

Response to the CMA's Call for Inputs
in its Review of the Competition
Concurrency Arrangements

October 2023

- 1.1** The PSR welcomes the CMA's review of the competition concurrency arrangements 10 years after the Enterprise and Regulatory Reform Act 2013 reforms were introduced. The PSR was incorporated in 2014 and became fully operational with regulatory and concurrent competition powers alongside the CMA in 2015. Our experience of concurrency, therefore, is based entirely on the 2013 regime.
- 1.2** In this submission, we explain why we consider that the concurrency arrangements are currently working well:
- a. our competition powers are a key aspect of our toolkit and complement our regulatory powers to promote competition in the payments sector for the benefit of all service users;
 - b. in our engagements with industry stakeholders, we continue to raise awareness of our competition law powers, our willingness to take enforcement action where appropriate and the importance of compliance with the rules;
 - c. the breadth and depth of cooperation between the CMA and the sector regulators help to make competition enforcement more consistent and effective overall through the sharing of know-how and experience;
 - d. we also see benefits from close cooperation with other regulators beyond concurrency related work, across our regulatory work, particularly given the increasingly cross-cutting nature of potential issues in the payments sector;
 - e. the concurrency arrangements provide a robust framework for the sharing of knowledge, expertise and facilitates cross-regulator engagement. We are keen to explore options for deeper cooperation which would benefit all UK competition enforcers.

Role of the PSR

- 1.3** The PSR is the independent economic regulator for the payment systems industry in the UK.
- 1.4** The payments sector is rapidly evolving and the whole UK economy relies on the systems regulated by the PSR. As payment systems and services continue to develop, we need to ensure that they do so in ways that benefit those who use these services and, in doing so, help to make sure that the sector is innovative and competitive.
- 1.5** We promote competition and innovation in the interests of the people and businesses using payment systems, as well as the services provided by payment systems. This includes promoting effective competition between operators of payment systems, between different payment service providers and between different infrastructure providers.
- 1.6** We pursue these objectives in several ways. Notably we:
- take action against businesses involved in anti-competitive agreements and/or conduct contrary to UK competition law where these relate to participation in payment systems
 - investigate the market for payment systems, or the markets for services provided by payment systems, to see how well they are working for service users – this includes market reviews under the FSBRA framework and using our concurrent powers to conduct market studies and/or to make market investigation references to the CMA
 - take regulatory action by way of making directions, and imposing requirements on participants in payment systems designated by HMT

Concurrent competition powers as a tool to promote competition

- 1.7** The enforcement of competition law rules by the PSR, alongside the CMA, plays an important role in enhancing competition, ensuring that the payments sector is working well, and that effective competition translates into better prices, choice and innovation, in the interests of the people and businesses that depend on it.
- 1.8** The concurrency regime is an effective way of leveraging sector regulators' market expertise and applying it to specific behaviour taking place within a particular sector. Concurrent competition powers were intended to take advantage of a regulator's sector knowledge, its ability to identify potential competition issues within its sector, and its ability to decide which form of regulation is most appropriate in the given circumstances.
- 1.9** The PSR expects regulated firms to take compliance with their competition law obligations seriously and to incorporate competition compliance as a feature of their regular business planning. Our routine engagements with stakeholders on regulatory matters give us a window of opportunity to discuss competition related matters and to highlight the importance of competition law awareness within their organisations. In this way, we are able to actively encourage compliance and make clear that where appropriate, we will take enforcement action to bring non-compliance to an end, holding businesses to account for their actions and deterring future non-compliance. More broadly, we use our platform at conferences and other external speaker / engagement opportunities to raise awareness of our competition law powers and stakeholders have expressed an interest in learning more about the application of competition law in the payments context.
- 1.10** The concurrent application of competition law rules promotes the effectiveness of competition law enforcement generally. It is possible for relatively small and new regulators, such as the PSR, to carry out complex investigations within their sector in a timely and efficient manner. For example, on 18 January 2022, the PSR announced the conclusion of its first investigation under the Competition Act 1998 (CA98) into two cartels in the prepaid cards market.¹ The PSR opened an investigation in October 2017 following a complaint, published its statement of objections in March 2021 and concluded its investigation in January 2022. During the course of the investigation, all parties settled and admitted breaking the law. In its final decision, the PSR decided to impose fines totalling more than £33 million on five parties for breaking competition law.
- 1.11** The PSR continues to receive and analyse information about potential competition issues, either in the form of complaints it receives or through its own market intelligence gathering. The PSR also works very closely with other regulators, notably the CMA and FCA, on cross-sectoral issues and we continue to keep under review the best use of our resources, including where potential competition cases are on the boundary of CMA, FCA and PSR remit. The PSR takes compliance with competition law rules seriously and we will consider taking enforcement action where appropriate. There may, however, be cases where more effective and efficient ways of promoting effective competition exist, other than by opening formal competition investigations. For example, the PSR might seek to address an issue with the firm or firms involved at an early stage, when it is still possible to influence how the market will develop. This may or may not involve using our concurrent competition powers. In its role as the payment systems regulator, keeping the industry under review, the PSR is well placed to monitor developments within the sector and to actively consider the best use

¹ <https://www.psr.org.uk/our-work/enforcement-cases/>

of resources and timeliness of potential interventions to achieve better outcomes for the service users.

- 1.12** Concurrency has benefits both in terms of utilising sector expertise of the concurrent regulators but also in ensuring consistency in how different powers are used to promote very similar objectives and outcomes sought by economic regulatory powers and competition powers. CA98 powers are well understood and provide a consistent framework for protecting competition but economic regulatory powers can be important to develop and promote (i.e. create more) competition in a way which would not be appropriate (or effective) using competition law powers.
- 1.13** Even where we decide to intervene using our regulatory powers with the express intention of promoting competition, this does not wholly remove the risk of specific anticompetitive agreements or conduct which may be better addressed through enforcement of the competition law rules. We keep an open mind as to which of our powers we will use to tackle competition issues that arise in our sector.

How the concurrency regime can be strengthened

- 1.14** The breadth and depth of cooperation between the CMA and the sector regulators help to make competition enforcement more effective overall, by tackling a wider range of conduct in more sectors of the UK economy and driving consistency within the UK competition regime.
- 1.15** As part of its CA98 investigation, the PSR benefitted from working closely with CMA colleagues, for example on procedural matters such as access to file, which enabled the PSR to progress its investigation more quickly and efficiently. Collaboration and sharing of know-how and resources in this way alleviates the burden of running enforcement cases with limited resources and drives organisational efficiencies. For firms to be aware of this level of potential resource-sharing and flexibility enhances the deterrent effect.
- 1.16** The PSR considers that there may be further scope to incorporate more novel or deeper ways of sharing CA98 resources, including the possibility of practical assistance and technology sharing in respect of document management in large scale cases but also less 'intense' forms of synergies, such as sharing knowhow, templates, and best practices as they evolve.
- 1.17** The PSR would be keen to explore deeper or pan-function collaborative initiatives, including secondment or hybrid opportunities, which would benefit all UK competition enforcers. This is especially relevant in the light of the establishment of the CMA's new Digital Markets Unit and considering the ever-evolving nature of payment technologies. We would advocate capitalising on existing relationships between our staff, who often have experience of working at more than one enforcement body and across different legislative toolkits.
- 1.18** It is important that where the remit of the CMA and the sector regulators overlap, efforts are made to avoid unnecessary duplication. This can be achieved through effective communication and sharing of intelligence to ensure that resources are used where they are most needed to achieve best outcomes in the sector. This applies to potential CA98 cases but also, more broadly, to any work on cross-sectoral issues, from AI to ESG.

- 1.19** The benefits of close collaboration between the sector regulators and the CMA go beyond CA98 cases. The PSR has shared its sector expertise with the CMA also in markets, merger control and other competition policy work. These benefits are the result of the framework created by the concurrency regime.

Concurrent competition powers support the use of regulatory tools and policy work

- 1.20** The PSR's competition powers are a key aspect of its toolkit to address issues which may hamper the proper functioning of markets in the payment systems sector. However, use of the concurrent competition powers is only one means available to the sector regulators to promote competition and improve service and quality to customers. We also have extensive regulatory powers to advance our competition objective where issues relate to participants in payment systems we regulate. We recognise the complementary nature of our competition and regulatory powers in achieving our objective of more effective competition.
- 1.21** We consider that the specialist knowledge and best practices gained from concurrency and competition law specialism are also important in non "concurrency related" work streams. The skills and knowledge of competition law, markets work, and economic regulation are complementary. We consider that building and maintaining competition law expertise and general awareness of competition law principles within the organisation support our regulatory interventions.
- 1.22** An example of this can be found in the analysis carried out by the PSR in the context of FSBRA market reviews. Market reviews are one tool we use to investigate the market for payment systems, or the markets for services provided by payment systems, to see how well they are working for service users. We may also carry out market studies under the provisions of the Enterprise Act 2002 (EA02).
- 1.23** To date, the PSR has undertaken several market reviews, including on access to payment systems, payments infrastructure and card acquiring services, and at the time of writing is undertaking two reviews focusing on card fees.² A market review enables the PSR to advance several of its statutory objectives, i.e. the promotion of competition, innovation and service user interests. In the event we identify issues of concern that need addressing, we have extensive regulatory powers to take action where the issue relates to participants in payment systems we regulate. By contrast, when undertaking a market study under EA02, , provided the statutory test is met, we can make market investigation references to the CMA under which the CMA conducts an in-depth investigation focused on competition and may impose remedies. It is also possible for us to accept undertakings in lieu of making a reference to the CMA, if we think they would address our competition concerns.
- 1.24** When we examine whether competition is working well in the context of a market review, we will often apply similar economic analysis, questions and concepts as we would when carrying out concurrency related work or a market study. The expertise and skills required will often be the same, so the concurrency regime largely complements our regulatory work and influences our approach to examining whether markets are working well and if they could be working better.

² <https://www.psr.org.uk/our-work/market-reviews/>

- 1.25** Competition law can provide important baselines for engaging with industry on initiatives which require a degree of coordination and offers important guardrails and principles for stakeholder engagement and industry collaboration, which may facilitate important innovation. This is relevant to a range of PSR projects, for example in relation to the design of new payment systems, such as our account-to-account work programme, in the context of the Open Banking initiative, or when tackling consumer fraud. The issues are not limited to risks linked to information sharing but also include interoperability and access/supply. The PSR has used its position as regulator, on occasion, to remind firms of their obligations whenever coordination is needed and to provide strategic leadership by reference to competition law principles to ensure the process of collaboration is done in a way that will achieve the desired outcomes. The threat of enforcement action against unlawful forms of coordination and clear consistent messaging in sector regulation policy work helps to keep participants on the right track and supports pro-competitive innovation and economic progress.
- 1.26** Conversely, the PSR can help to make sure that competition law does not become a false blocker in instances where some form of coordination is needed and beneficial. A misunderstanding of the rules can have a chilling effect on progress. In relation to access to cash, for example, the PSR has played a role in encouraging firms in self-assessing competition law to avoid false negatives, while highlighting the proper application of competition law rules and reminding firms of the limits imposed by competition law on permitted collaboration.

Benefits of concurrency regime to address cross-cutting sectoral issues

- 1.27** Wider than the strict confines of the CA98 regime, concurrency provides a robust and well understood framework for dealing with cross-sectoral issues. For example, there are opportunities for the PSR, CMA and other concurrent regulators to engage with each other on consumer-focused initiatives, such as the PSR's regulatory work on protecting consumers from fraud. The concurrency arrangements allow for sharing of knowledge and cross-regulator engagement which is of value, particularly given the increasing inter-relatedness of different aspects of the economy and the growth in digital markets and AI. The clear nexus in relation to digital markets and open banking initiatives and workstreams highlights the importance of the collaboration between the different regulators beyond the confines of competition law concurrency.
- 1.28** The PSR is interested in continuing to find new ways in which cross-sector issues could be examined in a way that leverages sectoral expertise and makes best use of resources.

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12 Endeavour Square
London E20 1JN
Telephone: 0300 456 3677
Website: www.psr.org.uk

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