

Feedback statement to The FCA's approach to advancing its objectives

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In this Feedback Statement we report on the main issues arising from our consultation on *The FCA's approach to advancing its objectives*.

Please send any comments or enquiries to:

Philippa Broadway
Early Intervention Team
Strategy and Competition Division
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Email: s1k.objectives@fca.org.uk

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Abbreviations used in this paper

AIFMD	Alternative Investment Fund Managers Directive
CMA	Competition and Markets Authority
CRD IV	Capital Requirements Directive IV
EA02	Enterprise Act 2002
EBA	European Banking Authority
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	European Supervisory Authorities
ESMA	European Securities and Markets Authority
EU	European Union
FCA	Financial Conduct Authority
the ombudsman	Financial Ombudsman Service
FSA	Financial Services Authority
FSB	Federation of Small Businesses
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
LIBOR	London Inter-Bank Offered Rate
MAR	Market Abuse Regulation
MAS	Money Advice Service
MiFID	Markets in Financial Instruments Directive
MoU	Memorandum of Understanding
OFT	Office of Fair Trading
PRA	Prudential Regulation Authority
TFEU	Treaty for the Functioning of the European Union

1. Overview

Introduction

- 1.1** On 1 April 2013, the Financial Conduct Authority (FCA) was established as the conduct regulator for the UK financial markets. We took over responsibility from the Financial Services Authority for the conduct regulation of all authorised firms, and the prudential regulation of non-designated investment firms.¹
- 1.2** We published *The FCA's approach to advancing its objectives* in July 2013 to give guidance on how we intended to advance our operational objectives², updating the information in *Journey to the FCA* (October 2012). We asked you to tell us what you thought about our plans.
- 1.3** In this document we summarise what we have heard, answer your questions, and let you know what we have done and are doing in response. We also tell you where you can find more detailed information about your questions.

Summary of feedback

- 1.4** We received 17 written responses from ten industry bodies, four regulated firms, two consumer representative organisations and one professional body.
- 1.5** Respondents broadly supported our aims and approaches. Four main themes emerged:
- Respondents wanted to know more about our new approach and powers, and how we plan to exercise them.
 - Respondents were in favour of us having greater accountability and transparency, and a commitment to better engagement.
 - The industry welcomed our commitment to a balanced approach, which promotes competition while looking after the interests of consumers. However, it also wanted us to be careful in how we use our new powers, and how we use evidence to inform our decisions.
 - Consumer representatives welcomed our increased focus on consumers, and wanted us to maintain strong protection mechanisms.

1 The Prudential Regulation Authority (PRA) is the prudential regulator of banks, building societies, credit unions, insurers and designated investment firms.

2 Section 1K of The Financial Services and Markets Act 2000 (FSMA) requires that general guidance given by the FCA under section 139A must include guidance about how it intends to advance its operational objectives in discharging its general functions in relation to different categories of authorised person or regulated activity.

1.6 In this document, we have grouped our responses to points raised during the consultation under the original heading structure of the consultation document:

- Chapter 2 – Introduction
- Chapter 3 – Protecting Consumers
- Chapter 4 – Promoting Effective Competition

Our response and next steps

1.7 We have taken on board the comments made by our stakeholders and updated *The FCA's approach to advancing its objectives* as a result of these and other changes in our approach since 2013.³

1.8 Our approach will naturally continue to develop over time. We will continue to publish any additional information on our approach through our normal publications and our website.

³ This includes publication of the FCA's new strategy and our Business Plan 2015/16: Our Strategy, FCA, (8 December 2014). www.fca.org.uk/your-fca/documents/reports/fca-our-strategy; Business Plan 2015/16, FCA, (24 March 2015). www.fca.org.uk/your-fca/documents/corporate/business-plan-2015-16.

2. Introduction

Our objectives

- 2.1 This section covers feedback we received in relation to our objectives and our response to it.

Definition of consumers

- 2.2 Some respondents noted an apparent inconsistency in the definition of consumer between different parts of our document and asked for clarification.

Our response

We included a definition of consumers on page 8 of *The FCA's approach to advancing its objectives*.⁴ Our aim was to provide an easier to understand version than the definition in the statute (in section 1G FSMA). We did not intend to suggest that we are not following the full FSMA definition of consumer when carrying out our objectives.

For clarity, we set out below an extract from the current version of FSMA. For further information, please refer to the statutory definition:

'consumers' means persons who:

- a) use, have used or may use:
 - i) regulated financial services, or
 - ii) services that are provided by persons other than authorised persons but are provided in carrying on regulated activities
- b) have relevant rights or interests in relation to any of those services
- c) have invested, or may invest, in financial instruments
- d) have relevant rights or interests in relation to financial instruments, or
- e) have rights, interests or obligations that are affected by the level of a regulated benchmark⁵

4 There we stated 'consumer' covered retail consumers buying financial products or services for their own use or benefit (such as mortgages or ISAs), retail investors in financial instruments (such as shares and bonds) and wholesale consumers (such as regulated firms buying products or making investments, or issuers looking to raise capital).

5 www.fca.org.uk/firms/markets/benchmarks

The FSMA definition of 'consumer' that applies for the purposes of our objectives and general duties was also recently amended in April 2013⁶ to extend it to persons affected by the level of a regulated benchmark (such as LIBOR).

One response pointed out that the definition of consumer did not specifically refer to commercial entities that hold insurance policies. Such commercial customers are included in the definition of consumers, as 'persons' who use regulated financial services. Similarly, in the case of consumer credit, customers can include sole traders and small partnerships and other unincorporated bodies.

The relationship between our operational objectives

- 2.3** Several respondents said there was potential for conflict between our three statutory objectives, particularly in relation to our competition objective, and asked for more information and transparency on how we would manage this.

Our response

There is no hierarchy to our objectives. We can decide to address issues to advance our consumer protection, market integrity or competition objective, or to advance more than one at a time. In doing this, we also follow our competition duty, which requires that we must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge our general functions in a way which promotes effective competition in the interests of consumers.

We do not believe our objectives will normally conflict, and for the most part they are mutually supportive. For example, effective competition will tend to drive better outcomes for consumers in terms of price, quality, range, service and innovation. Similarly, market integrity is a pre-requisite for effective competition in the interests of consumers. Should tension arise between our objectives, we will take decisions based on what is most compatible with our strategic objective⁷ in the circumstances.

⁶ Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2013

⁷ FSMA Section 1B (2) states the FCA's strategic objective to be: ensuring that the relevant markets function well. The relevant markets are: (a) the overall financial markets; (b) regulated financial services; and (c) services provided by non-authorised individuals that are carrying out regulated activities without breaking our rules (FSMA Section 1F (2)).

3. Protecting consumers

- 3.1** This chapter covers feedback related to our consumer protection objective and our response to this feedback.

How we make policy - Europe

The process we use to make policy and how we align our policy with European and international developments.

- 3.2** One respondent was keen that we develop a detailed strategy for proactively influencing EU regulatory developments. However, opinions about our delaying domestic action to align with developments outside the UK were mixed. One group did not believe that we should delay taking action if that action was already planned, and likely to be permitted. Another respondent agreed that delay was sensible, pointing out that early implementation could lead to additional and unnecessary costs. Another asked us to ensure consistency with EU precedents.

Our response

We set out our overall approach to strategic EU engagement, and how it will differ from the FSA's approach, in our 2012 document, *Journey to the FCA*. We have restated this with a more specific focus in each of our subsequent Business Plans. We have explained how we will approach new policy initiatives domestically (including interactions with EU initiatives), as well as how we will approach our work in negotiating and implementing EU Directives and other standards.

We continue to work together with the Government and other stakeholders, such as the PRA and the Bank of England, on all EU initiatives and proposals that fall within our regulatory scope. Recent examples include wide-reaching legislation, such as the revised Markets in Financial Instruments Directive (MiFID II), Capital Requirements Directive IV (CRD IV) and the Market Abuse Regulation (MAR), and more narrowly focused proposals such as the Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs).⁸

As we explained in our Strategy document,⁹ we recognise the importance of the European and wider international agenda and of ensuring our international activity is consistent and coordinated. We will aim to influence initiatives at all stages of development, including the earliest. For example, we have advocated

⁸ Other examples include the draft Regulation on benchmarks, the revised Insurance Mediation and Payment Services Directives, the Mortgage Credit Directive and proposals on money market funds.

⁹ www.fca.org.uk/your-fca/documents/reports/fca-our-strategy

the adoption of a better regulation agenda at EU level within the context of the Capital Markets Union proposals.¹⁰

We are also actively engaged with all the European Supervisory Authorities (ESAs) work that is relevant to our scope – not just in the European Securities and Markets Authority (ESMA, where we are the lead UK competent authority) but also in the European Banking Authority (EBA) and European Insurance and Occupational Pensions Authority (EIOPA), liaising with the PRA (the lead UK member in these authorities). This includes work on technical standards, advice, guidelines and other initiatives. Our aim for all our EU activity is to pursue outcomes that are as consistent as possible with our objectives and regulatory principles.

In our public statements, we have explained how we will consider whether pursuing or advocating action through the EU institutions or ESAs will be a more effective course of action than a unilateral response to an issue or risk. The European 'route' involves a number of additional considerations (such as how long it takes to act or the uncertainty of the outcome), which might mean a domestic response is still the preferred option if we need to address an identified risk to consumers. We will not take a domestic response without considering what the EU institutions or ESAs could or will later propose. However, there will inevitably be circumstances when we have chosen to respond to an issue or risk (or be asked to do so by the UK Government or Parliament) and the need for action is later taken up by others – including EU policymakers. For example, we initiated work at national level to mitigate risks around benchmarks; EU Regulation in this area is now pending. We also proceeded with restrictions on inducements around the supply of research and seek to retain such standards within the framework of MiFID II.

Engaging earlier, and carrying out consumer research

We will use our new *Consumer Spotlight* segmentation model to help us choose who we will speak to, and our aim to produce fewer, more focused consultations.

- 3.3** Several respondents raised concerns about our engagement approach. While highlighting current difficulties they had tracking the information we provide through different information sources, they also thought that there was a risk that some stakeholders would have less opportunity to give their views, and that we could have an incomplete understanding as a result. They agreed there were benefits in understanding the different needs of different types of consumer, and keeping our model up-to-date. One respondent suggested building a network of individuals for consultation.

¹⁰ www.fca.org.uk/static/documents/fca-response-european-commission-building-capital-markets-union.pdf

Our response

We talk to the people affected by our policies and listen to their views. Their feedback helps us shape our policy. We engage with people across the country – whether face-to-face, online or through third parties – including market representatives, firms, consumer bodies, other stakeholder groups and individual retail consumers. We use a consumer segmentation model to help us choose who we speak to in our work.

We also engage with the Financial Services Consumer Panel so that our actions can be informed by their views on how to protect consumers.

We know that some stakeholders can struggle to find the time to read and respond to our formal consultations. Our aim is to engage earlier, and use a range of different ways to get the views of stakeholders, so that we gather feedback more quickly, effectively and in a way that makes it easier for others to contribute. For example, in developing our regime to regulate consumer credit, firms and individuals have been able to feed in views in person, at regional roadshows and by email before webinars, as well as through our usual consultation papers.

Data

How we will use firm data to help us shape our actions

- 3.4** Some industry bodies requested more information on our planned data strategy. They agreed that it would be helpful to have a systematic and coordinated approach to collecting firm data to help avoid duplication. One body suggested that publishing certain data can actually have a detrimental effect on the market, by reducing innovation among competitors.

Our response

In September 2013 we published *The FCA Data Strategy* to give firms more clarity on why we ask for certain data.¹¹ This explains why data is important to us, how we intend to collect and use data in the future, our approach to delivering our vision for data and, recognising the size of the task ahead, our plan for implementation. Since October 2014, we have been publishing a quarterly Data Bulletin to give key information about what we do and the markets we regulate.¹² Firms can also call or email us at fcadataandanalysis@fca.org.uk with any data questions.

¹¹ The FCA Data Strategy, 4 September 2013. www.fca.org.uk/your-fca/documents/corporate/the-fca-data-strategy-how-we-will-manage-use-data; The FCA Data Strategy: An update one year on (30 October 2014). www.fca.org.uk/your-fca/documents/data-strategy-one-year-on.

¹² FCA Data Bulletin: Issue 1 - October 2014, (7 October 2014) www.fca.org.uk/your-fca/documents/data-bulletin/data-bulletin-october-2014.

Appropriate degree of protection

We strike a balance between the responsibilities of firms and consumers, and we take a risk-based and proportionate approach

- 3.5 Some respondents thought it was difficult for them to have to take into account the financial knowledge and understanding of each individual client. They felt that fairness for firms meant acknowledging that consumers had a range of knowledge, and could be helped to make their own decisions through clear and transparent information. They wanted more information on how to meet our expectations, and how we would use behavioural economics to help make our policy.

Our response

Our *Treating customers fairly* framework provides information on six outcomes we expect from firms to ensure they put consumers at the heart of their business.¹³ These include, for example, giving consumers clear information and keeping them appropriately informed before, during and after the point of sale.

We are also required¹⁴ to consider the principle that consumers should take responsibility for their decisions. We carry out research and use a variety of sources to gain a deeper insight into the experiences and behaviour of the consumers of financial services.¹⁵ Harm can be caused in many ways. For example, people and businesses can face limited choice, be unable to get the right product for their needs, or be treated unfairly by their chosen provider for as long as they have the product.

Firms need to ensure that they take steps to positively address the known behaviours and traits consumers can show, rather than trying to capitalise on them. They can do this in a number of ways, including shortening their terms and conditions and making them more accessible as part of communicating more smartly overall.

We use our *Consumer Spotlight* segmentation model¹⁶ to understand which customer groups may be more at risk with particular products, services and practices. Each of these groups has specific characteristics and needs, and we use the knowledge we gain from this research in much of our work. For example, we know that the 'retired with resources' group are at higher risk of being victims of financial crime than other groups, so our ScamSmart campaign targets this group.¹⁷

¹³ www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers

¹⁴ This is a requirement for us to have regard to, when discharging our general functions (FSMA s.1B(5)(a), referencing s.3B(1)(d)), and/or when considering what degree of protection is appropriate for consumers, under the consumer protection objective (s.1C(2)9d)). See our *Principles of Good Regulation*. www.fca.org.uk/about/operate/principles

¹⁵ See relevant research examples a) *Occasional Paper No.1 - Applying behavioural economics at the Financial Conduct Authority*, 10 April 2013. www.fca.org.uk/your-fca/documents/occasional-papers/occasional-paper-1; and b) *Consumer Responsibility: Identifying and closing the gap*, FCA Practitioner Panel, September 2013. www.fs-pp.org.uk/publications/research/consumer_responsibility_research_september_2013.html

¹⁶ www.fca.org.uk/news/consumer-spotlight

¹⁷ <http://scamsmart.fca.org.uk/>

Supervising firms

Our supervision framework and its focus on three pillars that deliver different aspects of supervision - proactive supervision, event supervision, and issues and products supervision.

- 3.6** We were urged by some respondents to recognise the potential supervisory burdens on firms caused by our supervisory approach, for example, in the use of Skilled Person (section 166) reviews. They asked us to ensure that we make information on thematic reviews and their findings widely available.

Our response

Supervision plays an important role in advancing our statutory objectives, but we know that this places demands on firms. Following our strategic review last December, we have shifted our approach to Supervision to increasingly take a whole market as well as a firm specific view. We have also brought together some of our cross-market thematic and market study work to undertake fewer pieces of market-based work that look broadly across regulated sectors and products.

Our supervision strategy is designed to limit the burden for the majority of firms, focusing our attention on those firms posing the greatest risks to consumers, particularly the more vulnerable (such as in the consumer credit area)¹⁸. We also aim to minimise these demands by working efficiently and effectively, for example via increased internal governance over information requests.

Skilled Person reviews are only one of our supervisory tools. We use them to obtain an independent view of aspects of a firm's activities that may cause us concern or where we require further analysis. You can find more information¹⁹ on our policy on the use of Skilled Person Reviews in SUP 5, including our policy on their use, the factors we consider when deciding whether to use them or not, and examples of when they might be used. We also publish records on their use for transparency.²⁰

We typically publish²¹ the findings from our thematic reviews on our website, and our Business Plan 2015/16 includes a full list of all the market studies and thematic reviews we intend to carry out in the financial year.²²

Regulating consumer credit

We took over the regulation of consumer credit from the OFT from April 2014.

- 3.7** Some respondents identified concerns with the scope of activities we would regulate after the transfer, and the short timetable for firms to react to the changes.

¹⁸ www.fca.org.uk/news/occasional-paper-no-8

¹⁹ fshandbook.info/FS/html/handbook/SUP/5

²⁰ www.fca.org.uk/about/what/regulating/how-we-supervise-firms/reports-by-skilled-persons

²¹ www.fca.org.uk/about/what/regulating/how-we-supervise-firms/thematic-reviews

²² www.fca.org.uk/news/our-business-plan-2015-16

Our response

We recognise that the move to consumer credit regulation by the FCA has been a complex task in a challenging timescale for firms. However, the decision to transfer, the timetable for the transfer, and the scope of activities covered by regulation, were Government decisions.

Our policy statement PS14/3: *Final rules for consumer credit firms*²³ outlines our approach to consumer credit regulation, and includes final rules that came into force on 1 April 2014. We have also published²⁴ a guide for firms that are new to FCA regulation. You can find a range of other useful information on our consumer credit website pages.²⁵

Working with others

- 3.8** Some respondents sought more detailed information on how we will work with the Financial Ombudsman Service (the ombudsman), the Money Advice Service (MAS), and the PRA to ensure that efforts are aligned and not duplicated.

Our response

The PRA and FCA have a duty to consult each other, and we have processes in place to help us coordinate. This is outlined in our Memorandum of Understanding (MoU).²⁶ For example, we have worked together on the implementation of EU Directives, such as Solvency II and CRD IV.²⁷ However, we also have the right to adopt different treatments and rules where this is proportionate and permitted under EU legislation. For example, the PRA is entitled to make prudential related Financial Services Compensation Scheme (FSCS) disclosure rules for banks and insurers.

We also have Memoranda of Understanding²⁸ with the Ombudsman and the Money Advice Service to ensure our alignment for the benefit of firms and consumers.

The Ombudsman is independent from the FCA but takes into account, amongst other things, relevant FCA rules, guidance and standards when determining complaints. Where a complaint falls within the scope of a consumer redress scheme specified under statutory provisions, the Ombudsman must also determine the complaint by reference to how it should be or should have been

²³ www.fca.org.uk/news/ps14-3-final-rules-for-consumer-credit-firms

²⁴ www.fca.org.uk/your-fca/documents/consumer-credit-being-regulated

²⁵ www.fca.org.uk/about/what/championing/consumer-credit

²⁶ The PRA and FCA have a series of MoUs outlining joint working arrangements on general coordination, operation of the FSCS, supervision of with-profits policies etc. www.fca.org.uk/your-fca/list?ttypes=MoU+Domestic&year=&ssearch=

²⁷ a) *CP12/13: Transposition of Solvency II*, 11 July 2012. www.fca.org.uk/your-fca/documents/consultation-papers/fca-cp1213

b) *CP13/6: Capital requirements for investment firms*, 31 July 2013. www.fca.org.uk/news/cp13-06-capital-requirements-for-investment-firms

c) *PS14/5: Response to CP12/38: Mutuality and with-profits funds: a way forward*, 28 March 2014. www.fca.org.uk/your-fca/documents/policy-statements/ps14-05

²⁸ www.fca.org.uk/mou-fca-fos, www.fca.org.uk/mou-fca-mas

determined under that scheme, unless the relevant firm and the consumer agree to disapply to the provisions of the scheme.

The FCA and the Money Advice Service have a specific statutory duty to cooperate with each other.²⁹ Although the Money Advice Service is independent, it must have regard to the duty of the FCA to advance its operational objectives, when carrying out its statutory function. The FCA is required to ensure the Money Advice Service can do this. These provisions are set out in a Framework Document.³⁰ The FCA must also consider any information provided by the Money Advice Service when deciding what degree of consumer protection may be appropriate.

²⁹ FSMA Sch 1A para 6A(1))

³⁰ Money Advice Service, Financial Conduct Authority and HM Treasury Framework Document, 24 May 2013. www.fca.org.uk/static/documents/mou/mas-fca-hmt-framework-document.pdf. The role of MAS has recently been reviewed by the Government www.gov.uk/government/publications/review-of-the-money-advice-service. The FCA's response to the review can be viewed at www.fca.org.uk/news/john-griffith-jones-responds-to-the-christine-farnish-review-of-the-money-advice-service.

4. Promoting effective competition

- 4.1** This chapter covers feedback related to our competition objective and our response to this feedback.

Our competition powers

Our powers to pursue our competition mandate and how we might decide whether or not to use them

- 4.2** Some respondents sought more information on our competition approach. One respondent wanted to know whether we would re-consult on our competition approach, because of our responsibility for setting up the new payments systems regulator. Another questioned whether we were bound by the Treaty for the Functioning of the European Union (TFEU) regarding competition.³¹

Our response

Amendments made to FSMA (by the Financial Services (Banking Reform) Act 2013) gave the FCA concurrent competition powers under the Competition Act 1998 (CA98) and Enterprise Act 2002 (EA02) from 1 April 2015. Since 1 April 2015, we have therefore been designated as a national competition authority and have the power to apply Articles 101 and 102 TFEU as well as Chapters 1 and 2 of CA98 and the power to conduct market studies under EA02.³²

We also recognise that actions we take under our domestic competition powers do not include action against agreements affecting trade between member states that would otherwise be lawful under EU law, eg. agreements or practices which meet the conditions in Article 101(3) TFEU.^{33,34}

We consulted on draft guidance on CA98 in early 2015 and expect to finalise this guidance shortly.³⁵

The new Payment Systems Regulator (though incorporated as a subsidiary of the FCA) has its own duty to publish guidance on how it will advance its objectives

³¹ Articles 101 to 109 TFEU establish common rules on competition. www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT

³² Article 101 TFEU prohibits all collusive agreements, decisions, and practices between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. Article 102 TFEU prohibits abuse of a dominant position within the internal market or in a substantial part of it.

³³ Article 3(1)(b) TFEU, Council Regulation 1/2003

³⁴ Article 101(3) TFEU sets out conditions under which the prohibition does not apply, because they improve the production and distribution of goods, or promote technical or economic progress while allowing consumers a fair share of the resulting benefit.

³⁵ www.fca.org.uk/news/cp15-1-fca-competition-concurrency

(under s96 Financial Services (Banking Reform Act) 2013). The Payment Systems Regulator has consulted separately on this and issued its own guidance.³⁶

Further information on our competition approach is available on our website competition page³⁷, including how we carry out market studies, market study announcements and links to their terms of reference that include a general call for evidence.

Identifying markets for review

How we will go about gathering information from a range of sources to help us identify markets that are not working well

- 4.3** Some respondents requested more information on how we would go about identifying the markets for review, and the factors that we would take into account when assessing competition. One respondent asked us to take account of the potential impact of regulation on competitiveness in the UK financial services industry.

Our response

As stated above, our website competition page provides information to stakeholders about our market studies. We also set out examples of market failures in our S1K guidance that could inhibit or distort competition, but noted that we would need to decide on a case-by-case basis if these factors warranted regulatory intervention.

Properly understanding the nature and extent of competition in any market is complex. We cannot study every market, so we must choose which markets or aspects of markets to study.

Our strategy places significant emphasis on developing a common view of issues and risks faced in the markets we regulate. This shapes our priorities, including identifying which markets to investigate using market studies.

Some of the factors we take into account when we launch a market study include the prospect for, and likely impact of, any intervention in the market, how the issue fits with upcoming regulatory developments, whether the market has been (or is likely to be) subject to significant non-regulatory change, as well as how a market study would affect the FCA's current portfolio of work.³⁸

We agree that regulation can have an impact on effective competition in international markets. Although, the Government has not given us the same obligation³⁹ to have regard to the desirability of maintaining the UK's competitive position that was previously given to the FSA, the competition objective and

³⁶ www.psr.org.uk/psr-publications/policy-statements/psr-ps-15.1

³⁷ www.fca.org.uk/about/what/promoting-competition

³⁸ See also Finalised Guidance on market studies and market investigation references, FG15/9 available at: www.fca.org.uk/static/documents/finalised-guidance/fg15-09.pdf and section on prioritisation of market studies in Wholesale Sector Competition Review, page 8, available at www.fca.org.uk/static/documents/feedback-statements/fs15-02.pdf

³⁹ FSMA s.73(1)(d)

competition duty together mean we will have regard to the impact of financial regulation on competition, particularly with respect to barriers to entry and innovation.⁴⁰

Market studies procedures

The process we will follow for doing market studies

- 4.4** A wide range of respondents were keen to know more about the process. They wanted to know how it would compare both to the approach to thematic reviews and the approach of the UK competition authorities with similar powers, as well as how to contribute to market studies. Responses urged us to make sure that we use and validate evidence appropriately to make our conclusions. One respondent asked whether the outputs would be final or drafts for consultation.

Our response

Since consulting on our draft S1K guidance, we have published final guidance⁴¹ on market studies and market investigation references under FSMA and EA02. Our processes will generally be similar to the approach adopted previously by the OFT and now by the Competition and Markets Authority (CMA) to market studies.

There are some differences between market studies under our FSMA competition objective, and studies we can undertake under EA02 from 1 April 2015. These include, for example, the requirement introduced by the Enterprise and Regulatory Reform Act 2013 to issue a market study notice, the statutory time limits for EA02 market studies, and the extent of formal information-gathering powers. As our guide states, we will engage with relevant stakeholders during this process and if we propose remedies that require formal consultation, such as changes to our rules, we may consult on these at the same time as our final report is published.

⁴⁰ For example, we worked with the PRA to implement changes designed to reduce barriers to entry in the banking sector (more information available at www.bankofengland.co.uk/pradocuments/publications/reports/2014/barriers2014.pdf). Further, as part of Project Innovate, we have recognised the critical contribution that innovation can have on competition by establishing an Innovation Hub. The Innovation Hub is dedicated to supporting innovation among new market entrants and existing market participants.

⁴¹ *FG 15-09 market studies and market investigation references*, 15 July 2015, www.fca.org.uk/news/fg15-09-market-studies-and-market-investigation-references

Actions following market studies

The measures we can take when intervening to promote effective competition

- 4.5** Some respondents questioned whether we have the power to implement behavioural or structural measures as part of our competition remit, and particularly whether we can require a firm to divest itself of assets or businesses. It was suggested that our ability to request that the OFT (now CMA) examine a market has a bearing on this, or that the powers of the competition authorities in this area implies some form of restriction on how we can exercise our powers. Other respondents asked us how we would go about choosing the most pro-competitive measure.

Our response

We can require behavioural and structural measures at the end of a market study. This includes, for example, requiring a firm to divest assets or a part of its business.

We can also refer a market to the CMA for investigation, rather than request it to consider investigating a market. The CMA has its own power to require divestments or other structural remedies from firms at the end of its market investigation.

Identifying a set of feasible solutions to any particular problem is essential so that we can assess which is most likely to advance effective competition in the interest of consumers. The specific solutions we propose will depend on the particular circumstances. Where appropriate, we will discuss these considerations in consultation documents for any proposed new rules or policy, or rule changes.

Here, the fact that the competition authorities (previously the Competition Commission on a reference from the OFT, and now the CMA) have their own power to take such actions does not alter our view. Our actions would be in exercise of our powers under FSMA, which are clear and unambiguous. There is no requirement for us to interpret our powers by having regard to the statutory powers of others, which to some extent cover the same 'areas of concern'. Additionally, our ability to use our powers in this way is not affected by there being a power to make a reference to the CMA; that is an additional power and does not restrict our ability to pursue our competition remit.

If, however, we were to take such steps we would only do so where it is proportionate and after appropriate consultation.

Working with others

How we will work with competition authorities, regulators, government and consumer bodies to deliver our competition mandate

- 4.6** A number of respondents highlighted concerns about potential overlap between the responsibilities of bodies, particularly the CMA that replaced the OFT.

Our response

'Concurrency' has long been a feature of the UK competition landscape: bodies such as Ofgem and Ofcom have had powers concurrent with CMA in their respective sectors for over ten years. General information about how we will work with the CMA is given in our Memorandum of Understanding,⁴² which is being updated to reflect our concurrent competition powers.

We are part of the UK Competition Network, which allows us to collaborate with other members (the CMA, and other sector regulators) by, for example, sharing best practice and improving capabilities to promote competition for the benefit of consumers. Where there could be potential overlap in responsibilities, this network enables the best-placed organisation to lead on particular issues or investigate specific cases. Case allocation and how concurrency should work is decided by regulation.⁴³

The Banking Reform Act introduced a secondary competition objective for the PRA. When pursuing its primary prudential objectives, 'the PRA must so far as is reasonably possible act in a way which [...] facilitates effective competition [...]'.⁴⁴ The PRA's secondary competition objective should be seen as complementary to, rather than equivalent to, the Financial Conduct Authority's primary competition objective.⁴⁵ We consult with the PRA on the prudential implications of potential competition remedies.

We are also a member of the UK Regulators' Network⁴⁶ which is an initiative of the nine UK economic regulators, including the FCA. The three main objectives of the network are to improve the consistency of economic regulation across transport, energy, water communications, financial services and other regulated sectors, to deliver efficiency of economic regulation and to improve understanding of how independent economic regulation works in the interests of consumers, markets, investment and economic performance.

From 1 April 2015, as a concurrent regulator we are also a member of the European Competition Network (ECN). We have signed a statement acknowledging the principles in the Commission Notice on cooperation within the Network of Competition Authorities.

⁴² www.fca.org.uk/your-fca/documents/mou/mou-between-the-fca-and-cma

⁴³ The Competition Act 1998 (Concurrency) Regulations 2014 SI 2014 No. 536

⁴⁴ Financial Services (Banking Reform) Act 2013, Part 7, para 130 (1) 2H (1)

⁴⁵ *PRA Statement of strategy*, 10 March 2014. www.bankofengland.co.uk/pradocuments/supervision/stratstate.pdf

⁴⁶ The MoU between members of the UK Regulators' Network can be found at www.ukrn.org.uk/wp-content/uploads/2014/05/UKRN-Memorandum-of-Understanding.pdf

Super complaints

The importance of super-complaints in alerting us to competition issues

- 4.7 Some respondents asked us to make sure that we use suitable tests to assess the quality of evidence provided in competition investigations and super complaints.

Our response

The Government is responsible for deciding which bodies are qualified to bring super-complaints, and has decided to grant such status to the following four organisations: Which?, Consumer Council Northern Ireland, Citizens Advice and The Federation of Small Businesses (FSB). We have published guidance⁴⁷ on super complaints, which sets out our requirements for the quality of evidence these organisations must supply. Complainants must make a reasoned case for their complaint. We may also carry out wider enquiries to test the evidence provided and obtain further information to help us come to a view on whether to act further. We will decide how we do this on a case-by-case basis, and it may include gathering information from firms, business representatives, consumer organisations, government departments and/or other public bodies.

We have also been working with the four bodies that have been granted the power to submit to ensure effective engagement on any super complaints. All three of the consumer organisations are part of our network of consumer bodies. We meet regularly to discuss their issues, including issues which could lead to their submitting super complaints. We have also developed a closer working relationship with the FSB, which will continue, ensuring we are abreast of what matters to them and their members.

⁴⁷ FG13/1: *Guidance for designated Consumer Bodies on making a Super-Complaint under s234C*; FG13/2: *Guidance for Regulated Persons and The Financial Ombudsman Service on making a reference under s.234D*; FG13/1 and 13/2: *Summary of Feedback received*, 25 June 2013. www.fca.org.uk/news/fg13-01-designated-consumer-bodies

Annex 1

Useful publications and links

Publications

[FCA Competition Concurrency Guidance and Handbook amendments](#) (January 2015)

[The FCA Business Plan 2015-16](#) (March 2015)

[FCA Our strategy](#) (December 2014)

[FCA Data Bulletin: Issue 1](#) (October 2014)

[The FCA Data Strategy: An update one year on](#) (October 2014)

[The FCA Business Plan 2014-15](#) (March 2014)

[The FCA Risk Outlook 2014](#) (March 2014)

[The FCA Data Strategy](#) (September 2013)

[The FCA's approach to advancing its objectives](#) (July 2013)

[A Response to Journey to the FCA](#) (July 2013)

[Journey to the FCA](#) (October 2012)

FCA website areas

Thematic reviews

www.fca.org.uk/about/what/regulating/how-we-supervise-firms/thematic-reviews

Skilled person reviews

www.fca.org.uk/about/what/regulating/how-we-supervise-firms/reports-by-skilled-persons

Supervision

www.fca.org.uk/about/what/regulating/how-we-supervise-firms/our-approach-to-supervision

Promoting competition

www.fca.org.uk/about/what/promoting-competition

Enforcement warning notices

www.fca.org.uk/firms/being-regulated/enforcement/outcomes-notices

Memoranda of understanding

www.fca.org.uk/your-fca/list?ttypes=MoU+Domestic&ssearch=&year

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25 The North Colonnade Canary Wharf
London E14 5HS
Telephone: +44 (0)20 7066 1000
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