ADDLESHAW GODDARD

**Response to CMA Concurrency Call for Inputs**

## 1 Introduction

1.1 Addleshaw Goddard LLP (**AG**) is grateful for the opportunity to share its views on the UK's competition concurrency arrangements as part of the CMA's call for inputs dated 24 August 2023 (**Call for Inputs**). AG's Competition and Regulatory team is made up of individuals with extensive joint expertise in UK competition and sectoral regulation matters:

(a) the majority of our UK-based team members have previously worked for the CMA, one of the sectoral regulators and/or a stakeholder operating in a sector that is subject to concurrent regulation;

(b) our client base and portfolio of cases reflect this joint expertise – many of our clients operate in the energy, transport, water, payments and communications sectors, all of which are heavily regulated;[1] and

(c) we monitor competition and regulatory activity from both policy and enforcement perspectives on an ongoing basis. Where appropriate, we also publish insights for our clients and the wider community.[2]

1.2 We are therefore well placed to comment on the efficacy of the UK's concurrency regime and hope our insights will be of value to the CMA.

1.3 We support the principles and overarching aims of competition concurrency. It is critical to the UK competition law regime's success that those who enforce it have sufficient expertise of how

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[1] See for example, the 2023 edition of Legal 500's EU & Competition rankings, which provides a list of some of our key clients and recent work highlights: https://www.legal500.com/c/london/corporate-and-commercial/eu-and-competition/. In particular, we recently acted for:

- SSE in its challenge to Ofgem's decision to accept modifications (CMP317/327) to the Connection & Use of System Code concerning electricity transmission system charges for generators;
- ten of the largest high street banks on the antitrust and merger control aspects of the creation of a new company to assist with the roll out of new banking hubs; and
- Openreach in its intervention under the *Cityfibre v Ofcom* appeal in the Competition Appeal Tribunal (Case 1426/3/3/21).

[2] See for example:

- *UK Competition Network's Annual Plan Publication Season – Common Trends*, 25 April 2023: https://www.addleshawgoddard.com/en/insights/insights-briefings/2023/competition/uk-competition-networks-annual-plan-publication-season-common-trends/;
- *Public cloud infrastructure market referral to the competition and markets authority for in-depth investigation – What you need to know and do*, 5 October 2023: https://www.addleshawgoddard.com/en/insights/insights-briefings/2023/competition/public-cloud-infrastructure-market-referral-to-the-competition-and-markets-authority-in-depth-investigation/.

relevant markets actually work in practice. Competition law is not enforced in a vacuum and the dynamics of each market must be understood in detail to determine whether anti-competitive issues arise. Behaviours that may appear problematic in one context may be more nuanced, or even pro-competitive, in another.

1.4 There are various ways to secure a successful concurrency regime. In our view, the central requirement in all scenarios is that concurrent regulators find efficient ways to collaborate, whether it is in the context of sharing market expertise and enforcement best practice, or working on specific cases together.

1.5 Given our stakeholder profile and as our comments are mostly general in nature, we have not answered each consultation question individually.

1.6 In the rest of this response, we address the following points:

(a) the aims of the 2014 concurrency reforms and whether they appear to have been achieved;

(b) the performance of the concurrency regime over the past decade;

(c) what have been the key hurdles to the success of the competition concurrency regime; and

(d) some suggestions going forward.

## 2 The 2014 concurrency reforms – stated aims and review

2.1 The stated aims of the concurrency enhancements introduced under the Enterprise and Regulatory Reform Act 2013 (**ERRA 2013**) (the **Concurrency Enhancements**) were:

> "*to ensure that the CMA and the sectoral regulators work more closely together and that they build up and continue to share competition expertise, including through enforcement work, training and research.*"[3] (the **Stated Aims**)

2.2 Certain aspects of the Stated Aims are not tangible and cannot easily be measured. By way of proxy, and given that the Concurrency Enhancements focused on arrangements surrounding Competition Act 1998 (**CA98**) investigations and overall transparency, we have conducted some high-level statistical analysis to answer the basic question as to whether the Concurrency Enhancements have led to more tangible CA98 activity from sectoral regulators.

2.3 Though a number of external factors may have contributed to the outcomes, our analysis of the CMA's Annual Concurrency Reports to date [4] suggests that since the Concurrency Enhancements:

(a) sectoral regulators have opened more CA98 investigations overall – the most prolific enforcers have been the Financial Conduct Authority (**FCA**), Ofcom and Ofgem, together responsible for around three quarters of cases;

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[3] See e.g., CMA, *'Baseline' Annual Report on Concurrency*, 1 April 2014, paragraph 4: https://www.gov.uk/government/publications/baseline-annual-report-on-concurrency.

[4] These can be consulted via this UKCN page: https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents#annual-report-on-concurrency.

(b) the proportion of CA98 cases which have resulted in a breach decision or commitments being agreed has more than tripled – this could be a sign that sectoral regulators are taking a stricter line of enforcement. Perhaps more realistically, sectoral regulators may have refined their criteria for opening cases and focus their attention on the more clear-cut infringements; and

(c) there is a clear disparity between the top sectoral enforcers (FCA, Ofcom and Ofgem) and the rest of the concurrent regulators – in particular, the number of cases opened by Ofwat, the Office of Rail and Road (**ORR**) and the Northern Ireland Authority for Utility Regulation do not seem to have increased after the Concurrency Enhancements. There will be a range of reasons for this – including different levels of market opening and different regulatory levers available in each case, but it may also suggest that "smaller" regulators may find it harder to scale up specialist resources needed to manage concurrency cases, and so find it harder to justify using their concurrency powers.

2.4 Based on the above findings, we can conclude that the Concurrency Enhancements have led to more CA98 activity from sectoral regulators overall, but that this has mostly been driven by the top three sectoral enforcers, namely the FCA, Ofcom and Ofgem.

## 3 Performance of the concurrency regime

3.1 An uptick in CA98 cases from concurrent regulators since the Concurrency Enhancements suggests that:

(a) better resourced sectoral regulators are not shy to open a CA98 investigation where they consider the right case presents itself; and

(b) almost half of CA98 cases between 2014 and 2023 have led to commitments or breach findings – a figure which has more than tripled versus the 2005-2013 period.

3.2 More broadly, the CMA's Concurrency Report 2023[5] indicates that sectoral regulators are making more use of concurrency powers under the Enterprise Act 2002 (**EA2002**) to conduct market studies:

(a) Ofcom recently concluded an EA2002 market study into the supply of public cloud infrastructure services, which it decided to refer to the CMA for in-depth investigation;[6]

(b) the FCA is conducting an EA2002 market study into the supply of wholesale financial data;[7] and

(c) the ORR previously conducted two EA2002 market studies in recent years – a market study into railway ticketing machines (completed in 2019) and a market study into railway signalling (completed in 2021).

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5 CMA, *Annual Report on Concurrency 2023*, 10 May 2023: https://www.gov.uk/government/publications/annual-report-on-concurrency-2023.

6 See Ofcom case page: https://www.ofcom.org.uk/consultations-and-statements/category-2/cloud-services-market-study; and CMA case page: https://www.gov.uk/cma-cases/cloud-services-market-investigation. The CMA's investigation is ongoing.

7 See FCA case page: https://www.fca.org.uk/publications/market-studies/ms23-1-wholesale-data-market-study.

3.3 In our view, although their impact is difficult to measure, a few collaborative arrangements have been key to the UK concurrency regime's overall success:

(a) joint knowhow sessions between the CMA and sectoral regulators to share procedural, competition and market expertise – both within and outside of the UK Competition Network (**UKCN**);

(b) regular case meetings with the CMA to discuss ongoing sectoral regulator investigations;

(c) targeted CMA secondments to sectoral regulators – for example, to assist the regulator during key stages of a CA98 investigation such as the drafting of the final decision;[8] and

(d) ad hoc support from senior external competition law counsel during key investigation stages (rather than only after the final decision has been appealed).

3.4 It is also useful to consider the functioning of concurrency competition regimes outside of the UK. In late 2022, the OECD published a report on this topic.[9] The OECD found that:

(a) thanks to clear concurrency parameters and a collaborative approach between regulators – with the CMA positioned as "first among equals" – the UK has fared well in terms of securing an efficient and consistent approach to competition enforcement.[10] This is in contrast with other jurisdictions such as the USA, where there have been examples of costly duplication and inconsistent outcomes;[11]

(b) secondments and broader overlaps in personnel as between regulators are also considered useful – as well as the UK, the OECD mentions Japan and Australia as jurisdictions which resort to these arrangements (for example cross-over board members);[12] and

(c) Memoranda of Understanding between concurrent regulators are also helpful mechanisms to establish a good faith relationship and provide a degree of certainty and transparency, provided they are consistent with the regulators' statutory duties and functions.[13]

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8 In this regard, we note that the CMA seconded a member of CMA staff to work on Ofcom's recent market study into public cloud infrastructure services, and that it recorded 15 formal active secondments in its Concurrency Report 2023.

9 OECD, *Global Forum on Competition Interactions between competition authorities and sector regulators – Contribution from Business at OECD (BIAS)* – Session III – 1-2 December 2022 (**OECD Report**): https://one.oecd.org/document/DAF/COMP/GF/WD(2022)64/en/pdf.

10 OECD Report, paragraph 7.

11 See OECD Report, paragraph 11, footnote 9 and parapraph 18, where the OECD explains that mergers in the electricity sector can be reviewed by several regulators at the same time (at federal and state level). This has on occasion led to different regulators reaching different conclusions as to whether the merger in question is harmful to competition.

12 OECD Report, paragraph 10.

13 OECD Report, paragraphs 8-9.

## 4 What have been key hurdles to the success of the UK's concurrency regime

4.1 While the UK's concurrency regime has achieved many of its Stated Aims, certain hurdles exist to achieving these Stated Aims in full. Some of these hurdles are inherent to the system and are difficult to cancel out, though they can be somewhat mitigated through effective collaboration focusing on each regulator's strengths.

***A lack of dedicated resources and infrastructure for sectoral regulators***

4.2 Sectoral regulators will typically struggle to justify budget expenditure on enforcement tools and training that are crucial to have in a competition context but less so in a regulatory context. The fact that certain tools and skills are only really needed once or twice every few years encourages situations whereby regulators have to "make do" with a heavier administrative burden than necessary when they do decide to take on competition cases. In particular, this will tend to affect the availability of:

(a) ongoing competition training of staff;

(b) a comprehensive and up-to-date competition-specific knowledge database;

(c) forensic software to efficiently sieve through information collected from the parties to the investigation; and

(d) in-house administrative services or administrator-level employees to handle management of case files, both during an investigation and over the course of appeals.

4.3 Some of these issues can be and are to some extent mitigated under current working arrangements:

(a) the CMA makes regular efforts to share its knowhow with sectoral regulators and disseminate best practice points across the UKCN;

(b) the CMA also has a track record of supporting sectoral regulators with the logistics of carrying out dawn raids; and

(c) sectoral regulators may be able to seek administrative solutions on an ad hoc basis by way of outsourcing.[14]

4.4 Despite this, a lack of dedicated resources:

(a) creates an additional administrative burden for sectoral regulators when compared to the CMA; and

(b) is likely to negatively influence sectoral regulators' appetite and confidence in exercising their competition powers.

[14] In any case, ad hoc outsourcing is not always a suitable solution due to data protection and confidentiality concerns.

***Expansion of regulatory powers may pose a risk to the competition concurrency regime***

4.5 For the competition concurrency regime to remain successful, sectoral regulators need to retain sufficient in-house competition law and economics expertise and sufficient focus on activities in that arena.

4.6 While we do not see this as a current issue, it may become one if sectoral regulators continue to receive additional non-competition powers. Once the balance of sectoral regulators' work tips disproportionately in favour of regulatory matters which are not based on competition principles, unless they focus clearly on ring fencing competition expertise (as the FCA has done), such regulators are more likely to struggle to retain competition law and economics experts.

## 5 Suggestions going forward

5.1 We set out below some guiding principles for the concurrency regime before making more specific comments in relation to particular competition procedures and transparency improvements.

***Guiding principle for concurrency – harnessing the best of both***

5.2 At a high level, the concurrency regime should foster collaboration, paired with a true sense of teamwork between the regulators to secure better outcomes. It may be tempting to fall into the trap of partisanship and focus on which regulator gets to "lead" on a given case. But the reality is that the CMA and each sectoral regulator have different strengths:

(a) the CMA has competition law expertise, cross-sector insights and resources on a scale that allows it to draw analogies between adjacent markets, run large and complex competition investigations and apply competition rules consistently across sectors. To secure these attributes, the CMA has to forgo the in-depth knowledge and understanding of heavily regulated sectors; and

(b) the sectoral regulators are not "mini-CMAs". Their respective regulatory roles give them a deep level of sector knowledge which is crucial in making the best regulatory decisions for relevant markets and their consumers. But these regulatory roles are time and resource intensive, so that sectoral regulators may not end up as well equipped to take on certain types of competition cases.

5.3 Recognising this, the continued success of the UK competition concurrency regime lies in harnessing the strengths of both the CMA and sectoral regulators, through extensive teamwork and recognising that the sectoral regulators and their markets also have marked differences between them. Flexibility of approach is therefore important.

5.4 As mentioned above, secondments and regular meetings between regulators have been good ways of achieving this to date. Competition regulators could go one step further and put together hybrid teams on specific cases to ensure the teams have the appropriate mix of competition law and sectoral expertise.

5.5 Embedding cross-organisational support within case teams and decision-making panels could maximise the utilisation of each organisation's strengths. It may also contribute to reducing the risk of confirmation bias. Project budgets and expenditure could be apportioned between organisations in a way which reflects each regulator's level of contribution – so could any fines collected from parties at the end of an investigation.

***Collaboration beyond the limits of competition concurrency***

5.6 To the extent that it is appropriate in the specific circumstances, this enhanced type of collaboration could extend to areas of competition scrutiny which, strictly speaking, fall outside the remit of concurrency. For example, in the context of merger control, embedding a sectoral expert within the CMA's case review team to provide 'day-to-day' expertise throughout the process may be more effective and efficient than relying on a separate opinion paper or voluntary submission from that regulator.

5.7 As the CMA and non-competition regulators have already recognised, there are areas of overlap between regulators beyond competition concurrency, where it makes sense to discuss and clarify how the different organisations propose to address overlaps. For example, the CMA and ICO have issued a helpful joint statement on this topic.[15] Similarly, the creation of the Digital Regulation Cooperation Forum in 2020 to better coordinate research and policy development across the CMA, Ofcom, the ICO and the FCA, has been a step in the right direction.

5.8 We note that in the context of the Digital Markets, Competition and Consumers Bill (**DMCC Bill**) introduced in Parliament last April, the proposed consumer law reforms suggest a possible recalibration of how the CMA and sectoral regulators might collaborate in future. In particular, only the CMA would have the power to enforce its consumer decisions on an administrative basis, without a court procedure. Once the DMCC Bill becomes an Act of Parliament and enters into force, it will be interesting to compare the effectiveness of collaboration among the UKCN under the new consumer law regime versus the competition concurrency regime. It might be an opportunity for both frameworks to learn from the other and improve their functioning.

***Improving transparency and clarifying certain roles across the UKCN***

5.9 As a final suggestion, the CMA could take certain practical steps to improve the transparency of the concurrency regime and clarify certain roles across the UKCN.

5.10 The CMA's case page[16] is easy to find, navigate and search filters work particularly well. Given this, it would greatly improve the transparency of the UK competition regime if users could search for all competition cases – including those run by the sectoral regulators – from a single official platform. Ideally the platform in question would be the CMA's existing case page, or would at least be modelled against it.

5.11 We note that the UKCN webpage does seek to provide a list of sectoral regulators' competition cases.[17] However, this page is not widely advertised/ known and it is not up to date.[18]

5.12 We anticipate that certain forms of collaboration currently taking place on the fringe of the UKCN and broader UK Regulators' Network are likely to take on a more important role over time – particularly the Digital Regulation Cooperation Forum (**DRCF**). In anticipation of the future

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15 CMA and ICO, *CMA-ICO joint statement on competition and data protection law*, 19 May 2021: https://www.gov.uk/government/publications/cma-ico-joint-statement-on-competition-and-data-protection-law.

16 https://www.gov.uk/cma-cases.

17 https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents.

18 For example, as at 20 October 2023, the list of Ofcom competition cases does not include the Chapter 1 infringement decision of 16 December 2022 against Motorola and Sepura (Case CW/01241/05/19). See Ofcom case page here: https://www.ofcom.org.uk/about-ofcom/bulletins/enforcement-bulletin/all-closed-cases/cw_01241.

regulatory framework for Digital Markets which the DMCC Bill proposes to introduce, it would be a useful exercise to consider and publicly clarify the role of the DRCF going forward.

5.13 We hope the CMA finds the above comments and suggestions useful and look forward to reading the outcome of its consultation. Should you wish to discuss them in more detail, feel free to reply to the senders of this document by email. Finally, we confirm that this submission is not confidential and may be published on the CMA's website should the CMA wish to do so.

**Addleshaw Goddard LLP**

**27 October 2023**