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# Competition Enforcement and Regulatory Alternatives – Note by the United Kingdom

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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# *United Kingdom*

## 1. Introduction

1. The UK Competition and Markets Authority (CMA) welcomes the opportunity to contribute to the OECD's Roundtable on "Competition Enforcement and Regulatory Alternatives".

2. Competitive and innovative markets that benefit consumers can best be achieved by the combination of timely, targeted competition enforcement and smart, practical and proportionate ex ante regulation which should be developed by drawing on a breadth of market experience. This requires that we are flexible in our interventions, with a focus on what we think would work best for consumers, businesses and the wider economy.

3. The UK competition concurrency arrangements – under which the sector regulators can enforce ex post competition law alongside their ex ante regulatory powers – aims to deliver this flexible and joined up approach in order to promote competition across the regulated sectors.

4. As well as this well-established arrangement, the CMA has more recently taken on a new role in relation to pro-competitive regulation in digital markets, expanding the CMA's remit to a new regulatory function. This follows findings from a range of reports indicating the limitations of ex post competition enforcement in this area.[1]

5. This paper sets out the UK's approach of applying the right balance of competition enforcement and regulatory alternatives to ensure competition is promoted via the most effective means possible. This draws upon the following areas:

a First, we highlight the key features of the UK competition concurrency arrangements. This includes the rationale and background behind concurrency. In addition, we detail the primacy obligation and its rationale.

b Second, we explain that competition enforcement and pro-competitive regulation have complementary roles to play in promoting competitive outcomes. This is evidenced through explaining the role the CMA and sector regulators play in promoting pro-competitive regulation across sectors in order to address structural or systemic issues in markets.

c Third we explain the importance of pro-competitive regulation in digital markets given the limitations of competition enforcement in this area. However, we are clear that competition enforcement will still have an important role to apply alongside this new pro-competitive regulation in order to address specific firm conduct.

[1] Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), Competition for the digital era, final report for the European Commission; Stigler Center (2019), ; US House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (2020), Investigation of Competition in Digital Markets

## 2. The UK's concurrency regime

### 2.1. Key features and benefits

6. The UK has a concurrent competition regime, otherwise known as 'concurrency'.

7. In short, this refers to the fact that both the CMA and sector regulators (such as the regulators in the communications, energy, water, aviation, rail, financial services and payment systems sectors) have powers to enforce the prohibitions against anti-competitive agreements and abuses of a dominant position in their respective sectors and can also carry out market studies and refer markets to the CMA for a detailed market investigation.

8. The CMA is required to decide which body should lead on a case involving a regulated sector, and in particular may decide to take a case on itself if it 'is satisfied that its doing so would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers'.[2]

9. The benefits of a concurrent approach to competition enforcement are that the regulators bring their deep knowledge of the relevant sector; while the CMA, as the competition authority, brings its in-depth competition experience and economy-wide perspective as well as ensuring there is a consistency of approach across sectors, both regulated and unregulated.

### 2.2. Background and rationale

10. To better understand the rationale and development of concurrency it is informative to reflect on the history and evolution of the regulated sectors.

11. Many of the regulated sectors were nationalised monopolies in the UK until the 1980s/90s, while others have operated other than through a fully competitive market (e.g. 'natural monopolies' not susceptible to market competition).

12. Consequently, these sectors are subject to direct ex ante regulation enforced by a sector regulator, with multiple aims and objectives. Two aims of this ex ante regulation of relevance for this submission were:

a to protect consumers in the absence of the normal protections usually afforded by a competitive market (such as downward pressure on prices and upward pressure on quality); and

b Where possible, to regulate to open up sectors to market competition.

13. As a result, markets which were previously thought inherently incapable of offering consumers the benefits of market competition have over the past few decades matured to a degree that they are now increasingly able to do so.

14. Reflecting the increasingly competitive nature of previously monopolistic or quasi-monopolistic sectors, the question has frequently arisen[3] of whether, in certain

[2] The Competition Act 1998 (Concurrency) Regulations 2014, reg 5. In addition the CMA is empowered to take over a case from a sectoral regulator, even if the sectoral regulator is already investigating that case, where, again, the CMA is satisfied that its doing so 'would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers'. The Competition Act 1998 (Concurrency) Regulations 2014, reg 8.

[3] Most recently in John Penrose MP (2021), Power to the people: independent report on competition policy

circumstances, lower prices, enhanced quality, and spurs to enhanced efficiency and innovation can more effectively and appropriately be achieved by normal competitive processes as they are in other 'normal' parts of the economy that were not previously monopolies, including the application of normal competition law to correct anticompetitive practices and market abuses. In most of the regulated sectors, the role of competition has long been recognised, reflected in the fact of most of the sectoral regulators having had concurrent competition law powers for many years.[4]

15. While we consider it is advantageous to be able to utilise a blended approach – applying both competition enforcement and other regulatory interventions in order to increase competition, rather than competition enforcement alone - it has been noted that the use of ex ante regulation can involve burdens that create barriers to entry and reduce the scope for innovation in regulated sectors. Enforcement powers have therefore provided another means to increase competition in markets so that effective competition would develop and reliance on ex ante regulation would reduce.[5]

16. Furthermore, in passing the Enterprise and Regulatory Reform Act 2013 (ERRA13), Parliament introduced a number of measures to enhance the role of competition law in the regulated sectors. They represent an attempt to enable competition, and competition law, to play a greater role in the regulated sectors and the intention of Parliament to enhance the 'emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the Competition Act 1998) by the sector regulators'.[6]

17. One key change in this regard was the establishment of the primacy obligation. This requires sector regulators to use their sector regulatory powers only after considering whether it would be more appropriate to use their powers under the competition law prohibitions. This is designed to ensure regulators consider using their competition powers before exercising their regulatory powers. Regulators have generally considered the duty has worked well, providing useful discipline which has now been embedded in their decision-making processes.[7]

18. Through the concurrency arrangements, during the period April 2020 to March 2021,[8] the CMA and other regulators have worked with each other to promote competition and increase their effectiveness at enforcing competition law. For example:

a 3 new investigations were launched by the CMA, the FCA and the ORR to investigate competition concerns in online payments, financial services and rail services, respectively

b 2 fines following the CMA-led investigations into the private healthcare and financial services sectors, totalling over £19 million

[4] 'Baseline' annual report on concurrency – 2014 (https://www.gov.uk/government/publications/baseline-annual-report-on-concurrency)

[5] Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013

[6] Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, paragraph 370.

[7] Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013.

[8] This is the annual period against which the CMA reports on in its most recent Annual Concurrency Reports. See https://www.gov.uk/government/publications/baseline-annual-report-on-concurrency for the most recent report.

c 3 ongoing investigations launched by Ofgem, Ofcom and PSR, resulting in those regulators provisionally finding breaches in competition law.

## 3. Competition enforcement and direct pro-competitive regulation have complementary roles to play

19. Notwithstanding the drive for greater enforcement action that has been placed on sector regulators through the measures described above, it is important to note that both competition enforcement and direct regulation can and should have a role in promoting competition.

20. The CMA considers[9] that the exercise of competition law powers can, in certain circumstances, have certain general advantages over direct regulation including:

a the use of competition law can encourage participants in a sector (including the parties to an allegedly anticompetitive practice and those who are complaining about it) to think in terms of the actual effects on the market of the practice concerned, rather than being directed by the 'black letter' of direct regulatory provisions such as licence conditions, rule books, regulatory codes and agreements or specific regulations;

b competition law is often more flexible and can be more sensitive to the changing economic reality of the situation than an ex ante set of prescribed rules that are only periodically reviewed;

c the application of competition law in these key sectors creates a body of competition law precedent applicable across regulated sectors and more widely in the economy

21. As we see above, the CMA and regulators have been active in using ex post competition enforcement to protect consumers and promote competition.

22. Having said this, there are areas in which a regulatory approach may be more suitable.

23. Direct regulation, as has been described above has already been effective in opening up regulated sectors to greater market competition (such as by mandating access to networks or requiring cost transparency between upstream and downstream functions in the value chain), and the increasing use of ex post competition law by the concurrent regulators is testament to how systemic and structural issues have increasingly been addressed, meaning that enforcement of competition law can be effectively used to promote competition.

24. However, in today's markets systemic and structural issues do still emerge that need to be addressed through well designed regulatory intervention[10] over competition enforcement.

[9] As similarly examined in 'Baseline' annual report on concurrency – 2014 (see note 4 above)

[10] For a full assessment of the importance of well-designed regulation and aspects to avoid in order to ensure competition is not inhibited, please see https://www.gov.uk/government/publications/baseline-annual-report-on-concurrency and the CMA's Competition Impact Assessment: Guidelines for Policymakers (https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers)

25. Below we set out a few examples of where the CMA and sector regulators have set out pro-competitive regulatory interventions, namely through the Open Banking intervention and in the CMA's response to a super complaint about "Loyalty Penalties". Both the market issues below could not have been dealt with by ex post competition enforcement alone given the lack of evidence of anticompetitive conduct by market participants. Instead, there were much broader structural or systemic issues in the markets concerned that required regulatory intervention in order to address poor market outcomes and increase competition.

26. The first regulatory intervention, Open Banking, was borne out of the CMA's market investigation regime. This is broader than the competition enforcement regime and allows the CMA to directly impose remedies on markets on the basis of finding features of a relevant market, which alone or in combination, prevent, restrict or distort competition such that there are adverse effects on competition. [11] In this case, the CMA considered the supply of personal current accounts in the UK and the supply of certain retail banking services to SMEs in the UK. The CMA found that older and larger banks did not have to work hard enough to win and retain customers and that it was difficult for new and smaller banks to grow. Central to the CMA's Open Banking remedy (delivered through binding 'Orders'[12] on banks') were measures to require the largest banks in Great Britain and Northern Ireland to adopt and maintain common API standards through which they would share data with other providers and with third-party providers including Price Comparison Websites, account information service providers and payment initiation service providers.

27. The CMA considered that the open API banking standard[13] had the greatest potential to increase competition between banks, by making it much easier for both personal customers and SMEs to compare what is offered by different banks and by paving the way to the development of new business models offering innovative services to customers.

28. The second regulatory intervention arose out of the CMA's response to a super complaint about "Loyalty Penalties", that is higher prices charged to existing customers compared to newer ones. A super-complaint[14] is a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers', to which the CMA is required to respond.[15] Although pricing differences such as introductory deals are not in themselves harmful, the extent to which prices differed between new and loyal customers led the CMA to conclude that there was widescale

[11] Within the meaning of section 134(2) of EA02. See page 481 of the Retail Banking Market Investigation for further detail:

https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk

[12] See Figure 13.1: Summary of measures to develop and require the use of open API standards and data sharing through them, Retail Banking Market Investigation

[13] An open API standard entails UK banks developing a single and common API, which is publicly available and can be used by any FinTech company or app developer, to design products or apps which would work for all UK banks.

[14] As defined by section 11(1) of the Enterprise Act 2002,

[15] Within 90 days after the day on which a super-complaint is received, the CMA must say publicly how it proposes to deal with it. See section 11(1) of Enterprise Act 2002

consumer harm.[16] This harm was not the result of any specific anticompetitive activity and could not be addressed using ex post competition enforcement alone. As such, addressing the problem required regulatory interventions (complemented with targeted consumer enforcement to tackle harmful business practices, with the CMA itself launching investigations into antivirus software market). Again, the regulatory interventions allowed the CMA and sector regulators to take a broader, holistic view of the market than competition enforcement alone.

29. These two examples are discussed in more detail in the accompanying annex.

## 4. Pro-competitive regulation in digital markets

30. A key illustration of how both ex ante regulation and ex post competition law can work together to promote competition can be seen in the case of digital markets. The UK government has announced that it will establish a Digital Markets Unit, housed within the CMA. From April 2021, work to operationalise this regime began within the CMA and government plans to legislate to create an ex ante regulatory framework which can be used alongside the CMA's competition enforcement powers to protect competition in digital markets.

31. Digital markets play a fundamental role in modern life, delivering substantial benefits for consumers, businesses and the economy more widely. However, the dynamics of digital markets have changed hugely, with a small number of digital firms now holding substantial market power, with the potential to cause significant harm to consumers and businesses that rely on them, to innovative competitors and to the economy and society more widely. The fall to a small number of digital firms is because digital markets have a unique set of characteristics, including strong network effects and strong economies of scale and scope. For this reason, in many cases, digital markets are subject to 'tipping' in which a winner will take most of the market. This was borne out in the CMA's market study into online platforms and digital advertising. In December 2020, the CMA published advice to the government, having worked closely with Ofcom, the ICO and the FCA, on the design and implementation of a pro-competition regime for digital markets.

32. Without effective competition, we will not unlock the full potential for these digital services to contribute to economic growth and the UK's recovery from COVID-19. This is also a challenge that other OECD members face. That is why we can no longer ignore the significant harms caused by powerful digital firms which are now increasingly evident.

33. However, as has now been recognised in many prominent reports,[17] existing ex post competition laws are not, by themselves, sufficient to address these challenges: in particular they are slow moving (especially in the context of such fast-moving markets) and cannot address the underlying structural issues.

34. Given the substantial and entrenched market power of these firms, an ex ante regime is needed to prevent them from exploiting their powerful positions as well as to drive vibrant competition and innovation. In particular, an ex ante regime has a number of advantages over existing ex post enforcement tools, including:

a the ability to cover a much wider range of concerns holistically;

[16] https://www.gov.uk/cma-cases/loyalty-penalty-super-complaint

[17] See footnote 1

b the ability to address concerns more rapidly and before they result in competitive harm; a greater focus on remedies and remedy design; and

c greater clarity for platforms and other market participants over what represents acceptable behaviour when interacting with users and competitors.[18]

35. This is not to say that competition enforcement will not have a role to play in digital markets. The CMA will continue to conduct targeted enforcement investigations into digital markets as and when appropriate. For example, in January 2021 the CMA launched an investigation under Chapter II of the Competition Act 1998 into suspected breaches of competition law by Google. The investigation concerns Google's proposals to remove third party cookies (TPCs) on Chrome and replace TPCs functionality with a range of 'Privacy Sandbox' tools, while transferring key functionality to Chrome.[19]

36. Looking forward, whilst a new pro-competition framework is needed to promote competition and protect consumers and businesses in digital markets, this framework cannot operate in isolation. It will need to be joined-up and coherent with the wider regulatory landscape, in particular with sectoral regulation, data protection regulation and with the government's new regime for harmful online content. The CMA, Ofcom and the ICO have already established the Digital Regulation Cooperation Forum (DRCF) to deliver a step change in coordination and cooperation between regulators in digital markets. In addition, the FCA joined the DRCF in April 2021.[20]

37. The DRCF is evidence of expanding ways of working together between the CMA and regulators to protect and promote competition in the UK. We look forward to working with regulators and sharing knowledge with international counterparts in order to develop the regime moving forward.

[18] CMA, Online platforms and digital advertising market study final report 1 July 2020: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study

[19] See Investigation into Google's 'Privacy Sandbox' browser changes. Further detail available on case page https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes

[20] The DRCF published its workplan for 2021/22 in March 2021:

https://www.gov.uk/government/publications/digital-regulation-cooperation-forum-workplan-202122/digital-regulation-cooperation-forum-plan-of-work-for-2021-to-2022 to 2022 see in particular section titled 'The DRCF will bring benefits for businesses and the people using digital services".

# Annex A.

## Open Banking: promoting competition through designing regulation around new technology

38. In August 2016, the CMA published its final report following its investigation into the supply of retail banking services to personal current account (PCA) customers and to small and medium-sized enterprises (SMEs) (retail banking market). The CMA found that older and larger banks did not have to work hard enough to win and retain customers and that it was difficult for new and smaller banks to grow. To address these issues the CMA proposed a number of remedies including Open Banking, which enables customers and small and medium-sized businesses to share their current account information securely with other third-party providers from January 2018.

39. Central to the CMA's Open Banking remedy were measures to require the largest banks in Great Britain and Northern Ireland to adopt and maintain common API standards through which they would share data with other providers and with third-party providers (TPPs) including Price Comparison Websites ("PCWs"), account information service providers (AISPs) and payment initiation service providers (PISPs).

40. The CMA considered that the open API banking standard[21] had the greatest potential to increase competition between banks, by making it much easier for both personal customers and SMEs to compare what is offered by different banks and by paving the way to the development of new business models offering innovative services to customers. We understand that around 30 other jurisdictions are now either contemplating or implementing Open Banking approaches.[22]

41. While it is too early to assess Open Banking's full impact, there have been significant improvements to the process that enables customers to authorise new TPPs.[23] New technologies have developed, this includes products launched to help people manage their finances – whether through better budgeting, automating savings, comparing products, or finding ways to clear debt. Further, as of May 2020, Open Banking product usage continues to grow with over 400 million successful API calls[24] made by customers to TPPs in March 2020.

42. Related to this work, the FCA is developing open finance. Open finance would extend open banking principles to give consumers greater control of their financial data. This could make it easier for customers to compare price and product features, and switch product or provider. Open finance would therefore allow firms to develop services that

[21] An open API standard entails UK banks developing a single and common API, which is publicly available and can be used by any FinTech company or app developer, to design products or apps which would work for all UK banks.

[22] Open Banking around the world Towards a cross-industry data sharing ecosystem, Article by Deloitte: https://www2.deloitte.com/global/en/pages/financial-services/articles/open-banking-around-the-world.html

[23] Open Banking – report published by the OBIE Posted July 22, 2019: https://www.openbanking.org.uk/wp-content/uploads/open-banking-report-150719.pdf

[24] An API call can be described as follows. Where a customer has downloaded an app, before using the app, a customer will be required to fill in an email or password. The moment the "enter button" to submit details is hit, the customer has made an API call.

benefit consumers and businesses, improving competition, financial capability and inclusion.[25]

## Loyalty penalty: promoting healthy competition and enhancing consumer engagement through regulation

43. In response to the Loyalty penalty super-complaint brought by Citizens Advice in September 2018, the CMA made recommendations to government and regulators (in particular Ofcom and the FCA) to help address the loyalty penalty. The loyalty penalty is where companies penalise longstanding customers by charging them higher prices than new customers, or those who renegotiate their deal for the same goods/services. The FCA and Ofcom estimate that in total more than 28 million customers were paying a loyalty penalty of £3.4 billion.[26] The CMA considered different aspects of loyalty penalty pricing, such as automatic renewal of services as found in the broadband or home insurance market. Such practices increase the risk that customers that get rolled over yearly will pay a loyalty penalty.[27]

44. Offering introductory deals is not necessarily harmful, but the CMA found that the loyalty penalty is particularly problematic when businesses make it harder than it needs to be for people to switch, and then exploit their longstanding customers. Such harmful business practices undermine consumer trust in markets. Trust is critical to a well-functioning competitive market: it means consumers shop around with confidence and switch providers to get the best deals

45. In responding to the super-complaint in December 2018, the CMA set out a package of reforms to help tackle the loyalty penalty, which included recommendations for regulators to: take action against harmful business practices (through effective enforcement of consumer law alongside recommendations to strengthen consumer protection law); protect vulnerable customers by using targeted pricing regulations where needed; publish the size of the loyalty penalty by provider in their markets to hold firms to account and to help people navigate the market to get better deals. The CMA also made recommendations in the five markets where particular concerns had been raised; mobile, broadband, cash savings, home insurance and mortgages.

46. To help improve engagement, in its six-month update the CMA set out a principles-based framework to give more clarity to businesses and regulators about the difference between healthy competition and unacceptable practices. The framework built on the

[25] In December 2019, the FCA published a Call for Input on its strategy for open finance (see FCA (2019), Call for input: Open finance): https://www.fca.org.uk/publications/calls-input/call-input-open-finance. The consultation closed in October 2020 and the FCA published a feedback statement in March 2021 (see FCA (2021), Open finance – feedback statement: https://www.fca.org.uk/publications/feedback-statements/fs21-7-open-finance-feedback-statement

[26] Estimate taken from combined published figures from FCA and Ofcom's work in the five markets in 2019 and 2020; we recognise that there may be instances where customers are paying a loyalty penalty in more than one market and therefore may be counted twice or more. See CMA (2020), Loyalty penalty December 2020 update, available here: https://assets.publishing.service.gov.uk/media/5fc52bdcd3bf7f7f591e141e/Loyalty_penalty_Dec_2020_-.pdf

[27] The loyalty penalty can arise through a variety of ways. In some markets there is a sharp increase after the introductory price ('price jump') like in energy; in others there are successive price rises ('price walking') as in insurance; and elsewhere customers on older tariffs sometimes pay higher prices for similar services ('legacy pricing'), as in broadband.

'effective nudge' theories developed by Professor Richard Thaler, a renowned behavioural economist. It set out principles which included: ensuring that auto-renewal is explicitly agreed to by the consumer when signing up to contracts; that consumers are properly notified before any renewal – in good time for them to take action; that changes to important terms such as price have the consumer's express agreement; and lastly an exit/entry equivalence principle – namely, that consumers should find it as easy to exit a contract as it was to enter. These principles are designed to ensure firms compete fairly and do not deliberately obfuscate the process of consumers switching between providers.

47. Since the CMA's review both the FCA and Ofcom have undertaken substantial further work to look at this problem in more detail. During the last year steps have been taken to tackle the issues (despite regulators having to switch focus to dealing with the pandemic) and both the FCA and Ofcom have over the past two years put in place or proposed measures to address the concerns.

48. Below we highlight but a few of the pieces of work undertaken by sector regulators.[28] For example the FCA has completed its market study in general insurance and proposed a package of robust remedies to tackle the problems found in this sector, including banning price walking, which the CMA strongly welcomes. In mortgages, as well as carrying out research into customers that can switch but do not, the FCA has been looking into the issues faced by mortgage prisoners. The FCA has published proposals to make it easier for this group of consumers to switch mortgage provider.

49. In addition, Ofcom has taken a number of steps to address broadband price differentials. In July 2020, it published its updated review of pricing practices in fixed broadband. This found that out-of-contract broadband customers (around 40% of customers) continued to pay higher prices and that the estimated price differential these customers pay was just under £500 million a year compared to the average price for the same service from the same provider. Ofcom has secured a range of commitments from all major providers to protect out-of-contract customers, including securing revisions to their pricing policies and conducting annual pricing reviews for vulnerable customers.

50. As set out in its December 2020 update, the CMA considers that while work is in progress and some interventions are yet to be implemented, the direction and commitment of regulators to addressing the issues is clear. The CMA supports and encourages the regulators to continue to take tough action where needed and to closely monitor the impacts in tackling the loyalty penalty.

51. The CMA will continue to use the powers it has to protect consumers from exploitative practices linked to the loyalty penalty. We believe the CMA's powers could be strengthened to enable us to take action more effectively, including through new powers to fine businesses who have broken consumer law directly. Consumer law on harmful practices relating to autorenewals and subscription services can also be clarified even further. We believe the above measures would complement the regulatory approaches that have been taken to date.

[28] For a comprehensive description of the word undertaken by the sector regulators in the last year please see Promoting competition in services we rely on - The annual concurrency report 2021 (https://www.gov.uk/government/publications/annual-report-on-concurrency-2021/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2021).