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# **Memorandum of understanding between the Competition and Markets Authority and the Office of Communications – concurrent competition powers**

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## 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 the Office of Communications (Ofcom) 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 enhance 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.'<sup>1</sup>

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 Ofcom will work together within the framework of competition law.<sup>2</sup>

The main purpose of this MoU is to establish an understanding between the CMA and Ofcom 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

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<sup>1</sup> UKCN, [Statement of Intent](#), 2 December 2013.

<sup>2</sup> 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 Ofcom 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 Ofcom – whether under this MoU (and under comparable MoUs 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, Ofcom, the electronic communications, broadcasting and postal sectors and, most importantly of all, consumers.

**Alex Chisholm**  
**CEO, CMA**

**Sharon White**  
**Chief Executive, Ofcom**

# Memorandum of understanding between the Competition and Markets Authority and the Office of Communications

## *Purpose of this memorandum of understanding*

1. This MoU sets out working arrangements between the CMA and Ofcom 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 United Kingdom (UK) under the Enterprise Act 2002 – referred to in this MoU as the ‘market provisions’;in the electronic communications, broadcasting and postal sectors.
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 Ofcom, including: the Communications Act 2003; the Postal Services Act 2011; 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; the CMA’s guidance on concurrent application of competition law to regulated industries, referred to in this MoU as the concurrency guidance,<sup>3</sup> and Ofcom’s guidelines for the handling of competition complaints and complaints concerning regulatory rules.<sup>4</sup> 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 Ofcom and the CMA to develop in the light of experience. The CMA and Ofcom commit to review these arrangements from time to time to evaluate their continuing

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<sup>3</sup> CMA (2014), [Regulated industries: Guidance on concurrent application of competition law to regulated industries](#) (CMA10).

<sup>4</sup> Ofcom (25 July 2012), [Enforcement Guidelines](#).

fitness for purpose. Such review can be initiated at the request of the CMA, Ofcom or a member of the UKCN. This MoU may only be revised by agreement between the CMA and Ofcom.

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 Ofcom under the sectoral statutes. The CMA and Ofcom 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. The arrangements between the CMA and Ofcom in relation to their concurrent consumer enforcement powers are set out in a separate MoU, and the CMA's guidance on merger jurisdiction and procedure sets out how the CMA and Ofcom will work together on mergers in the communications sectors.

### ***Context***

7. This MoU operates within the framework of the legislative provisions referred to in paragraph 1 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 sectoral regulators to use their powers, including their power to apply the competition prohibitions, in the interests of competition for the benefit of consumers.

## *Role of Ofcom*

12. Ofcom is the independent national regulatory authority for the UK's communications industries, with responsibilities across broadcasting (television and radio), telecommunications, spectrum and postal services. Ofcom is also a national competition authority with concurrent powers with the CMA to enforce competition law in the sectors which it regulates.
13. Ofcom's principal duties, set out in the Communications Act 2003, are to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
14. In relation to postal services, Ofcom's primary duty is to carry out its functions in a way that it considers will secure the provision of a universal postal service. Where it appears to Ofcom that, in relation to the carrying out of any of its functions in relation to postal service, that any of the general duties (including the principal duties set out above) conflict with its duty under section 29(1) of the Postal Services Act 2011 to secure the provision of a universal postal service, Ofcom must give priority to that latter duty.
15. Ofcom's role includes securing:
  - the optimal use for wireless telegraphy of the electro-magnetic spectrum;
  - that a wide range of electronic communications services is available throughout the UK;
  - that a wide range of TV and radio services of high quality and wide appeal are available in the UK;
  - that sufficient plurality in the providers of different television and radio services is maintained;
  - adequate protection for members of the public and others against offensive or harmful material;
  - that a universal postal service is provided in the UK; and
  - adequate protection for members of the public and others against unfair treatment in programmes or unwarranted infringement of privacy.
16. Pursuant to section 371(10) of the Communications Act 2003, the duties set out above do not apply when Ofcom is carrying out its concurrent functions

under the Competition Act 1998 or Article 101 and 102 of the Treaty on the Functioning of the European Union.<sup>5</sup>

## **Aims**

17. 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 (i.e. the competition prohibitions) by the sector regulators.'<sup>6</sup>
18. 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.<sup>7</sup>
19. 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.'<sup>8</sup>
20. 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 procompetitive regulatory frameworks, as appropriate.'<sup>9</sup>
21. The CMA and Ofcom seek to use their respective powers to achieve more competitive outcomes in the electronic communications, broadcasting and postal sectors for the benefit of consumers so as to make markets in those sectors work well for consumers, businesses in the sector and businesses that use those services and the economy in which those services play an important part. It is the view of the CMA and Ofcom that such competitive outcomes can be achieved by various tools, including: their concurrent

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<sup>5</sup> Save that Ofcom is permitted to have regard to any of the matters in respect of which a duty is imposed by section 3(1) to (4) of the [Communications Act 2003](#) or section 29 of the [Postal Services Act 2011](#) if it is a matter to which the CMA is entitled to have regard in the carrying out of its competition law functions – see section 371(11) of the Communications Act 2003.

<sup>6</sup> [Enterprise and Regulatory Reform Act 2013 Explanatory Notes](#), paragraph 370.

<sup>7</sup> Statement by Alex Chisholm, Chief Executive of the CMA, [CMA mission and strategy](#), 1 October 2013.

<sup>8</sup> Department for Business, Innovation and Skills, [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](#), 1 December 2015, page 11

<sup>9</sup> UKCN, [Statement of Intent](#), 2 December 2013.

competition law powers under the competition prohibitions, the market provisions and merger control, but also through other tools such as direct regulatory action by Ofcom including through enforcement of regulatory obligations (for example, in providing for third party access to networks) and liberalisation measures introduced under national and European Union legislation.

22. 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 Ofcom, including through:
- (a) promoting cooperation and coordination between the CMA and Ofcom when dealing with cases of suspected anti-competitive behaviour for which they have concurrent powers;
  - (b) promoting cooperation and coordination between the CMA and Ofcom 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 electronic communications, broadcasting and postal services markets;
  - (d) avoiding duplication of activity, wherever possible; and
  - (e) ensuring transparency as to the respective roles of the CMA and Ofcom for individuals and consumers affected.

### ***General cooperation***

23. In addition to the provisions for cooperation between the CMA and Ofcom specific to particular powers of the CMA and Ofcom, as set out in this MoU, the CMA and Ofcom are committed to the following general principles and practices for cooperation between themselves in respect of the sectors for which Ofcom has responsibility.
24. Officials of the CMA and Ofcom 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.
25. The CMA and Ofcom will, in respect of the electronic communications, broadcasting and postal sectors, 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.<sup>10</sup>
26. Where either the CMA or Ofcom exercises its concurrent powers, the CMA and Ofcom 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.
27. The CMA and Ofcom 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 the electronic communications, broadcasting and postal sectors but which may have a significant impact on any of those sectors, the CMA will inform Ofcom and share appropriate information relating to that market study with Ofcom to the extent permitted by law.
28. Within the spirit of broader collaboration for the purposes of the promotion of competitive outcomes, the CMA and Ofcom will commit to discuss and share other relevant information, where legally permissible to do so, but subject to the need not to impair the impartiality and fairness of the CMA in carrying out the functions referred to in paragraph 5 of this MoU.

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<sup>10</sup> Instigation of a market study occurs on the publication of a market study notice, as defined in section 130A of the [Enterprise Act 2002](#).

## **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*

29. The CMA and Ofcom 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.
30. Their determination of which authority will exercise its powers will be based on assessing which authority is better placed to exercise those powers, having regard to the factors set out in paragraph 3.22 of the concurrency guidance. Specifically, the factors include:
  - the sectoral knowledge of a regulator and the CMA;
  - whether the case affects more than one regulated sector and/or non-regulated sectors not subject to competition law;
  - previous contacts between the parties or complainants and a regulator or the CMA;
  - experience with dealing with any of the undertakings which may be involved in the proceedings;
  - experience with dealing with any similar issues which may be involved in the proceedings;
  - whether the CMA considers it necessary to exercise Part 1 functions in relation to a case in order to develop UK competition policy or to provide a greater deterrent and precedent effect for the benefit of competition and consumers, either within the relevant regulated sector, or more widely;
  - whether the case being allocated to the CMA and supported by the relevant regulator (or vice versa) will provide the best combination of competition and sector-specific expertise.
31. The CMA and Ofcom 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 above and in paragraph 3.22 of the concurrency guidance.

#### *Procedure for allocation*

32. Where either the CMA or Ofcom 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),<sup>11</sup> in relation to the electronic communications, broadcasting and postal services sectors, it will disclose to the other (ie 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.
33. The disclosing authority will provide this information within ten working days after it has decided that the reasonable suspicion test is met, whether or not it proposes to exercise concurrent powers.<sup>12</sup> Nothing in this paragraph prevents the CMA and Ofcom discussing the case prior to such a decision, subject to paragraph 46 below.
34. Within seven working days from receipt of the information described under paragraph 32, the receiving authority will respond in writing, settling out its initial view on the case and how it should be allocated and identifying any further information which it requires.
35. The CMA and Ofcom 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 32. 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.
36. The procedure for agreeing the transfer of a case that is already in progress from the CMA to Ofcom, or from Ofcom to the CMA, is as set out in

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<sup>11</sup> As provided in section 25 of the [Competition Act 1998](#).

<sup>12</sup> As provided in regulation 9 of the Concurrency Regulations.

regulation 7 of the concurrency regulations and in paragraph 3.32 of the concurrency guidance.

37. The procedure for the CMA to direct the transfer to itself from Ofcom, of a case that is already in progress, is as set out in regulation 8 of the concurrency regulations.

#### *Implications of allocation*

38. 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.
39. Case allocation determines which of the CMA and Ofcom is to exercise concurrent functions and make any decisions under the competition prohibitions. The CMA or Ofcom will be publicly identified as having such responsibility if and when any such investigation is announced. The CMA and Ofcom envisage that, whichever authority has responsibility for a particular case, they and their officials will work cooperatively with each other on the case, pooling their expertise including as described in paragraphs 54 to 60 of this MoU and in paragraph 3.33 to 3.35 of the concurrency guidance.

#### **Sharing information**

##### *Principles of information sharing*

40. The effective sharing of information between the CMA and Ofcom 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 32 to 37 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.
41. The CMA and Ofcom 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 electronic communications, broadcasting and postal sectors.

### *Information sharing mechanism – general liaison*

42. The CMA and Ofcom recognise the importance of meeting regularly to share information on matters relevant to competition in the electronic communications, broadcasting and postal sectors, and to keep each other abreast of relevant work which they are considering or currently undertaking.
43. The CMA and Ofcom will meet regularly at multiple levels, bilaterally and through the UKCN.
44. The CMA and Ofcom 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.
45. The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and Ofcom.
46. For the purposes of sharing information pursuant to paragraph 32, 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.<sup>13</sup> Where disclosure would be appropriate and permitted by law, the CMA and Ofcom 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 Ofcom 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

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<sup>13</sup> 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 active consideration of exercising its concurrent powers.

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 52 and 53.

*Information sharing mechanism – handling specific cases*

47. The procedures for information sharing for the purpose of case allocation shall be as set out in paragraphs 32 to 34 and 40 to 53 of this MoU.
48. When either the CMA or Ofcom is exercising its powers in respect of the competition prohibitions in a particular case in the electronic communications, broadcasting and postal sectors, 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 51 to 53 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) all other information which it reasonably believes to be relevant for the other to carry out its functions 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 of experience as this enhanced framework of collaboration and its supporting arrangements develop over time.

*Information sharing mechanism – for know-how purposes*

49. 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 Ofcom will, to the extent permitted by law, contribute information to that in the way best calculated to achieve that objective.
50. 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*

51. Any disclosure of information under paragraphs 32 to 34 and 40 to 50 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).
52. Prior to disclosing information to each other, the CMA and Ofcom 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 Ofcom 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, Ofcom 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.
53. In addition to the general provisions referred to in paragraph 51, where Ofcom 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 Ofcom of information received from other sources or if the leniency applicant's consent is obtained.<sup>14</sup> Where the provision of leniency information to either the CMA or Ofcom 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

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<sup>14</sup> 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 Ofcom 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.

passed to another authority, the receiving authority shall afford the leniency applicant, its subsidiaries or its employees no lesser protection.

### ***Pooling resources***

54. Paragraph 26, 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 Ofcom will endeavour, so far as is reasonably practicable and permitted by law, and in the 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 electronic communications, broadcasting and postal sectors, and more generally the promotion of competition for the benefit of consumers in those sectors, 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 function of the CMA in its role of considering appeals against, or references related to, proposed action by Ofcom under the sectoral statutes.
55. 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 reasonable 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.

### ***Secondments of staff***

56. One means of the practical assistance and support that might be given, as referred to in paragraph 54 and 55 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.
57. The CMA and Ofcom agree that secondments may, on a case-by-case basis, be appropriate for this purpose, and will endeavour to meet each other's requests for secondments to the extent that they are reasonable 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.
58. 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 requested.
- (b) The period for which each one is requested.
- (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 resource requested cannot adequately be met by deployment of staff from within the requesting authority.

### ***Other mutual support***

59. In addition to the sharing of information, expertise, experience and the secondment of staff, the CMA and Ofcom will provide each other with more informal forms of support to enable them to carry out their competition law functions in relation to the electronic communications, broadcasting and postal sectors – 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.

### ***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,<sup>15</sup> 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.

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<sup>15</sup> Enterprise and Regulatory Reform Act 2013 [Schedule 4](#) paragraph 16.

62. The CMA will consult, and cooperate with, Ofcom 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 Ofcom 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;
  - (b) take account of any comments or suggestions it receives from Ofcom 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 Ofcom and other sectoral regulators as appropriate; and
  - (d) make the annual concurrency report available on the CMA webpages.
63. Ofcom 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 electronic communications, broadcasting and postal sectors;
  - (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 electronic communications, broadcasting and postal sectors, both the CMA and Ofcom 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.<sup>16</sup>

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<sup>16</sup> 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.'

### ***Short form opinions***

65. The CMA shall inform Ofcom following an initial enquiry for a short form opinion relating to the electronic communications, broadcasting and postal sectors. Where the CMA is considering providing such an opinion, it will discuss with Ofcom before deciding to do so. If the CMA then decides to produce an opinion, it will engage with Ofcom, the nature and degree of that engagement to be considered on a case-by-case basis. In all cases, the CMA will give Ofcom the opportunity to provide comments on a draft opinion.

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

### ***How concurrency works under the market provisions***

66. Ofcom 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 electronic communications, broadcasting and postal sectors under Part 4 of the Enterprise Act 2002 (as do other sectoral regulators in relation to the sectors for which they are responsible).
67. Under the Enterprise Act 2002, the CMA and Ofcom may, in relation to the electronic communications, broadcasting and postal sectors, 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.
68. When making a reference, the CMA or Ofcom, 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).
69. The cooperation between the CMA and Ofcom 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***

70. 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.
71. Ofcom has a duty to respond to super-complaints made to it under the Enterprise Act 2002 if the complaint concerns the electronic communications, broadcasting and postal services sector.

72. The coordination of the CMA's and the sectoral regulators' super-complaint duties will be consistent with that for the market provisions generally to the extent appropriate and otherwise will be based on policies agreed and applied through the UKCN.

### ***Mutual consultation***

73. Ofcom and the CMA have a duty to consult each other before exercising concurrent functions under the market provisions.<sup>17</sup>

### ***Sharing information***

74. The provisions of paragraphs 42 to 46, 48 (excluding 4848(a)) and 50 of this MoU apply to information sharing under the market provisions as they do under the competition prohibitions.

### ***Pooling resources***

75. The provisions of paragraph 54 to 60 of this MoU apply to pooling resources under the market provisions as they do under the competition prohibitions.
76. Where the CMA and Ofcom 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.

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

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<sup>17</sup> Section 370 of the [Communications Act 2003](#).