

CMA / CAA Memorandum of Understanding - Concurrency



16 June 2014

Memorandum of Understanding between the Competition and Markets Authority and the Civil Aviation Authority– concurrent competition powers

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Foreword

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

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

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

The CMA and the sectoral regulators have already demonstrated their commitment to making the concurrency framework more effective through the establishment of the UK Competition Network (UKCN). This represents an enhanced forum for cooperation which will enable closer working, with the objective of more consistent and effective use of concurrent competition powers across all sectors. In their statement of intent in December 2013, the members of the UKCN affirmed:

“The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.”¹

This Memorandum of Understanding (MoU) represents a further stage in the process of co-operation, setting out more detail on how the CMA and the CAA will, in practice, work together within the framework of competition law².

¹ UK Competition Network, *Statement of Intent*, 2 December 2013.

² This Memorandum of Understanding does not relate to “regulatory appeals” – that is, the separate role that the CMA has in considering appeals against, or references relating to, proposed direct regulatory action by sectoral regulators under the sectoral statutes. This is a separate role, to be undertaken by the CMA panel, and the CMA is committed to ensuring that its co-operation with the CAA - whether under this Memorandum of Understanding (and under comparable Memoranda of Understanding agreed with other sectoral regulators), through the UK Competition Network, or otherwise in connection with their concurrent powers - will not impair the impartiality and fairness of the CMA's conduct of such regulatory appeals (or indeed of market or merger investigations undertaken by the CMA panel).

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It draws on the formal framework in the legislation and sets out our bilateral commitment to look for opportunities to work together, including within the framework of the UKCN, to promote competition for the benefit of consumers. We shall do this by the sharing of expertise, information, ideas and experience. Each of us will commit to doing this efficiently and with a mutual regard for each other's statutory duties and strategic objectives.

In particular, in working together with the CMA, the CAA will continue to discharge its primary statutory duties to maintain a high standard of safety in the provision of air traffic services, and to further the interests of users of air transport services regarding the range, availability, continuity, cost and quality of airport operation services. Wherever possible the interests of users will be best promoted through effective competition. In situations where effective competition is absent, or may not be achievable, regulation by licence may be more effective.

We believe that this Memorandum of Understanding offers a valuable basis for that co-operation, in the interests of the CMA, the CAA, the aviation sector and most importantly of all, consumers.

Alex Chisholm
CEO, CMA

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CEO, CAA

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Memorandum of Understanding between the Competition and Markets Authority and the Civil Aviation Authority

Purpose of this Memorandum of Understanding

1 This Memorandum of Understanding (“MoU”) sets out working arrangements between the Competition and Markets Authority (“CMA”) and the Civil Aviation Authority (“CAA”) in relation to:

(a) their concurrent powers to apply the prohibitions on agreements that prevent, restrict or distort competition; and on the abuse of a dominant position, under the Chapter I prohibition and the Chapter II prohibition of the Competition Act 1998 and under Article 101 and Article 102 of the Treaty on the Functioning of the European Union – referred to in this MoU as the “competition prohibitions”; and

(b) their concurrent powers to undertake market studies, and to make market investigation references to the chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the United Kingdom under the Enterprise Act 2002 – referred to in this MoU as the “market provisions”.

in the air traffic and airport operation sectors.

2 This MoU is not legally binding.

3 This MoU is to be read alongside other material concerning the relations between the CMA and the CAA, including: the Civil Aviation Act 2012; the Transport Act 2000; the Competition Act 1998; the Enterprise Act 2002; the Enterprise and Regulatory Reform Act 2013; the Competition Act 1998 (Concurrency) Regulations 2014; and the CMA’s Guidance on concurrent application of competition law to regulated industries. This MoU supplements and does not supplant that material.

4 The arrangements covered by this MoU are, wherever possible, set out in terms providing sufficient flexibility for the relationship between the sectoral regulators and the CMA to develop in the light of experience. The CMA and the CAA commit to review these arrangements from time to time to evaluate their continuing fitness for purpose. Such review can be initiated at the request of the CMA, the CAA or a member of the UK Competition Network. This MoU may only be revised by agreement between the CMA and the CAA.

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- 5 Nothing in this MoU applies in relation to the functions of the CMA in its separate role of considering appeals against, or references related, to proposed action by the sectoral regulators under the sectoral statutes. The CMA and the CAA acknowledge the importance of maintaining the CMA's impartiality and fairness in carrying out those functions, and indeed of market or merger investigations undertaken by the CMA panel.

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Context

Role of the CMA

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

Role of the CAA

- 10 The CAA is a public corporation established by Parliament in 1972 as an independent specialist aviation regulator. Its current functions and duties are found principally in the Civil Aviation Act 1982, the Transport Act 2000 and the Civil Aviation Act 2012 and in instruments made under them.
- 11 The CAA works to enhance aviation safety performance, improve choice and value for aviation consumers and to improve aviation's environmental performance. Its primary statutory duties in relation to activities within the scope of this MoU are:
 - (a) for airspace, to maintain a high standard of safety in the provision of air traffic services; and
 - (b) with regards to airports, the CAA must carry out its functions in a manner which it considers will further the interests of users of air transport services regarding the range, availability, continuity, cost and quality of airport

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operation services. It must do so where appropriate in a way which it considers will promote competition in the provision of airport operation services.

- 12 In both of these areas the CAA has a number of secondary duties. Where appropriate, the CAA fulfils these duties primarily through the economic licensing of dominant providers.
- 13 In so far as relevant to the matters that are directly the subject of this MoU, the relevant CAA functions are:
 - (a) those under the Competition Act 1998 investigating where there may be breaches of the competition prohibitions within the air traffic services or airport operation services sectors; and
 - (b) those under the Enterprise Act 2002 conducting market studies and market investigations within these sectors where there may be competition and consumer problems.

Under both the Transport Act 2000 and Civil Aviation Act 2012, the CAA has a duty to consider whether enforcement through the Competition Act 1998 is more appropriate than using its sectoral enforcement tools.

Aims

- 14 In agreeing this MoU, the CMA and the CAA seek to use their powers to make markets in the air traffic and airport operation sectors work well for users.
- 15 The aim of the CMA and the CAA is to make the changes introduced by the Enterprise and Regulatory Reform Act 2013 work effectively, maximising the complementary skills of the CMA and the sectoral regulators, including through:
 - (a) co-operation and coordination between the CMA and the CAA when dealing with cases of suspected anti-competitive behaviour for which they have concurrent powers;
 - (b) promoting co-operation and coordination between the CMA and the CAA when dealing with market studies and market investigation references for which they have concurrent powers;

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- (c) efficient and effective handling of cases of suspected anti-competitive behaviour within the air traffic and airport operation services markets;
- (d) efficient and effective handling of market studies;
- (e) ensuring sufficient expertise in handling competition cases and allocating resources effectively between CMA and CAA;
- (f) ensuring transparency for users as to the respective roles of the CMA and the CAA through the annual concurrency report.

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The Memorandum of Understanding

Part A - Co-operation and Coordination

General

- 16 Officials of the CMA and the CAA will meet and communicate periodically, at appropriate levels of seniority, to discuss matters of mutual interest, both through the UK Competition Network and bilaterally. A framework for such meetings will, as far as possible, be determined in advance so as to ensure attendance at the appropriate level and expertise.
- 17 The CMA and the CAA will always consult each other before exercising its powers on a case (including instigating a market study) where it appears that they have concurrent powers (which, for cases under the competition prohibitions, requires there to be reasonable grounds for suspecting an infringement of any of the competition prohibitions), even if the CMA and the CAA do not go on to exercise their concurrent powers.
- 18 Where either the CMA or the CAA exercises its concurrent powers, the CMA and the CAA will, to the extent permitted by law, engage with each other in open dialogue and by sharing relevant information as appropriate.
- 19 The CMA and the CAA will consult each other at an early stage on any issues that might have significant implications for the other.
- 20 Within the spirit of broader collaboration for the purposes of the promotion of competitive outcomes, the CMA and the CAA will commit to discuss and share other information about a broader range of competition complaints and concerns, where legally permissible to do so, but subject to the particular need not to impair the impartiality and fairness of the CMA in carrying out the functions referred to in paragraph 5 of this MoU.

Information sharing

- 21 The effective sharing of information between the CMA and the CAA is fundamental to the successful exercise of their concurrent competition powers. It is needed both for the appropriate allocation of cases, as described in paragraphs 29 and 32 of this MoU, and for the successful handling of cases once allocated to make optimal use of the complementary experience and expertise of the two authorities.

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- 22 The CMA and the CAA are committed, in addition to their legal obligations to share information (set out in regulation 9 of the Concurrency Regulations), to open dialogue and continuing liaison, both bilaterally and through the UK Competition Network, with a view not only to handling specific cases but to promoting competition, for the benefit of users in the air traffic and airport operation services sectors.

Relationship manager

- 23 The CMA and the CAA will each designate in its organisation a relationship manager at official level to take responsibility for relations between the two authorities. In each authority, the relationship manager's responsibilities will include (but not be limited to):
- (a) maintaining an overview of joint projects between the two authorities and matters of mutual interest;
 - (b) maintaining an overview of contacts between the authorities from all areas of joint working and mutual interest; and
 - (c) holding meetings with the relationship manager in the other authority from time to time (whether bilaterally or in the context of the UK Competition Network) to identify potential new issues, with a view to circulating information to appropriate individuals within each organisation.
- 24 The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and the CAA.

Other mutual support

- 25 In addition to means of mutual support such as information sharing and secondments of staff, the CMA and the CAA are fully committed to providing each other with other, more informal, forms of support to enable them to carry out their competition law functions in relation to the air traffic and airport operation services sectors. In each case this will be to the extent that it is appropriate and permitted by law, and that resources permit - including (but not limited to):
- (a) answering specific queries from time to time;
 - (b) providing information or advice on a specific sector or market, or an area of competition law or policy; and

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(c) providing training on a specific sector or market, or an area of competition law or policy.

- 26 Such support may be requested and provided in connection with a specific case or with the promotion of competition more generally. In this regard, both the CMA and the CAA will act reasonably, including by providing sufficient time and information for requests for support to be responded to fully and effectively, and for the relevant staff to be engaged.

Part B - Efficient handling of Competition Act 1998 cases

Basis of allocation

- 27 The CMA and the CAA will endeavour to reach agreement on which authority will have jurisdiction to exercise its powers under the competition prohibitions in respect of any particular case, under regulation 4(2) of the Competition Act 1998 (Concurrency) Regulations 2014 – referred to in this MoU as the “Concurrency Regulations”. They will do so in a spirit of constructiveness and co-operation, notwithstanding the CMA’s ultimate powers under regulations 5 and 8 of the Concurrency Regulations.
- 28 The basis for their determination of jurisdiction will be the general principle of which authority is better placed to exercise those powers, having regard to the factors set out in paragraph 3.22 of the CMA’s Guidance on concurrent application of competition law to regulated industries, referred to in this MoU as “the Guidance”. The CMA and the CAA envisage that other factors may appear relevant in the light of practical experience and that, if so, such factors may be chosen to supplement or supplant the factors set out in paragraph 3.22 of the Guidance.

Procedure for allocation

- 29 Each of the CMA and the CAA will, in respect of matters in the air traffic and airport operation services sectors, where it has formed the view that there are reasonable grounds for suspecting that one of the competition prohibitions has been infringed (the ‘reasonable suspicion test’ under section 25 of the Competition Act 1998), on the basis of information in its possession (whether received by way of complaint or otherwise), provide to the other sufficient information to enable the other to understand the basis on which it has formed that view (whether or not it proposes to exercise concurrent powers) and for there to be an informed discussion on which authority (if any) is best placed to proceed in respect of the case.

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- 30 It will provide this information in a timely manner and, in all cases, within ten working days after it has formed that view that the reasonable suspicion test has been met.
- 31 Nothing in this paragraph prevents discussions about the case taking place between the CMA and the CAA prior to such a view having been formed, in so far as such discussions are permitted by law.
- 32 Any agreement between the CMA and the CAA as to which authority will have jurisdiction, as provided for in regulation 4(2) of the Concurrency Regulations, will be reached as soon as possible and in any event no later than one month from the date of the passing of information from one authority to the other under paragraph 29. Within seven working days from the date of passing the relevant information under paragraph 29, the recipient of such information will write to the authority which has passed it that information setting out its initial view on the case and how it might be allocated and identifying further information it requires. Both parties will endeavour to reach agreement within the specified timescale. If agreement is, for whatever reason, not reached within two months after the earlier of either the CMA or the CAA first receiving sufficient information to enable it to form the view that there are reasonable grounds for suspecting that one of the competition prohibitions has been infringed then, other than in exceptional circumstances (which shall be set out in writing), the procedure in regulation 5 of the Concurrency Regulations will be initiated.
- 33 The procedure for the determination of jurisdiction where no agreement is reached between the CMA and the CAA is as set out in regulation 5 of the Concurrency Regulations.
- 34 The procedure for agreeing the transfer of a case that is already in progress from the CMA to the CAA, or from the CAA to the CMA, is as set out in regulation 7 of the Concurrency Regulations and in paragraph 3.32 of the Guidance.
- 35 The procedure for the CMA to direct the transfer to itself from the CAA of a case that is already in progress is as set out in regulation 8 of the Concurrency Regulations.

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Implications of case allocation

- 36 Any agreement or determination as to jurisdiction, under regulations 4, 5, 7 or 8 of the Concurrency Regulations, shall be notified to the person who has provided the information resulting in the case (for example, the person making a complaint), and so far as appropriate and lawful, to any other affected person, by the authority which has jurisdiction, as soon as reasonably practicable.
- 37 The determination of jurisdiction is a determination of which of the CMA and the CAA has legal responsibility for the investigation of the case and for any decisions arising from it and will be publicly identified as having such responsibility. The CMA and the CAA envisage that, whatever that determination may be in any particular case, they and their officials will work co-operatively with each other on the case as appropriate, pooling their expertise including in the ways described in paragraphs 47 to 53 of this MoU and in paragraph 3.33 to 3.35 of the Guidance.

Sharing of information on specific cases

- 38 When either the CMA or the CAA is exercising its powers in respect of the competition prohibitions in a particular case in the air traffic and airport operation services sectors, each of them will share with the other any of the following information in its possession (to the extent permitted by law and subject to the confidentiality obligations in paragraphs 41 and 42 of this MoU):
- (a) as a minimum, the matters referred to in regulation 9 of the Concurrency Regulations, and in paragraph 3.49 of the Guidance, complying with the time limits specified in paragraph 3.49;
 - (b) all other information which it reasonably believes to be relevant or helpful to the other in the conduct of the case; and
 - (c) in the case of the authority which is exercising the powers, reports to the other (and, to the extent permitted by law, to the UK Competition Network) on the progress of the case with sufficient frequency and detail to enable the other to be appropriately informed; the means and frequency of such reporting will be decided on a case by case basis and in the light of experience as this enhanced framework of collaboration and its supporting arrangements develop over time.
- 39 The CMA will maintain a classified database of cases under the competition prohibitions in the regulated sectors, accessible by its own officials and, to the

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- extent permitted by law, accessible by all members of the UK Competition Network, with a view to having a body of know-how that will help ensure the effective and consistent application of competition law in the regulated sectors. The CMA and the CAA will, to the extent permitted by law, contribute information to that in the way best calculated to achieve that objective.
- 40 In any event, the CMA will report on cases in the regulated sectors under the competition prohibitions in the annual concurrency report which it is required under statute to issue.³ Further provisions on the annual concurrency report are in Part E of this MoU
- 41 Any disclosure of information under paragraphs 38 to 40 of this MoU, and any use by the recipient of such information, shall only be to the extent permitted by law, including by reference to the provisions of Part 9 of the Enterprise Act 2002.
- 42 In addition to the constraints under paragraph 41 of this MoU, any information which came into the possession of any of the CMA, its predecessor bodies, the CAA or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under any of the competition prohibitions or obtained as a result of investigative measures resulting from the sharing of leniency information between the CMA and the CAA, may not be used for any purpose other than the application and enforcement of the competition prohibitions or the cartel offence under section 188 of the Enterprise Act 2002. Where the submission of such information to either the CMA or the CAA affords or might, under certain conditions, have afforded the applicant, its subsidiaries or its employees protection from sanctions (including a reduction in penalties) under the leniency programme operated by that authority, the passing of that information to the other authority shall not result in that other authority affording to the applicant any lesser protection. This is without prejudice to the use that may be made by the CMA or the CAA of information received from other sources.

Part C – Efficiency management of market studies and market investigations

- 43 The CAA and the CMA have a duty to consult each other before exercising concurrent functions under the market provisions.
- 44 The co-operation between the CMA and the CAA provided for in this Part C shall not extend to conduct that could reasonably be expected to impair the impartiality or the fairness of the CMA panel in conducting market investigations.

³ Paragraph 16 of Schedule 4 of the Enterprise and Regulatory Reform Act 2013

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- 45 The coordination of the CMA's and the CAA's super-complaint duties will be based on policies agreed and applied through the UK Competition Network.

Sharing information

- 46 The provisions of paragraphs 23 to 24, 38 (excluding 38(a)), 39 and 40 of this MoU apply to information sharing under the market provisions as they do under the competition prohibitions.

Part D – Management of expertise and resources

Pooling resources

- 47 The CMA and the CAA will endeavour, so far as is reasonably practicable and permitted by law, to share their resources with each other in the interests of the effective enforcement of competition law in the air traffic and airport operation services sectors, and more generally the promotion of competition for the benefit of consumers, and to ensure that their resources and expertise are used most efficiently for that purpose. This is subject to the proviso that, as stated in paragraph 5, this does not apply in relation to the functions of the CMA in its role of considering appeals against, or references related to, proposed action by the sectoral regulators under the sectoral statutes. This is without prejudice to the use that may be made by the CMA or the CAA of information received from other sources.
- 48 As a consequence, where it has been agreed or determined that one of the authorities is to have formal jurisdiction in a case or is conducting a market study, that authority will receive appropriate practical assistance and support from the other in the handling of the case.

Secondments of staff

- 49 One means of the practical assistance and support that might be given, as referred to in paragraph 47 of this MoU, is the secondment of staff, in accordance with regulation 10 of the Concurrency Regulations and paragraphs 3.33 and 3.34 of the Guidance.
- 50 The CMA and the CAA are fully committed to the idea of secondments for this purpose, and will endeavour to meet each other's requests for secondments to the extent that they are appropriate and resources permit; this may include

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- making provision for any secondee to be available to work for part of his or her time at his or her existing employer during the course of the secondment, for example on such cases that are in progress.
- 51 Requests for secondments should be made by the relationship manager of one authority to the relationship manager of the other, setting out the following information:
- (a) the number of secondees required;
 - (b) the period for which each one is required;
 - (c) the level of seniority of each one;
 - (d) the nature of the expertise or experience of each one;
 - (e) the proposed payment arrangements;
 - (f) a brief explanation of why the requirement or requirements cannot adequately be met by deployment of staff from within the requesting authority.
- 52 To the extent that the recipient of a request for a secondment made under paragraph 51 of this MoU refuses that request or accedes to it on terms that are materially different from those requested, the recipient shall give reasons.
- 53 The CMA and the CAA undertake to develop appropriate arrangements for the pooling and secondment of staff. Such arrangements will have regard to the resource constraints of both parties and such calls for staff, therefore, will be made in reasonable time and with sufficient warning to enable appropriate resource planning and management of other work commitments.

Part E – Annual concurrency report

- 54 The CMA is required by statute to publish a report every year, starting after its first year of operation in 2014-15⁴, containing an assessment of how the concurrency arrangements between the CMA and the sectoral regulators, as regards both the competition prohibitions and the market provisions, have operated during the year. This MoU refers to that report as the “annual

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

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- concurrency report". There is further provision on the annual concurrency report in paragraphs 3.55 to 3.62 of the Guidance.
- 55 The CMA will consult, and cooperate with, the CAA and with other sectoral regulators in preparing the annual concurrency report. In connection with this, the CMA will:
- (a) prepare a draft of the annual concurrency report that it will send to the CAA and other sectoral regulators seeking comments or suggestions on the content or conclusions of the annual concurrency report and giving them adequate time to comment or make suggestions;
 - (b) consider any comments or suggestions it receives from the CAA and other sectoral regulators and the CMA may seek further clarification on those comments or suggestions as appropriate;
 - (c) prepare a final version of the annual concurrency report for publication that takes account of its consultation of the CAA and other sectoral regulators as appropriate;
 - (d) share the final version of the annual concurrency report with the CAA and other sector regulators before publication; and
 - (e) make the annual concurrency report available on the CMA webpage.
- 56 The CAA will co-operate with the CMA in the preparation of the annual concurrency report including (but not limited to) by way of:
- (a) providing information and data on general market conditions and on the application of the competition prohibitions and the market provisions in the air traffic and airport operation services,
 - (b) responding to requests for information and data, and
 - (c) providing to the CMA any comments and suggestions it may have in connection with the process described in paragraph 56 of this MoU,
- in each case promptly so as to facilitate the timely production and publication of the annual concurrency report.