existing investigation which is into anti-competitive agreements and concerted practices which was opened in March 2016. It has exercised information gathering powers under the Competition Act 1998 during the period of this report.

(e) **NIAUR**: The NIAUR received a complaint regarding a potential breach of the Chapter II Competition Act 1998 in August 2016 and notified the CMA. The complainant later informed the NIAUR that it intended to pursue a

[11] The case was transferred to the CMA because Ofgem became aware of communications between Ofgem staff and representatives of some of the parties under investigation which had occurred prior to the investigation that could delay the progress of the case, for example, if parties were to call into question Ofgem's imparity in continuing with the case.

private action through the CAT and therefore no formal investigation was launched by either authority.

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

Table 1: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2016 to 31 March 2017

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	6
Number of new complaints*	9
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	3
- a Statement of Objections was issued	1
Number of those cases in the year to date that resulted in:	
- an infringement decision	1
- the giving of commitments or undertakings to change conduct	1
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	1
- case transfer to another NCA	1
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	5†
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

* '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 FCA which it regarded as raising competition law issues under those prohibitions.
† While the Chapter I element of the CAA's investigation into access to airport car parking facilities resulted in an infringement decision, the Chapter II element of the case remains ongoing at the end of the reporting period (31 March 2017).

Market investigations

8. The CMA published final reports in its market investigations into energy and retail banking during the period of this report. These both involved extensive joint working between the CMA and relevant regulators, including the secondment to the CMA of a number of staff with particular expertise from those regulators:

   (a) **Energy**: The CMA published its final report into the supply and acquisition of energy in Great Britain in June 2016 and identified significant competition concerns across the market regarding the weak levels of domestic and microbusiness customer engagement, the constraints on competition in the prepayment energy markets, the systems of gas and electricity settlement, the system of code governance, and in the broader regulatory framework. The CMA's package of remedies included 26 recommendations to Ofgem (out of over 30 remedies in total) as the relevant sector regulator. Ofgem published its remedies implementation strategy in August 2016 and its detailed implementation plan in November 2016. The CMA published its final orders and undertakings in December 2016. During the remedies design and implementation process, the CMA

and Ofgem worked together closely, with the CMA drawing on Ofgem's deep knowledge of GB energy markets and the regulatory framework in order to design and put in place effective and practicable remedies. Following publication of the final report, Ofgem published a series of consultations on the implementation of individual recommendations and the implementation is ongoing.

(b) **Retail banking**: In August 2016, the CMA published its final report into the supply of retail banking services to personal current account customers and to SMEs, identifying that older and larger banks do not compete hard enough for customers' business, and smaller and newer banks find it difficult to grow. This means that many people are paying more than they should for retail banking services and are not benefiting from new services. The CMA remedies included various measures being put in place through recommendations made to the FCA, HM Treasury and the Department for Business, Energy and Industrial Strategy (BEIS), undertakings given by Bacs and a final order published in February 2017. These remedies include measures to ensure that customers benefit from technological advances ("Open Banking") to compare banking options and deliver innovative new banking services, prompts to remind customers to review whether they are getting the best value, measures to make search and switching easier and measures to increase competition and reduce charges for customers that use unarranged overdrafts. The CMA worked closely with the FCA, PSR and PRA throughout the investigation, to help the CMA to understand the applicable regulatory frameworks, develop its understanding of competition issues and design an effective package of remedies. The CMA has seconded staff to the FCA to work on the testing of customer prompts and overdraft alerts. The CMA and the FCA have also worked closely to align the CMA's Open Banking remedy and the FCA's ongoing work to implement the second Payment Services Directive (PSD2). The CMA's work with the PSR resulted in the agreement that the PSR would monitor the performance of the Current Account Switching Services operated by Bacs against Key Performance Indicators set by HM Treasury and report to HM Treasury on an annual basis.

9. There has been one consultation on a market investigation reference to the CMA in respect of the regulated sectors during the period of the report. In November 2016, as part of the Asset Management market study (see paragraph 14a below), the FCA consulted on whether to refer the investment consultancy sector to the CMA. The FCA's decision is expected to follow after the publication date of this report.

Market studies and policy work

10. In September 2016, the CMA launched a market study into Digital Comparison Tools (DCTs) used by consumers to compare and/or switch between a range of products or services from a range of businesses. It is examining whether the sector is working well for consumers, and determining how to maximise the benefits DCTs offer. The study has been informed by the UKRN's work on price comparison websites in the regulated sectors and the CMA has continued to liaise closely with the UKRN to take the project forward, including by setting up a sector regulators' working group. The update paper, published in March 2017, found that consumers are generally confident in the way that they use DCTs but identified four areas of possible concern, which will form the focus for the second phase of the market study.

11. In March 2016, the CMA published its final policy document which assessed the desirability and feasibility of introducing greater competition between passenger train operators. This project benefitted from close working between the CMA and ORR throughout the project. The CMA found that an increase in on-rail competition on key intercity routes could result in a range of benefits for passengers and recommended that increasing the number of 'open access' services or splitting franchises would offer the most immediate benefits from increased competition, but that a move towards a system of multiple licensed operators replacing franchises would merit consideration in the future. In March 2016, the Department for Transport published a Ministerial statement which committed to explore the CMA's recommendations further, with the same commitment being made by HM Treasury in Budget 2016. The CMA's recommendations were echoed in the House of Commons Transport Committee's report on rail franchising published in February 2017. The CMA is continuing to work with ORR and the Department for Transport to take forward the recommendations as part of a cross-government steering group. Progress is being made. The ORR has provided more detail on the proposals to reform the structure of track access charges to create a level playing field between open access operators and franchisees. As part of the Department for Transport's response to the CMA's report, it published a consultation in February 2017 on a public service obligation levy which would enable open access operators to contribute towards the costs of unprofitable but socially valuable rail services.[12]

12. As noted in the 2016 report, there is also work going on in the non-concurrent, regulated sectors. In December 2016, the CMA completed its market study

[12] Department for Transport (21 February 2017), The passenger rail public service obligation levy.

into the provision of legal services. The market study concluded that competition in legal services for individual consumers and small businesses is not working well. There is a lack of information on price, quality and service to enable consumers to make informed purchasing decisions that drive competition. In addition, consumers require better information to enable them to identify if they have a 'legal need' and the options available in the sector to meet their needs. The CMA has proposed a series of recommendations to the frontline regulators which are designed to address the lack of transparency and the lack of consumer education information. In addition, the CMA considered the impact of legal services regulation on competition. The CMA found that, while the current system is not a major barrier, it may not be sustainable in the long-term as it is not sufficiently flexible to apply proportionate risk-based regulation which reflects differences across legal services which could harm competition. The CMA has therefore recommended that the Ministry of Justice review the current framework in the longer term.

13. Although there have been no market studies conducted by the regulators under their Enterprise Act 2002 powers,[13] a number of market studies and market reviews carried out by the regulators using sectoral powers have focused on competition issues within their sectors.

14. The FCA is currently carrying out two market studies and has published the outcomes of two further market studies using its powers under the Financial Services and Markets Act 2000 (FSMA):

(a) Asset Management market study – in November 2016, the FCA published the interim findings of its Asset Management market study. The aim of the study is to understand whether competition is working effectively to enable investors to get value for money when purchasing asset management services. The FCA's interim findings suggest that there is weak price competition in a number of areas of the asset management industry. The FCA proposed a package of remedies that seek to make competition work better in this market and protect those least able to engage actively with their asset manager. Following the consultation, the FCA aims to publish a final report in Q2 2017. As part of the Asset Management market study, the FCA also consulted on whether to make a market investigation reference to the CMA on the investment consultancy market.

[13] Market investigation references may also be made by sectoral regulators in accordance with the applicable sector-specific legislation.

(b) The FCA launched the Mortgages market study in December 2016. The study will explore two questions: first whether the available tools (including advice) help consumers make effective decisions at each stage of the customer journey, and secondly whether commercial arrangements between lenders, brokers and other players lead to conflicts of interest or misaligned incentives to the detriment of consumers. The FCA aims to publish an interim report in summer 2017 and a final report in early 2018.

(c) Credit Card market study – this looked at credit card services offered to retail consumers. In the final report published in July 2016, the FCA found that competition is working fairly well for most consumers, but that competition is working less well for higher risk consumers. The FCA consulted on proposals in relation to persistent debt and 'earlier intervention' and expects to publish final rules in summer 2017.

(d) Investment and Corporate Banking market study – this focused on primary market and related activities provided in the UK. The FCA found that many clients feel the universal banking model of cross-selling and cross-subsidisation from lending and corporate broking services to primary market services works well for them, but there were some practices that could have a negative impact on competition. The FCA developed a targeted package of remedies to address these concerns and to ensure competition takes place on the merits. In March 2017, the FCA published a consultation paper on changes to the IPO process.[14] The FCA expects to finalise the ban on restrictive contractual clauses in Q2 2017.

15. The FCA also announced a number of initiatives examining whether markets are working well for consumers including the Retirement Outcomes review, work on Big Data and work in retail banking and consumer credit. In November 2016, the FCA launched a Call for Input on high-cost credit.[15] This work includes reviewing the price cap on high-cost short-term credit and whether the price cap should be restructured or recalibrated.

16. During the reporting period, the PSR published its final report on two market reviews under its Financial Services (Banking Reform) Act 2013 powers.

(a) Infrastructure market review – the PSR concluded that competition is not effective for the provision of central infrastructure services to the payment systems in scope and set out two remedies on which it consulted:

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[14] FCA (1 March 2017), Reforming the availability of information in the UK equity IPO process.
[15] High-cost credit involves payday loans, home-collected credit, catalogue credit, some rent-to-own, pawn-broking, guarantor, logbook loans and overdrafts.

mandating competitive procurement exercises for three payment system operators when the operators of these systems purchase central infrastructure services and introducing ISO 20022 messaging standards in future procurement exercises for two of the payment systems operators. The PSR will consider whether further intervention is necessary following the CMA's acceptance in April 2017 of the undertakings offered by Mastercard to address competition concerns[16] arising from its purchase of VocaLink and will set out whether further steps are needed on divestment in the PSR's final decision on remedies to be published in May 2017.

(b) Indirect Access market review – the PSR identified some concerns about the quality of access, limited choice for some payment service providers, and barriers to switching but also a number of developments such as potential market entry and improved technical solutions for access which, combined with the PSR's programme of work on access, the PSR considers could address these concerns. The PSR set out its approach to monitoring whether the developments identified address its key areas of concern, or are making sufficient progress towards effectively addressing them. If the PSR concludes that developments are not progressing sufficiently, the PSR will consider intervening. An update on the progress of developments towards addressing the PSR's concerns was published as part of the 2017 access and governance report.

17. In 2016, the CAA published its report and an advisory letter to market participants on a review of market conditions for the surface access sector at UK airports. This review was conducted using the CAA's review powers under the Civil Aviation Act 2012. The CAA did not consider that it had sufficient grounds for a market study under the Enterprise Act 2002 or an additional investigation under competition or consumer law.

18. Ofcom has also undertaken or concluded a number of market reviews during the reporting period. These include:

(a) the Business Connectivity market review, examining the provision of leased lines to businesses in the UK, in which Ofcom published its final statement in April 2016.

(b) In May 2016, Ofcom published a consultation in relation to its Wholesale Local Access (WLA) market review, which examined the market for the provision of access connections used to provide telephone and

[16] After considering responses to a formal consultation that started during the reporting period for this Report, the CMA accepted undertakings after the end of this reporting period but before the publication of this Report in April 2017.

broadband internet services (including superfast broadband) to residential and business consumers.

(c) In December 2016, it published a further consultation in relation to the WLA review, which concerned Openreach's duct and pole access product.

(d) In March 2017, Ofcom published its main WLA market review consultation setting out its provisional conclusions for market definition, SMP and remedies in the wholesale local access market. Charge control proposals for wholesale standard broadband services based on Local Loop Unbundling (LLU) and superfast broadband based on Fibre to the Cabinet (FTTC) technology supporting broadband speeds up to 40Mbit/s are also included in the review. On the same day Ofcom also published proposals for regulating quality of service in the WLA and narrowband markets.

(e) In addition, in December 2016, Ofcom published a consultation document setting out its provisional views in its Narrowband market review.

(f) In March 2017, Ofcom set out the findings of its review of the regulation of Royal Mail, which aimed to ensure that regulation remained appropriate and sufficient to secure the efficient and financially sustainable provision of the universal postal service.

19. In October 2016, ORR's retail market review concluded that industry governance and rules regarding ticket retailing could be dampening the development of the potential for innovation in products on offer and how they are sold, and made a number of recommendations. These recommendations were aimed at (a) promoting and protecting competitive entry and; (b) facilitating the introduction of new products.

20. In November 2016, Ofwat launched a review using its regulatory powers to investigate how the market for new appointments and variations market is working. The review will investigate any issues in the market; consider the extent to which current initiatives and policy developments may help to address these, and identify if, and where, it may be appropriate to intervene using regulatory tools, including concurrent competition law powers.

Promoting competitive outcomes

21. Our objective is the achievement of competitive outcomes in regulated sectors. These outcomes can be achieved in part through effective and efficient enforcement. Softer enforcement tools, such as warning and advisory letters, can, in appropriate circumstances, also be effective. Advisory letters

can have particular impact where a market is newly open to competition, or where there is limited familiarity with competition principles, as they can improve compliance and increase awareness more speedily than can be achieved via competition enforcement.

22. The CMA and regulators have issued a number of warning and advisory letters over the past year which are designed to promote a competitive outcome for consumers: in the case of warning letters, this is achieved by requiring a change in the behaviour of companies and, in the case of advisory letters, by recommending that companies carry out a self-assessment of their practices to ensure compliance with competition law. During the reporting period, the FCA issued 23 'on notice' letters[17] and six advisory letters to firms, and the CAA issued an advisory letter to market participants at the same time as it published its report on its review of market conditions for the surface access sector at UK airports. The CMA issued a public statement regarding the circumstances in which agreements in paid online search advertising may be problematic when it closed the case that had been transferred to it by Ofgem involving a suspected infringement of the prohibition on anti-competitive agreements.

23. Much can also be achieved through advocacy and compliance work. The CMA has adopted various strategies to amplify case outcomes, such as issuing guidance to the relevant sector on competition compliance, contacting industry players directly, publishing open letters in the relevant trade press and using social media channels to highlight the anti-competitive conduct that was the subject of the relevant case.

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

    (a) In water, the CMA completed its assessment of two mergers (Severn Trent/UU and Severn Trent/Dee Valley) under the new regime, which allows expedited clearance of cases at phase one rather than compulsory reference to the second phase of the merger process. The new regime involves significant cooperation between the CMA and Ofwat to consider the case within the first phase deadline.

    (b) In rail, the CMA completed a Phase 2 review of the acquisition by Arriva Rail North Limited of the Northern rail franchise including over 1000 overlaps. A substantial lessening of competition was found on three rail

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

overlaps which was remedied by undertakings from Arriva in relation to the level of unregulated fares and the availability of advance purchase tickets. The CMA hopes that the Phase 2 methodology used to assess this franchise award will inform the assessment of future rail franchise awards at Phase 1 and provide clarity to franchise bidders regarding the CMA's approach.

(c) In payment systems, the CMA obtained undertakings in MasterCard's anticipated acquisition of VocaLink (a supplier of payment infrastructure services to three major UK interbank payment systems), including an undertaking that VocaLink would make its connectivity infrastructure available to a new supplier of infrastructure services to LINK, which would allow a competitor to use VocaLink's connectivity to members of the LINK ATM network, rather than having to build their own.

(d) In financial services, notably the CMA prohibited the merger of Intercontinental Exchange (ICE) and Trayport. The merger involved discussions between the CMA, Ofgem (which monitors the market) and the FCA which provided their respective expertise on the energy trading market and the firms involved. ICE is authorised by the FCA which provided appropriate background on the market. In a separate merger in energy trading the CMA accepted undertakings in lieu of reference for the anticipated acquisition by Tullett of ICAP's voice and hybrid broking and information business.

(e) In healthcare, two hospital mergers qualified for merger investigation. The merger between Central Manchester University Hospitals NHS Foundation Trust (CMUH) and University Hospital of South Manchester NHS Foundation Trust (UHSM) was notified to the CMA in February 2017. At Phase 1 of its review, following the parties' request for a fast-track reference, the CMA concluded that the merger gave rise to a realistic prospect of a substantial lessening of competition and the case was referred to Phase 2 in the same month. The deadline for completing the Phase 2 inquiry is in August 2017. The CMA is also in pre-notification discussions with the parties involved in another potential hospital merger. NHSI has worked closely with the CMA on these mergers and the CMA routinely engages with NHSI with regard to anticipated consolidation in the sector.

(f) In airport services, the CMA cleared the merger of ground handling businesses at London Gatwick involving Aviator and Swissport. In the merger of Menzies and ASIG's ground handling businesses, the CMA found a realistic prospect of an SLC at Aberdeen Airport. The CMA has now accepted undertakings in lieu of reference that were offered by

Menzies to remedy the identified concerns at Aberdeen Airport in April 2017.[18] The anticipated merger of Clariant and Kilfrost's de-/anti-icing fluids business was abandoned following the CMA's provisional findings in Phase 2 that indicated that there might be grounds for blocking the merger.

25. The CMA has continued to review remedies imposed following past mergers (and market investigations). As part of this, the CMA undertook an internal review of the practical, legal and policy considerations involved in the design, implementation, enforcement and monitoring of remedies in regulated sectors. This identified a significant number of remedies for review as well as areas where there may be opportunities for the CMA and the regulators to work more closely together.

26. The CMA published its evaluation in May 2016 of the impact of the remedies imposed by the Competition Commission's BAA airports market investigation in 2009. This showed that the airports have grown passenger numbers following the divestments along with a range of other improvements such as improved quality and investment. Independent estimates in the report indicate that the quantifiable benefits associated with the remedies, relating to the benefits from increased passenger numbers such as improved connectivity and choice and downward pressure on fares, are £75m per annum.

27. The regulators have been engaged in work to promote competitive outcomes in their own sectors, in keeping with the Government's steer to the CMA and HM Treasury's 2016 Budget Enhancements to monitor use of competition in place of regulation. Examples include:

(a) Ofgem is taking forward work to introduce competition for the construction, operation and financing of high value, new and separable assets in the onshore transmission network.[19] In energy supply, Ofgem has started the process of moving away from prescriptive rules towards more principles based regulation to promote innovation and competition in an evolving retail market. Ofgem also launched the Innovation Link in December 2016 to support innovation in the energy sector. This provides a means for fast and frank feedback to energy sector innovators on the regulatory implications for business propositions.

[18] Published shortly after the relevant reporting period but before publication of the Annual Concurrency Report.
[19] See, Ofgem, Competition in onshore transmission.

(b) Ofwat has put in place regulatory structures to enable the new non-household retail market in England opening in April 2017 to work effectively.

(c) As part of its Strategic Review of Digital Communications, Ofcom set out its competition concern that BT has the incentive and ability to favour its own retail business when making strategic decisions about new network investments by Openreach. Ofcom's proposal required Openreach to become a distinct company with its own Board. In March 2017, BT agreed to Ofcom's requirements for the legal separation[20] of Openreach and submitted a formal notification of these arrangements under section 89C of the Communications Act 2003. Under the arrangements notified by BT, Openreach Limited will be incorporated as a wholly owned subsidiary of BT with a majority independent Board of directors.

(d) In Northern Ireland, the latest electricity Price Control resulted in a reduction in the scope of the price control coverage – or market opening – so that only domestic electricity customers are covered within the scope of the Power NI Price Control.

(e) The FCA continues to actively encourage and support the development and use of innovative technology through "Project Innovate". Project Innovate is comprised of the Innovation Hub, Regulatory Sandbox and Advice Unit. The Innovation Hub has continued to support new and established businesses to introduce beneficial innovative financial products and services to the market. The FCA's Regulatory Sandbox provides a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms in a live environment while ensuring that consumers are appropriately protected. The Advice Unit provides regulatory feedback to firms developing automated advice models that seek to deliver lower cost financial advice to consumers in the areas of investments, pensions and protection (insurance).

(f) The PSR is promoting competition and innovation in the payment systems through several initiatives. In particular, the PSR has focused on improving access to payment systems through its access programme,[21] which has resulted in an increase in the number of direct participants; new entry in the market for providing indirect access; and improvements to the

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[20] Ofgem (March 2017), BT agrees to legal separation of Openreach.
[21] The PSR's access programme includes the Indirect Access Market Review; supporting the industry's establishment of a voluntary indirect access provider Code of Conduct; the PSR's General and Specific Directions on access; the PSR's annual access and governance report; and the PSR's access cases (formal or informal).

joining process, cost and quality of access. The PSR is also facilitating the work of the Payment Strategy Forum to simplify access to the interbank payment systems through consolidation of three payment system operators aimed at promoting efficiency, competition in the downstream market and a stronger drive for innovation.

28. These and other projects are set out in more detail in the sector-specific chapters which follow.

General co-operation

29. The CMA and regulators have continued to co-operate more generally during the period of the report, in line with the practical arrangements set out in the bilateral Memoranda of Understanding agreed between the CMA and each of the regulators in December 2015 and February 2016.

30. **Information-sharing**: The CMA and sector regulators have continued to share key information and comments in respect of the particular cases that they have been investigating, including emerging thinking and draft decisions, as provided for in the Concurrency Regulations[22] and the Memoranda of Understanding. Additionally, the CMA and the sector regulators have augmented the prescribed information-sharing process with more informal discussions and the sharing of know-how and relevant expertise.

31. **Case allocation**: During the period of this report, case allocation has continued to take place smoothly, with the allocation to Ofgem and the FCA of the new Competition Act 1998 investigations in their respective sectors.

32. **Support on casework**: The CMA and sector regulators provide each other with direct assistance on casework, whether by sharing relevant policy or practical experience (eg sharing internal guidance and template documents) or by active involvement of officials at key stages of an investigation. The CMA and sector regulators have also worked cooperatively on issues arising in connection with their concurrent powers to apply the competition prohibitions under EU law. The CMA and Ofgem have also engaged on the European Commission's review of the acquisition of National Grid's Gas Distribution Network business by Macquarie.

33. **UKCN**: The UKCN has continued to work well throughout the period of the report and there have been regular meetings of the UKCN Chief Executives as well as of senior director and working level officials. The CMA and

[22] The Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536).

regulator Chairs also meet regularly to discuss competition and regulatory issues. The UKCN provides a valuable forum for discussion and the sharing of experience and best practice. During the past year, the work of the UKCN has included: working on arrangements for the handling of leniency applications in the context of concurrency; holding a know-how sharing workshop on lead generation to develop expertise on the identification of potential new Competition Act 1998 cases; and considering the resourcing practices of UKCN members for EU and UK competition enforcement cases to help resource planning across the UKCN (see next section for further information). In addition to these work streams, there have been discussions at UKCN meetings on a variety of procedural and substantive issues, including the process for regulators issuing sector specific short form opinions, lessons learned from enforcement cases and streamlining the access to file process.

34. This year, there has been greater coordination between the UKCN and the UKRN. For example, meetings of the UKCN and UKRN Chief Executives are now held jointly and there are regular meetings between the Sector Regulation Unit and the UKRN's Director to identify issues of common interest and minimise unnecessary duplication.

35. The UKCN consumer remedies project was launched in June 2016 to take forward a recommendation made by the National Audit Office (NAO) in its competition report that the CMA and the sector regulators should improve their understanding of consumer behaviour to inform proposed remedies.[23] The project has been led by a steering group co-chaired by the CMA and the FCA and involving each of the other UKCN members. The project has set up a series of quarterly workshops aimed at sharing know-how and best practice on relevant topics and fostering a community of practitioners within the UKCN. Two workshops have been held in 2016/17 – one in September 2016 covering the linkages between consumer behaviour and remedies, including presentations by Amelia Fletcher and John Fingleton on the usage of demand-side remedies; and another in December 2016 on enhancing impact through customer testing; and a third in March 2017 on the selection and design of remedies in a practical context, with presentations on the experiences of the Behavioural Insights Team, Ofgem, Ofcom and the FCA in testing potential remedies. The workshops will continue to take place during

[23] 'Develop further their understanding of consumer behaviour to inform proposed remedies. This should include greater testing of remedies before implementation, and could include the establishment of a dedicated centre of excellence within the UK Competition Network, to enable others to learn from the approach of more experienced and better-resourced UK regulators'. NAO (February 2016), The UK competition regime.

2017 and will result in a set of online documents, such as a knowledge bank, which will aim to capture the lessons learned from the project.

36. **Regular bilateral meetings**: Alongside the interactions taking place in the context of the UKCN, bilateral meetings are held on a quarterly basis at working level between the Sector Regulation Unit of the CMA and each sector regulator.[24] There are, additionally, meetings at Chair and Chief Executive level as well as at senior director level, between the CMA and each sector regulator and also *ad hoc* contacts as the need arises.

37. **Support on policy work**: There is mutual support between the CMA and sector regulators on policy work; for example, the CMA helped Ofwat to organise and facilitate an event on competition law to support the opening of non-household retail competition from April 2017, at which recent changes in the industry, case law and Ofwat's and the CMA's approach to enforcing competition law were discussed.

38. **Secondments**: there has been a marked increase in secondments between the regulators with the aim of disseminating relevant expertise and addressing resource gaps. There have been secondments involving almost every regulator, with around 17 staff having participated in secondments to and from the CMA during the reporting period.

39. In line with the Secondment Principles document[25] that was published in March 2017, secondments have been arranged for both case-specific and non-case specific purposes. Examples of case-specific secondments include a number of secondments from Ofgem to the CMA following the transfer from Ofgem of its investigation into some price comparison websites that offer energy tariff comparisons to the CMA. There has also been one secondment to assist the CAA with access to file in connection with its investigation into access to facilities for car parking services at East Midlands International Airport. Additionally, both the CMA and Ofcom have exchanged a member of staff on secondment to work on competition enforcement cases. Examples of non-case specific secondments include secondments both to and from the CMA and sector regulators in connection with the Retail Banking market investigation and its remedies implementation phase. Additionally, the CMA has seconded staff to Ofwat to contribute to preparations for the opening of the non-household retail market.

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[24] The Sector Regulation Unit exists within the CMA to facilitate day-to-day contact with the sector regulators, co-ordinate the UKCN and undertake policy work aimed at achieving more competitive outcomes for consumers within the regulated sectors.
[25] CMA (March 2017), UKCN secondment principles.

40. **Guidance**: the CMA has worked with the sector regulators on the development of guidance. The CMA provided extensive input on Ofwat's guidance on its approach to competition law in the water sector, in advance of the opening of non-household competition from April 2017. It also reviewed and commented on the NIAUR's updated competition guidelines in September 2016. The CMA provided input on the ORR's guidance on its market monitoring powers and how it will undertake market studies and make market investigation references to the CMA.

Progress of the concurrency arrangements

41. In the first year of the new concurrency arrangements, six new Competition Act 1998 cases were opened. In the two years since then, two cases have been opened in each year. As the CMA has indicated in previous reports, the number of cases is only one factor in assessing the impact of the concurrency arrangements and, as explained in the preceding sections, competitive outcomes can be and are being achieved through various means such as market work and other work to promote competitive outcomes in addition to enforcement investigations.

42. The CMA observed in last year's report that it may not be unexpected that, with significant resources already allocated to existing cases, the regulators' focus may have moved to delivery rather than case leads and opening. However, the CMA indicated a desire to see a greater number of cases opened during the year ahead.

43. The CMA is also aware that there is a significant difference between the numbers of competition law enforcement cases in regulated sectors elsewhere in the EU and that the NAO, in its report on the competition regime, had suggested that regulators may still find it easier and more effective, at least in the short term, to use their regulatory powers instead of their competition powers under Competition Act 1998.[26]

44. With these issues in mind, the CMA carried out a project during this reporting period to assess the progress of the concurrency arrangements, to understand what barriers and opportunities exist for competition investigations and whether more needs to be done to increase the volume and effectiveness of Competition Act 1998 enforcement in the regulated sectors. Among the points explored was the appetite in each regulator for increased Competition Act 1998 enforcement and if – as suggested by the NAO in its report on the competition regime – regulators found it easier or more effective to use their

[26] See NAO (February 2016), The UK competition regime, at paragraph 1.26.

regulatory powers than their Competition Act 1998 powers. The CMA held a series of discussions with the sector regulators both through UKCN and on a bilateral basis to consider the issues and what steps, if any, to take.

45. The CMA found that the regulators are generally keen to use their Competition Act 1998 enforcement powers where appropriate. The project did not identify evidence that regulators have been defaulting to, or preferring, their regulatory powers where competition enforcement powers could be used. However, many regulators noted that the regulatory framework and/or the structures of their sectors meant that sectoral problems – for example, access to the incumbent natural monopoly or vertical integration – that have been tackled by competition law in other jurisdictions were often not present, or at least not to the same degree, in the UK. This is because the UK approach to economic regulation in most of the regulated sectors supported early structural reforms and promoted relevant regulatory frameworks.

46. There may be other relevant factors to take into account in the UK. For example, the recent increase in firms bringing private actions on competition issues, some of which involve the regulated sectors, may have an effect on the extent of competition enforcement. The outcome of the referendum on the UK's membership of the EU may also be a relevant factor, particularly as working towards EU exit is complex and resource-intensive for many of the regulators, and may divert some focus and resource away from competition enforcement in the near future.

47. Notwithstanding these features that may mean there may be less scope for competition enforcement in the UK than in other EU Member States, the discussions did, however, reveal a number of different challenges that affect the regulators to varying extents. In particular, there were some common concerns about developing good Competition Act 1998 case leads; how to manage the case-file efficiently; how to prioritise resources between Competition Act 1998 and other regulatory tools and, for some regulators, how to ensure the regulators have the necessary expertise to scope, plan and conduct analysis in any Competition Act 1998 cases they might take.

48. As a result of the discussions, the CMA and the regulators are working together in the following areas:

    (a) The CMA has shared insights with the regulators on the steps that the CMA has been taking to improve delivery of Competition Act 1998 cases, with an emphasis on 'more cases, more quickly'. This includes improvements to case file management techniques and the newly established Competition Act 1998 Registry. The CMA has offered short secondments of regulator staff to the CMA's Registry (which have already

been taken up by several regulators) in order to provide first-hand experience of these techniques. The results of the various steps that the CMA has taken to improve its case delivery include significantly more competition cases opened in the last year across the economy as a whole and also a notable increase in total fines, including in the pharmaceutical sector.[27]

(b) The CMA has engaged closely with the regulators with a view to ensuring that UKCN members have the resources necessary to deliver Competition Act 1998 cases in a timely fashion, and that resource needs can be identified and addressed at a suitably early stage of a case, including through the use of secondments, where appropriate.

(c) The CMA led a 'workshop' with regulators to share and develop expertise on how to identify and generate intelligence for new competition investigations with the expectation that intelligence-generation will increase the number of future competition investigations. This is important for the development of a 'pipeline' of cases.

(d) As noted above, the number of secondments between the CMA and the regulators has increased significantly. In order to build on that momentum, the UKCN has developed a set of secondment principles which members may follow when they are considering secondments. Secondments are an important means of sharing and transferring skills, expertise and resource. As noted above, this year, secondments have been arranged between almost every UKCN member. Secondments can be two-way between the CMA and regulators or between the regulators and they can be arranged for both case-specific and non-case specific purposes.[28] All secondments have value to both the secondees and the CMA and regulators. They provide an important means of sharing and transferring skills, expertise and resource within the UKCN.

(e) The CMA has offered to engage in discussions with the regulators at an early stage of Competition Act 1998 cases to discuss scoping, planning,

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[27] In the five years, April 2010 to March 2015, the CMA opened an average of 6.8 Competition Act cases a year, whereas in the year November 2015 to November 2016, the CMA opened 14 new Competition Act cases. In the three years, 2012 to 2014, the CMA issued an annual average of fines of just under £22 million whereas in the year November 2015 to November 2016 the CMA imposed just over £48 million of fines. Some fines may be subject to appeal. CMA (November 2016), UK competition enforcement – progress and prospects.

[28] Case-specific secondments can include secondments for a particular event such as inspections or participating in an oral hearing; secondments for a particular role such as providing an economic or legal advisory function on a case or providing case-file management assistance; or secondments relating to specific milestones such as advising up to the issue of a statement of objections. Case-specific secondments can be for specific parts or for the duration of a case. Non case-specific secondments can include secondments for specific periods in which the secondee may be involved in multiple workstreams or secondments for specific projects.

development of theories of harm as well as other substantive topics and procedural matters. The CMA commonly forms a team of competition experts for the investigation who are updated regularly by the regulator case team. While up until now the team of experts has typically been involved at the point at which the investigating authority is obliged to share information (including drafts of key documents such as statements of objection, commitments decisions and infringement decisions) with the supporting authority,[29] the CMA has offered to engage in greater detail at an earlier stage. This will ensure that concerns and issues can be discussed at a formative stage of the case and that the CMA can add value by sharing expertise and enable the investigating authority to progress the case more effectively. This early engagement has already started on a couple of the current cases.

49. Our engagement with the regulators and the work that we have done on enhancing the operation of concurrency have highlighted the value and importance of the concurrency arrangements and, in particular, the fact that they harness the complementary skills of the CMA and the regulators. The CMA has more extensive experience of the procedural and substantive issues involved in completing successful Competition Act 1998 cases and the economy-wide perspective, while the regulators hold detailed knowledge of the sectors for which they are responsible. Key aspects of the concurrency arrangements which yield benefits to the efficient delivery of competition enforcement in the regulated sectors include:

(a) Closer working (including via the UKCN) between the CMA and regulators across all of the CMA's work. The activities of the Sector Regulation Unit within the CMA and the UKCN, as listed above, have fostered significantly closer working and engagement between the CMA and the regulators. It is notable that these improved relations have had positive benefits beyond those in competition enforcement. They have engendered closer working across all the CMA's activities and tools. This includes closer and deeper interaction on market studies such as the ongoing DCT Market Study, important mergers such as ICE/Trayport, as well as policy work such as the CMA's project to assess the desirability and feasibility of introducing greater competition between passenger train operators;

(b) Greater likelihood of competition investigation prioritisation in the regulated sectors. The case allocation process has given greater prominence to regulator and CMA case prioritisation considerations. The CMA has a whole-economy remit whereas the regulators are responsible

[29] The obligation to share such information arises under Regulation 9 of the Concurrency Regulations.

only for their sector. As such, in certain circumstances, the regulator might be more likely to prioritise a competition case in its sector than the CMA given competing priorities; and,

(c) Harnessing of different approaches to improve the delivery of investigations. The sharing of competition expertise is not a one-way street. The combination of the different organisations' competition procedure and substantive analysis has amplified that available to any organisation alone and helped UKCN members to progress and deliver cases more effectively at pace.

(d) Continued sharing of this expertise and where appropriate, further enhancing the CMA's and regulators' means of doing so, should drive consistency and the success of competition enforcement, thus promoting the benefits of competition in the regulated sectors and complementing the work conducted by the regulators in promoting competition and innovation through the use of their sector specific regulatory powers.

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

50. The Civil Aviation Authority (CAA) is a public corporation responsible for regulating the UK's aviation sector. The CAA's core responsibilities derive from primary legislation (principally the Civil Aviation Act 1982, the Transport Act 2000 and the Civil Aviation Act 2012), European legislation and secondary legislation.

51. The CAA has competition and sectoral economic regulation powers for two particular aviation sectors:

- airport operation services (AOS) under the Civil Aviation Act 2012, which conferred concurrent competition powers from April 2013; and
- air traffic services (ATS) under the Transport Act 2000, which conferred concurrent competition powers from 2001.

52. The air transport and travel sectors were largely deregulated during the 1980s and 1990s through both national and European legislation. The CAA does not have responsibility for the economic regulation of these sectors. Nonetheless, the CAA does have a role in issuing and enforcing airline licences and operating the Air Travel Organiser Licensing (ATOL) scheme.

Airport operation services

53. AOS are defined in the Civil Aviation Act 2012 and are generally those services provided at an airport other than air transport services, air traffic services (see below) or services provided in shops or other retail businesses. Facilities allowing for the provision of these services may be defined as AOS.

54. The CAA has powers to grant economic licences to airport operators where it determines that the Market Power Test (MPT) under the Civil Aviation Act 2012 is met. The CAA determined in January 2014 that Heathrow Airport Limited (HAL) and Gatwick Airport Limited (GAL) met the MPT. HAL and GAL continue to be subject to economic regulation through economic licences.

Air traffic services

55. ATS consist of both 'en route' services, which provide air traffic control while an aircraft is cruising; and terminal air navigation services (TANS), which control aircraft during take-off and landing, together with ground movements at airports.

56. The en-route service is a natural monopoly that is provided under an economic licence by NATS (En-Route) plc (NERL). NERL also provides a centralised approach service for the London airports.

57. TANS, which comprise approach and aerodrome services, are provided for airport operators by a number of different companies. These include:

- NATS (Services) Limited (NSL) which serves most of the largest airports;
- ANSL Ltd, a subsidiary of the German air traffic service provider, provides TANS at GAL and recently won the tender to serve Edinburgh Airport Limited;
- some independent TANS providers at smaller airports; and
- some airport operators provide this function themselves, most notably Birmingham Airport Limited.

58. Following analysis by the CAA in 2015[30] under the Single European Skies Performance Scheme, the European Commission confirmed that the TANS market was contestable on 6 October 2016.[31]

Airline licensing

59. While the CAA does not have competition powers over airlines, the CAA licenses airlines under EU Regulation 1008/2008.[32] This regulation requires airlines to have an operating licence from a national authority in their primary place of business which sets minimum standards in terms of insurance and financial resilience; a valid air operator's certificate to ensure it meets minimum safety requirements; and the majority of their shares owned by EU nationals.

Air Travel Organiser Licensing

60. The CAA's ATOL scheme addresses the insolvency risk to consumers in the air holiday market. This risk arises because travel businesses take large sums of consumers' money in advance of delivering the service. In the absence of ATOL scheme membership, should a tour operator become insolvent, its

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[30] CAA (May 2015), Review of advice on SES Market Conditions for Terminal Air Navigation Services in the UK (CAP1293).
[31] Commission Implementing Decision (EU) 2016/1940 of 6 October 2016 on the establishment of market conditions for terminal air navigation services in the United Kingdom under Article 3 of Implementing Regulation (EU) No 391/2013 (L 299/59).
[32] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (L 293/3).

customers may not have any protection from the associated financial losses and/or may be stranded.

General developments since April 2016 from a competition or policy perspective

61. The key market developments since April 2016 are outlined below. There have been five key developments that have had a direct impact on airport operators:

- Review of remedies resulting from the Market Investigation on BAA;
- Review of Aberdeen Airport Limited;
- Market Power Test Guidance;
- Announcement on new runway; and
- Mid-term review of regulation of Gatwick Airport Limited.

62. There have been five key developments that have had an impact more generally on competition at airports:

- Review of Airport Groundhandling Regulations;
- TANS review of provider transition;
- Sector review of surface access;
- Research on Holiday Comparison Websites; and
- Approach to exclusivity in vertical agreements training event.

Review of the remedies resulting from the Market Investigation on BAA

63. In May 2016, the CAA contributed towards the CMA's evaluation report[33] on the benefits to consumers of its decision to break up the BAA airport operator monopoly in 2009.[34] This remedy remains arguably the most ambitious ever implemented by the Competition Commission as a result of an Enterprise Act 2002 market investigation in any sector. As a result of its findings, BAA plc sold Gatwick, Edinburgh and Stansted airports in 2009, 2012 and 2013

[33] CMA (May 2016), BAA Airports: evaluation of remedies, May 2016. The CMA's report is accompanied by a report commissioned from ICF International.
[34] The BAA was the UK largest airport operator before the 2009 Market Investigation. It operated Heathrow, Gatwick, Stansted, Edinburgh, Glasgow, Aberdeen and Southampton airports in the UK.

respectively, valued at £3.8 billion. The Competition Commission's recommended changes to the wider regulatory framework were subsequently incorporated into a new regulatory framework for airport operators introduced in the Civil Aviation Act 2012.

64. The CMA evaluation report estimated that the benefits for the period from 2009 to 2020 will total around £870 million or around £75 million per annum, based mainly on increased traffic volumes at the divested airports. As well as the benefits to passengers from increased volume and competition, the report also identified additional non-quantifiable benefits, for example improved service standards.

Review of Aberdeen Airport Limited

65. In May 2016, the CAA published a market monitoring report[35] reviewing the information provided by Aberdeen Airport under the undertakings given as a result of the Competition Commission's 2009 market investigation into the supply of airport services by BAA. The remedies and the report were intended to help airlines get a more transparent understanding of Aberdeen Airport's business which they could use in their commercial engagement with the airport operator.

66. In the report, the CAA maintained its view that there is not currently enough evidence to justify a more intrusive form of price regulation or a stronger form of oversight. The CAA considered that:

- it is for the CMA to decide when to review the remedies applied to Aberdeen Airport; and
- should the CMA decide to review the remedies, the CMA should consult with the airport operator and its users on the appropriateness and effectiveness of continuing to impose the current remedies.

Market Power Test Guidance

67. In August 2016, the CAA published guidance outlining its future approach to the application of the MPT in the Civil Aviation Act 2012.[36] The Civil Aviation Act 2012 prohibits the operator of a "*dominant airport*" from levying charges for the use of its facilities without an economic licence issued by the CAA.[37]

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[35] CAA (April 2016), Aberdeen Airport – a market monitoring report (CAP1403).
[36] CAA (August 2016) Market Power Test Guidance (CAP1433).
[37] Section 3 of the Civil Aviation Act 2012.

68. This guidance sets out how the CAA intends to approach applying the MPT to determine whether airports should be subject to economic regulation. The guidance is based on the methodology used in the 2014 Market Power Determinations for Heathrow, Gatwick and Stansted airports.

Announcement on new runway

69. In October 2016, the Government announced[38] its support for a new runway at Heathrow airport – the first full length runway in the south-east since the Second World War.

70. The Airport Commission's 2015 final report, which recommended a new runway at Heathrow airport, stated that expansion at Heathrow airport would be commercially viable and would deliver improved reliability and resilience, and enhanced competition in the London airports system. It would support growth in air freight, improve regional access to London's international connectivity, and enable the UK aviation system to provide more long-haul connectivity, which would be crucial to the country's prosperity in an increasingly integrated global economy.[39]

71. The CAA has consistently made the case that more aviation capacity is needed to prevent future consumers from experiencing higher airfares, reduced choice and lower service quality and the CAA has confirmed its support for the Government announcement.

72. As HAL continues to be economically regulated, the CAA has a role to play in incentivising cost efficiency and putting in place regulatory arrangements to support the efficient financing of the new runway. Following the Government's announcement, the CAA wrote to HAL[40] setting out its expectations for the efficient delivery of this new runway infrastructure. The CAA emphasised:

- the importance of HAL making clear how it will deliver on aspirations not to increase charges in real terms as the runway development progresses;
- that it expects effective engagement between HAL and its airline customers to drive value for money and efficiency; and
- that it expects HAL to set clear plans for engaging with local communities and addressing their legitimate concerns around issues such as

[38] Department for Transport (25 October 2016), Government decides on new runway at Heathrow.
[39] Airports Commission (July 2015), Final Report.
[40] CAA (October 2016), CAA sets out expectations to Heathrow Airport for delivering a new runway.

compensation, operational procedures and participation in the airspace change process.

73. In January 2017, the CAA published a consultation on the development of the regulatory framework for the new runway (and the associated new terminal capacity) at Heathrow airport.[41] The focus of this document is the regulatory treatment of the costs and financing of the construction programme – what we have called 'Category C' costs. The CAA has previously consulted on the costs that HAL will incur in obtaining planning permission ('Category B' costs) and on HAL's costs related to the Airport Commission process ('Category A' costs).

74. In February 2017, the Government launched a 'National policy statement' consultation[42] on the planning policy framework which the applicant for a north-west runway at Heathrow airport would have to comply with in order to get development consent.

Mid-term review of regulation of Gatwick Airport Limited

75. The CAA introduced a new, lighter touch framework for its economic regulation of GAL in 2014. One of the reasons for adopting this new framework was that it should promote competition by facilitating innovation and diversity of offer, as it would encourage bilateral contracts that could be better tailored to the needs of individual airlines and their passengers. At the time, the CAA stated that it would carry out a short and focused review during the second half of 2016 to identify any aspect of the new framework that was acting against the interests of passengers.

76. The CAA completed this review in December 2016. It found that many aspects of the new framework appeared to be working well and none of the airlines consulted had argued for a return to a traditional price cap regulation. However, it also found that:

- GAL had not yet expanded airfield capacity in response to stronger than expected traffic growth (though it was discussing some proposed projects with airlines). The airlines argued that the resulting capacity constraints had contributed to poor on-time performance at Gatwick, though GAL disagreed with this; and

[41] CAA (January 2017), Economic regulation of the new runway at Heathrow Airport: consultation on CAA priorities and timetable (CAP1510).
[42] Department for Transport (February 2017), Consultation on Draft Airports National Policy Statement: new runway capacity and infrastructure at airports in the south-east of England.

- while some airlines reported a good relationship with GAL at the commercial, strategic and financial level, they also described a poorer relationship at operating level and with airline representative bodies.

77. The review[43] concluded by stressing the importance of GAL making good progress with its proposals to provide additional airfield capacity and taking steps to improve its relationships with airlines, especially at an operating level.

Review of Airport Groundhandling Regulations

78. The Airport Groundhandling Regulations (AGRs)[44] which are based on the 'Directive on access to the groundhandling market at Community airports' (AGD)[45] established the general principle of freedom of access to the market for both third party handlers and self-handling airport users. The purpose of the AGD is "opening up of access to the groundhandling market which should help reduce the operating costs of the airline companies and improve the quality of service provided to airport users".[46] However, it also recognised that for certain categories of handling and depending on the size of the airport, it should be possible for Member States to allow a limitation on the number of parties providing groundhandling services where this is warranted on grounds of safety, security, capacity and available space constraints.

79. In May 2016, the CAA published a Request for Information[47] on the factors the CAA should take into account in preparing guidance on the exercise of these functions. Following the responses to the Request for Information, in 2017 the CAA will consult stakeholders on how it carries out its functions under the AGRs, along with draft AGR Guidance.

TANS review of provider transition

80. In February 2017, the CAA published reports by Steer Davies Gleave[48] on the process for the transition in TANS provider at Birmingham and Gatwick airports.

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[43] CAA (December 2016), A review of Gatwick Airport Limited's commitments framework: Findings and conclusions (CAP 1502).
[44] CAA, The Airports (Groundhandling) Regulations 1997 (consolidated version) (prepared by the CAA for information and not to be relied on for any legal purposes).
[45] Council Directive 97/97/EC of 15 October 1996 on access to the groundhandling market at Community airports (L 272/36).
[46] Recital 5 of Council Directive 96/97 EC on access to the groundhandling market at Community airports.
[47] CAA, May 2016, Access to the ground handling market at UK airports: a review of the CAA's approach – Request for information (CAP1409).
[48] Steer Davies Gleave (January 2017), Review of transition in terminal air navigation service provider at Birmingham and Gatwick airports.

81. Key findings from the reports were:

- the transitions were broadly successful, with no issues in terms of continuity or quality of service;
- there were a number of challenges between the incoming and outgoing providers through the provisions, particularly in relation to the transfer of staff and, to a lesser extent, the transfer of information and data; and
- there has been further activity in the market with Edinburgh and Belfast City airports choosing new providers, and the CAA expects other airport operators to tender their TANS provision in the coming years.

82. The CAA will consult in 2017 on how it proposes to improve the transition process, particularly to improve transparency around the effects of pension rights granted to NATS employees when it was part-privatised. These rights may require new providers, who take over services previously operated by NATS; to second staff from NATS until sufficient new recruits can be trained to operate at the airport.

83. This is designed to improve the process for an effective transition to a new TANS provider at UK airports, where airport operators competitively tender for the provision of TANS at their airports.

Sector review of surface access

84. In December 2016, the CAA published its final report and an advisory letter to market participants on a review of market conditions for surface access at UK airports.[49] Surface access describes the journey passengers make in order to get to and from an airport to their ultimate point of origin or destination on the ground. The sector review was carried out under section 64 of the Civil Aviation Act 2012.

85. The aim of the sector review was to understand more about the passenger experience of travelling to and from UK airports. It focused on how market structure and competitive conditions for road and forecourt access affect outcomes for consumers, as well as on whether consumers had sufficient transparency about the options they have to access airports. Surface access can be an important part of the overall experience of using UK airports. This

[49] CAA (December 2016), Review of market conditions for surface access at UK airports – Final report (CAP1473).

element of the market has been the subject of a number of competition actions in recent years, including the cases discussed below.

86. The review identified some areas where business practices have the potential to infringe the Competition Act 1998.[50] The CAA responded to these by sending an advisory letter to UK airport operators, surface access operators and relevant trade associations. It set out the CAA's concerns, and encouraged all market participants to review their practices to ensure they are compliant with competition law now and in the future.

87. The CAA did not consider it had, at the time of publishing its report, sufficient grounds for a market study under the Enterprise Act 2002[51] or an additional investigation under competition law. However, not commencing a market study or a competition infringement investigation at this stage does not prevent the CAA from doing so in the future if information emerges that justifies this course of action.

88. In related actions:

- A tender process by Stansted Airport Limited, for the provision of scheduled bus and coach services between Stansted airport and London resulted in a change of bus operators serving the airport. Two existing operators that lost out in the tender were excluded from the Stansted airport's Passenger Transport Interchange. In 2015, easyBus took legal action over the loss of its contract to use the Passenger Transport Interchange but was unsuccessful at challenging the way Stansted Airport Limited interpreted its byelaws. This was not a competition law case.

- In early 2016, Terravision took action over the loss of its contract to use the Passenger Transport Interchange at Stansted airport. The Terravision dispute was about an alleged abuse of dominance which was settled out of court on a confidential basis.

[50] The CAA, concurrently with the Competition and Markets Authority (CMA), has the power to apply and enforce the competition prohibitions – that is Chapters I and II of the Competition Act 1998and the equivalent EU law prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the EU (the EU competition prohibitions).
[51] Market Studies are examinations into the causes of why particular markets are not working well for consumers, in which competition authorities can use formal information gathering powers, and that could lead to a number of outcomes aimed at making markets work better for consumers. See Market studies: Guidance on the OFT approach (OFT519) for more information on market studies, including on the possible outcomes that they may trigger.

Research on Holiday Comparison Websites

89. The CAA is undertaking a project to research the activities of firms who operate Holiday Comparison Websites. The objective is to ensure that these firms do not mislead consumers, in particular that the holidays advertised are available and that the headline price is reasonably achievable. The CAA also aims to ensure that these firms provide consumers with the appropriate information on financial protection.

90. The CAA will also liaise with the CMA team undertaking the Enterprise Act 2002 market study into digital comparison tools,[52] and ensure the two projects complement each other and do not unnecessarily duplicate data gathering or assessment.

Approach to exclusivity in vertical agreements training event

91. The CAA held a training event attended by all members of the UKCN. The event focused on the competition aspects of exclusive vertical agreements between businesses. It covered the economic and legal theory on this topic, and provided an opportunity for attendees to learn more about how competition authorities and law firms have previously approached exclusivity cases in practice.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

92. The key changes to the legal/regulatory framework since 2016 that might significantly affect competition and innovation are outlined below.

Amendments to AOS licences

93. The CAA consulted in November 2016, on a proposal to modify HAL's AOS Licence to allow a pass-through of up to £10m for each year of the current price control to be recovered within the current price control (H6).[53] The CAA considered that additional runway capacity in the south-east of England would benefit current and future air passengers and cargo owners, and considered that incentivising HAL to start the process of obtaining planning permission was an important first step in delivering new runway capacity. Consultation on

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[52] CMA's digital comparison tools market study.
[53] CAA (October 2016), Notice of proposed modification to Heathrow Airport Limited's economic licence to extend the current price control by one year (CAP1459).

this proposal closed on 6 December 2016. The licence modification was made in December 2016,[54] and took effect on 1 February 2017. This was not appealed. This modification expected to be pro-competitive, because it is the first step in the process of increasing capacity at the airport to allow for greater choice for passengers and cargo owners.

Cases under the competition prohibitions since April 2016

Table 2: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2016 to 31 March 2017

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	1
Number of new complaints*	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	1
Number of those cases in the year to date that resulted in:	
- an infringement decision	1
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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.
† While the Chapter I element of the case resulted in an infringement decision, the Chapter II element of the case remains ongoing at the end of the reporting period (31 March 2017).

Access to car parking facilities at East Midlands International Airport

94. The CAA investigated an alleged breach of both the Chapter I and II prohibitions of the Competition Act 1998 at an airport in the UK in relation to AOS. The case was opened in March 2015 and the CAA published its decision notice in the Chapter I case in December 2016.[55] The CAA's decision was that East Midlands International Airport Ltd, its parent company the Manchester Airports Group Plc (EMIA), and Prestige Parking Ltd infringed Chapter I of the Competition Act 1998 by agreeing to fix parking prices at EMIA, supported by an information exchange and monitoring. The agreement

[54] The notice making the modification and a covering letter can be found at www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Economic-licensing-of-Heathrow-Airport/.
[55] CAA (21 December 2016), press notice on CAA competition investigation: East Midlands International Airport and Prestige Parking Limited admit to price fixing. CAA (17 January 2017), Access to car parking facilities at East Midlands International Airport – CAA decision CA98-001 (non-confidential) (CAP1507).

was implemented as a condition of EMIA granting Prestige Parking Ltd a lease and concession to provide car parking facilities at the airport between at least October 2007 and September 2012. As part of the agreement, the parties agreed that Prestige would only sell its car parking services to consumers for at least the same price as EMIA's own car parking prices.

95. The investigation under Chapter II remains ongoing.

Staff secondments

96. The CMA seconded a member of staff for three months from June to August 2016 to the CAA to support the delivery of the competition investigation regarding access to car parking facilities at East Midlands International Airport. The secondment was the first CMA/CAA secondment under the concurrency regime and was considered successful by all parties.

Market studies since April 2016

97. There were no market studies under the Enterprise Act 2002 opened or closed since April 2016 and no market studies are ongoing.

Decisions taken since April 2016 to use the CAA's direct regulatory powers where competition prohibition powers were considered

98. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have been no occasions on which the CAA has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has nevertheless decided that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

99. The CAA has a duty to consider, before exercising its powers under certain sector-specific legislation,[56] whether it would be more appropriate to proceed under competition powers. Since April 2016, the CAA has not exercised those of its sectoral powers which give rise to this duty.

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[56] Before exercising certain enforcement powers related to licensed airport operators under the Civil Aviation Act 2012 and before exercising certain enforcement powers related to licensed air traffic service providers under the Transport Act 2000.

Future work, and proposed changes to regulation, to improve competition and innovation

100. Future work and proposed changes to regulation, to improve competition and innovation are outlined below.

Proposed changes to licences and legislation for AOS

101. In January 2017, the CAA published a consultation on priorities and the timetable for its work on capacity expansion at Heathrow airport.[57] This is expected to be pro-competitive because it is part of the process of increasing capacity at the airport to allow for greater choice for passengers and cargo owners. The work programmes set out for consultation do not require any further changes to licences or legislation during 2017.

Proposed changes to licence for ATS

102. The CAA will consult on a proposal to modify the NERL licence to require NERL to submit a resilience plan to the CAA setting out how it will deliver the service obligations in its licence through minimising the occurrence, and managing the impact, of service failures.

103. The CAA and NATS will consult the industry on proposed guidance for enforcement of the NERL ATS licence which will set triggers for escalation of CAA's enforcement policy in relation to NATS engineering failures that cause specified levels of disruption to users. This will give stakeholders a better understanding of the level of service NERL is expected to deliver under the legislative and licence framework.

104. Through this, airport operators can improve the services they provide to airlines which can in turn improve the competiveness of the services airlines provide to aviation consumers.

Airport Charges Regulations

105. The Airport Charges Regulations implement the European Directive on airport charges into UK law.[58] They establish a common framework for airport operators when levying airport charges at UK airports (for airports which serve more than five million passengers in a year). The CAA can investigate

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[57] CAA (January 2017), Economic regulation of the new runway at Heathrow Airport: consultation on CAA priorities and timetable (CAP1510).
[58] Directive 2009/12/EC of the European parliament and of the Council of 11 March 2009 on airport charges (L 70/11).

complaints that an airport operator has not complied with the Airport Charges Regulations.

106. The European Commission established the Thessaloniki Forum of Airport Charges Regulators in 2014 of the Independent Supervisory Authorities that enforce the European Directive on airport charges in each Member State.

107. In February 2017, the Forum established a Working Group on Market Power Assessments to provide advice to support the European Commission in developing its understanding how market power assessments are currently being used in aviation and other sectors. In 2017, the working group is tasked with providing recommendations:

- to the Commission on how market power assessments can best be used to ensure economic regulation of airports in the EU is appropriately targeted; and
- to other Independent Supervisory Authorities on best practice in conducting market power assessments. These recommendations, once adopted by the Thessaloniki Forum, will inform the evaluation of the Airport Charges Directive and will also serve to improve the implementation of the Directive.

The CAA will participate actively in this working group.

Airport Groundhandling Regulations Guidance

108. As noted in paragraphs 78 and 79, the CAA expects to consult in 2017 on draft AGR Guidance. Following receipt of the responses, the CAA will finalise and publish its AGR Guidance.

Update Guidance on commercial considerations when tendering for and changing TANS provider

109. Following the publication of Steer Davies Gleave's review[59] of the Birmingham and Gatwick TANS transitions, the CAA plans to consult in 2017 on updating and supplementing its guidance to airport operators and TANS providers on the commercial considerations when tendering for and changing TANS provider. In particular, the CAA wants to:

[59] Steer Davies Gleave (January 2017), Review of transition in terminal air navigation service provider at Birmingham and Gatwick airports.

- make all parties involved aware of the issues that arise during transitions and the need to allow sufficient time between awarding a tender and the new provider taking over the TANS operation; and

- recommend to airport operators that their TANS contracts include adequate provisions for exit management to ensure that outgoing providers cooperate during transition processes.

110. This is designed to improve the process for effective transition to a new TANS provider at UK airports; where airport operators competitively tender for the provision of TANS at their airports and choose a new provider.

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

111. 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.

112. 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]

113. 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.

114. 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.

General developments since April 2016 from a competition or policy perspective

115. Ofcom's principal duty to further the interests of consumers in relevant markets, where appropriate by promoting competition, means that promoting competition is at the heart of everything Ofcom does.

Implementing the Strategic Review of Digital Communications (DCR)

116. In February 2016, Ofcom outlined measures to help make the UK a world-leading digital economy over the next ten years and beyond.[61] Since then,

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[60] Postcomm, Ofcom's predecessor as regulatory of the postal sector, did not have concurrent powers or duties under the Competition Act 1998.
[61] Ofcom (25 February 2016), Initial conclusions from the Strategic Review of Digital Communications.

Ofcom has announced progress on its plans relating to a more independent Openreach, greater choice of broadband networks, including fibre connections to homes and offices, better quality of service across the whole industry, and better broadband and mobile coverage for people and businesses.[62]

Openreach

117. In July 2016, Ofcom set out its competition concern that BT has the incentive and ability to favour its own retail business when making strategic decisions about new network investments by Openreach. This concern arises because BT runs the national network, Openreach, as well as its own retail business.

118. Ofcom proposed reforms to address this structural issue, to provide regulatory clarity and confidence to the industry, and ultimately better outcomes for people and businesses.[63] A more independent Openreach would be well placed to invest in 'full fibre' broadband for everyone.

119. Ofcom's proposal required Openreach to become a distinct company with its own Board. This would comprise a majority of non-executive directors, including the Chair, who are not affiliated with BT. Openreach would be guaranteed greater independence to make decisions on strategic investments, with a duty to treat all of its customers equally.

120. In March, BT agreed to Ofcom's requirements for the legal separation[64] of Openreach and submitted a formal notification of these arrangements under section 89C of the Communications Act 2003. Under the arrangements notified by BT, Openreach Limited will be incorporated as a wholly owned subsidiary of BT with a majority independent Board of directors. Openreach Limited will be responsible for the operation and management of the Openreach business, including the direct employment of those employees working on Openreach products, services and networks. Openreach Limited will be responsible for setting its own strategy to meet its purposes, within a financial envelope set by BT Group. In doing this, it will consider the interests and strategies of all its downstream customers, including BT and the overall BT Group strategy, and will have a duty to treat all customers equally.

121. The implementation of these arrangements is conditional on (i) the amendment of the Crown Guarantee, which currently covers the BT pension scheme, to continue pension protections for the newly incorporated

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[62] Ofcom (26 July 2016), Plans to make digital communications work for everyone.
[63] Ofcom (29 November 2016), Strengthening Openreach's strategic and operational independence.
[64] Ofcom (10 March 2017), BT agrees to legal separation of Openreach.

Openreach and its employees; (ii) approval from the BT Pension Scheme Trustees for Openreach Limited to become a participating employer in the BT pension scheme; (iii) completion of the consultation processes under TUPE which are necessary for the transfer of employees; and (iv) release of BT from the Undertakings it offered to Ofcom in 2005 under Part 4 of the Enterprise Act 2002.

122. Ofcom will take a detailed and pro-active approach to monitoring the compliance by BT and Openreach with the Commitments and Governance Protocol. This will ensure BT and Openreach remain focused on delivering the benefits of the new model. It will also allow Ofcom to ensure it continues to be satisfied that the model is addressing its competition concerns and benefiting the wider market. Given the importance of this task to the overall model, Ofcom expects monitoring of compliance to be undertaken by a new Openreach Monitoring Unit.

123. Ofcom will adopt a three-tier system for monitoring the new model, covering implementation by BT, compliance with the new formal governance arrangements, and considering how the new model supports good outcomes for communications providers, consumers and businesses.

Ducts and pole access

124. In July 2016, Ofcom detailed a new strategy[65] to promote large-scale roll-out of ultrafast broadband, based on cable and fibre lines that go all the way to people's doorsteps. This would provide an alternative to the mostly copper-based technologies currently being planned by BT, and deliver benefits to people and businesses in terms of choice, innovation and affordable prices.

125. Ofcom believes network competition is the most effective spur for continued investment in high quality, fibre networks. This will also reduce the country's reliance on Openreach, which is currently the network division of BT.[66]

126. Ofcom plans to make it quicker and easier for rival providers to build their own fibre networks direct to homes and offices using BT's existing telegraph poles and 'ducts' – the small, underground tunnels that carry telecoms cables. This would give BT's competitors the flexibility to innovate as technology evolves, and respond to changes in their customers' needs.

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[65] Ofcom (26 July 2016), Plans to make digital communications work for everyone.
[66] As noted in paragraph 120 above, in March 2017 BT agreed to the legal separation of Openreach.

127. In December 2016, Ofcom consulted on how these plans might be achieved by publishing a consultation document in relation to its Wholesale Local Access market review[67] which is detailed below under market reviews.

Enforcement action

128. In 2016/17 Ofcom has exercised its powers under the Communications Act 2003 in own-initiative investigations to benefit competition, which were:

(a) In January 2017, Ofcom announced that it closed its investigation concerning BT's compliance with its cost-orientation obligations under General Condition 18.5. Ofcom was satisfied with the assurances that BT had provided in respect of complying with the principles set out in the dispute determinations and making repayments totalling £6.5m to affected customers.[68]

(b) In March 2017, Ofcom announced that it had issued its final decision and settled its investigation into BT's use of Deemed Consent in the provision of Ethernet services. This investigation considered BT's compliance with 'significant market power' (SMP) obligations requiring BT to contract on fair and reasonable terms, comply with the terms of its contractual reference offer, and make compensation payments when Ethernet circuits are delivered late. Ofcom found that BT had breached relevant SMP obligations, and imposed a penalty of £42 million, which included a settlement discount. BT will also be paying compensation to parties affected by its conduct.[69]

Market reviews and dispute resolution

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

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

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

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[67] Ofcom (6 December 2016), Wholesale Local Access Market Review: Initial proposals to develop an effective PIA remedy.
[68] Ofcom (10 January 2017), Own initiative investigation into British Telecommunications Plc concerning compliance with its cost-orientation obligations under General Condition 18.5.
[69] Ofcom (6 November 2015), Investigation into BT's use of the Deemed Consent Mechanism in relation to the provision of Ethernet Services.

Market reviews

130. Where Ofcom finds that a provider has SMP it imposes regulations appropriate for protecting the interests of consumers in light of the competition concerns raised.

131. In April 2016, Ofcom published its final statement in relation to the Business Connectivity market review,[70] which examined the provision of leased lines to businesses in the UK. Leased lines are high-quality, dedicated, point-to-point data transmission services used by businesses and providers of communications services. They are essential components not only of many business information and communication technology services, but also of mobile and residential broadband services.

132. In December 2016, Ofcom published an initial consultation in relation to Ofcom's Wholesale Local Access (WLA) market review. This consultation concerns Openreach's duct and pole access product, known as Physical Infrastructure Access (PIA). It builds on Openreach's process improvement trials for PIA, conducted with the Office of the Telecommunications Adjudicator and five other telecoms providers, as well as Ofcom's positive engagement with stakeholders since the DCR was published. It links the commitments made in the DCR to specific actions, setting out Ofcom's initial views on what Openreach's PIA product could be used for, how it should work in terms of processes, and how charges could be set. Ofcom explains how each of these areas in combination will help address concerns regarding barriers to investing in ultrafast broadband networks at scale.

133. In December 2016, Ofcom published a consultation document setting out its provisional views in its Narrowband market review which covers five wholesale markets that underpin the delivery of retail fixed voice telephone services in the UK. The outcomes from this review are designed to promote competition and further the interests of residential and business customers.

134. In March 2017, Ofcom published its main WLA market review[71] consultation setting out its provisional conclusions for market definition, SMP and remedies in the wholesale local access market. Also included in this review are charge control proposals for wholesale standard broadband services based on Local Loop Unbundling and superfast broadband based on Fibre to the Cabinet technology supporting broadband speeds up to 40Mbit/s. On the same day Ofcom also published proposals for regulating quality of service in the WLA

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[70] Ofcom (28 April 2016), Business Connectivity Market Review – Final Statement.
[71] Ofcom (31 March 2017), Wholesale Local Access market review.

and narrowband markets.[72] Ofcom expects to publish its final decision in a statement in early 2018, with new measures taking effect on 1 April 2018.

135. Overall, competition in the telecommunications sector remains strong, with consumers getting better value for money in recent years. However, Ofcom is concerned that people who buy standalone landline services are not being served well by the market.

136. In February 2017, Ofcom published a consultation document setting out its provisional views in its review of the retail market for standalone landline telephone services;[73] that is, the sale of telephone services to those people who buy such services in a standalone contract and not as part of a bundle with other services such as broadband or pay TV. This affects around 2.9 million households in the UK. Ofcom provisionally concluded that there is a distinct market for these services and that BT has SMP. Ofcom sets out its proposals to address BT's SMP which would see a price cut for customers that take a landline without taking it as part of a bundle with broadband or other services. Ofcom also proposes to require BT to cooperate in the trial – and, if appropriate, the implementation – of consumer information remedies designed to stimulate competition.

Dispute resolution

137. Since April 2016, Ofcom has exercised functions in relation to its dispute resolution duties in three disputes. When exercising its dispute resolution duties, Ofcom does so with regard to its principal duties to further the interests of citizens in communications matters and to further the interests of consumers in relevant markets, where appropriate, by promoting competition. Disputes resolved by Ofcom were:

(a) Dispute relating to TelNG's compliance with General Condition 17 and the National Telephone Numbering Plan;[74]

(b) TalkTalk Group and BT concerning charges for special fault investigation services and time related charges;[75]

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[72] Ofcom (31 March 2017), Quality of service for WLR, MPF and GEA – Consultation.
[73] Ofcom (28 February 2017), Review of the market for standalone landline telephone services – Consultation.
[74] Ofcom (22 July 2016), Dispute relating to TelNG's compliance with General Condition 17 and the National Telephone Numbering Plan.
[75] Ofcom (26 September 2016), TalkTalk Group and BT concerning charges for special fault investigation services and time related charges.

(c) British Sky Broadcasting plc and BT concerning charges for special fault investigation services and time related charges.[76]

Spectrum auction

138. In November 2016, Ofcom consulted on competition issues for the forthcoming auction of spectrum in the 2.3 and 3.4 GHz bands. The 2.3 and 3.4 GHz spectrum is needed to provide additional capacity to meet growing consumer demand for mobile broadband. It is important that the frequencies are made available as quickly as possible for the benefit of consumers and industry.

Guidance updates

139. In December 2016, Ofcom published guidance under the Communications (Access to Infrastructure) Regulations, which came into effect on 31 July 2016. This followed a consultation in July 2016. These Regulations implement the Broadband Cost Reduction Directive which sets out measures to reduce the cost of deploying high-speed electronic communications networks.[77]

140. In January 2017, Ofcom consulted on changes to its Enforcement Guidelines, which set out how Ofcom investigates and enforces regulatory requirements relating to electronic communications networks and services, postal services, consumer protection legislation, competition law and certain competition-related conditions in broadcast licences.

141. Alongside this consultation, Ofcom published draft documents setting out its proposed procedures. These include draft revised Enforcement Guidelines, as well as draft guidelines for Competition Act investigations, draft guidelines for investigations into breaches of competition-related conditions in broadcast licences and a draft document providing advice to complainants and whistleblowers.

[76] Ofcom (26 September 2016), British Sky Broadcasting plc and BT concerning charges for special fault investigation services and time related charges.
[77] Ofcom (26 July 2016), Proposed guidance under the Communications (Access to Infrastructure) Regulations 2016.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

Telecoms

142. In July 2016, new[78] rules came into force that give telecoms providers further rights to access physical infrastructure. These rules implement the Broadband Cost Reduction Directive[79] which sets out measures designed to reduce the cost of deploying broadband networks, by sharing access to infrastructure across different sectors. The rules support the Digital Agenda for Europe with the aim for high-speed broadband to reach as many people as possible. Civil engineering accounts for a large proportion of the cost of deployment, and the new rules are intended to reduce that cost, making broadband roll out more effective, maintaining effective competition and increasing choice for consumers.

Broadcasting

143. In 2016, the Government completed its review of the BBC's Royal Charter. Under the new Charter, from 3 April 2017 Ofcom's responsibilities in relation to the BBC include a role concerning the protection of fair and effective competition in the UK.

144. In December 2016, Ofcom published four consultations setting out how it intended to regulate the BBC's impact on competition. In March 2017, Ofcom published its final requirements, procedures and guidance (the "Guidance") and a statement covering consultation responses.[80] These documents set out the tools Ofcom will use to protect fair and effective competition in the areas that the BBC operates. The Guidance forms part of Ofcom's Operating Framework for the BBC,[81] and Ofcom expects to add to it as work progresses.

145. As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by increasing choice or encouraging sector wide innovation, for example.

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[78] Communications (Access to Infrastructure) Regulations 2016.
[79] Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks (L 155/1).
[80] Ofcom (29 March 2017), Regulating the BBC's impact on competition - Statement on requirements and guidelines.
[81] Ofgem (29 March 2017), The Operating Framework and related documents.

However, in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.

146. Ofcom has developed rules relating to different areas of BBC activity that could lead to competition concerns and guidance to explain the tools Ofcom will use to protect fair and effective competition in the areas that the BBC operates.[82]

147. Competition concerns may arise if the BBC's public service activities are considered to be crowding out competition or deterring others from investing or innovating. There is also a risk that, without appropriate safeguards, the BBC's public funding could be used to subsidise or benefit its commercial subsidiaries by offering services on favourable terms. This could distort competition by giving those commercial subsidiaries an unfair competitive advantage.

148. In relation to distribution, there is a risk that competitors may not be able to develop compelling consumer offerings if they are unable to include BBC content in their services, or are given access to it on unfair or discriminatory terms.

149. Ofcom's role is to ensure that such concerns have been properly addressed. Ofcom will generally look at market impacts alongside any public benefits, taking into account the BBC's need to fulfil its Mission and promote its Public Purposes, and the need to protect fair and effective competition.

150. In November, Ofcom published its Final Statement in its Broadcasting Transmission Services Review, which set out its final position on that market to remove the SMP regulation on Arqiva in the broadcasting transmission services market in light of merger regulations. Notwithstanding Arqiva's strong market position, Ofcom concluded that, while the merger undertakings remain in place, there are sufficient remedies to address market failures. Should there be any significant changes to the broadcasting transmission services market in the future, Ofcom retains the ability to open a fresh review into this market at any time.[83]

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[82] Ofcom (29 March 2017), Introduction to Ofcom's Operating Framework for the BBC.

[83] In 2005 Ofcom concluded a review of the market for broadcasting transmission services. As a result of this review, Ofcom found that Crown Castle and ntl:broadcast, which both now form part of Arqiva, had significant market power in the market for the provision of access to masts and sites and shared or shareable antenna systems. Regulatory conditions were imposed as a result of the 2005 review, which remained in force until 2016. Since that review, Arqiva became subject to various remedies under the UK merger control regime, which effectively incorporate the regulation imposed in 2005. During the course of 2016 Ofcom reviewed the significant market power regulation on Arqiva, and decided to remove this regulation following consultation.

Post review

151. In March 2017, Ofcom published its final statement setting out the findings of its fundamental review of the regulation of Royal Mail.[84] This included Ofcom's assessment of Royal Mail's efficiency, analysis of its position within the letter and parcel sectors, and consideration of the company's potential ability to set wholesale prices in a way that might harm competition. The document set out Ofcom's decision on the future framework for post, focusing on five key areas:

(a) maintaining a regulatory approach that recognises the structural decline in letters and increasingly competitive parcels market, and extending the regulatory framework for a further five years;

(b) supporting competition and innovation in the parcels sector;

(c) tightening rules on access competition;

(d) focusing mail integrity regulation on appropriate areas and securing good consumer outcomes; and

(e) ensuring all regulatory conditions remain appropriate and fit-for-purpose.

152. This statement put the new regulatory framework in place with immediate effect, aside from the new Universal Service Provider (USP) Access Condition. This took effect from 1 April 2017 to allow Royal Mail to make any necessary changes to its commercial arrangements.

153. In addition, following feedback from consultation respondents, Ofcom has decided to amend its original proposal in relation to the Postal Common Operational Procedures (PCOP) Code of Practice. Ofcom set out a new proposal in this statement, and sought responses on this issue by 3 April 2017.

[84] On 16 June 2015 Ofcom announced a fundamental review of the regulation of Royal Mail. The review was to ensure regulation remains appropriate and sufficient to secure the efficient and financially sustainable provision of the universal postal service. Ofcom published a discussion document in July 2015 and a consultation in May 2016. Ofcom, Review of the Regulation of Royal Mail.

Cases under the competition prohibitions since April 2016

Table 3: 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 2016 to 31 March 2017

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	2
Number of new complaints*	1
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	1
Number of cases that are ongoing	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

* '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.

Broadcasting

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

154. In November 2014, Ofcom opened an investigation into the sale of live UK audio-visual media rights to Premier League matches. This followed a complaint from Virgin Media Limited against the Football Association Premier League (PL). Virgin Media's complaint alleged 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.

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

156. The complaint alleged that this contributes to higher prices for consumers of pay TV packages that include premium sport channels and for the pay TV retailers of premium sports channels. In January 2015, Virgin Media made an application requesting that Ofcom grant interim measures relief under section 35 of the Competition Act 1998. In February 2015, Ofcom decided to refuse Virgin Media's application for interim measures.

157. In March 2015, Ofcom provided the PL with a case update, responding to a request for more detail on Ofcom's assessment and analysis to date. Ofcom subsequently undertook consumer research in order to further understand how consumers benefit from the way the PL sells its rights.

158. In August 2016, Ofcom closed the investigation. In closing the investigation, Ofcom took into account the PL's decision to increase the number of matches available for live broadcast in the UK, to a minimum of 190 per season from the start of the 2019/20 season. This will be an increase of at least 22 matches per season over the number sold for live broadcast in the PL's auction in 2015. The PL's decision to increase matches available in its next auction for live TV rights builds upon commitments given to the European Commission in 2006.

159. The next auction will include a 'no single buyer' rule, which means that more than one broadcaster must be awarded rights. At least 42 matches per season will be reserved for a second buyer, of which a minimum of 30 will be available for broadcast at the weekend.

160. Ofcom also took into account the results of consumer research it carried out to understand the preferences of match-going fans and those watching on TV in relation to PL matches. Ofcom published the results of the consumer research undertaken as part of the investigation.

161. A fifth of fans said they wanted to see more matches televised live. A similar proportion said they were happy with the overall number of matches broadcast live, but wanted to see different matches shown. Among match-going fans, a high proportion said that the day of the week and kick-off time was of high importance, with over two-thirds of this group identifying the Saturday 3pm kick off as their preferred time to attend.

162. Ofcom believed that a balance would need to be struck between the potential benefits of releasing more matches for live broadcast, and the potential

disruption on match-going fans due to these games being rescheduled to be broadcast outside of the 'closed period'.[85]

163. Due to the range of views expressed in the consumer research, significant further work – including additional research among football fans – would be required to conclude this investigation.

164. Given the considerations outlined above, Ofcom decided to close the investigation. Ofcom believed that its resources could be used more effectively on other priorities to benefit consumers and competition.

Postal Services

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

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

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

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

168. Royal Mail has provided written and oral representations on the matters and evidence set out in the Statement of Objections. Ofcom is carefully considering Royal Mail's representations and has also gathered additional evidence and carried out further analysis. This will inform the next steps in the investigation.

[85] The closed period is between 2.45pm and 5.15pm on a Saturday.

Market studies undertaken since April 2016

169. There were no market studies opened or closed since April 2016 and no market studies which are ongoing. Market reviews carried out under Ofcom's sector-specific regulatory powers are detailed above.

Decisions taken since April 2016 to use Ofcom's direct regulatory powers where competition prohibition powers were considered

170. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a sector regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of Competition Act 1998. Since April 2016, there have been no occasions on which Ofcom has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has decided nevertheless that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

171. Ofcom also has a duty[86] to consider, before exercising its powers under the Communications Act 2003, whether it would be more appropriate to proceed under competition powers. Since April 2016, there has been one case in which competition concerns arose such that Ofcom needed to consider the matter further prior to exercising its powers under the Communications Act 2003, but considered that it was appropriate to proceed under its regulatory powers in the context of the particular case.

Future work, and proposed changes to regulation, to improve competition and innovation

172. Ofcom exists to make communications markets work for everyone. To achieve this, it has three high-level, long-term goals:

(a) Promote competition and ensure that markets work effectively for consumers.

(b) Secure standards and improve quality.

(c) Protect consumers from harm.

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[86] Under sections 94 and 96A of the Communications Act 2003 and paragraph 4 of Schedule 7 to the Postal Services Act 2011; this is commonly known as the 'primacy obligation'.

173. The 2017/18 financial year is likely to be one of significant change for Ofcom, implementing its digital communications strategy and taking on its new BBC responsibilities. To ensure Ofcom delivers positive outcomes for people and businesses, Ofcom needs to remain adaptable and flexible whilst delivering on its annual plan. To help with this, Ofcom sets out below areas of particular importance for people and businesses within Ofcom's 2016-17 work programme. Ofcom will ensure the following areas are adequately prioritised in the coming year:

(a) implementing the conclusions from Ofcom's DCR, including strengthening Openreach's strategic and operational independence from BT; and

(b) awarding further mobile spectrum (the 2.3GHz and 3.4GHz spectrum bands) to help meet the growing demand for mobile services and capacity.

174. To achieve Ofcom's goals, it needs to address specific challenges within Ofcom's regulated sectors. For Ofcom's goal to promote competition and ensure that markets work effectively for consumers, Ofcom has highlighted key work areas of particular importance in 2017/18:

(a) **Ofcom's aim** is to ensure consumers and businesses benefit from a range of communications products and services, with the market providing good outcomes in terms of choice, price, quality, investment and innovation.

(b) **Ofcom does this by** ensuring that markets can work effectively, through regulation where appropriate, so that consumers can gain from the benefits of competition.

(c) **Enabling competing operators to invest in super- and ultra-fast fixed-line networks. Ofcom** will open up and improve access to Openreach's ducts and poles and apply appropriate price controls to BT's regulated access network products, to create the opportunity for all operators to deploy their own fibre networks.

(d) **Promoting competition in fixed-line services**, by strengthening Openreach's strategic and operational independence from BT. In 2017/18, Ofcom will oversee transition to the new model of legal separation notified by BT in March 2017. This includes setting up new processes and functions to closely monitor BT and Openreach Limited's compliance with the new model.

(e) **Making available better, more granular information** for people and businesses on the availability, speed, quality of service, and pricing of

communications services. Ofcom will also improve people's ability to engage with the market and switch providers.

(f) **Ensuring fair and effective competition to deliver a wide range of high quality and varied content for broadcasting audiences,** including assessing whether the potential public value of new services (or significant changes to existing services) proposed by the BBC justifies any potential effect on competition. This is in addition to Ofcom's work on public service broadcasting performance and diversity.

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

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

General developments since April 2016 from a competition or policy perspective

Retail

176. In June 2014, Ofgem referred the energy market in Great Britain to the CMA for investigation. The CMA concluded the investigation in June 2016, and set out a number of remedies with the aim of making competition in the market more effective. Ofgem has been progressing work on these remedies, as discussed in paragraphs 191 - 193 and paragraph 211.

Onshore electricity transmission

177. Following publication in March 2015 of the final conclusions of a review of the Great Britain electricity transmission arrangements for system planning and asset delivery, Ofgem is taking forward work to introduce competition for the construction, operation and financing of high value, new and separable assets in the onshore transmission network.[87] Ofgem has published decisions this year on certain arrangements, discussed in paragraphs 188 - 190.

Interconnectors

178. Electricity interconnectors, which connect the GB electricity transmission network to other countries' networks, provide significant benefits to GB energy consumers and are an important part of the future energy system. Ofgem confirmed its cap and floor[88] regime which will be applied to future interconnection as part of its Independent Transmission Planning Regulation

[87] Ofgem, Competition in onshore transmission.
[88] The cap and floor regime is where developers receive a top up payment where regulated income is below a floor level, funded by transmission customers. Where a developer's income exceeds a pre-specified cap level then the excess will be transferred to transmission customers.

(ITPR) policy conclusions. The regime is open to competition from third party developers and TSOs. New investment in electricity interconnection is a competitive market with new projects having the option of seeking support from Ofgem's cap and floor regime, or pursuing the merchant exempt route,[89] which allows projects to receive exemptions from certain European legislation.

179. Six projects have received the cap and floor regime to date and are at varying stages of development and construction. The second cap and floor application window closed in October 2016 and Ofgem received three proposals for new interconnectors which are currently being assessed as part of the Initial Project Assessment stage of Ofgem's cap and floor framework. In spring 2017, Ofgem will consult on the Initial Project Assessment and following that will decide on whether to approve the projects for a cap and floor regime in principle.

Offshore electricity transmission

180. Ofgem manages the competitive tender process through which offshore transmission licences are granted to Offshore Transmission Owners (OFTOs). Through this tender process, new capital is brought into the offshore transmission sector in support of investments and offshore wind generators are partnered with the most efficient and competitive players in the market. This should result in lower costs and higher standards of service for such generators and, ultimately, consumers. Ofgem regulates OFTOs, and this year has continued to monitor compliance with their regulatory obligations, and their performance against the 98% availability target for their transmission systems under their offshore transmission licence.

181. In 2017, Ofgem expects to complete the fourth tender round of OFTO projects, announcing the preferred bidder and granting the licence for the Burbo Bank Extension project. Throughout 2017/18 Ofgem will continue to run the tenders for the five tender round five projects which launched in October 2016. Ofgem will also work closely with wind farm developers to identify the projects that will potentially form part of tender round six.

Networks

182. Ofgem's RIIO (Revenue = Incentives + Innovation + Outputs) framework sets price controls for network companies, and is designed to encourage them to

[89] The merchant exempt route is where a project developer of an interconnector applies to the two countries that the interconnector connects between for exemptions from the Third Energy Package (European legislation) to allow it to progress a project without having to abide by such regulation.

a) innovate to reduce network costs; b) put stakeholders at the heart of their decision making; c) invest efficiently to ensure continued safe and reliable services; and d) play a role in delivering a low carbon economy and wider environmental objectives. As part of the Mid-Period Review for transmission networks, Ofgem decided to reduce National Grid's funding by £185m as certain outputs are no longer required. Otherwise, Ofgem is continuing to monitor network company performance in relation to a range of outputs and incentives that were determined at the start of the control periods.

183. As part of its aim to enhance network innovation and competition, Ofgem is proposing changes to the Network Innovation Competition (NIC), which is discussed further in paragraph 214.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

Electricity Market Reform (EMR)

184. 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, including the Capacity Market, which was introduced to help ensure security of electricity supply at the least cost to the consumer. It is designed to provide investment in the overall level of reliable capacity (both supply and demand side response) by auctioning capacity agreements. Ofgem has several important roles in EMR, including: where necessary, to make changes to the Capacity Market Rules (the Rules) which govern the operation of the Capacity Market; and, enforcing compliance with the Rules and Regulations.

185. Ofgem made amendments to the Rules in 2016 as part of an annual Rules change process. These changes focused on simplifying the application process, ensuring participation in line with original policy design, and making the Rules clearer. These changes are anticipated to have a positive effect on competition by reducing the burden on capacity market participants, thereby allowing greater participation and thus competition in the capacity market auction.

186. Alongside Ofgem's Rules changes, BEIS has made a series of amendments to the Regulations, with some consequential amendments to the Rules.[90] The most recent amendments were consulted on in October 2016 and included changes to the Supplier Levy and Settlement Costs Levy calculation, and amendments to termination fees. These changes are anticipated to enhance competition by removing financial advantages for certain types of technologies, thereby levelling the playing field for other technologies in the market.

Transmission Constraint Licence Condition

187. Ofgem has been actively monitoring how the Great Britain wholesale electricity market complies with the Transmission Constraint Licence Condition (TCLC). This licence condition prohibits generators from obtaining an excessive benefit from electricity generation, or from allowing a reduction in generation in relation to a period of transmission constraint. The original licence condition will expire in July 2017. Following engagement with industry last year, Ofgem published a statutory consultation[91] in February 2017 on extending part of TCLC as a standard licence condition. The final decision is expected to be published in May 2017.

Competition in Onshore Transmission

188. As described in paragraph 3, Ofgem is taking forward work to introduce competition for the construction and operation of high value, new and separable assets in the onshore transmission network.[92] As such, by using market mechanisms that harness competition, Ofgem aims to achieve the following objectives:

- Provide value for consumers, protecting them from undue costs and risks.
- Deliver transmission infrastructure necessary to address system needs.
- Bring about timely, economic and efficient development of the GB electricity transmission system.

[90] For more details see Selective overcompensation in the Capacity Market and Capacity Market: proposals to simplify and improve accessbiltiy in future capacity auctions.
[91] Ofgem (3 February 2017), Statutory consultation: Transmission Constriant Liucence Condition.
[92] Ofgem, Competition in onshore transmission.

- Create a strong competitive field by attracting new entrants and new approaches to the design, construction, operation and financing of transmission infrastructure.

189. Ofgem published its decision on criteria, pre-tender and conflict mitigation arrangements in November 2016, alongside a consultation on the supporting licence modifications. It is proposed that a competitive tender may be run for projects that are new, separable and high value. The pre-tender and conflict mitigation arrangements are intended to encourage effective competition by creating a level playing field. Ofgem expects to undertake a statutory consultation on licence modifications mid 2017.[93]

190. Ofgem published a consultation on possible tender arrangements in August 2016. Subject to consideration of responses, Ofgem expects to consult further regarding the proposed arrangements mid 2017. In December 2016, Ofgem published a consultation on National Grid Electricity Transmission's North West Coast Connections project, setting out its views on the project's needs case and suitability for competition. Ofgem aims to be in a position to run the first competitive tender for onshore transmission assets from 2019.

Energy market remedies

191. In June 2014, Ofgem referred the energy market in Great Britain to the CMA for investigation. The CMA's energy market investigation concluded in June 2016 and identified a series of adverse effects on competition. The CMA recommended a package of remedies to Ofgem, with the aim of making competition in the market more effective. These remedies are expected to have market-wide implications and enhance competition, most significantly by increasing consumer activity and engagement, and therefore putting additional pressure on energy retailers to compete vigorously for custom.

192. The CMA's report contained 26 remedy recommendations to Ofgem. In August 2016, Ofgem set out its high-level approach to implementing those remedies in its Implementation Strategy and followed this up with detailed milestones in its Implementation Plan in November 2016.[94]

193. To bring forward anticipated consumer benefits, Ofgem has fast-tracked the implementation of remedies, where possible. An example is the removal of the Retail market review simpler restrictions (limiting suppliers to four tariffs per region and a single unit rate and standing charge), which were removed

[93] Ofgem (25 November 2016), Extending competition in electricity transmission – decision on criteria, pre-tender and conflict mitigation arrangements.
[94] Ofgem (9 November 2016), CMA Remedies Implementation Plan.

from the licence in November 2016. The intention of this change to the licence is to remove barriers to innovation for suppliers. Ofgem is acting on other remedies identified by the CMA. This includes consulting on the removal of the Whole of Market requirement for Confidence Code accredited price comparison websites; using principles to support tariff comparability and introducing a new licence condition to require suppliers to participate in trials, along with an open letter on selection criteria for those trials. Ofgem has also started to develop the database service including completion of initial "Alpha" phase trial. Ofgem is also consulting on industry code governance.

Competition in electricity distribution connection

194. New connections to the electricity distribution network can be provided by the regional monopoly Distribution Network Operator (DNO)[95] or an alternative connection provider. In each regional area, the DNO is the sole provider of several essential services needed to make a connection. The DNO provides these essential services to both its own connections business and its competitors'.

195. Ofgem has been working to facilitate competition in electricity connections since 2000. It has determined that effective competition has developed in some, but not all, sections of the connection market. Ofgem's 2014 review into the connections market found that the DNOs' role in the connection process (as the sole provider of essential connection services) was restricting the development of effective competition. To address these issues, Ofgem introduced a new licence condition and enforceable code of practice (CoP). The CoP governs how DNOs provide essential services to the market. (Ofgem also opened a Competition Act investigation into one party - see further below.

196. Since April 2016, Ofgem has approved four modifications to the CoP. These modifications introduced clear, common processes to allow competitors to determine their own Point of Connection[96] and approve their own connection designs.[97] These changes minimised the number of essential services that are only available from the DNOs and may reduce the time taken for competitors

[95] DNOs are holders of an electricity distribution licence and responsible for owning, operating and maintaining the electricity distribution networks.
[96] Ofgem (27 April 2016), Decision on Competition in Connections Code of Practice (CiCCoP) Modification 0001 – Self Detemination of Point of Connection by Independent Connection Providers.
[97] Ofgem (27 April 2016), Decision on Competition in Connections Code of Practice (CiCCoP) Modification 0002 – Self-Design Approval Processes.

to issue quotations (which would make them more attractive to customers).98 The final modification also introduced clear, common reporting requirements under the CoP for DNOs.[99] This should allow stakeholders to scrutinise DNO compliance with the CoP and improve accountability. The introduction of reporting requirements should also increase pressure on DNOs to develop consistent arrangements and align with best practice, wherever possible

197. Ofgem considers that these modifications will help facilitate competition by increasing the scope of activities that are open to competition and improving the transparency of arrangements for competitors.

198. Ofgem has committed to undertaking a further review of the electricity distribution connections market to determine the success of the regulatory remedies introduced.

Cases under the competition prohibitions since April 2016

Table 4: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2016 to 31 March 2017

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	2
Number of new complaints*	4
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	1
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	1
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
- case transfer to another NCA	1
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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.

[98] Historically, DNOs have determined the Point of Connection that competitors must use and insisted on approving the network design that their competitors use.
[99] Ofgem (11 July 2016), Decision on Competition in Connections Code of Practice Modification 0003 – Code of Practice Reporting Requirements.

Chapter I investigation (Undisclosed parties)

199. In August 2016, Ofgem opened a new investigation into whether there has been an infringement of Chapter I of the Competition Act 1998 which concerns anti-competitive agreements and concerted practices affecting the energy sector. This investigation is limited to a small number of parties.[100] A decision to continue with the investigation was taken in December 2016. Ofgem is planning to review the case by the end of April 2017 to determine whether to continue the case.

Connections

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

201. In September 2015, SSE informed Ofgem that it wished to offer binding commitments to address the potential competition concerns that had been identified. As a result of SSE's offer, Ofgem continued its investigation in order to assess the appropriateness of accepting commitments in this case.

202. In April 2016, Ofgem issued its Summary Statement of Competition Concerns to SSE. The three concerns related to conduct by Scottish and Southern Energy Power Distribution Limited ("SEPD") that could potentially restrict entry and expansion of competitors in the electricity connections market in the areas where SEPD is dominant.

203. SSE offered a comprehensive set of commitments in June 2016. Following formal consultation, Ofgem decided to accept these commitments from SSE as it was satisfied that they fully addressed the competition concerns identified. The decision to accept the commitments was issued in November 2016.

Third Party Intermediaries and supporting services

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

[100] The identities of the parties have not been released.

supporting service for the energy industry. This investigation was opened to look at whether certain price comparison websites had breached competition law in relation to paid online search advertising. During the course of the investigation, Ofgem became aware of communications between Ofgem staff and representatives of some of the parties under investigation that could delay the progress of the case, for example if parties were to call into question Ofgem's impartiality in continuing with the case. Ofgem therefore considered the CMA was better placed to continue with the investigation and in May 2016, issued a notice proposing to transfer the case to the CMA. The transfer was agreed with the CMA and the investigation was transferred in June 2016.

Market studies undertaken since April 2016

205. There have been no market studies opened under the Enterprise Act 2002 since April 2016 and no market studies which are ongoing.

Decisions taken since April 2016 to use Ofgem's direct regulatory powers where competition prohibition powers were considered

206. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a sector regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have been no occasions on which Ofgem has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has decided nevertheless that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

207. Ofgem has a duty[101] to consider, before issuing a final order, confirming a provisional order, or imposing a penalty in relation to a licence order, in the gas and electricity sectors, whether it would be more appropriate to proceed under competition powers. Since April 2016, in every instance in which Ofgem has decided whether to open an investigation into a possible breach of the applicable licence conditions, it first considered whether competition powers were applicable before using sectoral powers.[102] In each instance where

[101] Under sections 28 and 30A of the Gas Act 1986 and sections 25 and 27A of the Electricity Act 1989; this is commonly known as the 'primacy obligation'.
[102] It is Ofgem practice always to consider whether it is more appropriate to proceed under competition powers before proceeding under sectoral powers – see for example paragraphs 2.29 et seq of Ofgem (12 September 2014), Enforcement Guidelines.

Ofgem proceeded under regulatory powers, there were no competition concerns that warranted the use of competition powers.

Future work, and proposed changes to regulation, to improve competition and innovation

Regulating the retail gas and electricity markets

208. Ofgem has committed to relying more on principles, and less on prescriptive rules, when regulating energy suppliers.[103] Principles allow greater flexibility for suppliers to comply with regulation over time, thereby allowing them to harness innovative methods to minimise cost and maximise consumer benefit. Ofgem has prioritised reforming the supply licence rules which apply to the domestic retail energy market, as this is where the level of prescription is particularly acute. One-size-fits-all prescription will still be required where there is genuinely only one acceptable way of doing something or where consistency across the market is required. Outside of these areas, Ofgem does not consider prescriptive rules to be a sustainable way of regulating a retail market that is likely to undergo significant change over the coming years.

209. Relying more on principles will promote innovation and competition in an evolving retail market, while allowing Ofgem to continue providing effective protection to consumers as new risks emerge. Through the use of principles, Ofgem also wants to shift industry culture so suppliers are less worried about ticking compliance boxes and instead firmly own their responsibility for delivering good consumer outcomes.

210. Ofgem has started the process of removing unnecessary prescription from the licence. In line with the CMA's energy market investigation recommendation,[104] Ofgem has removed around 30 pages of prescriptive rules relating to tariff design from the supply licence and will be introducing principles which aim to ensure consumers are able to make informed choices.[105] During 2017/18, Ofgem will be reviewing the rules relating to supplier communications with consumers. Ofgem will also seek to amend the Standards of Conduct principles that set out its overarching expectations of supplier conduct in the market, to further clarify the expectations that suppliers

[103] Ofgem (2014) Our Strategy, p.16.
[104] CMA (June 2016), Energy Market Investigation, Final report, p.42.
[105] Ofgem (30 January 2017), Statutory consultation: enabling consumers to make informed choices.

treat customers fairly.106 In particular, these amendments aim to emphasise suppliers' special responsibility towards consumers in vulnerable situations.

Energy market investigation remedies

211. As described in paragraph 191, Ofgem is progressing work on the remedies proposed by the CMA. In addition to bringing to a conclusion the implementation of a number of remedy implementations, in 2017/2018, Ofgem will be looking to implement a programme of trials to support consumer engagement, including an Ofgem-led trial and a number of supplier-led trials. The output of these trials will inform regulatory decision-making. Ofgem will also be considering next steps in respect of the database service which may lead to the conducting of a "Private Beta" test of the service during 2017/18. Following its consultation on the removal of the Whole of Market requirement for Confidence Code accredited price comparison websites, Ofgem expects to publish its final decision in May 2017. Ofgem will also commence monitoring and evaluating the impacts of the remedies and, by autumn 2017, will publish its first State of the Market report, which will give an assessment of the impact of regulatory policies on consumer outcomes, which should support increased trust and confidence in the market.

Flexibility

212. Electricity system flexibility (including new sources of flexibility offered by the smart technologies) will be integral to the transition to a cost-effective, dynamic, efficient and low-carbon competitive market. Ofgem has recently published a joint call for evidence with BEIS setting out its initial thinking in a number of key areas and invited views on this.[107] Ofgem intends to publish a joint plan with BEIS in spring 2017 setting out the specific actions it intends to take to remove barriers and shape roles and responsibilities in the shift to a smart, more flexible energy system which meets the needs of consumers now and in the future.

213. Ofgem wants to see competition that is as far reaching as possible to make sure consumers benefit from a more efficient energy system. This means facilitating competition, based on the outcomes the energy system needs, between: a) those offering services to consumers and to industry parties; b) generation and other flexible alternatives (such as shifting demand away from peak periods or to periods of low demand, storage, or greater interconnection with other countries); and c) traditional infrastructure solutions (such as

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[106] Ofgem (30 January 2017), Standards of conduct for suppliers in the retail energy market.
[107] Ofgem (10 November 2016), Smart, Flexible Energy System – a call for evidence.

building network assets). The policy ambition is for providers of flexible alternatives to be able to access revenues which reflect the true value of their flexibility. In the current context, this means maximising access to the existing suite of markets (capacity, wholesale, balancing and ancillary services), alongside new markets (perhaps at a distribution network level, or for new services) and being able to stack value across them wherever appropriate. In the future, it could mean new market structures (such as flexibility trading platforms or other mechanism to enable coordinated distribution system operator and system operator procurement of services) where these better support Ofgem's aims.

Network Innovation Competition

214. In 2016, Ofgem reviewed the Low Carbon Network Fund and determined there was scope to enhance the level of competition and innovation in the NIC. Ofgem consulted in December 2016 on a requirement on network companies to issue an annual call for third party led proposals to the NIC. Ofgem will publish a decision in the spring of 2017. Ofgem expects the first call to take place next year with the first third party led proposals to the NIC in 2018. Ofgem considers this change has the potential to increase the number and diversity of submissions to the NIC, thereby promoting competition and innovation in both gas and electricity transmission and distribution. Ofgem is also seeking stakeholders' views on reducing the level of funding available through the electricity NIC which, it believes, in conjunction with its proposals relating to third parties, will increase the level of competition in the NIC.

Innovation Link

215. Ofgem launched its Innovation Link in December 2016 with a service to provide fast, frank feedback for energy sector innovators on the regulatory implications of the business propositions. The first three months have been a success with over 50 businesses applying for support. Topics are diverse and cover all aspects of the energy sector – from the retail and wholesale markets to networks.

216. In February 2017, the Innovation Link invited expressions of interest in a regulatory sandbox for energy. The sandbox is a way for innovators to test their ideas within a controlled regulatory environment, subject to certain conditions for consumer protection. Ofgem expects to provide a public update in early summer.

EMR – Capacity Market Rule changes

217. In line with the annual Capacity Market Rule change process described in paragraph 184, Ofgem intends to make further changes to the Rules, which it will consult on later in 2017. The aim of these changes will be to further enhance competition in the capacity market auctions by ensuring a level playing field for all participants, leading to better outcomes for consumers – a more efficient and competitive auction could lead to a lower clearing price, lower costs for suppliers and ultimately lower costs for consumers. Proposed changes include facilitating the participation of technologies providing frequency response services, and providing greater flexibility for demand-side resources.

Switching programme

218. Ofgem is leading a major programme to improve consumers' experience of switching by designing and implementing a new switching process that is reliable, fast and cost-effective. The aim is to facilitate greater engagement in the retail energy market by increasing consumer confidence in their ability to switch supplier with ease, and by doing so improve competition and deliver better outcomes for consumers. Over the past year, Ofgem has been working in partnership with retail energy market participants to design a comprehensive blueprint for a new set of switching arrangements. An impact assessment of different reform options is currently underway. A recommended option will be consulted on towards the end of summer and a decision on the chosen option is expected around the end of the year. This will enable the start of changes to regulatory requirements ahead of building and testing the new arrangements.

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

E.1 Financial Conduct Authority

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

220. Most of the FCA's powers and duties derive from the Financial Services and Markets Act 2000 (FSMA). In addition, the FCA has powers to (i) enforce the prohibitions in the Competition Act 1998 and the Treaty on the Functioning of the EU concurrently with the Competition and Markets Authority (CMA) and (ii) conduct market studies and make market investigation references to the CMA under the Enterprise Act 2002 with regard to the financial services sector.

General developments since April 2016 from a competition or policy perspective

221. Government and regulatory policy in many financial markets is to prioritise competition and innovation, underpinning economic growth and productivity. Increased competition can benefit consumers through lower prices, increased quality and greater product variety.

222. The financial sectors that the FCA regulates touch on more than 100 separate economic markets. The FCA seeks to ensure that its regulation is proportionate, up to date and strikes the right balance between permitting innovation that delivers consumer benefits and ensuring adequate consumer protection.

223. The FCA has used a range of competition tools and interventions, from investigating markets, making policy and rules that improve competition to supporting innovation. This year the FCA has:

- continued to encourage and support the development and use of innovative technology through "Project Innovate".
- continued to support prospective new banks through the authorisation process with the New Bank Start-up Unit in collaboration with the Prudential Regulation Authority.

- concluded two market studies into credit cards and investment and corporate banking, and carried out a further two market studies into asset management and mortgages.

- announced a further three initiatives to consider whether markets are working well for consumers, including initiatives in retail banking and consumer credit, a review into retirement outcomes, and a discovery piece on the use of Big Data in General Insurance (GI).

- opened one investigation, and continued to progress an existing investigation, under the Competition Act 1998.

- issued 23 'on notice' letters and six advisory letters to firms regarding competition law.

- published the Competition Report 2013-16, which summarised the activities the FCA has undertaken to promote competition in the first three years of the FCA, and provided further insight into competition in selected markets.[108]

224. The competition objective is now deeply embedded across the organisation. Whilst the Competition Division leads on many aspects of promoting competition, many parts of the FCA contribute to improving competition and competition is a key consideration in the FCA's day-to-day decision making.

225. Against this background, some examples of significant developments from a competition perspective in financial services since April 2016 are as follows.

FCA Project Innovate

226. The FCA continues actively to encourage and support the development and use of innovative technology through "Project Innovate". Project Innovate is comprised of the Innovation Hub, Regulatory Sandbox and Advice Unit. Since October 2014, Project Innovate has assisted or is assisting over 350 innovative businesses, 29 of which have now been authorised to undertake regulated activities.

- The Innovation Hub has continued to support new and established businesses to introduce beneficial innovative financial products and services to the market. The support offered includes help for these businesses to understand the regulatory framework and how it applies to them, and assistance in preparing and making an application for FCA

[108] FCA (12 July 2016), Competition Report 2013-16.

authorisation to undertake regulated activities. To date, the Innovation Hub has signed seven international co-operation agreements to increase collaboration on innovation between international regulators and to help facilitate the entry of innovative overseas firms to the UK and the expansion of UK-based firms into overseas markets.

- The Regulatory Sandbox aims to provide a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms in a live environment while ensuring that consumers are appropriately protected. The Regulatory Sandbox fosters, encourages and supports innovation in the interests of consumers and promotes competition through disruptive innovation. An initial cohort of 18 firms was selected from 69 applicants and product testing was commenced in November 2016. The products being tested are diverse and include, for example, an e-money platform that uses distributed ledger technologies, a web-based software platform that streamlines the overall IPO distribution process and a micro-savings app that provides a round-up service and an across-account view. From November 2016 to January 2017, the FCA invited applications for a second cohort of firms.

- The Advice Unit provides regulatory feedback to firms developing automated advice models that seek to deliver lower cost financial advice to consumers in the areas of investments, pensions and protection (insurance). An initial cohort of nine firms was selected from 19 applications. In January 2017, the FCA invited applications for a second cohort of firms.

227. Project Innovate also aims to foster innovation in RegTech, a sub-set of FinTech. FinTech is a term used to describe innovation in new products or new approaches in financial services where technology is the key enabler. RegTech focuses on technologies that may facilitate the delivery of regulatory requirements more efficiently and effectively than existing capabilities. The FCA hosted three RegTech 'Tech Sprints', in April and November 2016, and March 2017, aimed at bringing together a wide range of interested parties to work on solutions aimed at financial inclusion, regulatory reporting and mental health. In July 2016, the FCA published a Feedback Statement on supporting the development and adopters of RegTech, which found that there was broad support for the FCA to play an active role in RegTech.[109]

[109] FCA (1 July 2016), Call for input on supporting the development and adopters of RegTech.

New Bank Start-up Unit

228. The New Bank Start-up Unit is a joint initiative from the Prudential Regulation Authority and the FCA to give information and support to newly authorised banks and those firms thinking of setting up a new bank in the UK. The aim of the New Bank Start-up Unit is to reduce barriers to entry for prospective banks and supporting new banks by helping them to navigate the regulatory requirements. This in turn stimulates competition and drives innovation to promote better outcomes for consumers. For the period 1 April 2016 to 31 March 2017, eight new banks have been authorised.

Price comparison websites (PCWs) for high-cost credit

229. In May 2016, the FCA published final rules for PCWs which compare high-cost short-term credit. The rules made a number of requirements of PCWs in respect of their functionality, how they display results and financial promotions, and the role that commercial relationships play in ranking results. The rules will help ensure PCWs act in a fair and transparent way, enabling consumers to compare high-cost short-term credit products and shop around more effectively before making a full application for credit. The rules and guidance came into effect in December 2016.[110]

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

Regulatory changes following FCA market studies

230. Market studies are the most visible aspect of the work the FCA carries out to promote competition and drive many changes to the legal and regulatory framework which significantly affect competition and innovation. Against this background, significant developments since April 2016 are as follows:

(a) Cash Savings – the FCA's Cash Savings market study found that for many consumers, competition in the £700 billion sector was not working as effectively as it could.[111] In December 2016, new rules and guidance came into force aimed at delivering better outcomes for consumers with

[110] FCA (26 May 2016), Feedback on CP15/33 – Consumer credit: proposals in response to the CMA recommendations on high-cost short-term credit.
[111] FCA (20 January 2015), Cash savings market study report.

cash savings accounts.[112] This included provisions to make switching easier and disclosure remedies designed to improve information available to consumers. In particular, the publication of the lowest interest rates for certain savings accounts and ISAs – the 'sunlight remedy' – took place in July[113] and December 2016.[114] In July 2016, the FCA published a Market Study update[115] and an Occasional Paper[116] outlining the results of further remedies testing. This showed that encouraging customers to consider their choice of savings account and, in particular, their provider is challenging and that further work was needed.

(b) Pensions – the FCA's Retirement Income market study found that competition in this market was not working well for consumers.[117] In response, the FCA has been developing and testing a number of remedies designed to enhance competition in the interests of consumers. In July 2016, the FCA published the outcome of its consumer behavioural testing to encourage consumers to shop around when buying an annuity.[118] This concluded that a personalised annual version of an information prompt produced the largest increase in shopping around and, in November 2016, the FCA published a consultation to implement this information prompt in September 2017.[119] The FCA is also testing potential improvements to the information consumers receive from their providers in the run up to their retirement which will feed into the FCA's Retirement Outcomes review (see paragraph 239(b)). The FCA also continues to track market developments and consumer behaviour and outcomes since the pension freedoms were introduced by government in April 2015.

(c) Insurance – the FCA's GI Add-ons market study found that competition for GI add-ons (GI products sold alongside, or on the back of, 'primary products') is often not effective and that consumers are often unaware they own add-ons at all or buy products that are poor value and do not meet their needs.[120] The FCA has, in addition to earlier remedies introduced in response, launched a pilot in January 2017 on its proposal

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[112] FCA (8 December 2015), Cash savings remedies: Feedback and Policy Statement to CP15/24 and next steps.
[113] FCA (18 July 2016), Cash savings, Sunlight remedy second report.
[114] FCA (1 December 2016), Cash savings: Tables for sunlight remedy third report.
[115] FCA (3 July 2015), Cash Savings Market Study Update.
[116] FCA (18 July 2016), Attention Search and Switching: Evidence on Mandated Disclosure from the Savings Market.
[117] FCA (26 March 2015), Retirement income market study: Final report – confirmed findings and remedies.
[118] FCA (14 July 2016), Increasing consumer engagement in the annuities market.
[119] FCA (25 November 2016), Implementing information prompts in the annuity market.
[120] FCA (28 September 2015), General Insurance Add-ons Market Study – Remedies: banning opt-out selling across financial services and supporting informed decision-making for add-on buyers.

to address poor value in GI markets by publishing claims frequencies, claims acceptance rates and average claim pay-outs for four GI products.[121] This pilot information will provide consumer groups, firms and market commentators with additional indicators of value for the insurers it regulates. The FCA expects that the combined pressure generated by publicity, changes in wider consumer behaviour, regulatory intervention and peer review will incentivise firms to improve value. The pilot will also allow the FCA to refine these value measures and gather evidence ahead of further work in this area.

Other regulatory developments

231. In April 2016, the FCA introduced rules governing access to regulated benchmarks.[122] The rules were introduced to address concerns regarding the lack of constraints on the ability of administrators to set the prices of benchmarks. Specifically, the FCA was concerned that any administrator of an industry standard benchmark may have had market power, such that they could vary the terms, including the price at which it offered that benchmark, with limited fear of customers switching to an alternative, or of other suppliers entering to provide an alternative. The FCA's rules require the provision of fair, reasonable and non-discriminatory access to regulated benchmarks by benchmark administrators for certain users, namely central counterparties (i.e. clearing houses who need the benchmarks to price instruments linked to the relevant benchmark) and other trading venue users such as regulated markets and multilateral trading facilities. By limiting the ability of benchmark administrators to exploit their market power the new rules reduce the risk that such behaviour might hinder effective competition.

[121] FCA (25 January 2017), General Insurance value measures data – year ending 31 August 2016.
[122] FCA (8 February 2016), Fair reasonable and non-discriminatory access to regulated benchmarks.

Cases under the competition prohibitions since April 2016

Table 5: 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 2016 to 31 March 2017

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	1
Number of new complaints*	3
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	1
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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 FCA which it regarded as raising competition law issues under those prohibitions.

232. During the period of this report, the FCA opened an investigation under the Competition Act 1998. The FCA also continued to progress its existing investigation into anti-competitive agreements and concerted practices, including exercising information gathering powers under the Competition Act 1998 during the period of this report.

233. In addition, the FCA has made use of other tools to strengthen compliance under the Competition Act 1998. The FCA has issued 23 'on notice' letters to firms[123] where evidence suggests there may be a potential infringement of competition law, but where prioritisation factors[124] militate against opening an investigation. As a result of the FCA's on notice letters, the firms have undertaken a number of initiatives to strengthen competition compliance. The FCA also issued six advisory letters during the period of this report. These letters are educational and intended to increase awareness of competition law to achieve greater compliance by the firms in question. The types of behaviour which lead to the on notice and advisory letters included inappropriate exchanges of competitively sensitive information, across a range of financial services sectors.

234. The FCA's commitment to its programme of Competition Act-related work also includes working closely with external parties and other regulators and

[123] The FCA's warning letters are known as 'on notice' letters. This is to avoid possible confusion with the 'private warnings' letters which are issued under FSMA.
[124] See further paragraph 3.7 of FCA (15 July 2015), The FCA's concurrent competition enforcement powers for the provision of financial services.

competition authorities. This includes an ongoing and varied programme of engagement with trade bodies, professionals and firms. For example, the FCA held a competition law workshop in September 2016 for members of the Council of Mortgage Lenders, as part of the follow-on work from the Call for Inputs on competition in the mortgage sector. The event aimed to increase awareness of competition law and included information on the role of the FCA as a concurrent competition regulator as well as some basics of competition law.

Market studies undertaken since April 2016

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

236. The FCA has opened and continues to conduct a number of market studies using its powers under FSMA. This work is explained in more detail below. The FCA has not opened or closed any market studies under the Enterprise Act 2002 since April 2016 and no such market studies are ongoing.

237. The FCA is currently carrying out the following market studies:

(a) Asset Management market study – In November 2016, the FCA published the interim findings of its Asset Management market study.[125] The aim of the study is to understand whether competition is working effectively to enable investors to get value for money when purchasing asset management services. The FCA's interim findings suggest that there is weak price competition in a number of areas of the asset management industry. The FCA proposed a package of remedies to make competition work better in this market, and protect those least able to engage actively with their asset manager. The FCA has received feedback from stakeholders on the interim findings and provisional remedies and aims to publish a final report in Q2 2017.

As part of the Asset Management market study, the FCA also consulted on whether to make a market investigation reference to the CMA on the

[125] FCA (1 November 2016), Asset Management Market Study, Interim Report.

investment consultancy market.[126] The concerns identified in the investment consultancy sector were widespread and related to fundamental aspects of the way that both the demand side and the supply side operated. These features included a weak demand-side and the inability of investors to assess the quality of advice given, relatively high concentration and stable market shares, high barriers to entry and expansion and an increasing vertical integration within the business model of investment consultants. A number of these features had been long-standing concerns in the sector and the FCA considered that these looked likely to persist. In a market investigation, the CMA would be able to further investigate the issues identified in the market and be able to design, test and implement remedies. The FCA is currently reviewing responses to the consultation and aims to publish its decision on whether to make a market investigation reference alongside the final report to the market study in Q2 2017.

(b) Mortgages market study – In December 2016,[127] the FCA launched its Mortgages market study. The aim of the study is to understand whether consumers face challenges in making effective decisions in the mortgage market. The study will explore two questions: firstly whether the available tools (including advice) help consumers make effective decisions at each stage of the customer journey, and secondly whether commercial arrangements between lenders, brokers and other players lead to conflicts of interest or misaligned incentives to the detriment of consumers. The FCA aims to publish an interim report in summer 2017 and a final report in early 2018. This work followed other work in the mortgages area, in particular the Call for Inputs in October 2015[128] and Feedback Statement published in May 2016[129] and the Responsible Lending Review published in May 2016 which looked at how firms were applying the responsible lending rules.[130]

238. The FCA has also published the outcomes of two market studies during the relevant period:

(a) Credit Card market study – the FCA looked at credit card services offered to retail consumers by credit card providers (including banks and mono-line providers) through a range of distribution channels. The FCA's final

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[126] FCA (18 November 2016), Asset Management Market Study: Provisional decision to make a market investigation reference on investment consultancy services.
[127] FCA (12 December 2016), Mortgage Market Study – Terms of Reference.
[128] FCA (7 October 2015), Call for Inputs on competition in the mortgage sector.
[129] FCA (1 May 2016), Feedback Statement: Call for Inputs on competition in the mortgage sector.
[130] FCA (16 May 2016), Embedding the Mortgage Market Review: Responsible Lending Review.

findings report in July 2016 set out that competition is working fairly well for most consumers, but that competition is working less well for higher risk consumers.[131] The findings also expressed concern about persistent and potentially problematic credit card debt. In April 2017, the FCA consulted on proposed remedies in relation to persistent debt and earlier intervention designed to reduce the number of consumers who get into, or remain, in expensive longer-term credit card debt.[132] The FCA expects to publish final rules before the end of 2017.

(b) Investment and Corporate Banking market study – the FCA's market study focused on primary market and related activities provided in the UK.[133] The FCA found that many clients, particularly large corporate clients, feel the universal banking model of cross-selling and cross-subsidisation from lending and corporate broking services to primary market services works well for them. However, there are some practices that could have a negative impact on competition, particularly for smaller clients. The FCA developed a targeted package of remedies to address these concerns and to ensure competition takes place on the merits. These remedies included a ban on restrictive contractual clauses, ending league table misrepresentation in banks' pitches to clients, removing incentives for loss-making trades to climb league tables, a supervisory programme for IPO allocations and revising the IPO process. In March 2017, the FCA published a consultation paper on changes to the IPO process.[134] The FCA expects to finalise the ban on restrictive contractual clauses in Q2 2017.

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

(a) Retail banking and consumer credit:

(i) In November 2016, the FCA published its response to the CMA's Retail Banking market investigation,[135] setting out how it planned to take action following the recommendations from the CMA. The FCA's response reflected the fact that the FCA's statutory objectives, duties and regulatory initiatives give it a different remit from the scope of the

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[131] FCA (26 July 2016), Credit card market study: Final findings report.
[132] FCA (3 April 2017), Credit card market study: consultation on persistent debt and earlier intervention remedies.
[133] FCA (18 October 2016), Investment and corporate banking market study: Final Report.
[134] FCA (1 March 2017), Reforming the availability of information in the UK equity IPO process.
[135] The CMA published its Retail Banking market investigation final report in August 2016 (CMA (9 August 2016), Retail banking market investigation final report) and is implementing a wide-reaching package of reforms designed to foster innovation and growth and empower consumers to take more control of their retail banking activities.

CMA's investigation. The FCA is taking action in a number of areas which include improved transparency for overdraft users, improving service information and prompting increased customer engagement for both personal and business customers and supporting innovation with work on Open Banking. The work on Open Banking provides an opportunity to deliver a market wide solution for firms to comply with the 'access to accounts' requirements in the revised Payment Services Directive. Open Banking also provides a catalyst for new services which may compete with banks and help consumers to make informed choices about their accounts.

(ii) The retail banking business model spans multiple product lines and the actions of firms in one market can affect consumers in another. The FCA's market studies and the CMA's market investigation have to date not looked at market outcomes holistically across the broader retail banking sector.[136] In 2017/18, the FCA will launch discovery work to examine the business models used in the retail banking sector, focusing on the links between different parts of the business and their relative profitability. This work will include considering the impact of free-if-in-credit banking, for example its effect on different groups of consumers. The FCA will use the analysis to deepen its understanding of the impact of emerging developments, and to enhance its approach to current and future regulation of retail banks.

(iii) In November 2016, the FCA launched a Call for Input on high-cost credit (payday loans, home-collected credit, catalogue credit, some rent-to-own, pawn-broking, guarantor, logbook loans and overdrafts), including a review of the high-cost short-term credit price cap.[137] The price cap on high-cost short-term credit came into force in January 2015 and the FCA committed to reviewing it in H1 2017. The FCA will assess whether the price cap should be restructured or recalibrated. The FCA expanded this work to examine how high-cost credit products are used and whether they cause detriment to consumers. The focus on overdrafts follows a number of competition concerns[138] being identified with this product by stakeholders and the CMA's Retail Banking market investigation. The FCA has a different set of objectives and remit than the CMA, which requires it to consider

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[136] FCA (3 November 2015), Our response to the CMA's final report on its investigation into competition in the retail banking market.
[137] FCA (29 November 2016), Call for Input: High-cost credit Including review of the high-cost short-term credit price cap.
[138] Such issues include poor price transparency and the nature and level of charges, especially for unarranged overdrafts.

interventions from a consumer protection perspective as well as a competition perspective. Accordingly, the FCA considered it appropriate to examine overdrafts in the context of the wider consumer credit market and, in particular, in comparison to other forms of high-cost credit. The review marks an important stage in the FCA's evolving approach to consumer credit regulation as the FCA continues to take steps to ensure markets work well for consumers, particularly those who are vulnerable. The FCA expects to publish its findings in summer 2017.

(b) Retirement outcomes – In July 2016, the FCA published its Terms of Reference for the Retirement Outcomes Review,[139] as a follow up to the FCA's Retirement Income market study which identified potential issues which could impact on effective competition in the interests of consumers in this market. The purpose of the review is to assess the impact of the pension reforms on competition in the decumulation market by exploring four key topics: shopping around and switching, non-advised consumer journeys, business models and barriers to entry and the impact of regulation. The FCA expects to publish its findings in Q2 2017.

(c) Big Data in GI – The FCA's Feedback Statement published in September 2016 found that the increasing use of Big Data has resulted in broadly positive outcomes for GI consumers.[140] Big Data is being used by firms to transform how they deal with consumers, encouraging more innovative product development as well as streamlining sales and claims processes. However, the FCA found there is a potential for Big Data to exacerbate price discrimination practices which could result in poor outcomes for some consumers. The FCA is conducting discovery work into the pricing practices of a limited number of retail GI firms to explore this concern further. In addition, in response to stakeholders' comments on data protection, the FCA held a joint forum with the Information Commissioner's Office in January 2017 on the use of data in retail GI to highlight data protection risks and issues and to share best practice.

Decisions taken since April 2016 to use the FCA's direct regulatory powers where competition prohibition powers were considered

240. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a sector regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part

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[139] FCA (14 July 2016), Terms of Reference: Retirement Outcomes Review.
[140] FCA (21 September 2016), Feedback Statement: Call for Inputs on Big Data in retail general insurance.

1 of the Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have been no occasions on which the FCA has been satisfied that its functions under Part 1 of Competition Act 1998 are exercisable but has nevertheless decided that it is more appropriate for it to proceed by exercising functions other than its functions under Part 1 of the Competition Act 1998.

241. The FCA has a duty[141] to consider, before exercising certain of its powers set out in FSMA,[142] whether it would be more appropriate to proceed under the Competition Act 1998.[143] Since April 2016, there have been no cases in which competition concerns arose such that the FCA needed to consider the matter further prior to exercising the relevant FSMA power.

Future work, and proposed changes to regulation, to improve competition and innovation

Business Plan

242. The FCA issues a Business Plan each year that sets out the activities that it intends to carry out in the financial year. The FCA Business Plan 2017/18 was published in April 2017.[144]

Mission

243. The FCA published its Mission in April 2017.[145] The Mission provides a framework for the strategic decisions is makes, the reasoning behind its work and the way it chooses its tools to add most public value. It will inform the FCA's strategy and day-to-day work over the coming years.

244. The Mission recognises the importance of the FCA's competition powers in contributing to the public value of its work. Although unusual for a financial regulator, these powers fit well with the FCA's role as a conduct regulator. The FCA's competition mandate enables the FCA to identify and address competition problems and requires it to take a more pro-competition approach to regulation. The Mission explains how the FCA's competition powers can be used to intervene in markets where it assesses that competition is not working

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[141] Under section 234K(1) of FSMA; this is commonly known as the 'primacy obligation'.
[142] Specifically, prior to exercising powers under sections 55J (2), 55L, 88E, 89U, 192C and 196 FSMA.
[143] Prior to exercising these FSMA powers, if competition concerns arise, the relevant division within the FCA will liaise with the FCA's Competition Division.
[144] FCA (18 April 2017), Business Plan 2017/18. Published shortly after the relevant reporting period but before publication of the Annual Concurrency Report.
[145] FCA (18 April 2017), Mission. Published shortly after the relevant reporting period but before publication of the Annual Concurrency Report.

well. The Mission also explains how the FCA can help new and established businesses introduce innovative financial services and products to the market through the support of the Innovation Hub and Regulatory Sandbox.

Proposed changes to regulation and areas where changes to regulation might allow competition and innovation to work better

245. Effective regulation can help create a more competitive and innovative financial services markets. The FCA has already begun, and intends to continue, to identify specific areas where FCA regulation could inhibit competition. The FCA will take specific action, including a review of the FCA's Handbook, to reduce the restrictions its regulations cause without compromising its objectives. The FCA is also proactively considering areas where changes to regulation might allow competition and innovation to work better. In this regard, ongoing initiatives include:

- The FCA's review of the effectiveness of the UK's primary listing markets covers a broad range of issues, [146] including the effectiveness of financial markets in providing growth capital. The FCA is also considering the extent to which there are gaps in the UK's listing markets, for example whether there are appropriate structures in place to assist overseas companies to gain a listing in the UK. The discussion of these issues with stakeholders may give rise to innovative and pro-competitive solutions to make financial markets work more effectively.

- The FCA's review of the UK IPO process has a number of interrelated aims, one of which is to create the conditions that would allow for a market to develop in 'unconnected' IPO research. Unconnected research is produced by specialist research companies and banks that are not connected to the running of the IPO itself. This is in contrast to 'connected' research, which is produced by the research departments of the banks organising the IPO, and which is currently the primary source of research on IPOs. The FCA intends to introduce rules that are intended to assist unconnected research analysts to gain the information they need to compete on a more even footing with connected research.

- The FCA Smarter Consumer Communications initiative which aims to bring about a change in the way information is both communicated and

[146] FCA (14 February 2017), Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape; FCA (14 February 2017), Review of the Effectiveness of Primary Markets: Enhancements to the Listing Regime.

delivered to consumers.[147] The FCA published a Feedback Statement in October 2016[148] which proposes initiatives to address challenges faced in ensuring that regulation supports innovation and can keep pace with the market by responding quickly to new ideas and communication methods. The FCA also published a Policy Statement which provided for the removal of ineffective FCA rules and guidance, which took effect between 22 November 2016 and 17 March 2017.[149]

- The FCA's work on Insurance Linked Securities (ILS). ILS are financial instruments where the value of the security is linked to an insurable loss event. In February 2017, the FCA launched a consultation on rule changes to incorporate the new regulated activity of insurance risk transformation proposed by HM Treasury, as part of the Government's development of a new framework to attract ILS business to the UK.[150] The proposed new regime, while primarily focused on advancing the FCA's market integrity objective, is also designed to be proportionate so as to promote effective competition by encouraging new participants to enter the market and to ensure that barriers to entry are not created that might deter the ILS market from developing.

- As part of Project Innovate, the Innovation Hub will continue to seek to identify areas where the FCA's regulatory framework needs to adapt to enable further innovation in the interest of consumers.

[147] FCA (June 2015), Discussion Paper: Smarter consumer communications.
[148] FCA (October 2016), Feedback Statement: Smarter Consumer Communications.
[149] FCA (October 2016), Policy Statement: Smarter Consumer Communications: Removing ineffective disclosure requirements in our Handbook.
[150] FCA (February 2017), Consultation Paper: Proposed Handbook changes to reflect the new regulatory framework for Insurance Linked Securities.

E.2 Payment Systems Regulator

246. Payment systems form a vital part of the UK's financial system, underpinning the services that enable funds to be transferred between people and institutions.

247. The Payment Systems Regulator (PSR) was incorporated in April 2014 and became fully operational on 1 April 2015. The PSR is an independent economic regulator, with its own objectives and governance.

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

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

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

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

249. 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.

250. The PSR regulates those payment systems designated by HM Treasury. These are the largest and most important payment systems which, if they were to fail or to be disrupted, would cause serious consequences for their users. The eight payment systems currently designated are: Bacs, CHAPS, Faster Payments Scheme (FPS), LINK, Cheque & Credit, Northern Ireland Cheque Clearing, Visa Europe and MasterCard. For each designated system, all 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.

251. The PSR draws its direct regulation powers from the Financial Services (Banking Reform) Act 2013 (FSBRA) and has a range of powers to support its functions. In addition to its regulatory functions under FSBRA, the PSR has powers and functions under the following legislation:

(a) Interchange Fee Regulation (IFR)[151] – the PSR became the lead competent authority in the UK for monitoring and enforcing compliance with the IFR in December 2015.

(b) Payment Accounts Directive (PAD)[152] – the PSR is the competent authority responsible for designating alternative switching schemes, ensuring they continue to meet the requirements of designation and taking any enforcement action as appropriate.[153]

(c) Revised Payment Services Directive (PSD2)[154] – it is anticipated that the PSR will have competencies in respect of monitoring and enforcing compliance with access provisions under PSD2, which is due to become national law by early 2018.

252. Additionally, the PSR has concurrent competition powers under the Enterprise Act 2002 (since 1 April 2014) and the Competition Act 1998 (since 1 April 2015). The PSR can therefore:

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

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

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

General developments since April 2016 from a competition or policy perspective[155]

254. During the period covered by this report, the PSR published its final report on two market reviews using its FSBRA powers:

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[151] Regulation (EU) of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (L 123/1).
[152] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts with basic features (L 257/214).
[153] The FCA is the competent authority under PAD to ensure PSPs offer their customers a switching service between payment accounts denominated in the same currency.
[154] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (L 337/35).
[155] The PSR has focused in this section on general developments that are significant from a competition or policy perspective.

(a) **Infrastructure market review (IMR) –** the PSR concluded its review of the ownership and competitiveness of the infrastructure supporting the Bacs, FPS and LINK payment systems and published its final report of its findings in July 2016. The IMR report concluded that competition in the provision of central infrastructure is not effective and set out three potential remedies:

(i) mandating competitive procurement exercises for Bacs, FPS and LINK when the operators of these systems purchase central infrastructure services;

(ii) introducing ISO 20022 messaging standards in future procurement exercises for Bacs and FPS; and

(iii) divestment by the four largest VocaLink shareholder PSPs of their interest in VocaLink.

The PSR then published its consultation on remedies to address the competition issues identified in December 2016. This proposed implementing the first two remedies described above, with the third remedy not currently proposed due to the announced acquisition of VocaLink by MasterCard. In April 2017,[156] the CMA accepted final undertakings offered by MasterCard to address competition concerns in lieu of referring the anticipated acquisition to a Phase 2 investigation. The PSR will consider whether further intervention is necessary following the CMA's clearance decision and set out whether further steps are needed on divestment in its final decision on remedies which the PSR expects to publish in May 2017.

The PSR expects these remedies to remove barriers and create a competitive procurement process, opening up the provision of central infrastructure to competition. The remedies would also enable new infrastructure providers with different technology to enter the market and drive new and innovative products and services. This could benefit all users of payment systems, from large PSPs to consumers.

The PSR is reviewing these remedies following its consultation which closed in February 2017.

(b) **Indirect Access market review (IAMR) –** in July 2016, the PSR published a final report of its findings from its market review into the supply of indirect access to payment systems. The PSR concluded that,

[156] After the end of the relevant reporting period but before publication of this Report.

although competition in the supply of indirect access appeared to be producing some good outcomes, it had specific concerns about the quality of access, limited choice for some PSPs, and barriers to switching. However, the PSR identified a number of recent and current developments such as potential market entry and improved technical solutions for access which, combined with the PSR's programme of work on access, the PSR considered are likely to address these concerns.

The PSR has seen recent progress in relation to access issues discussed in the IAMR. For example, the Bank of England has announced that it will be extending settlement account access to non−bank PSPs and FPS has announced that five companies are now accredited with providing direct technical access to FPS, both of which provide more options for PSPs to have direct technical access.

255. Following the IAMR, the PSR published draft guidance on its powers under sections 56 & 57 FSBRA under which it can require certain payment system operators and certain direct payment service providers to provide indirect access to other PSPs. The PSR has consulted on the draft guidance and expects to publish its final guidance later this year. The PSR has received its first application under section 57 FSBRA. It expects to make a decision on the application by the end of June 2017.

256. The PSR's overall aim when exercising these powers is to continue to promote competition and innovation in payment systems markets for the benefit of service-users, while taking account of the commercial, operational, technical and financial risk factors of all parties involved. The PSR will only consider exercising its powers where it is appropriate and proportionate to take action, without introducing inappropriate risks or adversely affecting the development of the market.

Payment Strategy Forum

257. The Payments Strategy Forum (the Forum) was announced by the PSR in its March 2015 policy statement and met for the first time in October 2015. Established by the PSR, the Forum is a representative group of industry experts (including PSPs and end user representatives) that led a process to identify, prioritise and help to deliver initiatives where it is necessary for the payments industry to work together to promote collaborative innovation in the interests of service-users.

258. The Forum published its final Strategy in November 2016.[157]

259. It recommended 14 solutions to meet user needs across three main areas: i) improving trust in payments; ii) simplifying access to promote competition; and iii) a new architecture for payments infrastructure. These solutions included:

(a) consolidation of the governance of the three interbank payment system operators Bacs, Cheque and Credit Clearing and Faster Payments (which are largely owned by the same firms) into a single entity, the new payment system operator (NPSO) to simplify access to payment systems which should lead to increased competition in the downstream market;

(b) development of centralised functions for Know Your Customer and Data Analytics to address financial crime issues; and

(c) the design and development of a new payments architecture (NPA) for the UK's three retail inter-bank clearing systems (Bacs, Cheque and Credit Clearing and Faster Payments). The NPA is defined as the vision for a single set of standards and rules, a thin central infrastructure, end-to-end interoperability (using APIs and a common messaging standard), which would be expected to effectively drive competition and innovation across the value chain by offering greater capacity for overlay services and enhanced service quality and features to meet the needs of end users. The processing and clearing functions of the simplified framework could be built on distributed architecture or a centralised infrastructure.

Access and governance

260. Each year, operators of payment systems report to the PSR on their compliance with the PSR's general directions on access and service-user representation.[158]

261. In March 2017, the PSR published its second access and governance report which highlights progress made in the provision of access and sets out areas for on-going focus. The PSR believes that opening up access to more PSPs is essential to help create greater competition in payments, which can have a positive effect on the quality and range of services that consumers receive.

[157] PSR, A Payments Strategy for the 21st Century.
[158] Outlined in detailed in *Competition and Markets Authority,* Annual report on concurrency 2016, paragraphs 214-217.

262. Since the PSR's last report in December 2015, the PSR has seen the following improvements in the provision of access to the interbank payment systems regulated under the PSR's General Direction 2 on access:

(a) a significant improvement in the choice of access options available to PSPs both in terms of direct access and indirect access to payment systems;

(b) an improvement to the processes for PSPs to join payment systems as direct participants, including a reduction in time, cost and complexity;

(c) an improvement in the quality and availability of technical access for PSPs who choose indirect access to FPS; and

(d) an increase in transparency of information and engagement with service-users on the part of payment system operators and indirect access providers.

263. The improvements have resulted in an increase in direct participation in the interbank payment systems in 2016 with further increases expected throughout 2017. The PSR also expects the entry of new firms providing indirect access to payment systems, which should give PSPs greater choice of indirect access provider and increase competition in the provision of indirect access which could lead to lower prices. The improvements in quality and availability of technical access to FPS should allow PSPs to give their customers the same level of access as direct participants, thereby enabling indirect PSPs such as challenger banks to compete with established market leaders.

264. The PSR also sets out in its report how it wants operators and indirect access providers to build on the progress made in 2017, including through:

(a) operators developing their access offerings and solutions that facilitate the development of aggregators which can lower the cost of technical access;

(b) operators being ready to progress applications for direct access for non-bank PSPs once the Bank of England amends its settlement account policy and the necessary legislative changes have been made; and

(c) indirect access providers addressing quality-related issues affecting PSPs who choose indirect access.

265. Over the next year, the PSR plans to monitor developments, including the implementation of PSD2 in the UK and the potential consolidation of three interbank operators (the operators of Bacs, FPS and Cheques & Credit), and

plans to review its directions in light of those developments and to ensure they remain effective.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

266. In the period covered by this report, the PSR acquired additional powers deriving from the IFR and PAD.

Interchange Fee Regulation

267. The IFR is intended to allow more competition and spur innovation in payments by bringing important changes for consumers, merchants and banks in the way they deal with costs and pricing mechanisms of payments with card and card based products. The IFR introduced caps on the interchange fees on consumer debit and credit card transactions where both the issuer and acquirer are located in the EEA. The IFR also introduced new business rules and transparency requirements to improve market conditions.

268. The provisions of the IFR entered into force on different dates. The caps on interchange fees came into force in December 2015 and the final set of IFR provisions came into force in June 2016 and encompassed the following business rules:

(a) separation of scheme and processing entities, which aims to boost competition between processing entities by requiring payment schemes to separate from their processing activities and preventing discrimination between different processors. The objective is to create a more competitive processing market to allow banks and retailers to choose the best processor for their card transactions;

(b) co-badging, which aims to remove the restriction on issuers' ability to provide their customers with card-based payment instruments containing more than one card scheme and aims to increase competition by leaving the choice of the payment instrument to those who will bear its costs, ie merchants and ultimately consumers;

(c) unblending, which aims to give merchants greater visibility of the costs to them of accepting different types of payment card which is expected to promote competition by increasing transparency for merchants and therefore their ability to request a better deal from their bank;

(d) 'Honour All Cards Rule', which aims to give merchants greater freedom in deciding which cards to accept.

269. The PSR published its consolidated final IFR guidance in October 2016. The guidance sets out the PSR's approach to monitoring compliance with the IFR, describes its powers and procedures under the IFR and contains information on penalties for non‑compliance with the IFR.

Payment Accounts Directive

270. The PAD was adopted in July 2014 and was transposed into UK law through the Payment Accounts Regulations 2015 which came into force in September 2016. This legislation sets common regulatory standards that must be met in order to:

(a) improve transparency and comparability of current account fees;

(b) facilitate current account switching; and

(c) ensure access to bank accounts with basic features.

271. HM Treasury has appointed the FCA as the competent authority under the PARs to be responsible for ensuring that PSPs offer a switching service to their customers denominated in the same currency. The PSR is appointed as the competent authority under the PARs for designating alternative switching schemes, and monitoring and enforcing the schemes' compliance with the designation criteria set out in the PARs.

272. In May 2016, the PSR published its final guidance, outlining its approach as the competent authority for designation of alternative switching schemes under the Payment Accounts Regulations 2015. In September 2016, the PSR designated Current Account Switching Services (CASS) as an alternative switching scheme. CASS is designed to make current account switching simpler and quicker for consumers. The threat of consumers switching to a competitor should provide incentives for PSPs to improve the products and services they offer, for example by lowering prices, improving quality and investing in innovation and product development.

Cases under the competition prohibitions since April 2016

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

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	0
Number of new complaints*	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	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

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

Market studies undertaken since April 2016

273. There were no market studies under the Enterprise Act 2002 opened or closed since April 2016 and no market studies which are ongoing.

Decisions taken since April 2016 to use the PSR's direct regulatory powers instead of competition prohibition powers

274. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a sectoral regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have been no occasions on which the PSR has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has nevertheless decided that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

275. The PSR has a duty[159] to consider, before exercising certain powers under sections 54 to 58 FSBRA,[160] whether it would be more appropriate to proceed

[159] Under section 62 of FSBRA; this is commonly known as the 'primacy obligation'.
[160] Excluding its power to give general directions (sections 54(3)(a) and (b) FSBRA) and the power to impose a generally-imposed requirement (sections 55(3)(a) and (b) FSBRA).

under its competition powers. Since April 2016, the PSR has not exercised those of its FSBRA powers which give rise to this duty.

276. In the PSR's consultation on the proposed remedies in the IMR in December 2016, the PSR proposed to implement two remedies which are described in more detail at paragraph 254(a) above. The PSR proposed to implement these remedies through the use of its powers under section 54 FSBRA (ie those powers which are subject to the so-called primacy obligation).

277. Its provisional view was that the issues identified in the IMR as affecting competition could be most comprehensively, efficiently and expediently addressed by the remedies proposed. In its assessment of any remedies, the PSR is mindful of the need to consider whether it would be more appropriate for it to proceed under Competition Act 1998 rather than using its powers under certain sections in FSBRA. The PSR has consulted on the proposed remedies and plans to publish its final decision on whether to impose any of them in May 2017.

Future work, and proposed changes to regulation, to improve competition and innovation

Infrastructure Market Review

278. The PSR expects to publish a final decision on remedies under its infrastructure market review in May 2017 and, if required, take forward the implementation of any remedies thereafter. The remedies proposed, and how these are expected to improve competition in this area, are detailed at paragraph 254(a) above.

Regulatory Oversight of Current Account Switching Services (CASS)

279. In August 2016, the CMA published its final report on the Retail Banking market investigation, in which it concluded that there are detrimental effects flowing from three distinct adverse effects on competition in retail banking in the UK. In order to address the adverse effects on competition and resulting customer detriments, an integrated package of remedies has been imposed, including measures to make current account switching work better, comprising of building on and improving the existing CASS.

280. One such measure introduces regulatory oversight over CASS, which is operated by Bacs, is introduced. This is intended to ensure that the service continues to be developed and operated, through effective participation of a wide range of relevant stakeholders, in the interests of customers.

281. The remedy is intended to ensure that CASS provides additional assurance to customers about the ease and benefits of switching accounts and creates a more effective governance framework for CASS, in order for it to facilitate competition in the personal current account market in the most effective way.

282. The PSR has agreed with the CMA that the PSR will monitor the performance of CASS against Key Performance Indicators set by HM Treasury.

283. The PSR will then annually report to HM Treasury on the performance of CASS against the above Indicators and may provide recommendations to Treasury if formal powers are required to secure any additional changes to CASS.

Set up of consolidated payment system operator

284. The consolidation of the governance of three PSOs, Bacs, Cheque and Credit Clearing Company and the FPS into a single consolidated NPSO was proposed by the Payment Strategy Forum's strategy as part of a suite of measures aimed at reducing the complexity and costs of having multiple payment systems. See also paragraph 259(a) above.

285. The PSR and the Bank of England proposed the creation of the PSO Delivery Group at a meeting of the Payments Strategy Forum in September 2016. The PSO Delivery Group was established in October 2016 to consider key issues relating to the potential consolidation of the governance of the three payment systems operators.

286. The PSO Delivery Group submitted its report setting out its recommendations and implementation plan to the Bank of England and the PSR in March 2017. The PSR and the Bank of England will consider whether the recommendations and implementation plan are consistent with their respective objectives and that they are designed and delivered effectively. The consolidation will also have to be approved by the Boards of the three PSOs before implementation can commence. If it goes ahead, the target date for completion of the consolidation would be the end of 2017.

The Forum

287. The PSR has agreed that the Forum should continue and take ownership of the first phase of design and implementation of the Forum's strategy in 2017. The Forum will be responsible for the detailed design of key elements, including the NPA (see paragraph 259(c) above). The intention is for the design of the NPA to be handed over to the NPSO at the end 2017.

288. Further information on the PSR's activities for 2016/17 can be found on its Annual Plan for 2016/17.[161]

[161] PSR (31 March 2016), Annual Plan and Budget 2016/17.

F. Healthcare services in England – NHS Improvement

289. NHS Improvement (NHSI) is responsible for overseeing foundation trusts and NHS trusts, as well as independent providers that provide NHS-funded care. It offers the support these providers need to give patients consistently safe, high quality, compassionate care within local health systems that are financially sustainable. By holding providers to account and, where necessary, intervening, it helps the NHS to meet its short-term challenges and secure its future.

General developments since April 2016 from a competition or policy perspective

290. There have been no significant developments since April 2016 which affect competition and innovation.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

291. There have been no changes to the legal/regulatory framework which might significantly affect competition and innovation.

Cases under the competition prohibitions since April 2016

Table 7: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	0
Number of new complaints*	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	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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 NHS Improvement which it regarded as raising competition law issues under those prohibitions and met its guidelines for the submission of formal complaints.

292. There were no cases under the EU or UK competition prohibitions opened or closed by NHS Improvement in the year from April 2016.

293. There are currently not ongoing investigations under the competition prohibitions by NHS Improvement.

Market studies undertaken since April 2016

294. There were no market studies under the Enterprise Act 2002 opened or closed since April 2016 and no market studies which are ongoing.

Decisions taken since April 2016 to use NHSI's direct regulatory powers where competition prohibition powers were considered

295. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA required to report on any decision taken by a sectoral regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of Competition Act 1998. Since April 2016, there have been no occasions on which NHSI has been satisfied that its functions under Part 1 of Competition Act 1998 are exercisable but has decided nevertheless that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

Future work, and proposed changes to regulation, to improve competition and innovation

296. In the short term, the scale of financial and operational challenges across the sector means NHSI needs to take a more involved and direct approach with more providers than it intends to in the future. As the sector comes back into balance, it will adopt a longer term oversight model with more and more providers.

297. NHSI is also working to support the development of sustainability and transformation plans being produced in communities across England, which will set out the wider, shared action they must take together to achieve broader improvement in health, care and financial sustainability over the Five Year Forward View period.

298. In the longer term, improvement capability and capacity need to be successfully embedded, valued and supported in all provider organisations. With the development of an expert improvement faculty, NHSI will support providers and existing improvement agencies to develop leaders, and support trusts to develop the capability to improve and apply evidence-based improvement methodologies.

G. Railway services – Office of Rail and Road

299. The Office of Rail and Road (ORR) is the independent safety and economic regulator of railways in Great Britain. It acquired functions to regulate Northern Ireland's railways under the European rail regime in January 2017. ORR is also the monitor of the strategic roads network in England.

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

(a) **The network (track and related infrastructure, including stations and depots)** – this is primarily owned and operated by Network Rail.[162] Network Rail derives its revenue primarily from charges for access to its network and stations and from a direct financial 'network grant' from government.

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

(c) **Providers of rolling stock** – train operators typically lease rolling stock, primarily from three rolling stock companies that inherited rolling stock from British Rail on privatisation, albeit that the structure of this market is changing as some major train orders come into operation.

301. 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. In addition, pursuant to section 69 of the Railways Act 1993, ORR has a responsibility to keep the provision of railways services under review.

302. ORR delivers against its objectives by fully integrating its economic, competition and consumer functions and powers, while drawing on the expertise from its safety and engineering teams. Economic powers are an effective tool in addressing barriers to market entry and, in particular, tackling any incumbent advantages arising from ownership of key facilities and infrastructure. Competition powers can be used effectively to protect new entry and ensure conditions for its growth, to send out powerful signals as to what is and is not an appropriate response by incumbents to new entry

[162] Although the mainline network is owned and operated by Network Rail, there are other networks owned and operated by other parties such as freight operators and other third parties.

occurring. Examples of the complementary use of economic, competition and consumer powers include:

(a) the 2018 periodic review, in particular the measures ORR is taking to promote passenger open access.[163]

(b) ORR's response to dealing with barriers to competition in the deep sea intermodal shipping market. There were two issues which were limiting competition: firstly, the use of anti-competitive contracts which were addressed using competition powers, and, secondly, capacity constraints at key ports which were scrutinised using economic powers under the Access and Management Regulations 2005.

(c) the retail market review,[164] in particular the ORR recommendations around promoting and protecting competitive third party entry to the ticketing market, and the facilitation of new products.

General developments since April 2016 from a competition or policy perspective

Promoting and protecting competition across PR18 work streams

303. In May 2016, ORR published its first major consultation on the 2018 periodic review (PR18).[165] PR18 will determine Network Rail's outputs and funding in control period 6 (which ORR expects to run from 1 April 2019 to 31 March 2024). In November 2016, ORR published its conclusions on the consultation, which proposed changes that will a) encourage greater rivalry and competition between Network Rail's routes, and, b) reform network charges in ways that could support more open access entry to the market over time.

(a) **Encouraging greater rivalry and competition between Network Rail's routes:** The move to 'route-level regulation' means that each of Network Rail's routes will have a separate regulatory 'settlement', albeit within a single company. This will enable ORR to make more use of route level comparisons and improve incentives on route teams to improve the service they offer. It will also increase the involvement of TOCs and stakeholders in route business planning which will support greater scrutiny of those routes, and in turn, encourage greater rivalry.

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[163] See paragraph 303 below.
[164] See paragraphs 341 to 343 below.
[165] ORR, Periodic review 2018 (PR18).

(b) **Reforms to facilitate more entry to rail:**

(i) ORR is proposing changes to the **charges paid by open access passenger operators**.[166] This will involve them contributing towards the fixed costs of the network, where demand is sufficiently strong for this to be appropriate. When combined with other reforms being contemplated by the Government, this could make franchise authorities broadly neutral, in financial terms, between provision of services by franchised or open-access operators. We consider this should allow open-access to grow and increase the levels of competition for passengers.

(ii) ORR is also consulting on measures to improve the performance of **Network Rail's System operator functions**,[167] in particular, the development of a system operator dashboard. The aim of this dashboard is to improve ORR's understanding of network capacity, to support it in making improvements to achieve better use of the network and to increase opportunities for new entrants and services to enter the market.

(iii) ORR's competition and consumer powers can support the transition to more on-rail competition, ensuring that any incumbent response to new entrants is within the normal bounds of competition.

Applications for access to Network Rail's infrastructure under the Railways Act 1993

304. ORR has significant sector specific powers in relation to the access to facilities (including tracks, stations and light maintenance depots). TOCs which wish to run passenger train services will either apply for a franchise or operate as an open access operator. Franchisee passenger TOCs face a degree of competition *in* the market from open access operators. TOCs which wish to run freight services will all operate as open access operators.

305. Under the Railways Act 1993, a person (usually a TOC) may only enter into a contract with a facility owner (such as Network Rail) for the use of that facility following ORR's approval and direction. ORR approves proposed contracts[168]

[166] This follows on from the work ORR undertook with the CMA on ways to increase on-rail competition.
[167] Such as timetabling, capacity management, analysis and long-term planning functions.
[168] Section 18, Railways Act 1993.

and amendments to contracts,[169] and gives determinations where parties are unable to agree the terms of a contact.[170]

306. ORR has used these powers to consider applications for access to the network by open access operators whose services may compete with franchised passenger services. ORR grants such rights only if the new entrant would not be primarily abstractive, ie it would generate sufficient new-to rail business rather than merely abstracting business from existing operators.[171]

(a) In May 2016, ORR approved an application made by FirstGroup to run five trains per day between London and Edinburgh on an 'open access' basis, starting in May 2021.

(b) In December 2016, ORR approved additional services by open access operator Hull Trains during the 2017 Hull 'UK City of Culture' celebrations.

(c) ORR is currently considering proposals from Grand Central to run additional services between Wakefield and Kings Cross starting in December 2017, and from its sister company Alliance Rail to operate new services between Waterloo and Southampton.

307. The Railways Infrastructure (Access and Management) Regulations 2005 ('Access and Management Regulations 2005')[172] which transpose EU rail directives, provide for appeals to ORR where an applicant considers it has been wrongly denied access to a facility or service, or where the terms for obtaining access are unreasonable or discriminatory. ORR has used these powers to hear appeals regarding access to facilities otherwise exempt from its powers under the Railways Act 1993.

(a) In April 2016, ORR received an appeal from Transport for London (TFL) under the Access and Management Regulations 2005[173] regarding access to the Heathrow Rail Infrastructure for the operation of Crossrail

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[169] Section 22, Railways Act 1993.
[170] Section 17 of the Railways Act 1993 (proposed contracts), and Section 22A of the Railways Act 1993 (amendments to contracts).
[171] ORR's 'not primarily abstractive' test, commonly known as the 'NPA Rule', is currently interpreted to require an 'open access' operator to generate three units of new revenue for every ten units that it abstracts from the franchisee(s) operating on the same routes. See ORR, *Criteria and procedures for the approval of track access contracts.*
[172] These regulations have now been replaced by the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 ('Access and Management Regulations 2016'). See paragraphs 319 to 332 below.
[173] TFL resubmitted its appeal under the new Access and Management Regulations 2016. See paragraphs 319 to 332 below.

services to the airport.[174] ORR is currently working through the issues raised by the parties.

Rolling stock market investigation order

308. The Competition Commission concluded a market investigation of the rolling stock leasing market in 2009.[175] The Competition Commission identified a number of adverse effects on competition during the investigation and devised a package of remedies including an enforcement order, which requires rolling stock leasing companies (ROSCOs) to provide TOCs with certain standardised information when a TOC is considering leasing rolling stock.

309. During the year, ORR has kept the Competition Commission's Order under review, engaging with the leasing companies as necessary.[176]

Rail compensation super complaint

310. In December 2015, Which? submitted a super-complaint to ORR raising concerns that most delayed rail passengers are not aware of, nor apply for, the compensation to which they are entitled.[177]

311. In March 2016, ORR published its recommendations, the aim of which was to raise awareness among passengers of their rights, improve the information provided to passengers and make the process for claiming compensation more accessible and passenger friendly. ORR's interim report published in December 2016 indicates that there has been some improvement in the way that TOCs promote awareness of and help people through the claims process, but some TOCs are better at doing this than others. ORR will, therefore, continue to push for further change and will use regulatory powers where this is necessary. Enabling consumers to exercise their rights to recompense when they receive poor service plays an important role in making markets work more effectively.

Internal awareness of competition

312. In March 2016, ORR launched a structured programme to raise internal awareness of competition across the organisation. This programme has continued throughout 2016 and included online training, talks and seminars.

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[174] ORR, Transport for London appeal under regulation 29 and complaint under regulation 30 of the Railways Infrastructure (Access and Management) Regulations.
[175] The Competition Commission closed on 1 April 2014. Its functions were transferred to the Competition and Markets Authority (CMA).
[176] Competition Commission, ROSCOs market investigation.
[177] ORR, Rail compensation super complaint.

For example, in May 2016, ORR ran a seminar on *"The State of Play on Regulation vs. Competition"* with speakers from the CMA, OFWAT and Bristol University and invited other regulators to take part.

313. In September 2016, ORR set up an internal Competition Network as part of its on-going aim to raise internal awareness of competition and utilise competition principles in policy making. The Competition Network includes representatives from across ORR's functions,[178] and meets quarterly to discuss the competition pipeline and potential competition issues identified across ORR.

Information exchange

314. ORR and the CMA have continued to exchange information pursuant to Regulation 9 of the Concurrency Regulations during the last year. ORR met the CMA's Sector Regulation Unit regularly to support mutual understanding of developments in economic and competition policy. For example, the provision of advice and guidance as ORR moved towards the commitments decision in the Freightliner competition case, the transferral of rail related complaints from CMA to ORR, and the work following on from the recommendations set out in the CMA's report on competition in passenger rail services in Great Britain.

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

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

European Union law

316. A significant amount of the UK's rail legislation is the result of European Union (EU) law. The EU's ambition is to create a single, efficient and competitive market for rail throughout Europe by opening rail markets, promoting competition, tackling barriers to market entry and harmonising technical specifications, safety standards and certification. The new regulations described below, therefore, all have a postitive impact on competition. ORR has not identified any new regulations which have a negative impact on competition. Given that the 'direction of travel' in EU law is towards the

[178] Economics, Legal Services, Strategy and Policy, Consumer Policy, Access, European, Rail Safety, Railways Planning and Performance , Highways Monitor, and External Affairs teams.

established UK model, leaving Europe is likely to have a neutral impact on the extent of competition with the UK.

317. The European Commission has put forward various 'packages' of rail legislation, three of which have been implemented in the UK.[179] In 2012, the European Commission completed the "recast" of the First Railway Package,[180] which was transposed into UK law in July 2016.

318. In December 2016, the European Parliament concluded three years of negotiations on the Fourth Railway Package, which entered into EU law on 23 December 2016.[181] These measures are discussed below.

Recast of First Railway Package - Directive 2012/34/EU

319. The Directive 2012/34/EU of the European Parliament and of the Council of 21st November 2012 establishing a single European railway area (recast) ('Recast Directive') became EU law in 2012, and was implemented in the UK through the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 ('Access and Management Regulations 2016').[182] ORR has consulted on two guidance documents which set out how it intends to use the powers set out in the Access and Management Regulations 2016.

320. Several of the provisions in the Recast Directive were already part of the UK legal framework. These include: independence of decision-making and financial flows in infrastructure management, the obligation for each member state to have an independent regulatory body, and multi-annual contracts (periodic reviews).

Access and Management Regulations 2016

321. In July 2016, the Access and Management Regulations 2016 came into force. The key changes to the UK legal framework as a result of the Access and Management Regulations 2016 are:

(a) There are new obligations on service providers with regards to independence, access, information and charging.

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[179] The first was implemented in 2005, the second was implemented in 2006 and the third was implemented in 2009. For further information, please see ORR, EU law.
[180] See paragraphs 319 to 332 below.
[181] See paragraphs 333 to 336 below.
[182] As noted above these replace the Access and Management Regulations 2005.

(b) ORR must 'control' the network statement of each infrastructure manager and information about the infrastructure manager's network and charges contained within it.[183]

(c) An obligation on ORR to monitor the competitive situation in the rail services markets.[184] This function is in addition to ORR's monitoring responsibilities under the Railways Act 1993 and competition law.

(d) ORR must, where appropriate and on its own initiative, give appropriate directions to correct discrimination against applicants, market distortion or undesirable developments in relation to the competitive situation in the rail services markets.[185]

(e) New ORR responsibilities for regulation of the Channel Tunnel[186] and Northern Ireland.[187] These new responsibilities are also described in more detail below.

322. These changes have the aim of promoting and protecting competition in particular by reducing barriers to accessing rail infrastructure. They do this by placing obligations on infrastructure managers[188] to act fairly, transparently and in a non-discriminatory manner and by improving ORR's powers to tackle anti-competitive behaviour, particularly in relation to access.

Directions

323. Under Regulation 34 of the Access and Management Regulations 2016, ORR must, where appropriate and on its own initiative, give directions in order to correct discrimination against applicants (those with an interest in procuring railway infrastructure capacity), market distortion, or undesirable developments in relation to the competitive situation in the rail services markets.[189]

324. ORR expects to use this power to tackle straightforward and easily identifiable market issues, without the need for in-depth investigation where there is no established regulatory means (such as a licensing or access solution) which would be equally as effective and expedient in resolving the issue.

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[183] Regulation 34(2).
[184] Regulation 34(1).
[185] Regulation 34(3). See also Regulation 38: ORR may now impose a financial penalty if a party contravenes a relevant decision, direction or notice.
[186] See paragraphs 326 to 327 below.
[187] See paragraphs 328 to 329 below.
[188] An infrastructure manager is any person or organisation responsible for developing and maintaining infrastructure or for managing and operating infrastructure.
[189] Regulation 34.

325. This power improves the range of tools ORR has to tackle anti-competitve behaviour, particularly in relation to access to rail infrastructure. It will also enable the ORR to respond to, and address, anti-competitive behaviour quickly. The application of the power will reduce the ability of incumbents to act anti-competitively and, therefore, enable new entry to the market.

Channel Tunnel regulation

326. Following implementation of the Recast Directive in Great Britain and France, the functions of the regulatory body under European law in respect of the Channel Tunnel have been transferred from the Intergovernmental Commission[190] to ORR and the Autorité de régulation des activités ferroviaires et routières (ARAFER), the regulatory bodies in the United Kingdom and France, respectively. ORR and ARAFER are now responsible for the regulation of the part of the Channel Tunnel situated on the territory of its respective state.

327. ORR and ARAFER have set up a collaborative regulatory approach to enable robust and consistent independent regulation across the entire Channel Tunnel network. The two bodies are already working together to ensure that, as far as possible, they exercise their functions under the Recast Directive with respect to the Channel Tunnel in an aligned manner. This is expected to support competition because it aims to: ensure that the conditions for access are transparent between Great Britain and France; and promote entry to the market, with a particular focus on developing cross channel traffic.

Northern Ireland regulation

328. In line with the United Kingdom devolution settlement, the Recast Directive was implemented separately in Northern Ireland through the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016, which came into force in January 2017. These Regulations transfer the functions of the regulatory body under EU law in respect of the network in Northern Ireland from the Department for Infrastructure (Northern Ireland) to ORR.

329. ORR is currently seeking to establish a proportionate approach to carrying out its functions under the Recast Directive as implemented by the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016 ('NI Regulations') in Northern Ireland. As

[190] The body established under article 10 of the Treaty of Canterbury between the United Kingdom of Great Britain and Northern Ireland and the French Republic.

the NI regulations implement the Recast Directive, its provisions are similar to the Access and Management Regulations 2016 for Great Britain and therefore, the ORR anticipates the benefits to competition will be as set out above in paragraphs 321 to 325. However, the approach adopted will take into account the smaller scale of the network to which the NI Regulations are applied.

Guidance

330. In July 2016, ORR consulted on two guidance documents relating to the operation of the new Access and Management Regulations 2016: guidance on the ORR's approach to review markets, and; guidance on the Access and Management Regulations 2016.

Guidance on ORR's approach to reviewing markets

331. ORR has consulted with its stakeholders on the draft guidance on the way in which it will exercise its market monitoring powers under Regulation 34(1) of the Access and Management Regulations 2016, and how it will undertake market studies and make market investigation references to the CMA under the Enterprise Act 2002. ORR published this guidance in January 2017.

Guidance on the Access and Management Regulations 2016

332. ORR has consulted with stakeholders on the guidance for the new Access and Management Regulations 2016. The guidance explains the obligations of service providers; and ORR's role in considering appeals that relate to access and charging. ORR published this guidance in December 2016.

Fourth Railway package

333. The Fourth railway package was finalised in December 2016, and is intended as the next step towards the creation of a single European rail market. Alongside new processes for safety certification and technical authorisations, the package covers infrastructure governance and funding and the competitive tendering of all rail public service obligation contracts.

334. The revision of the Recast Directive establishes a default right of track-access for operators to use infrastructure, and 'Chinese wall' requirements for independence in personnel, decision-making and financial flows between operators and infrastructure management. Ticketing and information systems must be non-discriminatory. There will be a two-year timescale for domestic implementation into UK law.

335. The revision of regulation 1370/2007 introduces mandatory competitive tendering for all rail public service obligation contracts (franchises in the UK). Direct award will be limited to a small number of defined exceptions. Competent authorities must take steps to ensure that rolling-stock availability does not present a barrier to market entry. The legislation has direct effect, but there is a staggered timetable for compliance, and existing directly-awarded contracts may continue until 2023.

336. ORR will work alongside the Department for Transport, devolved administrations and the industry to ensure that the UK implements any changes necessary under the Fourth Package. As the UK already undertakes competitive tendering for all rail franchises this is expected to have no significant effect on competition.

Cases under the competition prohibitions since April 2016

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

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	0
Number of new complaints*	
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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.

Rail Freight

337. In November 2013, ORR opened an investigation pursuant to section 25 of the Competition Act 1998 into Freightliner Limited and Freightliner Group Limited (Freightliner) in relation to its arrangements with its customers for the provision of deep sea container rail transport services between certain ports and key inland destinations in Great Britain. In December 2015, ORR accepted commitments offered by Freightliner. ORR considered that the final

commitments would create a more level playing field for freight train operators competing for this traffic.

338. Under the commitments, Freightliner is obliged to submit an annual compliance statement to the ORR and a quarterly report providing data on the volumes of containers carried by Freightliner in that quarter under contracts with a duration of more than one year. At the time of writing, ORR has reviewed the first three of Freightliner's quarterly reports. At this stage, ORR is not yet able to judge whether the commitments are having the desired effect in the market.

339. A further feature of the case was the lack of capacity at key ports that strengthened the dominance of the incumbent, facility owner, Freightliner. As noted in last year's concurrency report, ORR received an appeal from DB Schenker under the Access and Management Regulations 2005[191] following a refusal by Freightliner to access its Maritime Terminal in Southampton. In parallel to using its competition powers to consider potential anti-competitive conduct by Freightliner, ORR scrutinised capacity constraints at Southampton using its economic appeal functions under the Regulations. ORR took into account a range of factors including the need for contingency capacity, efficiency of the operation, and that there is no obligation on a facility owner to provide a service facility which does not already exist and/or which would impose a disproportionate cost on the facility owner. ORR dismissed the appeal on the basis that refusal to supply was justified due to capacity constraints.[192]

Market studies undertaken since April 2016

340. There were no market studies under the Enterprise Act 2002 opened or closed since April 2016 and no market studies which are ongoing. While there have been no market studies under the Enterprise Act 2002, ORR carried out a market review which had a competition focus. This is set out in more detail below.

Retail market review

341. Train operators and third party retailers (such as Trainline) are subject to certain rules and practices when selling tickets to passengers. This relates to, for example, the shared IT systems they use when accessing information

[191] These regulations have now been replaced by the Access and Management Regulations 2016.
[192] ORR, Regulation 29 appeal by DBS for access and services at Freightliner Southampton Maritime Terminal.

about tickets and the commission they receive for selling a ticket (where that ticket is not for its own services).

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

343. In October 2016, ORR concluded that industry governance and rules around retailing could be dampening the development of innovation and new design in the products on offer and how they are sold, and made a number of recommendations. These recommendations were aimed at (a) promoting and protecting competitive entry and; (b) facilitating the introduction of new products.

(a) **Promoting and protecting competitive entry**: ORR made a number of recommendations to improve all retailers' ability to compete to sell tickets. The recommendations aim to make industry decision-making frameworks more transparent and inclusive towards third parties, and put in place effective dispute resolution.

To address concerns that restrictions[193] on the sale of discounted tickets undermine third party retailers' ability to compete, ORR made a further recommendation that all TOCs comply with industry rules[194] limiting the timescales over which discounted fares could be offered.

ORR considered that widespread use of discounted fares through restricted channels could lead to competition becoming less effective in the long term. ORR indicated to TOCs the possibility that competition provisions may become applicable, and result in enforcement action under the Competition Act 1998, should ORR receive evidence that a TOC (or TOCs) was operating so as to effectively exclude third party retailers from the market.

(b) **To facilitate the introduction of new products:** ORR recommended that industry processes for introducing new tickets are improved, in

[193] The industry practice is to create temporary web-site only fares that are not made available for third party retailers to sell.
[194] Ticketing and Settlement Agreement.

particular, by industry rules with the objective of accelerating and streamlining the process for introducing new products.

Decisions taken since April 2016 to use ORR's direct regulatory powers where competition prohibition powers were considered

344. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a sector regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have therefore been no occasions on which ORR has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has nevertheless decided that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

345. The ORR has a duty[195] to consider, before exercising its powers under certain sector-specific legislation, whether it would be more appropriate to proceed under competition powers.[196] Since April 2016, there have been no cases in which competition concerns arose such that ORR needed to consider the matter further prior to exercising its relevant regulatory power.

Future work, and proposed changes to regulation, to improve competition and innovation

Rail reform announcements

346. In December 2016, the Secretary of State for Transport announced plans to: move towards vertically integrated operating teams between train services and infrastructure; establish East West Rail as a new and separate organisation, and re-open the cross country link between Oxford and Cambridge.[197] Further details will be announced in spring 2017. The objective is to improve co-ordination between infrastructure managers and TOCs, and

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[195] Under sections 55 and 57A of the Railways Act 1993; this is commonly known as the 'primacy obligation'. The primacy obligation requires ORR to consider whether it would be more appropriate to proceed under Competition Act 1998 before deciding to make a final order or confirming a provisional order for the purpose of securing compliance with a licence condition or requirement. It also requires ORR to consider whether it would be more appropriate to proceed under Competition Act 1998 before imposing a penalty for a contravention of a licence condition or requirement or an order.
[196] As noted in last year's report ORR has published prioritisation criteria which apply to the use of all its enforcement tools. The criteria are designed to ensure ORR intervenes where the impact will be most effective taking into account the deterrent effect, and where the outcome will secure value for money from the railway, for users and funders. ORR, How we prioritise our activities.
[197] Department for Transport (6 December 2016), Rail reform: future of the rail network.

to introduce incentives to focus on the needs of the customer. This should improve both efficiency and value for money which in turn will improve the service for passengers. ORR will work with the Department for Transport to ensure that the impact of any changes on competition is considered and that potential competition issues are identified and addressed.

Periodic review 2018

347. ORR will continue to promote and protect competition across the range of its functions on the PR18 work streams. This work includes assessing how Network Rail manages its supply chain, which has led to a review of some important procurement markets for Network Rail and which has prompted some work on how the company manages competition for certain contracts. As set out above, the proposed changes in PR18 will encourage greater rivalry and competition between Network Rail's routes and facilitate more open access entry to the market.

Passenger open access

348. As part of PR18, ORR is reforming the framework for charges and open-access for passenger TOCs. ORR intends to focus on how it will identify competitive and anti-competitive responses to open access operations that go beyond the bounds of normal competition. The purpose of this will be to protect open access operators, once they have been granted access to the market, from anti-competitive responses to their entry by incumbents.

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

349. The Water Services Regulation Authority (Ofwat) is the independent economic regulator for water and sewerage services in England and Wales. Ofwat's primary duties are set out in the Water Industry Act 1991 (WIA91). One of these duties is to further the consumer objective to protect the interests of consumers, wherever appropriate, by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services.

350. 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.[198]

351. Competition in water and sewerage services has been relatively limited in England and Wales. The wholesale delivery of water and sewerage services to customers is split between a series of regional statutory monopoly providers, each with an appointed area of exclusivity given to the water and/or sewerage company as an "undertaker" by the Water Industry Act 1991.

352. Steps have been taken to introduce retail competition into the sector. In England and Wales, the Water Act 2003 introduced the Water Supply Licensing (WSL) framework which created a degree of competition in the market. Under the WSL arrangements, since December 2005 non-household customers that used 50 million litres of water a year have been able to choose their water retailer. In 2011, secondary legislation reduced the usage threshold to 5 million litres for appointed companies operating wholly or mainly in England. The threshold remained 50 million litres for appointed companies operating wholly or mainly in Wales.

353. As discussed in previous years' annual concurrency reports, the Water Act 2014 (WA14) will bring significant reforms to the water sector, including introducing more competition. As a result of these reforms, from April 2017, the water usage threshold for non-household customers[199] to be able to choose a retailer will be removed for customers served by water or sewerage appointed companies operating wholly or mainly in England. These customers will also be able to choose a retailer for their sewerage services. Companies

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[198] This includes the enforcement of the Chapter I and II prohibitions in the Competition Act 1998 and of the Articles 101 and 102 of the Treaty on the Functioning of the European Union. Ofwat also has the power to carry out market studies and make market investigation references in its sector under Part 4 of the Enterprise Act 2002.
[199] Non-household customers include business, charity and public sector customers.

seeking to operate as retailers in the market will need to apply for and be granted a Water Supply and/or Sewerage Licence (WSSL) by Ofwat. This replaces the previous WSL regime.

354. The Welsh Government has currently retained the existing scope of the WSL market for non-household customers of appointed companies operating wholly or mainly in Wales (Dee Valley and Welsh Water). Therefore the ability for these non-household customers to choose a new retailer will only apply to water (not sewerage) services and will continue to be subject to a water usage threshold of over 50 million litres a year. The WA14 does however give the Welsh Government the power to extend the full WSSL regime to companies operating wholly or mainly in Wales in the future if it considers it appropriate to do so.

355. The sector's New Appointment and Variations (NAV) regime also provides a degree of competition for the market. A new entrant (a new appointee or NAV) can apply to take over as the monopoly provider for a specific geographical area and hence provide both wholesale and retail services to customers in the area of appointment. To be able to choose a new appointee one of the following three criteria must be met:

- Unserved criterion - the site has no existing water or sewerage connection(s);
- Consent criterion – the existing local monopoly provider agrees to transfer the site or premises to the new appointee; or
- Large-user criterion – the site / premises uses a large amount of water, more than 250 million litres a year for customers of appointed companies operating wholly or mainly in Wales or more than 50 million litres of water for customers of appointed companies operating wholly or mainly in England.

356. Over the longer-term, Ofwat's Water 2020 (W2020) policy framework and methodology for the sector's next price review in 2019 (PR19), enabled by reforms introduced by the WA14, are also expected to enable greater competition in the sector's wholesale services. This will include increased use of markets in water resources[200] and bioresources (treated sewage)[201] in

[200] Water resources markets will enable the movement of water from where it is plentiful to where it is scarce. Reforms will allow water companies to trade between themselves and with third parties, enabling smarter use of water resources.
[201] Bioresources – also known as sludge – produce biogas, or green gas, that can be used to generate low-carbon electricity. When processed it can also be safely used in the agricultural sector as fertiliser. Reforms will bring in third parties and promote trading of bioresources.

England and, where it aligns with Welsh Government policy, in Wales. PR19 will also incentivise appointed companies to use direct procurement for customers, which will see better use of markets in the network part of the sector's value chain. Changes to introduce these new markets will not be introduced before 2019.

General developments since April 2016 from a competition or policy perspective

Business retail market opening

357. As part of the preparations for opening the business retail market[202], in April 2016 Ofwat opened the process by which companies can apply to become a retailer of water and/or sewerage services. Ofwat published guidance on the application process in March 2016 and updated guidance[203] in October 2016. The updated guidance reflected lessons learnt from its early use by applicants and provided further information for customers who want to become their own retailer (self-supply). A self-supply WSSL would allow the customer to supply their own sites and those of persons associated with them, but not allow them to become a retailer for any other sites.

358. As of the end of March 2017 Ofwat had granted 49 WSSLs to 25 retailers for the new business retail market.[204] Details of all licence holders[205] can be found on Ofwat's website. Licences granted ahead of market opening in April 2017 has resulted in entry from a range of new companies to the sector, including retailers associated with incumbent water companies (including two examples of joint ventures formed between associated retailers); entry by a number of retailers operating in the Scottish retail water market; entrants from the energy sector; and a retailer that will serve itself using a self-supply licence.

359. In January 2017, the water sector and the Open Water programme (which is delivering the opening of the business retail market) launched a national awareness campaign[206] to help businesses, charities and public sector organisations in England have a better understanding and awareness of the new retail market ahead of market opening. The campaign is funded by

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[202] Ofwat, Business retail market.
[203] Ofwat (31 October 2016), Application process for water supply and sewerage licences – retail market opening for non-household customers: guidance version 2.
[204] Most retailers have applied for and been granted both a water and a sewerage supply licence, but currently one only has a sewerage licence.
[205] Ofwat, Licences and licensees.
[206] Ofwat (24 January 2017), National awareness campaign for customers.

appointed companies and overseen by their representative body WaterUK and Open Water. Customers' early engagement with the market has been encouraging, with around 11,000 supply points[207] taking advantage of the opportunity to 'pre-switch' their retailer, to give effect to their switch on the day of market opening. In addition, around 9,000 supply point switches took place in the first week after market opening.

360. To support the successful development of the business retail market, Ofwat has worked with stakeholders to develop a robust monitoring framework.[208] This will enable Ofwat and its stakeholders to understand whether the market is working well, and if and when intervention may be needed to make the market more effective or to protect customers. Ofwat will monitor the market more closely around and following market opening to help customers and other stakeholders gain trust and confidence in the market.

361. The monitoring framework draws lessons from other regulated sectors and the CMA's investigation into the energy market. It will in particular focus on market structure (including levels of new entry and market share); customer experience and quality of service (including customer engagement and customer outcomes); and market conduct (including the behaviour of market participants and customer complaint data). Ofwat, the market operator, and the Consumer Council for Water will all regularly publish information about the market. Ofwat will also publish a more detailed 'state of the market' report annually.

Competition in new connections

362. The provision of new connections infrastructure is open to competition, with suitable qualified organisations (accredited self-lay organisations, SLOs) able to compete with appointed companies to provide certain services ('contestable services'). In addition, new appointees can compete with existing appointed companies to provide both the physical infrastructure for new developments and the on-going supply of water and/or sewerage services. In both scenarios, competitors rely to some degree on non-contestable services that only the existing appointed company can provide.

363. In September 2015, Ofwat published its "Trust and confidence: self-lay provision of new connections"[209] consultation to further the sector's understanding about and removal of potential barriers to competition in new

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[207] Supply point numbers are not directly equivalent to premises or customer numbers since a single premise and/or customer may have more than one supply point.
[208] Ofwat, Market monitoring.
[209] Ofwat (28 September 2015), Trust and confidence: self-lay provision of new connections.

connections. The consultation specifically sought views on the reasonableness of the requirements (financial, procedural and/or contractual) that appointed companies place on SLOs (often via self-lay agreements) to assure themselves of the quality of the SLO's work. Such requirements are a common area of dispute for SLOs and appointed companies. The consultation also sought views on other potential barriers to competition in the new connections market. Many of the issues raised by respondents mirrored those Ofgem identified as areas of concern in its separate review of competition in new connections in the electricity market. They include issues relating to: accreditation; access to information required to enable contestable services; variations between appointed companies' practices; the need for more transparent, 'convertible' quotations that enable developers to explore alternative providers; and inspections.

364. Ofwat published the outcomes of its consultation in April 2016.[210] This included an information notice setting out Ofwat's expectations on what it would typically consider reasonable terms for an appointed company to require in a self-lay agreement to assure itself of the quality of a SLO's work; and a document setting out a series of further challenges for appointed companies to consider and take forward to ensure they are enabling effective competition in new connections. The sector is now continuing this work, with appointed companies working closely with their SLO and developer customers, to make the processes around self-lay adoption agreements simpler and more transparent in order to ensure a level playing field.

Competition guidance

365. On 21 November Ofwat published a consultation on its updated guidance on its approach to competition law,[211] with a view to providing more clarity on how the competition law prohibitions may apply in the sector. The guidance sets out Ofwat's approach to the application of the Competition Act 1998 and the equivalent provisions under Articles 101 and 102 of the Treaty of the Functioning of the European Union to the water and wastewater sector in England and Wales. The consultation ran until January 2017. Ofwat published the final guidance[212] in March 2017, ahead of business retail market opening.

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[210] Ofwat (26 April 2016), Enabling effective competition in the provision of new connections.
[211] Ofwat (21 November 2016), Guidance on Ofwat's approach to competition law in the water and wastewater sector in England and Wales: a consultation.
[212] Ofwat (March 2017), Guidance on Ofwat's approach to the application of the Competition Act 1998 in the water and wastewater sector in England and Wales.

Residential retail review

366. In November 2015, the UK Government published 'A Better Deal'[213] which asked Ofwat to assess the costs and benefits of extending retail competition to residential water customers in England. In June 2016 Ofwat consulted on its emerging findings. Ofwat submitted its final assessment[214] to Government in September 2016.

367. Ofwat's assessment concluded that:

- whilst there can be no guarantees of how successful introducing competition would be, evidence suggested that the financial benefits of opening the market should exceed the costs. It estimated that potential benefits could be around £2.9 billion over 30 years.
- Competition could lead to widespread and ongoing innovation in customer service, with new offers such as water efficiency services and leakage detection, and multi-service bundling (e.g. combining energy and water).
- Competition could deliver substantial benefits that are difficult to quantify such as customer choice and the power for customers to take their business elsewhere if providers fall short.
- Reductions in customer bills directly as a result of retail competition would be limited, especially in the short term.
- Competition could help cut bad debt as retailers improve debt management and reduce the number of "unidentified customers" who use services but are not billed.
- There would be some significant set-up costs to open a new market that customers and companies would have to meet, but these could be minimised through a well-timed and well-planned process, and by learning lessons from the opening of the business retail market.
- Whilst it would be a competitive market, it would not be unregulated due to requirements to ensure public health and safety and customer protection to ensure all customers are treated fairly.
- 56% of customers think choice in the water markets would be a good thing.

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[213] Ofwat (November 2015) A Better Deal.
[214] Ofwat, Residential retail market.

- 45% of customers would be likely to switch if retailers offered additional services, such as water efficiency or leak detection, even if there was no price saving.

- Access to good quality data and new technologies such as search algorithms and blockchain switching would be important in maximising customer engagement with the market by making it easier to search and switch.

368. In March 2017, the UK government published a consultation on a new Strategic Policy Statement (SPS) to Ofwat,[215] which sets out the government's strategic priorities and objectives for Ofwat's regulation of the water sector in England. Under section 2A of the WIA91 Ofwat must carry out its functions in accordance with the SPS. The draft SPS states that Ofwat should work with the Government, to further build the evidence base, to enable the Government to fully understand the case for extending retail competition to residential customers. It states that Ministers will take a decision at the end of the Parliament or early in the next one on whether or not to introduce competition in the residential retail market. The draft SPS acknowledges the importance of addressing the issues identified in this analysis, such as high and rising bad debt and the need for greater innovation in the water sector. It states that Ofwat should continue to consider how it can address these issues within the current regulatory framework, including through bringing competitive pressures to bear.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

Business retail market legal and regulatory framework

369. A new legal and regulatory framework[216] has been put in place to facilitate and provide the necessary governance for the new business retail market opening in the sector in April 2017. This framework includes a number of codes which together set out the rules for the new market, including how market participants work with each other and safeguards to protect customers in the market. The codes come into effect and are enforceable from 1 April 2017. Amongst others, they include a Wholesale Retail Code (WRC)[217] and a

[215] Defra (14 March 2017), The Government's strategic priorities and objectives for Ofwat.
[216] Ofwat (17 March 2017), The legal and regulatory framework for the business retail market from 1 April 2017.
[217] Ofwat (1 April 2017), Designation of wholesale-retail code. The WRC is a statutory code which includes the requirements placed on wholesalers and retailers for the operation of the market, including business terms, market terms and operational terms. It also includes requirements for wholesalers and retailers to follow in

Market Arrangements Code (MAC)[218] and a customer protection code of practice.[219]

370. Ofwat developed the codes in collaboration with the sector and publicly consulted on them during 2016. As the codes were developed, an Interim Code Panel was in place to process and coordinate code changes. The Interim Code Panel[220] consisted of a group of elected representatives who considered and made recommendations to Ofwat on any changes needed to the draft market codes. It dealt with the WRC and MAC and other codes needed to allow the market to function correctly. The Interim Code Panel provided a formal change control process for the market codes to ensure changes were managed effectively; to improve buy-in to the final market documents by market participants; and to give the water sector experience of how the Enduring Code Panel for the market would operate in practice, allowing for an easier transition.

371. In November 2016, Ofwat published details of the process for nominating candidates for the Enduring Code Panel.[221]

372. In addition to the statutory codes Ofwat has published principles for voluntary codes of conduct for third party intermediaries (TPIs) operating in the business retail market.[222] This reflects lessons learnt from other sectors, and recognition that whilst the use of TPIs can offer a key opportunity for customers to engage in markets, in some instances there have been concerns about how some TPIs have operated and how this has impacted customer decisions.

Eligibility guidance

373. Only customers who own or occupy non-household premises are eligible to participate in the business retail market. In July 2016, Ofwat published

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maintaining the central register of supply points at the Market Operator and the processes which inform the design and construction of the market's central operating system.

[218] Ofwat (1 April 2017), Market Arrangements Code. The MAC is a non-statutory code, which sets out how the market will operate as well as the role and function of the market operator and systems and processes to support this, including the processes for joining and operating the market operator and for establishing a code panel. The MAC is established by conditions in retailers' licences and undertakers' instruments of appointment.

[219] Ofwat (1 April 2017), Customer protection code of practice. The business retail customer protection code of practice places obligations on retailers in relation to: sales and marketing; provision of information to customers; transfer of customers; billing; and complaint handling and dispute resolution. Compliance with the code is required via a standard condition within a retailer's licence.

[220] MOSL, Interim Code Panel.

[221] MOSL, The Panel.

[222] Ofwat (30 March 2017), Protecting customers in the business market – principles for voluntary TPI codes of conduct.

updated eligibility guidance.[223] This guidance was published to facilitate and support assessments by retailers as to the eligibility of customers to switch retailer both under the earlier WSL regime and the new business retail market regime from April 2017. This guidance will help both customers and retailers to understand whether particular customers' premises are eligible, and therefore, will support the development of competition and customer switching. It is a criminal offence under the WIA91 for a person to breach any of the statutory eligibility requirements set out in the guidance. Any retail licensee that provides services to non-eligible premises could face enforcement action by Ofwat and may incur financial penalties under the WIA91.

Retail exit

374. One of the key changes in the water sector as a consequence of retail market opening is the ability for established monopoly providers to exit the business customer retail market allowing for a variety of new retailers to replace them. Enabling retail exits helps ensure a well-functioning competitive market. It will enable appointed companies to make informed choices about their retail strategies, including the choice about whether they wish to compete in the market. Allowing exits will also enable retail licensees to increase their market share through the acquisition of an exiting company's business rather than pursuing individual customers contract by contract.

375. Retail exit has been facilitated by the retail exit regulations[224] which were provided for in the WA14 and came into force on 3 October 2016. These Regulations make provision for appointed companies whose areas are wholly or mainly in England to apply to the Secretary of State for permission to exit the non-household retail market in their area of appointment. Subject to the approval of the Secretary of State, the appointed company would exit the retail market by transferring its non-household retail business to one or more WSSL retail licensees and would thereafter be prohibited from providing retail services to any new non-household customers that arise in its area of appointment (the exit area).

376. The lack of competition in the water sector to date has meant that only the largest customers have had formally negotiated contracts in place with their water provider. In the newly competitive business retail market, customers who switch tariff or supplier will enter into their new arrangement on a

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[223] Ofwat (19 July 2016), Eligibility guidance on whether non-household customers in England and Wales are eligible to switch their retailer.
[224] The Water and Sewerage Undertakers (Exit from Non-Household Retail Market) Regulations 2016, (SI 2016 No.744).

contractual basis. The Exit Regulations require all retail licensees providing or proposing to provide services in an area where a retail exit has taken place to make and keep under review a scheme setting out the terms and conditions that will apply in cases where a contract has not been negotiated with a customer on an individual basis (a deemed contract).

377. The Exit Regulations also require Ofwat to issue a Retail Exit Code setting out the basis for these schemes. Where customers have not negotiated a new contract with a retailer, the introduction of Schemes of Terms and Conditions upon which deemed contracts will be based will make sure that customers who are affected by retail exit will have contractual terms and conditions after the retail market opens. Ofwat consulted on a draft Retail Exit Code and published its policy conclusions[225] on this in April 2016. Following finalisation of the Exit Regulations, Ofwat published the final Retail Exit Code[226] in March 2017. Customers will be able to switch away from a deemed contract at any point and there will be requirements on retailers to ensure that customers are clearly informed that they are being supplied on the terms and conditions in a Scheme (and so on a deemed contract) and their rights to switch retailer.

Interim supply code

378. As part of the market architecture for the business retail market Ofwat has developed an Interim Supply Code which sets out the arrangements to address the situation where, in certain circumstances, a retailer ceases to supply its customers in the new market, for example as a result of insolvency. These interim supply arrangements will ensure continuity for affected customers and put in place appropriate protections for customers and other market participants in such an event. These arrangements recognise that, whilst high levels of competition do from time to time involve companies failing, water and sewerage services are generally regarded as essential utilities, and therefore, require particular legal and administrative safeguards. Ofwat consulted on a draft interim supply code in February 2016 and published its policy conclusions in April 2016. The final Interim Supply Code[227] was published in March 2017.

[225] Ofwat (April 2016), Deemed Contracts: policy conclusions and consultation on draft Retail Exit Code.
[226] Ofwat (17 March 2017), Retail Exit Code.
[227] Ofwat (17 March 2017), Interim Supply Code.

Instruments of appointment

379. In August 2016, Ofwat undertook a statutory consultation on modifications to be made to appointed companies' instruments of appointment to enable the opening of the business retail market.[228] Appointed companies' instruments of appointment contain a number of conditions which cover both retail and wholesale services provided by the appointed company. The modifications introduce three new conditions and amend some of the existing conditions in order to reflect the new or changed legal and regulatory framework set up to facilitate the retail market to operate. For example, the new conditions give effect to requirement to comply with the MAC, WRC and Customer Protection Code of Practice. Following Ofwat's consultation, the modifications were made to instruments of appointment in August 2016.[229]

Wholesale charging rules

380. In addition to the code framework, Ofwat has published new wholesale charging rules.[230] Wholesale charges are the charges that new retailers will have to pay appointed companies for wholesale water and sewerage services. They typically represent about 90% of the costs ultimately borne by a business customer and are key to ensuring that an effective business retail market develops. The WA14 made provision for Ofwat to set charging rules for charges made by wholesalers to retailers. These rules came into effect in November 2016 and apply to charges payable in relation to any period beginning on or after 1 April 2017. These charging rules complement existing charging frameworks in relation to charges from appointed companies to end user customers[231] and charges between appointed companies for bulk supply agreements.[232]

Charging rules for new connections

381. Currently the charging regime for new connections services (including those services alternative providers require from appointed companies in order to be able to compete) are prescribed in the WIA91. However SLOs and new appointees have raised concerns that the current rules for setting for new

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[228] Ofwat (15 July 2016), Proposals to modify Instruments of Appointment under section 55: a consultation.
[229] Ofwat (30 August 2016), Modifications to Instruments of Appointment for Retail Market Opening.
[230] Ofwat (24 November 2016), Wholesale charging rules.
[231] Charges scheme rules have set out the principles and specific requirements that apply to water and sewerage undertakers when making their charges schemes for end users since 17 November 2015.
[232] See section 94(3) WA14. This does not cover the charges from undertakers to large user customers under section 56 WIA91.

connections favour the appointed company and prevent other businesses from competing on a level playing field.

382. The WA14 made provisions for Ofwat to issue new charging rules for new connections, following guidance issued by the Secretary of State. These rules will replace the notoriously complex charging regime currently in place in the sector that causes significant frustration for customers (both developers and SLOs seeking non-contestable services from appointed companies) due to its lack of transparency.

383. Following extensive consultation with stakeholders and the UK Government's guidance, Ofwat published its charging rules for new connections in December 2016.[233] The new charging schemes will come into effect for appointed companies operating wholly or mainly in England from April 2018. The Welsh Government expects to commence the relevant sections of the WA14 later and Ofwat anticipates working with the Welsh Government and the sector in the coming year to introduce new connections rules that similarly address the concerns about a lack of level playing field in the market to provide new connections in Wales.

384. The greater level of transparency and customer-focus within the new charging rules will better enable customers to choose who will provide their new connections. It will also better enable alternative providers such as SLOs and new appointees to compete on a level playing field with appointed companies by relying less on charging information and processes from them to progress their own business.

[233] Ofwat (8 December 2016), Charging rules for new connections.

Cases under the competition prohibitions since April 2016

Table 9: Use of powers under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (or relevant EU prohibition) for the year 1 April 2015 to 31 March 2016

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	0
Number of new complaints*	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	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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.

Market studies undertaken since April 2016

385. There were no market studies under the Enterprise Act 2002 opened or closed since April 2016 and no market studies which are ongoing.

Review of the NAV regime

386. Although Ofwat has not initiated any market study under the Enterprise Act 2002, in November 2016, it launched a review to investigate how the market for NAVs is working using its regulatory powers (under section 27 of the WIA91).

387. The NAV regime was introduced to provide a mechanism to enable new entry into the sector and to allow those already present to expand into other geographical areas. The introduction of this form of competition for the market was seen as a means of harnessing market forces to provide a challenge to existing appointees; drive efficiencies and stimulate innovation. In doing so, it was hoped that the market would deliver benefit for all customers through: lower prices; improved service; environmental benefits; and greater choice of supplier for developers and large user customers.

388. However, while NAV applications have increased in recent years, the scale of the market is still modest. To date, eight new appointees have entered the market and 68 NAV sites have been granted – mainly for new residential and mixed-use developments.

389. Ofwat has made a number of changes to its NAV policies and processes in recent years to improve the effectiveness of the market. However, stakeholders continue to express concerns about the operation of the market. Ofwat's review of the regime will enable it to investigate any issues in the market; to consider the extent to which current initiatives and policy developments may help to address these issues; or to identify other areas where it may be appropriate to intervene using the full range of its regulatory tools, including its concurrent competition law powers.

390. Ofwat anticipates that the majority of the information-gathering and analysis will be completed during the first quarter of 2017 and it will be engaging extensively with stakeholders to ensure that the investigation is as comprehensive and robust as possible. Ofwat will progress next steps following the review in 2017/18.

Decisions taken since April 2016 to use Ofwat's direct regulatory powers where competition prohibition powers were considered.

391. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, Ofwat is required to report on any decision it has taken, in respect of a case in relation to which it is satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable, that it is more appropriate for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have been no occasions on which Ofwat has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has nevertheless decided that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

392. Ofwat also has a duty[234] to consider, before exercising its direct regulatory powers of enforcement, whether it would be more appropriate to proceed under competition powers. Since April 2016, there have been no cases in which competition concerns arose such that Ofwat needed to consider use of its competition powers further prior to exercising its relevant regulatory power.

[234] Under sections 19 and 22A of the WIA91; this is commonly known as the 'primacy obligation'.

Future work, and proposed changes to regulation, to improve competition and innovation

Wholesale markets

393. Looking ahead beyond the introduction of the business retail market, Ofwat is developing the regulatory regime to encourage greater use of markets in the provision of wholesale water and services.

394. The Welsh Government prioritises the use of regulation to protect customers and the environment. Ofwat will therefore regulate to enhance the opportunities for appointed companies operating wholly or mainly in Wales to make greater use of wholesale water and sewerage markets in this context, while they retain responsibility for service provision. This will enable opportunities in relation to the water resources bidding market and the bioresources market.

395. The UK Government sees a broader role for markets and the WA14 will enable new markets to develop further for wholesale water and sewerage services currently provided by appointed companies operating wholly or mainly in England. When the changes are brought into force (which currently will not happen before 2019), new entrants will have opportunities to provide new sources of water or sewerage treatment services and place obligations on the existing appointed companies to provide access to their networks and treatment and storage systems. The reforms will make it easier for appointed companies to buy and sell water and sewerage services to and from each other. There will also be a legal framework for owners of small-scale water storage to sell excess water into the public supply.

396. The UK and Welsh Governments are also both aiming to reform the water abstraction regime through new legislation. Ofwat will support the abstraction reform programme as it develops.

397. Ofwat is currently developing the regulatory framework that will enable and incentivise these new markets, in particular through its methodology for the sector's next five-yearly price review, due to take place in 2019. In December 2015, Ofwat consulted on proposals for long-term changes to its regulatory approach for wholesale markets and the PR19 and beyond. Ofwat published decisions on this in May 2016.[235] These will inform the development of

[235] Ofwat (May 2016), Water 2020: our regulatory approach for water and wastewater services in England and Wales – overview.

Ofwat's methodology for PR19, the draft of which will be consulted on in summer 2017 and finalised in December 2017.

398. Ofwat's regulatory approach will promote the development of two new markets: bioresources and water resources. It will also encourage more competition in the financing and provision of new infrastructure by third parties.

399. Bioresources are the semi-solid product of the treatment of sewage, often referred to as sewage sludge. It has a value as fuel for energy production and as a fertiliser. 90% of water and sewerage companies responding to an Ofwat survey think the value of bioresources will increase in the medium term, helped by new technology. Promoting a market for trading bioresources (transportation, treatment and recycling/disposal) will create opportunities to optimise the value of bioresources, delivering better economic outcomes for customers. This means:

- appointed companies can trade with each other and use processing centres in adjacent company areas to improve efficiency in the short term;
- more efficient investment to make the most of bioresources processing across appointed companies' boundaries in the longer term; and
- better interaction and integration with the wider organic waste market, enabling efficient site and resource sharing.

400. Water resources are sources of water that are used for agriculture, industry, the public sector, residential, recreational and environmental activities. Promoting a water resources market will deliver efficiency savings and greater long-term resilience, for the benefit of customers, the environment and wider society. This means:

- efficient decision-making on procurement of new resources for resilient services and environmental improvements;
- the value of water being better reflected across the value chain; and
- links to the UK and Welsh Governments' proposed reform of water abstraction rights to facilitate abstraction trading.

401. Ofwat envisages two distinct types of water resource markets:

- A bidding market model in England and Wales, under which third parties submit bids for supply or demand/leakage management services to an

appointed company to help it meet the future water needs in the appointee's area of appointment.

- A bilateral market model in England in line with the WA14, in which third party providers of water resources (who could be other water appointees or other third parties) contract directly with retailers in the business retail market, and pay an access price to appointed companies to use their distribution system and, if needed, treatment facilities to do so.

402. To enable the development of these two new markets, Ofwat will:

- introduce separate binding price controls for them in PR19;
- allocate appointed companies' regulatory capital to the price controls to encourage transparency and market entry;[236]
- protect efficiently incurred investment up to 2020 to provide investor certainty;
- develop information platforms to enable potential new entrants to see opportunities in the market;[237] and
- set access pricing for the water resources market to facilitate third party access to the existing water network.

403. Ofwat's new regulatory approach will also incentivise appointed companies to use direct procurement for customers (DPC) for high-value infrastructure projects. DPC takes place when an appointed company procures services, particularly infrastructure projects, on behalf of customers, including the project's financing. It promotes the use of markets for projects which would otherwise be provided by the appointed company. By harnessing market forces, DPC can generate savings from project costs and cheaper financing. It can also encourage companies to take a long-term review of projects, bringing long-term savings. Ofwat expects water companies to use DPC for projects valued at more than £100m.

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[236] This will inform, enable and encourage an effective market by revealing improved information that will help Ofwat to set better targeted incentives; support appointed company decision-making; mitigate cross-subsidy concerns; and foster a more commercial culture and focus within appointed companies in relation to these activities.

[237] For example, sewerage appointees will be required to publish a standard set of information about the location of wastewater treatment centres, volumes of bioresources produced and information on its quality. Water appointees will be required to make key data available on supply-demand deficits and water resource costs to issue bid assessment frameworks to provide transparency in how they will assess bids from third parties.

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

404. 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.

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

(a) **Electricity**: The principal objective in electricity is to protect consumers, where appropriate by promoting effective competition.[238]

(b) **Gas**: The principal objective in gas is to "promote the development and maintenance of an efficient, economic and co-ordinated gas industry in Northern Ireland...". Subject to the principal objective, the NIAUR is obliged to carry out its functions in a manner which it considers is best calculated to facilitate competition.[239]

(c) **Water and sewerage**: The principal objective in water and sewerage is to protect consumers, where appropriate by facilitating effective competition.[240]

406. 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.[241]

407. The nature of the Northern Ireland markets differ somewhat from the equivalent markets in Great Britain. For example, there are circa 861,700 electricity consumers and circa 223,800 gas consumers in Northern Ireland. Unlike in Great Britain, oil is the primary home heating fuel in Northern Ireland.

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[238] The Energy (Northern Ireland) Order 2003, Article 12.
[239] The Energy (Northern Ireland) Order 2003, Article 14.
[240] The Water and Sewerage Services (Northern Ireland) Order 2006, Article 6.
[241] 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.

408. 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.

409. The 'Ten Towns'[242] gas network area has been open to competition for domestic and small non-domestic consumers since April 2015.

410. 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.

411. 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.

General developments since April 2016 from a competition or policy perspective

Energy (electricity and gas)

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

413. The first phase undertook a formal review of the effectiveness of retail competition in the Northern Ireland retail energy markets and the factors which might limit that competition. It considered the information requirements necessary to monitor the effectiveness of competition (and fed these back into

[242] 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 193,000 customers and approximately 30,700 customers in the Ten Towns. In the Ten Towns area, the incumbent supplier holds a licence to supply gas which grants it a period of exclusivity for supplying gas to customers within the Ten Towns area, meaning it is the only company allowed to supply gas to these customers during that period. This period of exclusivity ended on 30 September 2012 for customers using more than 732,000 kWh per annum, typically large industrial and commercial customers. The period of exclusivity for all customers (including domestic) using less than 732,000 kWh per annum ended on 31 March 2015.

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.[243]

414. 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.

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

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

417. The outcomes of this project will sit alongside other important initiatives the NIAUR is undertaking (such as the commencement of Retail Energy Market Monitoring and the Consumer Protection Strategy). These will ensure, as far as possible, that retail energy markets are working to the benefit of consumers now and into the future.

418. The NIAUR published a consultation paper[244] which examined the potential regulatory options which could be implemented. This consultation finished in March 2016.

419. It was indicated in the initial Information Paper[245] (published in May 2015) that the anticipated timing for the final report to be issued was December 2015. However, in light of the delay in the publication of the CMA final report into the GB energy market (which was published in June 2016), the NIAUR delayed the issue of its final report to enable it to take into account the CMA's findings, including any impact upon any approach the NIAUR may take. The NIAUR published its final report on Phase II in December 2016.[246]

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[243] NIAUR (November 2014), Review of the Effectiveness of Competition in the Northern Ireland Energy Retail Market.
[244] NIAUR (December 2015), Consultation on Phase II of the Review of Effectiveness of Competition in Northern Ireland Energy Retail Market.
[245] NIAUR (May 2015), Review of the Effectiveness of Competition in the Northern Ireland Retail Market – Phase II – Regulatory Implications (An Information Paper).
[246] NIAUR (December 2016), Review of the Effectiveness of Competition in the Northern Ireland Energy Retail Market – Phase II – Regulatory Implications (Final Report).

420. The NIAUR has engaged and continues to engage with the CMA at the various stages in the project on the issues involved. As highlighted above, the NIAUR has taken into consideration the CMA's findings in the review of the GB energy markets. The final report sets out the final list of potential options for a future regulatory framework. This would follow the end of the current price controlling regime in place in the NI energy market if it were to be removed. Seven options were consulted upon and taking into consideration stakeholder feedback and analysis of the options, four options have been retained for potential future use. The four options which were retained are:

- Significant Market Power: undue preference and undue discrimination licence obligations would be switched on for any supplier deemed by the Utility Regulator, under established and transparent criteria, to have significant market power;

- Inactive Customer Tariff: for incumbent suppliers' disengaged customers (not to be offered by all suppliers as with the default tariff). This option would only apply to the former incumbent energy suppliers. "Disengaged" would need to be defined.

- Default Tariff: for those consumers unwilling or unable to engage with the market. All suppliers will offer this tariff (not just incumbents as with the inactive customer tariff) and have to clearly show and justify its constituent parts, including the margin being taken under the tariff; and

- Dominance Thresholds: setting market thresholds above which if a supplier or suppliers are deemed sufficiently dominant to be able to exert market power, regulatory solutions may be implemented.

421. The NIAUR's Forward Work Program 2014-15 identified the introduction of contestability in the electricity connections market as an area where competition can be established. This was to allow choice in who carries out the work associated with connecting to the electricity network in Northern Ireland.

422. In 2015, the NIAUR established a working group[247] on contestability in connections and kicked off a work stream to consult with stakeholders and industry. Following the initial consultation, the outcome was a Next Steps paper mid-2015 and a final Decision paper at the end of July 2015. Together with the Distribution Network Operator (Northern Ireland Electricity (NIE)

[247] Contestability Working Group.

Networks) and the Transmission System Operator, the System Operator for Northern Ireland, contestability guidelines[248] were developed and consulted upon in 2016, leading to the establishment of contestable offers available to connectees of 5 Megawatt's and over.[249] This means customers can choose an Independent Connections Provider instead of NIE Networks for certain connections activities.

423. The NIAUR is currently working with NIE Networks to introduce contestability for all connectees. Once the IT systems are in place, a licence modification will be introduced to ensure and monitor compliance with the requirement to offer contestable connections to whoever asks for it.

424. The NIAUR has also started a new workstream focusing on connections and in November 2016[250] launched a call for evidence to begin the process of its review of electricity distribution and transmission connections policy. The scope of this review includes both the electricity distribution and the transmission networks. It also includes all types of customer connections and whether any changes to the connection charging policy are necessary to facilitate increased competition.

NIAUR competition guidelines

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

426. Following public consultation, these guidelines were published in September 2016. The guidelines clarify the relationship between sectoral regulation and competition law. In addition, they aim to promote awareness of how competition law applies to the electricity, gas and water and sewerage industries in Northern Ireland and the importance of ensuring compliance with it.

427. Included within the guidelines are the NIAUR prioritisation principles, which it will use to determine whether to open a formal investigation or not.

428. Additionally the NIAUR's approach to voluntary redress schemes is contained within the competition guidelines. Additional information along with an

[248] NIAUR (May 2016), Guidelines for Contestability in Electricity Connections in Northern Ireland – Version 2.
[249] Contestability in Connections.
[250] NIAUR (November 2016), Electricity connections call for evidence.

application form for any person wishing to apply for approval of a voluntary redress scheme from the NIAUR is available on the NIAUR's website.

Changes to the legal/regulatory framework since April 2016, including any new regulations put in place during the year, which might significantly affect competition and innovation

Electricity

429. The latest Power NI Price Control SPC17 was completed with the decision published in November.[251] The final decision resulted in a reduction in the scope of the price control coverage as it was determined that the combined market share of Power NI and Energia in the 0-50MWh segment meant that they are no longer dominant in that market. It would be unfair and discriminatory to impose a price control on Power NI alone as it is no longer dominant. Those I&C customers with a usage of less than 50MWh are no longer covered by the price control. This now means that only domestic electricity customers are covered within the scope of the Power NI Price Control.

Gas

430. The Final Determination paper for the SSE Airtricity Gas Supply Ltd and firmus energy price controls was issued in November 2016.[252] The final determination resulted in the scope of the price control for SSE Airtricity being limited to those customers using less than 2,500 therms per annum (73,200 kWh per annum), known as the EUC 1 category. This decision was taken on the basis of the level of competition and customer engagement within the market, and based on the evidence that SSE Airtricity no longer holds a dominant position on this market. The final determination for firmus energy was that the scope of its control should remain unchanged. This means that the control will remain on those consumers using less than 25,000 therms per annum.

431. In September and October 2016 respectively, the changes to the European network code on harmonised transmission tariff structures for gas and the

[251] NIAUR (November 2016), Power NI Supply Price Control 2017 (SPC17) – Decision Paper.
[252] NIAUR (November 2016), Price Control for SSE Airtricity Gas Supply (NI) Ltd and firmus energy (Supply) Ltd – Final Determination.

amended CAM (Capacity Allocation Mechanism) network code were agreed at EU level.[253]

432. In the short term, the amended CAM network code will need to be reflected in the Northern Ireland regulatory regime. The Tariff code will not be implemented until 2018. The CAM modifications will be aimed at ensuring compliance and further the underlying objective of CAM which is setting non-discriminatory rules for access conditions to natural gas transmission systems with a view to ensuring the proper functioning of the internal market.

433. The implementation of the new CAM rules in Northern Ireland will build on the existing integration of Northern Ireland into the GB gas market and support the vision of a competitive single European gas market comprising entry and exit zones with liquid trading points.

Water and sewerage

434. 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.

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

[253] The codes must pass comitology which means that, before it can implement an EU legal act, the Commission must consult, for the detailed implementing measures it proposes, a committee where every EU country is represented. The committee provides an opinion on the Commission's proposed measures.

Cases under the competition prohibitions since April 2016

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

	Total
Number of open cases as at the start of the reporting period (1 April 2016)	0
Number of new complaints*	1
Number of investigations formally launched	0
Number of those cases in the year to date in which:	
- information gathering powers and powers to enter premises/conduct dawn raids were used	0
- a Statement of Objections was issued	0
Number of those cases in the year to date that resulted in:	
- an infringement decision	0
- the giving of commitments or undertakings to change conduct	0
- an exemption or clearance decision (or equivalent)	0
- case closure without full resolution	0
Number of cases that are ongoing at the end of the reporting period (31 March 2017)	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

* '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.

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

437. There are currently no active investigations under the competition prohibitions being undertaken by the NIAUR.

438. The NIAUR received a complaint regarding a potential breach of the Chapter II Competition Act 1998/Article 102 TFEU prohibition in August 2016. As required by the Concurrency Regulations this was notified to the CMA. The complainant later informed the NIAUR that it intended to pursue a private action through the CAT and therefore no formal investigation was launched by either regulator.

Market studies undertaken since April 2016

439. There have been no market studies opened or closed since April 2016 and there are no market studies which are ongoing.

Decisions taken since April 2016 to use NIAUR's direct regulatory powers where competition prohibition powers were considered

440. Under Schedule 4 of Enterprise and Regulatory Reform Act 2013, the CMA is required to report on any decision taken by a sectoral regulator, in respect of a case in relation to which the regulator is satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable, that it is more appropriate

for it to proceed by exercising functions other than those that it has under Part 1 of the Competition Act 1998. Since April 2016, there have been no occasions on which the NIAUR has been satisfied that its functions under Part 1 of the Competition Act 1998 are exercisable but has decided nevertheless that it is more appropriate for it to proceed by exercising functions other than its Part 1 functions.

441. The NIAUR has a duty[254] to consider, before exercising its powers under certain sector-specific legislation, whether it would be more appropriate to proceed under competition powers. Since April 2016, the NIAUR has instigated three enforcement processes under this sectoral legislation against regulated companies and considered several complaints by individuals and companies. Each of the formal processes in which the NIAUR has engaged has resulted from information suggesting a potential licence breach had occurred and, in each case, it concluded that proceeding under its sectoral powers was the most appropriate, timely and effective means by which to address the concerns identified and to ensure consumer interests were protected.

Future work, and proposed changes to regulation, to improve competition and innovation

Cost Reporting

442. In its Forward Workplan for 2016/2017, the NIAUR highlighted its commitment to monitoring and cost reporting activities relating to regulated companies. The NIAUR has now implemented structured reporting templates for a range of network operators, together with related Regulatory Instructions and Guidance and, where appropriate, related licence conditions. The NIAUR plans to continue this work going forward, with a view to building a robust data set for comparative analysis between network operators, performance reporting and efficiency challenges. The NIAUR considers that this work will enhance transparency within the markets, and therefore encourage competition and market efficiency.

[254] Under Articles 42 and 45 of the Energy (Northern Ireland) Order 2003 (SI 2003/419) and Articles 31 and 35 of the Water and Sewerage Services (Northern Ireland) Order 2006 (SI 2006/3336); this is commonly known as the 'primacy obligation'.