

18 January 2016

Memorandum of understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority¹ – concurrent competition powers

Contents

	<i>Page</i>
Foreword.....	2
Memorandum of understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority	4
Part A – Cooperation in relation to the competition prohibitions (Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union)	11
Part B – Cooperation in relation to the market provisions: market studies and market investigations (Enterprise Act 2002)	21

¹ Referred to throughout as Ofgem.

Foreword

The changes to the United Kingdom's (UK) competition law system, introduced under the Enterprise and Regulatory Reform Act 2013 and in force since April 2014, are designed to improve the effectiveness of competition law enforcement in this country.

The Competition and Markets Authority (CMA) has competition law powers which apply across the whole economy. Sectoral regulators such as Gas and Electricity Markets Authority (Ofgem) may exercise the competition law powers to enforce the prohibitions on anti-competitive agreements and on abuse of a dominant position, and to make market investigation references, concurrently with the CMA in those sectors for which they have responsibility.

The Enterprise and Regulatory Reform Act 2013 introduced a number of changes to improve the working of concurrency and enable closer working between the CMA and sectoral regulators.

The CMA and the sectoral regulators have demonstrated their commitment to making the concurrency framework more effective through the establishment of the UK Competition Network (UKCN). This represents an enhanced forum for cooperation which will enable closer working with the objective of more consistent and effective use of competition powers across all sectors. In their statement of intent in December 2013, the members of the UKCN affirmed: 'The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate'.²

This Memorandum of Understanding (MoU) represents a further stage in the process of cooperation between the CMA and the regulators, setting out more practical detail on how the CMA and Ofgem will work together within the framework of competition law.³

The main purpose of this MoU is to establish an understanding between the CMA and Ofgem as to how this closer working will work in practice. It draws on the legislation which sets out the formal framework for how concurrency will operate and also, importantly, sets out our bilateral commitment to look for opportunities to work together, including within the framework of the UKCN, to promote competition for the

² UKCN (2013), *Statement of Intent*.

³ This MoU does not relate to "regulatory appeals" – that is, the separate role that the CMA has in considering appeals against, or references relating to, proposed direct regulatory action by Ofgem under the sectoral statutes. This is a separate role, to be undertaken by the CMA panel, and the CMA is committed to ensuring that its cooperation with Ofgem – whether under this MoU (and under comparable MoU agreed with other sectoral regulators), through the UKCN or otherwise in connection with their concurrent powers – will not impair the impartiality and fairness of the CMA's conduct of such regulatory appeals (or indeed of market or merger investigations undertaken by the CMA panel).

benefit of consumers. We shall do this by the sharing of expertise, information, ideas and experience and each of us will commit to doing this efficiently and with a mutual regard for each other's statutory position and strategic objectives.

We believe that this MoU offers a valuable basis for that cooperation, in the interests of the CMA, Ofgem, the gas and electricity industries in Great Britain and, most importantly of all, consumers.

Alex Chisholm
CEO, CMA

Dermot Nolan
CEO, Ofgem

Memorandum of understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority

Purpose of this memorandum of understanding

1. This MoU sets out working arrangements between the CMA and Ofgem in relation to:
 - (a) their concurrent powers to apply the prohibitions on agreements that prevent, restrict or distort competition and on the abuse of a dominant position, under the Chapter I prohibition and the Chapter II prohibition of the Competition Act 1998 and under Article 101 and Article 102 of the treaty on the Functioning of the European Union – referred to in this MoU as the ‘competition prohibitions’; and
 - (b) their concurrent powers to undertake market studies, and to make references to the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the UK under the Enterprise Act 2002 – referred to in this MoU as the ‘market provisions’,in the gas and electricity sectors in Great Britain.
2. This MoU is not intended to have legal effect.
3. This MoU is to be read alongside other material concerning the relations between the CMA and Ofgem, including: the Gas Act 1986; the Electricity Act 1989; the Competition Act 1998; the Enterprise Act 2002; the Enterprise and Regulatory Reform Act 2013; the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004; the Competition Act 1998 (Concurrency) Regulations 2014, referred to in this MoU as the concurrency regulations, and the CMA’s guidance on concurrent application of competition law to regulated industries, referred to in this MoU as the concurrency guidance.⁴ This MoU supplements and does not supplant that material.
4. The arrangements covered by this MoU are, wherever possible, set out in terms providing sufficient flexibility for the relationship between Ofgem and the CMA to develop in the light of experience. The CMA and Ofgem commit to review these arrangements from time to time to evaluate their continuing fitness for purpose. Such review can be initiated at the request of the CMA,

⁴ CMA10.

Ofgem or a member of the UKCN. This MoU may only be revised by agreement between the CMA and Ofgem.

5. Nothing in this MoU applies in relation to the functions of the CMA in its separate role of considering appeals against, or references related, to proposed action by Ofgem under the sectoral statutes. The CMA and Ofgem acknowledge the importance of maintaining the CMA's impartiality and fairness in carrying out those functions, and indeed of market or merger investigations undertaken by the CMA panel.
6. Nothing in this MoU applies in relation to the functions of Ofgem in respect of its role as the designated regulatory authority for Great Britain in accordance with Article 35 of the Electricity Directive and Article 39 of the Gas Directive ('relevant functions'). The CMA and Ofgem acknowledge the importance of acting independently in respect of relevant functions and the need to ensure that Ofgem's members and staff do not seek or take any instructions that might compromise, or might reasonably be seen to compromise, Ofgem's independence in respect of relevant functions.

Context

7. This MoU operates within the framework of the legislative provisions referred to in paragraph 1, the Gas Act 1986, the Electricity Act 1989 and any other applicable sector specific legislation from time to time.

Role of the CMA

8. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013.
9. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
10. The CMA's statutory responsibilities, in so far as relevant to the matters that are the subject of this MoU, include:
 - (a) investigating where there may be breaches of the competition prohibitions; and
 - (b) conducting market studies and market investigations where there may be competition and consumer problems.
11. In connection with its statutory responsibilities, the CMA will cooperate with sectoral regulators and encourage sector regulators to use their powers,

including their powers to apply the competition prohibitions, in the interests of competition for the benefit of consumers.

Role of Ofgem

12. Ofgem is the regulator of Great Britain's gas and electricity markets. Its powers, duties and objectives come from GB statutes and relevant EU legislation. Ofgem's principal objective is to protect the interests of existing and future energy consumers. These interests are taken as a whole and include the reduction of greenhouse gases, the security of the supply of gas and electricity to consumers, and Ofgem's fulfilment of the objectives in the EU Gas and Electricity Directives (such as the promotion of competition, helping to ensure consumer protection and contributing to the protection of vulnerable consumers).
13. When exercising regulatory functions, Ofgem is generally required to act in the manner it considers will best further the principal objective, by promoting effective competition in the activities it regulates wherever appropriate. However, before performing regulatory functions with a view to promoting competition, Ofgem must always first consider the extent to which the interests of consumers would be protected by the promotion of competition and whether there are other ways which would better protect those interests.
14. When performing regulatory functions, Ofgem is also subject to a wide range of other general duties which include (but are not limited to):
 - (a) a duty to act in the manner it considers is best calculated to secure a diverse and viable long-term energy supply;
 - (b) duties to have regard to a wide range of matters including:
 - (i) better regulation principles;
 - (ii) the need to secure that all reasonable demands for electricity are met;
 - (iii) the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;
 - (iv) the need to secure that licence holders are able to finance their activities;
 - (v) the need to contribute to the achievement of sustainable development; and

- (vi) the interests of individuals who are chronically sick, of pensionable age, with low incomes or live in rural areas, as well as to those of other consumers.
15. Ofgem conducts investigations into the conduct of companies that it believes may be breaching licence conditions and has concurrent powers with the CMA under the Competition Act 1998 or consumer protection laws. It also has powers under the Enterprise Act 2002 to conduct market studies or to make a market investigation reference to the CMA where it has reasonable grounds for suspecting that any feature or combination of features prevents, restricts or distorts competition in the gas and electricity markets.

Aims

16. The Enterprise and Regulatory Reform Act 2013, as well as establishing the CMA, made provision for the better working of the CMA's and the sectoral regulators' concurrent powers in the regulated sectors; specifically, the act: 'strengthens the role of the CMA and enhances the emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the CA 1998 [ie the competition prohibitions]) by the sector regulators'.⁵
17. It is one of the strategic goals of the CMA, announced on its establishment on 1 October 2013, to extend the frontiers of competition into new areas, including by working with sectoral regulators to ensure fuller use of competition law and policy in sectoral markets.⁶
18. The government's strategic steer to the CMA, issued on 1 December 2015, says that the CMA should build 'a strong dialogue with sectoral regulators using the UKCN to ensure that the overall competition regime is coordinated and regulatory practices complement each other'.⁷
19. The sectoral regulators and the CMA, working together in the UKCN established in 2013 (with Monitor having observer status), declared that: 'The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate'.⁸

⁵ Enterprise and Regulatory Reform Act 2013 Explanatory Notes, paragraph 370.

⁶ Statement by Alex Chisholm, Chief Executive of the CMA, CMA mission and strategy, 1 October 2013.

⁷ Department for Business, Innovation and Skills (1 December 2015), *Strategic steer for the Competition and Markets Authority*, in Annex A to the Government's response to the Consultation on the Strategic Steer to the CMA, p11.

⁸ UKCN (2013), Statement of Intent.

20. The CMA and Ofgem seek to use their powers to achieve competitive outcomes in the gas and electricity industries in Great Britain for the benefit of consumers so as to make markets in the gas and electricity sectors in Great Britain work well for consumers of gas and electricity services, businesses in those sectors and businesses that use those services and the economy in which those services play an essential part. It is the view of the CMA and Ofgem that such competitive outcomes can be achieved by various tools, including their competition law powers under the competition prohibitions, the market provisions and merger control, but also through other tools such as direct regulatory action including through powers to make regulatory rules, licence modification, enforcement of licence provisions (for example, in providing for third party access to networks) and liberalisation measures introduced under national and European Union legislation.
21. This MoU aims to further the attainment of these objectives, and to make the changes introduced by the Enterprise and Regulatory Reform Act 2013 work effectively, maximising the complementary skills of the CMA and Ofgem, including through:
- (a) promoting cooperation and coordination between the CMA and Ofgem when dealing with cases of suspected anti-competitive behaviour for which they have concurrent powers;
 - (b) promoting cooperation and coordination between the CMA and Ofgem when dealing with market studies and market investigation references for which they have concurrent powers;
 - (c) facilitating the efficient and effective handling of cases of suspected anti-competitive behaviour within the gas and electricity services markets in Great Britain;
 - (d) avoiding duplication of activity, wherever possible; and
 - (e) ensuring transparency as to the respective roles of the CMA and Ofgem for individuals and consumers affected.

General cooperation

22. In addition to the provisions for cooperation between the CMA and Ofgem specific to particular powers of the CMA and Ofgem, as set out in this MoU and elsewhere, the CMA and Ofgem are committed to the following general principles and practices for cooperation between themselves in respect of the sectors for which Ofgem has responsibility.

23. Officials of the CMA and Ofgem will meet and communicate, at appropriate levels of seniority, to discuss matters of mutual interest, both through the UKCN and bilaterally. A framework for such meetings will, as far as possible, be determined in advance so as to ensure attendance at the appropriate level and expertise.
24. The CMA and Ofgem will, in respect of Great Britain's gas and electricity markets, always consult each other:
 - (a) before the initial exercise of concurrent competition law powers in all cases where it appears that they have concurrent jurisdiction and where there are reasonable grounds for suspecting an infringement of the competition prohibitions; and
 - (b) before launching a market study under the Enterprise Act 2002.⁹
25. Where either the CMA or Ofgem exercises its concurrent powers, the CMA and Ofgem will, to the extent permitted by law, engage with each other in open dialogue and by sharing relevant information as appropriate. This engagement may include attendance at internal meetings held by the investigating authority (ie the authority to which a case is allocated) by the supporting authority (ie the other authority which would be competent to exercise concurrent powers in relation to the case), in order to discuss the case as envisaged at paragraph 3.31 of the concurrency guidance. The supporting authority will not generally attend the investigating authority's constitutional decision-making meetings, meetings of governance bodies or meetings with external parties such as those under investigation or complainants. Attendance by the supporting authority at any meeting is at the discretion of the investigating authority, but requests to attend should be considered by the investigating authority in the spirit of cooperation underpinning the new concurrency regime.
26. The CMA and Ofgem will consult each other at an early stage on any issues that might have significant implications for the other. For example, where the CMA undertakes a market study which relates to a sector other than Great Britain's gas or electricity sectors but which may have a significant impact on either of those sectors, the CMA will inform Ofgem and share appropriate information relating to that market study with Ofgem to the extent permitted by law.

⁹ Instigation of a market study occurs on the publication of a market study notice, as defined in section 130A of the Enterprise Act 2002.

27. Within the spirit of broader collaboration for the purposes of the promotion of competitive outcomes, the CMA and Ofgem will commit to discuss and share other information about a broader range of competition complaints and concerns, where legally permissible to do so, but subject to the particular need not to impair the impartiality and fairness of the CMA in carrying out the functions referred to in paragraph 5 of this MoU.

Part A – Cooperation in relation to the competition prohibitions (Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union)

Case allocation

Basis of allocation

28. The CMA and Ofgem will endeavour to reach agreement on which authority will exercise its concurrent competition powers in respect of any particular case, under regulation 4(2) of the concurrency regulations. They will do so in a spirit of constructiveness and cooperation, while acknowledging the CMA's ultimate powers under regulations 5 and 8 of the concurrency regulations.
29. Their determination of which authority will exercise its powers will be based on assessing which of them is better placed to exercise those powers, having regard to the factors set out in paragraph 3.22 of the concurrency guidance. The CMA and Ofgem envisage that other factors may appear relevant in the light of practical experience and that, if so, such factors may be chosen to supplement or supplant the factors set out in paragraph 3.22 of the concurrency guidance.

Procedure for allocation

30. Where either the CMA or Ofgem has decided, on the basis of information in its possession, that there are reasonable grounds for suspecting that one of the competition prohibitions has been infringed (the reasonable suspicion test)¹⁰ in relation to the gas and electricity markets in Great Britain, it will disclose to the other (ie the receiving authority) sufficient information:
 - (a) to enable the receiving authority to understand the basis on which the disclosing authority has decided that the reasonable suspicion test is met; and
 - (b) for there to be an informed discussion on which authority (if either) is best placed to proceed in respect of the case.
31. In practice, it may be helpful for the CMA and Ofgem to have discussed the case prior to such a decision having been reached, subject to paragraph 44 below. The disclosing authority will provide the information described under paragraph 30 within ten working days after it has decided that the reasonable

¹⁰ As provided in section 25 of the Competition Act 1998.

suspicion test is met, whether or not it proposes to exercise concurrent powers.¹¹

32. Within seven working days from receipt of this information, the receiving authority will respond in writing, setting out its initial view on the case and how it should be allocated and identifying any further information which it requires.
33. The CMA and Ofgem will endeavour to agree which authority will exercise its concurrent competition powers in relation to the case, as provided for in regulation 4(2) of the concurrency regulations, as soon as possible and in any event no later than one month from disclosure of the information described under paragraph 30. Other than in exceptional circumstances (which shall be set out in writing), the CMA will initiate the procedure set out in regulation 5 of the concurrency regulations if agreement is not reached within two months of the disclosing authority first receiving sufficient information in connection with a complaint to enable it to decide that the reasonable suspicion test is met.
34. The procedure for agreeing the transfer of a case that is already in progress from the CMA to Ofgem, or from Ofgem to the CMA, is as set out in regulation 7 of the concurrency regulations and in paragraph 3.32 of the concurrency guidance.
35. The procedure for the CMA to direct the transfer to itself from Ofgem of a case that is already in progress is as set out in regulation 8 of the concurrency regulations.

Implications of allocation

36. Any agreement or determination as to case allocation, under regulations 4, 5, 7 or 8 of the concurrency regulations, shall be notified to the person who has provided the information resulting in the case (for example, the person making a complaint), and so far as appropriate and lawful to any other affected person, by the authority which is exercising its concurrent competition powers in relation to the case, as soon as reasonably practicable.
37. Case allocation determines which of the CMA and Ofgem is to exercise concurrent functions and make any decisions under the competition prohibitions. The CMA or Ofgem will be publicly identified as having such responsibility if and when any such investigation is announced. The CMA and Ofgem envisage that, whichever authority has responsibility for a particular case, they and their officials will work cooperatively with each other on the case as appropriate, pooling their expertise including in the ways described in

¹¹ As provided in regulation 9 of the concurrency regulations.

paragraphs 52 to 60 of this MoU and in paragraph 3.33 to 3.35 of the concurrency guidance.

Sharing information

Principles of information sharing

38. The effective sharing of information between the CMA and Ofgem is fundamental to the successful exercise of their concurrent competition powers. It is needed both for the appropriate allocation of cases, as described in paragraphs 30 to 35 of this MoU, and for the successful handling of cases once allocated to make optimal use of the complementary experience and expertise of the two authorities.
39. The CMA and Ofgem are committed, in addition to their legal obligations to share information (set out in regulation 9 of the concurrency regulations), to open dialogue and continuing liaison, both bilaterally and through the UKCN, with a view not only to handling specific cases but to promoting competition for the benefit of consumers in the gas and electricity markets in Great Britain.

Information sharing mechanism – general liaison

40. The CMA and Ofgem recognise the importance of meeting regularly to share information on matters relevant to competition in the gas and electricity markets in Great Britain, and to keep each other abreast of relevant work which they are considering or currently undertaking.
41. The CMA and Ofgem will meet regularly at multiple levels, bilaterally and through the UKCN.
42. The CMA and Ofgem will each designate in its organisation a relationship manager at official level to take responsibility for relations between the two authorities. In each authority, the relationship manager's responsibilities will include (but not be limited to):
 - (a) maintaining an overview of joint projects between the two authorities and matters of mutual interest;
 - (b) maintaining an overview of the authority's contacts from all areas of joint working and mutual interest; and
 - (c) holding meetings with the relationship manager in the other authority from time to time (whether bilaterally or in the context of the UKCN) to identify potential new issues, with a view to circulating information to appropriate individuals within each organisation.

43. The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and Ofgem.
44. For the purposes of sharing information pursuant to paragraph 30, ie in circumstances where the reasonable suspicion test is met, such information will be shared by the disclosing authority to the extent permitted by law and whether or not it proposes to exercise concurrent powers.¹² Where disclosure would be appropriate and permitted by law, the CMA and Ofgem may also share information regarding potential infringements of the competition prohibitions in advance of having reached a view as to whether the reasonable suspicion test is met. In circumstances where either the CMA or Ofgem has taken the view that a matter is not an administrative priority, irrespective of whether a view has been reached on whether the reasonable suspicion test is met, each may share the details of the matter with the other, or with any other authority which would be able to exercise concurrent competition powers in relation to that matter, to the extent permitted by law. Where leniency information is being shared under this paragraph, special considerations apply, as set out in paragraphs 50 and 51.

Information sharing mechanism – handling specific cases

45. The procedures for information sharing for the purpose of case allocation shall be as set out in paragraphs 30 to 32 and 38 to 51 of this MoU.
46. When either the CMA or Ofgem is exercising its powers in respect of the competition prohibitions in a particular case in the gas and electricity markets in Great Britain, each of them will share with the other any of the following information in its possession (to the extent permitted by law and subject to the confidentiality obligations in paragraphs 49 to 51 of this MoU):
 - (a) as a minimum, the matters referred to in regulation 9(1)(b) – (j) of the concurrency regulations, and in paragraph 3.49 of the concurrency guidance, complying with the time limits specified in paragraph 3.49;
 - (b) other information which it reasonably believes to be relevant or helpful to the other in the conduct of the case; and
 - (c) in the case of the authority which is exercising the powers, reports to the other on the progress of the case, of sufficient frequency and detail to enable the other to be appropriately informed; the means and frequency of such reporting will be decided on a case-by-case basis and in the light

¹² For the avoidance of doubt, this does not entail an obligation to inform the other party if the regulator is carrying out general monitoring activity, where there is no consideration of exercising its concurrent powers.

of experience as this enhanced framework of collaboration and its supporting arrangements develop over time.

Information sharing mechanism – for know-how purposes

47. The CMA will maintain on its webpages a central database of decisions taken in cases under the competition prohibitions, with a view to having an accessible body of know-how that will help ensure the effective and consistent application of competition law. The CMA and Ofgem will, to the extent permitted by law, contribute information to that in the way best calculated to achieve that objective.
48. In any event, the CMA will report on cases in the regulated sectors under the competition prohibitions in the annual concurrency report which it is required under statute to issue. Further provisions on the annual concurrency report are in paragraphs 61 to 63 of this MoU.

Information sharing – confidentiality constraints

49. Any disclosure of information under paragraphs 30 to 32 and 38 to 48 of this MoU, and any use by the recipient of such information, shall only be to the extent permitted by law, including by reference to the provisions of Part 9 of the Enterprise Act 2002, relevant sector-specific legislative provisions and any other provisions relating to the disclosure, handling and use of information (such as the Data Protection Act 1998 and section 118 of the Financial Services and Markets Act 2000, to the extent relevant).
50. Prior to disclosing information to each other, the CMA and Ofgem will not generally give the person to whom the information relates prior notice of its intention to make the disclosure. However, if the CMA or Ofgem consider it necessary or appropriate to pass leniency information to each other (or to another UK authority with concurrent powers), the transmitting authority will inform the applicant or its legal adviser first. Leniency information for the purposes of this MoU is any information which came into the possession of any of the CMA, its predecessors, Ofgem or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency. It includes information obtained by the transferring authority as a result of investigative measures resulting directly or indirectly from an application for leniency.
51. In addition to the general provisions referred to in paragraph 49, where Ofgem or the CMA receives leniency information from the other (or from another UK authority with concurrent powers) for the purpose of applying the competition prohibitions or, in the case of the CMA, the cartel offence under section 188 of

the Enterprise Act 2002, that information will not be used for any other purpose. This restriction on use also applies to any information obtained by the receiving authority as a result of investigative measures relating to the competition prohibitions or the cartel offence following the receipt of leniency information from the other authority. This does not affect the use that may be made by the CMA or Ofgem of information received from other sources, or if the leniency applicant's consent is obtained.¹³ Where the provision of leniency information to either the CMA or Ofgem affords or might, under certain conditions, afford the leniency applicant, its subsidiaries or its employees protection from sanctions (including a reduction in penalties) under the leniency programme operated by that authority and that information has been passed to another authority, the receiving authority shall afford the leniency applicant, its subsidiaries or its employees no lesser protection.

Pooling resources

52. Paragraph 25 above and the concurrency guidance provide for support to be provided by the supporting authority to the investigating authority when it is exercising its concurrent powers in a case. The CMA and Ofgem will endeavour, so far as is reasonably practicable and permitted by law, and in light of their respective ongoing priorities and resource availability at the time, to share their resources with each other in the interests of the effective enforcement of competition law in the gas and electricity markets in Great Britain, and more generally the promotion of competition for the benefit of consumers in that sector, and to ensure that their resources and expertise are used most efficiently for that purpose. This is subject to the proviso that, as stated in paragraph 5, this does not apply in relation to the functions of the CMA in its role of considering appeals against, or references related to, proposed action by Ofgem under the sectoral statutes.
53. As a consequence, where it has been agreed or determined that one of the authorities is to exercise its concurrent competition powers in relation to a case, that authority will, to the extent that there are resources available, receive appropriate practical assistance and support from the other in the handling of the case, as agreed on a case-by-case basis.

¹³ The use restriction in this paragraph is intended to govern the use of leniency information in the context of the concurrency arrangements. It is not intended to prevent the disclosure of such leniency information by either one of the CMA or Ofgem to the other (to the extent permitted by Part 9 of the Enterprise Act 2002 and in accordance with Leniency and no-action applications in cartel cases: OFT1495) for purposes other than the application of the competition prohibitions or the cartel offence. However, any such disclosure of leniency information would only be likely to be justified in exceptional circumstances, given the strong public interest in maintaining the incentives for undertakings and, in the case of the cartel offence, individuals to apply for leniency.

Secondments of staff

54. One means of the practical assistance and support that might be given, as referred to in paragraphs 52 and 53 of this MoU, is the secondment of staff, in accordance with regulation 10 of the concurrency regulations and paragraphs 3.33 and 3.34 of the concurrency guidance.¹⁴
55. The CMA and Ofgem are fully committed to the idea of secondments for this purpose, and will endeavour to meet each other's requests for secondments to the extent that they are appropriate and resources permit; this may include making provision for any secondee to be available to work for part of his or her time at his or her existing employer during the course of the secondment, for example on such cases that are in progress.
56. Requests for secondments should be made by the relationship manager of one authority to the relationship manager of the other, setting out the following information:
- (a) The number of secondees required.
 - (b) The period for which each one is required.
 - (c) The level of seniority of each one.
 - (d) The nature of the expertise or experience of each one.
 - (e) The proposed payment arrangements.
 - (f) A brief explanation of why the requirement or requirements cannot adequately be met by deployment of staff from within the requesting authority.
57. To the extent that the recipient of a request for a secondment made under paragraph 56 of this MoU refuses that request or accedes to it on terms that are materially different from those requested, the recipient shall give reasons.
58. The CMA and Ofgem will develop appropriate arrangements for the pooling and secondment of staff. Such arrangements will have regard to the resource constraints of both parties and such calls for staff, therefore, will be made in reasonable time and with sufficient warning to enable appropriate resource planning, management of other work commitments and appropriate sign-off procedures within each authority.

¹⁴ Nothing in this section affects arrangements for the secondment of staff outside of the provisions of regulation 10 of the concurrency regulations and paragraphs 3.33 and 3.34 of the concurrency guidance.

Other mutual support

59. In addition to the sharing of information, expertise, experience and the secondment of staff, the CMA and Ofgem are fully committed to providing each other with more informal forms of support to enable them to carry out their competition law functions in relation to the gas and electricity markets in Great Britain – in each case to the extent that it is appropriate and permitted by law, and that resources permit – including (but not limited to):
- (a) answering specific queries from time to time;
 - (b) providing information or views on a specific sector or market, or an area of competition law or policy; and
 - (c) providing training on a specific sector or market, or an area of competition law or policy.
60. Such support may be requested and provided in connection with a specific case or with the promotion of competition more generally. In this regard, both the CMA and Ofgem will act reasonably, including by providing sufficient time and information for requests for support to be responded to fully and effectively and for the relevant staff to be engaged.

Annual concurrency report

61. The CMA is required by statute to publish a report every year, starting after its first year of operation in 2014/15,¹⁵ containing an assessment of how the concurrency arrangements between the CMA and the sectoral regulators, as regards both the competition prohibitions and the market provisions, have operated during the year. This MoU refers to that report as the annual concurrency report. There is further provision on the annual concurrency report in paragraphs 3.55 to 3.62 of the concurrency guidance.
62. The CMA will consult, and cooperate with, Ofgem and with other sectoral regulators in preparing the annual concurrency report. In connection with this, the CMA will:
- (a) prepare a draft of the annual concurrency report that it will send to Ofgem and other sectoral regulators seeking comments or suggestions on the content or conclusions of the annual concurrency report and giving them adequate time to comment or make suggestions;

¹⁵ Enterprise and Regulatory Reform Act 2013, Schedule 4, paragraph 16.

- (b) take account of any comments or suggestions it receives from Ofgem and other sectoral regulators and the CMA may seek further clarification on those comments or suggestions as appropriate;
 - (c) prepare a final version of the annual concurrency report for publication that takes account of its consultation of Ofgem and other sectoral regulators as appropriate; and
 - (d) make the annual concurrency report available on the CMA webpages.
63. Ofgem will cooperate with the CMA in the preparation of the annual concurrency report including (but not limited to) by way of:
- (a) providing information and data on general market conditions and on the application of the competition prohibitions and the market provisions in the gas and electricity markets in Great Britain;
 - (b) responding to reasonable requests for information and data; and
 - (c) providing to the CMA any comments and suggestions it may have in connection with the process described in paragraph 62 of this MoU;
- in each case promptly so as to facilitate the timely production and publication of the annual concurrency report.

Voluntary redress schemes

64. In cases relating to investigations under the competition prohibitions in the gas and electricity sectors in Great Britain, both the CMA and Ofgem have the power to approve voluntary redress schemes. When either authority proposes to exercise these powers, it shall liaise with the other authority as appropriate and will have regard to its own guidance.¹⁶

Short form opinions

65. The CMA shall inform Ofgem following an initial enquiry for a short form opinion relating to the gas or electricity markets in Great Britain. Where the CMA is considering providing such an opinion, it will discuss with Ofgem before deciding to do so. If the CMA then decides to produce an opinion, it will engage with Ofgem, the nature and degree of that engagement to be considered on a case-by-case basis, having regard, in particular, to the extent

¹⁶ The CMA's guidance on the approval of voluntary redress schemes (CMA40) states at footnote 7: 'The CMA expects that regulators will take this CMA guidance into account when producing their own guidance on the approval power.'

to which the opinion has a multi-sector rather than single-sector dimension. In all cases, the CMA will give Ofgem the opportunity to provide comments on a draft opinion.

Choice of instrument – competition prohibition or direct regulation by licence enforcement

66. As a result of legislative changes introduced by Schedule 14 to the Enterprise and Regulatory Reform Act 2013,¹⁷ Ofgem is required by sections 28(4A) and 30A(2) of the Gas Act 1986 and sections 25(4A) and 27A(2) of the Electricity Act 1989, to ‘consider whether it would be more appropriate to proceed under the Competition Act 1998’ before exercising its direct regulatory powers of licence enforcement.
67. The Explanatory Notes to the legislation explain that this provision ‘enhances the emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the CA98)¹⁸ by the sector regulators’.¹⁹
68. The Government had previously indicated that the policy intention is to: ‘strengthen the primacy of general competition law, so that the Sector Regulators are required to consider whether the use of their CA98 powers is more appropriate before using their sectoral powers to promote competition’.²⁰
69. Under this provision, it is for Ofgem to determine, in any particular case, whether using its powers under the competition prohibitions would be more appropriate than exercising its licence enforcement powers.
70. Paragraph 4.4 of the concurrency guidance says that this determination will be made by the sectoral regulators ‘on a case-by-case basis.’ It may be that, in the light of experience accumulated over the coming months or years in applying this provision, it will be possible to develop more general principles that could serve as useful guidance in future cases, perhaps through the forum of the UKCN, while respecting the right of the sectoral regulator to make the determination.

¹⁷ Having effect from April 2014.

¹⁸ That is, the competition prohibitions.

¹⁹ Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, paragraph 370.

²⁰ BIS (March 2012), *Growth, competition and the competition regime – Government response to consultation*, paragraph 8.16.

Part B – Cooperation in relation to the market provisions: market studies and market investigations (Enterprise Act 2002)

How concurrency works under the market provisions

71. Ofgem has the power, concurrently with the CMA, to carry out market studies, to make market investigation references, agree undertakings in lieu of a reference and make recommendations to the government in relation to the gas and electricity markets in Great Britain under Part 4 of the Enterprise Act 2002 (as do other sectoral regulators in relation to the sectors for which they are responsible).
72. Under the Enterprise Act 2002, the CMA and Ofgem may, in relation to the gas and electricity markets in Great Britain, undertake market studies, and may make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the UK. The purpose of these investigations is to examine the market(s) and (where required) implement appropriate remedies where the CMA determines that the structure of the market(s) or the conduct of the suppliers or customers is harming competition.
73. When making a reference, the CMA or Ofgem, as applicable, must have reasonable grounds for suspecting that any feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition in relation to the supply or acquisition of any goods or services in the UK (or in a part of the UK).
74. As provided for by section 36A(5A) of the Gas Act 1986 and section 43(4A) of the Electricity Act 1989, neither the CMA nor Ofgem shall exercise functions under Part 4 of the Enterprise Act 2002 in relation to any matter if such functions have been exercised in relation to that matter by the other.
75. As provided for in section 36A(6) of the Gas Act 1986 and section 43(5) of the Electricity Act 1989, where a market investigation reference is made, Ofgem can be required to provide advice and assistance to the CMA, or can itself decide to provide information, and the CMA is then under an obligation to take the information into account.
76. The cooperation between the CMA and Ofgem provided for in this Part B shall not extend to conduct that could reasonably be expected to impair the impartiality or the fairness of the CMA panel in conducting market investigations.

Super-complaints

77. Section 11 of the Enterprise Act 2002 provides for a super-complaint to be made by a designated consumer body that any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers.
78. Ofgem has a duty to respond to super-complaints made to it under the Enterprise Act 2002 if the complaint concerns a market in relation to which Ofgem has functions under the Gas Act 1986 and/or the Electricity Act 1989.
79. The coordination of the CMA's and the sectoral regulators' super-complaint duties will be based on policies agreed and applied through the UKCN.

Mutual consultation

80. Ofgem and the CMA have a duty to consult each other before exercising concurrent functions under the market provisions.

Sharing information

81. The provisions of paragraphs 40 to 44, 46 (excluding 46(a)) and 48 of this MoU apply to information sharing under the market provisions as they do under the competition prohibitions.

Pooling resources

82. The provisions of paragraph 52 to 60 of this MoU apply to pooling resources under the market provisions as they do under the competition prohibitions.
83. Where the CMA and Ofgem intend to pool resources in order to exercise powers under the market provisions of the Enterprise Act 2002, they shall, at the outset of any such project, discuss the arrangements for how they will pool resources and work jointly.

Annual concurrency report

84. The provisions of paragraph 61 to 63 of this MoU apply under the market provisions as they do under the competition prohibitions.