

A new pro-competition regime for digital markets

UK Finance response to consultation from the Department for Digital, Culture, Media and Sport and the Department for Business, Energy and Industrial Strategy

1 October 2021

Introduction

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 government's consultation on a new pro-competition regime for digital markets¹ in respect of issues of particular importance to our members and their customers.
2. If you have any questions relating to this response, please contact Matthew Conway, Director of Strategy & Policy, at matthew.conway@ukfinance.org.uk.

Regulatory coordination and information sharing

Q4. Is there a need to go beyond informal arrangements to ensure regulatory coordination in digital markets? What mechanisms would be useful to promote coordination and the best use of sectoral expertise, and why? Do we have the correct regulators in scope?

3. We welcome the government's actively seeking to mitigate the risks of uncoordinated action by regulators with overlapping remits. As we observed in our response² to HM Treasury's 2019 call for evidence on regulatory coordination in financial services,³ good coordination between regulators helps to ensure that the flow of interventions is manageable for firms and to avoid unintended interactions and unnecessary costs, allowing firms to focus on their primary role of serving customers and supporting economic growth. Coordination is also desirable insofar as it makes it more likely that regulators will work closely together when addressing issues that require their joint involvement. This is particularly important in banking and finance as structural trends—including new entrants, new technologies and evolving consumer demands—are bringing new business models.

¹ <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>.

² <https://www.ukfinance.org.uk/system/files/HMT%20call%20for%20evidence%20on%20regulatory%20coordination%20-%20UK%20Finance%20response.pdf>.

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819025/Future_Regulatory_Framework_Review_Call_for_Evidence.pdf.

4. We also welcome the consultation's recognition that the Digital Markets Unit (DMU) will need to coordinate with the Financial Conduct Authority (FCA) by virtue of their overlapping interests in the regulation of payments markets. However, the FCA is not the only financial-services regulator with locus over such markets as this is a responsibility shared with the Bank of England (BoE) and the Payment Systems Regulator (PSR). If the government deems that measures are necessary to ensure effective coordination between the DMU and the FCA, it should extend those measures to the BoE and the PSR as well.
5. We are nonetheless concerned that there is a risk of unnecessary overlap in regulatory remits based on the broad definition of "digital markets" in footnote 6 of the consultation and given both the FCA and the PSR already have statutory objectives, and the necessary powers, to promote effective competition in the markets they regulate. Digital technology is ubiquitous in the modern economy, and we therefore believe that the proposed regime would benefit from a more focused definition of digital markets that better distinguishes between "the concentration of power in a handful of the largest digital companies" and markets where digital technology is indeed a core component but which are already extensively regulated for competition purposes.
6. If the government is minded to keep the proposed definition of digital markets, we recommend that it require the DMU and relevant sectoral regulators to coordinate to ensure that, where both are minded to intervene in a given situation, only the authority best placed to intervene does so. This would mirror the arrangements that exist to ensure the effective operation of the concurrency regime.⁴
7. The consultation rightly notes that the FCA and Prudential Regulatory Authority (PRA) have a statutory duty to ensure the coordinated exercise of their respective functions. While the existence of this requirement is preferable to its absence, our experience is that it has not, alone, been sufficient to avoid problems in coordination between the two regulators. Section 3D of the Financial Services and Markets Act 2000, which sets out the duty, also states that it applies only to the extent that compliance with it "is compatible with the advancement by each regulator of any of its objectives."⁵ This subordination of the duty to coordinate to the pursuit of each regulator's statutory objectives limits its ability to address coordination problems. In particular, it does little to promote coordination to avoid the simultaneous introduction by both regulators of initiatives with major implications for firms. Neither regulator has an incentive to delay its own initiative as this could jeopardise the fulfilment of its statutory objectives. However, the coincidence of multiple major initiatives can put significant pressure on firms' ability to respond to regulatory change. As such, while we support the introduction of a similar duty in respect of the DMU, we would caution that it is likely to face the same limitations as in the case of the financial-services regulators.
8. Including the DMU in the membership of the Digital Regulation Cooperation Forum (DRCF) is a positive step. Although its launch during covid-19 makes it difficult to gauge its full impact, there are signs that the Financial Services Regulatory Initiatives Forum,⁶ which bears many similarities to the DRCF, has had an improving effect on coordination between regulators with a locus in financial services. However, both fora lack a statutory

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892735/Guidance_on_current_application_of_competition_law_to_regulated_industries.pdf.

⁵ <https://www.legislation.gov.uk/ukpga/2000/8/section/3D>.

⁶ <https://www.fca.org.uk/news/press-releases/financial-services-regulatory-initiatives-forum-launches-grid>.

footing and therefore cannot fundamentally overcome the problem of regulators being incentivised to prioritise the pursuit of their individual statutory objectives over coordination with other regulators.

Q5. How can we ensure that regulators share information with each other in a responsible and efficient way?

9. Regulators clearly need high-quality information about the markets and firms that they regulate to perform their duties effectively. However, answering information requests is a time- and resource-consuming exercise for firms, and it is therefore highly desirable to minimise the number of requests made by regulators to the greatest possible extent. Sharing information between regulators is a useful means of avoiding several regulators requesting largely the same information of the same firms on different occasions, and we therefore welcome the government's desire to encourage it.
10. We nonetheless believe there should be restrictions on one regulator sharing information with another where the latter's intended use for it differs significantly from the basis on which it was originally requested. At the very least, regulators should have to secure the consent of the firms that provided the information, explaining the recipient regulator's intended use for it, and giving the firm(s) the opportunity to add, or provide further context, to said information. Moreover, each regulator should only request, and be supplied by another regulator with, information that is strictly relevant to the exercise of its duties and powers. Such restrictions would be in line with those set out in the Enterprise Act 2002 for sharing information by and with the Competition and Markets Authority (CMA).⁷
11. We do not have detailed views on mechanisms to facilitate information sharing. However, we would generally encourage regulators to harmonise the formats of the templates they use for information requests, as well as the databases in which they store the information. This not only minimises the frictions involved in sharing information between regulators but also makes it easier and less costly for firms to respond to similar data requests by different regulators on separate occasions.

Pro-competitive interventions

Q17. What range of PCI remedies should be available to the Digital Markets Unit? How can we ensure procedural fairness?

12. The DMU should have a range of pro-competition intervention (PCI) remedy powers available to it to drive innovation and competition across the economy, particularly as digital markets can tend toward concentration. These remedies should recognise that big-tech and social-media companies do not just serve consumers as digital service providers in one sector but also as key intermediaries for other types of activity (e.g. e-commerce) across sectors. The DMU should therefore be able to consider the ability of firms with strategic market status (SMS) to leverage their position in one market to facilitate entry into, and growth in, others.
13. The consultation indicates that the DMU will be handed a PCI remedy mandating data sharing by big-tech and social-media firms, referencing the CMA's market study into online platforms and digital advertising, which found that digital platforms have unequal

⁷ <https://www.legislation.gov.uk/ukpga/2002/40/part9>.

access to user data, giving some firms a significant competitive advantage in the provision of some data-driven services. The opening of access to this data could therefore be beneficial for consumers and drive innovation across the whole economy.

14. In August 2016, as part of the final report of its retail-banking market investigation, the CMA set out a package of data-sharing remedies—Open Banking—aimed at increasing innovation and improving competition.⁸ While Smart Data work led by the Department for Business, Energy and Industrial Strategy is under way,⁹ it has currently focused on regulated sectors, including energy, communications and financial services. In its Smart Data spring report, the government recognised the need for greater collaboration between these various sectoral data-sharing initiatives, to “find practical ways to increase interoperability between sectors, to enable greater innovation, address artificial barriers to competition and realise Smart Data benefits for consumers and businesses”.¹⁰ Consistent with this, the government and the DMU should ensure any data-sharing initiative for digital markets is carried out under the wider Smart Data programme, as recommended in the Kalifa review of UK fintech.¹¹

Resilience

15. The introduction of the SMS designation in digital markets recognises that consumers and firms across the UK economy are increasingly affected by and dependent on big tech. It is therefore right that these services be designated as critical.
16. In response to this growing significance, the government may wish to consider a similar approach to that outlined in the operational-resilience policy statements issued by the UK’s financial-services authorities.¹² These require firms to take a service-led view, define what they see as their important business services and understand their impact tolerance to disruption.
17. Detailed mapping of the principal dependencies for these important business services aims to drive identification of vulnerabilities and associated remediation in areas such as supply-chain delivery and key technology. This approach has reinforced the desired step change in the banking and finance sector of protecting consumers and market integrity as opposed to just an individual firm’s survival as a going concern.
18. With the increased pace of outsourcing and digitalisation, there is an emerging risk of increased supply-chain concentration, particularly with respect to cloud-service provision.
19. With many of these services being supplied by non-UK entities, it is also of critical importance to promote greater understanding of the risks that arise to resilience from overseas. Given the growing importance of big-tech companies, due consideration should be given to whether they are appropriately regulated in a manner consistent with other sectors that are currently implementing key regulatory asks to promote national resilience.

⁸ <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>.

⁹ <https://www.gov.uk/government/publications/smart-data-working-group-spring-2021-report>.

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993365/smart-data-working-group-report-2021.pdf.

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978396/KalifaReviewofUKFintech01.pdf.

¹² <https://www.fca.org.uk/publications/policy-statements/ps21-3-building-operational-resilience>.