

# Response to the CMA's review of the competition concurrency arrangements

CAP 2595

A large, abstract graphic composed of overlapping blue and purple shapes, resembling a stylized wing or a modern architectural element, occupies the bottom two-thirds of the page.

Published by the Civil Aviation Authority, 2023

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First published 2023

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The latest version of this document is available in electronic format at: [www.caa.co.uk/cap2595](http://www.caa.co.uk/cap2595)

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## Introduction and summary

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1. The CAA is pleased to respond to the CMA's call for inputs on its review of the competition concurrency arrangements.<sup>1</sup>
2. The CAA notes that the scope of its concurrent competition powers is relatively narrow, being limited to air traffic services as defined in the Transport Act 2000 ("TA00") and airport operation services as defined in the Civil Aviation Act 2012 ("CAA12"). The CAA has, however, worked closely with the CMA on a number of competition law matters which has given it insight into the working of the concurrency arrangements. In the light of this experience, the CAA takes the view that both:
  - its ability to use concurrent competition powers alongside the CMA; and
  - the operation of the existing concurrency arrangementsprovide for a flexible and dynamic approach to competition enforcement.
3. This has clear benefits to consumers, enabling:
  - both the CAA and CMA collectively to become aware of more potential competition issues than might otherwise be the case;
  - cases to be allocated for investigation by the body which is most appropriately placed to consider the matters at hand;
  - appropriate sharing of staff and resources, not only between the CAA and CMA, but also between the CAA and other concurrent regulators to allow more resource flexibility and specialist expertise to be deployed in individual cases; and
  - the CAA, in particular, to be able to lever on its existing regulatory relationships, not only to gather intelligence, but also to engage in activities that dissuade parties from breaching competition law before any breach having a material impact on consumers can occur.
4. As a result, the CAA submits that it would not be appropriate to focus on or judge the effectiveness of the present arrangements solely by reference to the number of cases that have been started by either the CMA or the CAA in the context of concurrent arrangements. The CAA submits that it would be preferable to focus on the broader qualitative benefits to consumers that these arrangements bring.

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<sup>1</sup> See <https://www.gov.uk/government/consultations/review-of-the-competition-concurrency-arrangements>.

5. In summary, the CAA does not consider that radical changes are needed to make the concurrency arrangements work better, although some limited change to the scope of the CAA's role and some additional sharing between sectoral regulators might make the regime even more effective.
6. This response is broadly structured to respond to the questions set in the CMA's call for inputs. Where the CAA considers that the issues raised by some of the questions might more helpfully be grouped together, a single answer in response to a number of questions is given.

## Chapter 1

## Concurrency as part of sector regulation

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**Question 1: Have the concurrent Competition Act 1998 enforcement powers proven to be effective tools to remedy specific cases of anti-competitive harms in the regulated sectors? As part of this issue, how do sector regulators evaluate whether competition law enforcement would be a more appropriate course than either: (i) enforcing an existing *ex ante* rule (ii) setting a new *ex ante* rule, and are the choices that sector regulators make effective?**

- 1.1 The CAA considers that the concurrent competition law enforcement powers that it shares with the CMA have proved to be an effective tool for dealing with specific cases of anti-competitive behaviour. Despite the CAA's concurrent powers being tightly drawn (as noted above), a number of specific issues have arisen at airports that have been dealt with using competition law powers. Some of these have related to activities that fall outside the normal scope of the CAA's economic regulation role and therefore would not have been matters that the CAA could have addressed (even if it were possible or appropriate) using *ex ante* rules.
- 1.2 These examples include competition issues at currently unregulated airports relating to such matters as car parking and surface access. Furthermore, even if those activities had fallen within the CAA's sectoral economic regimes, the CAA considers that it would not have been appropriate for *ex ante* regulation to address them: the use of concurrent competition powers allowed them to be dealt with more appropriately.<sup>2</sup>
- 1.3 The CAA considers that the investigations that it has undertaken under its sectoral powers have been, by contrast, focussed on matters that would not have been appropriately or readily addressed using competition law powers, not least because they involved the investigation of breaches of specific sectoral (including specific statutory) provisions that do not have any direct parallel in the case law or decisional practice of the competition law regime.
- 1.4 So, while the CAA does consider issues of whether it is more appropriate to proceed under the competition law regime or through the use (or creation) of a new *ex ante* provision, the CAA's experience is that the competition law regime provides a more flexible and appropriate framework for addressing the kinds of more specific problems that it has seen arising within its jurisdiction. As such, in

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<sup>2</sup> See also the response to question 5 below.

considering the question of whether to use competition law tools or *ex ante* rules, in the CAA's experience, the answer is normally readily apparent.

**Question 2: Does the ability for sector regulators to conduct market studies under the Enterprise Act 2002 help them achieve their objectives?**

**Question 3: Does the ability for sector regulators to refer markets to the CMA for a market investigation help them achieve their objectives?**

**Question 4: Sector regulators also carry out market reviews under sectoral legislation. Does concurrency have an impact on how sector regulators carry out these reviews? For example, does it affect the extent to which competition issues are a focus in these reviews?**

**Question 14: What benefits does the ability for sector regulators to conduct market studies and refer markets to the CMA for market investigations have for the operation of the markets regime? Are there any downsides in the sector regulators having concurrent powers to conduct market studies and make market investigation references?**

1.5 The CAA considers that the powers and arrangements it has for undertaking market studies and making market investigation references readily complement the market-specific work that falls within the scope of the CAA's sectoral powers, such as Market Power Determinations under the CAA12 and the duties<sup>3</sup> of the CAA to keep the provision of airport operation services and air traffic services under review. Sectoral reviews have included reviews of surface access arrangements at airports and assessments of the contestability of terminal air navigation services. It is in the interests of consumers that such reviews can, in appropriate cases be bolstered or taken forward further through the use of market studies, making market investigation references, as well as accepting undertakings in lieu.

1.6 The CAA has considered whether the use of powers under Part 4 of EA02 might be (and might have been) appropriate in particular cases and, while it has not encountered a particular set of circumstances where the use of these powers would be warranted, it is clear in the view that such powers could be very useful in achieving its objectives of promoting the interests of consumers in the aviation sector. The CAA considers that the usefulness of these powers will be further enhanced by the proposals to remove the time-limit on pre-reference consultation proposed in the Digital Markets, Competition and Consumers Bill should it become law.

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<sup>3</sup> Set out in s64 CAA12 and s91 TA00 respectively.

- 1.7 Specifically, allowing sector regulators to conduct market studies (as at present) enables those regulators to bring to bear the deeper understanding of market dynamics, challenges, and potential competition issues unique to their sectors. This can also lead to more efficient processes, for example in relation to data collection as sector regulators are already familiar with industry players and can efficiently gather relevant data, reducing the time and cost required to initiate market investigations. This also benefits the CMA, by allowing it to focus on more complex and high-impact cases across the economy. In this light, there remains a case for the CAA to retain (and possibly have a slightly broader or clearer) jurisdiction to review markets and make market investigation references.

**Question 5: Does concurrency have an impact on how sector regulators carry out their wider regulatory functions, particularly in terms of the promotion of competition in the regulated sectors?**

- 1.8 The CAA is under specific statutory duties to promote competition in relation to its sectoral powers under the CAA12 and the TA00. It is also required to consider at each stage of the enforcement process whether it would be more appropriate to proceed using its powers under the Competition Act 1998 rather than taking licence enforcement action. So, for example we would consider this issue not only at the outset of a case, but also at the stage of determining whether to impose a penalty.<sup>4</sup>
- 1.9 Being a competition authority with a level of competition expertise enables the CAA to bring richer competition thinking to its regulatory activities generally to minimise distortions to competition that regulation might otherwise bring, assist in the consideration of issues of state aid, and in giving policy advice to DfT.
- 1.10 As such, concurrency complements the way that the CAA conducts its work under these acts by enabling the CAA to take action in relation to cases where either:
- the party in question falls within the CAA’s regulatory jurisdiction, but is not licensed (such as an operator of “Terminal Air Navigation Services” or a car park operator within the boundary of an airport); and/or
  - the conduct in question falls outside the scope of the rules set by economic licences (such as price fixing).
- 1.11 When viewed from this perspective, the CAA’s concurrent powers provide it with additional tools that enable it to address specific issues arising within its jurisdiction that may fall outside the scope of its *ex ante* regulatory regime. As

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<sup>4</sup> The CAA’s approach to enforcement is set out in our Economic Licensing Enforcement Guidance. See: [www.caa.co.uk/CAP1234](http://www.caa.co.uk/CAP1234)



such, concurrency can be seen to “complete” the CAA’s toolkit by filling in what would otherwise be gaps in its ability to address and resolve matters that bring harm to consumers.

- 1.12 These benefits of the concurrency regime can be seen in concrete cases through the leniency applications, open letters to stakeholders reminding them of their obligations and multiple enquiries from stakeholders all of which lead to greater overall awareness of, and compliance with, the competition regime.

**Question 6: What impact, if any, does maintaining the skills and expertise to exercise the concurrent powers have in terms of costs to sector regulators?**

- 1.13 The CAA does not consider that maintaining such skills and experience has a significant impact on its cost base. It currently has a small number of colleagues dedicated to competition work, but, if necessary and appropriate, the CAA has the flexibility to expand the resources available for concurrent competition activities. Conversely, the CAA’s competition resources can and are deployed to help on sectoral regulation and wider policy issues.
- 1.14 In addition, as noted above, the concurrency arrangements enable the CAA to have access to shared resources that it would not necessarily be efficient for it to maintain solely for its own purposes given the very specific jurisdiction of the CAA’s economic regulatory functions.
- 1.15 As part of the concurrency regime, the CAA’s membership of the UKCN plays a valuable role in enabling the CAA to benefit from the expertise and experience of both the CMA and other sectoral regulators, thereby further improving the efficiency of the CAA’s overall activities.

## Chapter 2

## Concurrency within the competition regime

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**Question 7: Are existing mechanisms to coordinate between the CMA and sector regulators sufficient to ensure consistent outcomes and coherence in the competition regime?**

**Question 8: To what extent does the cooperation between the CMA and the sector regulators that results from the concurrency arrangements give rise to 8 (i) more effective competition law enforcement; and (ii) benefits that extend beyond more effective competition law enforcement?**

**Question 9: To what extent does concurrency enable the leveraging of the different expertise and experience of the CMA and sector regulators in competition law enforcement?**

**Question 12: To what extent does the sharing of concurrent powers result in efficiencies or inefficiencies in the use of public resources across the competition regime? For instance, would the resources currently employed across regulators for the purposes of concurrency be used more or less effectively if concentrated in a single body?**

- 2.1 The CAA considers that cooperation between the CMA and the sector regulators is a critical part of well-functioning concurrency arrangements. They allow sector regulators to receive help and support on competition policy issues from experts at the CMA and they allow the CMA to benefit from sectoral expertise available at sectoral regulators. In the CAA's experience, the existing mechanisms (including UKCN meetings at various levels and regular bilateral meetings at all levels) work well.
- 2.2 The concurrency regime also allows for more formal processes in the context of individual cases that are set out in an MOU and legislation. The CAA has less experience of making use of these arrangements, but considers that they are fit for purpose and would be sufficient to ensure consistent outcomes and coherence in the competition regime.
- 2.3 In practice, the CAA considers that the coordination and cooperation mechanisms between the CMA and sectoral regulators (including through UKCN) work well in ensuring a joined up and coherent approach and in enabling the CAA to benefit from the CMA's and other sectoral regulators' expertise. By the same token, the CAA considers that, in specific cases (as has been demonstrated by past case experience), the engagement, collaboration and dialogue that arises from these arrangements all have positive benefits.

- 2.4 Furthermore, the CAA's experience of working with the CMA in particular cases can enable both the CAA to benefit from maintaining the relevant skills, but also benefit the CMA in allowing it to lever on the sectoral expertise that the CAA can bring to a specific case. The CAA considers this to be the case whether the matter proceeds to:
- a formal decision (such as where the CAA has shared staff and decision maker with the CMA); or
  - informal action (such as the publication of a warning letter or letter to industry).
- 2.5 The combined approach of the CAA and CMA working together brings benefits to consumers that would be harder to realise absent these arrangements. Indeed, if such arrangements were not to exist, the CAA takes the view that it would be necessary to create them in order to address adequately some of the issues of which the CAA has experience.
- 2.6 The flexibility in informal mechanisms for dealing with particular issues that these arrangements bring also helps to promote the effectiveness of the overall regime. As such, the CAA considers it would be a mistake to seek to assess the effectiveness of the regime through a crude "counting" of formal cases: rather the regime should be assessed more qualitatively through considering the range of issues that appear to have been addressed without the need to escalate them to a formal investigation.
- 2.7 The CAA's competition function is embedded in its wider economic regulation and competition policy team. In the light of the above, it is clear that the benefits of sharing these powers are particularly strong for a regulator such as the CAA whose concurrent powers are relatively narrowly drawn.

**Question 10: To what extent does concurrency improve overall deterrence for breaching competition law both (i) across the economy and (ii) within the regulated sectors specifically?**

**Question 11: Does concurrency have an impact on the overall number of Competition Act 1998 investigations, market studies and/or market investigation references, compared to if these powers were reserved solely to the CMA?**

- 2.8 The CAA considers that the concurrency arrangements lead to increased competition oversight and (formal and informal) interventions in the aviation sector, for the reasons set out above in relation to question 1. The CAA's experience is that specific issues have been addressed that the CMA might not have been able to prioritise, given its need to manage its own resources to address issues coming to it from across the wider economy.

- 2.9 Furthermore, having multiple enforcers of competition law results in competition law being enforced to a greater extent (and creating a greater deterrent) than if competition law enforcement were reserved solely to the CMA. This is because:
- regulators will have different expertise, strategic priorities, and perspectives that they can bring to bear to identify and investigate specific issues;
  - competition enforcement can benefit from an increased set of resources, as the CMA deals with an increased and more complex set of cases following the UK's exit from the EU; and
  - concurrent competition law powers create a perception of targeted enforcement being available in regulated sectors.
- 2.10 Concurrency may also improve deterrence across the economy, to the extent that it frees up resources for the CMA to concentrate on non-regulated sectors of the economy and to the extent to which regulators help create new legal precedents in novel competition issues.
- 2.11 Overall, the CAA considers that having multiple enforcers help make it clear to business that compliance is important, as there are more channels through which competition law issues can come to light and sectoral regulators are able to identify and prioritise competition issues arising in their particular areas of the economy more readily than the necessarily more generalist approach of the CMA. As such, the concurrency regime significantly enhances deterrence.

**Question 13: What impact, if any, does having multiple enforcers of competition law have on the costs associated with ensuring compliance with competition law from the perspective of businesses?**

- 2.12 The CAA is unable to comment on this in detail as the CAA does not hold specific information on the costs of regulation or compliance for industry. However, the CAA makes the following observations:
- It would not be possible completely to separate competition compliance costs from other regulatory compliance costs as, for sectoral regulators, engagement with stakeholders on competition law compliance is likely to form part of wider conversations on regulatory compliance;
  - As a matter of principle, it is not clear why compliance costs would be increased by the having more than one potential enforcement agency. As the CMA's guidance has always made clear, a company's approach to achieving compliance should be focussed on compliance with competition law itself, and not be based on an "agency by agency" compliance approach; and

- It is not clear why costs of dealing with a particular case would be increased by concurrency as there is always a lead enforcing authority depending on jurisdiction.

2.13 Nonetheless, the CAA considers that concurrency has a positive impact on deterrence through the existence of multiple enforcers.

## Chapter 3

## Improvements to concurrency

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**Question 15: Are there improvements which could be made to how the sector regulators exercise their concurrent powers?**

**Question 16 Are there improvements which could be made to the framework in which the sector regulators exercise their concurrent powers e.g. resourcing or funding for the concurrent functions, or the scope of the concurrent jurisdictions?**

- 3.1 While in practice the CAA has not had issues with resourcing and funding, the CAA is concerned that funding of dedicated competition resourcing could be an issue for those regulators with more limited concurrent jurisdiction. So, it might be worth exploring what the right funding and resourcing model for these matters might be if they were to arise.
- 3.2 The CAA considered the scope of its concurrent jurisdiction and certain resourcing implications of changing it in its Response to the 2019 Government Consultation “Aviation 2050: the future of UK aviation”.<sup>5</sup> The CAA’s position remains that set out in that submission and may be summarised as follows:
- the CAA is not actively seeking change to its jurisdiction but could see some merit in broadening its jurisdiction in respect of its current areas of concurrency;
  - there are other options which could be explored in broadening our jurisdiction (including aligning consumer and competition jurisdictions but the CAA is not actively considering these at present).
- 3.3 However, any such change should be focussed on assisting:
- both the CAA and the CMA in prioritising and allocating enforcement action and/or market studies without facing risks of highly technical jurisdictional challenge; and
  - the CAA in using its competition powers to prioritise market studies over a wider range of competition issues.
- 3.4 A secondary aim might be to bring the definition of the CAA’s powers more in line with that of other sectoral regulators.

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<sup>5</sup> Available at

[https://publicapps.caa.co.uk/docs/33/CAP1813Response%20toGovernment%20Consultation%20Aviation%202050\\_Redacted.pdf](https://publicapps.caa.co.uk/docs/33/CAP1813Response%20toGovernment%20Consultation%20Aviation%202050_Redacted.pdf) (pages 16 to 18).

- 3.5 The CAA is not actively seeking to extend the CAA's competition functions to include airline services, although it can see both some merits and some drawbacks in doing so. These matters were discussed further in our response to the Government's 2019 consultation as noted above and the CAA is not aware of any significant concerns with how the CMA currently fulfils this function in relation to airlines. However, the CAA recognises that the broader aviation sector is continuing to change rapidly, particularly with respect to new technologies (such as space, remotely piloted aircraft, and new forms of airspace management). We can see potential advantages of expanding the remit of our competition powers in these areas where there may be transformational innovation in the future, particularly from a market studies perspective. The CAA appreciates the importance of cooperation with international competition authorities in most airline competition cases (where the CMA may be best suited to lead). This would not necessarily apply to some of the areas becoming more important in our sector.

**Question 17: Are there improvements which could be made to the way in which the CMA exercises its leadership role in the concurrency arrangements, including, for instance, its preparation of the annual concurrency report?**

**Question 18: Are there improvements which could be made to the arrangements for cooperation (including both those arrangements with a statutory basis and those set out in guidance and the memorandums of understanding)?**

**Question 19: Are there improvements which could be made to the arrangements for multilateral cooperation, particularly through the UKCN?**

- 3.6 As noted above, the CAA is of the view that the formal and informal arrangements currently in place work well and can adapt in a flexible way to meet both the sectoral regulators' and CMA's evolving needs.
- 3.7 The CAA welcomes the very significant work on cooperation that has already been undertaken, but recommends that a continued focus on these matters would be helpful, with particular emphasis on common training and facilitating secondments to lever on the skills knowledge and experience of the members of the UKCN as a whole.

## Other issues

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**Question 20: Are there other issues which the CMA has not identified and should consider when assessing the effectiveness of concurrency? If so, please explain further.**

3.8 The CAA has not identified issues other than those set out in the responses above.