

Review of the competition concurrency arrangements

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Preface

1. The regulated sectors are critical for people, businesses and the economy. From energy to insurance, broadband to trains, we all rely on essential services in these sectors in day-to-day life, and they form around 20% of household spending.
2. Effective competition in these sectors can drive firms to meet their customers' needs, charge lower prices, operate more efficiently, invest and innovate.
3. This report focusses on one element of the UK's sectoral competition regime: concurrency – the technical means by which the CMA and the sector regulators share competition powers. It does not set out to evaluate sector regulation more generally, but looks specifically at whether the CMA and sector regulators sharing competition powers has been working well.
4. Overall, we conclude that sharing powers under concurrency has some key advantages, but that there is room for improvement. In particular, sector regulators need to continue to maintain the knowledge and expertise to make effective use of their concurrent powers.
5. In the course of this review, we've also become concerned about too artificial a separation between competition concurrency and how we share responsibility with sector regulators for consumer protection. There is a critical interdependence between effective consumer protection and effective competition. We know that for retail markets to work well, rivalry between firms needs to be complemented by consumers empowered to choose between what's on offer. More than that, support for the investments needed in these sectors will depend on both businesses and consumers having confidence and being treated fairly in these markets.
6. In the regulated sectors, so critical to our daily lives and that form the backbone upon which sustainable growth depends, both competition and consumer protection need to be seen as parts of a wider framework, a framework in which the CMA and sector regulators should work together to make markets work better for people, businesses and the wider economy.
7. That's why, in this report, we've recommended that we dial-up our cooperation with sector regulators when looking at competition and consumer issues which are broader than illegal anticompetitive conduct. This is especially important in the context of the new Digital Markets, Competition and Consumers Act which will make major reforms to how consumer protection laws are enforced across the economy, both by the CMA and by sector regulators.
8. It is also important to place the findings of this report on the competition concurrency arrangements, in their wider context.
9. First, the concurrent powers are tools; they are a means to an end. However, what matters is that we realise the benefits of competition in the regulated sectors, not that the CMA or sector regulators use a particular tool. In some cases, setting regulatory rules, and setting the right frameworks for competition, can result in better outcomes than relying on enforcement action after the fact, and the deterrence effect

of competition law. That said, we would lose the benefits of the concurrency arrangements, if sector regulators lost their capacity to meaningfully exercise their competition law powers.

10. Second, concurrency is one part of a wider policy to promote competition in the regulated sectors. Experience has shown that it has been easier to promote competition in some sectors, such as in telecommunications, whereas in other sectors, such as rail, it has been harder to sustain. The experience in the retail energy market - where until recently firms could enter the market at low risks to themselves, but at considerable risk for the sector - has also brought home the need to ensure that frameworks for competition are set to be effective over the long-run.
11. Third, and more broadly, a perception has emerged in recent years that in several sectors, the UK's regulatory system has delivered poor outcomes for those who rely on it. Whether in relation to service quality, network resilience or customer satisfaction, in many instances there is a feeling that the UK could, and should, be doing better.
12. Doing better will also be vital to delivering on the government's growth mission; with the provision of high-quality, efficient infrastructure underpinning the performance of businesses in every part of the economy, reducing costs and increasing productivity.
13. Getting regulation right will be essential to achieving this. In many sectors, whether due to natural monopoly or market failure, normal competitive pressures do not apply. Regulators are key to filling the gap: setting and enforcing standards on services, enabling access to infrastructure, and mandating investments for the future. This does not mean that competition policy has no role to play in the regulated sectors but that, even where it is not the most significant factor, it needs to work alongside, and be supported by, regulation to deliver the best outcomes.
14. Concurrency is therefore one element in a broader system. Nevertheless, joined-up enforcement of competition law, and effective use of market studies and investigations in the regulated sectors have an important role to play.
15. Looking ahead, as we move into the next decade of concurrency, we therefore welcome the opportunity to work with sector regulators to take forward the recommendations in this report. Together, we can further strengthen the operation of the competition concurrency arrangements and develop new approaches to our shared consumer law powers under the reformed regime.

1. Introduction and overview









1. The regulated sectors are a key part of the economy. They provide services on which every household and business in the UK relies, including basic utilities like electricity, gas and water. They also provide the infrastructure which underpins how well the economy functions and grows, including communications networks, financial services, and transport. For consumers, the goods and services supplied in the regulated sectors – often essential – form a large part of household budgets, particularly of the least well-off and most vulnerable people in our society.
2. These sectors are distinct in having a dedicated sector regulator with broad powers to implement and enforce regulatory rules on the behaviour of businesses. In markets which have features of natural monopolies, or where there is little or no competition, regulatory rules can prevent the exploitation of monopoly power. In other markets, regulatory rules and competition can work together to shape the behaviour of firms, to produce the best outcomes for consumers. This includes regulatory rules specifically designed to create and promote competition.
3. Effective competition in these sectors lowers prices, increases quality, and acts as a spur to efficiency, innovation and investment. In turn, stronger competition in these sectors can contribute to stronger growth across the economy as whole. Each sector regulator has a statutory duty to promote competition. They share this responsibility with the CMA, which has a duty to promote competition across the whole economy.
4. A distinctive feature of the UK's regulatory framework is that a shared responsibility to promote competition is coupled with a set of shared powers to enforce the UK's competition law. The CMA and sector regulators also share powers to carry out market studies, and the sector regulators may refer markets to the CMA for a market investigation. The CMA and the sector regulators' cooperate on the exercise of these shared powers through the "concurrency" arrangements.
5. In 2014, a set of reforms was introduced by the government, the sector regulators and the CMA to further enhance cooperation and the CMA's leadership role in this area. The operation of these concurrency arrangements ten years on is the subject of this report, following a review carried out by the CMA. As set out in the call for inputs issued as part of the review, the review is not intended to make a general appraisal of the performance of UK's framework for sector regulation. The focus of this review has been the concurrent competition powers.

6. Chapter 2 explains the concurrency arrangements and provides examples of how the regulators have promoted competition and enforced competition law in their sectors.
7. Chapter 3 sets out our review of the concurrency arrangements and our findings and recommendations.
8. While not subject to the same concurrency arrangements as competition powers, Chapter 4 outlines the consumer enforcement powers available to the CMA and sector regulators. In light of changes in this area in the Digital Markets, Competition and Consumers Act (DMCC Act), this is a good time to take stock of how the CMA and sector regulators work together in this area and what more could be done to improve the effectiveness of consumer protection.

2. The regulated sectors

The sector regulators

9. Where this report refers to the ‘regulated sectors’ and ‘sector regulators’, it refers to certain sectors subject to an enhanced form of regulation carried out by a dedicated sector regulator, holding concurrent competition powers with the CMA.

	Sectors	Regulator
	<ul style="list-style-type: none"> The aviation sector in the UK 	Civil Aviation Authority (CAA)
	<ul style="list-style-type: none"> Financial services in the UK, and claims management in Great Britain. 	Financial Conduct Authority (FCA)
	<ul style="list-style-type: none"> The energy sector in Great Britain 	Gas and Electricity Markets Authority (referred to as Ofgem)
	<ul style="list-style-type: none"> The communications sectors in the UK including TV, radio and video on demand, fixed line telecoms, mobile, postal services and the airwaves over which wireless devices operate 	Office of Communications (Ofcom)
	<ul style="list-style-type: none"> Railways and railway services in the UK, and the strategic road network in England (motorways and major A-roads) 	Office of Rail and Road (ORR)
	<ul style="list-style-type: none"> Payment systems in the UK 	Payment Systems Regulator (PSR)
	<ul style="list-style-type: none"> Electricity, gas and water in Northern Ireland 	Northern Ireland Authority for Utility Regulation (The Northern Irish Utility Regulator)
	<ul style="list-style-type: none"> Water in England and Wales 	Water Services Regulation Authority (Ofwat)

10. Each of the sector regulators has a duty to promote competition in its respective sector, although each regulator's duty is formulated differently in its governing legislation.¹ The sector regulators also have duties in relation to consumer protection, and there are a range of other objectives which are particular to each regulator. By way of example, the ORR is the health and safety regulator for Britain's railway industry. Similarly, the CAA is responsible for aviation safety.² Included in Ofcom's wider responsibilities are the regulation of broadcasting standards and it has recently taken on responsibility for online safety regulation. The FCA's objectives include protecting and enhancing the integrity of the UK financial system and it has enforcement powers in respect of regulatory breaches and criminal offences, such as insider dealing and market manipulation.

Competition in the regulated sectors

11. The regulated sectors are made-up of a broad range of different markets, which vary considerably in terms of how competition works.
12. Some markets have the characteristics of natural monopolies, and it may be difficult to sustain meaningful competition in these markets.³ In these cases, regulation has a role in preventing poor outcomes which would otherwise result from monopoly power. A number of infrastructure-based networks are essentially monopolies. For example, the transmission and distribution of gas, electricity and water to domestic and business premises is largely carried out by monopoly suppliers. The railway network (including track and signalling) is a monopoly owned and operated by Network Rail. Royal Mail faces no significant competition in the delivery of single letters.⁴

¹ **CAA:** Section 1(2), Civil Aviation Act 2012; **FCA:** Section 1B(4), Financial Services and Markets Act 2000; **Ofgem:** Section 4AA(1B), Gas Act 1986, and Section 3A(1B), Electricity Act 1989; **Ofcom:** Section 3(1), Communications Act 2003; **ORR:** Section 4(1)(d), Railways Act 1993; **PSR:** Section 50, Financial Services (Banking Reform) Act 2013; **NIAUR:** Section 12(1), The Energy (Northern Ireland) Order 2003 and Section 6(2)(a), The Water and Sewerage Services (Northern Ireland) Order 2006; **Ofwat:** Section 2(2B), Water Industry Act 1991.

² In contrast, while Ofwat is the economic regulator for the water industry, the safety of drinking water is regulated by the Drinking Water Inspectorate.

³ However, even where provision of a service has features of natural monopoly, it can be possible to create competition 'for the market', with firms competing against each other to be awarded the contract for the provision of the service.

⁴ In some areas, the monopolies are national (eg the gas transmission network). In other areas, the monopoly provider is regional (eg the UK's regional water companies, or gas distribution companies).

13. Some markets involve a combination of high fixed-costs and significant network effects but where competition can still be harnessed to achieve better outcomes (including through the assistance of regulation). For instance, competition has been introduced at the network level for fixed telecoms. BT – through its subsidiary Openreach – is the only operator with a national footprint. Virgin Media O2 has the second largest fixed network in the UK, covering over 17m homes, and there are a number of other alternative network providers (or ‘altnets’) with varying degrees of coverage.⁵ In this case, introduction of competition at the network level has been facilitated by regulatory requirements on Openreach to provide access to competitors to its poles and ducts, so they can develop their own networks without having to replicate these parts of the infrastructure required.
14. Many markets in the regulated sectors have a range of competing suppliers. In the utilities and telecoms sectors, competition has been introduced at the retail level, by separating the networks and infrastructure needed to supply services from the businesses which sell these services to firms and households. For example, British Gas was demerged after privatisation into National Grid, which had responsibility for transmission, and Centrica which took responsibility for its supply business (and which continues to trade as British Gas). At the end of 2023, there were 21 active suppliers in the domestic gas and electricity retail market. British Gas, the former monopolist, had market shares of 28% and 20% in gas and electricity respectively, with a relatively new entrant, Octopus, as its largest competitor with 26% and 22% market shares in gas and electricity respectively.
15. Competition can also play an important role upstream of network infrastructure, including competition for building and maintaining infrastructure.⁶ There can also be opportunities for competition ‘for the market’, as is being used in the development of new offshore transmission.⁷
16. Each sector has a range of markets with different competitive structures. For example, a large proportion of the water sector regulated by Ofwat

⁵ See VMED O2 Holdings Limited Annual Bond Report and Consolidated Financial Statements 31 December 2023 [VMO2 IFRS Annual Bond Report - Q4 2023 \(virginmediao2.co.uk\)](https://www.virginmediao2.co.uk)

⁶ See for example the role for competition in the water sector, as described by Ofwat: [Competition stocktake report final](#)

⁷ [Offshore Electricity Transmission \(OFTO\) | Ofgem](#)

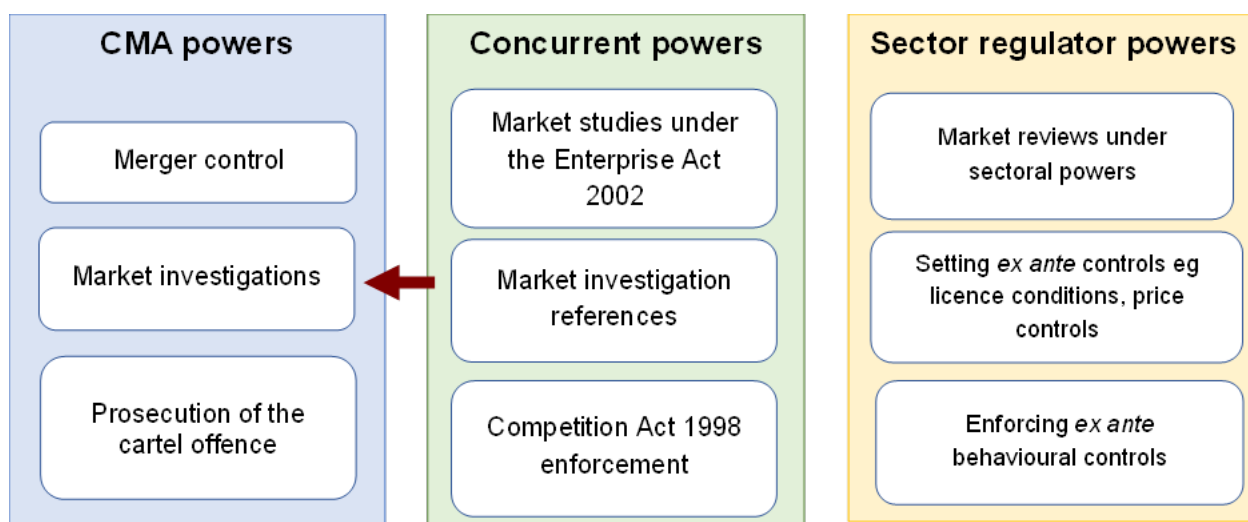
consists of regional monopolies, whereas markets in the financial services sector are largely open to competition.

How do sector regulators promote competition?

17. Sector regulators can promote competition through a variety of means, including:
 - **Regulating for competition:** Sector regulators can use regulatory rules to open up markets to competition or constrain the exercise of market power that forecloses competition. For example, they can place rules on network monopolists requiring them to provide access to their network to third parties on non-discriminatory terms, to enable competition in downstream markets. Regulatory rules may also improve consumers' ability and incentives to choose between competing offerings, driving stronger competition from the 'demand side' of the market.
 - **Considering competition as part of wider regulatory design:** Sector regulators will set rules pursuing other regulatory objectives e.g. safety, financial resilience or security of supply. Setting rules in the pursuit of these objectives can affect the functioning of competition. For example, rules may create barriers to entry or may narrow the parameters on which firms compete. Sector regulators can take into account the impact that their regulatory measures have on competition.
 - **Exercising concurrent powers:** Sector regulators can promote competition through the exercise of their 'concurrent powers'.

The concurrent powers

18. The concurrent powers in the regulated sectors are those shared between the CMA and the sector regulators shown in the following diagram (it does not include all CMA and sector regulators' functions but aims to illustrate the relative position of the concurrent powers):⁸



19. Neither the CMA nor the sector regulators have exclusive competition law enforcement responsibility. The sector regulators have powers to enforce competition law in the regulated sectors while the CMA can exercise those powers across the economy. The powers are *concurrent*, and the CMA and the sector regulators cooperate on the exercise of these powers through the concurrency arrangements.
20. In addition to sharing competition enforcement powers, the CMA and sector regulators also share concurrent powers to carry out market studies, and to refer markets to the CMA for a market investigation. Market studies are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. Market investigations are more detailed examinations by the CMA into whether there are features of markets which prevent, restrict or distort competition. If so, the CMA must decide what remedial action, if any, is appropriate, and can exercise powers to introduce remedies.

⁸ A summary of how the concurrent powers have in fact been exercised since 2014 is included as **Annex A**.

21. The Enterprise and Regulatory Reform Act 2013 introduced a series of reforms to the concurrency arrangements⁹ with the twin objectives of improving the use of the concurrent competition powers in the regulated sectors and the co-ordination between the different bodies with concurrent competition powers.
22. These reforms, which came into effect in 2014, introduced an enhanced set of concurrency arrangements, including mechanisms that seek to support the sharing of powers between the CMA and the sector regulators, ensure that the use of the powers is co-ordinated, and that the CMA and regulators benefit from each other's knowledge and expertise. These include legal requirements on the CMA and sector regulators to consult each other on the exercise of their concurrent powers. These legal requirements are more detailed in relation to Competition Act enforcement than they are in relation to market studies and market investigation references (MIRs).
23. In addition to legal requirements, the CMA and regulators have adopted a variety of institutional measures, including bilateral memoranda of understanding between the CMA and each regulator, setting expectations on how we will work together. The CMA and sector regulators have also established a multilateral network – called the UK Competition Network (UKCN) - for the CMA and sector regulators to discuss issues related to the exercise of their concurrent powers.

Choosing between regulation and concurrent powers

24. Sector regulators can often be presented with a choice as to whether to address competition concerns in a particular market through specific regulatory rules (such as rules on pricing or access), or instead, by relying on the obligations firms have under competition law, and the possibility of enforcement.
25. In contrast, exercising the concurrent powers to carry out a market study is not an alternative to regulation *per se*, and so does not present regulators with a choice between tools in the same way. Regulators can however face choices on whether to address potential issues themselves, or whether it would be more effective to refer issues to the CMA through a MIR.

⁹ Some of the reforms are set out in accompanying secondary legislation: see The Competition Act 1998 (Concurrency) Regulations 2014.

26. When the enhanced concurrency arrangements were introduced ten years ago, relying on the Competition Act prohibitions rather than setting or maintaining *ex ante* rules was considered to have certain advantages. These included that competition law would:
- encourage businesses in a sector to think in terms of the actual effects on the market of the practice concerned, rather than being directed by the 'black letter' of direct regulatory provisions;
 - be more flexible and more responsive to the changing economic realities, rather than an *ex ante* set of prescribed rules that are only periodically reviewed; and
 - create a body of competition law precedent applicable across these key sectors and more widely in the economy.
27. These statements remain true. However, we have more experience on the relative merits between relying on *ex post* enforcement of the Competition Act prohibitions and *ex ante* rules, particularly in markets where firms hold entrenched market power, such as digital markets.
28. For instance, the 2019 report of the Digital Competition Expert Panel (the 'Furman Review') concluded in respect of digital markets that: '*ex ante pro-competition tools [...] offer a faster, more co-operative and more certain basis for creating a successful competitive environment than ex post Competition Act enforcement*'.¹⁰
29. Similarly, the CMA's final report in its Online Platforms and Digital Advertising Market Study commented on certain advantages of a code of conduct over *ex post* enforcement tools to govern the conduct of SMS platforms. These advantages included:
- the ability to cover a much wider range of concerns holistically;
 - the ability to address concerns more rapidly and before they result in competitive harm;
 - a greater focus on remedies and remedy design; and
 - greater clarity for platforms and other market participants over what represents acceptable behaviour when interacting with users and competitors.¹¹

¹⁰ [Unlocking digital competition: Report from the Digital Competition Expert Panel](#), paragraph 3.114.

¹¹ [Online platforms and digital advertising market study final report](#), paragraph 82.

30. In selecting between competition law enforcement or regulation, the best approach will always depend on the facts of the particular issue to be addressed.

Case Study: Ofcom's *ex ante* regulation of fixed telecoms

Fixed telecoms markets underpin broadband, mobile and business connections. In 2021, Ofcom assessed BT to have market power in the provision of physical telecoms infrastructure. Ofcom's main competition concerns about BT's market power was that:

- a) BT could refuse access to its physical infrastructure;
- b) BT could provide access on less favourable terms compared to those obtained by its downstream business; and
- c) BT could set excessive wholesale charges for access to its physical infrastructure or engage in price squeeze behaviour.

Following that assessment, Ofcom considered whether the Competition Act prohibitions would be sufficient to address these competition concerns.

Ofcom decided that *ex ante* regulation would be more effective at promoting downstream competition, that it provided greater regulatory certainty which could in turn encourage investment in competing networks, and the enforcement would be more timely. Ofcom therefore required Openreach to supply access to its physical infrastructure, to allow other telecoms providers to deploy their own networks in its underground ducts and overhead poles. Ofcom also placed a control on the charges Openreach imposes for access to its physical infrastructure.

3. The CMA's review of the concurrency arrangements

31. 2024 marks ten years since the reforms under the Enterprise and Regulatory Reform Act 2013. Ten years of experience of operating under these enhanced concurrency arrangements is a good time to consider the objectives and performance of concurrency more broadly, and over a longer time frame than the CMA's annual concurrency reports.
32. So last year the CMA launched its review with a call for inputs, seeking views on the effectiveness of the concurrency arrangements. The CMA received 13 written responses, including from sector regulators, businesses in the regulated sectors and their representative bodies, as well as legal advisers. In early 2024, the CMA hosted a roundtable discussion to provide a more informal means for stakeholders to provide views.¹² Separately, the CMA has held meetings with individuals and legal and economic advisers to businesses in the regulated sectors with relevant experience and expertise and sector regulators to further explore the range of views relating to the concurrency arrangements.

The concurrency arrangements as a model

33. The majority of stakeholders who engaged in the CMA's review were supportive of the concurrency arrangements as a model.
34. However, a limited number of stakeholders considered that the model itself was less effective at promoting competition in the regulated sectors, compared to an alternative where Competition Act enforcement and MIRs were tools exclusively available to the CMA, as the economy-wide competition authority.
35. Such stakeholders said that sector regulators are less willing to exercise their concurrent powers, compared to an economy-wide competition authority, for a number of reasons.
 - **Other priorities:** Sector regulators' wider range of objectives can 'crowd-out' the promotion of competition.
 - **Relationships:** Regulators' relationships with firms in their sectors tend to be continuing, and they use these relationships in the delivery of their objectives in a variety of different areas. The value of

¹² Attendees at the roundtable included experienced practitioners (including legal and economic advisers and academics) and representatives of businesses within regulated sectors.

maintaining these relationships disincentivises exercising competition law enforcement powers.¹³

- **Familiarity:** Sector regulators and their staff tend to be less familiar with competition law enforcement as enforcement is less frequent. This disincentives use of these powers, given the additional resources it may require or greater uncertainty as to the outcome.
 - **Control:** In relation to the power to refer markets to the CMA for a market investigation, sector regulators may be disincentivised to actively hand responsibility to another body for important decisions about the regulation of the sector for which they are responsible.
 - **Deference:** The CMA is less willing to exercise the concurrent powers in the regulated sectors, given the presence of a sector regulator.
36. It was argued the combined effect of under-enforcement by sector regulators and under-enforcement by the CMA is that the concurrent powers are exercised less in the regulated sectors, compared to an alternative model, where the concurrent powers would be concentrated in an economy-wide competition authority.
37. It is difficult to assess with certainty whether there would be more frequent exercise of the concurrent powers in the regulated sectors under a model where competition powers were only available to the CMA, and the resources currently used by sector regulators to exercise the concurrent powers were allocated to the CMA. The CMA recognises some of the factors which may discourage a sector regulator from exercising its concurrent powers referred to above. There might, in effect, be certain 'economies of scale' were powers to be concentrated in a single body.
38. However, we consider that there are other stronger factors that point the other way. The CMA received feedback from stakeholders that highlighted that there are features of concurrency which support more and more effective enforcement in the regulated sectors:
- **Complementary skills and knowledge:** Where a sector is subject to extensive and often complex *ex ante* regulation, a sector regulator's knowledge and understanding of the markets therein and their operation can be key to facilitate effective enforcement. Compared to

¹³ A more limited set of stakeholders referred to examples where they had observed a distinct issue, where a sector regulator's decision on whether to exercise its concurrent powers was informed by taking into account the interests of the firms or sector involved.

the position of an economy-wide authority which would start from a lower base. In turn, the CMA's in-depth competition enforcement experience across the economy can support enforcement by sector regulators.

- **Additional capacity and coverage in the competition regime:** The sector regulators having concurrent powers introduced additional capacity and resource into the competition regime as a whole. The CMA and sector regulators have different strategic priorities and are likely to prioritise using their concurrent powers in different areas. This may lead to the usage of the concurrent powers – both antitrust enforcement and markets powers - across wider areas of the economy, compared to the powers being concentrated in the hands of a national competition authority as a single body.
- **Increase in enforcement:** Every year the CMA publishes an Annual Concurrency Report which details the operation of the concurrency arrangements. This highlights the work that the CMA and sector regulators undertake in the regulated sectors, both in the exercise of their Competition Act and their markets powers. If the number of infringement decisions is used as the metric of performance, there has been an improvement at the aggregate level since the enhanced arrangements were introduced. For example, in the ten years leading up to the introduction of the enhanced concurrency arrangements, sector regulators had made two Competition Act infringement decisions whereas over the last ten years, sector regulators have made eight infringement decisions. With respect to the concurrent markets powers, the sector regulators made two MIRs in the ten years to 2011, whereas they have made three MIRs over the last ten years.
- **Enabling CMA enforcement:** The CMA has launched cases in regulated sectors in the knowledge that it is able to do so in cooperation with the relevant sector regulators, which share the same powers. If the CMA were the only authority with competition powers, it would still need to prioritise the exercise of these powers in a context in which the regulated sectors were subject to regulation by sector regulators, but without necessarily benefiting from the same degree of cooperation under the concurrency arrangements. Furthermore, the sector regulators sometimes undertake competition enforcement that the CMA would be unlikely to prioritise. That is typically because such cases support a strategic objective for the sector regulators but not for the CMA. Thus, if the CMA were the only authority with competition powers, it is likely that fewer competition cases would be pursued in

the regulated sectors overall. Aside from the immediate benefits of such cases, they may also make useful contributions to the body of competition law precedent which would not be achieved, absent concurrency.

- **Detection and case selection:** Sector regulators are more likely to hold the skills and expertise to identify candidate cases when they hold concurrent powers, given their proximity to the sector and the information they hold as the regulator and the fact that they work within the sectors, with the firms, day in, day out. Furthermore, sector regulators faced with certain competition issues have a choice between investigating the conduct as a suspected breach of the antitrust prohibitions and remedying the competition concerns using regulatory tools. Sector regulators having Competition Act enforcement powers supports more effective decisions in these situations, compared to a situation where the antitrust enforcement decision would fall only to an economy-wide competition authority.

39. On balance therefore we consider that there would be less rather than more enforcement if the CMA alone exercised competition powers.

40. However, focussing unduly on whether the concurrency arrangements produce more or less enforcement in aggregate (including relying on the number of enforcement cases as a yardstick for the operation of the concurrency arrangements) risks missing important wider benefits that arise under the concurrency arrangements:

- **Deterrence:** Sector regulators have a close understanding of the behaviour of firms in their sectors and the markets in which they operate. Where sector regulators hold Competition Act enforcement powers, the increased likelihood that illegal conduct will be detected can increase the deterrent effect.

Case Study: FCA use of advisory and on notice letters

The FCA's pre-existing relationships as a sector regulator may increase its ability to engage effectively with firms and to achieve changes in firm behaviour. An example of this is the use that the FCA makes of advisory letters, which seek to educate and build awareness of competition law compliance, and 'on notice' letters, which request specific action to address competition concerns. Since obtaining concurrent powers in 2015, the FCA has issued 59 on notice letters, and 44 advisory letters to a range of financial services firms. The FCA has reported that many of these letters have resulted in positive changes to firm behaviour, which have been achieved faster than if a formal investigation had been undertaken. UK Finance, a trade body for the banking and finance industry, also reported that the threat of enforcement action by the FCA can act as a deterrent, and referred to the FCA's use of 'on notice' letters.

- **Competition skills and culture:** Individuals within sector regulators with responsibility for their concurrent powers will tend to have competition policy experience, whether through the discipline of competition law or competition economics. In addition to their skills and expertise, these individuals can contribute to a pro-competitive internal culture within sector regulators, which can support the sector regulators in their wider work, including the design of pro-competitive regulation. Indeed, certain types of *ex ante* regulation involves similar economic analysis and concepts as Competition Act enforcement.

Case Study: Ofcom Significant Market Power assessments

Ofcom assesses certain markets in the telecoms sector to identify whether any provider holds a position of Significant Market Power (SMP) in a defined market. Ofcom's experience is that this assessment is comparable to the assessment that is undertaken in an abuse of dominance investigation for whether a business has a position of dominance. Skills and expertise needed to run effective Competition Act investigations into abuse of dominance may therefore be utilised in a regulatory context, and vice versa.

- **Flexibility:** In certain cases, the concurrent powers can be more flexibly applied than a sector regulator's regulatory powers. An example of this arises in relation to the sector regulators' exercise of their concurrent market functions. Information can be acquired through a market study from a wider range of actors than may be possible under regulatory market reviews. Another example arises in relation to competition enforcement since the Competition Act prohibitions are

broadly defined, and can focus on the effects of anticompetitive conduct, rather than its ‘form’. The flexibility of the concurrent powers mean they can help sector regulators address harms to competition where they may not have regulatory powers, or where establishing new *ex ante* controls would not be appropriate, including where the conduct in question represents cartel-conduct which would not necessarily be captured by regulatory rules. ¹⁴

Case Study: ORR’s use of market studies

Since 2019, ORR has opened three market studies under the Enterprise Act 2002. These include a market study into automatic ticket gates launched in 2018, a market study into railway signalling launched in 2020, and a market study into railway station catering launched in 2023.

The market study power has served as a flexible tool, which has enabled the ORR to address issues in rail markets that go beyond the traditional reach of ex-ante economic regulation. For example, in 2024 ORR concluded the market study into catering at railway stations and made a series of recommendations to promote competition, including recommendations on how station operators lease catering outlets.

41. Some stakeholders raised concern about the consistency in the exercise of the concurrent powers between the CMA and the sector regulators. In particular that sector regulators’ approach to procedural matters in Competition Act enforcement was not always aligned with the approach that would be taken by the CMA.
42. In any system where multiple bodies are responsible for enforcing the same set of rules, there is an increased risk of inconsistency on the process used to apply the rules, and on the application of the rules to the relevant facts. However, there are a number of features of the concurrency arrangements which mitigate the risk of inconsistency:
 - The CMA and sector regulators are legally bound to follow the same procedural rules, set out in secondary legislation. ¹⁵

¹⁴ The sector regulators have powers to take civil enforcement against cartels, under the Competition Act 1998. In contrast to the CMA, sector regulators do not have powers to prosecute the criminal cartel offence.

¹⁵ Furthermore, the CMA is required by law to produce guidance on the calculation of financial penalties for infringements of the Competition Act prohibitions, guidance on the calculation of administrative penalties for breaches of investigatory obligations and guidance as to the circumstances in which it may be appropriate to accept commitments. The sector regulators are required by law to have the same regard to this guidance as the CMA.

- Although each sector regulator has its own procedural guidance, there is broad alignment between the CMA's procedural guidance and the procedural guidance adopted by each of the sector regulators.
- In concurrent cases, sector regulators and the CMA are required to share with the relevant concurrent authorities drafts of key case documents (such as statements of objections, commitments decisions and infringement decisions) in advance of their being issued, to comment on the investigating authority's proposed decision. These formal requirements to share documents are accompanied by wider information sharing on active casework, which is an opportunity to identify and consider potential inconsistencies.
- If the CMA considers that the sector regulators are proposing to take a decision or action that is inconsistent with the relevant Competition Act guidance or case law, it can raise, and indeed has on several occasions raised, that issue with the sector regulator in order to ensure a consistent approach.
- If the CMA continued to have concerns, it has powers to require that a case being investigated by a sector regulator be transferred to the CMA, so long as no statement of objections has been issued.¹⁶
- Decisions finding infringements of the Competition Act are subject to appeals determined on the merits by the Competition Appeal Tribunal.

Conclusions on concurrency as a model

43. There are clearly factors which may discourage sector regulators from exercising concurrent powers, or incentivise them to rely on their regulatory tools. However, on balance, the CMA thinks that concurrency as a model is likely to mean more enforcement in the regulated sectors compared to a model where only the CMA could exercise competition powers.
44. Furthermore, in our view, the level of enforcement should not be the sole metric for assessing the effectiveness of the concurrency arrangements as it fails to consider exercising the concurrent powers relative to alternative courses of action. In other words, it assumes that the exercise of concurrent powers is generally the right response to competition issues

¹⁶ These powers have to date not been used and any potential inconsistencies have been resolved through discussions with the relevant sector regulator.

in the regulated sectors, such that more cases would reflect a more effective regime. It is, in any event, difficult to define an optimum number of cases against which concurrency can be assessed. In addition, it does not capture any of the wider impacts of the concurrency arrangements both on the sector regulators' and the CMA's ability to promote competition in the regulated sectors that we have identified above.

45. The feedback received in this review and the factors outlined above therefore do not indicate that competition in the regulated sectors would be promoted more effectively where the exercise of these powers fell solely to the CMA.

Scope to improve the concurrency arrangements

46. Separate to the question of whether concurrency is the right underlying model, our review examined whether there are improvements which could be made to the current concurrency arrangements. The CMA has identified three key areas where there is scope for improvement and action which might be taken to address these.

- **Area 1:** The sector regulators' capacity for the exercise of their concurrent powers.
- **Area 2:** The priority sector regulators give to Competition Act enforcement.
- **Area 3:** Cooperation between sector regulators and the CMA on markets work.

Area 1: The sector regulators' capacity for the exercise of their Competition Act powers

47. Some sector regulators, particularly those which use their concurrent powers less frequently, or where there is less overlap between the expertise required for Competition Act enforcement and the expertise used in their regulatory functions, struggle to maintain a team of experts in competition law and economics to support the effective exercise of the concurrent competition powers. Often, they face challenges in recruiting and retaining the expertise needed to carry out Competition Act enforcement, which can involve long and complex investigations, followed in some cases by resource intensive appeals.
48. In broad terms, the FCA and Ofcom have a relatively large number of staff with the skills and expertise which could be deployed in the exercise of

the concurrent powers. The other six sector regulators are comparatively less well resourced, although there is significant variation between them, and over time. The challenge is therefore not necessarily limited to those smaller regulators, or those which take less frequent enforcement action.

Case Study: Ofgem

Ofgem, despite having around 1500 staff, and despite having exercised its concurrent powers relatively frequently compared to other sector regulators, still describes the resourcing challenge it faces:

‘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 [Competition Act] 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.’

49. Constraints on the availability of expertise and experience for Competition Act enforcement can make enforcement even more resource intensive; a sector regulator would have to re-acquaint itself with the enforcement process and train its staff before embarking on such work. Where sector regulators have to supplement their inhouse expertise with external advice (for instance, from specialist competition lawyers), this can be expensive. In turn, this can reduce the likelihood that a sector regulator will prioritise enforcement. In turn, this can result in a lower overall frequency of enforcement, which can further contribute to the resourcing challenge sector regulators can face, in a form of ‘reinforcing cycle’.

Actions to address

Strengthening cooperation and secondments

50. The provision of case support and the sharing of know-how and expertise, both of which are features of the concurrency arrangements, have helped address some of the resourcing challenges some regulators face. Secondments have also played an important role in sharing and building expertise across the CMA and the sector regulators. To date, there have

been numerous examples of secondments both from the sector regulators to the CMA and from the CMA to the sector regulators (for example, the annual concurrency report for the financial year 2023-2024 records that there were approximately 20 active secondments between the sector regulators and the CMA)¹⁷

51. As part of this review, the CMA has considered the merits of strengthening cooperation by moving to a system where instead of each sector regulator maintaining their own expertise to exercise the concurrent powers, a central pool of resource could be maintained, contributed to by each sector regulator, which could be drawn from by sector regulators as-and-when they exercise their concurrent powers.
52. However, the CMA's assessment is that the use of secondments agreed on an *ad hoc* basis involves relatively low administration costs, is flexible and easy to arrange, as shown by the number of secondments in recent years. By contrast, maintaining a central pool of resource could be costly to administer and would require a relatively large central pool to be maintained to be effective. It also might result in diluting the level of sectoral expertise deployed within a particular case, and the level of competition expertise a regulator maintains to develop a pipeline of cases.
53. Secondments between sector regulators (rather than to or from the CMA) may be particularly helpful where a sector regulator employs individuals with relevant Competition Act expertise, but currently has no active cases. A secondment in these circumstances may help the 'home' regulator maintain its competition expertise and retain the individual concerned for use in future cases. The CMA therefore recommends that the sector regulators be more proactive in considering the potential to second staff to one another.
54. Given the value of secondments, not just to plug gaps in resources, but also to build and maintain skills for the staff in question and for the authority that has seconded them, the CMA proposes to continue to support their use and to take steps to encourage greater secondments between sector regulators. For example, the CMA proposes to adopt secondments as a standing item at the UKCN Senior Directors' meeting, so that each sector regulator can highlight both their resource needs, and where they have staff available for secondment.

¹⁷ The CMA reports regularly in its Annual Concurrency report on the secondments that have taken place during the course of the relevant reporting period.

The use of resource within regulators

55. Regulators organise their resources for their concurrent functions differently. Ofgem, Ofcom and Ofwat have enforcement teams with responsibilities that include both Competition Act enforcement, and other kinds of sectoral enforcement.¹⁸ In contrast, the FCA and the ORR have specialised competition teams, which have a specific focus on competition rather than other types of sectoral enforcement. The FCA's team is relatively large compared to that of other sector regulators, whereas the ORR's team is relatively small, with staff deployed flexibly across the organisation.
56. The ORR told us that having a specialised competition team, even if relatively small, can help attract and retain staff who have specific expertise relevant to competition matters. Where the ORR's resource requirement for competition work expands, it can draw in additional resource from around the organisation to work alongside competition staff. For instance, the ORR has opened three market studies under the Enterprise Act 2002 (EA02) in the past 5 years. Having a central competition team may also provide a clear destination for other staff in the wider regulator to flag potential competition issues, and a team with specific responsibility for competition can provide a focus for the development of a pipeline of potential cases.
57. While the sector regulators will necessarily need to adopt different models for organising their concurrent functions, we consider that they may nonetheless learn from one another on how their duties to promote competition in their sectors are reflected in their internal organisation, and how staff with competition expertise work with other parts of each sector regulator.

Jurisdiction of the CAA

58. Each of the regulators' jurisdictions to exercise the concurrent powers is defined in statute, with some regulators' jurisdictions covering a much wider range of economic activities than others. Where the sector regulator's jurisdiction covers a narrow range of economic activities, this will contribute to a lower frequency of concurrent powers being exercised.

¹⁸ Markets work in these regulators – whether market studies under the EA02, or other types of review incorporating an assessment of competition - may be carried out by other teams within that sector regulator.

59. In the case of the CAA, its concurrent jurisdiction is limited to air traffic control services as defined in the Transport Act 2000 and airport operation services as defined in the Civil Aviation Act 2012. Its jurisdiction does not extend to air transport services, although it is the safety regulator for air transport, it can enforce consumer law as it applies to air travel, and it also enforces specific laws covering air passenger rights.¹⁹
60. Extending the CAA's concurrent jurisdiction to cover air transport services and new forms of aviation (including drones, remotely piloted aircraft and the space sector) would bring alignment between the CAA's competition and consumer protection responsibilities, as well as its wider regulatory responsibilities.²⁰ Extending the CAA's jurisdiction in this way would increase the scope for the CAA to exercise its concurrent powers, and help it to maintain a body of staff with the requisite competition expertise.
61. Whether to extend the CAA's concurrent jurisdiction is a question for government, which can consider all the relevant factors. However, the CMA's view²¹ is that extending the CAA's jurisdiction as proposed above, coupled with an increase in its resources and improvements to how the CAA's existing jurisdiction is defined,²² would assist the CAA in carrying out its role within the concurrency arrangements, as it would help support the CAA to maintain a body of competition expertise to support its functions.

Recommendations

¹⁹ Such as passengers' rights when flights are delayed or cancelled, or when passengers are downgraded or denied boarding.

²⁰ The CMA notes that other sector regulators' jurisdictions to exercise their concurrent powers are not necessarily limited to those areas where they have economic regulation functions.

²¹ In its response to the government's Green Paper on its new aviation strategy, 'Aviation 2050 – the future of UK Aviation in June 2019 (see https://assets.publishing.service.gov.uk/media/5d259effed915d69895f318d/CMA_response_to_Aviation_2050.pdf), the CMA considered that there would not be a material benefit in extending the CAA's concurrent competition powers to the airline sector unless there was a commensurate increase in the resourcing of the CAA's competition teams.

²² The CAA has also stated that its existing jurisdiction is tightly defined, and that it would be helpful for it to be more generically defined, covering all issues that are connected to the provision of airport operations and air traffic control services. For instance, its jurisdiction in relation to airport operation services is limited to only certain airport car parks, namely, those forming part of the terminal, or where there is pedestrian access to the terminal. See the CAA's Response to the 2019 Government Consultation "Aviation 2050: the future of UK aviation" available at: <https://www.caa.co.uk/publication/download/17392>.

- **Sector regulators should consider the potential of inter-regulator secondments to support the exercise of their concurrent powers.**
- **Secondments should be adopted as a standing item at quarterly meetings of the UKCN senior directors.**
- **Sector regulators may benefit from considering each other's approach to the internal organisation of staff with principal responsibility for exercising the concurrent powers.**
- **Consideration should be given by government to widening the CAA's jurisdiction so that it is aligned with its wider regulatory responsibilities.**

Area 2: The priority given to Competition Act enforcement

62. Certain regulators have undertaken Competition Act enforcement cases relatively infrequently, and one regulator has not brought a case in the past ten years.²³ Two sector regulators have not made a decision finding an infringement of the Competition Act prohibitions in the past ten years, although they have taken commitments decisions during that period.²⁴
63. This report has already noted a number of factors which mean sector regulators may not pursue Competition Act enforcement over alternative uses of their limited resources. For instance, there may be regulatory alternatives which will be quicker and more effective than Competition Act enforcement, which can take several years and then involve resource intensive appeals. Competition Act enforcement sits alongside a wide range of other types of activity a regulator is tasked with, in pursuit of their other objectives. It is rational for sector regulators to take the factors described into account as part of their prioritisation.
64. However, there are risks that Competition Act enforcement is given a lower priority within sector regulators for other reasons. These include:
- A lack of familiarity with Competition Act enforcement at senior levels in regulators.

²³ See Annex 1: The Northern Irish Utility Regulator has not undertaken any competition enforcement under the Competition Act 1998 in the past ten years.

²⁴ See Annex 1. The ORR and Ofwat have between them carried out three competition enforcement cases, all of which have ended in a decision to accept commitments under the Competition Act 1998.

- The relatively diffuse wider impacts of Competition Act enforcement, including the contribution of enforcement to overall deterrence.
- The discretionary nature of Competition Act enforcement, in the context of acute pressure on resource.

Familiarity

65. The senior leadership of a sector regulator will naturally tend to reflect its wider range of objectives, and where the promotion of competition is a smaller part of the overall set of strategic priorities, this is likely to be reflected in the competition policy experience at a senior level.
66. A repeated theme in the feedback that we received was that the value and weight that a sector regulator's senior leadership places on the promotion of competition and the use of competition enforcement as a tool has a significant bearing on how proactively a regulator invests in competition expertise and the priority the sector regulator gives to pursuing concurrent cases.
67. Some sector regulators may have a lower proportion of individuals at a senior leadership level with experience of Competition Act enforcement.²⁵ The impact this has on the prioritisation of Competition Act enforcement is not straightforward. Individuals without backgrounds in competition policy may be strong advocates for the promotion of competition in the sector concerned, and the use of the concurrent powers to achieve this.²⁶ However, a number of stakeholders providing feedback through this review have referred to the role played by staff with backgrounds in competition policy in promoting the potential advantages of Competition Act enforcement within sector regulators. In contrast, where individuals in senior decision-making roles within regulators have less familiarity with Competition Act enforcement, there can be greater uncertainty about its potential benefits, and a lack of confidence in prioritising enforcement over alternative uses of limited resources.

²⁵ In the course of this review, a number of stakeholders referred to individuals as having a 'competition background'; a term which was used loosely to refer to individuals with professional backgrounds in competition law, professional or academic competition economics, or working on competition focussed casework at a competition authority or a regulator.

²⁶ Some of the strongest advocates for competition may be individuals with industry experience who have felt the positive effects of competition in the running of a business.

Diffuse impacts of Competition Act enforcement

68. A lack of familiarity with Competition Act enforcement can be compounded by the fact that the overall value of enforcement can be relatively diffuse, and potentially lack the salience of regulatory alternatives. Competition Act enforcement aims to bring harmful conduct to an end.²⁷ The value of that impact may be relatively certain and quantifiable. However, Competition Act enforcement also contributes to wider deterrence from infringing the Competition Act prohibitions, not limited to the sector in question.

Pressures on resource

69. Sector regulators can face significant pressure on wider uses of their resource, where they need to focus their short-term efforts on particular issues. For example, Ofgem needed to deploy significant resource to address the consequences of the rapid price increases in wholesale energy markets. Where sector regulators face acute pressure on their short-term use of resource, they may find it harder to justify the prioritisation of Competition Act enforcement, particularly where the regulatory tools may provide quicker or more effective outcomes and the benefits of enforcement may be less certain and accrue over a longer time period.

Actions to address

Finding strong candidate cases for enforcement

70. Whether or not Competition Act enforcement is prioritised within sector regulators will depend on how strong the potential cases are in their 'pipelines'. The CMA runs a leniency programme and a cartels hotline that provides an important source of cases for the sector regulators. However, it is also important that the regulators develop their own strong pipeline of cases. This requires investment, including in encouraging complaints from businesses or consumer groups, training staff across the regulator to identify potential issues, and making best use of the information held through their role as a regulator.

Case Study: FCA work to develop its pipeline

²⁷ Either because the conduct in question is found to have infringed the Competition Act prohibition, in which case the parties will be ordered to cease the infringing conduct or modify it so that it no longer infringes the Competition Act prohibition, or because the parties have changed their conduct in response to the investigation, including through the formal process of offering commitments.

The FCA has opened an increasing number of investigations in recent years, reflecting a renewed focus on using its formal powers to investigate, deter and punish suspected CA98 infringements.

The FCA has also sought to improve its pipeline of potential cases, particularly through devoting additional resources to its internal engagement efforts, considering how it might make better use of data, and in the running of its open cases. For example, over the past 18 months, the FCA has:

- Raised awareness of the Competition Act across the organisation to coincide with the FCA's 10-year anniversary of its competition remit and through more bespoke training for and/or engagement with specific teams.
- Incorporated practical Competition Act case studies into the induction program for colleagues working in supervisory and regulatory policy areas.
- Emphasised Competition Act considerations in engagement with supervisory areas.
- Considered how data the FCA already collects may be more informative in identifying potential cases.

71. It is key that sector regulators share best practice on how they make effective use of their position as regulators to identify strong potential cases for the exercise of their Competition Act enforcement powers. The FCA's process may not be appropriate for all sector regulators, but serves as an example of how developing internal processes can make a significant difference.
72. The CMA will convene a workshop through the UKCN to ensure that best practice is shared across between the CMA and the sector regulators.

Stronger collective understanding of the impacts of enforcement

73. The wider benefits of Competition Act enforcement via its contribution to deterrence can be less transparent and immediate. Where a sector regulator or the CMA has evidence on the contribution a case has made to general deterrence, articulating this impact to other sector regulators, including through the UKCN may help inform future prioritisation decisions across sector regulators as a whole. There may also be opportunities for the CMA and the sector regulators to contribute jointly to efforts to research the impact of different types of Competition Act enforcement on wider deterrence.

Advocacy for making best use of concurrent powers

74. Where a sector regulator, including at the senior leadership level, is less familiar with competition enforcement, there can be an important role for advocacy, both by staff within the sector regulator and by the CMA exercising its leadership role within the concurrency arrangements.
75. The CMA will continue its efforts to advocate for sector regulators to make the most effective use of their concurrent powers, including the wider benefits of maintaining the skills and expertise to take enforcement in future cases. Advocacy can also involve the CMA and the sector regulators horizon scanning to share approaches to common or cross-cutting issues.²⁸
76. On a practical level, as well as expertise, the CMA can sometimes support sector regulators through providing resource. There may also be circumstances where the CMA may, where it fits within our prioritisation principles, undertake the case itself with the provision of resource and sector expertise by the relevant sector regulator.
77. Advocacy by the CMA for the promotion of competition in the regulated sectors where this can improve outcomes, and the exercise of the concurrent powers to support this objective, does not take place in a vacuum. The CMA has a single statutory duty: *'to promote competition, both within and outside the United Kingdom, for the benefit of consumers'*. In contrast, sector regulators have different priorities multiple individual duties and objectives from Parliament and government, which may be distinct from the promotion of competition.

Recommendations

- **Sector regulators should share best practice and consider ways to improve their pipeline of potential cases. To support this work, the CMA will convene a workshop through UKCN to consider best practice, and areas of potential improvement.**
- **Where observable, there is value in sector regulators recording the positive impact of Competition Act enforcement, including evidence on the deterrent effect of enforcement. The CMA will consider how to involve the**

²⁸ Advocacy does not involve the CMA pushing the sector regulators to use their powers for the sake of using them; the use of concurrent competition powers is not always the most effective course of action.

sector regulators in future research on the deterrence impact of Competition Act enforcement.

- **The CMA to continue to exercise its leadership role within the concurrency arrangements, in particular by seeking opportunities to advocate for sector regulators to make the most effective use of their Competition Act enforcement powers.**

Area 3: Cooperation on markets work

What is 'markets work'?

78. The sector regulators have concurrent powers to carry out market studies under the EA02, and to refer markets to the CMA for market investigations. Sector regulators do not need to have conducted a market study under the EA02 to exercise their power to refer markets to the CMA for a market investigation.
79. In addition to their concurrent powers, regulators may also carry out “market reviews” of a similar nature to market studies under their sectoral powers; these kinds of review will vary across regulators.
80. Sector regulators may undertake analysis as part of the formal process for setting price controls, or other types of *ex ante* regulation. This analysis, like a market study, may also involve assessments of the functioning of competition in a given market. For the purposes of this report, the CMA’s use of the term ‘markets work’ does not include these types of regulatory processes (in relation to some of which, the CMA has appellate functions).

Examples of market reviews outside of the EA02

- **Ofgem - Non-domestic retail energy:** In November 2022, Ofgem opened a review of the retail energy market for non-domestic customers. Ofgem examined concerns about pricing and contractual behaviours; competition in the market; and the regulatory support available for specific groups of customers.
- **PSR - Interchange fees and scheme and processing fees:** In June 2022, the PSR opened two market reviews. The first market review was into cross-border interchange fees for consumer transactions

between the UK and the European Economic Area, following increases by Visa and Mastercard in these fees. The second market review was into scheme and processing fees associated with the Mastercard and Visa card schemes, which are paid by acquirers and issuers.

- **Ofwat – Incumbent support for effective markets:** Ofwat opened a market review in 2019 to assess the support being given by incumbent water companies in supporting markets in the sector, including the business retail market, and developer services market.

81. There are certain statutory obligations on how the CMA and the sector regulators interact in respect of market studies and MIRs.
- The CMA and the sector regulators must consult one another before they first exercise their concurrent markets functions in relation to a particular matter.
 - Once a sector regulator has exercised its concurrent markets functions in relation to a particular matter, the CMA shall not exercise the same functions in relation to the same matter, and vice versa. This rule protects against simultaneous market studies or MIRs on the same subject matter.²⁹
 - Where sector regulators refer markets to the CMA for a market investigation, they are under obligations to provide information in their possession and other assistance to the CMA for the purpose of the investigation.
82. However, these statutory obligations are less detailed than those for Competition Act investigations and are not supplemented by more detailed expectations on how the sector regulators and the CMA should cooperate as they are in relation to Competition Act enforcement work as set out in bilateral MOUs and concurrency guidance.

Scope for improvement

83. Some stakeholders highlighted concerns that cooperation in relation to markets work was less well developed. They said that sector regulators could make greater use of competition-focussed market reviews, to help

²⁹ See part 2 of Schedule 9 of the EA02.

achieve their competition objectives, including market studies under the EA02. Some stakeholders said that there could be inconsistency in the circumstances where sector regulators referred a market to the CMA for a market investigation.³⁰

84. The CMA has completed three market investigations in the regulated sectors.³¹ In each case, the CMA has recommended action by the relevant sector regulator, in addition to imposing remedies through its remedial powers. While cooperation can help ensure an effective allocation of responsibility between the CMA and the responsible sector regulator on designing and implementing the remedies to the competition issues identified, some stakeholders were concerned that the CMA had previously become too involved in the implementation and monitoring of market investigation remedies in the regulated sectors, and that it would be preferable for sector regulators to take forward the implementation of remedies in these cases.³²
85. The CMA acknowledges that there has tended to be to greater engagement between the CMA and sector regulators in the context of market investigations in the regulated sectors, given that they are likely to produce actions for the relevant sector regulator to take forward.³³ The CMA has also carried out a number of market studies in the regulated sectors, resulting in recommendations to regulators. Recommendations from the CMA to regulators – whether from a market study or a MIR - are an important part of the CMA's toolkit to achieving better outcomes in markets.³⁴ The CMA then relies on regulators to consider, respond to and implement those recommendations. It is therefore an important part of a well-functioning concurrency regime that regulators publicly respond to the CMA's recommendations, in a timely way and setting out next steps towards implementation or a clear rationale as to why those recommendations are not being taken forward.

³⁰ These stakeholders suggested that references were being made in cases which were not appropriate, and regulators were failing to make references when the markets would have benefitted from a market investigation.

³¹ Retail banking (2014-2016), energy (2014-2016) and investment consultants (2017-2018). (The CMA's market investigation in relation to cloud services is ongoing.)

³² One stakeholder referred specifically to the example of remedies following market investigations in the financial services sector and said that CMA oversight of these remedies should be the exception.

³³ As noted above, however, some stakeholders had concerns about the implementation and monitoring of remedies.

³⁴ The CMA may also make recommendations to sector regulators when carrying out consumer protection policy or case work, including responding to super-complaints made under the Enterprise Act 2002.

86. There has tended to be a less consistent level of engagement, particularly on market reviews carried out under sectoral powers (rather than the EA02).
87. Greater cooperation on markets work can serve several purposes.
- **Know-how and expertise:** Both the CMA and sector regulators have know-how and expertise derived from their powers and responsibilities and their body of work. This could include know-how on types of evidence gathering and analysis, the design and implementation of remedies, sector-specific knowledge or the making of recommendations to other bodies.

Demand-side remedy design

In consumer-facing markets, competition can be stimulated by equipping consumers with the means to exercise more choice between competing suppliers. Remedies can therefore take the form of measures to promote consumer engagement, including measures such as the standardisation of information provided to consumers or 'prompts' to encourage consumers to switch. The effectiveness of so-called 'demand-side remedies' has been called into question in the past. Collaboration between the CMA and sector regulators in this area has supported the development of a stronger collective understanding of this type of remedy, drawing from a wider pool of experience.

- **Coordination:** where the CMA and sector regulators are undertaking or planning work in similar areas or related to similar issues, cooperation will help avoid potential duplication and minimise regulatory burden for stakeholders, while also helping to avoid unintended blind-spots between different projects, and maximise the potential for synergies.
- **Potential market investigation references:** If a sector regulator decides to make a MIR to the CMA, the CMA must carry it out. MIRs involve significant resource over an extended period of time. They take 12 to 24 months to conduct and involve large teams, including specialists. It is therefore important the CMA understands the cases which may potentially be in the pipeline for MIRs, and can support sector regulators to identify factors that are relevant to the question of whether or not to make a reference.

Actions to address

Institutional measures

88. A broad oversight of the markets work planned or underway is needed to make effective decisions on the issues where closer engagement will be of most value. The CMA and sector regulators already have systems in place for cooperation on Competition Act work, including in the regular bilateral meetings that are held. While markets work is often covered in these regular bilateral meetings, the CMA recommends that greater focus be given to this work in those meetings, so that the CMA and sector regulators have a clearer overall picture of the markets work planned or underway.
89. The CMA proposes that the following factors shape the level of engagement:
- relevant sector regulator or CMA experience in similar markets, or considering similar market features, or the likelihood that the CMA or the sector regulator may examine similar issues in the future;
 - relevant sector regulator or CMA experience with the types of remedies under consideration, or the likelihood that these remedies may be considered in future work; and
 - the extent to which a MIR is a potential consequence of the work.

Setting expectations and memoranda of understanding (MoUs)

90. Cooperation can be strengthened through the setting of clear upfront expectations which both the CMA and sector regulators can refer to. In comparison with Competition Act enforcement, the bilateral MoUs between the CMA and sector regulators set fewer expectations on how cooperation should take place in markets work, and are focused specifically on markets work under the EA02.
91. The CMA is planning a refresh of the MoUs to reflect current best practice and various legislative changes since the MOUs were drafted, including those made by the DMCCA.³⁵ As part of this refresh, clearer expectations

³⁵ The provisions of the MoU largely date from 2015-2016. The MoU with the FCA was updated most recently in 2019, to reflect legislative developments, but other aspects of the MoU were not amended from their original form.

should be set on how the CMA and sector regulators will cooperate in markets work.

92. The CMA believes there is merit in setting more specific expectations about markets work conducted under the EA02, to ensure that the benefits of cooperation identified at paragraph 87 above can be realised. We propose to explore with sector regulators setting expectations on the sharing of:
- provisional thinking on the scope of potential EA02 market studies, including potentially sharing the drafts of any market study notice;
 - provisional thinking on whether to make MIRs, and the sharing of drafts of any interim report that the CMA or sector regulator intends to publish;
 - a draft of any final decision, and the draft of any MIR;
 - information on any remedies that are being considered; and
 - information at a sufficiently early stage for the purpose of helping the CMA prepare for potential market investigation references.
93. There may be merit in setting an expectation on how the CMA and sector regulators will engage on market reviews and market studies carried out under sectoral powers, although these expectations may need to be more flexible, given there may be less nexus between a sectoral market review and the CMA's objectives.

Statutory rules

94. At this stage the CMA does not think there is a case for recommending statutory rules on cooperation on markets work, akin to the rules which exist for Competition Act enforcement. We hope that the improvements we would like to see in markets work can be brought about by cooperation, including setting clearer expectations in MoU.
95. In addition, the CMA believes that the legal framework governing the disclosure of information between sector regulators and the CMA for these purposes is sufficiently flexible to support the improved cooperation described, and that legislative changes should not be necessary. The CMA may need to revisit this position, in the light of experience of trying to bring about closer cooperation in respect of markets work.

Recommendations

- **The CMA and sector regulators to allocate more time in regular engagement to updating each other on markets work that they are undertaking in the relevant sector.**
- **As part of the planned refresh of the bilateral MoUs, the CMA will explore with sector regulators setting expectations that the CMA and sector regulators will share provisional thinking at various stages of markets work, including draft versions of certain key documents produced as part of markets work. This is particularly important when there is a prospective MIR.**

4. Consumer protection concurrency

Introduction

96. The UK's consumer protection regime – like the competition concurrency arrangements – involves responsibility being shared between a number of different bodies.
97. The CMA and all of the sector regulators – except the PSR – have consumer law enforcement powers, and sector regulators also have broader consumer protection responsibilities. Notwithstanding, the main consumer enforcer has been local authority Trading Standards Services which deals with the majority of cases. Other regulators such as the Gambling Commission and the Office for Students do not currently have consumer law enforcement powers.
98. Collectively, the arrangements where responsibility for consumer protection is shared between a number of different bodies may be referred to as a form of 'consumer protection concurrency'.
99. Competition and consumer protection enforcement involve separate legal powers. However, when considering the dynamics of a particular market or business practice, competition and consumer protection issues work together. Good consumer outcomes rely on competitive markets to provide choice and value. Vibrant competition relies on confident consumers who are empowered to shop around and protected from unfair and misleading practices.
100. For example, where prices are not clear, consumers will find it harder to make effective up-front comparisons which is likely to weaken overall price competition as incentives on firms to offer products at lower prices may fall. Consumers will be less likely to shop around, weakening competitive pressure on suppliers in the market to improve their offer.
101. Where consumers have a poor experience with traders who breach their legal responsibilities, they may choose to stick with incumbent, well-known, firms even if they do not offer the best product or service. Incumbents will then face less competitive pressure from new entrants, reducing their incentives to invest in and prioritise serving their customers well.
102. This critical interdependence between effective consumer protection and effective competition lies at the heart of the CMA's approach to considering whether and how to act. The CMA's starting point is not with a

particular legal tool, but to consider the issues consumers and businesses are experiencing and consider what action is likely to have the greatest impact in the most effective and timely way.

103. In the regulated sectors, so critical to our daily lives and that form the backbone upon which sustainable growth depends, both competition and consumer protection concurrency are therefore parts of a wider framework in which the CMA and sector regulators should work together to make markets work better for people, businesses and the wider economy.

Developments in consumer protection

104. The DMCCA will introduce significant changes to the consumer protection landscape, it will:

- align the CMA's consumer and competition enforcement powers, in particular giving the CMA the ability to make decisions about whether certain consumer laws have been breached as well as strong fining powers for substantive and procedural breaches;^{36, 37} and
- enhance the existing court-based regime for the CMA and other consumer law enforcers, including the sector regulators.³⁸ Under these enhancements, the courts will be empowered to impose monetary penalties on traders who breach consumer laws or do not comply with undertakings. Under the pre-existing regime, while consumer law enforcers could ask a court to require a business to stop infringing conduct, the court was not empowered to apply monetary penalties for the breach. ^{39,40}

105. The CMA is working closely with DBT and with the sector regulators to prepare for the entry into force of the DMCCA (and other changes such as Ofcom's new Online Safety responsibilities), both in relation to the

³⁶ Chapter 4 of Part 3 of the DMCC Act provides a new direct enforcement regime for the CMA in respect of the consumer protection laws listed in Schedule 15 to the Act.

³⁷ More information about these new powers can be found in the CMA's consultation on draft guidance [Direct consumer enforcement guidance and rules | Connect: Competition and Markets Authority \(cma.gov.uk\)](#)

³⁸ Except the PSR

³⁹ Chapter 3 of Part 3 of the DMCC Act sets out a court-based regime for the civil enforcement of consumer protection law to protect the collective interests of consumers. That regime simplifies and enhances the regime provided by Part 8 of the EA02.

⁴⁰ More information can be found in Annex B of the CMA's draft guidance consultation [Direct consumer enforcement guidance and rules | Connect: Competition and Markets Authority \(cma.gov.uk\)](#)

changes to enforcement powers as well as changes to substantive law. The CMA has consulted on procedural guidance⁴¹ and intends to publish new guidance on unfair commercial practices as soon as practicable.⁴² DBT has recently published a consultation on the new rules for subscriptions which will also be brought forward using DMCCA powers.⁴³

106. This review has focused on competition concurrency. However, the CMA's view is that competition and consumer issues need to be seen hand in hand. Furthermore, there are legitimate questions about how the regulatory regimes are delivering. This has been corroborated by stakeholder feedback that highlighted the strong interdependence between competition and consumer protection. The CMA therefore believes more work needs to be done on the different arrangements for shared responsibility for consumer protection, and how these arrangements might develop, including as the CMA and sector regulators prepare to operate under the enhanced DMCCA consumer protection framework.

Sector regulators and consumer protection enforcement

107. Unlike the CMA, most sector regulators have regulatory licensing or authorisation regimes through which they set and enforce consumer protection-related obligations. However, it can be challenging to enforce consumer law without the familiarity that comes from regular use. There has been limited use of formal consumer law powers by the majority of sectoral bodies in recent years, with one notable exception being the FCA, in respect of unfair contract terms in consumer contracts, which has worked closely with CMA (in its leadership role) to make use of these powers.
108. Under those licensing and authorisation regimes, sector regulators can make enforcement decisions and impose fines without needing to take firms to court. Sector regulators also have the option of using the general consumer law powers, which they share with the CMA.⁴⁴ Using these powers may be particularly attractive where market participants fall outside existing sectoral powers. However, sector regulators have faced

⁴¹ [Direct consumer enforcement guidance and rules | Connect: Competition and Markets Authority](#)

⁴² This will revise the old OFT/BERR guidance on the *Consumer Protection from Unfair Trading Regulations 2008*, which have been revised by Part 4 of DMCCA. [Consumer protection from unfair trading - guidance - oft1008](#)

⁴³ [Consultation on the implementation of the new subscription contracts regime - GOV.UK](#)

⁴⁴ In particular, powers to enforce consumer law protections under Part 8 of the EA02 and the Consumer Rights Act 2015.

certain challenges in using these powers such as significant costs, time of court action and the lack of sanctions. Together, these reasons act to limit the number of cases sector regulators have taken forward under general consumer law powers.⁴⁵

109. There is a case that exercise of these powers by sector regulators would mean consumers are better protected from a range of problems in areas where the CMA does not typically take action or cannot always prioritise. Increased willingness and likelihood to use these powers would enhance their deterrence value, reaping wider benefits than bringing conduct to an end in a particular case. It would also help develop a strong bank of pro-consumer legal precedent. Whilst regulatory and licensing powers can be vital, these are sometimes limited in scope, which means that cross-cutting consumer law (which tends to be generic and principles-based), can be very helpful in cases on the perimeter of these regimes and for some novel issues when not caught by the limited scope of more specific legislation.
110. The CMA offers support to other consumer law enforcers to understand how they could best use their existing and new consumer enforcement tools, both on a general and a case-specific basis. For example, the CMA chairs the Consumer Concurrency Group (CCG), which aims to improve clarity and share knowledge and best practice on overlapping areas of responsibility and has more recently involved discussion about the practical implications of the DMCCA reforms.

Reflections and next steps

111. In light of the reforms in the DMCC Act, we think there is merit in a more in-depth review of the effectiveness of existing consumer concurrency arrangements, and how the CMA works with sector regulators to fulfil their consumer protection roles in the regulated sectors.
112. The CMA sees merit in sector regulators making maximum use of their existing civil powers and welcomes new DMCCA provisions that will strengthen these powers, giving sector regulators the power to use the existing-court model to impose sanctions on firms for breaches of consumer law. The CMA has previously suggested that all enforcers

⁴⁵ See for example [responses](#) to the Government's "Reforming competition and consumer policy" consultation by the UKRN, Ofgem and the ORR.

should be given the new direct enforcement powers.⁴⁶ However ultimately, whether sector regulators should have direct enforcement powers is a matter for government.⁴⁷

⁴⁶ [Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers](#)

⁴⁷ [CMA response](#) to the Reforming Competition and Consumer Policy consultation, published on 4 October 2021.

5. Conclusion

113. This report focusses on concurrency, one element of a broader system for regulating and promoting competition in the regulated sectors. In the last ten years, concurrency has played an important role in promoting competition in the regulated sectors. However, there is scope for improvement, and we have identified through this review potential ways to do this.
114. The concurrency arrangements in the UK are not an inevitable feature of a national competition regime. In some jurisdictions, the powers to enforce competition laws in regulated sectors are held solely by a national competition authority. In other jurisdictions, the roles of utility regulator and competition authority are combined into a single body. The CMA has therefore considered the overall effectiveness of the concurrency arrangements across the different authorities in the UK as a model for promoting competition in the regulated sectors.
115. Critics of concurrency have argued that it leads to underenforcement of competition law in the regulated sectors. Due to the range of factors at play, it is not possible to conclude with certainty that competition law is enforced more strongly under concurrency compared to alternative models. That said, the CMA has concluded that there are several features of concurrency which make it more likely that it results in stronger enforcement of competition law.
116. Aside from the frequency of enforcement, there are other features of concurrency which support more efficient and effective enforcement. Concurrency helps to harness the complementarity between the skills and expertise required to exercise the concurrent powers and those required to promote competition through other regulatory tools. In particular, concurrency creates a flexible set of arrangements that enable the CMA and the sector regulators to bring to bear their complementary skills on individual cases. The CMA has in-depth competition enforcement experience and an economy-wide perspective. The sector regulators have deep knowledge of the sectors that they regulate. The concurrency arrangements enable the CMA and the regulators to share resource flexibly. For example, with competition enforcement, cases are allocated to the authority best placed to investigate, while ensuring that any other authority with concurrent jurisdiction over a case can provide support and expertise to the investigating authority.
117. In summary, the CMA concludes that on balance, competition in the regulated sectors is being promoted more effectively than it would be

under an alternative model to concurrency, for example, one in which the CMA was the sole authority with competition law powers in the regulated sectors. The CMA has however identified certain challenges for sector regulators in making most effective use of their concurrent powers. There is scope for improvement in the operation of the concurrency arrangements.

118. Certain sector regulators can struggle to maintain sufficient in-house experience and expertise to exercise their concurrent powers. In addition, sector regulators face competing demands on their resources and attention, which can crowd-out consideration of whether exercising their concurrent powers would help them achieve their competition objectives.
119. The effect of these two challenges varies considerably between different regulators, but both create risk that sector regulators do not make most effective use of their concurrent powers in promoting competition in the regulated sectors where these can change outcomes for the better. The CMA has therefore proposed a range of measures with the aim of increasing cooperation and supporting sector regulators to address these challenges, so that the sector regulators can maximise the potential for the concurrent powers to support their competition objectives.
120. The CMA has also identified opportunities for improved cooperation between the sector regulators and the CMA in relation to markets work, so that these tools are used as effectively as possible in the regulated sectors. The CMA has proposed measures to strengthen cooperation on markets work, so that best use is made of the substantive and procedural expertise held within the concurrency arrangements as a whole.
121. The report also reflects on the fact that there may be merit in the CMA carrying out a review of how the CMA and the sector regulators can work more effectively together on their shared consumer law powers, as we operate under the new enforcement system established in the DMCCA.
122. Finally, we wish to thank the sector regulators and all other stakeholders who have contributed to the review, both in responding to the call for inputs and in participating in the roundtable or attending meetings with the CMA. We invite feedback on how we exercise our powers for the benefit of people, businesses and the UK economy.

Annex 1 – Completed competition enforcement and markets work in the regulated sectors over the last ten years

Investigating Authority	Competition Act commitments decisions	Competition Act infringement decisions	EA02 Market Studies	Enterprise Act 2002 Market Investigation references
CAA	-	1) East Midlands Airport Parking (2016)	-	-
FCA	-	1) Asset managers (2019) 2) International money transfer (2023)	1) Wholesale financial data (2023)	1) Investment consultants (2017)
Ofgem	1) SSE electricity connections (2016) 2) PayPoint (2021) 3) Epex Spot (2019)	1) Supply of energy to domestic customers (2019)	-	1) Energy market (2014)
Ofcom	-	1) Royal Mail bulk access (2018) 2) Express parcel delivery services (2019) 3) Emergency communications (2022)	1) Cloud Services (2022)	1) Cloud Services (2023)
ORR	1) Freightliner (2015) 2) Railway Assessment Centre Forum (2021)	-	1) Automatic ticket gates (2018) 2) Railway signalling (2020) 3) Station catering (2023)	-
PSR	-	1) Pre-paid cards (2022)	-	-
NIAUR	-	-	-	-
Ofwat	1) Bristol Water (2015) 2) Thames Water (2022)	-	-	-
CMA - cases in regulated sectors only	1) EV Charge points (2021) 2) Meta (2023) 3) Amazon (2023)	1) Heathrow Parking (2017) 2) Compare the Market (2020)	1) Heat Networks (2017) 2) Online platforms and digital advertising (2019) 3) EV Charging (2020) 4) Mobile ecosystems (2021)	1) Retail Banking (2014) 2) Land Mobile Radio network services for public safety (and ancillary services) in Great Britain (2021) 3) Mobile browsers and browser engines (2022)
TOTAL	10	10	9	6

