

# United Kingdom Competition Network (UKCN) Statement of Intent

## 1. The statutory basis for the UKCN

The Enterprise and Regulatory Reform Act 2013 (ERRA13) was enacted in April 2013. The Act creates the Competition & Markets Authority (CMA) as Non-Ministerial Government Department to replace the Office of Fair Trading and the Competition Commission<sup>1</sup>, with the main duty to:

*“promote competition, both within and outside the United Kingdom, for the benefit of consumers”<sup>2</sup>*

The Act makes provision for the strengthening of the primacy of general competition law, so that the sector regulators are expressly required, where they are not already required to do so, to consider whether the use of their competition law powers is more appropriate before taking enforcement action under their sector-specific, regulatory powers<sup>3</sup>.

Certain sector regulators<sup>4</sup> have concurrent competition powers alongside the CMA to enforce Articles 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU), the Competition Act, 1998 (CA98), to make Market Investigation References (MIRs) to the CMA with respect to activities in their sectors, and concurrency in respect of super-complaints under the Enterprise Act, 2002 (EA02)<sup>5</sup>.

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<sup>1</sup> Part 3, s. 26, ERRA13.

<sup>2</sup> Part 3, s. 25, ERRA13.

<sup>3</sup> Schedule 14, ERRA 14. The primacy provision will not be commenced for Monitor until a later date on Government agreement.

<sup>4</sup> The present concurrent regulators, and the scope of their competition concurrency, are:

Civil Aviation Authority (CAA) (air traffic control services and airport operation services)

Monitor (the provision of health-care services in England)

Ofcom (electronic communications and post)

Ofgem (gas and electricity markets in Great Britain)

Ofwat (water and sewerage markets in England and Wales)

Office of Rail Regulation (ORR) (railway services in Great Britain)

Utility Regulator, Northern Ireland (NIAUR) (gas, electricity, water and sewerage services in Northern Ireland)

<sup>5</sup> The various regulators are given their concurrent powers to deal with super-complaints by virtue of section 205 EA02 and the 2003 Regulations. Monitor does not have powers to deal with super-complaints.

ERRA13 amends the enabling power for the competition concurrency regulations, so as to<sup>6</sup>:

- require enhanced information sharing arrangements between the CMA and the sector regulators;
- allow the CMA to decide who will act in a case in a concurrent sector, following consultation; and
- allow the CMA, in certain circumstances, to take over a case from a concurrent regulator

The intent of these statutory reforms is to ensure that competition cases, business and the economy should benefit from greater consistency in approach through the use of general competition law and to ensure that the sector regulators consider whether a more appropriate way of proceeding would be under the competition law before using their sector-specific powers.

As soon as practicable after the end of each financial year, the CMA must prepare a report containing an assessment of how the concurrency arrangements have operated during the year<sup>7</sup>.

Under ERRA13, the Secretary of State may make an order to remove the competition functions from the sector regulator if the SoS considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the UK, for the benefit of consumers. This clause applies to all sectoral regulators with concurrent competition powers, with the exception of Monitor<sup>8</sup>.

## **2. Purpose of the UK Competition Network as agreed by regulatory heads**

To give effect to the statutory requirements of ERRA13 and in order to strengthen the collaborative framework through which the sector regulators and CMA will work to further the interests of the consumer, the heads have agreed to establish a United Kingdom Competition Network (UKCN) and to develop a programme of work for the UKCN.

The UKCN brings together the CMA with the CAA, FCA, Ofcom, Ofgem, Ofwat, ORR and the Utility Regulator of Northern Ireland. These sector regulators all have a duty to promote competition in the interests of consumers. The health-care regulator, Monitor, which has a statutory duty to prevent anti-competitive behaviour, will attend the Network with observer status.

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.

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<sup>6</sup> Chapter 5, s.51, ERRA 13.

<sup>7</sup> Part 1, s.16, *Concurrency report*, ERRA 13.

<sup>8</sup> Chapter 5, s.52, ERRA13.

The heads agreed to pursue this mission on the basis of six priority areas that are summarised in section 3, below.

### **3. Proposed areas of focus for UKCN Members**

Within the overall mission of the UKCN, the UKCN will work individually and collectively in the following areas:

#### **3.1 Strategic dialogue**

The CMA and Sector Regulatory Heads should engage together within the UKCN in a broad strategic dialogue, identifying opportunities to use competition or regulatory powers to promote market mechanisms to further the interests of consumers<sup>9</sup> with a view to:

- mutual understanding of market developments, opportunities to shape regulatory frameworks to further competition/prevent anti-competitive behaviour and otherwise use competition tools to benefit consumers/users and the wider economy
- understanding developments in the EU and international regimes
- identifying common challenges in relation to litigation
- taking into account other *ex ante* regulatory objectives such as ensuring safety of networks and services

#### **3.2 Enforcement cooperation under competition law**

To ensure consistent application of competition law in the United Kingdom in the areas of sector regulation, members of the UKCN will cooperate closely with respect to:

- cases, including the identification of potential CA98 and MIR cases in regulated sectors
- market studies (including, collaborative market studies where applicable)
- CMA proposals to allocate ongoing Competition Act cases to itself
- the role of the CMA taking cases in regulated sectors
- peer review of competition-related work products

#### **3.3 Enhancing capabilities**

To ensure that UKCN members each have the capabilities needed to enforce competition powers correctly and effectively, members will contribute to:

- staff development and training
- establishing an effective information sharing and casework process structure (with suitable disclosure barriers)

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<sup>9</sup> Monitor does not have a duty to promote competition but will act to prevent anti-competitive behaviour where this is against patients' interests.

- enhancing process handling, including considering the option of using a procedural adjudicator
- the sharing of staff through secondment programmes between the CMA and the sector regulators and between the sector regulators

### **3.4 Sharing best practice**

Aligned to effective enforcement coordination, UKCN members will adopt means by which to share best practice which may include:

- the development of model procedures
- sharing of research findings
- participation in international benchmarking of best practice
- joint workshops

### **3.5 Advocacy**

To ensure that the most significant competition and consumer issues are identified and expedited, UKCN members will:

- exchange ideas and expertise for competition advocacy.
- support mutually, as appropriate, each others' competition advocacy work
- support mutually, as appropriate, each others' work on best regulatory practice including the fundamental principle of day-to-day operational independence from Government
- input into the Annual Concurrency Report

### **3.6 Annual concurrency report**

To ensure the timely publication of the annual Competition Concurrency Report under ERRA13, members of the UKCN will provide information with regard to:

- cases in progress as well as closed cases
- cases examined by sector regulators but where no infringement was found
- their contributions to developing a track record of competition cases and market investigations by UKCN members
- the operation of the concurrency arrangements
- the outcomes achieved alongside the delivery of the process
- the development of competition within their sectors in addition to specific cases in order to provide overall strategic context

## **Annexe 1 – Background to the establishment of the UK Competition network following the reform of the UK competition landscape.**

### **A1. Government Competition Landscape Review**

Competitive markets are a key driver of productivity, innovation and economic growth, providing greater choice and other benefits for consumers. In March 2011, the Government launched its consultation on reforming the UK competition regime<sup>10</sup> with the overarching objective to maximise the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth.

One of the key proposals was the creation of a new Competition and Markets Authority (CMA) to replace the Competition Commission and the Office of Fair Trading (OFT). The Government considered that creating a single competition authority and modernising its competition toolkit would improve markets and help consumers and businesses by providing greater coherence in competition practice and a more streamlined approach to decision-making. It would also facilitate faster and less burdensome processes for businesses and a single strong centre of competition expertise that could help business understand their competition law obligations and provide national and international leadership.

The package of proposals included options to enhance the competition concurrency regime affecting the sector regulators following the National Audit Office 2010 Review of the UK Competition Landscape that recommended the introduction of appropriate incentives for the sector regulators to use their competition powers.

The consultation also considered that competition cases, business and the economy could benefit from more consistency in approach through the use of general competition law. One of the conclusions of the consultation was that the Government wanted to encourage sector regulators to work more closely with the CMA and to use their competition powers where they considered them to be appropriate.

Following the consultation, the Government set out its specific reforms before Parliament in May 2012, in the Enterprise and Regulatory Reform Bill.

### **A2. Enterprise and Regulatory Reform Act, 2013**

#### ***New Primary Legislation***

The Enterprise and Regulatory Reform Act 2013 (ERRA13) was enacted in April 2013. The Act creates the CMA as a Non-Ministerial Government Department with the main duty to:

*“promote competition, both within and outside the United Kingdom, for the benefit of consumers”*

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<sup>10</sup> A Competition Regime for Growth: A Consultation on options for reform, BIS, March 2011.

This duty reflects the CMA's position as the UK's principal competition authority and its leadership role in tackling anti-competitive behaviour as part of ensuring markets work well for consumers, as well as its domestic and international advocacy role.

ERRA13 gives the CMA an important role to play in working with and through partner agencies to deliver positive competition outcomes by ensuring greater coherence in competition policy and practice, increased case flow and flexibility in resource allocation, and to advocate the benefits of competition and markets across the economy. ERRA13 also maintains the regulatory appeal function currently exercised by the Competition Commission and in future to be exercised by the CMA. This is subject to a wider review of the appeals system for competition cases and regulatory decisions<sup>11</sup>.

### ***The Primacy of general competition law***

The Act makes provision for the strengthening of the primacy of general competition law, so that the sector regulators are expressly required, where they are not already required to do so, to consider whether the use of their competition law powers is more appropriate before taking enforcement action under their sector-specific, regulatory powers<sup>12</sup>.

### ***Changes to the Competition Concurrency Regime***

The Act is designed to ensure that the CMA and the sector regulators work more closely together and for there to be greater sharing of information between them in respect of potential and ongoing competition cases.

The Secretary of State also has powers to prescribe circumstances in which the CMA may decide that it, rather than a sector regulator, should bring a Competition Act case. This will ensure the CMA can take action in cases where it is better placed to do so, and it is intended to further improve the robustness of decisions and to strengthen the regime.

It is envisaged that this power for the CMA to take over a case from a concurrent regulator will be used rarely in practice as the closer working and information sharing arrangements between the competition authorities will in any case ensure better and more consistent case management and competition enforcement outcomes for the benefit of consumers. Where the power is used, the CMA would have to consult the regulator before exercising this power and there will have to be a formal agreement with each regulator on how this will work in practice<sup>13</sup>.

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<sup>11</sup> [Streamlining regulatory and competition appeals: consultation on options for reform, BIS, June 2013.](#)

<sup>12</sup> The primacy provision will not be commenced for Monitor until a later date.

<sup>13</sup> Where there is dispute, the CMA may not however decide that it or another Regulator other than Monitor is to exercise Part 1 functions which are primarily concerned with matters relating to the provision of health care services for the purposes of the NHS in England. The CMA and Monitor may

### ***The Power to remove competition functions from concurrent sector specific regulators***

The Act also allows the Secretary of State to make an order to remove the competition functions from a sector regulator if it is considered that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the UK, for the benefit of consumers<sup>14</sup>.

### ***The Annual Competition Concurrency Report***

Alongside this and in order to ensure transparency, accountability and greater certainty for business, the CMA will be required to report annually on the operation of the concurrency arrangements and on decisions on the use of concurrent competition powers by the CMA and sector regulators.

### **A3. Government's strategic steer**

To increase transparency, the Government has committed to issuing a non-statutory statement of strategic priorities for the CMA (the Steer<sup>15</sup>) setting out how Government envisages the competition regime will fit into wider government economic policy.

The Steer is part of an overall accountability framework which also comprises the legal and performance management frameworks, e.g. the CMA's duty to 'promote competition, both within and outside the UK, for the benefit of consumers'. It provides an open and transparent statement which the CMA will be expected to have regard to, but the CMA retains full independence in how it approaches its work, and in its selection of cases, and the tools it uses to tackle them. Alongside this Steer will sit the Performance Management Framework established by BIS and HM Treasury.

As part of the Steer the CMA will be expected to identify markets where competition is not working well and tackle the constraints on competition in these cases.

The draft Steer also proposes that the CMA should assess specific sectors where enhanced competition could contribute to faster growth (for example, knowledge intensive sectors, financial services and infrastructure sectors including energy) – working with the responsible regulator where appropriate.

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nevertheless agree that the CMA is to act in such a case as will be reflected in the Concurrency Regulations.

<sup>14</sup> This power applies to all sectoral regulators with concurrent competition powers except Monitor. Monitor does not have a duty to promote competition but will act to prevent anti-competitive behaviour where this is against patients' interests.

<sup>15</sup> Competition Regime: Consultation on CMA Priorities and Draft Secondary Legislation, BIS, July 2013.

Alongside the Consultation on some of the CMA’s new draft guidance, the Government invited comments on the Steer and certain key pieces of secondary legislation on 15 July.<sup>16</sup>

**A.4 The Competition powers of the sector regulators**

The CMA will need to work with other sector regulators, to build up and continue to share competition expertise, including through joint enforcement work, training and research. This will include engagement with those sector regulators with concurrent competition powers listed in the table below and with regulators such as the Financial Conduct Authority that have a duty to promote competition in the interests of consumers but that do not have concurrent competition powers.

***Sector Regulators with Concurrent Competition Powers***

<b>Regulator</b>	<b>Scope of Concurrent Competition Powers</b>
Civil Aviation Authority (CAA)	Air traffic services, and now under the Civil Aviation Act 2012, airport operation services in the United Kingdom.
Monitor	Health care services in England. <sup>17</sup>
Northern Ireland Authority for Utility Regulation (NIAUR)	Gas, electricity, water and sewerage services in Northern Ireland.
Office of Rail Regulation (ORR)	Railway services in Great Britain.
The Office of Communications (Ofcom)	Electronic communications, broadcasting and postal services in the United Kingdom.
The Office of Gas and Electricity Markets (Ofgem)	Gas and electricity in Great Britain.
Water Services Regulation Authority (Ofwat)	Water and sewerage in England and Wales.

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<sup>16</sup> A second tranche of consultations was launched on 17 September covering the new concurrency regulation, CMA Rules on Competition Act enforcement and CMA guidance on concurrency and Competition Act procedures. These consultations were closed on 11 November 2013 and responses are currently being reviewed.

<sup>17</sup> There is a power for the Secretary of State to extend these powers to the area of social care in England.



## ***The Financial Conduct Authority (FCA)***

At present, the FCA is not specified as a sector regulator in ERA13 because it does not have concurrent Competition Act 1998 (CA98) nor Market Investigation Reference (MIR) powers with the CMA.

The Government believes that the FCA should have a far stronger role in competition than the Financial Services Authority had. This commitment is reflected in the FCA having a statutory mandate to promote effective competition in the interests of consumers. The FCA may use any of its regulatory powers to promote competition. The FCA also has the power of referral to the CMA. The FCA will take the lead in addressing competition issues where it is better placed to do so. In addition, The Financial Services (Banking Reform) Bill, 2013 envisages FCA receiving concurrent competition powers from April 2015<sup>18</sup>.

## ***Monitor***

Monitor has no duty to promote competition in the interest of consumers, unlike other sector regulators. Monitor's main duty is to protect and promote the interests of patients by promoting provision of health care services which is economic, efficient and effective, and maintains or improves the quality of the services. Monitor must exercise its functions with a view to preventing anti-competitive behaviour in the provision of NHS-funded health care services which is against patients' interests. The Health and Social Care Act gives Monitor the power to take enforcement action under the provider licence and the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. Monitor also has concurrent powers which enable it to enforce the Competition Act, 1998 and to make market investigation references under the EA02.

## **A.5 Progress report of the Joint Regulators Group Work-Group on Concurrency to the May 2013 JRG meeting**

The regulators, under the aegis of the Joint Regulators Group (JRG), have worked with the CMA transition team and colleagues from the Department for Business (BIS) and the Office of Fair Trading (OFT) to consider in more detail how operational relationships can be optimised.

In May 2013, the JRG published a report<sup>19</sup> on progress so far on this work, as well as setting out directions for future consideration, in particular how a vision for enhanced

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<sup>18</sup> Financial Services (Banking Reform) Bill Government Amendments: FCA Concurrent Powers, Briefing to Peers:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/245760/HoL\\_Policy\\_Brief\\_-\\_FCA\\_Concurrent\\_Powers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245760/HoL_Policy_Brief_-_FCA_Concurrent_Powers.pdf)

<sup>19</sup> Building Confidence that Consumers in Regulated Sectors are Effectively Protected from Competition Failures: Concurrent enforcement with the Competition and Markets Authority, *Progress report of the Joint Regulators Group Work-Group on Concurrency to the May JRG meeting*, June 2013.

cooperation might be realised and the key areas that needed to be addressed, in particular:

- transparency: in order to demonstrate to stakeholders that effective action is being taken on emerging issues;
- flexibility: recognising the need to reflect differing regulatory and market conditions in each sector; and
- pragmatism and practicalities: for example in relation to the different levels of resources available to different regulators

## **A.6 Meetings of the regulatory heads**

Subsequent to the working level cooperation between JRG and the CMA transition team, the first meeting of the regulatory heads was held on Thursday 11 July and the UKCN Statement of Intent was approved by the Chief Executives at a workshop held on 18 September 2013.

The initial meeting was convened to discuss how best to respond to the various reforms to the competition legislation, including the creation of the CMA, revision of the concurrency regime and additional competition responsibilities for some of the sector regulators as indicated above.

The CMA and sector regulator heads agreed that:

- i) a 'step-up' in the role of competition concurrency in the areas covered by sector regulators would be sought, following the introduction of ERRA13; and
- ii) each head should support the establishment of the UK Competition Network and should involve themselves personally in the establishment and supervision of an appropriate programme of work and to manage the delivery of agreed actions.

At the workshop, the heads considered the draft UKCN Statement of Intent (UKCN Sol), developed following the July meeting. It was agreed that the UKCN Sol should be a living document, which should be updated to reflect new regulators/powers and reviewed at least annually. Following adoption by the heads, it was then submitted to each agency's Board for agreement.

Following agreement by each Board, the UKCN Heads agreed the publication of the latest version of the UKCN Statement of Intent and associated press release on 2 December, 2013.