

## FINANCIAL CONDUCT AUTHORITY RESPONSE

### COMPETITION AND MARKET AUTHORITY'S CALL FOR INPUTS: REVIEW OF THE ENHANCED COMPETITION CONCURRENCY ARRANGEMENTS

#### Introduction and summary

1. The Financial Conduct Authority (**FCA**) welcomes this opportunity to contribute to the Competition and Market Authority's (**CMA**) Call for Inputs regarding its review of the enhanced competition concurrency arrangements (the **CMA's Call for Inputs**).
2. In summary, in relation to its concurrent functions gained in 2015, the FCA's experience has been, and continues to be, a positive one. We consider that there are significant benefits to UK consumers of financial services/claims management services, and consequently to the broader economy, from the FCA having concurrent powers.

#### Why competition matters

3. When it works well, competition in financial services drives down costs and prices, drives up service standards and quality and increases access to those services. It also drives innovation, productivity and economic growth, not only in financial services themselves, but across the economy. A competitive landscape becomes all the more important against a backdrop of the recent pandemic and the "cost of living" crisis (as the CMA itself has itself noted).<sup>1</sup> Competition is therefore an important tool in helping keep prices down, emphasising the importance of open and competitive markets at a time when the economic environment remains challenging.

#### The FCA's role in relation to competition

4. The FCA has an important role to make sure that competition is a key driver in ensuring financial markets function well.
  - a. Following concerns that problems of competition and consumer choice in financial services had not been addressed by financial regulation prior to the 2008 financial crisis, the FCA was established in April 2013 with a clear competition mandate. The FCA has a single strategic objective to ensure that relevant markets function well. This strategic objective is supported by three operational objectives: consumer protection; market integrity; and our competition objective to promote effective competition in the interests of consumers.<sup>2</sup>
  - b. The FCA has a competition duty which states that we must, so far as it is compatible with acting in a way which advances our consumer protection objective or the market integrity objective, discharge our general functions in a way which promotes effective competition in the interests of consumers.

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<sup>1</sup> <https://www.gov.uk/government/publications/annual-report-on-concurrency-2023/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2023>.

<sup>2</sup> S1E, Financial Services and Markets Act 2000 (**FSMA**).

- c. The FCA has also recently been given a secondary objective to facilitate the international competitiveness of the UK economy and its medium to long term growth,<sup>3</sup> of which competition is a key driver.
  - d. In 2015, the FCA gained concurrent competition powers to enforce the Competition Act 1998 (**CA98**) and to conduct market studies under the Enterprise Act 2002 (**EA02**) (together, **concurrency**).<sup>4</sup> The FCA has four open CA98 investigations at the time of writing (October 2023).<sup>5</sup> It is also undertaking its first market study under EA02,<sup>6</sup> having conducted 11 market studies since 2013 under FSMA.
5. The FCA's three operational objectives and competition duty do not apply to our concurrent powers, but we regard them as consistent and aligned.<sup>7</sup>

### **Benefits from the FCA having concurrent powers**

6. Our experience since 2015 is that our concurrent powers bring significant benefits to financial services markets and consumers.
7. First, our competition mandate assists us in our concurrent functions<sup>8</sup> and having a Competition Directorate within the FCA enables us to input efficiently and effectively to broader work raising competition issues.
  - a. The Competition Directorate within the FCA plays an essential role in supporting the work of the wider organisation where competition issues arise in policy formulation. By addressing these competition issues, we ensure consumers are protected and markets function effectively. Recent examples include in relation to (i) the proposed framework for a UK consolidated tape;<sup>9</sup> (ii) the provision of cash deposit and withdrawal services for personal and business current accounts in the UK or part of the UK;<sup>10</sup> and (iii) potential ways to manage the systemic risks to our objectives posed by certain third parties.<sup>11</sup>
  - b. The Directorate also provides regular training regarding competition law and economics for wider FCA staff. Our experience is that an organisation-wide competition mindset benefits the FCA's position as a concurrent competition authority. This is because it allows us to harness the expertise and knowledge of frontline specialists around the wider organisation in circumstances where those specialists already recognise/are aware of the importance of competition in their everyday work. In many instances, it is those specialist staff who have first identified the potential for harm and refer those concerns to the Competition Directorate.
  - c. Further, once concerns have been identified, we routinely draw upon the knowledge and experience of specialist Supervision, Policy and Legal divisions within the FCA. Specialist staff

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<sup>3</sup> Amendments to FSMA by s25, the Financial Services and Markets Act 2023.

<sup>4</sup> The FCA can also conduct market studies under FSMA.

<sup>5</sup> <https://www.gov.uk/government/publications/competition-act-1998-cases-in-the-sectors-regulated-by-ukcn-members/competition-act-1998-cases-in-the-regulated-sectors>.

<sup>6</sup> <https://www.fca.org.uk/publications/market-studies/ms23-1-wholesale-data-market-study>.

<sup>7</sup> See D. Jones, M. Bethell, I. Cameron, Competition at the Financial Conduct Authority ([FCA Article](#)), 2015.

<sup>8</sup> See Question 1 and 9, CMA's Call for Inputs.

<sup>9</sup> [CP23/15: The Framework for a UK Consolidated Tape \(fca.org.uk\)](#).

<sup>10</sup> <https://www.fca.org.uk/news/statements/financial-services-markets-act-2023-gives-fca-new-powers-protect-access-cash>.

<sup>11</sup> <https://www.fca.org.uk/publications/discussion-papers/dp22-3-operational-resilience-critical-third-parties-uk-financial-sector>.

can be quickly identified and consulted at an early stage of exercising our concurrent powers to help us understand key market dynamics and potential harms to competition in an efficient and effective way. Many of the remedy implementations and monitoring following market studies have also benefitted from this sector expertise. For example, monitoring can be combined with wider supervisory approaches for a relevant sector to make sure the impact of work is considered in the round. Evaluations of our work on general insurance add-ons for example have highlighted the importance of this supervisory work in implementing remedies.<sup>12</sup>

- d. Our competition mandate can often help to facilitate proportionate and targeted follow-up action after the exercise of our concurrent powers. This might be through outreach activities conducted with relevant market participants,<sup>13</sup> and/or supervisory staff reinforcing specific findings and/or compliance messages with their firms.
8. Second, our concurrent powers also assist us in the exercise of our competition mandate.<sup>14</sup>
- a. Since its creation, the FCA has undertaken a rich portfolio of competition-focused market studies and reviews, aimed at identifying and remedying competition issues in various financial services markets. The benefits here have ranged considerably from case to case, but in the General Insurance Pricing Practices market study alone, we estimated £4.2 billion of maximum savings to consumers over 10 years through lower prices and time savings.<sup>15</sup>
    - To date, the FCA has conducted 11 market studies, led by the Competition Directorate. Our market studies have been carried out – with one ongoing notable exception<sup>16</sup> – under our FSMA powers. As set out in our published guidance, we decide on a case-by-case basis whether to pursue a FSMA or EA02 market study.<sup>17</sup>
    - FSMA based market studies (and the powers which we use to run them) depend on the relevant firms and activities being situated within our regulatory perimeter. However, it is possible that competition issues found in financial services markets outside our regulatory remit can also result in harms that we may nonetheless be best placed to investigate. The FCA’s concurrent EA02 market study powers fill this gap – allowing us to investigate whether competition in any market for financial services is working well, regardless of whether the FCA directly authorises or otherwise regulates the firms and financial activities in question.
    - Our EA02 power therefore contributes to the exercise of our competition mandate and serves to benefit consumers in financial services more broadly than just our regulatory powers allow. It also means issues may be tackled which might not be if only the CMA had jurisdiction to conduct market studies in financial services beyond our regulatory perimeter (see further, paragraph 9 below).

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<sup>12</sup> <https://www.fca.org.uk/publications/corporate-documents/evaluation-guaranteed-asset-protection-insurance-intervention>.

<sup>13</sup> For example, following the FCA’s CA98 decision in relation to anti-competitive conduct in the asset management sector (Case CMP/01-2016/CA98), members of the Competition Directorate attended a series of industry events to explain the FCA’s findings in the case and what that might mean for the sector.

<sup>14</sup> See Questions 2 and 5, CMA’s Call for Inputs.

<sup>15</sup> <https://www.fca.org.uk/publications/market-studies/ms18-1-general-insurance-pricing-practices-market-study>.

<sup>16</sup> See footnote 6 above.

<sup>17</sup> See FG15/8.

- b. In this way, we consider our concurrent powers allow us to take a complete approach to promoting competition in financial services that would not be possible in the same way if those powers rested elsewhere. Our ongoing EA02 market study into wholesale data<sup>18</sup> is a good example of this, in circumstances where it complements the FCA's wider (FSMA-based) work in relation to concerns around wholesale data.<sup>19</sup>
- c. Our CA98 powers also support us in exercising our broader competition mandate. These apply to the provision of financial services/claims management services broadly (rather than relevant only to our regulatory perimeter), mirroring our wider jurisdiction in respect of EA02 market studies. The FCA issued its first CA98 infringement decision in 2019<sup>20</sup> and as noted above, currently has four open CA98 investigations – the most live cases the FCA has had at a single point in time since obtaining concurrent competition powers.<sup>21</sup> We have also made extensive use of confidential advisory and on notice letters to alert firms to possible concerns without opening a formal CA98 investigation (see further paragraph 10(a) below). We note the position before the FCA had concurrency where, as the National Audit Office noted in 2016, “[h]istorically, the UK competition regime [...] struggled to identify anti-competitive behaviour, notably in financial services. The Office for Fair Trading and the CMA found only three breaches in financial services between 2001 and 2015, despite serious and long-running problems.”<sup>22</sup>
9. Third, concurrency allows for a broader discussion between regulators in terms of strategic priorities and provides flexibility in making the best use of expertise, resources and available remedial powers across the regime.
- a. A key aspect of the enhanced concurrency regime is an assessment of who is best placed to act in relation to the case in question.<sup>23</sup> For example, in 2017, the FCA made a market investigation reference to the CMA in the context of its Asset Management Market Study in relation to investment consultancy and fiduciary management services. The FCA considered, amongst other things, that there were appropriate remedies that were available to the CMA at the end of its investigation and that a thorough review was required in circumstances where a significant part of the market was not regulated.<sup>24</sup>
- b. In practice, each organisation will make a prioritisation assessment about the potential case ahead of any formal case allocation taking place.<sup>25</sup> Certain cases may better align with the strategic priorities of one concurrent competition authority than another, and resource considerations may also differ between authorities. If CA98 or EA02 powers rested with only one authority for the whole UK economy, it might be the case that not all investigations and studies that could be taken forward are taken forward. Having different concurrent

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<sup>18</sup> See footnote 6 above.

<sup>19</sup> Further recent work includes the [Trade Data Review](#) (March 2023). See also our consultation regarding consolidated tape: consolidated tape consultation as well <https://www.fca.org.uk/publications/consultation-papers/cp23-15-framework-uk-consolidated-tape>. See also Question 14, CMA's Call for Inputs.

<sup>20</sup> Anti-competitive conduct in the asset management sector: <https://www.fca.org.uk/publications/notices-and-decisions/anti-competitive-conduct-asset-management-sector-fca-decisions-under-competition-act-1998>

<sup>21</sup> <https://www.gov.uk/government/publications/competition-act-1998-cases-in-the-sectors-regulated-by-ukcn-members/competition-act-1998-cases-in-the-regulated-sectors>.

<sup>22</sup> NAO, [The UK competition regime](#) (2016), p.32.

<sup>23</sup> See in respect of the exercise of concurrent powers, CMA published guidance about considerations which go to this assessment: See [CMA 10](#).

<sup>24</sup> <https://www.fca.org.uk/publications/market-studies/asset-management-market-study-final-decision-mir>.

<sup>25</sup> Prioritisation assessments are carried out based on FCA's and CMA's published prioritisation criteria: FCA FG15/8, CMA16: [CMA Prioritisation Principles](#). The CMA has consulted on its approach to prioritisation with the view to update its guidance (see [here](#)).

authorities in place makes it more likely that investigations and studies that might otherwise be deprioritised could be launched, which in turn benefits the overall competition regime (i.e. in tackling the direct harm, developing precedents and creating a credible deterrent effect in the relevant sector). The FCA therefore considers that better outcomes in financial services markets are likely to be achieved through concurrency.<sup>26</sup>

10. Fourth, our experience is that our position as a sectoral regulator makes us well placed to promote compliance with competition law and to deter firms from breaking it.
  - a. As noted above, complementing our ability to detect and assess potential competition infringements, the FCA has made use of advisory and on notice letters. Such letters do not constitute formal decisions relating to infringements of competition law, but instead seek to educate and build awareness (advisory letter) or request specific action to be taken to address concerns (on notice letter).<sup>27</sup> Since obtaining concurrent powers, the FCA has issued 59 on notice and 43 advisory letters to a range of financial services firms.<sup>28</sup> Many of these letters have resulted in positive changes to firm behaviour in our aim of making markets work well (and faster than if a formal investigation had been undertaken), and the ability to engage effectively with many of these firms may come from pre-existing relationships.
  - b. The FCA's Competition Enforcement team is also able to engage in early-stage advocacy and guidance with firms where competition issues may arise. Having this capability closer to the supervisory relationship with firms is helpful in addressing competition issues more quickly. The benefits of such early-stage informal guidance have recently been recognised by the CMA in its sustainability guidance and the open-door policy in respect of sustainability agreements.<sup>29</sup> A further example was in relation to the approach taken to cooperation between businesses during the Covid-19 pandemic, where the CMA issued its guidance in March 2020<sup>30</sup> supported publicly by the FCA and Payments Systems Regulator.<sup>31</sup>
  - c. The FCA's approach to enforcing competition compliance within firms in our sector is well coordinated with the CMA. This means that, instead of creating additional costs for firms, firms' compliance costs are more effectively and efficiently targeted than perhaps they would have been in the absence of concurrency.<sup>32</sup>
11. Finally, our experience is that cooperation between the CMA and the FCA in relation to our concurrent powers works well on a number of levels, both formal and informal.<sup>33</sup>
  - a. Mechanisms for cooperation take different forms. This includes requirements under secondary legislation,<sup>34</sup> a memorandum of understanding between the CMA and the FCA<sup>35</sup>

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<sup>26</sup> See Question 11, CMA's Call for Inputs.

<sup>27</sup> For further details, see FG15/8, para 3.11 to 3.13.

<sup>28</sup> See further, the CMA's annual concurrency reports between 2015 and 2023.

<sup>29</sup> CMA's Guidance on environmental sustainability agreements. See also CMA 177: Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, para 7.2 .

<sup>30</sup> <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19> (withdrawn on 24 June 2022).

<sup>31</sup> FCA and PSR respond to the CMA's guidance on business cooperation under competition law | FCA.

<sup>32</sup> See Question 13, CMA's Call for inputs.

<sup>33</sup> See Questions 7 and 12, CMA's Call for Inputs.

<sup>34</sup> The Competition Act 1998 (Concurrency) Regulations (2014).

<sup>35</sup> CMA and FCA memorandums of understanding, available [here](#).

and published guidance.<sup>36</sup> The FCA also participates in the UK Competition Network alongside the other concurrent authorities, as well as the Digital Regulation Cooperation Forum alongside the CMA, Information Commissioner’s Office and the Office of Communications.

- b. These materials and forums establish formal processes that underpin competition concurrency. These provisions are enhanced by a high level of informal communication and mutual support between the CMA and the FCA that runs alongside the formal processes. Such regular interactions, including in areas that do not directly concern our concurrent functions (such as the FCA’s assistance to the CMA on mergers in financial services markets)<sup>37</sup> help build and maintain strong working relationships which can be harnessed when exercising our (formal) concurrent competition powers.
- c. Whilst we recognise that cooperation between concurrent competition authorities may represent a “cost” in terms of the efficiency of the regime when compared to a one-stop shop approach, there is a clearly a trade-off between that cost and allowing a sectoral regulator, with expertise in its areas, to have concurrent powers in its tool-kit, with all the advantages we outline above. We think in our case, the balance is very clearly in favour of the concurrent regime as it stands.<sup>38</sup>

## Conclusion

- 12. Against a currently challenging economic backdrop, we will continue to ensure that the process of competition is protected and promoted in financial services/claims management services to the benefit of consumers and to ensure markets function well.
- 13. As the concurrency regime currently stands, and from the experience we have gained since 2015, our view is that there are no major deficiencies that we would call out as requiring significant improvement/remedy. That said, there is always the potential for continuous efficiency and incremental improvement in the way the regime operates. For example, where resourcing can sometimes be an issue for both the CMA and the FCA, it may be expedient to formulate some provisions around mutual secondment where each authority can benefit from the other’s experience and expertise. We have also seen the benefits of strong collaboration in the Digital Regulation Cooperation Forum, particularly around horizon scanning, and it may be helpful to explore some of those learnings around cross sectoral competition issues.
- 14. We look forward to exploring these issues with the CMA and working with them to identify further improvements to the regime as this review progresses.

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<sup>36</sup> CMA10 and FG15/8, as well as other published guidance followed by the FCA.

<sup>37</sup> In the 2022/23 reporting period, the FCA provided assistance on LSE’s acquisition of Quantile, as well as 8 other transactions that were under consideration by the CMA’s merger intelligence unit. See CMA’s [Annual Concurrency Report 2023](#), Assistance on mergers work – financial services.

<sup>38</sup> See Question 6, CMA’s Call for Inputs.