Reforming Competition and Consumer Policy

UK Finance response to consultation from 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 Department for Business, Energy and Industrial Strategy's (BEIS) consultation on reforming competition and consumer policy.[1]

2. Our response is selective, rather than comprehensive, in the questions to which it responds, dealing only with issues of particular importance to our members and their customers. Nonetheless, we welcome the UK government's recognition that aspects of competition policy, consumer rights and consumer-law enforcement require updating considering the significant changes the UK's economy has undergone in the past 20 years, and we strongly support its stated aim of achieving best-in-class frameworks in these areas.

3. We highlight two overarching themes.

    - First, it is vital that competition and consumer law and sectoral regulation recognise and complement each other so that firms do not face over- or underlapping requirements that impose unnecessary complexity and cost. For example, while BEIS was consulting on reforming competition and consumer policy, the Financial Conduct Authority (FCA) consulted on proposals for a consumer duty that would set higher expectations for the standard of care that all regulated financial services firms provide to consumers,[2] yet neither initiative seems to have taken account of the other. As a matter of principle, we believe that sectoral regulation should only be permitted where there is a clearly evidenced need to supplement generally applicable measures.

    - Second, even when regulation is coherent and incrementally justified, its cumulative impact on firms individually and the UK's competitiveness as a whole is rarely assessed. The government has already recognised the need to improve coordination in financial services regulation through the establishment of the Financial Services

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf
[2] https://www.fca.org.uk/publication/consultation/cp21-13.pdf

Regulatory Initiatives Forum,[3] of which the Competition and Markets Authority (CMA) is a member. It could extend this approach more generally given that the source of a regulatory intervention—be it central or local government, a non-departmental public body or an independent regulator—is ultimately of little significance to a firm compared to the nature of the requirement facing it.

4. If you have any questions relating to this response, please contact Matthew Conway, Director of Strategy & Policy, at matthew.conway@ukfinance.org.uk.

Competition policy

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

5. Although we do not have a strong view on the merits of the proposed State of Competition reports, we are concerned that giving the CMA additional, extensive powers to issue requests for information (RFIs) could further increase the burden on banking and finance firms, which already field a significant number of information requests from public authorities. Responding to 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 public authorities to the greatest possible extent. Given the economy-wide nature of the proposed reports, we would expect much of the information required for their compilation to be available to the CMA already. The CMA should only make new RFIs where it requires specific information that is not already available to it.

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

6. The consultation indicates that, unless otherwise stated, the changes proposed to the CMA's competition law enforcement powers would also be made to the powers available to sectoral regulators under the concurrency regime. At present, this regime allows the FCA and the Payment Systems Regulator (PSR) to conduct market studies under the Enterprise Act 2002 (EA02). They cannot conduct market investigations themselves but can instead make a Market Investigation Reference (MIR) to the CMA for an in-depth investigation.

7. Footnote 51 indicates that, under the proposal to replace the existing market study and market investigation system with a single stage market inquiry tool, the sectoral regulators would have the power to make market inquiry references akin to their existing power to make an MIR. However, the consultation is silent on whether they would retain their ability to conduct EA02 market studies, which would no longer be a tool available to the CMA. The implication appears to be that sectoral regulators with concurrent competition powers would no longer be able to conduct EA02 market studies. We would welcome clarity on whether this is, indeed, the government's intention.

8. Nonetheless, this may be of little practical consequence for the banking and finance industry. As we noted in our response[4] to HM Treasury's (HMT) phase-II consultation on

[3] https://www.fca.org.uk/publication/corporate/financial-services-regulatory-initiatives-forum-tor.pdf
[4] https://www.ukfinance.org.uk/system/files/F2R2-phase-II-consultation-FINAL.pdf

the financial services future regulatory-framework (FRF) review,[5] the FCA and the PSR have conducted all market studies to date using their sectoral powers under the Financial Services and Markets Act 2000 (FSMA) and the Financial Services (Banking Reform) Act 2013 respectively rather than their concurrent EA02 competition powers.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

9. We recognise the need for the CMA to move swiftly in some cases of significant customer detriment. However, regulatory interventions can be costly and disruptive, and as such should be made on a sound evidential footing. We believe all binding regulatory interventions, including the imposition of interim measures in a market inquiry, should be justified by a robust cost-benefit analysis (CBA) and informed by thorough consultation of all interested parties.

10. We are also concerned that more appropriate remedies could be identified at a later stage of the market inquiry, resulting in firms having to unwind interim remedies that they have already implemented at considerable and unrecoverable cost.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

11. We believe there is a valid role for voluntary, industry- or firm-initiated solutions within the regulatory framework, where these can solve a problem in a more timely and less burdensome way (for both the responsible public authorities and the firms concerned) than a measure proposed by a public authority. On these grounds, we support enabling the CMA to accept binding commitments at any stage in the market inquiry process, subject to the ability to review such commitments at a later date (see answer to question 8 below). We assume that there would be a requirement for the CMA to consult before doing so.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

12. We agree that remedies in market investigations do not always have their intended effect, while markets can change quickly, such that even remedies that were effective at the time of their introduction may wane over time. However, section 162 of the EA02 already requires the CMA to review and, if necessary, vary remedies imposed following a market investigation on the basis of a change of circumstances. We therefore question the need to give the CMA expanded powers to this effect.

13. In particular, we are concerned that, in some scenarios, this may lead to "mission creep," as observed through the periodic addition of functionality to Open Banking ever since its introduction in 2018 as a remedy following the CMA's Retail Banking market investigation.[6] Continual changes of this kind make it difficult for firms to accurately plan the resources they need for implementation.

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[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927316/141020_Final_Phase_II_Condoc_For_Publication_for_print.pdf

[6] https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk

14. If the government decides to introduce the expanded powers, these would need to be accompanied by strong checks and balances, namely:

    - requiring the CMA to demonstrate that the adverse effect on competition (AEC) finding that justified the original remedy is still relevant. It should not be presumed that the AEC persists;

    - requiring the CMA to conduct a robust CBA of the proposed variations; and

    - introducing a "cooling off" period, as mooted in the BEIS consultation. This would reduce the risk of certain CMA remedies being perpetually "under review," forcing businesses to continually readapt to new rules.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

15. Consistent with our response to the call for evidence issued by the Independent Review of Administrative Law Panel,[7] we value judicial review as the mechanism through which public authorities are held accountable under the law to those who are or could be affected by their actions. We believe it would be severely detrimental if the route to judicial review and/or the judicial-review process itself in respect of decisions by the CMA were made more onerous

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

16. We are concerned about the likely unintended consequences of the proposals to introduce additional liability for company directors for the accuracy of information provided to the CMA. In many banking and finance firms, the director ultimately responsible for an RFI response tends to be far removed from the team preparing the information for submission to the CMA. The prospect of personal liability for directors for incomplete or inaccurate RFI responses, including fines and possible disqualification, is likely to see them less inclined to rely on validation by their direct reports, slowing down and increasing the cost and burden of responding. Moreover, section 110 of the EA02 already enables the CMA to impose penalties on businesses for providing inaccurate RFI responses. Against these downsides, it seems to us that the proposed additional powers are likely to produce only marginally more deterrence than is currently provided by the existing enforcement powers.

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

17. Breaches of CMA Orders are often unintentional and highly technical in nature—the results of the complexity the Orders themselves but also of the markets and firms to which they apply. We believe the CMA should recognise this in the exercise of any new powers to levy fines for non-compliance. Such fines should be restricted to the most material

[7] https://www.ukfinance.org.uk/system/files/Independent-review-of-administrative-law-call-for-evidence-UK-Finance-response.pdf

breaches and only after the CMA has provided firms with sufficient time to address and rectify the issues it has identified. The CMA should also issue clear guidance on how it intends to exercise its discretion to impose fines for breaches of Orders, which should not be retrospective in nature.

Consumer rights

Q49. Are there perverse incentives or unintended consequences from our existing consumer law?

Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?

Consumer Credit Act

18. We believe work is necessary to update the 40-year-old Consumer Credit Act 1974 (CCA). While a significant volume of the CCA has already been transferred into FCA rules, several provisions remain on the statute book. The FCA's call for input in May 2016[8] and subsequent discussion paper in November 2018[9] fulfilled its statutory obligation to report to HMT on those retained provisions. The Woolard Review of change and innovation in the unsecured-credit market (the Woolard Review)[10] has recently recommended the FCA engage with HMT to prioritise work on CCA reform to achieve a unified regime with balanced outcomes for lenders and consumers. Provisions that would deliver targeted benefits to consumers while facilitating a simplified and proportionate regime for lenders in an age of digital communication and innovation include:

    - replacing statutory disclosure requirements with simplified and more flexible FCA rules; and

    - replacing CCA sanctions that do not focus on good customer outcomes with the FCA's extensive enforcement powers.

19. More generally, the CCA contains prescriptive rules on the content and format of certain customer communications which limit the action firms can take to respond to the varied needs of customers. This high level of prescriptiveness, while appropriate at the time that the legislation was passed, is at odds with the more recent trend in financial services of favouring outcomes- rather than rules-based regulation.

Same activity, same risk, same regulation

20. Like the wider economy, the banking and finance sector has evolved significantly in the last 20 years. New entrants and new technologies have brought benefits for competition and consumers. At the same time, the UK's regulatory framework for financial services has become fragmented, evolving in such a way that it is now structured around both firms and activities. Firms undertaking the same activity can face different levels of regulation, and firms can face the same cost of regulation despite posing different levels

[8] https://www.fca.org.uk/news/news-stories/call-input-review-retained-provisions-consumer-credit-act
[9] https://www.fca.org.uk/publication/discussion/dp18-7.pdf
[10] https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf

of risk. This is particularly problematic for customers, who might reasonably expect, but cannot currently be guaranteed, the same protections when consuming broadly substitutable products and services.

21. We believe that any reforms to consumer law should aim to give more consistent effect to the principle of "same activity, same risk, same regulation" (SARR), a concept we developed at length in our response to HMT's phase-II FRF consultation. SARR should be one of the guiding principles in the government's and regulators' approach not just to introducing new consumer law or regulation but also to reforming or updating existing regulatory frameworks.

22. An excellent recent example of the SARR principle being applied is the way in which the public authorities have recognised the discrepancy that exists between the level of regulation of "buy now, pay later" (BNPL) and that of more established forms of unsecured lending. The Woolard Review recommended that BNPL "needs to be brought within regulation to both protect consumers and ensure it is sustainable." HMT accepted this recommendation, [11] and the UK parliament has enacted the necessary enabling legislation.[12] This will allow for a level of regulation that varies according not to the nature of providers but rather to the risks posed by their activities. Indeed, with the introduction of BNPL regulation, policymakers can establish a set of outcomes-based regulatory requirements for a credit product that can act as an example for wider CCA reform.

Protections for package travel customers

23. The significant disruption to domestic and international travel wrought by the covid-19 pandemic underlined the importance of a simple, predictable and fair system for refunding customers in the event that their package travel organiser faces liquidity problems or ceases trading. However, the current framework of regulation enabling access to refunds for package travel customers is fragmented, providing inconsistent and unpredictable protection to customers.

24. As the government observed in the final report of its Airline Insolvency Review,[13] different mechanisms are available to protect passengers from an operator's insolvency, including section 75 of the CCA (s75), chargeback rights, statutory protections in the Package Travel and Linked Travel Arrangements Regulations 2018 (PTRs), personal travel insurance, the Air Travel Organisers' Licensing (ATOL) scheme[14] run by the Civil Aviation Authority (CAA) and other bonding and assurance schemes.

25. The PTRs provide consumer protection rights on cancellation of travel and stipulate the requirements of travel operators to protect their customers from the financial risks of cancellation. ATOL is the mechanism commonly used by operators of package travel holidays that include a flight to arrange this financial protection. It requires all licensed firms to lodge bonds with the CAA to finance refunds and arrangements for customers to be repatriated if necessary. The amount of the bond required is generally a percentage of sales, with the result that at peak periods the amount of the bond may be insufficient to cover all exposures. Moreover, save for ATOL and its contractual arrangements with

[11] https://www.gov.uk/government/news/buy-now-pay-later-products-to-be-regulated
[12] See section 37 of the Financial Services Act 2021 at https://www.legislation.gov.uk/ukpga/2021/22/section/37/enacted
[13] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800219/airline-insolvency-review-report.pdf
[14] https://www.caa.co.uk/ATOL-protection/Trade/Maintain-and-renew-your-ATOL/ATOL-financial-criteria/

some card acquirers, none of the other available protections are coordinated in a complementary way. This creates the possibly for confusion among consumers, who expect to get what they paid for or were promised.

26. The insufficiently stringent requirements for operators to set aside their own funds to cover reimbursement claims and the absence of a clearly defined "hierarchy" of the various protections mean travel companies are often unable or unwilling to provide full refunds to customers. In recent high-profile cases of operators ceasing trading, there has been a tendency for travel companies, and also some insurers, to encourage their customers to seek a refund through the protection accompanying their means of payment (such as s75 for credit card payments, and chargeback for debit card payments). We have long argued that this gives rise to a "moral hazard." Consistent with the polluter-pays principle, the cards industry, via s75 and chargeback rules, should not be a primary right of recourse that underwrites the failures of other regulated sectors such as the travel industry.

Q53: How common is the practice of using terms and conditions to delay the formation of a sales contract?

Q54: Does the practice of using terms and conditions to delay the formation of a sales contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?

27. As the BEIS consultation notes, the widespread practice of a merchant's terms and conditions delaying contract formation until the dispatch of the purchased goods means that a consumer may not have the benefit of s75 protection in the period between payment and dispatch. This is particularly problematic in cases where the merchant becomes insolvent before dispatch, and where the contract is therefore never formed. There is some ambiguity, only partially resolved by an April 2021 Law Commission report on the matter,[15] as to whether customers are entitled to claim a s75 refund from their credit provider in such circumstances. In practice, and as we noted in our response[16] to the Law Commission consultation[17] that informed its report, while it might be possible for card issuers to reject s75 claims if a contract had not formed, we do not think this is a tactic routinely adopted by issuers or merchant acquirers.

28. The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill proposed by the Law Commission, which would introduce new rules into the Consumer Rights Act 2015 on the transfer of ownership under contracts for the sale of goods between a trader and a consumer, did not include provisions to clarify whether the rejection of a s75 refund claim in the above-described circumstances was permissible. If the government decides to introduce legislation, we recommend that it deal with the timing of contract formation by specifying clearly that contract formation on delivery is either permitted or prohibited with exceptions (by allowing for conditions to be met before the retailer is obliged to fulfil its contractual obligations). The cards industry requires clarity one way or the other so that a simplification exercise does not lead to a rise in complex card claims.

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[15] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Transfer-of-ownership-report-and-bill.pdf
[16] https://www.ukfinance.org.uk/system/files/Response%20letter%20to%20Law%20Commission%20Consultation%20246.SUBMISSION%20VERSION30.10.20.clean_.pdf
[17] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/07/6.6721_LC_Consultation-paper_FINAL_230720_WEB.pdf

Overlap with the FCA's proposals for a new consumer duty

29. The BEIS consultation commendably takes a "horizontal" view of consumer rights, seeking similar standards of protection for consumers across the economy. Of course, individual sectors evolve in different ways, raising new forms of consumer harm that are often specific to them, and we recognise that the inherent nature of many banking and finance products warrants additional consumer protection beyond the horizontal baseline.

30. Particularly noteworthy at the current time is the FCA's ongoing work on the potential introduction of a new consumer duty pursuant to section 29 of the Financial Services Act 2021. As we noted in our response[18] to the FCA's first consultation,[19] its proposals, if implemented, are likely to have significant consequences for the protections afforded to retail banking and finance customers. While the proposals in the BEIS consultation appear to have only minor overlap with those set out by the FCA in its first consumer duty consultation, we recommend BEIS and the FCA coordinate as necessary to avoid the unintended imposition of conflicting and/or duplicative requirements on banking and finance firms, favouring reliance on horizontal measures where possible.

31. One area of overlap between the BEIS consultation and the FCA's first consultation is their common focus on some firms' use of behavioural techniques to influence consumers' purchasing decisions. As we stated in our response to the FCA's first consultation, we support proportionate action being taken to prevent "sludge practices," such as hiding fees through complex pricing structures, or purposely making it difficult for customers to cancel a subscription or switch to a more suitable one. However, many banking and finance providers use behavioural techniques to protect customers (e.g. from fraud) or to prompt them into taking action that could benefit them financially. As such. any measures to address firms' use of behavioural techniques should not hinder their use for purposes that are beneficial to consumers.

Consumer-law enforcement

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

32. We note that the FCA already has the power under section 404 of FSMA to establish a collective consumer redress scheme. As such, we would welcome further information on whether, and how, the proposals on collective redress in the BEIS consultation would apply to financial services.

Miscellaneous

Updating memoranda of understanding between the CMA and sectoral regulators

33. If, as is proposed, changes are made to the CMA's role in the enforcement of consumer law, modifications may be required to the memoranda of understanding (MOUs) that exist between the CMA and the various sectoral regulators on the use of concurrent powers under consumer protection legislation, such as that which exists between the CMA and

[18] https://www.ukfinance.org.uk/system/files/210730%20UK%20Finance%20response%20to%20FCA%20Consumer%20Duty%20consultation.pdf
[19] https://www.fca.org.uk/publications/consultation-papers/cp21-13-new-consumer-duty

the FCA.[20] To ensure consistency and provide firms and customers with a clear understanding of the signatory parties' respective roles, these MOUs should be reviewed in light of any changes made through the progression of this work, and updated as appropriate.

34. We assume that the FCA will remain the lead regulator and enforcer of consumer protection legislation for the firms it regulates, as is currently set out in the above-mentioned MOU. However, we would welcome an explicit statement that this is the government's intention.

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888739/FCA_-CMA_-_MoU_consumer_-_pdf_---.pdf