The United Kingdom's 'enhanced concurrency regime'

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Abstract: An interesting feature of the Competition Act 1998 (the 'CA 1998') is the concurrency regime: the UK's sectoral regulators are given concurrent powers with the Competition and Markets Authority ('CMA') to enforce the Chapter I and Chapter II prohibitions and Articles 101 and 102 TFEU. This article explores the 'enhanced concurrency regime' that has applied since the entry into force of the Enterprise and Regulatory Reform Act 2013 and considers the main points outlined in the CMA's 2018 Concurrency Report and competition enforcement activity by the CMA and sectoral regulators in regulated sectors. It concludes with some thoughts on how concurrency may function in a post-Brexit world.

Keywords: concurrency, Competition and Markets Authority, sectoral regulators, Competition Act 1998, Chapter I prohibition, Chapter II prohibition, Brexit

An interesting feature of the Competition Act 1998 (the 'CA 1998') is the concurrency regime: the UK's sectoral regulators are given concurrent powers with the Competition and Markets Authority ('CMA') to enforce the Chapter I and Chapter II prohibitions and Articles 101 and 102 TFEU. The privatization of utilities that commenced in the UK in the 1980s led to the establishment of sector-specific regulators with a wide array of *ex ante* regulatory powers that could be used, *inter alia*, to promote competition; the concurrency regime introduced by the CA 1998 enabled those same regulators to use competition law as well as regulation to address competition problems. At the time of its adoption the UK's concurrency regime was unique, although the model has been replicated in some other jurisdictions since: a good example can be found in Hong Kong, where the Competition Commission applies competition law to the economy generally, but the Communications Authority has concurrent jurisdiction within a specific perimeter.¹

Over the years the number of concurrent regulators in the UK has grown: there are now nine. In their respective spheres of activity the Office of Communications

('OFCOM'), the Gas and Electricity Markets Authority ('OFGEM'), the Water Services Regulation Authority ('OFWAT'), the Civil Aviation Authority ('CAA'), the Northern Ireland Authority for Utility Regulation ('NIAUR'), the Office of Rail and Road ('ORR'), NHS Improvement,² the Payment Systems Regulator ('PSR') and the Financial Conduct Authority ('FCA') enjoy concurrent powers. It is understood that the only two of the regulators not to have used their competition powers are NIAUR and NHS Improvement.³

After its inception in 2000 the concurrency regime worked reasonably well; however, there was a growing sense that it had under-performed: there were relatively few infringement decisions, and it appeared to be the case that sectoral regulators, for a variety of reasons, preferred to use their *ex ante* regulatory powers rather than to take the (more difficult) route of applying competition law. This perception led to various reforms contained in the Enterprise and Regulatory Reform Act 2013 (the 'ERRA 2013') which entered into force in 2014.

This article will explore the post-ERRA 2013 'enhanced concurrency regime' as it currently functions; for a more detailed discussion of this subject readers are

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1 See the Hong Kong Competition Ordinance 2012, Part 11 'Concurrent Jurisdiction Relating to Telecommunications and Broadcasting'; there are other concurrency systems, for example in Ireland and Singapore.

2 'NHS Improvement' is the operational name for the organization that brings together several NHS bodies including Monitor, which has concurrent powers under the Health and Social Care Act 2012; see Monitor, *Application of the Competition Act 1998 in the healthcare sector: guidance for*

providers (September 2014), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/354078/cc_Guidance_on_application_of_CA98.pdf.

3 NHS Improvement was involved in the CMA's investigation of private ophthalmology that led to a fine of £382,500 being imposed for the unlawful exchange of information and price agreements: *Conduct in the ophthalmology sector* (Case CE/9784-13, 20 August 2015).

referred to the CMA's *Annual report on concurrency 2018* (the '2018 Concurrency Report').⁴ The article will begin with a brief overview of the concurrency regime; it will then consider the main points outlined in the *2018 Concurrency Report*, and go on to consider enforcement activity in practice, in particular since the entry into force of the ERRA 2013. It would be reasonable to suppose that after Brexit,⁵ when the CMA's workload will be considerably greater than it currently is, the sectoral regulators will be called upon to apply the competition rules with greater frequency: the article will conclude with some thoughts on how concurrency may function in a post-Brexit world.

1. An overview of the concurrency regime

1.1. The duty of primacy

The concurrency regime was established by the CA 1998. As noted, the perception that the regime had failed to have the impact expected of it led to the introduction in the ERRA 2013 of the 'primacy duty' – the requirement that the sectoral regulators (apart from NHS Improvement) should consider whether the use of their competition powers would be more appropriate than their sector-specific powers when deciding what action to take in a particular case.⁶ This would mean, for example, that, where a complainant complains to a sectoral regulator that it has been excluded from a market by anti-competitive behaviour by a dominant firm, the regulator should first consider whether this might amount to an infringement of the Chapter II prohibition and whether that provision should be used to address the problem. However, the ERRA 2013 does not *mandate* that competition law should be used, only that its use should be considered. It would still be open to the regulator to determine that it might be more appropriate (for

example because it would require fewer resources or lead to a speedier outcome) to use its *ex ante* regulatory powers. Clearly, the intention of the duty of primacy was that there would be more use of competition law in the future than has been the case to date in the regulated sectors and, as discussed below, there is some evidence that this is now happening.

The corollary of the duty of primacy is the idea of 'use it or lose it'. The ERRA 2013 envisages that, if a sectoral regulator does not make effective use of its concurrent powers, it may lose them. The Secretary of State therefore has the power to remove the concurrent powers of any sector regulator except NHS Improvement. Section 52 of the ERRA 2013 enables him or her to make a 'sectoral regulator order' if it is appropriate to do so for the purpose of promoting competition, within any market in the UK, for the benefit of consumers.

1.2. The Concurrency Regulations and the Concurrency Guidance

The Competition Act (Concurrency) Regulations 2014⁷ (the 'Concurrency Regulations') and the CMA's *Guidance on concurrent application of competition law to regulated industries* (the 'Concurrency Guidance')⁸ seek to ensure that concurrency operates in a satisfactory manner. The *Concurrency Guidance* provides the best picture of the operation of the concurrency provisions. It explains that the regulators have the same powers as the CMA,⁹ save that only the latter can issue guidance on penalties and make and amend the CMA's Rules.¹⁰

Additional information about the concurrency regime will be found in the memoranda of understanding that the CMA has entered into with the various sectoral regulators;¹¹ an information note is also available that explains the arrangements for handling leniency applications in the regulated sectors.¹²

4 *Annual report on concurrency 2018* (CMA79, April 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703566/annual_concurrency_report_2018_cma79.pdf, covering the period from 1 April 2017 to 31 March 2018.

5 See generally, CMA, *CMA's role after Brexit* (30 October 2018), available at <https://www.gov.uk/government/publications/cmas-role-after-brexit/cmas-role-after-brexit>.

6 ERRA 2013, Sch 14.

7 SI 2014/536, adopted pursuant to section 54 of the CA 1998; these Regulations replaced earlier ones (SI 2004/1077) with effect from 1 April 2014.

8 CMA, *Guidance on concurrent application of competition law to regulated industries* (CMA10, 12 March 2014), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704663/CMA10.pdf; note that all of the concurrent regulators have published guidelines on the application of competition law to their respective sectors, which are available at www.gov.uk/government/collections/uk-competition-network-ukcn-documents.

9 *Concurrency Guidance* (fn 8), paras 2.2–2.3.

10 Ibid, para 2.4; the CMA must consult with the regulators when issuing guidance on penalties, commitments and amending the CMA's Rules; note also that only the CMA can proceed under Part 6 of the Enterprise Act 2002 (the 'EA 2002') in relation to the criminal cartel offence.

11 See e.g. *Memorandum of Understanding between the Competition and Markets Authority and the Payment Systems Regulator – Concurrent Competition Powers* (22 December 2015), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487947/PSR-CMA_memorandum_of_understanding.pdf and *Memorandum of Understanding between the Competition and Markets Authority and the Office of Communications – Concurrent Competition Powers* (8 February 2016), available at https://www.ofcom.org.uk/_data/assets/pdf_file/0021/83523/cma_and_ofcom_mou_on_use_of_consumer_powers_webversion.pdf.

12 CMA Information Note, *Arrangements for the handling of leniency application in the regulated sectors* (3 November 2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656905/information-note-on-arrangements-for-handling-of-leniency-applications.pdf.

Complaints may be made to the CMA or the relevant regulator;¹³ the same is true for applications for interim measures.¹⁴ The *Concurrency Guidance* explains that cases will be allocated between the CMA and the regulators (save for NHS Improvement) according to which of them is 'better or best placed' to act.¹⁵ The *Concurrency Guidance* sets out the principles by reference to which a 'better or best-placed' authority is to be identified.¹⁶ In the event of a dispute on jurisdiction the CMA will decide which authority shall handle the case.¹⁷

Once a case has been allocated the Concurrency Regulations make provision for the CMA to direct a regulator to transfer a case to it where the CMA is satisfied that its enforcement of the prohibitions in the CA 1998 and/or Articles 101 and 102 TEU, rather than enforcement by the regulator, would promote competition, within any market or markets in the UK, for the benefit of consumers.¹⁸ The CMA expects that it will exercise this power sparingly.¹⁹

The *Concurrency Guidance* also discusses the relationship between the regulators' powers under competition law and their sector-specific powers²⁰ and explains the law on confidentiality and disclosure of information.²¹ A key feature of the concurrency arrangements is the requirement to share information about current cases, including drafts of statements of objections, commitment decisions and infringement decisions; this will be discussed further below in the context of the *2018 Concurrency Report*.

1.3. The UK Competition Network

The UK Competition Network (the 'UKCN') brings together the CMA and all the regulators, except NHS Improvement which has observer status.²² The mission of the UKCN is to promote competition and deter anti-competitive behaviour in the regulated sectors.²³

The *Concurrency Guidance* describes the work and procedure of the UKCN;²⁴ meetings of the UKCN are chaired by a representative of the CMA.²⁵ The UKCN will focus on six 'priority areas': strategic dialogue; co-operation in the enforcement of competition law; enhancing capabilities; sharing best practice; advocacy; and the preparation of the CMA's concurrency report.²⁶

1.4. The Government's competition law review

In April 2018 the Department for Business, Energy and Industrial Strategy ('BEIS') published its consumer Green Paper, *Modernising Consumer Markets*, in which it announced its review of competition law pursuant to section 46 of ERRA 2013.²⁷ One of the specific questions asked by BEIS is whether the competition regime provides the CMA and regulators with the tools they need to tackle anti-competitive behaviour and to promote competition.

2. The CMA's 2018 Concurrency Report

The CMA is required, after consultation with the regulators, to publish an annual report on the operation of the concurrency arrangements and on decisions on the use of the concurrent competition powers by the CMA and sector regulators.²⁸ The *2018 Concurrency Report* is the fifth such report to have been published. It runs to a total of 142 pages. The main point to make at the outset is that concurrency is about much more than simply deciding which authority should take enforcement action in the case of possible infringements of the Chapter I and II prohibitions and Articles 101 and 102. Of course this is a very important issue, but there is more to concurrency than this; in particular the various authorities work together in relation to markets, mergers and the promotion

13 *Concurrency Guidance* (fn 8), para 3.37; the authorities will strive to allocate the case within two months of the first authority to receive the complaint: *ibid*, para 3.24.

14 *Ibid*, para 3.40.

15 *Ibid*, para 3.22; see paras 3.21–3.25 generally on case allocation; reg 5(5) of the Concurrency Regulations (fn 7) provides that NHS Improvement will normally be responsible for cases principally concerned with the provision of healthcare services for the purposes of the NHS in England.

16 *Ibid*; the principles of case allocation set out in the European Commission's Notice on co-operation within the Network of Competition Authorities, OJ 2004 C 101/43 ('Network Notice'), will be taken into account where Articles 101 or 102 apply: *ibid*, para 3.38.

17 Concurrency Regulations (fn 7), reg 5(1)–(4); see also *Concurrency Guidance* (fn 8), para 3.23.

18 Concurrency Regulations (fn 7), reg 8; on the circumstances in which the CMA may exercise jurisdiction where a case has already been allocated to a regulator see the *Concurrency Guidance* (fn 8), paras 3.26–3.29.

19 *Concurrency Guidance* (fn 8), para 3.28.

20 *Ibid*, paras 4.2–4.7 (CA 1998 and sector-specific regulation) and paras 4.8–4.12 (EU competition law and sector-specific regulation).

21 *Ibid*, paras 5.1–5.7.

22 *Ibid*, para 3.1; the UKCN's website is www.gov.uk/government/collections/uk-competition-network-ukcn-documents.

23 See UKCN Statement of Intent in the *Concurrency Guidance* (fn 8), Annexe B.

24 *Concurrency Guidance* (fn 8), paras 3.15–3.20.

25 *Ibid*, para 3.15.

26 *Ibid*, paras 3.1–3.6.

27 BEIS, Consumer Green Paper, *Modernising Consumer Markets* (April 2018), available at <https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets>.

28 ERRA 2013, Sch 4, para 16; the annual concurrency reports are available at <https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents>.

of competition generally. A particular feature of 'enhanced concurrency' is that there is closer co-operation in numerous practical ways than hitherto. After a general introduction, the key components of which will be set out below, the *2018 Concurrency Report* contains informative discussions of the activities of each of the CMA and the nine sectoral regulators of relevance to the concurrency regime.

The introduction to the *2018 Concurrency Report* discusses various aspects of concurrency during the reporting period under four headings.

2.1. Significant investigations in the regulated sectors

The first part of the introduction to the *2018 Concurrency Report* discusses recent and current investigations conducted by the CMA and the sectoral regulators under both the CA 1998 and the EA 2002.

2.1.1. Competition Act 1998 and Articles 101 and 102

The *2018 Concurrency Report* contains a useful summary of recent cases in which the CMA or the sectoral regulators have been involved in enforcing the Chapter I and II prohibitions and Articles 101 and 102. These cases will be discussed in Section 3 below.

2.1.2. Market investigations

Market investigations are carried out by the CMA. The two most recent market investigations to have been completed by the CMA, *Energy Market Investigation*²⁹ and *Retail Banking Market Investigation*,³⁰ are obviously relevant from a concurrency perspective. In the case of *Energy*, which was a reference by OFGEM to the CMA, the CMA made 26 remedy recommendations to OFGEM. The *2018 Concurrency Report* describes the progress that has been made to date.³¹ In the case of *Retail Banking*, the FCA has been taking forward the recommendations of the CMA on matters such as the improvement of services and the encouragement of consumers to have greater engagement in relation to their bank accounts.³²

The CMA is currently conducting one market investigation, into Investment Consultants: this was a reference by the FCA to the CMA in September 2017. The FCA is working closely with the CMA in this case. On 18 July 2018 the CMA provisionally found that there are some adverse effects on competition in the investment consultancy market and some more serious ones in the fiduciary management market.³³ The CMA proposed a series of changes to address the problems identified. The statutory deadline for this investigation is 13 March 2019, although the CMA is aiming to publish its final report by the end of 2018.

2.1.3. Market studies

Both the CMA and the sectoral regulators conduct market studies, and the *2018 Concurrency Report* provides details of three particular ones of interest in the context of concurrency.

*Digital comparison tools*³⁴

The interest of the CMA's market study of Digital comparison tools ('DCTs') as far as concurrency is concerned is that its findings have obvious significance for the sectoral regulators: clearly, it is in the interests of competition that consumers should be able to have access to information that helps them to make well-informed choices about suppliers, standards of service and price, and DCTs have an important part to play in this regard.

The CMA found that DCTs provide consumers with a variety of benefits that are pro-competitive. However, it was of the view that more could be done to ensure that consumers would be able to trust price comparison websites and make well-informed choices: in particular the CMA emphasized that DCTs should treat people fairly by being Clear, Accurate, Reasonable and Easy to use: the so-called 'CARE principles'.

The CMA was also concerned about the use of 'Most Favoured Nation' clauses in contracts between suppliers and price comparison websites: this led to its opening of a case under the Chapter I prohibition against Compare The Market.³⁵ This is a case that falls within the perimeter of the FCA's concurrency powers, but, given the experience gained by the CMA in its market study,

29 CMA, *Energy market investigation*, Final Report (24 June 2016), available at <https://www.gov.uk/cma-cases/energy-market-investigation>.

30 CMA, *Retail banking market investigation*, Final Report (9 August 2016), available at <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>.

31 *2018 Concurrency Report* (fn 4), paras 66–69 and 220–223.

32 *Ibid*, paras 70–74 and 257–258.

33 CMA, *Investment Consultants Market Investigation*, Provisional Decision Report (18 July 2018), available at <https://www.gov.uk/cma-cases/investment-consultants-market-investigation>.

34 CMA, *Digital comparison tools market study*, Final Report (26 September 2017), available at <https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>; this market study is discussed in the *2018 Concurrency Report* (fn 4), paras 9–15.

35 CMA, *Price comparison website: use of most favoured nation clauses*: see <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

this was held to be a case more naturally to be conducted by it, albeit with significant sectoral input from the FCA.

The *2018 Concurrency Report* discusses certain findings in the market study of particular relevance in the regulated sectors: for example, the CMA recommended that DCTs should be brought within the regulatory scope of the regulators and made some specific recommendations to the FCA, OFGEM and OFCOM for further action. The CMA also discusses the current work being undertaken by each of them and by OFWAT in relation to DCTs.³⁶ The work of the UK Regulators Group (the 'UKRN') is also discussed: the UKRN welcomed the CMA's recommendations and has formed a project team to ensure a consistent approach to DCTs having regard to the CARE principles; to consider ways in which to make more information available to improve data portability so that users can obtain useful comparisons of complex and data-intensive services; and to improve the use of the way in which the quality of products can be measured.

Heat networks³⁷

In December 2017 the CMA launched a market study into heat networks, as there is a concern that switching may be difficult for customers and that some contracts are of excessive duration. Heat networks provide homes with heat and hot water from a central source via insulated pipes; they are not regulated. This is a case in which the CMA worked in conjunction with OFGEM, which was able to share its knowledge of the regulatory environment and the law on consumer protection in this sector. The CMA published its report on 23 July 2018, in which it found that some users of privately operated networks are receiving poor deals, and it made a series of recommendations that should be made once a regulator is established for this market.³⁸

Automatic ticket gates and ticket vending machines³⁹

The ORR has opened a market study into the supply of automatic ticket gates and ticket vending machines. This is the first market study to have been launched by a sectoral regulator since the amendments to the concurrency system made by the ERRA 2013. The ORR published its emerging findings on 13 September 2018.⁴⁰

The *2018 Concurrency Report* also provides details of market studies carried out by the regulators under their own sectoral powers as opposed to under the EA 2002, including four by the FCA and five by OFCOM.⁴¹

2.1.4. Mergers

In formal terms there are no concurrency arrangements in place for mergers. However, the sectoral regulators work closely with the CMA in appropriate cases, and the *2018 Concurrency Report* lists numerous cases – in water, communications, rail, financial services, healthcare, air and energy – in which there was co-operation between the CMA and a sectoral regulator.⁴²

2.2. Promoting competitive outcomes

The second part of the introduction to the *2018 Concurrency Report* discusses ways in which the CMA and the sectoral regulators seek to promote competition other than through enforcement activity and markets work. It points out that much can be achieved through advocacy and compliance work, and provides details of action taken by the CMA and the various regulators in this respect.⁴³

2.3. General co-operation

The third part of the introduction to the *2018 Concurrency Report* discusses the various ways in which the CMA and the sectoral regulators co-operate with one another in a general sense. This perhaps is where one sees 'enhanced compliance' in practice most obviously. Whereas at one time concurrency was predominantly a matter of the authorities meeting to determine the allocation of cases, there is now a deeper level of co-operation in a variety of ways; this develops upon the practical arrangements set out in the various Memoranda of Understanding between the CMA and the sectoral regulators.⁴⁴ Specifically this section of the *2018 Concurrency Report* contains paragraphs on each of the following matters:⁴⁵

- *Information-sharing*: apart from the exchange of information provided for in the Concurrency

³⁶ See *2018 Concurrency Report* (fn 4), para 15.

³⁷ Ibid, para 16 and paras 76–78.

³⁸ *Heat Networks Market Study*, Final Report (23 July 2018), available at <https://www.gov.uk/cma-cases/heat-networks-market-study>.

³⁹ See *2018 Concurrency Report* (fn 4), paras 17–18.

⁴⁰ ORR, *Market Study into the supply of automatic ticket gates and ticket vending machines*, update paper (September 2018), available at <http://orr.gov.uk/rail/publications/research-and-studies/monitoring-markets/>

supply-of-automatic-ticket-gates-and-ticket-vending-machines-market-study.

⁴¹ *2018 Concurrency Report* (fn 4), paras 19–24.

⁴² Ibid, paras 83–96.

⁴³ Ibid, paras 25–29.

⁴⁴ See fn 11 above.

⁴⁵ *2018 Concurrency Report* (fn 4), paras 30–43.

Regulations and the various Memoranda of Understanding, there is now more informal discussion and sharing of know-how and relevant expertise.

- *Case allocation*: during the reporting period, there was one case in which more than two authorities had jurisdiction to investigate a particular case (though it is not stated which one it was).
- *Support on casework*: examples of this have been given above.
- *Preparations for Brexit*: some thoughts on concurrency after Brexit will be found at the end of this article.
- *The functioning of the UKCN*: matters discussed within the UKCN have included the use of the powers in section 26A of the CA 1998 available to the CMA and the sectoral regulators to ask questions and the revised market investigation process for regulators at Phase I of the market investigation system. It is also reported that there are meetings between the UKCN and the UKRN, at Chief Executive and operational levels.
- *Regular bilateral meetings*: bilateral meetings are held on a quarterly basis between the CMA's Sector Regulation Unit and each sector regulator.
- *The Case Decision Groups working group*: a working group has been established to allow UKCN regulators to share know-how and best practice for the use of Case Decision Groups in cases under the CA 1998.
- *The UKCN consumer remedies project*: this project was initiated following a recommendation from the National Audit Office that the CMA and sectoral regulators should further their understanding of consumer behaviour in order to inform proposed remedies in competition cases.
- *Leniency*: an information note has been published on arrangements for leniency applications in the regulated sectors.
- *Competition awareness training*: competition law training is regularly shared between the CMA and the sectoral regulators.
- *Support on policy work*: examples are given of mutual support in relation to policy work, including OFWAT's engagement with the CMA about its *Energy* market investigation and the *Digital Comparison Tools* market study in order to inform policy thinking about the water sector's new business retail market.
- *Secondments*: these occur regularly between authorities.

2.4. Progress of the concurrency arrangements

The fourth part of the introduction to the *2018 Concurrency Report* discusses what is described as a 'step-change' in the breadth and depth of the relationships between the CMA and the sectoral regulators in recent years: that is to say the move towards 'enhanced concurrency'.⁴⁶ The *2018 Concurrency Report* says that there are now increased levels of sharing of know-how and expertise. More specifically, there is now earlier engagement in CA 1998 cases on matters such as scoping the investigation, planning and developing theories of harm.

3. Enforcement activity since 2014

3.1. Enforcement prior to the ERRA 2013

Prior to the entry into force of the ERRA 2013, only two infringement decisions had been adopted by a sectoral regulator, one in 2006 by the ORR in *English Welsh and Scottish Railway*⁴⁷ and the other in 2008 by OFGEM in *National Grid*.⁴⁸ The sectoral regulators did, however, adopt several commitment decisions under Section 31A of the CA 1998, leading to a legally-binding change in the behaviour of the undertakings under scrutiny; however, such decisions do not result in a finding of an infringement of competition law (nor of a non-infringement).⁴⁹ More numerous than infringement decisions were the findings by the sectoral regulators of non-infringement of competition law, of which there have been many. In *Albion Water v. Water Services Regulation Authority* the Competition Appeal Tribunal ('CAT') set aside OFWAT's non-infringement decision and substituted its own finding of an infringement.⁵⁰

Various commentators criticized the under-enforcement of the competition provisions by the regulators.⁵¹ There are several possible explanations for the small number of infringement decisions by sectoral regulators. As noted above, one is that the sectoral regulators have an option whether to apply competition law to anti-competitive conduct or to use their sector-specific regulatory powers. It is

⁴⁶ Ibid, paras 44–49.

⁴⁷ ORR, *English Welsh and Scottish Railway Limited* (16 November 2006), finding that EWS had infringed the Chapter II prohibition and Article 102 TFEU in relation to contracts for the carriage of coal by rail in Great Britain.

⁴⁸ GEMA, *National Grid (formerly Transco)* (Case CA98/STG/06, 21 February 2008), finding that National Grid had infringed the Chapter II prohibition and Article 102 TFEU in relation to the provision of domestic-sized gas meters (including the ancillary service of meter maintenance) in Great Britain; upheld as to substance on appeal in *National Grid Plc v. Gas and Electricity Markets Authority* [2009] CAT 14, and on appeal to the Court of Appeal [2010] EWCA Civ 114; both the CAT and the Court of Appeal reduced the level of the penalty.

⁴⁹ See e.g. *Manweb* (OFGEM, 27 October 2005); *Severn Trent* (OFWAT, January 2013); *Bristol Water* (OFWAT, March 2015); and *Freightliner* (ORR, 19 November 2015).

⁵⁰ *Albion Water v. Water Services Regulation Authority* [2006] CAT 36, upheld on appeal [2008] EWCA Civ 536.

⁵¹ See e.g. M. Bloom, *The Competition Act at 10 Years Old: Enforcement by the OFT and the Sector Regulators* [2010] Comp Law 141 and N. Pimlott, *Concurrency and the Role of the Competition Appeal Tribunal as Supervisor of the Sectoral Regulators* [2010] Comp Law 162.

not unusual to see, for example, that OFCOM or OFGEM have required regulated undertakings' licence conditions to be amended to address problems of market failure:⁵² in practical terms this may be a simpler and quicker way to proceed, with a knock-on effect on the number of infringement decisions, although the duty of primacy introduced by the ERRA 2013 may alter the situation. Another explanation for the relative lack of findings of infringement might be that in some cases the sectoral regulators considered that they were unable to satisfy the standard of proof under the CA 1998.⁵³ A third explanation could be that the de-monopolization and liberalization of regulated sectors that began in the UK a considerable time ago, in the 1980s, has had the result that such markets are by now reasonably competitive: that is to say that today there are fewer dominant positions capable of being abused than there once were.

3.2. Enforcement since the ERRA 2013

There is evidence that the ERRA 2013 has led to a greater use of the concurrency powers, although it would be wrong to suggest that there has been a dramatic change. There have been two infringement decisions by sectoral regulators since the ERRA 2013 entered into force. In addition, there are five other cases under consideration by the sectoral regulators at the moment, and the CMA in investigating two cases that concern the financial services sector.

CAA and CMA: car parking facilities at airports

In *Access to car parking facilities at East Midlands International Airport*,⁵⁴ the CAA concluded that East Midlands International Airport, its parent company Manchester Airport Group and Prestige Parking had infringed the Chapter I prohibition by entering into a price-fixing agreement for parking charges at East Midlands Airport. No fines were imposed in this case: the airport was granted immunity under the leniency programme and by the time of the decision Prestige Parking was in liquidation. A related case concerning a possible infringement of the Chapter II prohibition at the same airport was closed in June 2017.

In a subsequent case, concerning car parking at Heathrow Airport, the CMA, rather than the CAA, took the lead; however the CAA provided support, including the provision of a secondee, as well as its sectoral expertise, to the CMA. In this case the CMA imposed a fine of £1.6 million on Heathrow Airport Ltd. for entering into a written signed agreement with the Arora group whereby the latter, the owner of the Sofitel hotel at Heathrow's Terminal 5, would not charge non-hotel guests cheaper prices than those charged at other car parks at the airport.⁵⁵ The Arora group was not fined as it was granted immunity. The CMA has sent letters to other airports and hotel operators warning them against similar anti-competitive agreements.⁵⁶ It also published, on 25 October 2018, guidance on land agreements and competition.⁵⁷

OFCOM: discriminatory pricing by Royal Mail

In August 2018 OFCOM imposed a fine of £50 million on Royal Mail for infringing the Chapter II prohibition and Article 102 TFEU.⁵⁸ This was the first time that OFCOM has found an infringement of competition law; the infringement was in the postal rather than the telecommunications sector.

Whistl (formerly TNT Post) began to deliver bulk mail in London in 2012. It intended to extend its operations in this market, in particular by establishing its own delivery network. The intention was that it would be able to cover around 40% of all addresses in the UK by 2018; however, where it did not have its own delivery network, it required access at the wholesale level of the market to the delivery system of Royal Mail. Whistl complained to OFCOM that increases in Royal Mail's wholesale prices to be introduced in 2014 discriminated against it and amounted to an abuse of dominance.

OFCOM agreed that the proposed charges were unlawful: they penalized any wholesale customer that sought to compete with Royal Mail in bulk mail delivery. In OFCOM's opinion the discriminatory tariffs that were intended to be introduced (but which Royal Mail suspended when OFCOM began its investigation) would have had a material impact on the profits of an undertaking seeking to enter the bulk delivery market, thereby

52 See e.g. OFGEM's *Energy Supply Probe* (2008), available at <https://www.ofgem.gov.uk/gas/retail-market/market-review-and-reform/retail-market-review/energy-supply-probe>.

53 A point noted by the CAT in *JJJ Sports plc v. OFT* [2004] CAT 17, para 205.

54 CAA, *Access to car parking facilities at East Midlands International Airport* (CAA decision CA98-001, 17 January 2017).

55 CMA, *Conduct in the transport sector (facilities at airports)* (25 October 2018). See CMA press release, *Heathrow and Arora admit to anti-competitive car park agreement* (18 September 2018).

56 See <https://www.gov.uk/cma-cases/conduct-in-the-transport-sector-facilities-at-airports>.

57 CMA, *Land agreements and competition: dos and don'ts* (25 October 2018), available at <https://www.gov.uk/government/publications/land-agreements-and-competition-law-dos-and-donts/land-agreements-and-competition-dos-and-donts>.

58 OFCOM, *Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK* (Case CW/01122/01/14, 14 August 2018).

making entry significantly harder. OFCOM considered that internal documents of Royal Mail provided evidence that the proposed changes were part of a deliberate strategy to limit competition in delivery. Royal Mail has appealed against OFCOM's decision to the CAT on both procedural and substantive grounds; it also claims that the amount of the fine is manifestly disproportionate.⁵⁹

OFGEM: ongoing investigations

OFGEM is conducting two investigations.

In August 2016 it opened an investigation into a possible breach of the Chapter I prohibition and on 31 May 2018 it proceeded to issue a Statement of Objections to two energy suppliers and to a consultancy firm. The energy companies, Economy Energy and E (Gas and Electricity), are accused of market sharing and the exchange of commercially sensitive information; Dyball Associates is accused of facilitating these practices by designing, implementing and maintaining software systems that allowed customer lists to be shared and the recruitment of each other's customers to be blocked.⁶⁰ In this case Economy Energy complained to OFGEM's Procedural Officer that there had been significant procedural problems with the way that the investigation had been conducted. On 23 May 2018 the Procedural Officer concluded that some of the complaints lay outside his jurisdiction; in one instance he did have jurisdiction, but he concluded that there was no procedural defect.⁶¹

OFGEM's second investigation concerns a possible infringement of the Chapter II prohibition and Article 102 by a company providing services to the energy industry; in December 2017 it announced that it was continuing with the investigation.⁶² There is no further information about this case in the public domain.

OFCOM: ongoing investigation

On 13 August 2018 OFCOM opened an investigation into whether there may be market-sharing and/or customer-allocation agreements in place between operators in the business parcel delivery sector.⁶³

Payment Systems Regulator: ongoing investigation

The PSR has announced that it had opened its first investigation under the CA 1998; it carried out several searches under warrant at business premises in the UK, working in close co-operation with the CMA, which provided specialist investigative and forensic support.⁶⁴

Financial Conduct Authority: ongoing investigation

The FCA has sent Statements of Objections to four asset management companies, Artemis Investment Management, Hargreave Hale, Newton Investment Management and River & Mercantile Asset Management, accusing them of sharing information in relation to the prices they intended to pay in relation to two Initial Public Offerings.⁶⁵ An oral hearing has been heard in this case and the outcome is awaited.

CMA: ongoing investigations

On 2 November 2018 the CMA announced that it had sent a Statement of Objections to Compare The Market (of Meerkat fame) and to three other legal entities in the same group provisionally concluding that its use of 'Most Favoured Nation' clauses infringes the Chapter I prohibition and Article 101 TFEU.⁶⁶ Home insurers enter into contracts with Compare The Market, which operates two price comparison websites, comparethemarket.com and comparethemeerkat.com. According to the CMA these contracts prevent home insurers from quoting lower prices on rival sites and other channels: in the CMA's view this may be preventing consumers from finding better deals for the insurance of their homes.

The interesting point about this investigation in terms of the concurrency regime is that home insurance is a sector that falls within the perimeter of the FCA's powers, so that it would have been competent to take the case. However, as noted above, the CMA has acquired considerable knowledge of price comparison tools from its market study into digital comparison tools;⁶⁷ it was therefore in a better position to take

⁵⁹ Case 1299/13/18 *Royal Mail plc v. Office of Communications*, pending.

⁶⁰ See OFGEM press release, *Ofgem issues statement of objections under the Competition Act to Economy Energy, E, and Dyball Associates* (31 May 2018).

⁶¹ *Economy Energy Trading Limited* (Procedural Officer Decision 2018/1, 23 May 2018), available at https://www.ofgem.gov.uk/system/files/docs/2018/10/procedural_officer_decision_dated_23_may_2018.pdf.

⁶² See <https://www.ofgem.gov.uk/publications-and-updates/investigation-under-chapter-ii-competition-act-and-or-article-102-treaty-functioning-european-union>.

⁶³ See https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01222.

⁶⁴ Payment Systems Regulator, Annual report and accounts 2017/18 (HC 1243, 19 July 2018), available at <https://www.psr.org.uk/sites/default/files/media/PDF/PSR-annual-report-and-accounts-2017-18.pdf>, page 14.

⁶⁵ See FCA press release, *FCA issues first statement of objections to four asset management firms* (29 November 2017).

⁶⁶ See CMA press release, *ComparetheMarket home insurance deals could deny people better prices* (2 November 2018).

⁶⁷ *Digital comparison tools market study* (fn 34).

jurisdiction, albeit working closely with the FCA in order to take advantage of its sectoral expertise. To put the point another way, concurrency is a two-way process, whereby suitable cases might be conducted by the CMA rather than the sectoral regulator where this is an appropriate way to proceed: concurrency is not only about the sectoral regulators taking cases that the CMA might otherwise have done. MFN clauses are to be found in many sectors, and the CMA's findings in this case will have implications beyond the market for home insurance.⁶⁸

On 16 November 2018, the CMA announced that it had opened an investigation into suspected anti-competitive arrangements in the financial services sector which may infringe the Chapter I prohibition and/or Article 101(1) TFEU. The CMA has stated publicly that it had agreed with the FCA that it should undertake the investigation.⁶⁹ No further information is publicly available.

One final point about enforcement that is made in the *2018 Concurrency Report* concerns the use of warning and advisory letters in the concurrency sphere. It is reported that OFGEM sent advisory letters to industry participants in one case after a complaint that there had been a breach of the Chapter I prohibition.⁷⁰ The FCA has issued three 'on notice' letters to firms where evidence suggested that there may have been an infringement of competition law.⁷¹

4. Concurrency after Brexit

It is a statement of the obvious that after Brexit the CMA's workload will be considerably greater than at present, whether this is with effect from 30 March 2019 (in the event of a 'no deal Brexit') or 1 January 2021 (following the expiry of the 'transition or

implementation period' provided for in the draft Withdrawal Agreement⁷²). The CMA's budget has been increased in anticipation of this, and it is clear that it will have to investigate up to 50 more mergers per year than at present; the likely jurisdiction over State aid measures will also pose a major challenge. This will have an effect on the CMA's ability to pursue its enforcement activities. The Office of Fair Trading and the CMA have often been criticized in the past for 'under-enforcement' of the competition rules: a point that is often overlooked is that there have been numerous European Commission decisions in which major UK undertakings have been found guilty of infringements: UK companies were fined, for example, in the *LIBOR* cases⁷³ and in *Car Glass*,⁷⁴ *Airfreight*,⁷⁵ *Retail Food Packaging*,⁷⁶ *Freight Forwarding*,⁷⁷ *Marine Hoses*⁷⁸ and many others. If these cases had occurred in a post-Brexit world, it is reasonable to suppose that the CMA would have investigated them (subject to the availability of resources) as well as the European Commission.

The UK's concurrency arrangements may be particularly useful and important in the post-Brexit world if the CMA does find that it is overstretched with its new duties. Once the UK has left the EU (and any transition period has expired), Regulation 1/2003 will cease to apply.⁷⁹ In particular, the European Commission will no longer have the power in Article 11(6) of that Regulation to order a case being conducted by the CMA or a sector regulator to be transferred to it. The *LIBOR* cases would presumably, in the future, be ones that would come under the concurrent jurisdiction of the CMA and the FCA; but, more specifically, one can imagine that the CMA would be more than content that the FCA, with its considerable resources equipped to handle competition cases, should take jurisdiction. Presumably

68 On 14 June 2016 OFGEM announced that it had transferred an investigation into third party intermediaries and price comparison websites to the CMA: see Notice on final decision on transfer, available at <https://www.ofgem.gov.uk/publications-and-updates/ofgem-has-decided-transfer-competition-act-investigation-competition-and-markets-authority>. The CMA subsequently closed its investigation without finding an infringement, on grounds of administrative priority: *Energy price comparison websites: suspected anti-competitive agreements*, Case Closure Statement (Case 50332, 6 October 2016).

69 See *Financial services sector: suspected anti-competitive practices* (16 November 2018), available at <https://www.gov.uk/cma-cases/financial-services-sector-suspected-anti-competitive-practices>.

70 *2018 Concurrency Report* (fn 4), para 231.

71 *Ibid*, para 275.

72 Draft United Kingdom/European Union Withdrawal Agreement of 14 November 2018 (TF50 (2018) 55) Article 126, available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf. The State aid and competition-related provisions of the Draft Withdrawal Agreement are in Articles 92 and 95 and in the Protocol on Ireland/Northern Ireland, Annex 4, Parts Four (State aid) and Five (competition) and require the United Kingdom to maintain and enforce State aid and competition laws that are equivalent to those in EU law.

73 See e.g. Case AT.39924 *Swiss France Interest Rate Derivatives* (Settlement Decisions of 21 October 2014), which involved, amongst others, RBS and the London operations of UBS; and Case AT.39914 *Euro Interest Rate Derivatives* (Settlement Decision of 4 December 2013 and Infringement Decision of 7 December 2016), which involved, amongst others, RBS, HSBC and Barclays.

74 Case AT.39125 *Carglass* (27 July 2009).

75 Case AT.39258 *Airfreight* (17 March 2017), readopting a decision of 9 November 2008 that was annulled by the General Court on 16 December 2015 in a series of judgments, including Case T-48/11 *British Airways v. Commission*, ECLI:EU:T:2015:988. British Airways was fined €104 million: see Commission press release, *Antitrust: Commission re-adopts decision and fines air cargo carriers €776 million* (IP/17/661, 17 March 2017).

76 Case AT.39563 *Retail Food Packaging* (24 June 2015).

77 Case AT.39462 *Freight Forwarding* (28 March 2012).

78 Case AT.39406 *Marine Hoses* (28 January 2009).

79 See generally, CMA, *CMA's role in antitrust if there's no Brexit deal* (30 October 2018), available at <https://www.gov.uk/government/publications/cmas-role-in-antitrust-if-theres-no-brexit-deal/cmas-role-in-antitrust-if-theres-no-brexit-deal>.

the Commission's investigation of *Credit Default Swaps*, ended with the acceptance of commitments under Article 9 of Regulation 1/2003 in 2016, would also be one that the FCA would be able to conduct post-Brexit.⁸⁰ A different point is that a case such as *Aviation insurance*, which the FCA was investigating, would no longer be taken over by the Commission, as occurred in October 2017.⁸¹

5. Conclusion

Concurrency today is very different from what it was when first introduced in 2000. As the *2018 Concurrency*

Report demonstrates, it is about much more than the mere allocation of cases. There is a greater coherence to the system, and co-operation operates at several levels and in relation to much more than enforcement of the CA 1998 and Articles 101 and 102. It is particularly fortunate that there is a well-established system in place given the likely future stresses on the competition law system that will be produced by Brexit; in particular it may be anticipated that certain cases in the financial services sector that the European Commission would have investigated will, in the future, be taken by the FCA.

80 Case AT.39745 *CDS Information Market* (Commitments Decisions of 20 July 2016).

81 *2018 Concurrency Report* (fn 4), para 273.