The first two years of enhanced concurrency: a mixed bag

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An article considering the main developments that have taken place over the last two years since enhanced concurrency arrangements were introduced by the Enterprise and Regulatory Reform Act 2013.

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Enhanced concurrency in the regulated sectors

Introduction

It has been over two years since the enhanced concurrency arrangements were implemented with the aim of increasing competition law enforcement in the regulated sectors and "extend[ing] the frontiers of competition into new areas" (*see Statement by Alex Chisholm, chief executive of the CMA, CMA mission and strategy, 1 October 2013*). The changes have affected sectors including aviation, energy, financial services, healthcare, rail and road, and water.

This article examines some of the main developments that have taken place over the last two years and comments on the key trends that have become apparent. These include the increased influence of the Competition and Markets Authority (CMA) in the regulated sectors when compared to its predecessors; a marked increase in new Competition Act 1998 investigations in year one of the enhanced concurrency arrangements followed by a reduction in new cases in year two; the increased use of 'softer enforcement'; and sector regulators' reluctance to use their powers under the Enterprise Act 2002 to carry out competition-focused market studies.

The article also considers the potential impact of enhanced concurrency in the development of markets and regulation and the possibility of pooling enforcement resources at the UK and EU levels.

Background to the enhanced concurrency arrangements

- The regulated sectors account for approximately 25% of the economy (*see David Currie, Chatham House speech (www.practicallaw.com/2-573-5293) , July 2014*). Regulated sector businesses provide "key services that are essential to every house-hold and business in the country" (*see Foreword, CMA Annual Report on Concurrency 2015 (www.practicallaw.com/6-607-3285) , 1 April 2015*). From a competition law perspective, the regulated sectors are considered particularly important because, in some cases, they are "characterised by monopolistic or oligopolistic market structures … [which] … might suggest the need for more, rather than less, competition enforcement than in other parts of the economy…" (*David Currie, Chatham House speech*).

- The background to the enhanced concurrency arrangements in the Enterprise and Regulatory Reform Act 2013 (ERRA13) was the policy position set out in a March 2012 paper issued by the Department for Business, Innovation and Skills: "There have been few Competition Act 1998 cases or Market Investigation References in the regulated sectors, and the Government is concerned that general competition law may not be being enforced as proactively as it could be, and that the cases that are brought may not be always be managed well" (*paragraph 8.1, Department for Business, Innovation and Skills, "Growth, competition and the competition regime (www.practicallaw.com/1-518-4847) - Government response to consultation", March 2012*).

- While the majority of sector regulators had concurrent competition powers before April 2014, there had been just two infringement decisions taken by the sector regulators under the Competition Act 1998 (CA98): one in 2006 by the Office of Rail Regulation, concerning an abuse of a dominant position in the coal rail haulage market; and one in February 2008 by Ofgem, in which National Grid was found to have abused a dominant position in the supply of domestic gas meters.

- While the sector regulators may not have enforced competition law as proactively as perhaps they could have, the Office of Fair Trading (OFT) was also "reluctant to get drawn into consideration of the regulated sectors … " (*David Currie, Chatham House speech*), resulting in an enforcement gap.

- The enhanced concurrency arrangements came into force in April 2014, the same time as the CMA took over the functions of the OFT and the Competition Commission. The arrangements were designed to strengthen co-operation between the CMA and sector regulators, "with a view to greater competition law enforcement activity in these sectors" (*Foreword, CMA Annual Report on Concurrency 2015*). It is one of the strategic goals of the CMA to "extend the frontiers of competition into new areas", including by working with sector regulators to ensure fuller use of competition law and policy in sectoral markets" (*Statement by Alex Chisholm, CMA mission and strategy, 1 October 2013*).

The enhanced concurrency arrangements from April 2014

- ERRA13 introduced the following key changes:
  - sector regulators (other than Monitor) must consider whether the use of their CA98 powers is more appropriate before using their licence enforcement powers;
  - the CMA must report annually on the use of concurrent powers in the regulated sectors;
  - the Secretary of State's existing power to make regulations regarding concurrency arrangements have been extended;
  - the CMA has the power to decide which body should lead on a case;
  - the CMA has the power to take over a case from a sector regulator, even if a sector regulator is already investigating that case; and
  - the Secretary of State has the power to remove competition powers from sector regulators (with the exception of Monitor).
- The following sector regulators have concurrent competition powers:
  - the CAA (Civil Aviation Authority), in respect of air traffic services and airport operation services;
  - Ofcom (Office of Communications), in respect of communications (telecommunications, broadcasting and postal services);
  - Ofgem (Gas and Electricity Markets Authority), in respect of electricity and gas in Great Britain;
  - the FCA (Financial Conduct Authority), in respect of financial services (full concurrent powers since April 2015);
  - the PSR (Payment Systems Regulator), in respect of participation in payment systems (concurrent powers under the Enterprise Act 2002 since 1 April 2014 and concurrent powers under the Competition Act 1998 since 1 April 2015);
  - Monitor (part of NHS Improvement from 1 April 2016), in respect of healthcare services in England (Monitor does not have a duty to promote competition but will act to prevent anti-competitive behaviour where this is against patients' interests);
  - the ORR (Office of Rail Regulation), in respect of railway services;
  - Ofwat (Water Services Regulation Authority), in respect of water and sewerage services in England and Wales; and
  - NIAUR (Northern Ireland Authority for Utility Regulation), in respect of electricity, gas, and water and sewerage services in Northern Ireland.
- As well as substantive legal and procedural reforms, another key change was the creation of the UK Competition Network (UKCN) which facilitates communication and co-operation between the sector regulators and the CMA. The UKCN aims to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating the use of competition powers and the development of pro-competitive regulatory frameworks. The amended concurrency arrangements furthermore included amended provisions for facilitating information sharing between the CMA and the sector regulators.
- In March 2014, the sector regulators established the UK Regulators' Network (UKRN), a "vehicle for co-operation that supports the separate independent regulatory frameworks of the individual regulators" (*see Legal update, New UK Regulators' Network launched (www.practicallaw.com/7-561-4745)*). The UKRN's objectives include achieving coherent and consistent economic regulation across sectors, the promotion of competition in the interests of consumers and obtaining a better understanding of the effectiveness of economic regulation.

  While not formally part of the enhanced concurrency arrangements, the UKRN builds on the collaboration between regulators which takes place within the UKCN and has its own ambitious work programme. It has carried out several projects including one in relation to consumer engagement and switching which analysed the work undertaken in relation to this topic by participating regulators and drew cross-sector comparisons. The UKRN also published a report on its survey of the approaches that Ofgem, Ofwat, ORR and Ofcom take in relation to promoting quality of service in their respective sectors and stated that it believes that the report will help regulators when considering options for introducing new, or modifying existing, regulatory quality of service interventions.

First year of the enhanced concurrency arrangements

- In 2013, the government agreed to provide the CMA with an extra £4 million of funding to support work in regulated sectors during the

first year of the enhanced concurrency arrangements. The National Audit Office (NAO) reports that the CMA used this money to share knowledge and to support individual cases, particularly cases pursued by the smaller sector regulators, noting that "competition capacity varies greatly among the regulators, and some may be unable to handle complex cases" (*paragraph 1.25, National Audit Office Report on the UK competition regime (www.practicallaw.com/4-622-8066) , 5 February 2016*).

- In April 2015, the CMA published its first annual concurrency report (www.practicallaw.com/6-607-3285) in which it reported on a very successful first year of enhanced concurrency. The highlights referred to in the report included the following:
  - new Memoranda of Understanding (MoUs) were agreed with most of the sector regulators;
  - communication, co-operation and information sharing between the regulators improved and there were good levels of participation in the UKCN;
  - the CMA worked with sector regulators on individual projects including working with the CAA, FCA, PSR and NIAUR to develop their new competition guidance documents;
  - the CMA and Ofgem worked together on the market investigation into the supply and acquisition of energy in Great Britain and the CMA worked with the FCA on the market investigation into the supply of retail banking services to personal current account customers and to SMEs. These were the first two market investigations initiated at the CMA and the CMA stated that "the fact that both are in the regulated sectors is not mere chance" (*paragraph 17, CMA Annual Report on Concurrency 2015*). The NAO has reported that the CMA is investing 16% of its front-line competition resources in these two high-profile market investigations; and
  - there were an increased number of CA98 investigations in the regulated sectors. Six new CA98 investigations were launched: two by Ofgem (one under Chapter I and one under Chapter II); two by Ofcom (one under Chapter I and one under Chapter II); one by the CAA (under both Chapter I and Chapter II); and one by the CMA (in consultation with Monitor) (under Chapter I). This was a significant increase on the average of 2.9 CA98 investigations launched per year in the period 2005 to 2013 (*paragraph 19, CMA Annual Report on Concurrency 2015*). In the year there were also five other ongoing CA98 investigations, of which two were brought to a conclusion.
- The increase in enforcement activity suggested that the sector regulators were embracing their enhanced powers and is likely to have been considered the highlight of the first year of the enhanced concurrency arrangements.
- The NAO commented that the CMA's first concurrency report "highlighted several promising developments, including: an increase in the number of enforcement cases opened by the regulators; agreement of memoranda of understanding; and productive co-operation between the CMA and regulators. This is helpful, but the indicators thus far are largely based on outputs achieved, such as the number of cases opened or closed, rather than outcomes for consumers" (*paragraph 3.7, NAO Report on the UK competition regime*).
- Other commentators have echoed the concerns voiced by the NAO stating that reliance on summary statistics of the number of cases to measure the success of concurrency arrangements is overly simplistic and that "the potential incentives from this system of performance measurement are questionable" (*see Luisa Affuso and Alastair Sullivan, PwC,"Competition powers for regulators? Not a numbers game", 22 October 2014*).

Second year of the enhanced concurrency arrangements

- The CMA's second annual concurrency report (www.practicallaw.com/6-627-2906) , published on 28 April 2016, noted that while the first year of the enhanced concurrency arrangements saw the 'building blocks' of the new regime put into place, during the second year, "co-operation within the regime has extended beyond competition enforcement activity to broader policy and markets work. As a result, there has been improved co-ordination between the CMA and the sector regulators". The report furthermore refers to a "clear increase in joint working between the CMA and the sector regulators", including through the secondment of specialist staff from the sector regulators to the CMA to provide input for the CMA's market investigations and a number of mergers (*see Foreword, CMA Annual Report on Concurrency 2016*).
- The second year of the enhanced concurrency arrangements also saw the CMA agreeing MoUs with the FCA and PSR who acquired concurrent powers on 1 April 2015, as well as amended MoUs with other sector regulators to reflect their experiences of working together (*see Legal update, CMA memorandum of understanding on competition concurrency with sector regulators (www.practicallaw.com/2-623-6915)*). A number of sector regulators also published additional guidance documents in relation to their concurrent powers.
- The CMA's second annual concurrency report identifies themes that are common to a number of regulated sectors, including low consumer engagement and switching, the promotion of competition for the benefit of SMEs and balancing cooperation and competition. The report notes that CMA and sector regulators have, in particular via the UKCN, shared experiences of dealing with the same challenges, with a view to identifying best practice and sustainable solutions.
- The UKCN increasingly appears to be involved in substantive work streams and examined procedural challenges during the second

year of the enhanced concurrency arrangements. For example, it assessed arrangements for the handling of leniency applications in the context of concurrency and held a know-how sharing event on access to file and disclosure. Such co-operation demonstrates well the benefits of enhanced collaboration between the CMA and sector regulators which the enhanced concurrency arrangements have encouraged.

- The UKRN also continued to be active in the second year of the enhanced concurrency arrangements. In March 2016, it published a set of cost of capital principles (www.practicallaw.com/9-625-4835) which will be taken into consideration when each regulator makes a future decision on the cost of capital. These principles were designed to ensure that UKRN members take an effective, efficient and transparent approach in setting the cost of capital in their own sectors. The UKRN will also publish an annual comparison report (the first of which was published in March 2016 alongside the principles) which will set out the main regulatory decisions on the cost of capital made that year and will explain differences in approaches between regulators, where relevant.

- Some of the other key developments during the second year of the enhanced concurrency arrangements, including the activities of the FCA and PSR, the decrease in the number of new CA98 investigations, the publication of the CMA's provisional findings and remedies in the energy market investigation and the CMA's policy project in relation to passenger rail services, are discussed in further detail below. Other notable points from the CMA's second annual concurrency report are also discussed further below.

FCA

- Although the FCA did not obtain concurrent competition enforcement powers until 1 April 2015, the FCA has been active in promoting competition since its formation in April 2013 as a result of its statutory competition objective and general duty to promote competition.

- The FCA's competition work to date has mostly involved market studies to assess how competition is working in cash savings, retirement income, general insurance, credit cards, investment banking and asset management. The outcomes of some of these market studies have been published and the FCA has been working with the relevant firms to implement remedies in the cash savings, general insurance and retirement income sectors to improve the functioning of competition.

- All of the market studies, including the ones launched after the FCA acquired concurrent powers under the Enterprise Act 2002 (EA02) in April 2015, have been carried out using the FCA's powers under the Financial Services and Markets Act 2000 (FSMA). Many commentators have noted that this may have been because FSMA provides the FCA with wider-ranging powers to address any problems identified in respect of regulated activities and authorised firms. See further *EA02 powers remain unused*, *below*.

- Albeit that the FCA has predominantly focused on market reviews designed to uncover any potential structural competition concerns in financial services markets, it has recently launched its inaugural antitrust enforcement case: Deb Jones, Director of Competition at the FCA, announced on 23 March 2016 that the FCA is "taking active steps towards the opening of [a] Competition Act investigation" (*see Legal update, FCA Director of Competition considers how FCA uses its competition powers (www.practicallaw.com/5-625-3946)*). This is discussed in further detail below.

  In the same speech, Deb Jones also referred to a number of additional developments in relation to competition law detection and enforcement:

  - following amendments to the FCA handbook to reinforce the obligation on authorised firms to report significant infringements of applicable competition law to the FCA, there have been a greater number of notifications in relation to competition issues under Principle 11 (of the Principles for Businesses) during 2015/2016 than 2014/2015;

  - the FCA issued two 'on notice letters' to firms in relation to concerns identified during the retirement income market study. These letters are similar to the CMA's warning letters and are issued where the evidence suggests that there may be a potential infringement of competition law but the FCA does not open a formal investigation due to prioritisation. The relevant firms subsequently undertook a number of initiatives to strengthen competition compliance; and

  - the FCA issued three advisory letters which are educational and intended to increase awareness of competition law to achieve greater compliance by the relevant firms.

- The above examples of the FCA's work demonstrate that soft touch detection and enforcement can play an important role in improving the functioning of competition and the outcomes for consumers in the regulated sectors without having to invest the resources that are required for formal competition law investigations.

CMA's role in financial services

- In addition to the market studies carried out by the FCA, on 22 October 2015, the CMA announced its provisional findings and published a notice of possible remedies in its market investigation into the supply of retail banking services to personal current account (PCA) customers and to small and medium-sized enterprises (SMEs). While the CMA's predecessors also had the power to carry out market investigations in the financial services sector, the importance that the CMA has placed on this wide-ranging market investigation

and the resources it has invested in the investigation may be regarded as an indicator of its intention to be actively involved in the review of competition in the financial services sector.

The CMA provisionally found that there are a combination of features of the markets for PCAs, business current accounts (BCAs) and SME lending that give rise to adverse effects on competition. These features include low levels of customer engagement, barriers to accessing and assessing information, barriers to switching and incumbency advantages, and linkages between PCAs, BCAs and SME lending products.

- The CMA published its provisional decision on remedies on 17 May 2016. In its decision, the CMA stated that it believes that banks need to be made to provide their customers with the right information so that they can easily find out which provider and type of account offers best value for them. The CMA also proposes to push the development of new online comparison tools and improve the current account switch service to make switching banks more straightforward and give customers more awareness of, and confidence in, the process.

  The CMA's proposals also include new measures targeted at overdrafts, with a particular focus on users of unarranged overdrafts. For example, the CMA proposes requiring banks to set a monthly maximum charge for unarranged overdrafts on personal current accounts.

  The CMA is furthermore proposing to require banks to move swiftly to introduce an Open API (application programming interface) banking standard, which will enable personal and SME customers to safely and securely share their unique transaction history with other banks and trusted third parties. This will enable bank customers to click on an app, for instance, and get comparisons tailored to their individual circumstances, directing them to the bank account which offers them the best deal. The CMA also proposes that banks should be made to regularly prompt their customers to check that they are getting good value from their banking provider.

- The combination of the CMA's keen interest in financial services, the FCA developing 'soft touch' enforcement and the launch of a CA98 investigation by the FCA certainly suggest that any potentially questionable practices in the financial services sector will not escape scrutiny.

PSR

- The PSR acquired concurrent powers under EA02 on 1 April 2014 and concurrent powers under CA98 on 1 April 2015.

- In May and June 2015, the PSR launched market reviews in relation to the supply of indirect access to payment systems and the ownership and competitiveness of infrastructure provision. Despite having the power to conduct market studies under EA02, the PSR is conducting both market reviews using its Financial Services (Banking Reform) Act 2013 powers. In February and March 2016, the PSR published the interim reports in its market reviews. It will be interesting to see whether the PSR continues to prefer to use its powers under the Financial Services (Banking Reform) Act 2013 to assess markets. See further *EA02 powers remain unused, below*.

CA98 enforcement

- Six new CA98 cases were launched during the first year of the enhanced concurrency arrangements. By contrast, year two has seen only two formal investigations opened, despite five complaints having been received by the sector regulators. The CMA's second annual concurrency report suggests this is due to a clear focus on the "delivery of ongoing competition cases". The decrease in the number of CA98 investigations is discussed in more detail in *An increase, then decrease in CA98 investigations, below*.

- In October 2015, Ofgem opened an investigation to examine whether a number of price comparison websites breached the Chapter I prohibition of CA98 and/or Article 101 of the TFEU in relation to paid online search advertising. As at May 2016, this investigation remains ongoing.

- In her speech, on 23 March 2016, Deb Jones of the FCA referred to the fact that the FCA was planning to launch a CA98 investigation. While the FCA website does not provide any information in relation to the launch of an investigation, the CMA's second concurrency report states that "the FCA opened its first investigation under the Competition Act 1998 during the period of this report, following discussions with the CMA and agreement that it should be allocated to the FCA. As at 31 March 2016, formal CA98 powers had not yet been exercised" (*paragraph 4g*). It appears that details of the behaviour and firms under investigation by the FCA remain confidential. What prompted the regulator to investigate also remains unclear; the CMA's second concurrency report revealsudit that the FCA received no competition law complaints during the relevant period. The lack of clarity and transparency regarding the FCA investigation is surprising and could raise questions about the reporting of investigations.

Energy market investigation and related developments

- Another significant development during the second year of the enhanced concurrency arrangements was the publication in July 2015 of the CMA's provisional findings in the energy market investigation and the publication in March 2016 of its provisional remedies. While the CMA's predecessors also had the power to carry out market investigations in the energy sector, the importance that the CMA has

placed on this market investigation and the resources it has invested in the investigation are clear indicators of its intention to be involved in improving the functioning of competition in the energy sector.

- The CMA's provisional findings included the following:
  - no evidence of collusion on retail prices between the 'big six' energy suppliers;
  - the CMA provisionally dismissed structural concerns regarding the impact of vertical integration; and
  - the CMA identified a range of concerns that it concludes do impede competition in the retail market, including widespread consumer "disengagement" (*CMA press release, 10 March 2016*), regulatory inadequacies and a need for greater transparency.
- In March 2016, the CMA published its provisional decision on remedies in the energy market investigation. The CMA's proposals included a range of measures aimed directly at customers (including microbusinesses) to help and encourage a greater number to benefit from switching to more competitively priced deals.
- One of these measures is the creation of an Ofgem-controlled database of disengaged customers who have been on a standard variable tariff for more than three years, which will allow rival suppliers to target their marketing to those customers. The CMA is also proposing a temporary safeguard price control to protect customers on prepayment meters to reduce their bills.
- The CMA also proposed extensive measures to reset the relationship between Ofgem, the Department of Energy and Climate Change (DECC) and the industry, so that decisions are made efficiently, on the basis of readily available accurate information, with the impact on consumers clearly set out. These measures, some of which would require legislation, include requiring the largest suppliers to provide fuller information on their financial performance and increased public consultation by DECC on policy decisions being taken that will be a major driver of consumer prices in the future. The CMA "also proposes that the system of self-regulation of industry codes needs to change, so that Ofgem is in a better position to ensure that measures that benefit consumers are introduced promptly" (*CMA press release, 10 March 2016*).
- On 18 December 2015, in response to the CMA's provisional findings in the energy market investigation, Ofgem published a consultation on the future of retail market regulation (www.practicallaw.com/7-621-2691) . Ofgem set out the thinking behind its plans to move to principles-based regulation (as opposed to relying on prescriptive rules), noting that it had decided to focus on the domestic retail supply market where there is a great deal of prescription and the biggest scope for change.

Passenger rail services "policy project"

- In January 2015, the CMA launched a "policy project" to examine the scope for increasing competition in passenger rail services in Great Britain. The CMA specifically noted that the policy project was not a formal investigation or a market study and stated that it was being carried out "in line with the CMA's statutory duty to promote competition for the benefit of consumers" (*CMA press release*).
- The CMA published its final report (www.practicallaw.com/4-624-3726) in March 2016 and recommended that the current market structure increase its open access operations to generate greater competition with franchised operators. The CMA also found that opening routes to multiple franchisees would be beneficial for certain routes and that, in the long-term, a licensing regime may generate the most competition.
- The ORR welcomed the CMA's report and stated that it was already consulting on proposals for open access operations to make a greater contribution to network costs. The ORR is also likely to bear the recommendations of the CMA in mind in its review of the structure of track access charges. This passenger rail policy project is consistent with the high degree of CMA engagement in developing competition policy and focus in the regulated sectors since the enhanced concurrency arrangements came into effect on 1 April 2014 (*see Increased influence of the CMA, below*).

Other notable points from the CMA's second annual concurrency report

- The CMA's second concurrency report identified the increase in 'softer enforcement' work: in addition to the work being carried out by the FCA referred to above, the ORR decided to issue a warning letter to London Underground in lieu of opening a formal investigation and Ofgem closed one of its CA98 cases on administrative priority grounds and sent advisory letters to the relevant companies.
- It is notable that this 'softer enforcement work' was not mentioned in the CMA's first annual concurrency report, when the focus was very much on the significant number of new CA98 investigations.
- In its second report, the CMA states that "[a]though the number of cases opened by the CMA and the sector regulators to apply competition law in their sectors is a key factor in assessing the success of the concurrency arrangements, it is, as noted in last year's report, not the only factor. What really matters is the achievement of competitive outcomes in regulated sectors. … there are also other ways to achieve competitive outcomes: for example, softer enforcement tools, such as warning and advisory letters, can, in

appropriate circumstances, be effective. The CMA and regulators have issued a number of warning and advisory letters over the past year, which promote a competitive outcome for consumers: in the case of warning letters, this is achieved by requiring a change in the behaviour of companies and, in the case of advisory letters, by recommending that companies carry out a self-assessment of their practices to ensure compliance with competition law" (*paragraph 18*). The increase in 'softer enforcement' is certainly welcome in the light of the decrease in new CA98 cases.

- The CMA's second annual concurrency report also provides information on its activities in relation to mergers in the regulated sector, stating that this is another example of work it has undertaken to "promote competitive outcomes for the benefit of consumers within the regulated sectors" (*paragraph 20*). It is interesting to note that its first annual concurrency report did not contain any information in relation to its mergers work in the regulated sectors other than in relation to mergers in the healthcare sector.

Key observations

Increased influence of the CMA

- The enhanced concurrency arrangements strengthened the CMA's powers by, for example, allowing it to take over cases from sector regulators. However, putting aside these increased powers, the influence of the CMA in the regulated sectors still appears markedly stronger than that of its predecessors. As mentioned above, the OFT often appeared reluctant to be drawn into the regulated sectors whereas the CMA appears to have a keen interest in the regulated sectors and has issued several statements which highlight how important it believes these sectors are to the economy as a whole. The CMA appears to be asserting its influence through direct and indirect channels.

- In terms of its direct channels of influence, the CMA has prioritised regulated sector market investigations and invested significant resources in the retail banking and energy sector inquiries since 1 April 2014 (16% of front line resources).

- The CMA's second annual concurrency report further highlights the importance of these two investigations, noting that specialist staff from the sector regulators were seconded to the CMA "to provide sector-specific input in the CMA's market investigations" (*Foreword, CMA Annual Report on Concurrency 2016*). In its Annual Plan for 2016/2017 (www.practicallaw.com/4-624-8248) , the CMA made it clear that it intends to continue to assess competition in the regulated sectors, stating that it will launch one to two new pieces of policy or markets work in the regulated sectors in 2016/2017 (*at paragraph 3.19*). The CMA also plans to launch an internal review of the practical, legal and policy considerations involved in the design, implementation, enforcement and monitoring of remedies in regulated sectors (*paragraph 3.19*).

- The CMA's desire to play a role in the shaping of competition in the regulated sectors in indirect ways is clear in its Annual Plan for 2016/17: "...the CMA's work on competition in the regulated sectors does not just focus on competition law cases, but also involves broader thinking and advocacy on opportunities to promote effective competition, for the benefit of consumers, in these sectors, working with the relevant regulators and other interested parties as appropriate" (*paragraph 4.7*).

- A key example of the CMA's desire to indirectly influence the regulated sectors is the policy project it carried out to examine the scope for increasing competition in passenger rail services in Great Britain (see Passenger rail services "policy project"). The CMA explicitly decided not to conduct a formal investigation or market study in relation to passenger rail services and in its final report noted that the "project is intended as a contribution to public policy debate by an independent competition authority that is not a participant in the rail industry" *(paragraph 1.15, Competition in passenger rail services in Great Britain: A policy document, 8 March 2016*).

- There has been increased communication and co-operation between the CMA and sector regulators since the enhanced concurrency arrangements came into force through the UKCN and UKRN, bilateral meetings, joined-up working on investigations and market studies and other projects such as guidance documents. The NAO has noted that the CMA gives more support to smaller sector regulators than did its predecessor bodies (*Summary, National Audit Office Report on the UK competition regime (www.practicallaw.com/4-622-8066) , 5 February 2016*). There is a disparity in competition law expertise between the sector regulators with the NAO reporting that, as at February 2016, Ofgem had 170 competition staff and Ofcom had 132, whereas the ORR had ten, the CAA had eight and Ofwat had five (*Figure 7, National Audit Office Report on the UK competition regime*).

- In the light of its lack of competition expertise it is perhaps not surprising that, in November 2015, the CAA board approved (www.practicallaw.com/7-626-9852) a resolution to enable the Enforcement Decision Panel, established by Ofgem, to take decisions on behalf of the CAA with respect to the enforcement of the CA98.

- More generally, however, it would not be surprising if the CMA had a particularly strong influence on the sector regulators that are the least well-resourced in terms of competition law expertise. The CMA's role as 'competition law expert' and the fact that it appears to be taking a lead on most issues at the UKCN suggests that it is using all the tools in its arsenal to assert its influence in the regulated sectors (*see paragraph 1.26, National Audit Office Report on the UK competition regime*). This approach is consistent with the government's view (www.practicallaw.com/4-620-8214) that the CMA is "well placed to provide a leadership role on competition with sector regulators" and "should encourage [the sector] regulators to make greater use of their competition powers and to tackle

anti-competitive actions in regulated markets".

- As the sector regulators, especially the less well-resourced regulators, develop their experience in enforcing competition law and reviewing markets, they may be less likely to rely on the CMA's expertise and the UKCN may therefore, in time, become a 'genuinely collaborative enterprise'.

- However, given the emphasis on collaboration between the CMA and the sector regulators in the enhanced concurrency arrangements and the CMA's commitment to the regulated sectors, it seems likely that the CMA will continue to exert a far more significant influence in the regulated sectors than its predecessors.

An increase, then decrease in CA98 investigations

- The increase in CA98 investigations initiated in the regulated sectors in the first year of the enhanced concurrency arrangements compared to the previous years was one of the main successes noted in the CMA's first annual concurrency report. The CMA's second annual concurrency report noted that only two new CA98 investigations were launched in the second year of the enhanced concurrency arrangements. This decrease in the number of CA98 investigations is significant. It is notable that the second year of the enhanced concurrency arrangements saw fewer investigations launched than in the period 2005 to 2013, when an average of 2.9 CA98 investigations per year were launched (*paragraph 19, CMA Annual Report on Concurrency 2015*).

- The CMA's second annual concurrency report acknowledges that "the number of cases opened during the period of the report is below the level that we would like it to be..." and states that it hopes "to see a greater number of cases opened during the year ahead" (*see Foreword and paragraph 5, CMA Annual Report on Concurrency 2016*). The CMA also appears to try to explain the decrease in investigations by referring to the "clear focus on delivery of the ongoing competition cases within the regulated sectors, with the issue of one infringement decision, one decision to accept commitments and a Statement of Objections". While it is certainly the case that a number of regulators were working on ongoing CA98 cases in the second year of the enhanced concurrency arrangements, this was also the case in the first year due to a number of CA98 investigations that were launched before the enhanced concurrency arrangements came into force. The CMA's first annual concurrency report notes that there were five ongoing CA98 investigations during the year.

- The statistics in relation to the number of complaints made and investigations launched may provide further insight into the decrease in new investigations. In the first year of the enhanced concurrency arrangements, six complaints were made and six new investigations were launched (five by the sector regulators and one by the CMA). In the second year, five complaints were made and the CMA's report states that two new investigations were launched. Of the five complaints, one was made to the CAA, three to Ofgem and one to the ORR. However, the new case launched by Ofgem was not based on a new complaint but on evidence obtained from a separate investigation.

  Furthermore, the source of the FCA investigation remains unclear as the FCA did not receive any complaints during the relevant period. The ORR decided in October 2015 to issue a warning letter to London Underground in lieu of opening a formal investigation and the CAA agreed with the CMA that the CMA was best placed to handle the complaint it had received in relation to access to facilities at an airport as it was not clear whether it fell within the CAA's concurrent powers. However, as at May 2016, it does not appear that the CMA has launched an investigation in relation to this issue.

- On the whole, the statistics suggest that the complaints received during the second year of the enhanced concurrency arrangements may not have been as substantiated or as serious as the complaints made during the first year which may go some way towards explaining the decrease in investigations.

- Going forward, it is unclear whether there will be more CA98 cases pursued by the sector regulators than before the enhanced concurrency arrangements came into force. It also remains to be seen how many of the investigations actually lead to infringement decisions. In general, however, it seems reasonable to allow a certain period of time, e.g. five years, before reaching any definitive conclusions about whether the enhanced concurrency arrangements have increased competition law enforcement in the regulated sectors and whether all sector regulators should retain their concurrent CA98 powers.

Increase in 'softer enforcement'

- The CMA's second annual concurrency report picks up on the increase in 'softer' enforcement work by numerous sector regulators. These 'softer' enforcement methods require fewer resources than formal investigations, thereby arguably enabling regulators to engage with more cases overall. A good example of this is the fact that Ofgem closed one of its investigations on administrative priority grounds and sent advisory letters to the relevant companies, as it considered that this was "an appropriate way to achieve pro-competition outcomes from the investigation and devote resources to other areas of work" (*paragraph 4(f)(ii), CMA Annual Report on Concurrency 2016*). It is therefore possible that, unless a suspected infringement is particularly serious, this will become a more usual approach used by the sector regulators.

EA02 powers remain unused

- The CMA's second concurrency report notes that "[a]lthough there have been no market studies conducted by the regulators under their Enterprise Act 2002 powers, a number of market studies and market reviews carried out by the regulators using sectoral powers have focused on competition issues within their sectors" (*paragraph 12*).

- The reliance on sector powers to carry out competition-focused market studies is a common theme amongst the sector regulators. Like the FCA and PSR, Ofcom has also chosen to carry out a number of market reviews using its sectoral (Communications Act 2003) powers rather than EA02 powers. Furthermore, during the second year of the enhanced concurrency arrangements, the CAA chose to examine surface access to airports using its Civil Aviation Act 2012 powers and Ofgem announced it is reviewing non-domestic gas metering using its sectoral powers.

- Since 1 April 2014, there have been no formal competition market studies launched by the sector regulators under EA02. It is not entirely clear why the sector regulators have preferred to use their sectoral powers for competition-focused market reviews, although sector-specific rules tend to provide greater timing and flexibility than EA02 and, in some cases, may provide wider-ranging powers to address any problems identified during the market study. If the sector regulators continue to prefer to use their sectoral powers over their EA02 powers, questions may arise as to whether their powers to carry put market studies under EA02 are necessary.

  However, the current legislation makes it unlikely that the Secretary of State will remove the power to carry out market studies under EA02 from sector regulators. The sector regulators also have the power to make market investigation references to the CMA under EA02 and ERRA13 currently only allows the Secretary of State to remove all EA02 powers from sector regulators, meaning that the Secretary of State could not remove the power to carry out market studies from sector regulators while allowing them to retain their powers to make market investigation references. However, the CMA may still choose to examine why sector regulators are choosing not to use their competition powers and are instead relying on sector rules to achieve a similar outcome.

The potential impact of concurrency in the development of markets and regulation

- It is yet to be seen whether the enhanced concurrency arrangements can serve as tools to help develop effective competition in those regulated sectors which are still developing competitive markets. In the water and sewerage sector, the CMA and Ofwat believe that competition enforcement under CA98 and review of markets under EA02 will be increasingly important tools to enable the development of effective competition in the sector (*Foreword, Memorandum of understanding between the Competition and Markets Authority and the Water Services Regulation Authority - concurrent competition powers, 23 February 2016*).

- The enhanced concurrency arrangements may also impact the development of regulation in the regulated sectors. For example, Ofgem's December 2015 retail energy market consultation was a direct response to the CMA's provisional findings in the energy market investigation. The CMA was highly critical of Ofgem's prescriptive approach to regulation and Ofgem's retail energy market consultation outlines how it plans to move away from detailed rules by replacing them with a high level principles-based approach.

Pooling of resources, nationally and at the EU-level?

- In the future there may be scope for consolidation of enforcement resources, both nationally and across the EU (assuming the UK remains a member of the EU). At the national level, the NAO has recommended that the government could "consider greater pooling of competition enforcement resources across the concurrent regulators" (*Recommendation 23, National Audit Office Report on the UK competition regime, 5 February 2016*). If such an approach were to be implemented it would be important to ensure that the sector expertise that sector regulators bring to the table is not lost.

- At the EU level, both the Committee on Industry, Research and Energy and the Committee on the Internal Market and Consumer Protection recommended in January 2016 that the EU's telecoms market should be regulated by a single authority and companies such as Google have supported this recommendation. It is unusual within the EU for sector regulators to have competition powers so it is unlikely that the relevant committees have considered what this recommendation would mean for Ofcom's competition powers.

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