

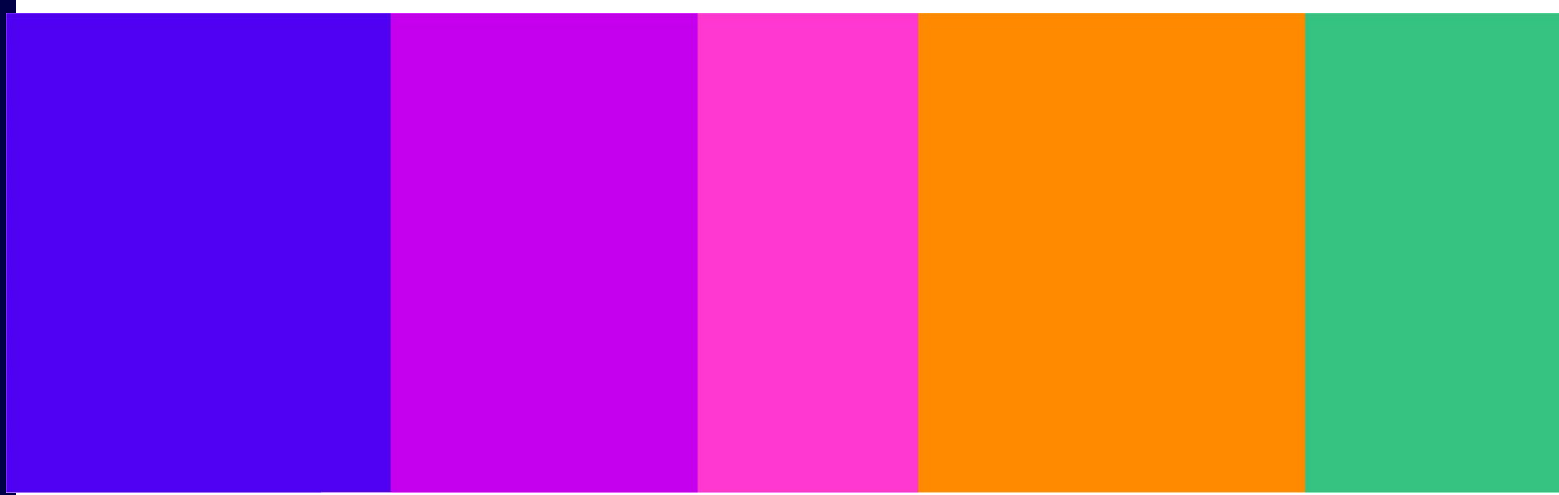


Review of the competition concurrency arrangements

Ofcom's response to the CMA's call for
inputs

Consultation response

Submitted 20 October 2023



Overview

Ofcom welcomes the opportunity to input to this review of the operation of the competition concurrency arrangements.

Ofcom's functions as a competition authority are an important part of the toolkit that we use to make sure consumers benefit from well-functioning, competitive communications markets. We use these functions both where we take formal enforcement action under the Competition Act, and as part of our real-time engagement with industry stakeholders. Further, because of the particular relevance competition law has within our market review activities, these functions play an important role more broadly in our regulatory work.

Our concurrent functions are intrinsically linked with our broader sectoral regulatory powers; having a range of powers allows us to adapt our approach depending on which tool we think will be most effective in addressing the harm in a particular case. We work more efficiently by continually developing our in-house skills and expertise across the exercise of all our functions, while the arrangements we have with our concurrent regulators allow us to draw on their knowledge and expertise where a case warrants it.

The knowledge that a pool of regulators is equipped to investigate potential anti-competitive conduct signifies to industry that any such conduct is more likely to be investigated than it would if these powers were vested in a single body. We think the current competition concurrency arrangement works well both in identifying which regulator is best placed for allocation of a case based on their expertise and administrative priorities at the time, and in supporting ongoing knowledge and expertise sharing during investigations.

The importance of Ofcom's competition enforcement activities

Ofcom has been a concurrent competition authority for the purposes of the Competition Act 1998 and Enterprise Act 2002 since its formation in 2003. In that time, we have opened several important investigations which have produced benefits for consumers.

This includes, in recent years, three infringement decisions and the completion of a market study. These enforcement decisions have delivered for consumers in the telecoms sectors and more broadly benefited citizens and contributed to UK competition regulation. For example:

- Our [Royal Mail decision](#), which we successfully defended at the Competition Appeal Tribunal and the Court of Appeal, makes a significant contribution to UK caselaw on abuse of dominance issues.
- Our [Sepura and Motorola decision](#) engages with some novel and important aspect of illegal information exchanges and is relied upon in recent CMA guidance.
- Most recently, our [cloud market study](#), which contains our decision to refer the market for public cloud infrastructure services to the CMA for a market investigation, contributes a considerable amount of evidence, analysis and thinking to application of competition policy in digital markets.

In those cases where we have not proceeded to make formal findings, we have also often been able to secure important outcomes for consumers. Ofcom will continue to actively consider using its concurrent powers to make impactful decisions which deliver for consumers and contribute to the wider competition policy landscape.

Ofcom's regulatory functions are intrinsically interlinked to the application of competition law

The exercise of our concurrent competition powers is strongly complementary to the exercise of our other regulatory levers and allows us to act more efficiently. We use the expertise and skills that we need to effectively exercise our concurrent competition powers in the course of exercising our regulatory functions, and vice versa. For example, the same lawyers, economists, policy experts and enforcement colleagues who work on market studies or Competition Act cases also work on sector-specific cases or policy initiatives. Maintaining the skills and expertise required to exercise our concurrent powers is therefore clearly beneficial to the exercise of our broader regulatory functions.

For example, cloud services and the dynamic in this market are not only relevant to Ofcom from a competition perspective, but are becoming increasingly relevant for our duties in relation to consumer protection, and network security and resilience in the communications sector. Our recent cloud market study and the insight colleagues across several disciplines gained from that into how these markets function will help us more effectively take regulatory decisions in future about whether they are working well for consumers in different sectors.

Also of particular note is our 2018 infringement decision about the prices, terms and conditions Royal Mail charged for access to wholesale letter delivery services. This investigation depended on a comprehensive understanding of the interactions between competition law and the ex-ante regulatory frameworks put in place by Ofcom. Ofcom's concurrent role enabled an efficient investigation that combined in-house regulatory expertise with competition law enforcement.

The importance of having a good understanding of the ex-ante regulatory framework and its interactions with competition law is particularly relevant to Ofcom's market review process, during which Ofcom assesses a range of markets in the telecoms sector to identify whether any provider holds a position of Significant Market Power (SMP) in a defined market. This is comparable to the assessment that is undertaken in an abuse of dominance investigation. Furthermore, where Ofcom identifies a position of SMP it considers whether ex-post competition law would be sufficient to address any risks to competition. Accordingly, Ofcom's ex-ante and ex-post functions are complementary.

An example of this is our five-yearly Wholesale Fixed Telecoms Market Review (WFTMR). The WFTMR has resulted in several ex-ante policy interventions which have facilitated the entry and expansion of rival networks which can compete with BT or Openreach. This market review is underpinned by a comprehensive and practical understanding of the application and effectiveness of competition law in the relevant market.

The power to conduct market studies under the Enterprise Act 2002 is another useful tool that supports Ofcom in meeting our broader regulatory objectives. It has not been a tool we have relied on extensively in the past, but its use is growing and as the lines between sectors continue to shift¹, market studies can add even greater value as a tool to investigate features of markets, including conduct, that are broader than what may be specifically covered under sector regulation powers. This ensures that sector regulators can apply their sector expertise more broadly than may otherwise be possible under their sectoral regulatory powers, where relevant markets do not appear to be functioning in the best interests of consumers and end users. This is particularly important

¹ As discussed in our [2022 Digital Markets Strategy](#) Ofcom, in support of its duties, expects to increasingly look to engage in competition issues in new digital markets which impact on our sector. Engagement in such markets requires us to look to our full set of competition powers.

where sectors, such as is the case in communications are characterised by rapid changes in technology and market dynamics.

The effect of Ofcom's concurrent powers

As a specialist sector-focused regulator, Ofcom has a unique regulatory relationship with the stakeholders in the industries we regulate. Given the nature of these sectors, many of these stakeholders hold positions of market strength which could, if misused, have detrimental impacts on competition and ultimately harm consumers.

Having the breadth and flexibility of both ex-ante regulatory tools and competition law powers at our disposal allows Ofcom to engage more effectively, using the most appropriate tool for the issue at hand. The nature of the interactions we have with regulated entities about their future plans and ongoing compliance spans specific regulatory issues as well as broader competition law considerations.

This enables us to identify a broader spectrum of potentially problematic conduct earlier than would otherwise be the case and, where appropriate, means we can and do intervene to seek to discourage such conduct from taking place rather than only seeking to remedy harm once it has arisen.

Additionally, the knowledge that Ofcom has a broad spectrum of levers at its disposal can help to disincentivise anti-competitive conduct. Our experience is that where companies understand our strategic priorities for the sectors we regulate (and hence where we are likely to focus our enforcement efforts if we see the need arise), they are more likely to seek to comply with both our sectoral rules and competition law. This complements the work of the CMA, which, as the competition authority with jurisdiction over the breadth of the whole economy, inevitably must prioritise its resources. We believe that in combination, this concurrent partnership between the CMA and sectoral regulators such as Ofcom, has the effect of increasing the overall capacity for competition law investigations to be pursued where they are most needed.

Ofcom's ability to minimise regulatory burdens across the two regimes

Competition Act investigations impose a significant regulatory burden on stakeholders and Ofcom will only undertake them when we consider they are justified by the circumstances at hand. In some cases, using ex-ante regulatory powers may be more appropriate, more efficient and impose a lower burden on industry. In our decisions, we have been able to balance those factors, helping to minimise the regulatory burdens that could result from stakeholders being subject to both sectoral rules and regulations and general competition (and consumer) law.

To decide which of our enforcement powers are the most appropriate to use in a given case, Ofcom takes into account a range of factors. This includes a consideration of the sometimes different aims of ex-post competition law and ex ante regulation in any given case. For example, ex ante sectoral regulation can have the objective of promoting competition, while ex post competition law can be about protecting competition. Another relevant factor may be the likely timeliness of the outcomes we are seeking to achieve, and whether a case raises novel points which there may be wider benefits of clarifying.

In our recent investigation into Sepura and Motorola, we decided that our concurrent competition law powers were the most appropriate to use to investigate the conduct in question. The use of these powers allowed us to more effectively address this specific instance of anticompetitive behaviour in one of Ofcom's regulated sectors.

Concurrency in practice

The existing concurrency arrangements enable us to agree efficiently with the CMA who is best placed to take an issue forward when it intersects with a sector we regulate. In some cases, the decision on who is best placed will rest on who has the necessary specialist expertise: for example, Ofcom is likely to have greater technical expertise in relation to its sectors and how they operate, while the CMA has more experience in investigating, say, multi-party horizontal cartels. Concurrency enables us each effectively to leverage the combined skills across our organisations, without unnecessary duplication.

We have built strong working relationships with the CMA and welcome the open and constructive way in which allocation of cases is agreed, as well as how effectively we share our expertise with the CMA and other concurrent regulators while working on cases. For example, we collaborated closely with the CMA in the elements of the Sepura and Motorola case that related to leniency, as this is an area in which the CMA primarily holds expertise. Through the various cooperation and coordination mechanisms that we have established between us (such as the UK Competition Network and Digital Regulation Cooperation Forum), as well as our positive bilateral relationships, we have benefitted from sharing experience both formally and informally and have each seconded colleagues to the other in cases where particular expertise is required.

The existing mechanisms to coordinate between sector regulators work well in ensuring we can leverage each other's expertise and, ultimately, to ensure coherence in the competition regime. We meet regularly, at various levels of seniority and these standing meetings give us the opportunity to surface and appropriately work through emerging issues. In addition, we engage regularly with the CMA's published guidance on various matters as well as those of other regulators when they are relevant to our respective remit.