# Competition Concurrency Arrangements Review

## UK Finance response to Call for Inputs from the Competition and Markets Authority

**20 October 2023**

### Introduction and executive summary

1. UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms, we act to enhance competitiveness, support customers, and facilitate innovation. We welcome the opportunity to respond to the Competition and Markets Authority's (CMA) Call for Inputs on its review of competition concurrency arrangements.

2. We support the principle of having concurrency arrangements between the CMA and the sector regulators on competition law issues and the Financial Conduct Authority (FCA) and Payment System Regulator (PSR) having the ability to directly enforce competition law.

3. However, despite the benefits of the regime and the importance of the CMA's role in encouraging and enforcing competition compliance, it is important that the unique, already highly regulated nature of the financial services sector is understood and acknowledged by the concurrency regime in order to achieve regulatory coherence.

4. We have set out a number of these unique features that demonstrate the need for proportionality in terms of CMA engagement, as well as a need for understanding, on the CMA's part, that the tools that the FCA and PSR have at their disposal (including under the CA98) are already significant and far reaching. It is important that the review of the concurrency regime recognises this and, at a minimum, does not unnecessarily disrupt any of the balance achieved to date or adds complexity that would run counter to the regulatory objectives (by disproportionately increasing the cost of compliance and stifling innovation).

5. While we do not want to make it a central argument of this submission, we think that it might be appropriate at some stage for the CMA to consider (with Government) whether the rationale still holds for having three separate regulators with oversight for competition regulation in financial services, and how this is balanced against the additional burden that is placed on market participants – particularly given the sector is now legally bound to act in a way that minimises consumer harm through the Consumer Duty and deliver good outcomes for customers. Having multiple regulators operating under potentially multiple regimes with differing policy objectives, injects a great deal of regulatory uncertainty, and could produce contradictory and market-distorting results. It is therefore right that the Government and the CMA continue to keep this arrangement under review.

### The importance and continued relevance of the Financial Services and Markets Act 2000 and Financial Services and Banking Reform Act 2013 powers

6. The Financial Services and Markets Act (FSMA) 2000 and Financial Services and Banking Reform Act (FSBRA) 2013 provide the FCA and PSR with powers to undertake market studies and market reviews respectively, outside of the concurrency regime, which is the product of separate legislation (Enterprise Act 2002 - EA02). This is clearly an approach the FCA and PSR has relied upon given that, in practice, they undertake most of their market studies and market reviews using the FSMA 2000 and FSBRA 2013 powers.

7. Put simply, the FSMA 2000 and FSBRA 2013 powers provide the FCA and PSR with a greater level of control, through utilising their sector expertise in their investigations (compared to the powers under EA02), and allows them to retain the ability to impose remedies (and not just accept undertakings) they consider best suited to the industry and which can be factored into the wider regulatory framework. Where these powers are utilised correctly, they should (in most cases) allow for a more agile, effective, and expert-led supervision of the industry than competition law market studies and investigations, generally creating a better environment for growth of the financial services sector and wider economy.

8. It is important, therefore, that the FCA and PSR retain and maintain the flexibility to use their FSMA 2000 and FSBRA 2013 powers to tackle issues in financial services, and that their added ability to proceed under competition law legislation is not inappropriately prioritised over their regulatory powers.

**The changing regulatory landscape and external environment**

9. It is right that the CMA is undertaking this review of the concurrency regime after the refreshed regime was established nine years ago. The financial services sector has undergone significant regulatory change since then, with much of that change coming in the last few years, following the passing of the Financial Services and Markets Act 2023 legislation and the introduction of the much-anticipated Consumer Duty. The CMA itself has added to the complexity of the regulatory regime and the requirements on firms through the remedies imposed by it in the Retail Banking Market Investigation Order 2017.

10. The application of the Consumer Duty raises an interesting prospect for competition regulation and policy, and Government should keep this under review as the Consumer Duty beds in. The core focus of the Consumer Duty requires firms to consider how their activities impact consumers and demonstrate how they will provide good outcomes for the customer by providing, amongst other things, fair value. The introduction of the Consumer Duty obligation may result in a lesser need for both regulatory and competition law intervention in the future.

11. The Duty represents a significant shift in the expectations on firms and aligns with the broader objective to promote effective competition.

12. Elsewhere, the Digital Markets, Competition and Consumers (DMCC) Bill is set to introduce significant reforms that overhaul the UK's digital markets regulatory landscape, helping to level the regulatory playing field with big tech firms. In time, it may be worth considering how the expansion for tech firms into financial services has impacted competition in the sector and whether the concurrent regulators have the tools they need to address any emergent competition issues caused by these entrants to the market. The amendments to enforcement of and changes to market investigation remedies proposed in the DMCC Bill are also of key relevance to financial services.

**Transparency**

13. While we agree that the mechanisms put in place to ensure effective co-operation under the concurrency regime have been fairly successful, we think it is useful to explore how these mechanisms can be strengthened further to ensure that the most appropriate regulator is allocated to cases, as well as a greater transfer of knowledge between the CMA and the financial services experts in the FCA and PSR. We would, for example, like to see better documentation and reporting of engagement that the sector regulators have with the CMA outside of its flagship UK Competition Network forum. This would provide a clearer demonstration of how decisions

are made between the sector regulators and the CMA. Alongside this, sector regulators and the CMA should consider new ways to build better communications between them.

14. Furthermore, the Memoranda of Understanding (MOU) between the regulators should be reviewed to assess whether they need to be expanded to cover new legislative and regulatory developments.

**Oversight of market investigation remedies**

15. Whilst not specifically referred to in the questions in the consultation, it is important for regulators to consider if the oversight of market investigation remedies within financial services is being run effectively. We believe that when the CMA proposes remedies on the back of their market investigations which relate to a regulated sector, the starting position should be that oversight for these should pass to the relevant sector regulator, (i.e., the FCA or PSR in the case of financial services remedies). The CMA retaining oversight should be an exception.

16. This is due to the fact that we consider that the FCA and PSR are best placed to apply the sector expertise and understanding in monitoring such remedies, along with applying more proportionate enforcement action where needed, than the CMA currently is. Aligning to the FCA's supervisory and enforcement approach, alongside clear signposting as to when oversight would be passed back to the sector regulator, would improve clarity and consistency for the financial services industry. This would also free up resource for the CMA elsewhere, including in non-regulated industries.

17. The number and breadth of market investigation remedies currently applicable to retail financial services should also be considered when looking at concurrency and the variety of different obligations imposed on firms.

18. If you have any questions relating to this response, please contact Matthew Young, Principal, Strategic Policy, at matthew.young@ukfinance.org.uk

## Select consultation questions

**Question 1: Have the concurrent Competition Act 1998 enforcement powers proven to be effective tools to remedy specific cases of anti-competitive harms in the regulated sectors? As part of this issue, how do sector regulators evaluate whether competition law enforcement would be a more appropriate course than either: i) enforcing an existing ex ante rule ii) setting a new ex ante rule, and are the choices that sector regulators make effective?**

19. We believe that the CA98 enforcement powers are effective tools to remedy specific cases of anti-competitive harm (such as cartels). We note there have been relatively few enforcement cases under the CA98 powers by the sector regulators in the financial services sector. While the FCA and PSR will be able to provide a fuller picture as to the rationale for use of their various powers, it is clear from the cases being taken forward by the authorities that the majority of issues in the sector are more appropriately dealt with through a regulatory lens.

20. CA98 investigations are resource-heavy undertakings which require a high standard of proof to be met before a final decision can be made. In addition, the CMA and the sector regulators have several other tools to draw from when enforcing compliance. This deterrent is also likely to strengthen in the coming years following the implementation and operationalisation of the

Consumer Duty and the Digital Market Unit's ability to enforce *ex ante* code of conducts on Big Tech firms.

21. While we do not have direct insight into the factors that the FCA and PSR take into account when deciding whether to use CA98 powers or to enforce (existing or new) *ex ante* rules, we note that they have, to date, largely tended to use their powers under FSMA 2000 and FSBRA 2013 to impose remedies rather than go down the CA98 route. Our view is that this will generally be the more effective option to resolving any competition issues in financial services where both sets of powers are available to deal with the same issue.

**Question 5: Does concurrency have an impact on how sector regulators carry out their wider regulatory functions, particularly in terms of the promotion of competition in the regulated sectors?**

22. We believe that the concurrency regime has influenced how sector regulators carry out their wider regulatory functions, in addition to other factors, with the FCA regularly considering the impact on competition of certain issues. In addition, as described above, the new Consumer Duty will help further ensure firms are considering the interests of their customers, which could reduce the need for regulatory interventions on competition law or other regulatory rules.

23. As the Consumer Duty comes into effect it will be important to monitor the impact it has on competition. Although the Consumer Duty will only directly impact certain markets, the CMA, FCA and PSR should consider their competition strategies for financial services more widely, and what lessons they can take from its implementation. We urge the FCA to work with the CMA and others to develop an updated strategy to financial services competition regulation which reflects the evolving landscape once the Consumer Duty has bedded in, including with respect to the new or amended powers which will be given to the regulators through enactment of the DMCC Bill as envisaged.

**Question 7: Are existing mechanisms to coordinate between the CMA and sector regulators sufficient to ensure consistent outcomes and coherence in the competition regime?**

24. We believe that the UK Competition Network, established as a forum for multilateral engagement between the different regulators following the passing of the Enterprise and Regulatory Reform Act 2013, is an effective and useful mechanism to share information. However, elsewhere, co-ordination between the regulators could be made to work more effectively. For example, the transition of the CMA's Open Banking remedy to a longer term, operationalised, initiative (that can be accommodated by a Future Entity), is currently subject to debate within JROC, with slow progress being made due to divergent interests, and little consensus for a speedy resolution.

25. Moreover, these mechanisms are unlikely to capture the more informal and frequent engagement between the regulators, which can often be a significant factor in collective decision-making regarding competition concurrency decisions. We would like to see greater transparency around these interactions, demonstrating the exchange of respective competition regulation and financial services sector expertise and how that is being put into practice by each regulator. This could be delivered in the form of a quarterly report published by the CMA, detailing the interactions the CMA has had with the sector regulators on competition issues. Indeed, Open Banking is a good example of how these current interactions are not always transparent to market participants.

26. Relevant regulators should also consider how the existing mechanisms are reviewed and updated to reflect the wider changing regulatory environment, including whether the existing MOU needs to be expanded to take account of decisions made outside of the formal UK Competition Network forum.

27. In addition, the process of case allocation between regulators could potentially be improved. Different regulators will take different approaches to an investigation and will have different levels of expertise on the subject matter, so the allocation choice is important in determining the process and outcome. We propose two potential improvements that could be made:

    a. There should be a presumption that the regulator which has the most technical expertise in the subject matter should receive the allocation.
    b. Companies and other interested parties directly impacted by the allocation decision, relating to market studies, should have the opportunity to provide comments on the decision before it is finalised.

28. These two reforms would bring much-needed transparency and flexibility to the allocation process and would therefore greatly improve the overall functioning of the concurrency regime.

**Question 9: To what extent does concurrency enable the leveraging of the different expertise and experience of the CMA and sector regulators in competition law enforcement?**

29. While there may have been expertise sharing by the three authorities with competition powers in the financial services sector, we would suggest that they could spend more time understanding and reflecting upon the work of their counterparts so as to ensure that duplication can be minimised.

**Question 10: To what extent does concurrency improve overall deterrence for breaching competition law both (i) across the economy and (ii) within the regulated sectors specifically?**

30. Oversight for competition regulation within the financial services sector is spread across three separate regulators – the CMA, FCA and PSR. As noted above, whilst there have been relatively few formal infringement decisions in the financial services sector, we do think the threat of enforcement, combined with the FCA and PSR's regulatory powers, acts as a strong deterrent.

31. It is vital that a balance is struck between effective competition and regulation on the one hand and unnecessary interference in financial markets on the other. The financial services sector is already one of the most regulated sectors in the UK, and, indeed, the world. Therefore, the CMA, FCA and PSR must ensure their approach is proportionate and does not result in regulatory red tape compromising economic growth.

32. Financial services firms have a unique reporting obligation when it comes to competition law issues, given the requirements to report actual or potential significant competition law infringements as part of their Principle 11 reporting obligations. This, combined with having three UK regulators with concurrent competition law powers, acts as more than sufficient oversight and consequentially provides significant deterrence already.

**Question 11: Does concurrency have an impact on the overall number of Competition Act 1998 investigations, market studies and/or market investigation references, compared to if these powers were reserved solely to the CMA?**

33. We believe that concurrency has had a limited impact on the overall number of market studies by the FCA and PSR because they are able to make use of similar powers set out under FSMA 2000. The FCA in particular almost always uses its market study powers under FSMA 2000, instead of similar powers provided to it in EA02. This is most likely because the former legislation provides a wider scope for the FCA to impose different levels of remedy, where it is well placed to determine appropriate action as a market sector expert (a position that would not be mirrored by the CMA alone).

34. There have been relatively few formal CA98 decisions in the financial services sector, under concurrent powers by the FCA or PSR. This may be because there is typically a high level of competition law compliance in a sector that is otherwise highly regulated. As noted above, we also think that there are more resource-effective and efficient routes that the FCA and PSR can take to resolve competition issues. Often the threat of enforcement action by the FCA or PSR alone acts as a deterrent (be that under CA98 or their regulatory powers), such as the FCA's use of so called 'on notice letters' delivered to regulated firms.

**Question 14: What benefits does the ability for sector regulators to conduct market studies and refer markets to the CMA for market investigations have for the operation of the markets regime? Are there any downsides in the sector regulators having concurrent powers to conduct market studies and make market investigation references?**

35. Sector regulators like the FCA and PRA are often better equipped to undertake market studies, including under the CA98, as they have a deeper understanding and expertise of the sector they regulate, as well as being better placed to deliver remedies that work alongside the existing, complex regulatory landscapes they regulate. This will also extend to having better, more established stakeholder relations with firms in the relevant sector they regulate, making their supervisory role more effective and precise.

**Question 15: Are there improvements which could be made to how the sector regulators exercise their concurrent powers?**

36. It is critically important that the CMA, FCA and PSR reflect upon the way in which they have made use of their competition powers in the past in relation to financial services and consider what lessons can be learned for the future. In particular, the regulators should be mindful of the instances in which they are creating duplication and the impact this has on the time and resource available for firms to innovate and serve their customers. The regulators should retain their autonomy to choose which powers to draw upon when deciding to conduct market studies and retain the right to utilise their EA02 powers if they deem it to be more appropriate to do so.

37. As mentioned above, we also believe that steps could be taken to make the case allocation process more transparent.