CMA call for views:
How regulators work together to protect consumers - review of the competition concurrency arrangements

https://www.gov.uk/government/news/cma-call-for-views-how-regulators-work-together-to-protect-consumers

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1180013/Concurrency_review_call_for_inputs__.pdf

Thank you, CMA

The Transparency Task Force is very concerned about the efficacy of the financial services regulatory framework, particularly in relation to the FCA's performance with regard to its statutory objective to provide 'an appropriate degree of consumer protection'.

We believe the evidence shows there is an urgent need for reform.

We are therefore very grateful to the CMA for the opportunity afforded to feed in to this important Call for Views, and we stand by ready to support the reformation agenda in any way that we can. In particular, we would like to suggest a meeting to discuss our input once you have had time to review it.

About the Transparency Task Force and our approach to the Review

The Transparency Task Force (TTF) is a Certified Social Enterprise with a mission to "promote ongoing reform of the financial sector so it serves society better".

We've developed and successfully executed ***"our strategy for driving change"***, which is"

"To bring together those with a sense of passion and purpose for the change we want to see; and those with the power and position to make change possible."

In particular, we're particularly pleased about:

- Our engagement with politicians, especially
    - Our running the secretariat to The All-Party Parliamentary Group on Personal Banking and Fairer Financial Services - an APPG we helped to initiate
    - Our successful campaigning that has led to three Parliamentary inquiries being opened - see here, here and here
- Our media presence, including the BBC Panorama programme in which we were featured very prominently and a BBC Radio 4 programme, the Transparency Detectives
- Our ongoing scrutiny and challenge of the Financial Conduct Authority (FCA); which we believe is failing to deliver on its consumer protection remit
- Our sub-brands, including The Rally for Better Financial Regulation and The International League of Ethical Financial Services Leaders
- Our role in the successful launch and ongoing success of the free-to-use public utility, Violation Tracker UK

Given our specialisation in financial services, it has made sense for us to focus our input on sharing views that relate to the FCA, the Payments Systems Regulator (PSR) and the Prudential Regulation Authority (PRA).

And of those three regulators we believe we have an unrivalled understanding of the shortcomings of the FCA, built on the first-hand experience our members have gained as a consequence of their interacting with the conduct regulator.

Prior to responding to the specific questions posed by the CMA we shall cover off highly relevant general points that will provide a useful context for the question-specific responses that follow.

The FCA is a 'problem child'.

As mentioned earlier, TTF is actively involved in the ongoing scrutiny and challenge of the FCA, an organisation that the evidence shows is failing to deliver on its consumer protection responsibilities. That evidence includes testimony about the FCA that has been put into the public domain by the APPG on Personal Banking and Fairer Financial Services (that TTF provides the secretariat for), as part of the output from its Call for Evidence about the FCA.

There is an abundance of troubling testimony about the FCA available here (note the page takes a while to open) and we urge the reader to take time to study at least some of it because it shows beyond any reasonable doubt that the FCA is failing to protect consumers.

The Data tells us there are serious, systemic problems

The data in Violation Tracker UK shows the financial services sector to be the most violating of all the industries in the UK (based on the amount of fines since 2010) and further analysis shows it to be highly recidivist, which not only points to the likelihood that some financial services firms consider fines for malpractice to be a 'cost of doing business' but also that the principal conduct regulator, the FCA, is ineffective at driving good conduct into the market.

Here are the fines imposed by the FCA, the PSR and the PRA.

Key Factors contributing to the serious, systemic problems

We believe there are three key factors contributing to the serious, systemic problems that manifest in what amounts to a mountain of malpractice in the financial services sector and regulatory sub-optimality:

1. The Revolving Door problem

There is the potential for actual and/or perceived conflicts of interest that can arise with movement of personnel between a regulator and the firms it regulates. The concern of course is the risk that individuals who move to a regulator from the financial sector might in some sense be endued with the culture of the sector which might be in conflict with what the regulator's conflict should be. A potential moral hazard in the other direction is that officials might be influenced in their approach to, for instance, intervention and their contact with regulated firms because of expectations of subsequently working in the financial sector.

Whilst there can be advantages to the regulators and the financial sector in having professional exchanges, the potential dangers and hazards require clear rules and guidelines governing the revolving door problem such as periods of gardening leave before taking up positions in the private sector, and whether the staff in question have had direct professional contact with the regulated firm they are working for whilst working at the regulator.

In short, if the regulator has too close and cosy a relationship with those it regulates there is bound to be an adverse impact - the revolving door problem leads people to be suspicious of the true agendas of those involved; are they loyal to delivering on their regulator's job

spec as best as possible, or do they have one eye on the possibility of a highly paid job in the City; or even an ongoing loyalty to a previous employer?

A detailed analysis of the revolving door problem and potential solutions is beyond the scope of our response, but we are happy to provide further detail if requested to do so, be that at a meeting or otherwise.

2. Conflicts of Interest

Whilst there may be conflicts of interest at the PRA and the SRA, they are very obvious at the FCA.

It is possible to consider the FCA's overall work in relation to its objectives (what it is seeking to achieve) and its functions (what it does to achieve its objectives).

The regulator now has four secondary/operational objectives:

- Consumer protection
- Promoting competition
- Market integrity
- Competitiveness and growth.

We would suggest that it engages in five principal functions:

- Policymaking
- Authorisations
- Supervision (conduct)
- Supervision (prudential)
- Enforcement.

It is clear that there are conflicts of interest at work here, between these objectives and functions.

Some examples:

- The reason prudential regulation was hived off to the PRA following the global financial crisis was the realisation that there's a tension between ensuring that consumers are protected from risk of firms becoming insolvent and protecting consumers from misconduct - which requires regulators to stop firms indulging in wrongdoing, even if doing so threatens their financial stability; so why are the FCA responsible for both of these conflicting functions for around 97% of the firms in the sector i.e. all those not deemed to be systemically important?

- It could be argued that the FCA is at risk of policymaking in an inappropriately mild manner because they are also responsible for authorising, supervising and enforcing against the policies they make; so why would they create a challenging environment for themselves through ambitious policymaking, regardless of how great the need for ambition? If an organisation is responsible for both setting rules and upholding them, would it not tend to make its own life easy by setting lax or ambiguous rules?

- The FCA's authorisation and supervision of firms might lead it to be reluctant to enforce against them, when if doing so highlights that those firms should never have been authorised in the first place or should have been picked up by supervision years previously.

- Going after a firm for misconduct and trying to secure consumer redress very often results in the discovery of the fact that the firm has insufficient resources to compensate those consumers, thereby suggesting that it might not have been capable of meeting the appropriate resources tests in the FCA's threshold conditions.

Conflicts of interest should be managed strictly, and prevented as far as possible. The FCA's job is to regulate and that should by default mean it is protecting the consumer first and foremost, but its other objectives create tensions within it.

We are happy to provide further information on conflicts of interest, if wanted.

3. Regulatory Capture

Regulatory Capture is a well-established concept. It occurs when, for example, a regulator serves the commercial interests of the industry it regulates, as a consequence of the industry having successfully lobbied the regulator, to the point that the regulator fails to carry out its legitimate duties effectively.

Whilst in extreme circumstances regulatory capture may manifest in the form of corruption, we think that is rare - we do not believe our regulatory framework is riddled with corruption.

But we do believe it is riddled with a lack of independent thinking from the sector it regulates; we can think of that as cognitive capture. It would be impossible to overstate the importance, value and rarity of true intellectual independence in this arena.

A good regulator would be mindful of the possibility of regulatory capture, and put in place measures to proactively seek to observe it and take action if it arises - but the FCA seems not to be and that's a 'red flag' for us. We share the thought based upon what we have observed - for example the CEO of the FCA dismissing the notion of regulatory capture out of hand on at least two occasions - at a TTF event a few years ago, and also at this year's FCA Annual

Public Meeting. Alarm bells should ring whenever a regulator appears nonchalant, even casual about the risk of regulatory capture.

Here are some examples of regulatory capture; all of which are serious as they are leading to significant consumer detriment:

- The evidence suggests the financial sector is very reluctant to accept a Duty of Care and has lobbied the FCA very effectively and successfully to water down reforms in that direction, resulting in the far-less-potent Consumer Duty that we now have.
- Proposals for reform relating to achieving greater transparency on costs and charges in the Retail Foreign Exchange sector were scuppered at the final meeting of a series of meetings. Until that final meeting there had been support for the reforms by the FCA, but the influence of the sector's trade body prevented the FCA moving forward with reforms that would have led to improved outcomes for consumers.
- The FCA failed to comply with John Swift KC's decision in his review of the mis-selling of Interest Rate Hedging Products, that the FCA should enable redress for SME victims that suffered as a result of misconduct.

There are numerous other examples of the FCA failing to avoid being captured by the powerful lobbying forces that seek to prevent it doing what it should do.

Regulatory capture is a problem the severity of which cannot be underestimated, much less ignored. Its effect is to render the regulatory and supervisory exercise a nullity, or worse. It is a problem the existence of which, and the scholarship it has generated, dates back to the work of Charles Francis Adams Jnr who, writing in the 1860s, observed the capture of the railroad commissions in the United States. It is a phenomenon which is insidious, and takes many forms - some more subtle than others.

For example, capture can be evidenced in forms such as ideational and ideological capture; cognitive capture. So, for example, a supervisor of banks who takes the view that the strong, well-capitalised and highly profitable banks are the best assurance against financial crises, may be inclined to favour consolidation in the industry, to the exclusion of the competitive advantages - and by implication - advantages for consumer choice, and consumer protection, of less consolidation.

Such an approach, while not corrupt, nonetheless may result in a diminution of the public good and as has been seen in Australia, where the Australian Productivity Commission, in its 2018 report stated that Australia's banking industry had become a 'cosy, four-bank oligopoly' in which consumers were denied choice, and because of which productivity gains in the Australian economy had not resulted in any real wage increases for a period of 15 years.

Of course, one of the consequences of a regulator that has been captured is that it will fail to enforce quickly and robustly when an entity it regulates is in breach; and one of the consequences of that is that it will fail to capitalise on one of the most powerful weapons in its armoury - the power of deterrent.

How can a regulator that has a reputation for failing to regulate, and in particular a reputation for failing to enforce swiftly and robustly, truly be a regulator?

Again, we are happy to provide further information on the problem of regulatory capture, if wanted.

Some initial thoughts on Regulatory Concurrency

The pattern we observe is that there is a tendency for the CMA to under-utilise its concurrency powers, and for the sector regulators to do the same. This is not a recent phenomenon - we believe it can be traced back to the genesis of concurrency.

A good example of this relates to what happened in the payments service space, before before the PSR existed:

- The predecessor to the CMA, the Office of Fair Trading (OFT)) had been very focused on the sub-optimal behaviour of the payments sector. But since the concurrency regime has been brought in, the CMA has been significantly less active in this space. A specific example is where the OFT closed the investigation into the very important and much-needed Visa/Mastercard payments cards case, on the basis that the PSR was coming into existence. But the PSR has failed to continue the good work that had been done by the OFT.

Why has that happened? Is it because:

- The PSR has been influenced by the constant bombardment of industry lobbyists?
- The PSR's leadership Team is lacking in strength and determination to mandate for much-needed change?
- Are factors connected to the revolving door problem, conflicts of interest and regulatory capture at work here?
- Are there political sensitivities, whereby the CMA is not not wanting to be seen to be instructing a sector regulator that "you need to be doing a much better job"?
- Is the PSR therefore somehow complicit in the problem, as if it is resigned to the idea that the sector regulators are under-regulating, but they have somehow become comfortable with that state of affairs

It must be stressed that if there is now fresh, dynamic and determined thought leadership in the CMA to no longer tolerate this state of affairs, and that this Call for Views is evidence of that, we would be most pleased as it would mean the problem has been acknowledged by the CMA and the problem is now being managed out.

It would be excellent if the CMA became better at calling out the sector regulators when they perform badly; and it would also be excellent if the sector regulators admitted the problem themselves, because

Through their concurrency powers, sector regulators can refer an industry to the CMA, but they seem reluctant to do so. As has been indicated elsewhere, perhaps the issue is that the optics might suggest that the sector regulator is failing to do its job; so why would it do that if it was not being compelled to?

Nevertheless, the need for the CMA to get more involved is certainly there, and in some cases the need is huge. For example, we believe there is an urgent need for the PSR to refer the payments sector to the CMA.

Concerns about optics, where the CMA is reluctant to appear to be indicating it does not have confidence in a sector regulator, and sector regulators fearing how it would look if they referred the sector they are responsible for is resulting in an unhealthy underlap.

Again, we are happy to provide further information on the problem of regulatory capture, if wanted.

Having shared our general concerns about the revolving door problem, conflicts of interest and regulatory capture and having indicated that they are a root cause of much of the sub-optimality in much of the regulatory framework, and having shared our initial thoughts on the problems in regulatory concurrency we will now focus on the specific questions posed.

Concurrency as part of sector regulation

Question 1: Have the concurrent Competition Act 1998 enforcement powers proven to be effective tools to remedy specific cases of anti-competitive harms in the regulated sectors? As part of this issue, how do sector regulators evaluate whether competition law enforcement would be a more appropriate course than either: (i) enforcing an existing *ex ante* rule (ii) setting a new *ex ante* rule, and are the choices that sector regulators make effective?

We believe that the competition powers have not been made good use of, and where they have been they have been used inappropriately slowly. The underlying trend is that the sector regulators tend to want to use their enforcement powers and not the competition powers that are available to them - there is a real reluctance for them to do so, even when they could use their competition powers from the offset of an issue, to great effect. The sector regulators behave as if there is a high hurdle for them to use their competition powers, when there is not.

An example of what should be done comes from the payment sector - it relates to the 'access to cash' issue, where one of the first issues that the OFT addressed under the Competition Act 1998 was in relation to the anti-competitive agreements between the ATM operators. The PSR was completely dismissive of using its competition powers to deal with the issue - they just used their enforcement powers.

Question 2: Does the ability for sector regulators to conduct market studies under the Enterprise Act 2002 help them achieve their objectives?

It would do if they used such powers, but they tend not to. This happens not for reasons of the 'optics' as mentioned earlier, because market studies are carried out largely internally.

The problem is that they just tend not to use their powers.

Question 3: Does the ability for sector regulators to refer markets to the CMA for a market investigation help them achieve their objectives?

It's essentially the same answer to the prior question above - they should do, but they do not. The sector regulator is just too close to the industry they regulate - proximity is problematic.

Question 4: Sector regulators also carry out market reviews under sectoral legislation. Does concurrency have an impact on how sector regulators carry out these reviews? For example, does it affect the extent to which competition issues are a focus in these reviews?

The sector regulators have used sectoral powers rather than concurrent powers to do market reviews. As a consequence they are only a shadow of what they could have been had concurrency powers been used. The review would be far more stringent, with far more rigorous analysis; it would be far more comprehensive and ultimately far more meaningful as a basis for reform.

Question 5: Does concurrency have an impact on how sector regulators carry out their wider regulatory functions, particularly in terms of the promotion of competition in the regulated sectors?

Promotion of competition falls into the concurrency regime, so it's difficult to say - this is essentially what the concurrency regime is for.

The sector regulators' promotion of competition is not always aligned to concurrency - the competition powers should be the 'gold standard' and they need to be held to account.

Question 6: What impact, if any, does maintaining the skills and expertise to exercise the concurrent powers have in terms of costs to sector regulators?

There are two sets of skills and expertise - industry expertise and regulatory expertise.

Whilst the CMA is phenomenally good at getting up to speed on a new sector, e.g. because of a merger it is looking into in an industry in which it had no prior knowledge, and they can always recruit in industry expertise if they need to.

In contrast, the PSR has had such high turnover of staff that they are lacking in both industry and regulatory expertise.

But the concurrency regime itself is not really a factor in this regard.

Concurrency within the competition regime

Question 7: Are existing mechanisms to coordinate between the CMA and sector regulators sufficient to ensure consistent outcomes and coherence in the competition regime?

There is ample scope to improve the levels of coordination, collaboration and cooperation. The mechanisms are in place, but they are insufficiently utilised. It would be valuable if the CMA were to second staff into the sector regulators; doing so is likely to lead to an increase in the performance of the sector regulators because of the inevitable scrutiny and accountability that would follow on quite naturally.

Question 8: To what extent does the cooperation between the CMA and the sector regulators that results from the concurrency arrangements give rise to

(i) more effective competition law enforcement; and (ii) benefits that extend beyond more effective competition law enforcement?

We believe there are small benefits on both of those fronts, but they could be significantly increased and improved if the concurrency arrangements were used properly.

Question 9: To what extent does concurrency enable the leveraging of the different expertise and experience of the CMA and sector regulators in competition law enforcement?

This is not happening sufficiently enough; the UK Regulators Network has significant scope to improve its effectiveness as a means to leverage the different expertise.

Question 10: To what extent does concurrency improve overall deterrence for breaching competition law both (i) across the economy and (ii) within the regulated sectors specifically?

It doesn't - it has the opposite effect, by creating an unhelpful underlap as explained previously.

Question 11: Does concurrency have an impact on the overall number of Competition Act 1998 investigations, market studies and/or market investigation references, compared to if these powers were reserved solely to the CMA?

No, there are fewer as a result of concurrency.

Question 12: To what extent does the sharing of concurrent powers result in efficiencies or inefficiencies in the use of public resources across the competition regime? For instance, would the resources currently employed across regulators for the purposes of concurrency be used more or less effectively if concentrated in a single body?

In principle, it should create efficiencies but those efficiencies are not being harnessed.

Question 13: What impact, if any, does having multiple enforcers of competition law have on the costs associated with ensuring compliance with competition law from the perspective of businesses?

The sector regulator and the CMA do not look at the same issues at the same time - this is a fundamental principle of the concurrency regimes. There are therefore no significant cost implications.

Question 14: What benefits does the ability for sector regulators to conduct market studies and refer markets to the CMA for market investigations have for the operation of the markets regime? Are there any downsides in the sector regulators having concurrent powers to conduct market studies and make market investigation references?

There would be significant benefits but they are under-utilised. There is a significant downside, in that if concurrency didn't exist the CMA would naturally fill the void caused by the underlap.

Improvements to concurrency

In addition to reviewing the concurrency arrangements, we would also like to use this review to consider possible improvements to concurrency. To the extent these issues have not been

addressed in answers to previous question, we would be interested in responses to the following questions:

Question 15: Are there improvements which could be made to how the sector regulators exercise their concurrent powers?

Yes, any concerns about the 'stigma' or optics that may be discouraging the use of the powers should be proactively identified and removed.

Question 16: Are there improvements which could be made to the framework in which the sector regulators exercise their concurrent powers eg resourcing or funding for the concurrent functions, or the scope of the concurrent jurisdictions?

There should be more transparency in how the framework is used ''sunlight is the best disinfectant" comes to mind.

Question 17: Are there improvements which could be made to the way in which the CMA exercises its leadership role in the concurrency arrangements, including, for instance, its preparation of the annual concurrency report?

The CMA should take a more dominant leadership role, and ensure that what should happen does happen.

Question 18: Are there improvements which could be made to the arrangements for cooperation (including both those arrangements with a statutory basis and those set out in guidance and the memorandums of understanding)?

The Memoranda of Understanding should be reviewed, looking for vagueness, risk of underlap, a lack of compulsion to act and the gap between the regulators to become a black hole.

Question 19: Are there improvements which could be made to the arrangements for multilateral cooperation, particularly through the UKCN?

Yes, the UK Competition Network could and should play an important part in driving through the changes that are needed.

Other issues

We recognise that stakeholders may have different perspectives on the objectives of the concurrency arrangements, including the metrics which should be used to measure

performance against these objectives. We would welcome feedback from stakeholders on the overall framework for the CMA's review.

Question 20: Are there other issues which the CMA has not identified and should consider when assessing the effectiveness of concurrency? If so, please explain further.

It would be valuable if the CMA were to commission an additional piece of work, to explore the 3 issues we are particularly concerned about within the financial services regulatory framework:

- The revolving door problem
- Conflicts of interest
- Regulatory capture, particularly as it relates to the lack of intellectual independence i.e. cognitive capture

Suggested next steps

As mentioned earlier, we suggest a meeting to discuss our input.

If you would like to discuss any of the ideas proposed in this document, please contact Andy Agathangelou, Founder of Transparency Task Force, at this address: andy.agathangelou@transparencytaskforce.org