

Market reviews, market studies and market investigation references

**A guide to the PSR's powers and procedures
(Markets Guidance)**



Contents

1 Introduction	2
2 Our powers to carry out market reviews and market studies	4
3 How we carry out FSBRA market reviews	9
4 How we carry out EA02 market studies	16
5 Market investigation references and undertakings in lieu of a reference.....	19
6 Information gathering, use and disclosure in market reviews and market studies	22

1

Introduction

- Market reviews and market studies are the principal ways in which we investigate the market for payment systems or the markets for services provided by payment systems.
- We may carry out market reviews under the Financial Services (Banking Reform) Act 2013 (FSBRA) or we may carry out market studies under our concurrent competition law functions and the provisions of the Enterprise Act 2002 (EA02).
- We have a range of powers which we can use if we need to take action to advance our statutory objectives.

- 1.1 Market reviews and market studies are the principal ways in which we 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 (i.e. those who use, or are likely to use, services provided by payment systems). They are in line with our competition, innovation and service-user objectives (see paragraph 2.2). If we find that the markets we review or study could be made to work better, we have a range of powers to take appropriate action.
- 1.2 As from 1 April 2014, under the concurrency provisions in FSBRA relating to the EA02,¹ we have competition law powers under the EA02 to carry out market studies and make market investigation references (MIRs) which relate to participation in payment systems to the Competition and Markets Authority (CMA) for detailed investigation.² These competition law powers may also be exercised by the CMA, whose powers extend to all sectors of the UK economy. Accordingly, we are a 'concurrent regulator' having concurrent competition law functions (concurrent functions).
- 1.3 We can also use our information-gathering power under section 81 FSBRA to carry out market reviews.
- 1.4 This document describes:
- our powers to carry out market reviews under FSBRA or market studies under our concurrent functions and the provisions of EA02, and explains how we choose which powers to use (section 2)

¹ Section 59 FSBRA

² As from 1 April 2015, we also have powers to enforce the Competition Act 1998.

- how we carry out market reviews under FSBRA and the outcomes that may follow (section 3)
- how we carry out market studies under our concurrent functions and the provisions of EA02 and the outcomes that may follow (section 4)
- how we will make MIRs or accept undertakings in lieu of making an MIR (section 5)
- our approach to disclosure and use of information in market reviews and market studies (section 6)

2

Our powers to carry out market reviews and market studies

- We may carry out market reviews under FSBRA or market studies under our concurrent functions and the provisions of EA02.
- We have a broad choice as to which tool to use.
- We will choose which markets to review/study based on several factors, but broadly we aim to have the greatest impact with our limited resources.
- We will think carefully about what it is that might be preventing the market from working well for service users, and what we will need to do to investigate this, before launching a market review/study.

The PSR's powers to carry out market reviews and studies

- 2.1 We may conduct market reviews using our information-gathering power under section 81 FSBRA or we may conduct market studies under our concurrent functions and the provisions of EA02.

FSBRA market reviews

- 2.2 Under FSBRA, the PSR has three statutory objectives:
- to promote effective competition in the market for payment systems and the markets for services provided by payment systems in the interests of service users ('the competition objective')³
 - to promote the development of, and innovation in, payment systems in the interests of service users ('the innovation objective')⁴
 - to ensure that payment systems are operated and developed in a way that takes account of, and promotes, the interests of service users ('the service-user objective')⁵

³ Section 50 FSBRA

⁴ Section 51 FSBRA

⁵ Section 52 FSBRA

2.3 We have a range of regulatory powers including:

- the power to give directions to participants in regulated payment systems, either generally or in relation to a specific participant or category of participant⁶
- the power to require operators of regulated payment systems, either generally or in relation to a specific operator or category of operator, to take certain steps in relation to the rules for the operation of a regulated payment system⁷
- the powers to require an operator or a direct member payment service provider (PSP) to grant access to a payment system, or to vary the fees, charges and terms and conditions of agreements relating to a payment system⁸
- the power to require a person who has an interest in the operator of a regulated payment system or an infrastructure provider to dispose of all or part of that interest⁹

2.4 Under FSBRA, we have various powers to gather information and to conduct investigations,¹⁰ and we can obtain information for the purposes of carrying out a market review using our information-gathering power under section 81 FSBRA (FSBRA market reviews). We can also use information we routinely receive from participants in regulated payment systems, or request within the framework of pursuing our objectives, to support our functions and to inform ourselves with a view to deciding whether or not to use our powers. We see FSBRA market reviews as one of our principal tools for advancing our competition, innovation and service-user objectives.

EA02 market studies

2.5 For the purpose of our concurrent functions¹¹ we have the function of keeping under review the market for payment systems, and the markets for services provided by payment systems,¹² and we may carry out market studies under the provisions of EA02 (EA02 market studies).¹³ We may do this when we need to:

- consider the extent to which a matter in relation to the participation in payment systems used to provide services in the United Kingdom has or may have effects adverse to the interests of consumers (including any person who uses, or is likely to use, services provided by payment systems in the course of a business carried on by that person)¹⁴
- assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects¹⁵

2.6 The concurrent function of keeping the market under review is to be carried out with a view to ensuring we have sufficient information to take informed decisions and to carry out our other functions effectively.¹⁶

6 Section 54 FSBRA

7 Section 55 FSBRA

8 Sections 56 and 57 FSBRA

9 Section 58 FSBRA

10 These are described in detail in paragraphs 25.1 to 29.4 of the PSR's *Powers and Procedures Guidance* (PPG), available at <https://www.psr.org.uk/powers-and-procedures-guidance>

11 That is, our functions under EA02 (section 59 FSBRA) and the Competition Act 1998 (section 61 FSBRA).

12 Section 64 FSBRA

13 Section 59 FSBRA

14 Section 130A EA02 and sections 59(4)(c) and 59(6)(a) FSBRA

15 Section 130A EA02

16 Section 64(2) FSBRA

FSBRA market review or EA02 market study?

- 2.7 At the outset of any review/study, we have an open mind as to whether a market is in fact working well for service users or not, and accordingly, we do not have a decided view as to whether we need to take action to make the market work better. Only once we have gathered evidence, analysed it and sought the views of interested parties can we form a view of what the outcome of a review/study should be.
- 2.8 We have a broad choice as to which procedure to follow. We have a broadly similar range of powers to take action available to us under both FSBRA and EA02 procedures. In particular, we may:
- make an MIR whether or not we have first conducted an EA02 market study, as long as the statutory test for making an MIR is met (see paragraph 5.1)
 - use our powers under FSBRA to take action in respect of participants in regulated payment systems (see paragraphs 3.16 to 3.26) whether we have followed either a FSBRA or an EA02 process
- 2.9 Accordingly, we will decide on a case-by-case basis whether to pursue a FSBRA market review or an EA02 market study. In considering whether to conduct a FSBRA market review or an EA02 market study, we would take account of the aim(s) of the review/study. An EA02 market study can be used to consider the extent to which there are adverse effects on consumers and how these might be remedied. A FSBRA market review might have a similar aim, or might instead (or also) be focused on advancing our competition, innovation or service-user objectives in other ways (for example, by considering the extent to which there could be untapped potential for innovations or improvements in the experience of service users).
- 2.10 There are different procedural requirements and timetables for FSBRA market reviews and EA02 market studies (described in sections 3 and 4). One difference is that we have different sets of powers under FSBRA and EA02 to gather information (see section 6) and this may influence our choice of tool.

Choosing which markets to review or study

- 2.11 We identify markets for payment systems and the services they provide that appear not to be working well for service users and/or matters concerning those markets that may be impeding competition, using information from a range of sources, such as:
- own-initiative desk research or intelligence-gathering, including from previous market reviews/studies
 - our regulatory activities under FSBRA in respect of participants in regulated payment systems
 - internal papers and analyses
 - complaints, including super-complaints from bodies designated under section 68 FSBRA¹⁷
 - applications made under sections 56 and 57 FSBRA
 - general market intelligence
 - other regulators

¹⁷ We have produced guidance on how designated bodies can bring a super-complaint (*Super-Complaints Guidance*). See: <https://www.psr.org.uk/how-psr-regulates/complaints-and-disputes/super-complaints>.

2.12 We welcome information from industry participants, representative groups and the public about markets for payment systems and the services they provide that appear not to be working well or where there may be competition concerns. You can bring such concerns or complaints to our attention by contacting:

Payment Systems Regulator
25 The North Colonnade
Canary Wharf
London
E14 5HS

Email: PSRcomplaints@psr.org.uk

2.13 Based on the information we have about the market(s) identified, we may form an initial view of how well the market is working in the interests of service users. However, understanding properly the functioning of any market is complex, and we cannot study every market. We must therefore choose which markets or aspects of markets to review/study. We decide on a case-by-case basis whether to open a market review/study and will have regard to our Administrative Priority Framework.¹⁸ Under that framework, we might have regard to factors including, but not limited to:

- The prospects for and likely impact of any intervention in the market, having regard to such factors as market size and the number of participants and/or service users affected.
- The scope for the PSR to take effective action (taking into account, for example, domestic versus international issues, the impact of harmonising EU legislation and the PSR's regulatory perimeter).
- The prospects for intervention to have a wider impact (e.g. clear read-across to other markets).
- How the issue in question fits in with any upcoming regulatory developments or ongoing activity at a domestic, EU or wider international level. For example, are there other current competition investigations taking place that are considering the issue?
- Any expected change in regulation that will affect the relevant market behaviour.
- Whether the market has been subject to recent significant non-regulatory change that has not had sufficient time to bed in, but might have an important impact on the relevant issues, or whether market changes or forces are anticipated in the future that might serve to address any issues identified.
- How a market review/study would affect the PSR's current portfolio of work, including any resource implications.
- Whether the issue might be better addressed by another form of PSR action (such as enforcement, including under CA98, or FSBRA regulatory action), or by another authority (FCA/PRA/Bank of England/CMA/European Commission/other).
- The likelihood of a successful outcome (e.g. in terms of being able to take action to make the market work better for service users).

¹⁸ See: <https://www.psr.org.uk/administrative-priority-framework>

- 2.14 As part of the process of deciding whether or not to launch a market review/study, we may choose publicly to call for evidence and/or consult stakeholders.

The pre-launch stage

- 2.15 Before launching a market review/study, we consider what might be preventing the market working well for service users. We consider what information, data and analysis might indicate whether or not the market is working well, in order to shape our investigation and help us to decide what information to seek. We may consult third parties regarding the availability of such information. We may engage external parties on particular aspects of the market review/study. We produce an initial project plan and establish the resources we need. In some cases, it may be necessary to undertake some preliminary work to define the scope of our FSBRA market reviews (given that they may involve competition, innovation and/or service-user interest issues). We may do so through consultation on draft terms of reference, for example.
- 2.16 We decide whether to launch a FSBRA market review or an EA02 market study. In either case, we will consult the CMA¹⁹, and we will also consult with the FCA as appropriate.²⁰ We cannot launch an EA02 market study if the CMA or FCA has launched such a study into the same matter.²¹ The CMA and FCA are subject to reciprocal obligations.²² If the CMA or FCA has launched or is about to launch an EA02 market study, we will take this into account in deciding whether or not to launch a FSBRA market review. We will aim to avoid duplication, and may work jointly with the CMA or FCA on an EA02 market study.

¹⁹ In line with the general principle of cooperation set out in our Memorandum of Understanding (MoU) with the CMA, and our duty under section 60(1) FSBRA for EA02 market studies. [Note: Our website will be updated with the MoU agreed and adopted by the CMA and the PSR. See: <https://www.psr.org.uk/how-psr-regulates/memorandums-understanding>]

²⁰ Under section 60(4) FSBRA, we must consult with the FCA before exercising our concurrent functions under EA02.

²¹ Sections 60(2) and 60(5) FSBRA

²² Sections 60(1), 60(2), 60(4) and 60(5) FSBRA

3

How we carry out FSBRA market reviews

Overview

3.1 The following table illustrates the stages of a typical FSBRA market review following the pre-launch stage (which is described at paragraphs 2.15 and 2.16 above).

Phase	Detail
Launch	<ul style="list-style-type: none"> Announce publicly the intentions of the market review and the issues under consideration Indicate the scope of the matters on which views and evidence are sought Engage with relevant stakeholders, including, as appropriate, Operators, PSPs, trade bodies, service users, consumer bodies, government departments and other regulators
Research	<ul style="list-style-type: none"> Fully define the data requirements for the market review Collect and request data and information Carry out market research, business model analysis, interviews, roundtables and other research as appropriate
Analysis and Interim Report	<ul style="list-style-type: none"> Assess how well the market is working for service users and any evidence of issues/market failures Assess extent of any service-user/consumer detriment Publish interim report outlining analysis, preliminary conclusions and, where practicable and appropriate, proposed solutions for addressing any concerns identified
Report	<ul style="list-style-type: none"> Publish final report including analysis, conclusions and, where appropriate, the action we propose to take
Outcomes	<ul style="list-style-type: none"> Use existing powers and processes to develop and implement proposed actions (including, for example, making directions, publishing guidance and making proposals for enhanced industry action) If required, conduct formal consultation on proposed actions

Launch

- 3.2 We announce the launch of any market reviews we carry out under FSBRA on our website and via a regulatory information service. We will generally set out:
- The information-gathering powers which we may exercise in conducting the market review.
 - The scope of the market review (which may be through the publication of final terms of reference). The scope may include the questions we are seeking to answer or the hypotheses we are trying to test (such as ways in which the market might be made to work better for service users).
 - The period during which initial representations may be made to the PSR in relation to the review.
 - The timescales within which we expect to complete the review. This will usually be one year from launch to report, but may vary depending on the specific circumstances of the review.²³
- 3.3 In launching the review publicly, we invite all relevant participants in payment systems, trade bodies, service users (including consumers) and representative bodies, government departments and other regulators (UK and international) to provide us with information and data. In line with the PSR's general policy on responses to formal consultations, we will seek to publish views or submissions in full or in part (see section 6 regarding our treatment of information). Respondents should seek to limit claims for confidential treatment to the minimum necessary. If respondents include extensive tracts of confidential information in their submissions, we would ask that they submit non-confidential versions which they consent for us to publish. We will also not accept blanket claims of confidentiality, and will require respondents to identify specific information over which confidentiality is claimed, and to explain the basis for this claim.
- 3.4 For each market review, we will provide a clear point of contact for stakeholders.

Research

- 3.5 We gather information about the market to see how well it is working for service users. A market review may involve gathering specific information from a broad set of stakeholders (e.g. participants in payment systems, trade bodies, service users (including consumers) and representative bodies, government departments and other regulators (UK and international)). We will also use our own data, past reviews/studies, other papers and any previous analysis we have conducted, in order to limit the information-gathering burden on stakeholders.
- 3.6 We gather this information through questionnaires, desk research, surveys and working with other regulators. We may also meet with stakeholders to discuss issues raised by the review.
- 3.7 We may ask for information on an informal basis without using our statutory information-gathering power under section 81 FSBRA. We would typically expect regulated participants to assist us with such a request, in line with their duty of cooperation and disclosure under General Direction 1, thus: *'A participant must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of the PSR's statutory objectives and duties'*. We may also ask for information from organisations and individuals that we do not regulate.' Alternatively, we may use

²³ Unlike EA02 market studies, there are no statutory deadlines within which we must complete a FSBRA market review. See paragraph 4.4.

our power under section 81 FSBRA to formally require persons to provide us with information or documents (see paragraphs 6.2 to 6.5).²⁴

- 3.8 In order to reach well-evidenced decisions, we may need detailed information and data. We recognise that providing this can be onerous for the parties that supply it to us. Accordingly, before making requests for information and documents, we scope our requests carefully in light of the purpose for which the information is sought, the availability of relevant information from other sources, including information held by the PSR already, and the ease with which respondents can provide the information we need. The PSR as a whole aims to coordinate its various activities regarding data requests, in order to be proportionate and manage the burden on any given respondent, and this also applies to our market review activity. Section 6 describes how we must treat information we receive.
- 3.9 Where appropriate, we may also share data and coordinate with other authorities, such as the CMA, the FCA and the Prudential Regulation Authority (PRA), subject to complying with the provisions governing disclosure under FSBRA (as set out in section 6).

Analysis and interim report

- 3.10 We use the information and data we collect to examine how the market functions, and to assess whether the market is working well for service users. We consider the evidence and views we receive with reference to the issues identified. We investigate our initial views in the review, taking into account the feedback from stakeholders and information gathered during the review.
- 3.11 When assessing competition, we consider all the features of the market, including the competitive constraints that suppliers of payment systems or the services they provide face from current rivals, the ability of new suppliers to enter the market (and how this entry might be constrained by costs, applicable regulation and other factors), and the ability of service users (including consumers) to obtain, assess and act on information relevant to their usage decisions.
- 3.12 We will publish an interim report (other than in exceptional circumstances – for example, where we have decided not to proceed with the market review), presenting our analysis and preliminary conclusions and, where practicable and appropriate, include possible remedies to address any concerns identified. The timing and form of these interim reports and statements on possible remedies vary according to the needs of particular reviews.
- 3.13 We set a deadline for interested parties to make submissions on our interim report and any possible remedies, which will usually be a minimum of 15 days, depending on what is appropriate in a specific case. Again, in line with the PSR's general policy on responses to formal consultations, we will seek to publish views or submissions in full or in part and respondents should seek to limit claims for confidential treatment to the minimum necessary (see further paragraph 3.3 above). See also section 6 regarding our treatment of information.

Report

- 3.14 The duration of a market review depends on many factors, such as the scale and complexity of the market. However, we aim to complete a market review from launch to final report stage within approximately a year. Once complete, we publish a market review report, including:
- a description of the market(s) and issue(s) we considered

²⁴ The PSR's information-gathering and investigation powers are described in detail in paragraphs 25.1 to 29.4 of the PSR's *Powers and Procedures Guidance* (PPG), available at <https://www.psr.org.uk/powers-and-procedures-guidance>.

- the reasons for carrying out the review
- a description of the methodologies used to collect and analyse the data
- our analysis and, as appropriate, our responses to feedback received
- our conclusions on the issues considered

3.15 If appropriate, we will also publish our proposals for the action we will take to address any issues that we have identified.

Outcomes

3.16 We may conclude that no action is necessary following a market review. However, if we conclude that the market is not working well for service users, we may take any of the following action:

- General action, including (but not restricted to):
 - Directions and Requirements. This includes giving general directions under section 54 FSBRA, or imposing generally-imposed requirements under section 55 FSBRA.
 - Publishing general guidance. This covers guidance issued under section 96 FSBRA about the operation of FSBRA or specified parts of it, about any directions we have given, or requirements we have imposed, using our FSBRA powers, or guidance about any of the PSR's functions or any other matter about which it appears to the PSR to be desirable to give advice or information.
 - Proposing enhanced industry action. This refers to providing the payments industry an opportunity to develop measures that promote the interests of service users.
- Specific action, including giving specific directions or imposing specifically-imposed requirements, or taking enforcement action against compliance failures (where existing directions or requirements have not been complied with).²⁵
- Making an MIR to the CMA. The purpose of an MIR is typically to investigate markets where it appears that competition is adversely affected by the structure of a market, by the businesses operating in the market or by conduct of their customers or suppliers. We may also accept undertakings in lieu of making a reference (see section 5 for more detail).

3.17 Alternatively, we may decide to take no further action for the time being. This could be because our concerns are likely to be satisfied by upcoming legislative measures, action by the relevant participants or other circumstances. In such cases, we may continue to monitor the market in case our concerns are not addressed.

3.18 We may seek to implement a package of actions. For instance, we might make an MIR, but deal with a discrete issue identified in our market review if it can be addressed appropriately through use of our other tools.

3.19 We will have regard to the principles of proportionality in relation to the action we take. The nature of any action we take depends on the individual circumstances of each case, and could include:

²⁵ The PSR also has powers to take enforcement action against infringements of the Competition Act 1998 which might be identified in the course of its market review. The CMA has concurrent functions in this respect.

- Measures that affect how participants engage with service users – for example, determining the information to be provided to service users or the terms and conditions of agreements relating to payment systems.
- Market-opening measures to reduce barriers to entry and expansion.
- Measures to control outcomes.
- Structural measures where behavioural remedies (or other less intrusive options) would not adequately address our concerns (for example, the disposal of an interest in the operator of a payment system or an infrastructure provider) provided that these are proportionate measures.

3.20 The process involved in implementing regulatory actions will depend on the specific power we select to exercise.

General action

3.21 General action such as giving general directions, imposing generally-imposed requirements or publishing general guidance will usually entail a consultation exercise.²⁶ More information on the consultation process in such cases can be found in the PSR's *Powers and Procedures Guidance* (PPG).²⁷

3.22 We may also encourage self-regulation within the payments industry, e.g. implementing codes of conduct. Such measures aid our efforts in promoting the interests of service users. The aim is to establish a partnership with the payments industry where participants may be better placed to develop solutions that can be easily implemented and are tailored to our concerns.

Specific action

3.23 Specific action such as giving specific directions or imposing specifically-imposed requirements, on the other hand, may or may not entail a public consultation process. We will normally send the specific addressees a notice of a proposed direction or requirement and seek their representations. Where a proposed direction or requirement is likely to have wider implication or relevance beyond the specific addressees, we might decide to share the draft direction or requirement more widely and seek the views of other stakeholders. More information on the representation and consultation processes in the case of specific directions and specifically-imposed requirements can be found in the PPG.²⁸

3.24 In the case of proposed disposal requirements (under section 58 FBSRA), we will normally publish a draft of the disposal requirement and invite representation on it from all affected stakeholders, including stakeholders other than the affected operator/infrastructure provider and the person holding an interest (who will be sent a notice of the proposed disposal requirement). We would have previously engaged with the operator/infrastructure provider and the person holding an interest before we propose to exercise the relevant power.²⁹

²⁶ However, we are not required to conduct a public consultation on a draft direction or requirement if we consider that the delay involved would be prejudicial to the interests of service users.

²⁷ See paragraphs 5.1 to 5.5 of the PPG.

²⁸ See paragraphs 4.1 to 4.5 of the PPG.

²⁹ See paragraphs 16.1 to 16.5 of the PPG.

- 3.25 Additionally, we may also open investigations into the nature, conduct or state of business of any participant in a regulated payment system.³⁰ We may also open investigations into suspected compliance failures.³¹ If we take the view that a warning notice should be issued in relation to any compliance failure, we will recommend such action to the Enforcement Decisions Committee (EDC). More information on enforcement action (including EDC warning notices and decision notices) can be found in the PPG.³²
- 3.26 We also have the option to apply to the civil courts for injunctive relief to enforce certain of our regulatory decisions. Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers to publish details or impose a financial penalty.³³
- 3.27 It is also possible that during a market review, we identify potential infringements of other laws, such as competition law, and we may open an investigation accordingly, or refer the matter to other enforcement agencies.

Market investigation references

- 3.28 Where we have reasonable grounds to suspect that features of a market are adversely affecting competition, we can refer a market or a feature of several markets to the CMA for an in-depth investigation, or accept undertakings in lieu of making a reference. If we wish to make such a market investigation reference, we must consult any persons whose interests we consider may be substantially impacted by this proposed decision. See section 5.

Effectiveness and proportionality, equality and diversity

- 3.29 We aim to ensure that any action we take is effective and proportionate to the concerns identified.³⁴ We must have regard to the regulatory principles in section 53 FSBRA when exercising our general functions relating to payment systems, including giving general directions, and determining the general policy and principles by reference to which the PSR performs its particular functions.³⁵ We consider that these regulatory principles are also relevant when we are carrying out market reviews under FSBRA, and also when we carry out market studies under EA02. There are eight principles, three of which in particular will generally be relevant when considering intervention:
- the efficiency principle – the need to use the resources of each regulator in the most efficient and economical way
 - the proportionality principle – that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction
 - the transparency principle – the principle that the regulators should exercise their functions as transparently as possible

30 Section 83(1) FSBRA

31 Section 83(2) FSBRA

32 See, in particular, paragraphs 21.1 to 21.27 of the PPG.

33 See further paragraphs 24.1 to 24.4 of the PPG.

34 We note what the CMA has said regarding effectiveness and proportionality in the context of its assessment of possible remedies following a market investigation: CC3 (revised) April 2014. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf (Part 4 in general and paragraphs 334 to 347 in particular).

35 Section 49(3)(c) FSBRA states that in discharging our general functions relating to payment systems, we must have regard to the regulatory principles found in section 53 FSBRA.

- 3.30 In addition, we will be mindful, as appropriate, of the five high-level ‘better regulation’ principles in the Legislative and Regulatory Reform Act 2006, including proportionality and transparency, and the additional requirements of the Regulators’ Code.³⁶ Accordingly, we carry out an assessment of the proportionality of our proposed actions and will consult on the draft measures as appropriate.
- 3.31 We consider Equality and Diversity Implications as part of our decision-making processes in line with our public sector equality duty under the Equality Act 2010. In particular, we will assess the likely equality and diversity impacts and rationale of our proposals to assess whether they give rise to any concerns as a result of any protected characteristic.³⁷

Ongoing review

- 3.32 We have ongoing duties under FSBRA to promote effective competition, innovation and the interests of service users in payment systems and the services they provide (see paragraph 2.2). We will continue to monitor the effectiveness and proportionality of any action that we take following a FSBRA market review or indeed following an EA02 market study.

Urgent action

- 3.33 In the majority of circumstances we complete the market review procedures outlined above (paragraphs 3.1 to 3.15) before taking any action. However, in exceptional circumstances, where we identify a need to act more quickly, we may take action early to prevent harm to or to protect the interests of service users – for example, we may give a specific direction or impose a specifically-imposed requirement.

³⁶ See the Legislative and Regulatory Reform Act 2006 (LRA) principles around the exercise of regulatory functions at <http://www.legislation.gov.uk/ukpga/2006/51/contents>, and the 6 April 2014 Regulators’ Code at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf.

³⁷ Our website provides more information: <https://www.psr.org.uk/corporate-responsibility>

4

How we carry out EA02 market studies

- The stages of an EA02 market study are similar to those of a FSBRA market review.
- There are statutory deadlines and an EA02 market study must be complete within 12 months of formal launch.
- There are also different formal powers for gathering information.
- Our powers to take action following an EA02 market study are similar to those following a FSBRA market review.

4.1 The stages of an EA02 market study are similar to those of a FSBRA market review (section 3). However, there are some key differences, described below.

Launch and timescale

4.2 When we formally launch an EA02 market study, we must publish a 'market study notice'. This sets out:

- the scope of the market study
- the period during which representations may be made to the PSR in relation to the study, and
- the timescales within which the study will be completed³⁸

4.3 In line with the PSR's general policy on responses to formal consultations, we will make submissions available for public inspection unless the respondent requests otherwise and we accept its request. See further section 6 regarding our treatment of information.

4.4 Publication of a market study notice triggers the following statutory deadlines:

- Where we propose to make an MIR in relation to the subject matter of a market study, we must publish notice of our proposed decision and begin the process of consulting relevant persons within six months of publication of the market study notice.³⁹

³⁸ Section 130A(3)EA02

³⁹ Section 131B(1)EA02

- Where we do not propose to make an MIR, but have received (non-frivolous) representations in response to a market study notice arguing that a reference should be made, we must, within six months of publication of the market study notice, publish notice of our proposed decision and begin the process of consulting relevant persons.⁴⁰
- Where we do not propose to make an MIR and no representations have been made in response to a market study notice arguing that a reference should be made, we must publish a notice of our decision not to make a reference within six months of publication of the market study notice.⁴¹
- We must publish a market study report setting out our findings and the action (if any) we propose to take, within 12 months of publication of a market study notice.⁴² When our decision is (a) to make an MIR, (b) not to make an MIR (when non-frivolous representations have been received to the effect a reference should be made) or (c) to accept undertakings in lieu of an MIR, the market study report must in particular contain the decision, the reasons for the decision and such information we consider appropriate for facilitating a proper understanding of our reasons for the decision.⁴³
- Where a market study report sets out a decision to make an MIR, the reference must be made at the same time as the report is published.⁴⁴

Research and information gathering

- 4.5 We will carry out research for an EA02 market study in the same way as for a FSBRA market review. However, we have a different set of formal powers with which we can require information (see section 6).

Analysis and interim report

- 4.6 We anticipate conducting similar types of analysis for EA02 market studies as we do for FSBRA market reviews. However, the binding legal obligation on us to reach a preliminary view and make a proposal as to whether or not to make an MIR within six months of launching an EA02 market study may affect the amount of information we can gather and the extent of the analysis that we may carry out before deciding whether or not a market should be referred for investigation by the CMA (see section 5).
- 4.7 As noted, where we propose to make an MIR, or not to make an MIR where we have received non-frivolous submissions urging such a reference, we must consult on this within six months of publication of the market study notice (paragraph 4.4). We will do this in an interim report. We must consult any persons on whose interests we consider making an MIR would have a substantial impact.⁴⁵
- 4.8 When consulting, we must give our reasons so far as practicable, having regard to the restrictions imposed by the timetable for making the decision, and any need to keep the proposal or the reasons for it, confidential.⁴⁶ We will make any responses to our proposal to make or not to make

40 Section 131B(1) EA02

41 Sections 131B(2) and (3) EA02

42 Section 131B(4) EA02

43 Section 131B(5) EA02

44 Section 131B(6) EA02

45 Sections 131A(2)(b) and (4) EA02

46 Sections 131A(5) and (6) EA02

an MIR available for public inspection unless the respondent requests otherwise and we accept its request. See further section 6 regarding our treatment of information.

Final report

- 4.9 If we receive no submissions urging an MIR and are not ourselves minded to make such a reference, we must publish that decision within six months of the market study notice (see paragraph 4.4).⁴⁷
- 4.10 We must within 12 months of publication of a market study notice publish a market study report setting out our findings and the action (if any) we propose to take (see paragraph 4.4).⁴⁸ In particular, we must decide whether or not to make an MIR (see section 5). The report will contain our reasons for this decision.
- 4.11 Following an EA02 market study we may use our FSBRA regulatory powers (see paragraphs 3.16 to 3.26), and any such proposed action will be set out in the EA02 market study report (see paragraph 4.4).

⁴⁷ Section 131B(3) EA02

⁴⁸ Section 131B(4) EA02

5

Market investigation references and undertakings in lieu of a reference

- We can refer a market, or a feature of several markets, to the CMA for in-depth investigation.
- We may do this where we have reasonable grounds to suspect that features of the market are adversely affecting competition.
- It is possible for us to accept undertakings in lieu of making a reference, if we think they would address our competition concerns.

The PSR's power to refer markets or features of more than one market to the CMA

- 5.1 We have the power to refer a market to the CMA where we have reasonable grounds to suspect that any feature, or combination of features, of a market or markets for payment systems and the services they provide in the UK prevents, restricts or distorts competition (an 'ordinary reference').⁴⁹ The task of the CMA on a reference is focused on competition, while our market reviews/studies may explore broader issues (see paragraphs 2.2 to 2.6). The CMA has 18 months to complete its investigation (extendable by 6 months), which is a more detailed examination into whether there is an adverse effect on competition in the markets referred.
- 5.2 A 'feature' of a market may be⁵⁰:
- the structure of the market concerned or any aspect of that structure
 - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned⁵¹
 - any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services

⁴⁹ Section 131(1)EA02

⁵⁰ Section 131(2)EA02

⁵¹ We understand the reference to 'one or more than one person who supplies or acquires goods or services' to include one or more than one participant in a payment system or payment systems used to provide services in the United Kingdom.

- 5.3 'Conduct' includes any failure to act (whether intentional or not) and any other unintentional conduct.⁵²
- 5.4 We may also make a 'cross-market reference': that is, to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.⁵³ The legal criteria for an ordinary reference or a cross market reference are the same (see paragraph 5.1), although only features that relate to conduct can be the subject of a cross-market reference.⁵⁴
- 5.5 We have the power to make an MIR if the applicable legal test is met, even without having completed an EA02 market study. However, if we propose to do this, we must consult any persons on whose interests we consider making an MIR would have a substantial impact.⁵⁵

Factors the PSR will take into account when considering whether to make an MIR

- 5.6 A market investigation entails detailed examination by the CMA of whether there is an adverse effect on competition in the market(s) referred and, if so, what remedial action may be appropriate. Following its investigation, the CMA has a duty to take such action as it considers reasonable and practicable to remedy any adverse effect on competition it identifies, which may include behavioural and/or structural remedies.
- 5.7 While we have powers under FSBRA, they do not extend beyond participants in regulated payment systems.⁵⁶ Accordingly, a key factor in deciding whether to make an MIR will be whether we foresee the need to implement remedies affecting persons that are not participants in regulated payment systems.
- 5.8 Otherwise, we intend to follow the CMA's own approach as set out in *Market Investigation References* (OFT511)⁵⁷ in deciding whether or not to make an MIR, i.e. we expect to make an MIR where all of the following criteria are met:
- It would not be more appropriate to deal with the competition issues identified by applying CA98 or using other powers available to us.
 - It would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference (see paragraphs 5.9 to 5.12).
 - The scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it.
 - There is a reasonable chance that appropriate remedies will be available.⁵⁸

52 Section 131(3)EA02

53 Sections 131(2A) and (6) EA02

54 Sections 131(1) and (2A) EA02

55 Section 169 (2) EA02

56 That is, those payment systems designated as regulated payment systems by the Treasury. See further sections 43 to 48 FSBRA.

57 *Market Investigation References: Guidance about the making of references under Part 4 of the Enterprise Act*, paragraph 2.1. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf

58 The CMA's powers to impose remedies are described in the *CMA's Market investigations guidelines*, CC3, Part 4. <https://www.gov.uk/government/publications/market-investigations-guidelines>

Undertakings in lieu of a reference

- 5.9 Section 154 EA02 gives the PSR the power to accept undertakings instead of making an MIR. In exercising this power we must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any adverse effects on competition identified (and any detrimental effects on customers so far as they result or may be expected to result from such adverse effects). We may also have regard to the effect of the possible undertakings on any relevant customer benefits arising from a feature or features of the markets concerned.
- 5.10 In practice, we expect that undertakings in lieu of a reference are unlikely to be common. We may not have completed a sufficiently detailed investigation of a competition problem to be able to judge whether particular undertakings will achieve 'as comprehensive a solution as is reasonable and practicable'. Seeking to negotiate undertakings with several parties with different interests is likely to pose serious practical difficulties, especially within the 12 months provided under an EA02 market study.
- 5.11 Before accepting any undertaking in lieu of a reference, we must publish the proposed undertaking in a notice. This must state the purpose and effect of the undertaking and identify the adverse effect on competition and any resulting detrimental effect on customers that the proposed undertaking is intended to remedy.⁵⁹ We must consider any representations arising from the publication of the notice. There is a power for the Secretary of State to intervene at this stage if he or she believes that wider public interest matters are relevant to the case. The Secretary of State is able to block the acceptance of undertakings in lieu when he or she believes that a public interest consideration specified in the legislation (currently only national security) is relevant. In such a case, the outcome may be other undertakings in lieu of a reference.
- 5.12 When an undertaking in lieu is accepted, we may not make an MIR involving the same services for a period of 12 months unless we consider the undertaking has been breached or we have been given false or misleading information by the person responsible for giving the undertaking.⁶⁰

⁵⁹ The list of all the points to be included in such notices is given in section 155(2) EA02.

⁶⁰ Section 156(1) EA02

6

Information gathering, use and disclosure in market reviews and market studies

- We have different sets of powers under FSBRA and EA02 to gather information.
- In exercising our functions we may use information we have gathered regardless of its source.
- We can only disclose information in accordance with the applicable legal regime.
- We will make submissions available for public inspection unless the respondent requests otherwise and we accept its request, and may publish working papers and other relevant documents.

Information gathering

- 6.1 Although we expect parties to respond to our requests that information be provided on an informal basis, we have formal powers with which we can gather information under FSBRA and EA02.⁶¹

FSBRA

- 6.2 Under section 81 FSBRA, the PSR may by notice in writing require a person to provide the PSR with information or documents that it requires in connection with its functions under Part 5 FSBRA. The PSR can also apply, in certain circumstances, to a justice of the peace for a warrant to enter premises where documents or information are held.⁶²
- 6.3 The PSR may also appoint investigators who will have the power to require a person to attend and answer questions, or to provide any information or document required by the investigator.⁶³ These requirements can only be imposed so far as the investigator reasonably considers the questions, or the provision of information or production, to be relevant to the purposes of the investigation.⁶⁴

⁶¹ See paragraphs 3.7 and 3.8.

⁶² Section 88 FSBRA

⁶³ Sections 83 and 85 FSBRA

⁶⁴ Section 85(4) FSBRA

- 6.4 Failure to comply, without reasonable excuse, with an information requirement, or other requirement imposed by an investigator, may be treated as a contempt of court.⁶⁵ Furthermore, if a person knows or suspects that an investigation is being conducted,⁶⁶ it is a criminal offence for that person to falsify, conceal, destroy or otherwise dispose of documents⁶⁷ which he knows or suspects to be relevant to the investigation,⁶⁸ unless he can show that he had no intention to hide the facts disclosed in those documents from the investigator.⁶⁹ A person could also be guilty of a criminal offence if, in purported compliance with a requirement, he knowingly or recklessly provides information that is false or misleading in a material particular.⁷⁰
- 6.5 A detailed description of the PSR's information-gathering and investigation powers can be found in the PPG.⁷¹

EA02

- 6.6 Under our concurrent functions, we have powers under EA02:
- to give notice requiring any person to attend a specified place to give evidence to the PSR or a person nominated for the purpose
 - to give notice requiring any person to produce specified documents or categories of documents that are in that person's custody or under his control
 - to give notice requiring any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner⁷²
- 6.7 Like section 81 FSBRA, we can use these powers against any person.⁷³
- 6.8 Where the PSR considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice issued by the PSR using its EA02 investigatory powers or intentionally obstructed or delayed another person in copying documents produced to that other person, the PSR has the power to impose an administrative penalty.⁷⁴
- 6.9 It is a criminal offence for a person intentionally to alter, suppress or destroy any document which the person has been required by notice to produce.⁷⁵ Where an act is capable of constituting both (a) a failure warranting an administrative penalty and (b) a criminal offence, the PSR cannot impose a financial penalty if it has brought criminal proceedings against the person. Similarly, criminal proceedings cannot be brought against the person if an administrative penalty has been imposed in respect of the same act.⁷⁶
- 6.10 Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily

65 Sections 90(1) and 90(2) FSBRA

66 Or is likely to be conducted.

67 Or to cause or permit this to occur.

68 Section 90(4) FSBRA

69 Section 90(5) FSBRA

70 Section 90(6) FSBRA

71 See paragraphs 25.1 to 29.4 of the PPG.

72 Section 174(1)(a) and sections 174(3) to (5) EA02

73 Section 174 EA02

74 Sections 174A(1) to (3) EA02

75 Section 174A(4) EA02

76 Sections 174A(4) and (5) EA02

penalty).⁷⁷ Persons committing a criminal offence are liable, on summary conviction, to an unlimited fine, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.⁷⁸

- 6.11 The PSR is under a statutory obligation to issue its own statement of policy for penalties under section 174A(1) to (3) EA02. For the sake of consistency with the CMA, the practice of other concurrent regulators in relation to such penalties⁷⁹ and with the PSR's approach to penalties for failure to comply with information-gathering powers in CA98 investigations, the PSR has adopted the CMA's penalty policy (CMA4: *Administrative penalties: Statement of Policy on the CMA's approach*, January 2014) as its policy on penalties under sections 174(1) to (3) EA02.⁸⁰

Use and disclosure of information by the PSR

- 6.12 We can use information we receive in the course of undertaking a FSBRA market review or an EA02 market study for our other functions, such as FSBRA regulatory action, including compliance failure proceedings, or enforcement of the prohibitions in the Competition Act 1998.⁸¹
- 6.13 The applicable legal framework for the disclosure of information is determined by the statutory context in which it was received by. In particular, whether we carry out a FSBRA market review or an EA02 market study will determine the legal framework for disclosure of information received by us in the context of that review/study.

FSBRA

- 6.14 When we receive information for the purposes of, or in discharge of, our statutory functions under FSBRA (for example, during a FSBRA market review) which is not in the public domain and relates to a person's business or other affairs, the information will be 'confidential information' under section 91 FSBRA. Information which is already publicly available, or which is in aggregated form so that it is not possible to ascertain from it information relating to a particular person, is not considered confidential information under FSBRA.
- 6.15 However, when we receive information for the purposes of, or in discharge of, our concurrent functions, the disclosure of this information is expressly excluded from the FSBRA regime and will instead be dealt with under the regime set out in EA02. In other words, information received by the PSR for the purposes of or in discharge of its concurrent functions can only be disclosed by the PSR under Part 9 EA02, not under FSBRA (see paragraphs 6.18 to 6.21).⁸²
- 6.16 Where we have obtained information under FSBRA rather than in connection with our concurrent competition functions (see paragraph 6.18), FSBRA provisions on disclosure will apply. Section 91 FSBRA restricts the disclosure of confidential information unless we have the consent of the person who provided the information (and the person to whom the information relates, if different) or a gateway applies. A gateway is an exception to the restriction on disclosure, allowing the disclosure of confidential information to third parties in certain prescribed circumstances. If a gateway is not applicable, we may not release confidential information without the requisite consent(s).

77 Competition and Markets Authority (Penalties) Order 2014 (SI 2014/559)

78 Section 174A(6) EA02

79 All other concurrent regulators (other than the FCA) are obliged to have regard to the CMA's statement of policy on such penalties.

80 The CMA's statement of policy also relates to penalties imposed in CA98 investigations for failure to comply with information-gathering powers. The PSR is required to have regard to this guidance in relation to such penalties in CA98 investigations.

81 However, there may be restrictions on our use of information if we receive it from other authorities.

82 Section 91(6) FSBRA

6.17 The full set of gateways is set out in Regulations made under FSBRA.⁸³ They include disclosure to assist the PSR in the discharge of its functions, and disclosure to the FCA, the Prudential Regulation Authority and the CMA to assist them in the discharge of their functions. When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

EA02

6.18 When we receive information in connection with the exercise of our concurrent functions, including EA02 market studies, Part 9 EA02 will apply to any disclosure of such information.⁸⁴ This imposes a general restriction on the disclosure of information relating to the affairs of an individual or any business of an undertaking which we obtain during the exercise of our EA02 functions (referred to as 'specified information') to other persons.⁸⁵ The restriction applies during the lifetime of an individual or while the undertaking continues in existence (for the individual or business to which the specified information relates, respectively). Disclosure is permitted if it falls within one of the 'information gateways', as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents⁸⁶ or where the disclosure is made for the purpose of facilitating the exercise of any of our statutory functions.⁸⁷

6.19 Even when Part 9 EA02 and one of its information gateways apply, we must have regard to certain considerations before making a disclosure. In particular, we must have regard to the three considerations set out in section 244 EA02:

- The need to exclude from disclosure (so far as it is practicable to do so) any information whose disclosure we consider to be contrary to the public interest.
- The need to exclude from disclosure (so far as practicable) commercial information we consider might significantly harm the legitimate business interests of the undertakings; or information relating to the private affairs of an individual which we think might significantly harm that individual's interests.
- The extent to which the disclosure of information relating to the private affairs of an individual or of commercial information is necessary for the purpose for which we are permitted to make the disclosure.

6.20 We will apply these three considerations on a case-by-case basis when we are considering disclosure of specified information.

6.21 Where we disclose information to another person, there are restrictions on the further disclosure or use of the information by that person.⁸⁸

83 Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/8820)

84 Section 91(6) FSBRA

85 Section 237 EA02

86 Section 239 EA02

87 Section 241 EA02

88 Section 241(1) and (4) EA02

Transparency

- 6.22 We have noted throughout this document that we will make submissions available for public inspection unless the respondent requests otherwise (see paragraphs 3.3, 3.13, 4.3 and 4.8). We will seek parties' views on which parts of their submission are confidential before deciding if, and if so how much, information should be redacted prior to making them publicly available. We will apply the relevant legislation in making this decision: for FSBRA market reviews, see paragraphs 6.14 to 6.17; for EA02 market studies, see paragraphs 6.18 to 6.21.
- 6.23 We may in addition publish working papers or other relevant documents, in the interests of transparency and to allow interested parties to make better-informed submissions. Again, we will apply the relevant legislation when considering disclosure of information, depending on how we gathered the information.

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