

REVIEW OF THE COMPETITION CONCURRENCY ARRANGEMENTS

CALL FOR INPUTS - RESPONSE FROM OFGEM

19 OCTOBER 2023

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?

The concurrent Competition Act 1998 (**CA98**) enforcement powers have proven to be an effective tool for regulators in protecting consumers. Ofgem's CA98 investigations have resulted in positive outcomes for consumers that, in some instances, Ofgem could not have achieved using its energy sector-specific powers. Further, it is unlikely that the CMA would have taken forward those cases whereas the behaviour under investigation presented, in Ofgem's view, significant risks of harm to energy consumers.

In assessing whether enforcing competition law would be a more effective course than enforcing energy existing sector-specific regulation or setting new sector-specific rules, we typically consider factors such as:

- Whether specific sectoral rules prohibiting the behaviour in question exist in relation to all of the parties to the behaviour under consideration.¹ If energy sector-specific rules exist governing the conduct in question, other things being equal, we will typically enforce against those rules rather than the broader CA98 provisions.
- The relative probability of successful challenge were Ofgem to enforce sectoral rules compared to the corresponding probability of a successful enforcement of the CA98 prohibitions.
- The expected duration / complexity of a sectoral investigation compared to a CA98 investigation.
- The remedies and penalties that we may impose in the context of sectoral enforcement compared to enforcement of the CA98 prohibitions.
- The deterrent effect that sectoral enforcement would be likely to achieve compared to a CA98 case (taking into account the potential for follow-on claims).

Competition enforcement may create a more powerful deterrent effect than the enforcement of sectoral regulation, which would militate in favour of competition enforcement. Ofgem is always mindful of our statutory "primacy" duty, which requires us to consider whether it would be most appropriate to promote

¹ Ofgem's powers to enforce energy sector-specific regulation allow it to do so in relation to "regulated persons", a category that largely consists of energy licensees and businesses that, while engaged in activities that are prohibited without a licence, benefit from a statutory exemption from holding a licence.

competition and/or to enforce competition law before applying our sectoral powers².

Our choices ensure effective protection of energy consumers.

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

We agree that the ability for sector regulators to conduct market studies under the Enterprise Act 2002 may help to achieve their objectives. Market studies may help us to understand where there are potential competition issues in the sectors that we regulate, thoroughly investigate, and make recommendations to address these issues. The most obvious benefit of the market study powers is that they would allow Ofgem to obtain information from parties who do not hold a licence, such as third-party intermediaries (for example, price comparison websites).

While, in 2008, Ofgem conducted a study of the state of the British energy supply markets using its formal information gathering powers under the Enterprise Act 2002, for the purposes of assessing whether or not it is appropriate to refer the market to the Competition Commission for an investigation, in practice, we have tended to use our sectoral information-gathering powers to review the functioning of markets or aspects of markets because this allows greater flexibility around timeframes.

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

Yes. In November 2013, Ofgem agreed to work with the Office of Fair Trading and the CMA to produce an assessment of competition in the energy retail market, which we published on 27 March 2014. That assessment updated previous retail market reviews that we had conducted.

During the course of that assessment, we concluded that the energy market was going to change significantly over the following few years as a result of the rollout of smart meters, the government's electricity market reforms, and closer integration with other European energy markets. We decided that a market investigation by the CMA was the best way to protect competition (in light of these changes).³

We reached that conclusion because of the CMA's experience of competition in other sectors and because it has remedy powers that Ofgem does not have, including the ability to make structural reforms if needed. Any such reforms might

² As per section 3A(1B) and (1C) and section 25(4A) and (4B) of the Electricity Act 1989 and section 4AA(1B) and (1C) and section 28(4A) and (4B) of the Gas Act 1986

³ See our decision to make a market investigation reference in respect of the supply and wholesale acquisition of energy in Great Britain: <https://www.ofgem.gov.uk/publications/decision-make-market-investigation-reference-respect-supply-and-acquisition-energy-great-britain>

have helped to mitigate adverse market features arising from vertical integration, incumbency, or other market features.

The market investigation was completed in 2016, with the CMA's final report being published in June of that year.⁴

While the CMA is well placed to conduct a market investigation, Ofgem has extensive sector expertise that can be used to inform the terms of market investigation references. For example, in its 2014 market investigation reference, Ofgem was careful in framing the reference to focus on features (a) that would be likely to persist in the market, (b) in relation to which the reference would be unlikely to create undue risks for security of supply by harming investor confidence, (c) in relation to which progress on other regulation that is in consumers' interests would be unlikely to be slowed or prevented as a result of the reference, and (d) which might be remedied, in any case, by recent reforms that were yet to produce their full effects.

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?

While it is difficult to identify how the concurrency arrangements have produced direct positive impact on the way in which Ofgem conducts sectoral market reviews, good working relationships between regulators that have been reinforced by cooperation in the context of the concurrency arrangements are likely to have supported Ofgem's sectoral market reviews. For instance, Ofgem is reviewing non-domestic energy markets and, as a result of input from the CMA, we're more conscious of potential competition issues.

That said, it is worth noting that the protection and promotion of competition is an important part of Ofgem's day-to-day work outside of the competition law sphere, given our statutory duties. We also note that the effectiveness of the competitive domestic market for energy has been impacted by wider global events.

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?

Promoting competition for the benefit of consumers is a central part of Ofgem's objectives. We encourage domestic consumers and non-domestic customers to shop around and find the best tariff available and switch to that supplier to save money.

⁴ <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>

The concurrency arrangements have given Ofgem additional powers to address a wider range of issues and regulatory tools for tackling these issues. However, we do not consider that it has had an impact on how we carry out our wider regulatory functions.

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?

All of our investigators work on the range of Ofgem's enforcement action, including sectoral investigations and competition law enforcement. In the absence of a CA98 investigation, our investigators continue to work on other sectoral investigations. CA98 work has to be prioritised alongside all the other investigations and if the appropriate cases are not in our pipeline, it can mean that people with CA98 do not get the opportunity to work on competition casework.

At Ofgem, we have faced challenges maintaining a critical mass of competition expertise. We have found it difficult to recruit people with the appropriate CA98 skills and have recently made the decision that it would be better to go through a process of training our own staff. There is a real risk associated with this approach in that it can lead to the well-trained people leaving your organisation to find the work that interests them.

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

Regular bilateral and multilateral meetings at both working and senior levels between the CMA and sector regulators with concurrent competition powers are an effective means of sharing understanding of common issues in the concurrency regime and issues affecting individual regulators. Positive working relationships between the relevant personnel and an investment of time and effort by all parties support the existing coordination mechanisms. While some aspects of coordination are used only infrequently (for example, case allocation discussions), when called upon all parties approach discussions constructively, leading to positive outcomes.

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

Effective cooperation structures and working relationships between concurrent regulators has undoubtedly improved competition law enforcement by Ofgem and, probably, by other concurrent UK competition authorities. Support by the CMA, in particular (but not exclusively), has helped Ofgem to better apply investigatory tools. Sharing information about issues encountered by regulators

when investigating suspected breaches of competition law, and, how those issues have been addressed has better equipped Ofgem to investigate effectively and efficiently.

The conduct of Ofgem's CA98 cases has benefited from significant support from the CMA and other sector regulators, most notably through the secondment of economists and IT professionals, advice on common issues encountered during CA98 investigations and peer review. Equally, Ofgem has seconded staff to the CMA to contribute to the CMA's investigations, markets work and governance, supported the CMA with sectoral expertise on investigations in the energy sector, advised other sector regulators on issues that had arisen in Ofgem's CA98 investigations and, more generally, has fed reflections from competition investigations to the CMA and other concurrent regulators through bilateral contact and the UKCN.⁵

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?

This leveraging happens in at least 2 ways:

1. by personnel from one authority supporting an investigating authority. This support could take the form of a formal secondment or consultation and operates in both directions (with the CMA sharing investigatory expertise with regulators and regulators sharing industry knowledge and relationships), and their experience from CA98 investigations with the CMA and other sector regulators, and
2. by the sector regulators bringing their in-depth familiarity with their respective regulated markets to their own investigation of potential competition infringements.

Ofgem's competition law expertise and knowledge of energy markets allows it to better evaluate, at an early stage, whether particular behaviour may be likely to constitute a breach of a competition law prohibition.

The CMA's experience of dawn raids and access to file have been of particular help in Ofgem's CA98 investigations.

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?

The concurrency arrangements are likely to result in a broader usage of CA98 enforcement, meaning that a wider breadth of cases are opened and successfully concluded, creating a greater deterrent effect than would otherwise be the case.

⁵ Notable novel issues encountered by Ofgem during competition investigations have involved considerations around legal privilege, access to file and the interaction between competition law and insolvency law.

Equally, the ability for sector regulators to conduct market studies and make market investigation references is likely to have increased both the number and quality of each.

The concurrency regime opens up greater resources for CA98 investigations than would be the case if CA98 powers were reserved solely to the CMA.

Increasing competition enforcement activity will improve compliance with competition law in the regulated sectors, to the benefit of consumers in these important areas of the economy.

The 2014 market investigation reference made by Ofgem is an example of a regulator identifying potential barriers to effective competition through its regulation of the market. Ofgem sought the CMA's support in diagnosing and remedying those barriers. It seems unlikely that a market investigation reference would have been made had it not been for the concurrency regime, without it the resulting improvements to energy market regulation would not have taken place.

Ofgem regularly highlights that competition law is highly relevant to its functions; an example would be Ofgem's open letter in response to high balancing costs. (www.ofgem.gov.uk/publications/open-letter-responding-high-balancing-costs)

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?

As explained above, the concurrency regime opens up greater resources for CA98 investigations than would be the case if CA98 powers were reserved solely to the CMA. Those greater resources have had a positive impact on the number of investigations and market studies/investigation references being made.

Please also see comments regarding the 2014 market investigation reference in Answer 10 above.

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?

There are efficiencies that can be gained from having an investigation performed by regulators with concurrent powers. Efficiencies can come from having in-depth knowledge of the sector and being able to understand how the market works in practice. Concurrent regulators also have access to expert resources outwith their investigation team which they can access with fewer barriers and on a much quicker timeframe.

This is a sensible and pragmatic approach and Ofgem are happy to continue with the current arrangements with the CMA's support. As long as the support continues to be available from the CMA, the efficiencies will be gained. We have also found that where there are competition issues that may lend themselves more to specialist input from the CMA, we equally benefit from the CMA's expert input. We have benefitted in the past from having conversations with the CMA on market issues and appreciate the strong collaborative approach.

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?

[No response provided by Ofgem.]

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?

There are no obvious downsides to a sector regulator having concurrent powers to conduct market studies and make market investigation references.

Where we are acting in this domain, the parties will generally be familiar with us and engage with us. We generally have relationships with entities operating in these markets and a baseline understanding of the market, whereas the CMA would probably come to such circumstances cold and need to start from the ground up. In circumstances where we cannot use our regulatory powers, but can use our competition powers, we would already have done work before referring it to the CMA. We suspect the current approach also helps the CMA manage resources and helps the CMA to have a greater awareness of when issues are likely to arise.

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

Ofgem is committed to continuous improvement and is helped in doing so by cooperation arrangements such as the UKCN which allow regulators to share best practice and understand how competition law is applied by other regulators, including the CMA. Ofgem has also invested in effective competition enforcement by recruiting experienced competition lawyers and in training its enforcement officers.

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

The CMA and regulators should continue to explore opportunities for resource-sharing to help concurrent regulators, including the CMA, to access competition and sectoral expertise.

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?

The CMA provides excellent leadership of the concurrency arrangements, not least by organising constructive discussion in the context of UKCN and bilateral meetings, and by supporting sectoral regulators with individual investigations.

Secondments and knowledge sharing have been valuable for both Ofgem and the CMA in allowing each body to effectively regulate markets by promoting appropriate competition. Building upon that track record of constructive cooperation would be welcomed by Ofgem.

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)?

The CMA guidance on the CA98 is an important central reference for all sectoral regulators and it should continue to be regularly updated. We also benefit from regular bilateral and multilateral meetings at both working and senior levels.

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

UKCN meetings and bilateral contacts are valuable fora in which concurrent regulators can share experiences and solutions, improving both the effectiveness and efficacy of competition enforcement across the economy.

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.

We have not identified any other issues that the CMA should consider when assessing the effectiveness of concurrency.