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**THE USE OF COMPETITION POWERS BY SECTOR
REGULATORS – THE ORIGINS, EXPERIENCE AND POTENTIAL
FUTURE OF THE UK’S CONCURRENCY ARRANGEMENTS**

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THE USE OF COMPETITION POWERS BY SECTOR REGULATORS – THE ORIGINS, EXPERIENCE AND POTENTIAL FUTURE OF THE UK's CONCURRENCY ARRANGEMENTS

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ABSTRACT

This paper discusses the UK's concurrency arrangements under which sector regulators can apply aspects of competition law to their industry. It is frequently claimed that concurrency is a unique aspect of UK competition policy. However, this paper argues that it arose during the 1980s as one aspect of an almost uniquely pro-competitive regulatory framework for privatised telecommunications and other UK infrastructure industries. The paper discusses the origins of these formal concurrency arrangements and their use in the UK since the 1980s. It also compares the UK with other EU and OECD countries over the role of ex post competition policy relative to ex ante regulation and the interactions between sector regulators and competition authorities. It emphasises the role of 'informal' concurrency as well as 'formal' concurrency in the UK and other countries. The paper concludes with a discussion of the likely prospects for the UK under the enhanced concurrency regime established in 2013 and makes some recommendations for the future. Developing and implementing effective methods to evaluate the net welfare benefits of the enhanced concurrency regime will be crucial both in its own right and in establishing a robust deterrence strategy against anti-competitive behaviour in industries with sector regulators.

The Use of Competition Powers by Sector Regulators – The Origins, Experience and Potential Future of the UK's Concurrency Arrangements

1 Introduction¹

The UK's concurrency arrangements refer primarily to the powers given to the sector regulators to apply aspects of competition law in their industry. The powers are set out in the Competition Act 1998 which derives directly from the EU Treaty TFEU Articles 101 and 102. These powers refer to powers to investigate and take action against:

- (i) undertakings [businesses] engaging in anticompetitive agreements (e.g. price fixing, cartels, etc); and
- (ii) the abuse by an undertaking of a dominant market position (e.g. imposing unfair prices or trading conditions; limiting production markets or technical developments to the detriment of consumers, etc).

The UK regulators with concurrent powers also have the authority to carry out market studies, which can lead to a full 'Phase 2' market investigation carried out now by the CMA panel and, before 2014, by the Competition Commission (CC). These powers were given to OFT and the concurrent regulators under the Enterprise Act 2002.

The sector regulators include the infrastructure industry economic regulators for telecoms and ICT, broadcasting and postal services; electricity and gas; railways and water. In addition, the Civil Aviation Authority has concurrency powers in respect of air traffic services and of airport operations. The Financial Conduct Authority will also have concurrency powers from April 2015. Monitor has concurrency powers (but no competition objective) over health services. In Northern Ireland, the Utility Regulator (responsible for regulating the gas, electricity and water sectors there) has concurrency powers.

These competition law powers were exercised until April 2014 by the Office of Fair Trading (OFT) and are now administered by the CMA. For the regulated sectors, until 2014 they were exercised concurrently by the sector regulators and OFT– now concurrently by the sector regulators and the CMA. Under the concurrency rules, problems of anti-competitive behaviour in the industries covered by the main sector regulators can be investigated under these competition law powers *either* by the sector regulator *or* by the CMA (by the OFT up to April 2014). These *ex post* competition law powers are in addition to the ability of the sector regulators to use their *ex ante* regulatory powers as tools with which to address problems (including competition-related problems) in the industries that they regulated. The UK is unusual in this; in other countries, regulators typically do not have formal concurrency powers.

¹ I owe thanks to a number of people for their help during the writing of this paper. I would particularly like to mention Rosalind Bolton, Martin Cave, Michael Grenfell, Morten Hviid, Suyong Kim, Cathryn Ross, Stuart Stock and Helen Weeds. Domile Butkeviciute provided excellent research assistance and her work provides much of the data in Section 3 and the Appendix Tables. However, the paper reflects only my personal views and does not necessarily reflect the views of anyone else or any organisation with which I am or have been associated.

Since 2014, the merger of the OFT and the Competition Commission into the CMA has led to the CMA taking over the Phase 1 responsibilities and functions of the OFT. Referrals from Phase 1 (and market investigations) will be taken by the CMA under its Phase 2 powers and procedures. However, the Enterprise and Regulatory Reform Act 2013 (ERRA) also significantly enhanced the sector regulators' concurrency obligations. ERRA requires them – other than Monitor - to consider the use of (ex post) competition powers before using their direct (ex ante) regulatory powers. ERRA (and subsequent policy documents) further promote concurrency. For instance, they set out institutions and mechanisms for co-operation between the CMA and the sector regulators over concurrency policy, procedures and case allocation. The main forum for such co-operation is the UK Competition Network (UKCN). Under ERRA, there are also powers for the CMA to take over these cases from regulators. Finally, regulators (other than Monitor) can have their concurrency powers removed by the Government if they are deemed consistently not to have used them sufficiently and caused some detriment of competition in the UK.

It is often argued that concurrency is a unique feature of the UK competition system. However, I will argue in this paper that concurrency arrangements – even formal concurrency arrangements - are not peculiar to the UK. *More importantly, I will argue that the strengths and weaknesses of the UK concurrency arrangements are much more obvious if we think of them as a particular feature of the UK sector-regulation system rather than of its competition system.* I will demonstrate that UK sector regulation is – and since the early 1980s always has been - heavily locked into UK competition policy so that concurrency is one aspect of the chosen regulatory framework. Indeed, I will argue that we should best consider concurrency as the 'coping stone'² of the UK's strongly pro-competitive infrastructure regulation system.

The key point is that UK regulation has focused heavily on the role of competition and markets - not just in general but specifically for the benefit of consumers. This is apparent from its initial developments in the 1980s and, as I will demonstrate, the UK is almost exceptional among OECD countries on this. Many other countries (including all EU Member States) have the promotion of competition as a regulatory responsibility for telecoms and, to a lesser extent, in energy, but rarely if ever for other infrastructure industries. Moreover, in those countries, the responsibility for developing competition assigned to regulators almost always refers to the responsibility to promote markets in general and typically refers to wholesale markets and/or enterprises requiring the use of physical networks. Unlike the UK, the competition obligation usually does not refer to final consumers.

The structure of the rest of the paper is the following. In Section 2, I discuss the origins of concurrency and the links of regulation to competition policy up to the mid-1990s, including the major contribution of Michael Beesley in this area. This section also briefly discusses the role of the OFT and the MMC (Monopolies and Mergers Commission³) in the development of the overall regulatory framework for the regulated industries over this period. Section 3 presents some international comparisons of regulatory regimes, focusing on their competition role (if any). The analysis in section 3 is limited to telecoms/ICT and energy as few other OECD

² Oxford English Dictionary: Highest stone in building or wall. Also (metaphorically) finishing touch or crowning achievement.

³ The MMC was replaced by the Competition Commission in 1999.

countries have independent transport or water regulators and none of those seems to have significant pro-competition obligations. Section 4 discusses the arguments put forward by the critics of concurrency. Section 5 discusses concurrency in the UK since 1995 and its likely future, drawing heavily on the April 2014 CMA Baseline Concurrency Report. Section 6 draws lessons and provides some comments on the likely potential future role of concurrency in the UK.

The paper contains little discussion of the operation of concurrency for airports and air transport services, for financial services or for health services since they have either only recently received concurrency powers (CAA and Monitor) or not yet had them activated (financial services.)

2. The Origins and Early Development of the UK Concurrency Regime in the 1983-1997

The development of sector regulation before 1987 was closely related to the needs of privatisation, firstly of BT and then of British Gas. This was followed in the late 1980s and the 1990s by the the privatisation of airports, electricity, water and railways. All of these (except airports) had sector regulators put in place during the privatisation process.⁴

2.1 Regulation, Concurrency and the Privatisation of BT

The initial development of the UK sector regulation system in 1983-84 via the BT telecommunications privatisation is relatively well-known. In particular, several writers⁵ have shown that:

- (i) relying wholly on ex post competition was ruled out fairly early, not least because this was seen as giving inadequate protection to the new shareholders, not least because it would operate too slowly;
- (ii) there was a suggestion that OFT take on telecom regulation, but this was refused by OFT on the grounds that it would be too great a burden for that organisation – and that, given the need to give clear protection to the new shareholders, a specialist regulatory agency was needed.⁶

What is much less well-known is, firstly, how firmly rooted UK telecom regulation was from the start within a competition policy framework and, secondly, how concurrency emerged within this framework. This is made clear in Chapter 12 of David Parker's official history of UK privatisation 1970-87⁷. Parker's narrative demonstrates:

⁴ The CAA, the airports regulator, was established in 1972 and had its (rather unsatisfactorily structured) economic regulatory powers added to it in 1982 when BAA was privatised.

⁵ See Vickers and Yarrow (1988), Littlechild (2003), Stern (2003) and others.

⁶ See Parker (2009), Volume 1 p. 267.

⁷ There was also a suggestion that the MMC take it on. They also refused. See Parker (2009) Volume 1, pp 266-90.

- (a) *The commitment to competition as a regulatory objective.* This was shown by the 1984 Telecommunications Act listing as the second duty of Oftel (the designated telecom regulator) “to maintain and promote effective competition between persons engaged in commercial activities connected with telecommunications in the United Kingdom”⁸.

The duties also included (i) promoting the interests of consumers, purchasers and other users; and (ii) promoting the efficiency and economy of persons engaged in commercial activities connected with telecommunications in the United Kingdom. This was all within a general requirement “to satisfy all reasonable demands” (including emergency services, call boxes, etc).

The emphasis on competition for the benefit of consumers rather than just competition as a process was particularly important, not least as a precedent for other sector regulators.

- (b) *The adoption of regulatory licences, with licence appeals to the MMC.* This was very important and its impact is generally under-estimated.

US telecom and similar regulation was based on rules with appeals to the courts against FCC (or PUC) rulings. Beesley, Walters, Littlechild and others involved in the BT privatisation were hostile to the US model because it was perceived as very costly and time-consuming.

References to the MMC were originally seen as a method of dispute resolution between regulator and regulated company. However, the use of appeals to the MMC on licence modifications quickly expanded so that all licence-related appeals went to the MMC apart from “due process”, judicial review appeals. This licence modification (and appeals process) was also applied to price cap review appeals.

As will be discussed below, the decision on appeals was crucial in ensuring that regulatory deliberations were lodged within a pro-competition legislative and institutional framework. Almost all other countries take regulatory appeals through the courts and this leads to a much less pro-competitive policy process⁹.

- (c) *Sharing competition powers between Oftel and OFT - the invention of concurrency.* This came about as a little-known result of inter-Departmental negotiations in 1982.

The Department of Industry had considered transferring all of OFT’s competition responsibilities in telecoms to Oftel. However, Lord

⁸ Oftel was replaced by Ofcom in 2003. Ofcom also took on the regulatory responsibilities for ICT and all regulatory aspects for broadcasting.

⁹ Since 2003, telecom related appeals against Ofcom decisions are made to the CAT which the forwards them to the CC and now the CMA. The latter, however, take the appeal and report back to the CAT so that, in practice, the appeals are heard and processed by the CC/CMA.

Cockfield (Secretary of State for Trade¹⁰) was determined to maintain in full the powers of the OFT and the MMC over telecoms. In consequence, it was agreed that Oftel “... would oversee concurrently with the OFT the application of the Fair Trading Act 1973 and the Competition Act 1980 as they applied to telecommunications”¹¹.

Apparently, according to Parker’s history, the Treasury and the Department of Industry discussed the possibility of merging Oftel back into OFT at some point in the future. This never happened. However, what emerges clearly is the Government’s desire that Oftel take OFT – a competition body - as its model for developing its role.

Was Oftel’s name intended to stand for the “Office for Telecommunications Regulation” or the “Office of Fair Trading” – Telecommunications”? It has always been interpreted as the former but there may have been some (semi-)deliberate ambiguity.

There are two additional points worth noting about the proposed role of the MMC in sector regulation. Firstly, under the Competition Act 1980, the MMC was given the responsibility for conducting efficiency enquiries into the nationalised industries. Secondly, during the discussions on rate of return or price cap regulation in 1983, there was a Department of Industry proposal for rate of return regulation with permitted maximum and minimum rates. It was suggested that this be carried out by licence specification but with Oftel referring the rates of return for review to the MMC every five years¹².

As we now know, the UK adopted price cap (RPI-X) regulation rather than rate of return regulation. This was largely down to the 1983 Littlechild Report and subsequent debate. However, as has been discussed elsewhere, the Littlechild Report did not explicitly discuss repeat regulation or resetting the price cap¹³. That was developed by Oftel under Bryan Carsberg who significantly increased the initial X factor in 1989 and 1991. This was done by licence amendments – with appeals to the MMC, not the courts (except on process issues). Carsberg also made use of the threat of MMC referrals to achieve some of his regulatory objectives¹⁴.

2.1.1 Discussion: The Role of Michael Beesley

The discussions over the post-privatisation regulation of BT effectively set the framework for subsequent sector regulatory arrangements. There was the emphasis on competition as the primary method of achieving consumer benefits – and the emergence of concurrency. Perhaps most importantly, but not realised at the time, was the role of licence appeals to the MMC and the role of MMC over competition disputes, efficiency studies, etc. The latter, however, required Oftel to use – or threaten to use - its competition policy powers (or, pre-1998, to make an efficiency reference).

¹⁰ The Department of Trade was separate from the Department of Industry from 1974-1983. Lord Cockfield was the last Secretary of State for Trade.

¹¹ Parker op cit, p. 268.

¹² Parker op cit, p. 272.

¹³ See Stern (2003), Littlechild (2003).

¹⁴ Parker op cit, p. 324.

A reader of Parker's history of privatisation will not that Michael Beesley's name crops up frequently, for instance as an advocate of price control via periodic MMC enquiries rather than by a US-style regulatory agency. He, like Stephen Littlechild, wanted as much competition in the market as possible for the post privatisation telecoms industry. He also strongly opposed rate of return regulation and a US-style rules based regulatory system. However, faced with considerable hostility from BT, the government restricted the degree of competition faced by BT and opted for a telecom duopoly with BT and Mercury as the two licensed providers and no resale of leased BT lines for five years. The duopoly was abolished in 1991.

During the 1980s, Michael Beesley promoted competition in telecoms through value-added network services (VANS), but this only developed after 1987, initially for data services only, with VANS liberalisation only after 1991. In fact, of course, competition in telecoms and ICT only really took off with the arrival of mobile in 1985 and the growth of unbundling after 2000. However, there is no question that the regulatory framework established for telecoms, including a strongly pro-competitive stance as well as an active role for competition powers and agencies was crucial for the subsequent development of the sector after 1990.

2.2 The Privatisation and Regulation of British Gas: Competition Postponed - Concurrency to the Rescue?

The regulatory arrangements for the privatised British Gas (BG) followed closely on those for BT – but with one major exception. For various reasons¹⁵, British Gas and the Department of Energy were keen to keep Ofgas out of the commercial contract market. Hence, Ofgas was not given the powers to make a Fair Trading reference to the MMC; that was made the prerogative of the OFT or Ministers.

In addition, the Ofgas competition obligation was weak and very limited– “to enable persons to compete effectively in the supply of gas through pipes at rates which, in relation to any premises, exceed 25,000 therms per year”¹⁶. It was also the last of the four main Ofgas duties (and only put in at all after considerable parliamentary pressure). This was replaced in the Gas Act 1995 by the obligation “to secure effective competition” in gas supplies.¹⁷ However this was further changed in the Utilities Act 2000 by “The *principal objective* of the Secretary of State and GEMA in carrying out their respective functions ... *is to protect the interests of consumers in relation to gas conveyed through pipes, wherever appropriate by promoting effective competition* (in gas supplies). [My emphases] The 2000 Utilities Act revision is close to the 1984 telecoms competition obligation – apart from the “wherever appropriate” caveat¹⁸.

In consequence, two major pro-competitive elements present in the BT regulatory structure were much weaker in the original 1986 gas equivalent. However, the limited competition requirements on BGC and the restriction of the powers of Ofgas

¹⁵ National champion, security of supply ... and political issues. See Parker op cit and many others.

¹⁶ Gas Act 1986, Section 4 (2)(d).

¹⁷ Utilities Act (2000), Section 9, 4AA(1)

¹⁸ As will be discussed below, the competition obligation for electricity and gas companies has since been significantly weakened in the Energy Act 2000.

did not last. In particular, BG's strong hold on the contract market was broken within 10 years by a series of competition-oriented interventions by Ofgas and the OFT¹⁹.

Ofgas acted to ensure that BG provided fuller and more separated accounting data and, with this new data available, the OFT secured an MMC inquiry in 1988 (only two years after privatisation). The resulting MMC determination required BG to publish price schedules in the gas supply contract market which were to prevent price discrimination by BG. In 1991, a second OFT-led review of BG and progress in developing competition led BG to give undertakings to further reduce its share of the contract market. In 1992, the government removed the remaining controls on the imports of gas and the Government reduced the gas tariff market threshold from 25,000 to 2,500 therms.

In 1993, there was a further MMC inquiry which recommended the physical separation of gas transmission and distribution from supply. The government did not adopt this recommendation but instead pursued an acceleration of gas supply competition, including retail competition for all consumers, including household consumers. However, in 1997, BG decided that it would break itself up and it vertically unbundled, separating services from networks.

2.2.1 Lessons from the British Gas Unbundling

The story of the short-lived vertically integrated privatisation structure of BG is relatively well-known. Its breakup over the next decade is almost certainly the most important set of events in cementing a pro-competition approach to UK utility regulation. However, in the context of this paper, the point to emphasise is the joint work of Ofgas with OFT and the MMC. BG was not unbundled by outside forces. In the end, it chose to break itself up when faced with a perceived hostile regulatory environment to its vertically integrated structure – a regulatory environment to create which the sector regulator and the competition agencies had worked closely together.

Was this concurrency to the rescue? In a formal sense, the answer is No since Ofgas did not have concurrent powers – these were only granted in the 1995 Gas Act. However, in a de facto sense, the answer is probably Yes. There is no question that Ofgas and OFT worked very closely in this area and that their joint work was strongly supported by two MMC inquiries. Hence, in anything other than the formal legal sense, this clearly was an example – and a very important one - of how concurrent responsibilities can give competition policy focus to sector regulation.

Even if concurrency was not a major formal contributor to the gas supply unbundling process, appeal rights were. The 1993 MMC enquiry arose because BG rejected the proposed rate of return for the access charges price cap proposed by Ofgas. The resulting arguments led BG to request a reference to the MMC of its whole business under the Fair Trading Act. It seems likely that this was to forestall an Ofgas reference to the MMC. This referral gave the MMC the power to investigate the industry, its efficiency and performance. Michael Beesley was one of the panellists

¹⁹ See Parker op cit, p.396. A longer and more detailed version is given in Chapter 8 of Armstrong, Cowan and Vickers (1997).

on that inquiry and, along with Geoff Whittington, heavily influential in its pro-competitive, vertical unbundling conclusions²⁰.

The other main lesson from the gas privatisation aftermath is the importance of the role of government. In the mid-1980s, the government was unwilling to confront the issue of the British Gas structure because its key priority was to achieve the privatisation. However, by the mid 1990s, government policy had changed significantly. MMC recommendations were not mandatory but the government sufficiently supported the thrust of them for the initial gas privatisation structure to be very significantly changed and for competition genuinely to become the prime objective in the gas supply industry.

This suggests another lesson. The force of concurrency powers depends crucially on government attitudes to competition. They can be very useful when the government and other major players support competition in wholesale and retail markets in the relevant industry. But, they have much less force for industries or circumstances where the government is very cautious about (or opposed to) genuine competition. We will discuss this further in Section 5.

3. **International Comparisons of the Relationship between Sector Economic Regulation and Competition Policy**²¹

From Section 2, the four key factors that underlie the UK competition and regulation arrangements are:

- (i) The adoption of substantive licences as the main regulatory authorisation;
- (ii) The role of competition as a regulatory objective;
- (iii) Regulatory appeals; and
- (iv) What competition powers, if any, are possessed by the regulator, particularly as regards enforcement of TFEU Articles 101 and 102 (i.e. the EU equivalent of the Competition Act 1998).

In formal terms, only the last counts as “concurrency”. However, as argued above, it seems to me that the effectiveness of UK concurrency arrangements can only be judged within the wider perspective.

In this section, I report the results for the factors above in the USA, Australia and as many as possible of the EU Member States, as well as for the UK.

The tables are reported only for telcoms/ICT and energy as very few other countries have water, rail or airports regulators and, of the ones that do, none seem to have any

²⁰ See Kodwani, Open University, Mimeo, undated. See also Armstrong et al op cit p.269.

²¹ The information in this section was collected by Domile Butkeviciute by email correspondence with regulatory agencies and others in the countries covered in the tables. I am very grateful for her assistance.

explicit competition objective. Where water regulators exist, they tend to be part of other regulatory agencies (as in Ireland, Italy and some Central European countries). Rail regulatory agencies, where they exist (like ARAF in France) have some EU legislation to enforce monitoring powers but few decision making powers, particularly on competition within their countries.

3.1 Substantive Licences and Alternative Operational Authorisation Methods

As discussed in Section 2, a key early UK regulatory choice was that a privatised BT would operate under a licence. The licence in question was a (moderately) complex document not a simple permit like a driving licence. The form of the licence was – and still is – that it looks very much like a contract and there are often references to it as embodying a “regulatory contract”. Indeed, the original BT and subsequent licences agreed at privatisation were hammered out over a long period of negotiations between the government, the company and the nominated regulator (assisted by all their legal, economic and other advisers). However, in legal terms the licence is not a contract. Unlike concession contracts, there is no counter-party to a licence; it is a permit to operate issued by the regulatory agency²². It includes an agreement to operate under rules issued by the regulator but it is not in any formal sense a contract with the regulator. This allows appeals to the competition authorities and helps support concurrency.

This model was developed for the relationship between Oftel and a privatised BT and has been used for almost all subsequent utility regulators²³. It is scarcely found outside the UK. In 2003, UK telecom licences were replaced by a “general authorisation” regime as required by EU legislation for all communications network national regulators. However, the authorisation regime allows for specific as well as general obligations and this allows Ofcom to retain the form and content of the earlier substantive licence model, at least for markets in which some operators (typically telecom incumbents) are deemed to have significant market power.

The substantive licence model seems to exist for telecoms in the Irish Republic, but not elsewhere²⁴. In other countries, for regulated infrastructure industries, one finds *either* simple permits but with rules, codes and conditions set by the regulator and appealed in the courts (as in the USA) *or* concession contracts of one type or another (as in France and other Continental EU countries).

This difference is important, given the role of UK-style regulatory licences, firstly, in allowing appeals to the competition agency rather than the courts; and, secondly, for the ability of the regulator (unless prevented by government policy decision) to issue licences to new entrants as a way of developing competition.

3.2 The Role of Competition as a Regulatory Objective

²² Sometimes, the agreement of the relevant government department was required as well as that of the regulator. This was primarily common for the period before 2000.

²³ Regulated airports only came into the licence regime in 2013.

²⁴ In telecoms, only Ireland and the UK seem to have adapted the EU authorisation model to provide substantive licences. See ICT Authorization of Services <file:///C:/Users/User/Downloads/Authorization+of+Services.pdf>

As discussed in Section 2 above, Oftel was given two responsibilities to consumers in the 1984 Telecommunications Act. The first was the duty “to maintain and promote effective competition between persons engaged in commercial activities connected with telecommunications in the United Kingdom”; and the second was the promotion of the interests of consumers, purchasers and other users. Initially the competition obligation for natural gas was a lot weaker but that in the Utilities Act 2000 was relatively strong and, again specifically referred to the duty to protect the interests of consumers.

The explicit reference to the use of competition *for the benefit of consumers* has been followed in all British utility regulatory acts, apart from the initial (1986) Gas Act²⁵. This is in contrast to the position in other countries where the competition obligation is almost always specified as promoting competition *as a process* and, typically without any mention of final consumers. Hence, in other countries, this means that regulators may be required to promote rule-based competition in telecoms or network energy industries but this is a *general* obligation.

For energy, where competition is mentioned as a regulatory duty, legal regulatory competition obligations in other countries are typically for network access and prices that will support effective competition in upstream markets. These obligations rarely if ever include any reference to the interests of retail consumers. Indeed, in some countries like France and Belgium, the government still specifies a retail default price for household electricity and gas tariffs which is kept low and leaves little space for competitive entry. (This position is similar in most US States.)

The role of competition in the regulation of (a) Telecoms and (b) Electricity and Gas various countries is set out in Annex Table 1 for the USA and most of the EU countries. The results can be summarised as follows:

- (i) *Most regulators have an obligation to promote competition as a process.* In those countries, the regulator has to regulate networks and wholesale markets so that competition can be effectively maintained. That is mandatory both for telecoms and the network energy industries (electricity and natural gas) in the EU. Outside the EU, it is very common for telecoms and reasonably common for network energy (but not for the FERC in the US).
- (ii) *Some countries have some separate competition obligations for their sector regulators beyond general competition process obligations.* These include Australian energy, Finland (energy and telecoms), France (energy and telecoms), Ireland (energy and telecoms), Italian energy and Sweden (energy and telecoms). However, the strength of these obligations is unclear de jure let alone de facto.
- (iii) *The UK most directly links the promotion of consumer interests with competition.* Other countries come close (e.g. Australian telecoms) but none make it as direct. The UK does this for railways, water and airports as well as for telecoms and energy. For all except railways,

²⁵ The Energy Act 2010 weakens the competition obligation for electricity and gas but still refers to benefits to consumers, current and future.

this is a primary duty. However, the obligation is now, in all cases, qualified by adding “where appropriate” in the competition obligation; and, since 2010, it has been further weakened in energy.

Germany provides a good – and clear - example where the regulator’s duties with regard to competition are general process-oriented rather than specifically for final consumers. In energy, the general infrastructure regulator (the Bundesnetzagentur (Federal Network Agency), known as the BNetzA) is required to ensure "effective and genuine competition in the supply of electricity and gas, and efficient and reliable operation of energy supply systems for the long term". However, it is the *competition authority* (the Bundeskartellamt) that has the responsibility for protecting competition on markets that are upstream and downstream of the energy networks, as well as the consumers of these services. It is also the Bundeskartellamt which intervenes in the areas of merger control, cartel and abuse proceedings and which carries out corresponding sector inquiries. The BNetzA has no role in those matters.

Sweden is closer to the UK position. The Swedish telecoms regulator has the obligation to promote sustainable competition and consumer interests; and, in energy, to promote efficient competition in electricity and natural gas markets via the promotion of an efficient market design. However, there is still no direct equating of the promotion of consumer welfare with competition in the legal framework.

In contrast to the UK, none of the countries with airport, rail, or water regulators seems to impose any competition obligation on the sector regulator - with the exception of competition *monitoring* as required in EU Directives.

3.3 Regulatory Appeals

From the start, UK regulatory appeals for regulated infrastructure industries on matters of substance have been handled by the competition agencies. This is very unusual. It follows from having substantive, contract-like licences as the main form of regulatory authorisation plus explicit competition duties written into the licences.

This UK combination seems to be unique. Appendix Table 2 sets out the appeal procedures for the regulated communications and electricity/energy industries in the EU countries plus the USA and Australia. In almost all cases, appeals of regulatory decisions are taken in the courts – primarily administrative courts. Australian energy appeals go to the Australian Competition Tribunal, but this is comparable to the UK’s CAT (Competition Appeal Tribunal), rather than the CMA²⁶. The UK seems to be the only country where regulatory appeals are taken by the main competition agency, originally the Competition Commission, now the Phase 2 (upper tier) part of the CMA.

This element of the UK utility regulatory scheme is crucial for its pro-competition focus. Line-item appeals (e.g. for price cap reviews) are not allowed, although it is sometimes suggested that telecom appeals procedures can approach this. Hence, in

²⁶ See Mountain (2014) for a critique of Australian energy regulation and the role of the ACT.

general, for price cap reviews, companies have to appeal the whole package. Even if they win on some elements, they can lose on other elements of the package²⁷.

A wider consideration is that having regulatory appeals via the competition agencies “locks-in” a pro-competition perspective by the regulator. The regulatory agency knows that if its decision is appealed, the lens through which its appraisal is viewed will be a competition-policy lens. This provides a strong incentive to make a clear, well-argued case appealing to market and competition objectives rather than on public service objectives. Indeed, it encourages the regulator to consider whether and how competition can be used to deliver public service objectives (PSOs). This last is important. It provides much stronger pressure for introducing competition in-the-market or franchise/project auctions for PSOs than in other countries.

The other side of the coin is that, when the company(ies) make their case to the regulator, they need to have in mind how a competition-policy oriented appeals body will consider their arguments. That greatly lessens the likelihood of sympathy for a ‘national champion’ or similar approach as found in national utilities in other countries. Again, knowing that any appeals will be considered through a pro-competition lens provides strong incentives for companies not to rely on anti-competitive or favoured status arguments.

Seen in this perspective, appeals to a competition agency with licence amendments (including price review decisions) are one of the crucial building blocks which are essential for concurrency to be effective.

3.4 Concurrency – TFEU Article 101 and 102 Powers

Concurrency, the ability to apply competition articles against cartels and abuse of dominance, is often described as unique to the UK. This statement is not quite correct even taking this in the most formal terms. The Republic of Ireland telecom regulator seems to have some formal, legal responsibilities in this area as, apparently, does the Greek telecom regulator and the Cyprus energy regulator. See Appendix Table 3 for more details.

Perhaps more interestingly, in several countries, there seems to be institutionalised co-operation between the telecom and/or energy regulator and the competition authority, which amount to an informal concurrency structure. This seems to apply (to a greater or lesser extent) in Austria, French telecoms, Greek energy, Hungary, and Irish energy regulation. There are also informal, non-mandated co-operation between regulators and competition authorities in other countries.

²⁷ See Geroski (2004) for a strong defence of the need to examine the package as a whole. In a recent example, Northern Ireland Electricity (NIE) appealed against the 2012 price cap renewal by the Northern Ireland Authority for Utility Regulation (the NIAUR). The appeal was primarily over the level of investment allowed for over the upcoming 5-year price control period. The Competition Commission found in NIE’s favour on many of the investment issues but it also, as part of examining the package, explored NIE’s cost of capital, which was not one of the issues appealed. Overall, after lengthy analysis and discussion, the CC judgement reduced NIE’s projected revenues by 6.4% relative to the NIAUR final determination. Much of this was accounted for by the reduction in the (real, vanilla) allowed cost of capital from 4.55% to 4.1%

Co-operation arrangements of this type are important. In the UK, the competition investigations that led to the vertical unbundling of British Gas in the 1990s were a result of joint work by Ofgas (the regulator) and OFT (the Phase 1 competition authority). This was a period when formal concurrency arrangements were not in place, but informal co-operation between the agencies was crucial to achieving the final outcome.

The EU countries listed above are those where there is some legislative backing to co-operation between regulator and competition agency. However, informal co-operation of one type or another seems to exist between competition agencies and utility regulators in a number of countries. It is difficult to say how deep and organised this co-operation is. In many countries, the regulator is probably just a monitor and helper for the competition authorities; but, in some countries, it may be more – possibly a lot more. Moreover, it is always possible for enhanced co-operation if necessary on a particular case – as happened in the UK over British Gas in the 1990s when Ofgas did not have formal concurrency powers.

The role of concurrency as a *supporting* element for a pro-competitive regulatory regime emerges clearly in these international comparisons. However, concurrency powers in the UK primarily primarily exert their force via (a) the specification of the regulatory obligations on competition; and (b) the licence-appeals framework – that is what gives them their power. In the absence of those, the impact of concurrency per se would probably be quite small.

In addition – and very importantly, the UK government has, in general, since 1990 been progressively more pro-competitive and less supportive of protectionist, ‘national champion’, PSO and similar justifications for supporting powerful incumbent utilities²⁸. It is this combination that has given concurrency a significant role in the UK regulatory and competition framework.

4. Arguments against Concurrency²⁹

This paper has not so far questioned the view that it is advantageous for sector regulators to have formal competition powers. However, there are critics of concurrency. They tend to be competition specialists and their views need to be considered. Some commentators oppose formal concurrency on the grounds that it inevitably weakens the position of regulators; while others are not so much opposed as sceptical about its benefits and wary about how it operates in practice. Interestingly, the critics are almost always competition specialists not regulation specialists.

The key point in this debate is that, since the mid-1980s, UK competition policy has focused much more heavily on pure competition effects. For merger inquiries in particular, the use of public interest objectives has been greatly reduced, with specified exceptions on the grounds of media plurality, defence mergers and (since

²⁸ This is not universal – the postal service is an exception as is health and, to a lesser extent, rail has been in this category.

²⁹ The discussion in this section reflects helpful conversations with Martin Cave, Morten Hviid, Helen Weeds and others. However, I take sole responsibility for the views expressed.

2008) financial system stability. This position (which had evolved since the mid-1980s) was entrenched in the 2002 Enterprise Act³⁰. EU competition policy has also moved in the same way over this period.

Conversely, we have economic regulation of infrastructure utilities *precisely because* there are unavoidable public interest concerns in these industries. Some people will die if they do not have continuous access to winter heating or safe drinking water – products that are obtained via dedicated monopoly physical networks. These (and the other regulated infrastructure industries) are also crucial for industrial development and are highly capital intensive. That is why there are sector regulators for these industries but not for “mainstream” industries. In the regulated infrastructure industries, particularly energy and water, there are unavoidable public goods effects and externalities³¹.

The argument above gives one reason why regulation and competition policy might be kept separate as in Germany and many other countries. Separation allows the public interest issues (and public service obligations) to be handled by ex ante regulation as employed by sector regulators, while keeping ex post competition policy focused on the effective working of markets and consumer benefits. This position is relatively clear-cut in network energy and water markets where monopoly networks and potentially competitive upstream and downstream markets; it is less clear-cut in other regulated infrastructure industries.

However, the separate assignment of functions is not well suited to ensuring efficiency in the delivery of PSOs and, more significantly, it leaves overlapping areas where problems could be addressed *either* by ex ante regulation *and/or* by ex post competition policy – or by some other mechanism. Hence, in US telecoms and ICT, we see continuous and regular conflict and jurisdictional arguments between regulatory agencies and competition authorities e.g. between the Federal Communications Commission (the FCC) and the Federal Trade Commission (the FTC)³².

The existence of concurrency raises various other potential problems. These include the following:

- (i) *Who has institutional primacy, the regulatory agency or the competition authority?* That is not a trivial issue and could be more important with a single-tier competition authority as the UK has with the CMA. One concern is that in a concurrent system, the regulator can lose its primacy in its sector with consequent loss of prestige and reputation
- (ii) *Does concurrency lead to too cosy a system?* It can be argued that separating competition from regulation and having robust lawyer-led

³⁰ See Chisholm (2014) <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control> for more details and an exposition of current CMA views.

³¹ These concerns also apply with force in health services and, to a lesser extent, in financial services. See CMA (2014).

³² See Ohlhausen 2014 for a description of the FCC-FTC relationship.

proceedings has advantages over joint regulator and competition agency Phase 1 investigations.

This claim is one that has been used by defenders of the Trinko judgment in the US over the relative roles of the FCC and the FTC. It has also arisen in the context of the relative roles of the BNetzA and the Bundeskartellamt in Germany. In both cases, the legal setting for regulator and competition agency is clearly very separate and that leads to robust disputation rather than consensual co-operation.

- (iii) *Does concurrency lead to the suppression of multiple viewpoints?* This is related to the point above. It is clearly a very serious problem for merged regulatory and competition regimes as in the Netherlands, but is not obviously problematic for UK-style formal concurrency - provided that Phase 1 and Phase 2 proceedings are kept strictly separate³³.
- (iv) *How do regulators maintain their practical independence and reputation when there is active concurrency?* This could, in theory, be rather more of a problem, the more that concurrency is – or is perceived to be – led by the competition authorities.

There are, of course, responses to these questions and there are offsetting factors. Among the offsetting factors are:

- (a) *Concurrency to helps promote consistency across regulators, particularly consistency on the application of competition economics.* In the UK, this is probably achieved most by having appeals against regulatory decisions being taken by the competition authority. However, concurrency supports that since appeals against the competition decisions both of regulators and the CMA are both taken by the same body – the CAT (Competition Appeals Tribunal)³⁴.
- (b) *Concurrency promotes competition in the achievement of PSOs and thereby promotes efficiency in delivering the public good and externality outputs of regulators.* This helps provide significant and in-built incentives for PSO efficiency relative to the separated competition-regulation model.
- (c) *Concurrency provides support for sector regulators against political intervention by Governments.* A ‘national champions’ agenda was one element in the 1980s UK privatisations, particularly for airports and gas. A pro-competition approach backed up by concurrency was important in unbundling those industries to provide effective competition for consumers. Given the decline of the public interest test in competition, this provides a stronger position for promoting competition – provided

³³ The CMA has made it clear that it takes this separation very seriously both for markets and for CA98 cases, with separate officials making the final decision from those conducting the investigation.

³⁴ The CMA also expects that consistency will be further increased by the newly enhanced concurrency arrangements with CMA and the regulators sharing information via the UKCN.

there are no major political objections to increased competition in the relevant industry³⁵.

It can be argued that international regulatory networks and international rankings can provide an alternative support group. However, in practice, these are not very powerful except perhaps in emerging market countries.

- (d) *Regulators have higher staff numbers and, unlike competition authorities, are funded from regulated company fees so that more resource-intensive concurrent investigations can, in practice, ease the budget constraints on competition agencies.* This is a second or third-best practical argument, but it is not unimportant³⁶.

Weeds (2004) takes a sceptical view of concurrency per se but suggests that it might be seen as a useful step towards withdrawing ex ante regulation – at least in telecoms and ICT. Her concerns about concurrency relate largely around PSOs. Her concerns relate not just to the question as to what role PSOs should have relative to markets, but also to sector regulators' experience and biases regarding the use of competition policy powers relative to ex ante regulatory powers plus the knowledge, resources, habits and understanding that they develop in ex ante regulation³⁷.

The question of whether regulators have (or can obtain) sufficient competition policy expertise is almost certainly less important now than it was in 2004 given the greater experience of regulators with competition policy objectives and tools. However, the other points made in this paper are less easily dismissed.

- Is it the case that regulators typically perceive competition issues through a PSO lens?
- How far can and should ex ante regulation be rolled back in the other infrastructure utilities, particularly given the difference in the time scales involved between regulatory and competition investigations?

These are clearly valid questions and ones which UKCN and its members will have to address. However, they seem to me to urge caution in the use of concurrency rather than a strong case for withdrawing from it. They also seem to me to apply much more to Ofcom than to the other regulators.

The most interesting argument for concurrency is about reputation – point (iv) above. The conjecture of the critics is that regulators operating under concurrency and working with the competition authorities (as in the UK) is likely to reduce the status and reputation of sector regulators. However, that conjecture seems to be false.

Regulators generally have *lower* status and reputation in countries where competition authorities are established and regulators are confined to the more technical role of

³⁵ See Bolt (2014) for some cautionary views on this.

³⁶ There is a wider issue about resource allocation within and between agencies

³⁷ The issue of Utilities Policy in which the Helen Weeds paper was published also had a paper on concurrency by Vincent Smith of the OFT. He (perhaps not surprisingly) was strongly in favour of it and had few if any criticisms.

making and enforcing rules (e.g. enforcement of access conditions on networks and related). This could be argued for Germany, Denmark and Sweden. However, these countries have ombudsmen who can be very powerful and who may well be able partially or wholly to fill the role supposedly filled by concurrency (viz. Denmark). (In the UK, ombudsmen have been important in providing redress in financial services.) In addition, much competition enforcement in Germany is done by private actions rather than by the authorities. Whether and how far these could substitute for CA98 concurrency in the UK is an interesting question.

Regulators tend to have an even lower status in countries where there is separation *and* where government policy supports ‘national champion’ incumbent utilities. This last often leads to a minimalist interpretation of competition obligations while the government sometimes works with the regulated incumbent to collude (at least implicitly) against the regulator³⁸. Conversely, in practice, I can find no indication that concurrency in the UK – at least as yet – has reduced the autonomy or reputation of sector regulators.

I have not in this discussion discussed lawyer critiques of concurrency. Some competition lawyers are also opposed to or wary about concurrency. However, I note a paper by Dabbah in 2011. This paper, published in the Cambridge Law Journal argues for the separation of competition policy from regulation as the first best policy with concurrency as a second-best. Most interestingly, Dabbah distinguishes between formal and informal concurrency and quotes approvingly various informal arrangements e.g. in Canada, Finland and the USA which provide informal concurrency with customary co-operation and consultation between sector regulators and competition agencies.

Dabbah’s argument supports my conjecture that formal legal concurrency is not on its own a particularly strong method of developing competition in regulated infrastructure industries. Developing such competition clearly seems to be more dependent on other aspects of the regulatory regime like licences, consumer-linked competition obligations and appeals via the competition authority than on formal concurrency per se. Hence, this supports the view that concurrency is the ‘coping stone’ of the UK competition-based regulatory system rather than a critical foundation.

5. Concurrency and Competition in Regulated Utilities in the UK since 1995

The vertical unbundling of British Gas in 1997 was crucial in establishing the role of competition policies and the competition agencies and in entrenching a pro-competition regulatory model in the UK. This happened in spite of the fact that Ofgas did not have formal concurrency powers unlike (almost all) of the other utility regulators.

In this section, I will discuss key developments over competition in regulated industries after 1995, including the role of the competition agencies.

³⁸ Among OECD countries, this appears at times to have been the case in France, Italy, Spain and a number of Central European countries.

The discussion in this section only covers the regulated infrastructure industries – energy, railways, telecoms/ICT and water. I do not discuss financial or health services as the FCA does not yet have legal concurrency obligations and those for Monitor are both very recent and relatively restricted³⁹.

5.1 Utility Regulation and Competition Agency Involvement 1995-2010

Competition policy and the competition agencies played a significant role in the development of the utility industries after 1995, but not primarily through concurrency. In particular, the MMC and CC were major agents in the unwinding of the initial vertical and horizontal concentrations in the 1980s privatisations. The main events were:

- (i) *The unbundling of electricity generation after 1995 owed much to MMC involvement.* The initial foray was the 1994 divestment by National Power and PowerGen of some mid-merit plant under the threat of an MMC reference. However, the most important event was the Ministerial blocking in 1996 of proposed mergers between National Power, PowerGen and two Regional Electricity Companies. This decision, based on an MMC minority dissenting report, led to a sharp increase in the number of competing generators.

The CC was subsequently involved (a) in supporting the appeal against Ofgem's proposed Market Abuse Licence Condition in 2000; and (b) allowing various vertical mergers between generating companies and supply companies following the substantial divestment of generation by National Power and PowerGen⁴⁰. The latter turned out to be a significant factor in the development of the 'Big Six' energy companies and the revival of vertical integration in electricity and gas.

- (ii) *The break-up of BAA (the British Airport Authority) in 2013 followed an investigation by OFT after a full CC Market Inquiry in 2007.* This was a very important event in the development of UK regulation and a significant increase in competition in airports. However, the Market Inquiry was initiated by OFT, not by the CAA as the CAA did not then have formal concurrency powers.
- (iii) *The functional separation of the retail arm of BT from Openreach.* This was achieved by BT offering formal undertakings to Ofcom on access services in lieu of a market investigation reference to the CC.

The CC was also involved in various other appeals. There were also some CA98 cases. These, though, were second and third-order cases in terms of industry development – however important for those involved. The cases outlined above were the most significant in this period and they clearly demonstrate the role of the competition agencies via appeals, merger investigations and market inquiries.

³⁹ See CMA 'Baseline' Annual Report (2014) for a review of concurrency in financial and health services

⁴⁰ See Green (2006) for a fuller discussion.

Of the various concurrency powers possessed by the sector regulators, it may well be the market inquiry/study powers – linked with the power to refer a market to the CMA for a full market investigation - that are the most important, as shown in the BAA and BT cases above. They might seem to have been used in the commissioning of the 2014 Energy Investigation. However, the Ofgem-CMA Energy joint assessment of competition was a recommendation arising from the first annual review of the state of competition in the energy industries. Hence, this is another example of Phase 1 – Phase 2 co-operation between regulatory agency and competition authority that looks very similar in practice to what could have been achieved using classic concurrency powers, but where an alternative mechanism has been used in Phase 1.

The recent use of concurrency powers by regulators will be discussed below. However, in illustrating the potential difficulties of applying the Competition Act prohibitions, it is worth noting Albion Water's case against Dwr Cymru. In 2004, Ofwat rejected Albion Water's appeal against Ofwat's rejection of their abuse of dominance complaint against Dwr Cymru. This was appealed to the CAT who, in 2006, found against Ofwat. However, final settlement and an award for damages was made only in 2013 – some 9 years after the initial Ofwat decision and with a damages award of £1.7 million, much less than what Albion had claimed⁴¹. The possibility of a judicial review of this case is apparently still open at the date of writing

Summarising, in the period from 1995-2010, concurrency powers in a formal sense were relatively little used. The main pro-competition developments in airports, energy and ICT were achieved using licences and licence appeals, merger investigations and market inquiries. These all involved co-operation between OFT/CC staff and regulators but not the formal use of concurrency powers via a Phase 1 market study – and this also seems to be the case with the current energy market investigation.

The limited impact of concurrency rules in the 1995-2010 period does not necessarily mean that having the concurrency powers in ERRA 2013 might not have enabled more and/or faster progress in introducing competition into the regulated industries – that's a question of the relevant counter-factual. However, it is difficult to see how they would have had a major impact. The post-2010 history on this will be discussed below.

5.2 The Experience of Concurrency in the UK 2005-13

Under the obligations of ERRA, the CMA is obliged to publish an annual report assessing how concurrency has worked over the previous year. The first of these is due to be published in April 2015. However, in April 2014, the CMA – working with the sector regulators – published the CMA 'Baseline' annual report on concurrency. The rest of this section draws extensively on that report.

5.2.1 Concurrency Experience Since 2004/5: The Key Facts

The results in the Baseline report are summarised in two tables below. There is also a narrative description of the main features industry-by-industry from which I try to

⁴¹ See <http://www.olswang.com/articles/2013/04/albion-water-awarded-damages-in-the-competition-appeal-tribunal/> for a short description.

draw some lessons in the next section. The tables and discussion omit CAA, Ofcom postal services and Monitor as they have only had concurrency powers since 2011/12 and financial services which will only gain them in 2015.

Table 1

Concurrent Competition Law Cases (Article 101 & 102) in 2005-13: No of Cases

Use of Powers		Ofcom (2004-13)	Ofgem	ORR	Ofwat
Complaints		19	10	4	13
Investigations formally launched		13	5	3	3
Statement of Objections issued		2	1	1	1
Infringement Decision		0	1	1	0
Behavioural Commitments/Undertakings given		0	1	0	1
Exemption or Clearance decision		9	0	2	1
Case Closure without resolution		2	3	0	8
Cases ongoing		2	0	1	2
Decision appealed to CAT		1	1	0	0

Source: CMA Baseline Concurrency Report April 2014

The main points of interest from Table 1 are:

- (i) *Ofcom not only received most complaints but also carried out most investigations. Indeed, Ofcom carried out more investigations than the other three regulators combined.*

- (ii) *The apparent success rate was very low. For Ofcom, 11 out of 19 complaints resulted in a clearance or case closure without resolution. For Ofgem, it was 3 out of 5 investigations (3 out of 10 complaints); for ORR it was 2 out of 3 investigations (2 out of 4 complaints) and for Ofwat it was 9 out of 13 complaints.*
- (iii) *In terms of resulting actions, there were 2 infringement decisions (one each for Ofgem and ORR) and 2 impositions of behavioural remedies or undertakings (one each for Ofgem and Ofwat).*
- (iv) *Two cases were appealed to the CAT – one each for Ofcom and Ofgem.*

At first glance, this does not look like a very successful programme. A very high proportion of cases were exempted, cleared or closed – and this at a time when the regulators were being criticised for not bringing enough cases. The latter would imply that only the most promising cases were being brought. However, if these were the most promising cases, it is far from obvious that bringing more cases would have been worthwhile.

The verdict above may, however, be too harsh. It is quite possible that in some cases the company complained against may have admitted some degree of admission soon after being informed of the complaint and taken action to rectify the problem. In that case, further enforcement action might not have been necessary. However, it is not clear from the table whether there were such cases or how many. In addition, the figures in the table are very far from measures of the *outputs* of the process let alone of net welfare impacts.

In comparison to the regulators in Table 1, OFT in 2012-13 concluded seven CA 98 cases and had opened another nine. (2012-13 does not seem to be an unrepresentative year.) Of the cases closed, sanctions were imposed in two cases and voluntary assurances were given in a further two cases⁴². This record shows the difficulty of achieving success in these cases and arguably suggests that the sector regulators' record in this area may not be as weak as appears at first sight.

Table 2 below reports the CMA Baseline Report data for market studies by regulators.

⁴² See OFT Annual Report 2012-13, p.16-17.

Table 2**Regulator Initiated Market Studies and Outcomes: 2005-13**

		Ofcom (2004-13)	Ofgem	ORR	Ofwat
No of Market Studies Initiated		3	3	3	1
Undertakings given		1			
Market Investigation Reference to Competition Commission		1		1	
Recommendations to Government					1

Source: CMA Baseline Concurrency Report April 2014

The table shows that the number of market study cases taken by regulators under their concurrent powers was also very small. However, in 2012-13, OFT launched only seven market studies across the whole economy – and concluded another seven started in previous years. Only two of the seven concluded in 2012 -13 were sent to the CC as market investigations⁴³. Hence, the use of the market study powers by the regulators reported in Table 2 does not look particularly weak. In addition, this period covers the BAA market investigation, initiated by the OFT but doubtless with considerable input from the CAA – an example of ‘informal concurrency’ at work.

It may be argued that market studies and inquiries are inevitably large and infrequent exercises like that for UK airports. That, however, is not obviously the case. Ofcom in particular has used market reviews to promote deregulation in some smaller, relatively self-contained markets, as discussed below.

5.2.2 Recent Concurrency Experience: Narrative Description and Emerging Lessons

The CMA Baseline Concurrency Report contains much of interest in the narrative which relates and explains the use of concurrency powers by each of the relevant

⁴³ See OFT Annual Report 2012-13, p.7.

regulators. The two of most interest are (a) Ofcom and (b) Ofwat. I discuss these below along with a short discussion of the Ofgem position.

In each case, I focus primarily on the lessons that one can learn for general policy on concurrency.

A *Ofcom*

Ofcom was given competition powers and obligations similar to those in ERRA under the Communications Act 2003 and this was extended to postal services in 2011. Hence, it is not surprising that Ofcom has carried out far more CA98 investigations than any other regulator. The Concurrency Baseline Report discusses several cases, notably the Pay TV cases which have been problematic, long drawn-out and, as yet, without any substantive change resulting. There have also been two abuse of dominance cases, including one (involving TalkTalk) involving high-speed broadband where a relatively minor infringement was found but no penalties imposed. In addition, as noted above, there have been several market reviews which have resulted in the withdrawal of regulation from various retail and wholesale service elements.

It is not surprising that Ofcom should have made so much more use of concurrency powers than any other regulator. As emphasised in the Baseline Concurrency report section on Ofcom, telecoms, ICT and broadcasting have experienced huge technological changes which have been highly conducive to the growth of competition. Of the privatised 1980s incumbents, BT has seen the most decline in its market share. At the retail level, now accounts for 42% of fixed lines, 39% of voice calls and 30% of residential and small business broadband connections. The concurrency powers have been useful – particularly the market investigations – but they have been able to support strong, existing market trends and technology changes. In addition, governments have consistently supported the growth of competition in this area and the PSO burden is relatively light.

However, although concurrency has been helpful for Ofcom, it seems to have made a minor rather than a major difference. Moreover, the experience with the CA98 powers has been at best mixed; at worst, relatively unsuccessful. The use of the market review powers seems to have been more successful.

Interestingly, the Baseline Report draws attention to the fact that companies often prefer to bring disputes to Ofcom for regulatory resolution rather than as a Competition Act infringement. This is because:

- (i) Ofcom is obliged to consider complaints relating to regulatory conditions, unlike CA cases where it has administrative discretion;
- (ii) Ofcom is obliged to resolve disputes within 4 months whereas CA cases can take much longer – several years in some cases; and
- (iii) Ofcom can award damages in disputes cases but they have to be sought separately in follow-on litigation in CA98 cases⁴⁴.

⁴⁴ See CMA Baseline Concurrency Report pp 49-50.

The interesting – and understandable – preference for companies in using Ofcom’s dispute procedures over CA98 complaints shows the limitations on the potential for formal concurrency in competition enforcement.

B Ofwat

Ofwat is at the opposite end of the competition spectrum from Ofcom and ICT. There has been little growth in competition to date and the vertically integrated English regional incumbent water and sewerage companies remain overwhelmingly dominant. Retail competition will start in England in 2017 for non-household customers but, given the experience in Scotland, it is likely to develop only very slowly⁴⁵.

Ofwat has made it clear since at least 2010 that it wants to pursue a pro-competition agenda with far more decisions left to companies and markets. However, not only have they faced consistent opposition from the water companies, but successive governments have either opposed or moved very slowly on introducing competition – particularly upstream competition. In 2013, the Government response to the EFRA Committee’s pre-legislative scrutiny of the Draft Water Bill included the following:

*Para 36 (on Voluntary Exit from the retail market)*⁴⁶

“[The Government] remains concerned that allowing an exit route from the retail market for some water companies would leave it open to a competition reference. *We are convinced that this must be a decision for Ministers to take.*” [My emphasis]

Ironically, voluntary retail exit was included in the Bill at a late stage. That presumably, leaves open the legal possibility of Ofwat action and a CMA market inquiry into the industry to provide more competition. Thus, there should now be greater scope for Ofwat working with the CMA on these issues using concurrency as a lever. As a long-term proponent of such changes in the water supply industry, I welcome the possibility that the competition authorities could be involved in an investigation involving the separation of water supply networks from services on the lines of the other privatised utilities. That would allow a much greater range of companies and services than provided by the current set of vertically integrated companies⁴⁷.

The discussion above is highly relevant to the section on Ofwat in the CMA Baseline Concurrency report. In several places, the report makes it clear that Ofwat is committed to greater competition in the industry and that it regards concurrency powers as a very useful lever with which to achieve them.⁴⁸ Indeed, Ofwat cite their 2011 joint study with OFT on anaerobic digestion (sludge treatment, recycling and disposal) as a successful exercise in this area.

⁴⁵ The Government of Wales has rejected all forms of increased competition. Scotland introduced retail competition in 2008 but has made no move towards upstream competition. Interestingly, WICS, the Scottish water regulator does not have concurrent powers. However, appeals against WICS’ decisions do go to the CMA.

⁴⁶ Government Response to the EFRA Committee’s pre-legislative scrutiny of the Draft Water Bill, June 2013: Para 36

⁴⁷ See Stern (2011) and Stern & Mirrlees-Black (2011).

⁴⁸ See, for instance, CMA Baseline Concurrency report paras 399, 405 and 418.

However, although the market study on sludge may have been successful and led to a series of implemented recommendations, the Ofwat record with CA 98 cases is much less obviously successful. We discussed earlier the serious problems with the Albion water case which started in 2004. According to the CMA Baseline Concurrency report, Ofwat has in recent years pursued two CA abuse of dominance cases neither of which led to a finding of abuse. There was, though, one successful abuse of dominance case alleging below-cost pricing by Severn Trent in 2012-13 that led to a set of binding commitments on Severn Trent regarding laboratory water analysis services.

C Ofgem

Ofgem's record with CA98 cases is limited and shows little success with the few cases pursued. (The only apparent success was an abuse of dominance investigation into Electricity North-West in 2012 which led to the formal acceptance of undertakings.) However, the thing that emerges most clearly from the Ofgem section is their apparent unease with the use of CA98 powers.

The Baseline Concurrency report chapter on Ofgem reports directly the legal obligation on them to consider regulatory and other alternatives to competition before proceeding with competition investigations and remedies. This is then followed by a statement that Ofgem's use of direct regulation “ ... [reduces] the likelihood of competition issues arising due to abuse of a dominant position.⁴⁹” In other places, the chapter refers to government priorities and Ofgem's work with the government.

The impression is given in the Baseline Concurrency report (at least to me) that Ofgem and CMA both realise that the attitude to competition in the Energy Act 2010 sits very uneasily with the concurrency obligations in ERRA. In retail markets, the current Energy Market Inquiry will decide the way forward, including the role of competition and its form. In wholesale markets (particularly electricity generation), it seems entirely open whether competition requirements will dominate or whether government policy objectives (e.g. on renewable energy) will prevent a pro-competition agenda in which concurrency could – if desired and allowed – be an appropriate tool.

5.2.3 Conclusions from Post-2005 Experience

What emerges from the CMA Baseline Report is that concurrency has been useful to a limited extent as a pro-competition tool for regulators – but to a limited extent and not with major impacts. The market study (and market investigation) route has been a rather more useful tool for sector regulators than the CA98 competition powers. The latter have been focused on abuse of dominance cases, where the regulators have, at times, had major difficulties with protracted cases that have not resulted in clear results.

One of the arguments for enhanced concurrency under ERRA and with the CRN is that more CA98 cases can (and should) be brought than under the previous regime. Certainly Ofcom (which has long had ERRA-like powers) has brought more CA98 cases – but has not had great success with them. However, in general, comparing the

⁴⁹ See Baseline Concurrency report paras 227-230. The quotation is from para 230.

regulators' CA98 record with OFT, the difference in the record of the respective organisations in bringing (and winning) CA98 cases since 2005 is not as great as one might expect. Similarly, the number of market studies initiated by the regulators is not very different from what one might expect given the OFT record.

One must be cautious in generalising from a small sample. In terms of the likely success of the ERRA-enhanced competition powers, Ofcom experience should be a useful guide as they have had similar powers since 2003. However, their record would suggest caution in efficacy, particularly on CA98 powers. In addition, Ofcom regulates a number of strongly market-driven sectors where government involvement is low and public sector obligations (PSOs) are limited.

Ofwat experience is interesting in that they are looking to competition powers as a lever to generate wider and deeper markets – concurrency clearly has a potential role here and one can imagine how the powers might usefully be used. However, PSOs are important and powerful in the water and sewerage industry and it remains to be seen whether and how far post-2015 governments will allow any major increase in water competition, particularly upstream competition. The same issues arise with energy where successive governments since 2008 have had a clear agenda which, at least in electricity generation, has opted for heavily managed competition⁵⁰.

Although formal concurrency can play a role in this area, so can informal concurrency. In the 1980s, Oftel had formal concurrency powers unlike Ofgas; but, substantive competition in the market evolved much more quickly through OFT – with Ofgas –intervention and MMC inquiries than in fixed line telecoms. Similarly, the major inquiries into airports and now retail energy markets have occurred by routes other than formal concurrency – they respectively arose via OFT involvement and the annual energy competition report. That has happened because the agents involved have found useful tools and co-ordination opportunities with which to pursue a competition objective. In addition, the government of the day either supported (or, at least, did not oppose) these initiatives.

Government is a major player in the strategic game of economic regulation. However, it is not only a major player – it is also a rule-setter. Looking forward, whatever concurrency arrangements are in place, it is difficult to expect major advances using this tool unless PSO obligations in regulated infrastructure industries are well-specified and relatively contained and unless governments are supportive of a pro-competition agenda for the industry in question. Where government is supportive, concurrency (formal and informal) can be a useful addition to the standard regulatory and competition mechanisms; but, it can achieve little in circumstances/sectors where governments are resolutely opposed to greater competition.

The potential powers of government are shown by the various legal (and policy-derived) restrictions that UK Ministers can invoke against the use of competition powers and market inquiry referrals by the sector regulators. The Water Act 2014

⁵⁰ There are similar PSO issues to water and electricity for railway regulation. That is further complicated by the existence of sizeable ongoing subsidies. That raises additional complications which is why they are not discussed here. Postal services raise similar issues via the strong legal primacy of the Universal Service Obligation coupled with the secular decline in mail volumes.

includes potential powers for the Secretary of State to veto some pro-competitive remedies (e.g. imposed divestment) proposed by Ofwat or the CMA arising from their exercise of competition powers, such as a CA98 case or a market investigation. The Secretary of State's explicit consent may be needed for this, or even at any earlier stage, for any exercise of competition functions by either Ofwat or the CMA which may be likely to result in such an outcome. It is far from clear whether and if so, how, Defra might use these powers, but the powers do exist and are therefore bound to affect Ofwat's attitude towards making references to the CMA. The Secretary of State may also specify, for any potential market investigation, particular public interest considerations that the CMA must consider along with competition issues.⁵¹.

In the regulatory sphere, the 1993 Railways Act also contains a power in section 13 which enables the Secretary of State for Transport to prevent a reference to the CMA asking it to investigate whether matters relating to the provision of any railway services may operate against the public interest but might be remedied by way of licence modifications. There are similar provisions in other regulated sectors, such as gas and electricity.

Aside from these formal legal powers, regulators clearly have to “manage” their relationship with the relevant Ministry. Regulatory independence was always intended to prevent day-to-day political intervention not to create a zone in which policy and politics would have no impact. (The UK's Monetary Policy Committee is given its inflation objective by Ministers. It does not choose its own.) Hence, it is virtually inconceivable that a regulatory agency could proceed with a market study or recommend a Market Inquiry in the face of clear and/or publicly stated opposition from the relevant Minister.

Both regulatory agencies and Ministers are well aware of Government powers that can be used in various ways against regulatory agencies that are seen to step out of line. This effectively provides a way of containing disputes over concurrency investigations and remedies – and as illustrated above, these policy powers have been given legal backing, particularly in those regulated infrastructure industries where PSOs and externalities are most important.

6. Summary and Implications for the Future

The main lessons of past concurrency experience and international comparisons can be summarised by the following:

- 1) *Formal concurrency powers (on competition abuses) emerged almost by accident in 1983-84 during the privatisation of BT.* They were part of the privatisation settlement that established Ofcom as the sector regulator for telecoms. The market study concurrent powers were granted to the sector regulators in 2002 at the same time as they were given to OFT

⁵¹ I am very grateful for a description of the legal position in the Water Act 2014, which was kindly provided by Rosalind Bolton.

- 2) *The formal concurrency powers for Oftel were established within a framework of (a) substantive, non-contractual licences (b) all licence appeals on matters of substance being heard by the MMC and (c) a competition obligation that linked competition with benefits for consumers.* This framework has since been followed for all subsequent regulated infrastructure industries, except for gas 1986-96. The competition obligation was weakened to competition “where appropriate” from 2000 onwards and was further weakened for energy in 2010.
- 3) *The framework above has provided the UK with a uniquely pro-competitive regulatory framework for its infrastructure utilities.* Formal concurrency is much better taken as a component of the UK regulatory framework than of the competition system. But, the UK economic regulation system seems to be strongly embedded in a competition framework – apparently, uniquely so.
- 4) *Formal concurrency is almost unique among OECD countries but informal concurrency (organised co-operation between regulators and competition authorities) is far from unique – either in the UK or in various EU countries.* There are one or two other examples of formal concurrency (e.g. Irish telecoms), but there are a good number of examples of informal concurrency.
- 5) *Oftel had formal concurrency powers and a very strong pro-consumer competition obligation. Ofgas had neither but Ofgas (with strong OFT support and MMC investigations) successfully brought extensive competition into the UK gas industry within 10 years whereas there were no major increases in competition in telecoms for at least 7 years.* The difference is that government policy restricted the growth of competition in fixed line telecoms until the 1990s; but, after 1987, the government decided actively to promote competition in the industrial gas market. The gas case is a good example of informal concurrency working well based on the other key pro-competitive features of the UK regulatory system (including the role of the MMC/CC).
- 6) *Some form of informal concurrency may be reasonably common across the EU but UK-style regulatory licences and appeals to the competition authorities do seem to be almost unique to the UK as do direct competition obligations to consumers.* The other pro-competition elements in UK sector regulation are what give formal concurrency its power – and they are almost entirely absent in other countries.
- 7) *Concurrency has disadvantages as well as advantages.* Critics of concurrency suggest that it can weaken the authority of regulators and that it can lead to competition issues in regulated industries being perceived through a PSO lens. There is some merit to the criticisms but they do not seem to me nearly strong enough to abolish formal concurrency in the UK. Since, in any event, the concurrency framework (including UKCN) has now been set via recent primary legislation, the best way ahead is to take note of the criticisms and attempt to forestall them in future. Regular and systematic ex post evaluation will be important in enabling this.
- 8) *Regulators’ experience in using CA98 competition powers since 2004-5 has not been noticeably successful – but neither was the experience of OFT in this*

area. Few cases were brought and few of the regulators' investigations have had significant results. This includes Ofcom where the strongly competitive nature of the ICT and broadcasting industries, strong technical progress and relatively weak PSOs should have given most potential – and where the regulator has had ERRA-like powers since 2003. However, the results are not obviously worse than those of OFT. These cases are just difficult.

9) *There are easier alternatives to using concurrent CA98 powers for handling competition problems in regulated industries.* The successful use by companies of Ofcom dispute resolution procedures is worth noting here. Other countries (e.g. Denmark, Germany and Sweden) make use of a powerful ombudsman. The FSA/FCA have had apparently effective ombudsman facilities.

10) *Regulators' experience using concurrency powers for market studies has been more successful.* Both Ofcom and Ofwat have had some noted successes in this area. Ofcom have made interesting use of market reviews to withdraw regulation.

11) *Informal concurrency remains important and effective in the UK as shown by the fact that none of the major MMC/CC/CMA market investigations or regulated industry unbundling over the last 20 years has been initiated by a standard Phase 1 market study.* Major market inquiries are a once-in-a-generation event. The 1990s unbundling of electricity followed an MMC merger investigation; the BAA break-up following a CC market inquiry was initiated by an OFT investigation and the current Energy Markets Inquiry was initiated by the first annual review of competition in the energy industries.

12) *Further progress will depend heavily on developing effective ex post evaluation tools with which to estimate the welfare effects of CA98 cases and market studies/inquiries relative to ex ante regulatory actions or other alternatives.* Estimating the gross benefits let alone the net benefits of these is hard and there is always the problem of establishing the relevant counterfactual. However, the CC and OFT have both developed tools and commissioned studies of this type e.g. on merger remedies so that there is in-house as well as external expertise on which to build. Developing effective analysis on these lines should be a priority for UKCN – not least as an important element of future Annual Concurrency Reviews.

Looking ahead, what should be expected of enhanced (formal) concurrency and the UKCN? It should provide useful pro-competition tools for regulators and the CMA as well as greater co-ordination; but, it does not seem to me to be likely to be a game-changer. Ofcom has had ERRA-like concurrency powers since 2003 (and for postal services since 2011), but this has not led to significantly better outcomes, particularly on CA98 competition cases. Similarly, market studies and market inquiries are primarily major, occasional exercises. Market reviews can be important if the regulated industry is (like ICT) in a position where regulation can be rolled back because of the growth of genuinely effective competition.

The main potential use of concurrency over the next decade seems to be where there are good arguments for competition but where hostility from established incumbents

has prevented progress. This is the case in water and sewerage so that it is no surprise that Ofwat seems to be keen on using concurrency as a lever with which to achieve the emergence and development of competitive water markets.

This process may be more difficult in rail, postal services and health but the potential is there. The key question in water and these other industries (where externalities and PSOs are very important) is whether current and future governments will encourage or even allow significantly more competition in these industries. The same issue arises in energy where governments since 2008 have moved from open to managed competition in generation and retail markets.

Are there disadvantages from enhanced concurrency? I do not see any obvious ones, although it will be important to evaluate the results. The main lesson I draw from the critics of concurrency is that both CMA and the regulators will have to be careful to navigate carefully between (a) the Scylla of over-competitiveness and growing harmonisation of opinions between regulators and CMA; and (b) the Charybdis of competition in general and the CMA in particular becoming over-important relative to other entities⁵². (The latter would risk the autonomy and reputation of regulators.) In addition, it will be essential to maintain genuine and substantial separation between Phase 1 and Phase 2 activities within the CMA.

So, does concurrency work? Yes, when it is allowed to. It provides a modest but useful boost to encouraging competition and the use of markets in regulated industries but the gains made have been slow, steady and modest ... and that's how it is likely to continue in coming years. It is obviously of some use in regulated industries where competition is well-established. However, its main benefit will probably continue to be in industries where competition is greatly restricted, but where the regulator, the competition authority (and hopefully the government) are all agreed that the scope and scale of competition should be extended. That was the case with gas after 1987 and, over the next decade, could be similar for water - and perhaps railways and postal services.

One final point: publicity and information dissemination. There is considerable evidence that deterrence effects are very important in competition policy⁵³. In view of that, maximising the potential benefits of concurrency – particularly the CA98 cases – will require a powerful publicity and deterrence strategy both by the sector regulators and by the CMA.

Ex post evaluation of cases can play a useful part in developing an effective publicity-based deterrence strategy for concurrency activity, which implies that an important issue for UKCN will be to develop a sound and effective approach to measuring the net welfare benefits of its actions and those taken under concurrency powers by sector regulators and/or the CMA. This seems to me to be a high priority issue. The process

⁵² Scylla and Charybdis were mythical sea monsters noted by Homer, who mentioned them in the Odyssey. According to Wikipedia, they were supposed to have operated in the Straits of Messina between Sicily and the Italian mainland with Scylla as a six-headed rock-shoal and Charybdis as a whirlpool. This metaphor was a staple of late 18th and 19th Century political rhetoric but in recent years has been used in pop lyrics by The Police and Trivium (a US heavy metal band).

⁵³ See Davies and Ormosi (2013) and their literature review.

depends on good learning and, in the regulatory and competition policy areas, learning depends on robust and effective evaluation.

The lessons learned from an effective evaluation strategy of concurrency can be used to help focus a publicity and deterrence strategy which, as argued above, will be important for taking this policy forward effectively.

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APPENDIX TABLES

Table 1 Competition Obligation on National Regulator

Country		Telecommunications Regulator		Electricity/Energy Regulator
USA		General competition process authority		No – regulation as substitute for competition
Australia		General competition process authority while protecting consumers and other users		No general legal duty on AER but some specific energy regulation competition obligations
Austria		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Belgium		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Bulgaria		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Croatia		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Cyprus		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Czech Republic		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Denmark		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Estonia		<i>N/A (Merged Regulator and Competition Authority)</i>		<i>N/A (Merged Regulator and Competition Authority)</i>

Finland		Promotion of competition as a process. (Enforcing EU Telecom Directives) Moderate pro-consumer emphasis		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
France		Promotion of competition as a process. (Enforcing EU Telecom Directives) Mild pro-consumer emphasis.		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives) Some explicit pro-competition obligations, including competition to benefit consumers
Germany		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Greece		Very weak general process competition obligation		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Hungary		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Ireland		Promotion of competition as a process. (Enforcing EU Telecom Directives) Separate consumer objective		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives) Also some specific consumer welfare objectives.
Italy				Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives) Separate objective to promote consumer and user interests.
Lithuania		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Luxembourg		Promotion of competition as a process. (Enforcing EU Telecom Directives)		Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)

Malta		Promotion of competition as a process. (Enforcing EU Telecom Directives) Explicit mention of promoting customer choice and value for money	
Netherlands		<i>N/A (Merged Regulator and Competition Authority)</i>	<i>N/A (Merged Regulator and Competition Authority)</i>
Poland		Promotion of competition as a process. (Enforcing EU Telecom Directives)	Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives) Separate reference to customer interests.
Portugal		Promotion of competition as a process. (Enforcing EU Telecom Directives)	Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Romania		Promotion of competition as a process. (Enforcing EU Telecom Directives)	
Slovak Republic		Promotion of competition as a process. (Enforcing EU Telecom Directives)	Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Slovenia		Promotion of competition as a process. (Enforcing EU Telecom Directives)	Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives)
Spain		<i>N/A (Merged Regulator and Competition Authority)</i>	<i>N/A (Merged Regulator and Competition Authority)</i>
Sweden		Promotion of competition as a process. (Enforcing EU Telecom Directives) Specific mention of consumers interests	Promotion of competition as a process. (Enforcing EU Electricity and Gas Directives) References to efficient wholesale competition and an efficient market design.
UK		Promote consumers interests, where appropriate, by use of competition.	Pre-2010, promote consumers interests, where appropriate, by use of competition.

				Since 2010, as above, but subject to test that no alternative to competition is superior.
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Source: Country Regulatory Websites and CCRP Enquiries

Table 2 Regulatory Appeals Arrangements

Country		Telecommunications Regulator		Electricity/Energy Regulator
USA		The Courts		The Courts
Australia		The Courts		Australian Competition Tribunal
Austria		Administrative Court		Administrative Court
Belgium		Brussels Court of Appeal		Administrative courts
Bulgaria		Administrative Court		Administrative courts (Court of Appeal or Conseil d'État)
Croatia		High Administrative Court		High Administrative Court (part from licence denials and revocations, which are appealed to Government Ministry).
Cyprus		Supreme Court		Supreme Court
Czech Republic		Minister of Transport and Supreme Court		Regulatory authority Chairman and administrative courts
Denmark		Telecommunications Complaints Board and High Court		Energy Board of Appeal (a legal and technical body) and the High & Supreme Courts
Estonia		<i>N/A (Merged Regulator and Competition Authority)</i>		<i>N/A (Merged Regulator and Competition Authority)</i>
Finland		Administrative Court		Market Court and Supreme Administrative Court
France		Courts (Conseil d'État, Cour d'Appel and Tribunal Administratif)		Cour d'Appel and other courts, depending on topic of appeal;
Germany		Administration Court		Civil courts

Greece		Administrative Courts		Administrative Court
Hungary		Appeals Courts		Administrative Court
Ireland		Courts – judicial review		Courts
Italy		Administrative Court		Regional Administrative Tribunal and Council of State
Latvia		Administrative Courts		
Lithuania		Administrative Court		Administrative Courts
Luxembourg		Administrative Tribunal		Administrative Tribunal
Malta		Communications Appeal Board		
Netherlands		<i>N/A (Merged Regulator and Competition Authority)</i>		<i>N/A (Merged Regulator and Competition Authority)</i>
Poland		Court for Competition and Consumer Protection		
Portugal		Administrative Courts (apart from fines)		Administrative courts
Romania		Court of Appeal		
Slovak Republic		Regulatory Office Chair and Supreme Court		
Slovenia		Administrative Courts		Administrative Courts
Spain		<i>N/A (Merged Regulator and Competition Authority)</i>		<i>N/A (Merged Regulator and Competition Authority)</i>
Sweden		Administrative Courts		Administrative Courts
UK		Matters of Substance: CAT and CMA Matters of Process: High Court		Matters of Substance: CMA Matters of Process: High Court

Source: Country Regulatory Websites and CCRP Enquiries

Table 3 Concurrency: Ex Post Competition Powers of Regulatory Agency

Country		Telecommunications Regulator		Electricity/Energy Regulator
USA		None – All with FTC & DOJ		None – All with FTC & DOJ
Australia		None – All with ACCC		None – All with ACCC
Austria		Regulator refers cases to competition authority and/or cartel court		Regulator refers cases to competition authority and/or cartel court.
Belgium		Regulator can conduct studies but has no ex post competition powers.		Regulator can conduct monitoring studies but has no ex post competition powers.
Bulgaria		None – all with competition authority		Competition in energy still in development
Croatia		None – all with competition authority. But, regulator can be involved in providing data for competition authority cases.		No formal legal powers but regular consultation and co-operation between regulator and competition agency
Cyprus		None – all with competition authority		Concurrency – with competition agency deciding on merits of case and regulator deciding and enforcing remedies.
Czech Republic		None – all with competition authority.		None – all with competition authority Regulator can inform competition agency if concerned over abuse of dominance.
Denmark		None – all with competition authority		None – all with competition authority
Estonia		<i>N/A (Merged Regulator</i>		<i>N/A (Merged Regulator and Competition</i>

		<i>and Competition Authority)</i>		<i>Authority)</i>
Finland		None – all with competition authority		None – all with competition authority
France		None – all with competition authority. Regulator provides opinion on sector-studies (and vice versa for ARCEP investigations).		None – all with competition authority.
Germany		None – all with competition authority. Joint decision whether market is subject to ex ante regulatory measures. Bundeskartellamt regularly comments on regulator's decisions		None – all with competition authority Bundeskartellamt intervenes on competition issues in markets upstream and downstream of network e.g. cartel and abuse proceedings and sector inquiries.
Greece		Yes – regulator only party that can enforce EU and national competition law in sector		None – all with competition authority Regulator provides annual reports to competition agency
Hungary		All with competition authority. But, co-operation agreements with sector regulators and consultation prior to competition decisions.		All with competition authority. But, co-operation agreements with sector regulators and consultation prior to competition decisions.
Ireland		Yes – via a co-operation agreement.		No - all with competition authority. But, extensive co-operation agreement between regulator and competition authority.
Italy		None – all with competition authority. But extensive co-operation between regulator and competition agency.		No - All with competition authority

Lithuania		None – all with competition authority		No - All with competition authority
Luxembourg		None – all with competition authority		No - All with competition authority
Malta				
Netherlands		<i>N/A (Merged Regulator and Competition Authority)</i>		<i>N/A (Merged Regulator and Competition Authority)</i>
Poland		None – all with competition authority		None – all with competition authority. Co-operation e.g. on abuse of dominance cases.
Portugal		None – all with competition authority		[None – all with competition authority
Romania				
Slovak Republic		None – all with competition authority Co-operation e.g. on market studies, abuse of dominance cases.		None – all with competition authority
Slovenia		No – all with competition authority		No - All with competition authority
Spain		<i>N/A (Merged Regulator and Competition Authority)</i>		<i>N/A (Merged Regulator and Competition Authority)</i>
Sweden		None – all with competition authority		No - All with competition authority
UK		Full concurrency		Full concurrency

Source: Country Regulatory Websites and CCRP Enquiries