

THE RELATIONSHIP BETWEEN COMPETITION LAW AND SECTOR- SPECIFIC REGULATION IN THE FINANCIAL SERVICES SECTOR

COMPETITION POLICY IN
FINANCIAL MARKETS
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COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

STRUCTURE OF PRESENTATION

- ◉ INTRODUCTION TO COMPETITION LAW AND POLICY
- ◉ OVERVIEW OF THE FCA'S COMPETITION REMIT
- ◉ THE FCA'S POWERS
- ◉ THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ There are many systems of competition law in the world today - more than 130
- ◉ Competition law applies equally to the goods and the services sectors
- ◉ There have been many competition law cases in the financial services sector, for example
 - Bank and insurance cartels
 - Exclusion from payment systems
 - MIFs, LIBOR, Forex

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ Why competition policy? Competition can be expected to lead to
 - Lower prices
 - Better terms and conditions
 - Better products/innovation
 - Efficiency
 - Choice
- ◉ These benefits appear to be absent when markets are monopolised, cartelised - or oligopolised!

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ Most competition authorities today are concerned with behaviour that is detrimental to *consumer welfare* (as opposed, for example, to *total welfare*)
- ◉ The FCA's competition objective is to promote 'effective competition in the interests of consumers' in certain financial markets (section 1E FSMA 2000)

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INTRODUCTION TO COMPETITION LAW AND POLICY

- Competition law (as opposed to competition policy generally) is mainly concerned with:
 - Agreements that prevent, restrict or distort competition
 - Abusive behaviour by dominant firms
 - Mergers that will be harmful to competition
- In the UK the competition authorities also have powers to review markets to determine whether they are working well

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INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ Competition authorities also (increasingly) act as ‘advocates’ for competition, for example advising Governments about the anti-competitive effect of policies, legislation, regulation etc.

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INTRODUCTION TO COMPETITION LAW AND POLICY

- ◎ The main provisions of competition law are:-
 - Article 101 TFEU and the Chapter I prohibition of the Competition Act 1998: control of anti-competitive agreements
 - Article 102 TFEU and the Chapter II prohibition: control of the abuse of dominance
 - Part 4 of the Enterprise Act 2002: market studies and investigations
 - The EU Merger Regulation and Part 3 of the Enterprise Act: control of mergers

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INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ The European Commission enforces Articles 101 and 102 TFEU and the EUMR
- ◉ The CMA (and concurrent regulators: below) can also enforce Articles 101 and 102 TFEU and the Chapter I and II prohibitions
- ◉ The CMA investigates markets and mergers
- ◉ In some cases the CMA conducts an ‘in-depth investigation’ in the case of markets and mergers (‘Phase 2’)

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INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ From 1 April 2014 the OFT and CC ceased to exist and were replaced by the Competition and Markets Authority as a unitary authority
- ◉ The decisions of the CMA can be appealed to the Competition Appeal Tribunal
- ◉ The CMA can also be judicially reviewed by the High Court

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INTRODUCTION TO COMPETITION LAW AND POLICY

- ◉ Note also the ‘concurrency’ regime, which enables sectoral regulators to apply the competition rules (but not to mergers)
 - OFCOM, OFGEM, NIAER, ORR, CAA, OFWAT, Monitor
 - From 1 April 2015 the FCA and the Payment Systems Regulator (Financial Services (Banking Reform) Act 2013) became concurrent authorities
 - The FCA has published Guidance on Competition Act cases and markets studies

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ Section 1B of the Financial Services and Markets Act 2000 ('FSMA') establishes the FCA's 'general duties'
- ◉ Section 1B places a **duty** on the FCA, when discharging its general functions, to act in a way which:-
 - 'is compatible with its strategic objective'
 - 'advances one or more of its operational objectives'

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ⦿ The FCA's strategic objective is:
 - 'ensuring that the relevant markets function well'
- ⦿ The relevant markets are defined in section 1F

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ⦿ The FCA's operational objectives are:-
 - 'The consumer protection objective' (section 1C)
 - 'The integrity objective' (section 1D)
 - 'The competition objective' (section 1E)

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ⦿ Section 1B(4) provides that the FCA has a duty, so far as is compatible with the first two operational objectives, to ‘discharge its general functions in a way which promotes effective competition in the interests of consumers’
- ⦿ Combined, these provisions undoubtedly strengthen the FCA's competition remit compared with that of the FSA, which did not have a competition objective or duty

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ The competition duty means that, when taking action, for example, in relation to the consumer protection objective, the FCA would need to take into account its duty to promote 'effective competition in the interests of consumers'
- ◉ The FCA's has said that as a matter of policy it will normally choose the most pro-competitive measure open to it that is compatible with its duties as a whole

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ Note that the section 1B(4) duty applies when discharging the FCA's **general functions**
- ◉ These are defined in section 1B(6) and include:-
 - The function of making rules
 - The function of preparing and issuing codes
 - The function of giving guidance
 - The function of determining general policy and principles

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ Note that the competition objective enables the FCA to **promote**, not simply to **protect**, effective competition
- ◉ ‘[W]e are on a journey which will end with ‘promoting competition in the interests of consumers’ written into the DNA of the organisation alongside consumer protection and market integrity’ (Christopher Woolard, 9 September 2013)

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OVERVIEW OF THE FCA'S COMPETITION REMIT

⦿ Section 1E sets out the competition objective:-

- 'The competition objective is: **promoting effective competition in the interests of consumers** in the markets for-
 - (a) regulated financial services, or
 - (b) services provided by a recognised investment exchange ...'

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OVERVIEW OF THE FCA'S COMPETITION REMIT

⦿ Section 1E(2) provides that, in considering whether there is effective competition in a market, the FCA may take into account various matters, including:-

- (a) the needs of different consumers who use or may use those services ...
- (b) ease of access
- (c) ease of switching
- (d) entry barriers
- (e) innovation

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- What is **effective** competition?
 - Effective competition is not a theoretical concept (compare 'perfect' competition, 'workable' competition, 'monopolistic' competition)
 - Effective competition connotes the idea that firms should be subject to effective competition constraints
 - The term is often found in legislation, soft-law and jurisprudence

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- What is **effective** competition?
 - However the terms 'competition' and 'effective competition' are not defined in the legislation
 - Effective competition is not simply a matter of numbers
 - A market might be more effectively competitive with three players than with six
 - Effective competition looks at the competitive constraints arising from **as-efficient** competitors
 - And note that the 'effective' competition must be in the interests of consumers

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ Note also that the FCA's functions include the giving of guidance (section 1B(6)(c))
- ◉ When giving guidance the FCA must include guidance on how it intends to advance its operational objectives (section 1K)
- ◉ The FCA has adopted guidance both on Competition Act investigations and on market studies and market investigations

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ⦿ Note that the FCA may receive 'super-complaints' from a 'designated consumer body' under section 234C FSMA that features of a market are damaging the interests of consumers
- ⦿ The FCA must state within 90 days of the receipt of a super-complaint how it intends to proceed with the matter

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ The FCA has published Guidance for Designated Consumer Bodies on Making a Super-Complaint (FG13/1)
- ◉ Four bodies have been designated
 - The National Association of Citizen Advice Bureaux
 - The Consumers' Association
 - The General Council for Northern Ireland
 - The National Federation of Self-Employed and Small Businesses

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OVERVIEW OF THE FCA'S COMPETITION REMIT

- ◉ Various consequences may follow from a super-complaint (see paragraph 1.30 of FG13/1)
 - Regulatory action
 - Initiating a consumer redress scheme
 - Initiating a review of FCA rules or guidance
 - Referring the complaint to another agency
 - Initiating further assessment
 - No action
 - Dismissing complaint as unfounded or frivolous

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THE FCA'S POWERS

- ◉ Section 137A FSMA provides the FCA with the **general rule-making power** for authorised persons; rules can be used to further the competition objective
- ◉ These powers are extensive
- ◉ Note in particular the power of the FCA to make **product intervention rules** (section 137D FSMA), which could, for example, lead to the prohibition a certain kind of product (eg point-of-sale PPI)

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

THE FCA'S POWERS

- ⦿ The FCA has the power to provide **guidance**
- ⦿ The FCA has firm-specific powers that can be used to advance the competition objective:
 - It can exercise **powers in relation to a firm's permission** on its own initiative (own-initiative variation of permission, or 'OIVoP')
 - It can also **impose or vary requirements on an authorised firm** (own-initiative requirements on a person, or 'OIReP')

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THE FCA'S POWERS

- ◉ The OIVoP and OIReP powers could be used, for example, to impose structural remedies
- ◉ Also the FCA could use its regulatory powers to achieve the same effect as intervention under competition law, subject to the rule that domestic law cannot apply more strictly to an agreement than EU law where that agreement has an effect on inter-state trade (below)

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

- ◉ Note the Competition Act 1998 (Concurrency) Regulations 2014
- ◉ And the FCA's Guidance documents
- ◉ There is a Memorandum of Understanding between the CMA and the FCA
- ◉ The FCA is a member of the European Competition Network and the UK Competition Network

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Articles 101 and 102;

Chapter I and II prohibitions

- ◉ These provisions are enforced by the European Commission and the CMA
- ◉ And, since 1 April 2015, by the FCA as a concurrent regulator

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Articles 101 and 102;

Chapter I and II prohibitions

- ◉ Note that, as a concurrent regulator, the FCA has the power to apply the competition rules to the financial services sector generally (that is to say its jurisdiction will be wider than under FSMA)
- ◉ Note the ‘**primacy**’ of the competition rules over FSMA (new section 234K) in some cases

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Articles 101 and 102;

Chapter I and II prohibitions

- ◉ Query: can the FCA use its FSMA powers to prohibit conduct that infringes Articles 101 and 102 or the Chapter I and II prohibitions?
- ◉ On this point note the 'EU complication' that arises in relation to agreements from Regulation 1/2003 (see below)

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Market studies and market investigation references

- ◉ The FCA conducts market studies, and may make a market investigation reference to the CMA under Part 4 of the Enterprise Act

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Market studies and market investigation references

- ◉ At the end of an market investigation reference the CMA has a wide variety of powers, including the ordering of divestiture (see *British Airports Authority*, *Aggregates* and *Private healthcare*)

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Mergers

- ◉ The European Commission conducts merger investigations in relation to 'large' mergers
- ◉ Mergers that have an 'EU dimension' fall exclusively within the Commission's jurisdiction (Article 21 EUMR), although a Member State can request a reference back on competition grounds (Article 9: rarely given)

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Mergers

- ◉ A Member State may also request jurisdiction to review a merger having an EU dimension where it has a 'legitimate interest' in doing so, for example prudential supervision (Article 21(4) EUMR)

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Mergers

- ◉ The CMA reviews mergers below the EUMR thresholds but above the UK thresholds
- ◉ The FCA has no specific role in relation to mergers under the EUMR or the Enterprise Act (nor do the concurrent regulators)
- ◉ However there is nothing to prevent the CMA consulting with the FCA

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

Mergers

- ◉ Query: can the FCA use its FSMA powers to prohibit (or require the modification of) a merger that falls below the thresholds of the EUMR?
- ◉ Probably no: by analogy to the position under the EUMR, and also as a result of the EU Acquisitions Directive (limits the role of authorities in reviewing changes of control)

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

An EU complication!

- ◉ Article 3 of Regulation 1/2003 discusses the relationship between EU and domestic competition law
- ◉ Where an agreement has an effect on trade between Member States, it is not possible to apply stricter standards under domestic competition law than obtain under Article 101 TFEU

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THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

An EU complication!

- ◉ However, Article 3(3) of Regulation 1/2003 provides that it is possible to apply stricter national laws to agreements which 'predominantly pursue an objective different from that pursued by Articles 101 and 102'
- ◉ Article 3(2) of Regulation 1/2003 provides that it is possible to apply stricter national law to unilateral behaviour

COMPETITION LAW AND POLICY IN THE FINANCIAL SERVICES SECTOR

THE FCA'S INSTITUTIONAL RELATIONSHIPS IN COMPETITION LAW MATTERS

An EU complication!

- ◉ Note that the FCA is bound by EU jurisprudence and precedent as a result of the 'duty of consistency' in section 60 Competition Act when it applies EU law
- ◉ It would not be bound by EU 'soft-law' (eg the de minimis Notice: see *Expedia*, 2012)

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THANK YOU FOR YOUR ATTENTION