

Consultation Paper

PSR CP15/1

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# PSR Competition Concurrency Guidance



We are asking for comments on this Consultation Paper by 5pm on Friday 20 March 2015.

You can send your comments and responses to our consultation questions by using our online response form or by emailing us at [PSRconsultations@psr.org.uk](mailto:PSRconsultations@psr.org.uk)

If you email us, we would be grateful if you could provide your response in a Word document (rather than, or in addition to, providing your response as a PDF).

You may respond in writing to the address below (although we ask for respondents to provide their responses electronically wherever possible).

Payment Systems Regulator  
Concurrency consultation response team  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

We will make all non-confidential responses to this consultation available for public inspection.

We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. Stakeholders who wish to claim commercial confidentiality over specific items in their response should identify those specific items which they claim to be commercially confidential.

We may nonetheless be required to disclose all responses which include information marked as confidential in order to meet legal obligations, in particular if we are asked to disclose a confidential response under the Freedom of Information Act 2000. We will endeavour to consult you in handling such a request. Any decision we make not to disclose a response is reviewable by the Information Commissioner and the Information Rights Tribunal.

You can download this Consultation Paper from our website: <http://www.psr.org.uk>

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# 1 Overview

## Introduction and context

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- 1.1 The PSR was incorporated as a subsidiary of the Financial Conduct Authority (FCA) on 1 April 2014. It was created under the Financial Services (Banking Reform) Act 2013 (FSBRA). We will become fully operational on 1 April 2015.
- 1.2 As from 1 April 2014, we have had concurrent competition powers under the Enterprise Act 2002 (EA02), and on 1 April 2015 we obtain concurrent competition powers under the Competition Act 1998 (CA98).<sup>1</sup> This means we have powers to carry out market studies, and make market investigation references to the Competition and Markets Authority (CMA) under the EA02, in relation to participation in payment systems. We will also have powers to enforce the prohibitions on anti-competitive behaviour in the CA98 and the Treaty on the Functioning of the European Union (TFEU) in relation to participation in payment systems.
- 1.3 The same competition powers may also be exercised by the CMA with regard to payment systems (and the services they provide) and other sectors of the economy. This means that, in respect of participation in payment systems, the CMA and the PSR will have 'concurrent powers' and the PSR will be a 'concurrent regulator'.
- 1.4 These powers are additional to our ability to use our FSBRA regulatory powers<sup>2</sup> to advance our competition, innovation and service-user objectives.<sup>3</sup>
- 1.5 As from 1 April 2015, the FCA will have concurrent powers under EA02 and CA98 in relation to the provision of financial services.<sup>4</sup> The FCA has launched a consultation on its own guidance on its concurrent powers, which can be found at: <http://www.fca.org.uk/news/cp15-1-fca-competition-concurrency>

## Overview

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- 1.6 In this consultation we are seeking views on two separate documents:
  - draft guidance on our powers under CA98, to be issued under section 52 CA98 (Appendix 1)
  - draft guidance on market reviews under FSBRA, market studies under EA02 and making market investigation references, to be issued under section 96 FSBRA (Appendix 2)

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<sup>1</sup> The PSR's powers to consult on and issue guidance under section 52 CA98 came into force as from 1 November 2014. See The Financial Services (Banking Reform) Act 2013 (Commencement No. 6) Order 2014 (SI 2014/2458).

<sup>2</sup> See sections 54 to 58 FSBRA

<sup>3</sup> See sections 50 to 52 FSBRA

<sup>4</sup> Under the concurrency provisions in sections 234I to 234O of the Financial Services and Markets Act 2000 (FSMA).

- 1.7 An introduction to both of these draft documents is provided in Parts 2 and 3 of this consultation paper. These draft documents are based extensively on the equivalent draft documents published for consultation by the FCA. We propose to adopt procedures that mirror those of the FCA in respect of its own concurrent powers, so that stakeholders who are active in the UK financial services sector as well as being participants in UK payment systems might be subject to the same procedures in relation to CA98 and EA02 irrespective of which concurrent regulator they are dealing with. The differences between the PSR's proposed processes and those of the FCA reflect our specific regulatory functions, objectives, duties and powers under FSBRA.<sup>5</sup>
- 1.8 For convenience, we are also making available on request versions of our draft guidance documents which highlight the paragraphs which contain differences from the FCA's draft guidance documents. Any respondents wishing to request these versions should contact the PSR concurrency consultation response team by email ([PSRconsultations@psr.org.uk](mailto:PSRconsultations@psr.org.uk)).
- 1.9 We have set out specific questions for consideration in Parts 2 and 3 of this consultation paper but would welcome any other feedback you may have. The closing date for comments is **20 March 2015**.
- 1.10 The FCA's consultation on its own concurrent powers closes on 13 March 2015. Some notes for respondents who wish to respond to both the FCA and PSR consultations are set out below (see 'next steps' at paragraphs 1.16 to 1.18).
- 1.11 The FCA's consultation also seeks views on a draft legislative instrument to introduce minor changes to the FCA Handbook, to be adopted by the FCA Board (FCA's Appendix 3). There is no equivalent 'Handbook' for participants in designated payment systems regulated by the PSR and accordingly we do not have an equivalent of the FCA's Appendix 3.
- 1.12 The PSR consulted in November 2014 on a draft *Powers and Procedures Guide* (PPG), which relates to the processes and procedures that the PSR will generally apply in relation to its regulatory functions under FSBRA.<sup>6</sup> There is no direct overlap between the powers and procedures set out in the draft PPG and in the two draft guidance documents now being consulted upon. In November 2014, the PSR also consulted on certain proposed general directions (including on Principles of participation in regulated payment systems). The PSR is currently evaluating responses to its November 2014 consultation and expects to issue final versions of the PPG and the general directions before our operational launch on 1 April 2015.

### Who does this consultation affect?

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- 1.13 This consultation is relevant to payment system operators, banks, building societies and other payment service providers (PSPs), infrastructure providers, service-users of UK payment systems (including businesses), trade bodies, consumer groups, and other parties interested in UK payment systems.
- 1.14 We have designed our procedures with the aim of using our powers effectively and efficiently. This should benefit service-users (including consumers) through detecting, enforcing against and deterring anti-competitive behaviour in relation to participation in UK payment systems.

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<sup>5</sup> As distinct from the FCA's specific regulatory functions, objectives, duties and powers under FSMA.

<sup>6</sup> See the PSR's consultation *A new regulatory framework for payment systems in the UK* (PSR CP14/1), and in particular Part E and Annex 3 of *Supporting Paper 6: Regulatory Tools*, available at: <http://www.fca.org.uk/psr/our-consultation>

## Equality and diversity considerations

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- 1.15 We do not consider that the proposals raise any equality or diversity impacts, but we would welcome your comments on this.

## Next steps

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- 1.16 Please provide your comments by 5pm on Friday 20 March 2015. We will reflect on the feedback received before finalising the guidance documents and issuing a feedback statement as soon as possible after our operational launch on 1 April 2015 (which is also the day we acquire our concurrent competition powers under CA98).
- 1.17 Certain respondents may wish to respond to both the PSR and FCA consultations (for example, where a business is active in the UK financial services sector as well as being a participant in a UK payment system). The FCA and the PSR are willing to receive submissions dealing with both sets of guidance documents jointly. Such joint submissions should, however, be provided by the FCA's deadline of 13 March 2015.
- 1.18 Alternatively, if a respondent to the FCA's consultation does not wish to make a joint submission, it may forward to the PSR its response to the FCA's consultation and add any further comments that are uniquely responsive to the PSR's consultation. Such submissions should be provided by the PSR's deadline of 20 March 2015.

## 2 Competition Act 1998: A guide to the PSR's powers and procedures

### Summary of our proposals

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- 2.1 The changes on 1 April 2015, when we obtain our concurrent competition powers under CA98, are primarily institutional – all undertakings are already subject to competition law. However, now the PSR (as well as the CMA and, in the case of EU law, the European Commission) will be able to investigate and enforce against breaches of UK and EU competition law where they relate to participation in payment systems. These powers are not limited to participants of the designated payment systems that we regulate under FSBRA. Rather, they extend to participants in any payment system.
- 2.2 We consider it is appropriate to provide procedural guidance on how we will use our new powers. This is also in line with our duty under section 52 CA98 to consult on and issue general advice and information about the application of the competition law prohibitions and our enforcement of those prohibitions.
- 2.3 The draft guidance set out in Appendix 1 focuses on the procedural aspects of the PSR's powers of enforcement under CA98. These include how we will identify potential infringements and decide whether to open a formal investigation, and who will be the decision-makers for certain key decisions in such an investigation. In preparing this guidance, we have been mindful of the statutory framework within which we must operate, and our expected practices in enforcement under FSBRA. We have had regard both to our draft enforcement procedures relating to FSBRA (see paragraph 1.12 above) and other authorities' CA98 procedures, notably the CMA. In many respects, our processes are equivalent to those of the CMA. In others, such as settlement, we have incorporated aspects of the FCA's proposed CA98 procedures.
- 2.4 The final version of this guidance will be available on the PSR website (<http://www.psr.org.uk>).
- Q1: Do you agree with our proposals on how we will carry out CA98 investigations as set out in Appendix 1?**
- Q2: Do you have any comments on the scope or content of the draft guidance provided in Appendix 1?**

# 3

## Market reviews, market studies and market investigation references: A guide to the PSR's powers and procedures

### Summary of our proposals

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- 3.1 We wish to provide guidance on how we will use our new powers under EA02. These relate to participation in payment systems and are not limited to participants of the designated payment systems that we regulate under FSBRA. Rather, they extend to participants in any payment system.
- 3.2 We also wish to provide guidance on how we will use our information gathering power under section 81 FSBRA to conduct market reviews.
- 3.3 Appendix 2 therefore comprises draft guidance on our FSBRA market review procedures, our EA02 market study procedures and our powers to make market investigation references to the CMA. This sets out the differences between FSBRA market reviews and EA02 market studies.
- 3.4 Under section 174E EA02 we are required to issue (after appropriate consultation) a statement of policy in relation to the enforcement of notices given under section 174 EA02, and in particular about the considerations relevant to the determination of the nature and amount of any penalty imposed.<sup>7</sup> For the sake of consistency with the CMA, the practice of other concurrent regulators in relation to such penalties<sup>8</sup>, and the PSR's approach to penalties for failure to comply with information gathering powers in CA98 investigations,<sup>9</sup> we propose to adopt the CMA's policy<sup>10</sup> as our policy on penalties under section 174(1) to (3). This is set out in the draft guidance.
- 3.5 The guidance also sets out the framework for the use and disclosure of information obtained using our FSBRA or EA02 powers.
- 3.6 The final version of this guidance will be available on the PSR website (<http://www.psr.org.uk>).

**Q3: Do you agree with our proposals on how we will carry out market reviews and market studies as set out in Appendix 2?**

**Q4: Do you have any comments on the scope or content of the draft guidance provided in Appendix 2?**

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<sup>7</sup> Under section 174A(1) or (3) EA02

<sup>8</sup> All other concurrent regulators (other than the FCA) are obliged to have regard to the CMA's statement of policy on such penalties.

<sup>9</sup> 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.

<sup>10</sup> CMA4: *Administrative penalties: Statement of Policy on the CMA's approach*, January 2014

## Appendix 1

### **The PSR's concurrent competition enforcement powers in relation to participation in payment systems**

A guide to the PSR's powers and procedures under the Competition Act 1998

# 1 Overview

- We have powers to enforce the prohibitions under UK and EU competition law on anti-competitive agreements and conduct in relation to participation in payment systems.
- Our competition law functions are ‘concurrent’ – the CMA and possibly other regulators may also exercise them in this sector.

## Introduction

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- 1.1 Part 1 of the Competition Act 1998 (CA98) and Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibit anti-competitive agreements and abuses of a dominant position.<sup>1</sup>
- 1.2 As from 1 April 2015, under the concurrency provisions in the Financial Services (Banking Reform) Act 2013 (FSBRA),<sup>2</sup> we have competition law powers, including powers under CA98 in relation to agreements and conduct relating to participation in payment systems.<sup>3</sup> The concept of ‘participation’ in payment systems is defined in section 42 FSBRA and includes the operation of the payment system and the provision of infrastructure and payment services.<sup>4</sup> The powers relate to all payment systems falling within the definition in section 41 FSBRA, and not only to those systems that have been designated by HM Treasury under section 43 FSBRA.
- 1.3 We also have powers to carry out market studies as provided by the Enterprise Act 2002 (EA02) and to refer markets to the Competition and Markets Authority (CMA) for detailed investigation. This guidance does not cover these powers.
- 1.4 These competition powers may also be exercised by the CMA with regard to all sectors of the economy so, in respect of payment systems, the CMA and the PSR have concurrent competition law functions (‘concurrent functions’) and the PSR is a ‘concurrent regulator’.
- 1.5 This guidance explains how we will exercise our concurrent functions in respect of the prohibitions in Chapter I and Chapter II CA98 and/or Article 101 and Article 102 TFEU in relation to

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<sup>1</sup> We do not have powers to prosecute the criminal cartel offence in section 188 of the Enterprise Act 2002.

<sup>2</sup> Sections 59 to 66 FSBRA

<sup>3</sup> As from 1 April 2015 the FCA, under the concurrency provisions in sections 234I to 234O of the Financial Services and Markets Act 2000 (FSMA), will have competition law powers, including powers under CA98 in relation to agreements and conduct relating to the provision of financial services. The FCA has published its own guidance on its concurrent competition powers which can be found at *[insert link when final]*.

<sup>4</sup> The Bank of England is not to be regarded as a participant of any kind in any payment system (see section 42(8) FSBRA).

participation in payment systems within the UK, in particular the enforcement processes we will follow, and how these relate to our other powers and duties.<sup>5</sup>

- 1.6 This document focuses on the procedural aspects of the PSR's powers of enforcement under CA98. For guidance on the application of the CA98 prohibitions, please refer to the CMA's guidance documents, including *Agreements and concerted practices* (OFT401) and *Abuse of a dominant position* (OFT402), which apply to all areas of economic activity, including the payments industry.<sup>6</sup>

## Legislative context and other guidance documents

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- 1.7 The legal framework for the PSR's CA98 concurrent enforcement powers in relation to participation in payment systems in the UK includes (but is not limited to):
- Articles 101 and 102 TFEU and Regulation 1/2003<sup>7</sup>
  - The Competition Act 1998
  - The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (CA98 Rules)
  - Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations)
  - Financial Services (Banking Reform) Act 2013
  - Enterprise Act 2002
  - Enterprise and Regulatory Reform Act 2013
- 1.8 Additionally, we must have regard to:
- the CMA's guidance on the appropriate level of a penalty imposed under section 36 CA98<sup>8</sup>
  - the CMA's statement of policy in relation to the imposition of penalties under section 40A CA98<sup>9</sup>
  - the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments under section 31A CA98<sup>10</sup>
- 1.9 The CMA's Guidance on concurrent application of competition law to regulated industries (Concurrency Guidance)<sup>11</sup> explains how the concurrency regime operates in relation to CA98.

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<sup>5</sup> This document constitutes advice and information issued pursuant to section 52 CA98, referred to in this document as guidance for the sake of convenience.

<sup>6</sup> Available at <https://www.gov.uk/cma>

<sup>7</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, OJ L 1, 4.1.2003, p. 1.

<sup>8</sup> The guidance in force as at the date of this document is OFT423 *OFT's guidance as to the appropriate amount of a penalty* (which has been adopted by the CMA Board).

<sup>9</sup> CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach*

<sup>10</sup> OFT407 *Enforcement*

<sup>11</sup> CMA10, available at <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

- 1.10 This guidance sets out how we will carry out enforcement action under our powers under CA98.<sup>12</sup> Our approach will be informed by the statutory rules that apply to CA98 enforcement. We refer where relevant in this guidance to CMA's Procedural Guidance<sup>13</sup> and other guidance documents.
- 1.11 We may revise our guidance from time to time, e.g. in light of our experience or because of changes in the law. Our website will always contain the most up to date version.

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<sup>12</sup> For guidance on the processes and procedures that we will apply in relation to our regulatory functions under FSBRA, see our *Powers and Procedures Guide*: [\[insert link when final\]](#)

<sup>13</sup> *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases* (CMA8)

## 2 Our approach to using our CA98 powers

- We seek to exercise our functions transparently and fairly, and parties are able to challenge our procedural and substantive decisions.
- We are a national competition authority under Regulation 1/2003, which places certain obligations on us in the application of EU competition law.
- Only one regulator can exercise prescribed CA98 functions in any one case at any one time, and there are procedures in place to ensure the best-placed authority takes a case forward.
- There may be instances in which we take enforcement action under our other powers as well as CA98.
- Our 'primacy' obligations mean that before exercising certain of our powers set out in FSBRA we have a duty to consider whether it would be more appropriate to proceed under CA98.

### Fair and transparent process

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- 2.1 We aim to exercise our functions as transparently as possible, recognising the importance of ensuring that appropriate information is provided on our decision-making process and also that we should be open and accessible both to affected stakeholders and the general public. The legal framework for the disclosure of information gathered under CA98 is different from that for information gathered under our other functions. This guidance sets out what we propose to publish about our CA98 investigations and how we will liaise with parties under investigation and third parties.
- 2.2 We are also committed to ensuring fair treatment in the exercise of our powers: this protects the rights of those we are investigating and of third parties, and assists us in our decision-making. We must carry out our investigations and make decisions in a procedurally fair, transparent and proportionate manner, according to the standards of administrative law. In addition, we must comply with the Human Rights Act 1998.
- 2.3 Conducting an investigation involves taking many administrative decisions, e.g. setting deadlines, determining the scope of information requests, and deciding on the disclosure of information. Anyone who wishes to query such a decision should raise it with the case team (see section 4).

- 2.4 If it is not possible to resolve the dispute in this way, procedural complaints can be made to the PSR's Procedural Officer<sup>14</sup>, whose details can be found on our website. He or she may consider complaints that relate to:
- deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections (see section 5 below)
  - requests for treatment of confidential information in documents on the PSR's case file, in a Statement of Objections or in a final decision
  - requests for disclosure or non-disclosure of certain documents on the PSR's case file
  - issues relating to oral hearings, e.g. the date of the hearing
  - other significant procedural issues that may arise during the course of an investigation
- 2.5 The Procedural Officer is not able to review PSR decisions beyond those listed above, e.g. decisions on the scope of requests for information or decisions relating to the substance of a case.
- 2.6 The Procedural Officer will also chair any oral hearing and prepare a report assessing its fairness (see section 5 below). He or she will not otherwise be involved in the investigation.
- 2.7 *[The PSR is currently giving consideration to the arrangements it will put in place for the handling of complaints. This paragraph will be updated in due course.]* We expect that complaints in relation to procedural matters within the scope of the Procedural Officer's jurisdiction will be dealt with by the Procedural Officer, who is established for that purpose. Ultimately, a party with sufficient interest can seek judicial review in the High Court of an administrative decision taken by the PSR.
- 2.8 Parties whose agreements or conduct are the subject of a decision specified in section 46 CA98 have a right of appeal on its merits to the Competition Appeal Tribunal (CAT). These decisions are:
- whether the Chapter I or Chapter II prohibition, or the prohibition in Article 101 or 102 TFEU has been infringed
  - the imposition of a penalty for an infringement of Chapter I or Chapter II CA98 or Article 101 or Article 102 TFEU or the amount of such a penalty
  - the cancellation of a block or parallel exemption
  - withdrawing the benefit of a regulation of the European Commission pursuant to Article 29(2) of Regulation 1/2003
  - not releasing commitments pursuant to a request made under section 31A(4)(b)(i) CA98
  - releasing commitments under section 31A(4)(b)(ii)
  - directions and interim measures in relation to agreements or conduct

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<sup>14</sup> His or her role is similar to that carried out by the CMA's Procedural Officer in relation to procedural complaints. See <https://www.gov.uk/procedural-officer-raising-procedural-issues-in-cma-cases#procedural-officer-role-scope-and-process-competition-act-1998-investigations>

- 2.9 A party can also appeal the imposition of an administrative penalty imposed on it under section 40A CA98<sup>15</sup> to the CAT.
- 2.10 Third parties with a sufficient interest in a decision of the type set out in section 47 CA98 also have a right of appeal to the CAT. Such decisions include:
- a decision as to whether the Chapter I or Chapter II prohibition, or the prohibition in Article 101 or 102 TFEU has been infringed
  - a decision to accept or release commitments, or to accept a variation of commitments (unless that variation is not material in any respect)
  - a decision to make directions, or a decision not to make directions, under section 35 CA98

### Regulation 1/2003

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- 2.11 We are a national competition authority (NCA) for the purposes of Regulation 1/2003. We have certain obligations under Article 3 of Regulation 1/2003, including that we must apply Article 101 and/or Article 102 TFEU in any case where we are applying the Chapter I or Chapter II prohibition respectively if trade between EU Member States may be affected. We must notify the European Commission if we open an investigation involving the application of Article 101 and/or Article 102 TFEU. This assists in the efficient allocation of cases between NCAs and as between NCAs and the European Commission.
- 2.12 The European Commission has the power to take over cases involving an alleged breach of Article 101 and/or Article 102 TFEU from NCAs such as the PSR, by initiating proceedings. If we have already opened an investigation, then the European Commission would consult with us before initiating its own proceedings.<sup>16</sup>
- 2.13 We may not prohibit an agreement or concerted practice under national competition law if it would not be prohibited under Article 101 TFEU. This does not prevent the application of stricter national law to an agreement if it predominantly pursues different objectives from those pursued by Article 101. We may apply national law which is stricter than Article 102 TFEU in respect of unilateral conduct.<sup>17</sup>

### Case allocation under concurrency arrangements and the UKCN

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- 2.14 Our functions under CA98 in respect of participation in payment systems are concurrent with those of the CMA and, in certain instances, other regulators that have concurrent functions over some payment systems participants (for example, the FCA).
- 2.15 While cases may be transferred between concurrent authorities, only one authority can exercise prescribed functions in respect of a case at any moment.<sup>18</sup> The Concurrency Regulations and Concurrency Guidance set out how information will be shared between relevant competent authorities and how cases will be allocated. The general principle is that the regulator that will be responsible for a case depends on which one is better or best placed to do so.<sup>19</sup> We will cooperate with the CMA and other concurrent regulators to ensure the effective and efficient handling of

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<sup>15</sup> See footnote 31 in relation to administrative penalties.

<sup>16</sup> Article 11(6), Regulation 1/2003

<sup>17</sup> Article 3, Regulation 1/2003

<sup>18</sup> The prescribed functions include the opening of a formal investigation and the taking of a decision within the meaning of section 46(3) CA98, including a decision as to whether the Chapter I or Chapter II prohibition has been infringed.

<sup>19</sup> See Concurrency Guidance paragraph 3.22, which contains a list of factors relevant to which authority will be best placed.

cases in relation to participation in payment systems. If agreement cannot be reached, the CMA may determine which relevant competent authority should exercise their power. We will enter into a Memorandum of Understanding with the CMA which will set out the framework for our cooperation.<sup>20</sup>

- 2.16 We are part of the UK Competition Network (UKCN), which is an alliance of the CMA and UK sector regulators which have a duty to promote competition in the interests of consumers. The UKCN's Statement of Intent can be found as an annex to the Concurrency Guidance.
- 2.17 The PSR will participate in, and support the CMA in its lead participation in, the activities of the European Competition Network and the International Competition Network, and other international forums as appropriate.

## Relationship with FSBRA

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- 2.18 Anti-competitive agreements or abusive conduct by participants in payment systems may breach regulatory obligations under FSBRA or other legislation, as well as competition law. Accordingly, there may be instances in which we take enforcement action under our other powers as well as CA98, in parallel or sequentially. We will consider our obligations to act reasonably and proportionately when considering taking other enforcement action (such as imposing a penalty or publishing details of a compliance failure) and, for example, the level of any penalty to be imposed.<sup>21</sup>
- 2.19 We will make clear when using our formal information gathering powers which powers we are using and the nature of the suspected infringement(s) that we are investigating. Where more than one of our enforcement powers is considered to be potentially appropriate, we may make separate information requests under different information gathering powers. However, we will seek to decide as early as possible what is likely to be the most appropriate power(s) to deal with the specific agreement or conduct in question.
- 2.20 In some circumstances we may begin an investigation under CA98 and subsequently decide that action under our other powers is more appropriate, or vice versa. In such cases we will inform the party or parties involved.

## 'Primacy'

- 2.21 We are bound by statutory provisions giving 'primacy' to CA98 enforcement in certain situations.<sup>22</sup> This means that, before exercising certain of our powers set out in FSBRA (listed in paragraph 2.22 below), we have a duty to consider whether it would be more appropriate to proceed under CA98. If we consider that it would be more appropriate to proceed under CA98, we must do so rather than exercise that other power.
- 2.22 The specified powers are the powers under:
- section 54 FSBRA to give a direction (apart from the power to give a general direction)
  - section 55 FSBRA to impose a requirement (apart from the power to impose a generally-imposed requirement)

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<sup>20</sup> The Memorandum of Understanding will be available on our website: <http://www.psr.org.uk>

<sup>21</sup> The PSR's guidance on the imposition of penalties under FSBRA is set out in our *Penalties Guidance*, available at [Insert link when final].

<sup>22</sup> Section 62 FSBRA

- section 56 FSBRA to require the operator a regulated payment system or a payment service provider (PSP) with direct access to grant access to that payment system
- section 57 FSBRA to change the fees, charges, terms and conditions of an agreement relating to a regulated payment system
- section 58 FSBRA to require the disposal of an interest in the operator of a regulated payment system

2.23 We will determine on a case-by-case basis whether it may be more appropriate to proceed under CA98. We will look at the potential harm to competition raised by the conduct or agreement in question, the resource and timing implications of the actions available to us, and the potential outcomes (including their suitability for addressing the issues identified) and deterrent effect of those actions. Other factors may also be relevant to our considerations.<sup>23</sup>

2.24 In some cases it will be clear that CA98 is not the appropriate legal instrument, for example, if the proposed action relates to behaviour of a single undertaking that is not dominant, or if the behaviour does not appear likely to be capable of affecting competition.

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<sup>23</sup> See the CMA's 'Baseline' annual report on concurrency, April 2014, CMA24, paragraph 47, which states that the use of competition law may encourage companies to think in terms of the effects of their activities rather than compliance with specific rules; the greater flexibility of competition compared to *ex ante* regulation which may be reviewed only periodically; and that the application of competition law in regulated sectors may set a precedent across the regulated sector and more widely in the economy.

## 3 Case Initiation

- We may be alerted to possible CA98 infringements from a variety of sources, including other work we are undertaking, or information shared with us by others.
- We cannot investigate every possible CA98 infringement of which we become aware, and must prioritise which cases to take forward.
- When we open an investigation, we will generally provide the parties we are investigating with basic information about the case, though we will delay doing so if it could prejudice our investigation.

### Sources of potential CA98 Investigations

- 3.1 We may be alerted to possible CA98 infringements from a variety of sources:
- Complaints from the public or businesses. Such complainants may be granted 'Formal Complainant' status by the PSR.<sup>24</sup>
  - Super-complaints from bodies designated under section 68 FSBRA,<sup>25</sup> such as *[to be inserted once bodies are designated, which is expected to be before April 2015]*.
  - Referrals from other authorities. This could include information shared by the CMA under the concurrency arrangements or information received from the European Commission or NCAs.
  - Applications for leniency.
  - Applications made under sections 56 and 57 FSBRA.
  - Our own enquiries and activities in relation to payment systems.
  - Market studies or other own-initiative work or intelligence-gathering.
- 3.2 *[The PSR is currently evaluating responses to its November 2014 Consultation Paper 'A new regulatory framework for payment systems in the UK' (PSR CP14/1), including on its proposal to give general directions (under section 54 FSBRA) on Principles of participation in regulated payments systems. One of those proposed Principles (Principle 1) specifies that participants in designated payment systems 'must disclose to the PSR anything relating to the participant of*

<sup>24</sup> We will follow the CMA's Procedural Guidance (*Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, March 2014 (CMA8)) and the OFT guideline *Involving third parties in Competition Act investigations* (OFT451), adopted by the CMA Board, with regard to the granting of Formal Complainant status to any person who meets the criteria set out by the CMA (and formerly the OFT).

<sup>25</sup> We have produced guidance on how designated bodies can bring a super-complaint (*Super-Complaints Guidance [Insert full reference when final]*).

*which the PSR would reasonably expect notice'.<sup>26</sup> This paragraph of this guidance will reflect the outcome of the PSR's November 2014 consultation on this point.]*

- 3.3 Complaints from the public or businesses about possible CA98 infringements can be made by contacting:

*[To be inserted in final version of guidance]*

Email: *[To be inserted in final version of guidance]*

Tel: *[To be inserted in final version of guidance]*

- 3.4 We also participate in the FCA's Whistleblowing programme, details of which can be found on the FCA's website (including contact details).<sup>27</sup> Whistleblowers are individuals who want to provide information about wrongdoing in the regulated sector and want their information and identity to be treated confidentially. Such whistleblowers can be employees/contractors of firms who meet the criteria in the Public Interest Disclosure Act 1998 or other individuals (for example, consultants, associates or employees of other regulated or non-regulated firms).
- 3.5 The PSR does not offer immunity from criminal offences. However, individuals who have been involved in the behaviour in question may wish to familiarise themselves with the CMA's leniency policy in relation to cartel activity (see section 6) to see if it may be relevant to them. They may be eligible to apply to the CMA for immunity from criminal prosecution for the cartel offence under s.188 of the Enterprise Act 2002.

### **Deciding whether to open an investigation – Prioritisation assessment**

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- 3.6 We cannot investigate every complaint or possible infringement of competition law of which we are made aware and must therefore prioritise which work to undertake.
- 3.7 We will decide on a case-by-case basis whether to open an investigation. In deciding whether to investigate a possible infringement of competition law, we will have regard to several factors, including:
- the likely impact of the investigation in terms of the direct and indirect consumer benefit that investigation may bring
  - the significance of the case (including the possible deterrent effect of an investigation or decision)
  - the risks involved in taking on a case (including the likelihood of determining whether or not there has been an infringement)
  - whether other tools are available that would be more appropriate to achieve the same or a better outcome
  - the resources required to carry out the investigation

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<sup>26</sup> [See in particular Annex 2 of Consultation Paper and Supporting Paper 6 (Regulatory tools), available here: <http://www.fca.org.uk/psr/our-consultation>]

<sup>27</sup> <http://www.fca.org.uk/site-info/contact/whistleblowing>

- 3.8 These criteria are illustrative, rather than exhaustive. Before launching any CA98 investigation we will consult the CMA, and discuss whether it (or possibly another concurrent regulator) should lead the investigation. Ultimately, the CMA may decide this (see paragraphs 2.14 and 2.15).
- 3.9 We will keep our prioritisation assessment of any particular case under review and it may be that we need to close an investigation once it has been opened, if our assessment of its priority changes. The CMA has the power to take over an investigation we have opened (see paragraph 2.15).
- 3.10 While we may assess the strength and quality of the available evidence, a decision not to conduct an investigation, or to close an investigation after it has been opened, is not a decision on the merits of the case. It does not imply any view about the merits of a complaint or whether there has been a breach of competition law. Our choice of whether to take enforcement action is a question of how we use our resources effectively and efficiently. In some cases it may be appropriate to deal with suspected infringements of competition law without formal enforcement action. For example, we may alert businesses to possible concerns without formally opening an investigation. Our prioritisation assessment underlies our decision as to whether or not to investigate a matter. However, if the PSR decides not to open a formal investigation into a matter under CA98, it is open to the CMA (or any other regulator with concurrent jurisdiction over the agreement or conduct in question) to take action under CA98, following consultation with the PSR (see paragraphs 2.14 and 2.15 and the Concurrency Guidance with regard to case allocation).

### Opening a formal investigation

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- 3.11 If we decide to open a formal investigation under CA98, we will generally send the business(es) under investigation a case initiation letter setting out brief details of the conduct which we are investigating, the relevant legislation, our indicative proposed timetable and contact details. However, we will not do so at the start of an investigation if this may prejudice the investigation (for example, where we intend to conduct unannounced inspections), and we may need to limit the amount of information provided if there are good grounds for doing so (for example, to protect the identity of a whistleblower or a complainant).
- 3.12 We may in some circumstances (e.g. if we consider that it may assist us in our investigation or is necessary for market stability) publish basic information about the investigation, in accordance with our powers under section 25A CA98. If we publish information identifying a business whose activities are being investigated, and subsequently decide to terminate the investigation into that business, we will (in compliance with our statutory obligations) publish a notice stating that the activities of that business are no longer being investigated.

## 4 Conduct of the investigation

- We will assemble a case team to conduct the investigation, headed by a Case Sponsor who will take certain key decisions up to and including any decision to issue a Statement of Objections.
- We will keep parties informed on the progress of our investigation, including holding 'state of play' meetings.
- We have formal information gathering powers to investigate suspected CA98 infringements.
- We can order interim directions in order to prevent significant damage or protect the public interest.
- There are several potential outcomes of an investigation, including case closure, finding no grounds for action, accepting commitments or finding an infringement.

### The case team and decision-makers

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- 4.1 The PSR will assemble a case team to conduct the investigation. This may consist of case officers, investigators, lawyers, economists, financial analysts and others with the necessary expertise from across the PSR and the FCA, as appropriate. Each investigation will have a Case Sponsor, who will take the following decisions, as appropriate:
- Whether there is sufficient evidence to issue a Statement of Objections (see paragraphs 5.1 to 5.6).
  - To close a case on grounds of administrative priorities (before or after the issue of a Statement of Objections (see paragraph 4.16).
  - To make an interim measures direction (see paragraphs 4.12 to 4.15).
  - To accept commitments offered by a party under investigation (see paragraphs 4.19 to 4.22).
  - Whether a case is appropriate for settlement (see paragraphs 6.4 to 6.14).
- 4.2 These decisions are described in more detail in the relevant paragraphs, including in relation to the additional approvals needed for certain decisions.

- 4.3 We will maintain a clear division between the conduct of the investigation and the exercise of our regulatory functions under FSBRA.

### Keeping parties informed

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- 4.4 The PSR expects to provide case updates to businesses under investigation and Formal Complainants either by telephone or in writing. We will also offer 'state of play' meetings to businesses under investigation. We use these meetings to ensure that the business is aware of the stage the investigation has reached, and inform it of the next steps and the likely timing of these, subject to any restrictions due to confidentiality or market sensitivity.
- 4.5 We are likely to hold state of play meetings after a case has been formally opened (unless this could prejudice the ongoing investigation), before the decision is taken to issue a Statement of Objections (see section 5) and after we have received the oral and written representations on the statement of objections.
- 4.6 The PSR will keep businesses under investigation and Formal Complainants to the investigation informed of the anticipated case timetable and any changes to this.

### Information gathering

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- 4.7 Once we have 'reasonable grounds for suspecting'<sup>28</sup> an infringement of the prohibitions contained in Part 1 of the CA98 and/or Article 101 or Article 102 of the TFEU, we may use the information gathering powers provided by the CA98. These are described in the CMA's Procedural Guidance.<sup>29</sup> In summary, we:
- Can issue requests for information and documents (commonly referred to as section 26 notices) in writing.
  - Can conduct formal interviews with any individual connected to a business under investigation.<sup>30</sup>
  - Have the power to enter business and domestic premises, require the production of documents and take copies of documents. Such entry may be either with or (for business premises) without a warrant. If we have obtained a warrant, we may search for and seize documents.
  - May fine any business or individual who (without reasonable excuse) does not comply with our information gathering powers.<sup>31</sup>
- 4.8 We also have extensive powers to obtain information from those subject to our regulation under FSBRA (as set out in the PSR's *Powers & Procedures Guide*)<sup>32</sup>, and as noted (see paragraph 2.20) we may use information we obtain in other ways during an investigation under CA98. However, once we have decided to launch an investigation under CA98, we would use the tools provided by CA98 in order to conduct that investigation.

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<sup>28</sup> This is the legal test under section 25 CA98.

<sup>29</sup> *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, March 2014 (CMA8), Chapter 6

<sup>30</sup> Under section 26A CA98

<sup>31</sup> Under section 40A CA98, we may impose penalties for parties failing to comply with our investigation gathering powers without reasonable excuse. In determining whether, and if so how, to proceed under section 40A CA98, we must have regard to the CMA's Policy Statement on Administrative Penalties (*Administrative penalties: Statement of Policy on the CMA's approach* (CMA4)). In addition, it is a criminal offence to provide false or misleading information, or to destroy, falsify or conceal documents (subject to certain statutory defences and conditions).

<sup>32</sup> [Insert link when final]

4.9 The CMA's Procedural Guidance describes the limits on its powers of investigation under CA98.<sup>33</sup> Those limits apply equally to the PSR so that we:

- cannot require the production or disclosure of privileged communications<sup>34</sup>
- cannot force a business to provide answers that would require an admission that it has infringed the law
- are subject to strict rules governing the extent to which we are permitted to disclose confidential and sensitive information (see section 7)

4.10 We expect to receive a separate non-confidential version of any document or materials containing sensitive or otherwise confidential information, along with a clear explanation as to why the redacted information should be considered confidential.<sup>35</sup>

4.11 Where information has been gathered using powers under CA98, we may use it to investigate other matters under CA98 or other legislation such as FSBRA, subject to and in accordance with the relevant legislation and case law (see also section 7).

### **Taking urgent action to prevent significant damage or to protect the public interest**

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4.12 Under section 35 CA98, we have the power to require a business to comply with temporary directions (referred to as 'interim measures') while we complete the investigation. In summary, we can require a business to comply with temporary directions where:

- the investigation has been started but not yet concluded, and
- we consider it necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest

4.13 We can impose interim measures on our own initiative or in response to a request to do so. Any person who considers that the alleged anti-competitive behaviour of another business is causing them significant damage may apply to us to take interim measures. If a person fails to comply with the interim measures without reasonable excuse, we will apply to court for an order to require compliance within a specified time limit.

4.14 In terms of the procedure we will follow:

- Any application should be made to the case team in writing, providing as much detail as possible as to why the grounds set out in section 35 CA98 are met.
- The Case Sponsor may provisionally decide to give an interim measures direction (a provisional decision which may follow a complaint or be on our own initiative). We will write to the business to which the directions are addressed setting out the terms of the proposed directions and the reasons for giving them.
- We will also allow that business a reasonable opportunity to make representations. Given the nature of the interim measures process, the time allowed may be short.

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<sup>33</sup> See its Chapter 7

<sup>34</sup> See section 30 CA98

<sup>35</sup> However, the PSR may nonetheless need to disclose such information pursuant to one of the statutory gateways (set out in EA02 for information gathered under CA98).

- We will allow the business to inspect documents on our file, other than those parts that are confidential (see section 7).
- After taking into account any representations, and having satisfied ourselves as to the adequacy of the evidence we are relying upon, taking into account all the circumstances of case, we will make our final decision and inform the applicant and any Formal Complainants and the business against which the order is being sought. The Case Sponsor is responsible for deciding whether to give an interim measures direction, subject to obtaining the approval of PSR senior management.
- We will publish any interim measures direction we issue.

4.15 If the Case Sponsor provisionally decides to reject an application for interim measures:

- We will consult the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out the principal reasons for rejecting the application.
- We will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.
- If the comments from the applicant or Formal Complainant contain confidential information, a separate non-confidential version must be submitted at the same time (see section 7 on handling confidential information). We may provide this non-confidential version to the business under investigation if we think it would be appropriate to do so, such as where it may be relevant for the rights of defence.
- We will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided, if the Case Sponsor still decides to reject the application, we will send a letter to the applicant and any other Formal Complainants and normally the business against which the directions are sought to inform them and give our reasons.
- However, if the comments and/or additional information from any of these parties leads the Case Sponsor to change his or her provisional view and to decide that we should make an interim measures direction, we will inform the applicant, any other Formal Complainants, and the business against which the directions are sought, and the interim measures application will continue as set out in paragraph 4.14.

## Possible outcomes of investigation

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4.16 There are several ways in which an investigation under CA98 can be resolved.<sup>36</sup> In summary:

- We will issue a Statement of Objections where our provisional view is that the conduct under investigation amounts to an infringement. After doing this and receiving the parties' representations, we can issue a final decision that the conduct amounts to an infringement, and can impose a fine and/or directions on the business(es) concerned (see sections 5 and 6).
- We can issue a decision that there are no grounds for action (either before or after issuing a Statement of Objections) if we have not found sufficient evidence of an infringement (see section 5).

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<sup>36</sup> See paragraph 7.11 below in relation to taking action using the PSR's powers under other statutes, which could be in addition to one of the outcomes listed below.

- We can close our investigation on the grounds of administrative priorities at any time (before or after issuing a Statement of Objections). In these circumstances, we may also write to businesses explaining that, although we are not currently pursuing a formal investigation, we have concerns about their conduct. We will consult Formal Complainants before taking a decision to close an investigation on grounds of administrative priorities.
- We can accept commitments from a business about its future conduct (see paragraphs 4.19 to 4.22).

4.17 Infringement decisions<sup>37</sup>, penalty decisions and decisions that there are no grounds for action will be taken by the Competition Decisions Committee (see sections 5 and 6). All other decisions are the responsibility of the Case Sponsor, subject to obtaining the approval of PSR senior management for any decision to accept commitments.

4.18 As noted (paragraph 2.20), it is possible that information obtained during an investigation under CA98 may lead to and/or be used in enforcement action under FSBRA.

## Commitments

4.19 Under section 31A CA98, we may accept commitments from one or more businesses for the purposes of addressing the competition concerns that we are investigating in a particular case. Commitments are binding promises from a business in relation to its future conduct.

4.20 We will have regard to the CMA's guidance on the circumstances in which it may be appropriate to accept commitments.<sup>38</sup> If we choose to accept commitments we will close our investigation and not take an infringement decision.

4.21 We will give notice of any proposal to accept commitments and allow at least eleven working days for interested third parties to give their views on the proposed commitments. If the parties offer material modifications to the proposed commitments, we will allow interested third parties a further period of at least six days within which to comment on the modified commitments.

4.22 If we accept commitments, then we cannot continue the investigation, make a final decision, or order interim measures.<sup>39</sup> However, we can take such action if we have reasonable grounds to suspect that there has been a material change in circumstances, a business has not adhered to the commitments we accepted, or if the information that led us to accept the commitments was incomplete, false, or misleading in a material particular.<sup>40</sup>

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<sup>37</sup> Other than in settlement cases, for which, see paragraphs 6.4 to 6.14 below.

<sup>38</sup> Annexe A in *Enforcement* (OFT407)

<sup>39</sup> Section 31B(1) CA98

<sup>40</sup> Section 31B(2) CA98

## 5

# The Statement of Objections and following steps

- We will issue a Statement of Objections setting out our provisional findings if we consider that the conduct under investigation amounts to an infringement.
- We will provide the addressees of a Statement of Objections with access to the file of documents relating to the matters set out within it. We may provide third parties with access to the Statement of Objections, if they could assist our investigation.
- Addressees have the opportunity to make written and oral representations, which will be considered by a Competition Decisions Committee who will be appointed after the issuing of the Statement of Objections.
- If necessary, we may issue a Supplementary Statement of Objections or a Statement of Facts.
- If we propose to issue an infringement decision and impose a penalty, we will issue the addressee with a draft penalty statement setting out how the penalty will be calculated.
- The Competition Decisions Committee will be responsible for a final infringement decision or a decision that there are no grounds for action.

### **Decision to issue a Statement of Objections and appointment of a Competition Decisions Committee**

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- 5.1 Where our provisional view is that the conduct under investigation amounts to an infringement, we will issue a Statement of Objections to each business we consider to be responsible for the infringement (the addressee(s)). The Case Sponsor is responsible for the decision to issue a Statement of Objections, after consultation with other senior officials within the PSR.
- 5.2 A Competition Decisions Committee comprising at least three people will be appointed to be the final decision-maker on whether or not the business/es under investigation have infringed the prohibitions contained in Chapter I or Chapter II of CA98/ Article 101(1) or 102 TFEU, once the Statement of Objections has been issued. It will be drawn from a panel appointed by the PSR Board to act as decision-makers in CA98 cases.
- 5.3 We will inform those businesses of the identity of the Competition Decisions Committee members. However, the case team will remain the primary contact for parties, which will remain in place, and parties should not contact the Competition Decisions Committee directly.

## The Statement of Objections

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- 5.4 The Statement of Objections sets out our provisional view and proposed next steps. It gives the business accused of a breach of competition law an opportunity to know the full case against it and, if it chooses to do so, to respond formally.
- 5.5 The Statement of Objections will set out the facts and our legal and economic assessment of them which led to the provisional view that an infringement has occurred. It will also set out any action we propose to take, such as imposing financial penalties<sup>41</sup> and/or issuing directions to stop the infringement if we believe it is ongoing, as well as our reasons for taking that action.
- 5.6 We will normally announce the issue of a Statement of Objections on our website and make an announcement on a regulatory information service. However, we may decide not to announce the issue of a Statement of Objections, or may vary the extent of any publication, depending on the circumstances of the case and in particular the market sensitivity of any information we would otherwise publish. However, in any situation and at any time, listed companies may need to consider their own market disclosure obligations.

## Access to the file

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- 5.7 At the same time as issuing the Statement of Objections, we will also give the addressee(s) of the Statement of Objections the opportunity to inspect the file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.
- 5.8 We will allow addressee(s) of the Statement of Objections a reasonable opportunity (typically six to eight weeks), to inspect copies of disclosable documents on the file. These are documents that relate to matters contained in the Statement of Objections, excluding certain confidential information and PSR internal documents.<sup>42</sup> Section 7 sets out the statutory framework for the disclosure of information. A person to whom we disclose information which is not made publically available must not make any onward disclosure of that information without our consent.
- 5.9 We may, if appropriate, exclude routine administrative documents from the file and list them in a schedule, allowing businesses to access specific documents upon request. Routine administrative documents would be those which do not relate to the substance of matters set out in a Statement of Objections, and could include, for example, correspondence setting up meetings.
- 5.10 In appropriate circumstances, we may consider establishing confidentiality rings (within which confidential information may be disclosed to a defined group) or data rooms (within which access to confidential information may be given to a defined group).

## Involving third parties

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- 5.11 We may provide Formal Complainants (see paragraph 3.1 above) and third parties who may be able to assist materially our assessment of a case with an opportunity to submit written representations. We expect that disclosure of a non-confidential version of the Statement of Objections will be sufficient to enable third parties to provide us with informed comments: this will not generally include any annexed documents. Any such document is to be used only for making representations to us and must not be disclosed to others.

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<sup>41</sup> See paragraphs 5.27 and 5.28 below in relation to the issuing of a draft penalty statement.

<sup>42</sup> Confidential information and internal information are defined in Rule 1(1) of the CA98 Rules.

## Responding to the Statement of Objections

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- 5.12 We will give the recipients of the Statement of Objections the opportunity to make written and oral submissions to the Competition Decisions Committee.
- 5.13 We will set a reasonable time limit for parties to make written submissions. While this will depend on the circumstances, in particular the complexity of the case, we anticipate that we will give addressees between eight and twelve weeks to respond. We anticipate giving Formal Complainants and other third parties between four and six weeks to respond with any representations on the Statement of Objections.
- 5.14 Parties should submit non-confidential versions of their written submissions at the same time or shortly after submission of those submissions to us.
- 5.15 We will disclose non-confidential Formal Complainant and third party submissions to the addressees of the Statement of Objections. In some circumstances, it may be appropriate to share a party's representations with Formal Complainants and other third parties for their comment, e.g. where different versions of the facts have been put forward. We will seek submissions from the party regarding confidentiality before disclosing such representations to the Formal Complainant.
- 5.16 We will invite the addressee(s) of the Statement of Objections to make oral submissions to the Competition Decisions Committee. Any oral hearing will be chaired by the Procedural Officer.<sup>43</sup>
- 5.17 The oral hearing provides the addressee with an opportunity to highlight to the Competition Decisions Committee issues of particular importance to its case, and which have been set out in its written representations.
- 5.18 During the oral hearing, the Competition Decisions Committee and others present may ask questions about the addressee's written representations or questions of clarification. There is no obligation to answer, and addressees may respond to questions in writing after the hearing.
- 5.19 We will take a transcript of the oral hearing and the addressee will be asked to confirm the accuracy of the transcript and to identify any confidential information.
- 5.20 Following the oral hearing, the Procedural Officer will report to the Competition Decisions Committee, indicating any procedural issues that have been brought to the attention of the Procedural Officer during the investigation and confirming whether the parties' right to be heard has been respected, including an assessment of the fairness of the procedure followed in the oral hearing.<sup>44</sup>
- 5.21 We will consider holding multi-party oral hearings in appropriate cases, such as where there are differing views on key issues.

## Steps following representations

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### Consideration

- 5.22 The Competition Decisions Committee will consider the Statement of Objections and representations from the addressee(s), Formal Complainants and third parties. It may draw on advice from PSR/FCA staff, including economists, lawyers and those with sectoral expertise.

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<sup>43</sup> See paragraph 2.4 above.

<sup>44</sup> Rule 6(7) and (8) of the CA98 Rules

## Letter of facts

- 5.23 It may be that we acquire new evidence at this stage which supports the objection(s) contained in the Statement of Objections. If the Competition Decisions Committee proposes to rely on it to establish that an infringement has been committed, it will put that evidence to the addressee in a letter and give it an opportunity to respond to the new evidence. The time allowed for responding will depend on the volume and complexity of the new evidence. However, it will be shorter than the time given to respond to the Statement of Objections.

## Supplementary Statement of Objections

- 5.24 If new information received by the Competition Decisions Committee in response to the Statement of Objections indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement described in the Statement of Objections, the Competition Decisions Committee will issue a Supplementary Statement of Objections setting out the new set of facts on which the Competition Decisions Committee proposes to rely to establish an infringement.
- 5.25 The Competition Decisions Committee will give the Addressee a further opportunity to respond in writing and orally, and to inspect new documents on the file.
- 5.26 If it appears unlikely that engaging with Formal Complainants or other interested third parties at this stage will materially assist the investigation, the Competition Decisions Committee may decide to consult them on a more limited basis, or not at all.

## Draft penalty statement

- 5.27 Where, once any written and oral representations made on the Statement of Objections have been considered, the Competition Decisions Committee is considering reaching an infringement decision and imposing a financial penalty on a party, we will provide that party with a draft penalty statement.<sup>45</sup> This will set out the key aspects<sup>46</sup> relevant to the calculation of the penalty that we propose to impose on that party, based on the information available to us at the time.<sup>47</sup> It will also include a brief explanation of the Competition Decisions Committee's reasoning for its provisional findings on each aspect. We will provide access to any new relevant documents on the file, which will include non-confidential versions of the draft penalty statements issued to other addressees of the Statement of Objections, if applicable.
- 5.28 Parties will be offered the opportunity to comment on the draft penalty statement in writing and to attend an oral hearing (in person or by telephone) with the Competition Decisions Committee.<sup>48</sup>

## Possible decisions

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- 5.29 Following consideration of the Statement of Objections and representations from the addressees, Formal Complainants and third parties, including the possible additional steps described above (paragraphs 5.22 to 5.28), the Competition Decisions Committee will decide to issue:

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<sup>45</sup> Rule 11 of the CA98 Rules

<sup>46</sup> Including, for example, the starting point percentage, the relevant turnover figure to be used, the duration of the infringement, any uplift for specific deterrence, any aggravating/mitigating factors (and the proposed increase/decrease in the penalty for these), and any adjustment proposed for proportionality.

<sup>47</sup> Rule 11 of the CA98 Rules. For further information on how the CMA calculates the appropriate amount of a penalty, see *Guidance as to the appropriate amount of a penalty* (OFT423) available at: [www.gov.uk/cma](http://www.gov.uk/cma). We must have regard to the CMA's Guidance on penalties for the time being in force.

<sup>48</sup> Rule 6 of the CA98 Rules

- an infringement decision, or
- a decision that there are no grounds for action<sup>49</sup>

5.30 As noted in paragraphs 2.18 to 2.20, we may consider that information discovered during a CA98 investigation may justify taking action under our powers under other legislation, such as FSBRA.

### **Infringement decision**

5.31 If we are satisfied that the legal test for establishing an infringement is met, we will issue an infringement decision to each business that the Competition Decisions Committee has found to have infringed the law.<sup>50</sup> The infringement decision will set out the facts on which we rely to prove the infringement and the action that we are taking, and will address material representations made during the course of the investigation. In cases that involve more than one party, information that is confidential will be disclosed to other parties only if necessary. The infringement decision may impose a financial penalty (see section 6) and may also give directions to bring the infringement to an end.<sup>51</sup> If a business fails to comply with our directions, we may seek a court order to enforce them.<sup>52</sup>

5.32 We expect to issue a press announcement regarding any infringement decision, and to make an announcement on a regulatory information service. If so, we will inform the addressee(s) before the issue of the infringement decision and its announcement.

5.33 We will publish a summary, and a non-confidential version of the infringement decision, after seeking representations on confidentiality from the addressee(s) and third parties if relevant.

### **Decision that there are no grounds for action**

5.34 If, having completed its consideration of the case, the Competition Decisions Committee does not find sufficient evidence of a competition law infringement, we will close the case.

5.35 Before taking a decision that there are no grounds for action, we will consult any Formal Complainant in the case.

5.36 We will generally follow the same procedure as for issuing an infringement decision, including making an announcement and publishing a non-confidential version of the decision, although we may decide not to publish a no grounds for action decision, e.g. if it may affect an ongoing investigation under our other powers.

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<sup>49</sup> There are alternative options for the closure of a case following the issuing of a Statement of Objections, which would not be taken by the Competition Decisions Committee. As noted (see paragraph 4.16), we may close a case on grounds of administrative priorities at any time; however, we expect that we will rarely do so once it has reached the stage of issuing a Statement of Objections. The PSR may also accept commitments from businesses to address its competition concerns at any stage, but we anticipate that we would be unlikely to do so at a very late stage, such as following receipt of the representations from the addressee(s) of the Statement of Objections.

<sup>50</sup> Section 31 CA98 and Rule 10(1) of the CA98 Rules

<sup>51</sup> Sections 32 and 33 CA98

<sup>52</sup> Section 34 CA98

## 6 Penalties, leniency and settlement

- If we find a competition law infringement, we may impose a penalty.
- We will apply the CMA's leniency policy when imposing fines under CA98, meaning that we will grant immunity from, or a reduction in the fine imposed on, a business meeting the criteria in the CMA's leniency policy.
- We may, at our discretion, agree a settlement with parties who admit that they have committed a CA98 infringement and agree to a streamlined procedure for the remainder of the investigation.

### Penalties

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- 6.1 If we find an infringement of the prohibitions in Chapter I or Chapter II of CA98/ Article 101(1) or 102 TFEU, we may impose a penalty on the infringing undertaking(s). The infringement decision will explain how the Competition Decisions Committee decided upon the appropriate level of penalty, having taken into account our statutory obligations in fixing a financial penalty<sup>53</sup> and the parties' written and oral representations on the draft penalty calculation.

### Leniency

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- 6.2 Under leniency arrangements, those who have participated in cartel activity such as price-fixing or market sharing can choose to give detailed confessions of their infringements, in return for significant reductions in, or complete immunity from, penalties for that infringement. We will apply the CMA's leniency policy<sup>54</sup> when imposing fines under CA98 where the investigation arises out of a leniency application to the CMA and where the case is transferred to us under concurrency arrangements. We expect leniency applications to be made directly to the CMA (in particular, since we do not have concurrent powers under the Enterprise Act 2002 in relation to the prosecution of the cartel offence, and cannot grant immunity from prosecution in relation to this offence). However, if a party were to choose to apply to us directly for leniency and it satisfied the relevant criteria, we would have regard to the CMA's Penalty Guidance and apply the CMA's leniency policy in relation to CA98 enforcement.

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<sup>53</sup> Section 36(7A) CA98. We will have regard to the CMA's penalty guidance for the time being in force when setting the amount of a penalty (available at <https://www.gov.uk/cma>). The penalty guidance in force at the date of publication of this document is OFT423 *OFT's guidance as to the appropriate amount of a penalty*.

<sup>54</sup> See OFT423 (ibid) and OFT1495 *Applications for leniency and no-action in cartel cases - OFT's detailed guidance on the principles and process* ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf))

- 6.3 This means that we will grant immunity from a fine, or a reduction in the fine, for the infringement of competition law, to an undertaking satisfying the criteria set out in the CMA's leniency policy.

## Settlement

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- 6.4 Settlement is a voluntary process in which:
- a party admits that it has been party to an agreement or has been engaged in conduct which infringes one or more of the prohibitions in Chapter I or Chapter II of CA98/ Article 101(1) TFEU or 102 TFEU
  - the party agrees to a streamlined administrative procedure for the remainder of the investigation (see paragraph 6.8) and
  - we issue an infringement decision but impose a reduced penalty on the settling party (see paragraph 6.7)
- 6.5 The decision to engage in settlement discussions and to settle is at our discretion. The circumstances in which we are likely to consider it appropriate to settle a case will depend on several factors:
- Whether we consider that we have a sufficient understanding of the nature and gravity of the suspected infringement to make a reasonable assessment of the appropriate outcome.
  - The likely procedural efficiencies and resource savings that can be achieved.
  - The number of parties in a case.
  - In multi-party cases, the number of parties interested in pursuing settlement discussions.
  - The prospect of reaching a settlement in a reasonable time. We will not allow parties to use settlement discussions in order to delay an investigation. We will set clear and challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from the formal process.
- 6.6 The settlement procedure is separate from leniency or the commitments procedure, though it is possible for a leniency applicant to benefit from both leniency and settlement discounts.

## Requirements for settlement

- 6.7 We will require a settling party to take a number of actions:
- Admit liability in relation to the nature, scope and duration of the infringement. The scope of the infringement will include, as a minimum, the material facts of the infringement as well as the legal characterisation of the infringement.
  - Cease the infringing behaviour immediately from the date that it enters into settlement discussions with us, where it has not already done so. It must also refrain from engaging again in the same or similar infringing behaviour.
  - Confirm it will pay a penalty set at a maximum amount. This maximum penalty (which will apply provided the business continues to follow the requirements of settlement) will reflect the application of a settlement discount to the penalty that would otherwise have been

imposed. This discount will reflect the circumstances of the case, in particular whether the case is being settled before or after issue of a Statement of Objections. Settlement discounts will be capped at a level of 20%. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount available for settlement pre-Statement of Objections will be up to 20% and that available for settlement post-Statement of Objections will be up to 10%.

- 6.8 In addition, in order to achieve our objective of resolving the case efficiently, settling parties must confirm that they accept that:
- There will be a streamlined administrative process for the remainder of the investigation. This may include streamlined access to file arrangements (e.g. through access to key documents only and/or through the use of a confidentiality ring), no written representations on the Statement of Objections (except in relation to manifest factual inaccuracies), no oral hearings, no separate draft penalty statement after settlement has been reached and no Competition Decisions Committee being appointed (see paragraph 5.2).
  - There will be an infringement decision against the settling party.
  - The decision will remain final and binding as against it, even if another addressee of the infringement decision successfully appeals it.
  - The settling party may be required to undertake to assist us in any continued investigation or in a defence should another party appeal a decision in the case.
- 6.9 The settling party may be required to confirm that they will not appeal a subsequent infringement decision to the Competition Appeal Tribunal.
- 6.10 Parties should not disclose the fact or content of settlement discussions to other persons unless required by law or regulatory requirements, apart from information about the matter to which the infringement decision relates once made public.

### Settlement decision procedure

- 6.11 A decision to initiate a settlement procedure will be taken by the Case Sponsor subject to obtaining the approval of at least two members of the PSR's senior management (the Settlement Decision Makers).
- 6.12 The Settlement Decision Makers will not have been directly involved in establishing the evidence on which the decision is based. They may, but need not, be involved in the discussions exploring possible settlement. If they approve the decision of the Case Sponsor to settle the case, they will formally issue the infringement and penalty decision.
- 6.13 Whenever we enter into settlement discussions, we may agree with the party concerned that we would not seek to rely against each other on any admissions or statements made in the course of the settlement discussions if the matter becomes contested (in an infringement decision or a subsequent appeal from a contested decision<sup>55</sup>). The Competition Decisions Committee (if it has been appointed) will be informed that one or more businesses are exploring the possibility of settlement (because this will extend the case timetable) but would generally otherwise be unlikely to be involved in the settlement discussions.

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<sup>55</sup> If we do not require a settling party to waive its right of appeal, and that party appeals a settlement decision against it, the PSR may use admissions made during the course of the settlement negotiations.

- 6.14 The terms of any proposed settlement will be put in writing<sup>56</sup> and be agreed by us and the party concerned. The admission will be by reference either to the alleged infringement as set out in the Statement of Objections or, if the case settles before a Statement of Objections is issued, will be made by reference to the infringements as set out in a summary statement of facts that we will present to the party.

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<sup>56</sup> Though the PSR may consider a reasoned request from the settling business to provide the confirmation that it accepts the settlement requirements orally, which will be transcribed at the PSR's premises.

# 7

## Disclosure and use of information by the PSR in CA98 investigations

- We must handle confidential information carefully and may not disclose it other than in accordance with either FSBRA or EA02 (as applicable).
- The framework for disclosure of information by us is governed by the context in which we have obtained it.
- Where information is received by us in connection with our CA98 functions, it will be treated as 'specified information' under EA02 and is excluded from the FSBRA regime governing disclosure of information.
- Where appropriate, we may use information obtained during the course of a CA98 investigation to take action under other legislation.

### Disclosure of information by the PSR

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- 7.1 The framework for our use and disclosure of information will be determined by the context in which it has been provided to, or obtained by, us and under which legislation. We may use information that we have received from many lawful sources in conducting investigations under CA98. However, we may only disclose such information under the applicable legal regime. Accordingly, when we wish to use and disclose information that we have gathered under our FSBRA powers in a CA98 investigation, we must apply the relevant FSBRA disclosure provisions.<sup>57</sup>

### Disclosure under FSBRA

- 7.2 When we receive information for the purposes of, or in discharge of, our statutory functions under FSBRA 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 aggregated in a format so that it cannot be attributed to a particular person, is excluded from the definition of confidential information in FSBRA.
- 7.3 However, when we receive information for the purposes of, or in discharge of, our concurrent functions, this information is expressly excluded from the FSBRA regime and will instead be dealt with under the rules set out in EA02 (in other words, information we receive for the purposes of

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<sup>57</sup> The converse would also apply were we to wish to use and disclose information gathered under a CA98 investigation during a FSBRA regulatory action (including compliance failure proceedings).

or in discharge of our concurrent competition law functions can only be disclosed by us under Part 9 EA02, i.e. not under FSBRA). (See paragraphs 7.6 to 7.10).<sup>58</sup>

- 7.4 Where we have obtained information under FSBRA rather than in connection with our concurrent functions (see paragraph 7.6), FSBRA provisions on disclosure will apply. Section 91 FSBRA prevents us from disclosing confidential information unless we have the consent of the person who provided the information (and the person about whom the information relates, if a different person) or a 'gateway' applies. A gateway is an exception to our duty of confidentiality, allowing the disclosure of confidential information to third parties in certain circumstances. If we do not have a gateway, we may not release confidential information without the relevant consent(s).
- 7.5 The full set of gateways is set out in Regulations made by the Treasury under FSBRA.<sup>59</sup> They include a gateway to the FCA and the Prudential Regulation Authority to assist them in the discharge of their public functions, and disclosure of information not subject to single market restrictions to the CMA for the purpose of assisting it to discharge its functions (including under CA98). When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

## Disclosure under EA02

- 7.6 When we receive information in connection with the exercise of our concurrent functions, Part 9 EA02 will apply to any disclosure of such information.<sup>60</sup> Part 9 EA02 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 CA98 functions (referred to as 'specified information') to other persons.<sup>61</sup> 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).
- 7.7 Only disclosure falling within one of the 'information gateways' is permitted, as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents<sup>62</sup> or where the disclosure is made for the purpose of facilitating the exercise by us of any of our statutory functions.<sup>63</sup>
- 7.8 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, namely:
- 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 undertaking to which it relates; or information relating to the private affairs of an individual which we think might significantly harm that individual's interests, and
  - 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

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<sup>58</sup> Section 91(6) FSBRA

<sup>59</sup> The Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/882)

<sup>60</sup> Section 91(6) FSBRA

<sup>61</sup> Section 237 EA02

<sup>62</sup> Section 239 EA02

<sup>63</sup> Section 241 EA02

- 7.9 We will apply these three considerations on a case-by-case basis when we are considering disclosure of specified information. When decisions are finely balanced, we will have particular regard to the need for disclosure to achieve due process, for example to safeguard the rights of defence of an addressee of a Statement of Objections.
- 7.10 Where we disclose information to another person, there are restrictions on the further disclosure or use of the information by that person.

### **Taking action under other powers**

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- 7.11 Given our other objectives and powers, in certain circumstances, it may be appropriate for us to use information that we receive during the course of a CA98 investigation to take action under different statutes, where applicable. Any restrictions that may apply to the use of information transferred to the PSR from a member of the European Competition Network (ECN) or the CMA do not apply to information received by the PSR directly from firms or individuals.

## Appendix 2

### **Market reviews, market studies and market investigation references**

A guide to the PSR's powers and procedures

# 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 introduce appropriate remedies.
- 1.2 As from 1 April 2014, under the concurrency provisions in FSBRA relating to the EA02,<sup>1</sup> 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.<sup>2</sup> 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)
  - how we carry out market reviews under FSBRA and the remedies that may follow (section 3)

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<sup>1</sup> Section 59 FSBRA

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

- how we carry out market studies under our concurrent functions and the provisions of EA02 and the remedies that may follow (section 4)
- how we will make MIRs or accept undertakings in lieu of making an MIR (section 5)
- our 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 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

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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')<sup>3</sup>
- to promote the development of, and innovation in, payment systems in the interests of service-users ('the innovation objective')<sup>4</sup>
- 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')<sup>5</sup>

2.3 We have a range of regulatory powers including:

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<sup>3</sup> Section 50 FSBRA

<sup>4</sup> Section 51 FSBRA

<sup>5</sup> Section 52 FSBRA

- the power to give directions to participants in regulated payment systems, either generally or in relation to a specific participant or category of participant<sup>6</sup>
- 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 system<sup>7</sup>
- 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 system<sup>8</sup>
- the power to require a person who has an interest in the operator of a regulated payment system to dispose of all or part of that interest<sup>9</sup>

2.4 Under FSBRA, we have various powers to gather information and to conduct investigations,<sup>10</sup> 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 functions<sup>11</sup> we have the function of keeping under review the market for payment systems, and the markets for services provided by payment systems,<sup>12</sup> and we may carry out market studies under the provisions of EA02 (EA02 market studies).<sup>13</sup> 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)<sup>14</sup>
- assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects<sup>15</sup>

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.<sup>16</sup>

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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 Guide* (PPG), available at [\[insert link when final\]](#)

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 choice as to which procedure to follow. We have a broadly similar range of remedy powers available to us under both FSBRA and EA02 procedures. In particular, we may:
- make an MIR whether or not we have conducted an EA02 market study, as long as the legal criteria for making an MIR are met (see paragraph 5.1)
  - use our powers under FSBRA to impose remedies on 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.
- 2.10 There are different procedural requirements and timetables for FSBRA market reviews and EA02 market studies (described in sections 3 and 4). One important 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 or features of a market to review or study

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- 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 FSBRA<sup>17</sup>
  - applications made under sections 56 and 57 FSBRA
  - general market intelligence
  - other regulators
- 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

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<sup>17</sup> [To be inserted once bodies are designated, which is expected to be before April 2015.] We have produced guidance on how designated bodies can bring a super-complaint (*Guidance for designated representative bodies on making a super-complaint under section 68 FSBRA*), available here [*insert link when final*].

where there may be competition concerns. You can bring such concerns or complaints to our attention by contacting:

*[To be inserted in final version of guidance]*

Email: *[To be inserted in final version of guidance]*

Tel: *[To be inserted in final version of guidance]*

2.13 Based on the information we have about the market(s) identified, we may form an initial view of how well competition is working in the interests of service-users. However, understanding properly the nature and extent of competition in any market is complex, and we cannot study every market. We must therefore choose which markets or aspects of markets to study. We decide on a case-by-case basis whether to open a market review/study and have regard to several factors, including:

- The prospects for and likely impact of any intervention in the market. This will be a combination of the scale of harm and/or market size, and the potential impact of intervening to address the issue in question.
- 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. deterrent effects or 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 (in terms of being able to take action to make the market work better for service-users).

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

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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.

- 2.16 We decide whether to launch a FSBRA market review or an EA02 market study. In either case, we consult the CMA<sup>18</sup> and FCA<sup>19</sup>. We cannot launch an EA02 market study if the CMA or FCA has launched such a study into the same matter.<sup>20</sup> The CMA and FCA are subject to reciprocal obligations.<sup>21</sup> If the CMA or FCA has launched or is about to launch a study under EA02, we will take this into account in deciding whether or not to launch a FSBRA market review. We will aim to avoid duplication, but might work jointly with the CMA or FCA on a market study.

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18 In line with the general principle of cooperation which will be set out in our forthcoming Memorandum of Understanding with the CMA, and our duty under section 60(1) FSBRA for EA02 market studies.

19 In line with the general principle of cooperation which will be set out in our forthcoming Memorandum of Understanding with the FCA, and our duty under section 60(4) FSBRA for EA02 market studies.

20 Sections 60(2) and 60(5) FSBRA

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

# 3

## How we carry out FSBRA market reviews

### Overview

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- 3.1 The following figure 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"> <li>• Announce publicly the intentions of the market review and the areas of concern</li> <li>• Indicate the scope of the matters on which views and evidence are sought</li> <li>• Engage with relevant stakeholders, including, as appropriate, Operators, PSPs, trade bodies, service-users, consumer bodies, government departments and other regulators</li> </ul>
Research	<ul style="list-style-type: none"> <li>• Fully define data requirements for the market review</li> <li>• Collect and request additional data and information</li> <li>• Carry out market research, business model analysis, interviews, roundtables and other research as appropriate</li> </ul>
Analysis and Interim Report	<ul style="list-style-type: none"> <li>• Assess evidence of issues/market failures</li> <li>• Assess extent of any consumer detriment</li> <li>• Publish interim report outlining draft analysis and preliminary conclusions, and where practicable and appropriate, proposed solutions for addressing any concerns identified</li> </ul>
Report	<ul style="list-style-type: none"> <li>• Publish final report including analysis, conclusions and, where appropriate, proposals and further regulatory requirements</li> </ul>
Remedies	<ul style="list-style-type: none"> <li>• Use existing powers and legal processes to develop proposals (including, for example, making directions, publishing guidance and making proposals for enhanced industry action)</li> <li>• If required, conduct formal consultation on proposed remedy</li> </ul>

## Launch

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- 3.2 We announce the launch of any market reviews we carry out on our website and via a regulatory information service. We will set out:
- The scope of the market review
  - 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.<sup>22</sup>
- 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 make submissions available for public inspection unless the respondent requests otherwise and we accept its request (see section 6 regarding our treatment of information).
- 3.4 For each market review, we inform stakeholders of the issues that concern us and describe our initial views on the reasons that the market may not be working well for service-users. We provide a clear point of contact for stakeholders.

## Research

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- 3.5 We gather information about the market to see how well it is working for service-users (see paragraph 2.13). Each market review involves 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 a voluntary basis. [*The PSR is currently evaluating responses to its November 2014 Consultation Paper 'A new regulatory framework for payment systems in the UK' (PSR CP14/1), including on its proposal to give general directions (under section 54 FSBRA) on Principles of participation in regulated payments systems. One of those proposed Principles (Principle 1) specifies that participants in designated payment systems 'must disclose to the PSR anything relating to the participant of which the PSR would reasonably expect notice'.<sup>23</sup> This paragraph of this guidance will reflect the outcome of the PSR's November 2014 consultation on this point.*] Alternatively, we may use our power under section 81 FSBRA to require persons to provide us with information or documents (see paragraphs 6.2 to 6.5).<sup>24</sup>
- 3.8 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, and the ease with which respondents can provide the information we need. The PSR as a

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<sup>22</sup> Unlike EA02 market studies, there are no statutory deadlines within which we must complete a FSBRA market review. See paragraph 4.4.

<sup>23</sup> [See particularly Annex 2 of Consultation Paper and Supporting Paper 6 (Regulatory tools), available at: <http://www.fca.org.uk/psr/four-consultation>]

<sup>24</sup> 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 Guide* (PPG), available at [insert link when final].

whole aims to coordinate its various activities regarding data requests, in order to manage the burden on any given respondent. Section 6 describes how we must treat confidential 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

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- 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 and test 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 usually publish an interim report, 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, of usually a few weeks. Again, 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 paragraph 3.3). See further section 6 regarding our treatment of information.

## Report

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- 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 to 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
  - the reasons for carrying out the review
  - a description of the methodologies used to collect and analyse the data
  - our responses to feedback received and our analysis
  - our conclusions on the issues considered
- 3.15 If appropriate, we will also publish our proposals for remedies to any issues that we have identified.

## Remedies

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- 3.16 If we conclude that competition is not working well for service-users, we may take action to promote effective competition using a number of remedial measures, including:
- General remedies, 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 remedies. These include 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).<sup>25</sup>
  - 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 firms operating in the market or by conduct of the firms' 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 a package of interventions. 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 The nature of any action we take depends on the individual circumstances of each case, and could include:
- Measures that affect how participants engage with service-users – e.g., 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, e.g. the disposal of an interest in the operator of a payment system, provided that these are proportionate measures.

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<sup>25</sup> 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.

- 3.20 The process involved in implementing remedies will depend on the specific remedy selected.

### General remedies

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

- 3.23 Specific remedies such as giving specific directions or imposing specifically-imposed requirements, on the other hand, do not entail any public consultation process. In the vast majority of cases we will send participants a notice of a proposed direction or requirement and seek representations. More information on the representation process in such cases can be found in the PPG.<sup>28</sup> We would expect to have previously engaged with prospective addressees on the subject matter of the specific direction or specifically-imposed requirement before we decide to give or impose it (for example, in the analysis and interim review phase of the market review).
- 3.24 Additionally, we may also open investigations into the nature, conduct or state of business of any participant in a regulated payment system.<sup>29</sup> We may also open investigations into suspected compliance failures.<sup>30</sup> 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.<sup>31</sup>
- 3.25 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.<sup>32</sup>
- 3.26 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

- 3.27 Where we have reasonable grounds to suspect that features of a market are adversely affecting competition, and where the use of our powers set out above would not be more appropriate, 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.

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<sup>26</sup> 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.

<sup>27</sup> See paragraphs 5.1 to 5.7 of the PPG.

<sup>28</sup> See paragraphs 4.1 to 4.5 of the PPG.

<sup>29</sup> Section 83(1) FSBRA

<sup>30</sup> Section 83(2) FSBRA

<sup>31</sup> See, in particular, paragraphs 21.1 to 21.27 of the PPG.

<sup>32</sup> See further paragraphs 24.1 to 24.4 of the PPG.

## Effectiveness and proportionality, equality and diversity

- 3.28 We aim to ensure that any intervention is effective and proportionate to the concerns identified.<sup>33</sup> 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.<sup>34</sup> There are eight principles, of which the most relevant to us when considering intervention are:
- the efficiency principle - the need to use the resources of each regulator in the most efficient and economic 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
- 3.29 In addition, we are mindful of the high-level principles for regulators in the Legislative and Regulatory Reform Act 2006 including proportionality and transparency, when exercising certain regulatory functions, including policy work (but not rule-making).
- 3.30 Accordingly, we carry out an assessment of proportionality of our proposed remedies and will consult on the draft measures when required.<sup>35</sup>
- 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.<sup>36</sup>

## On-going 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 remedy that we implement following a FSBRA market review or an EA02 market study.

## Urgent action

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- 3.33 In the majority of circumstances we complete the market review procedures outlined above (paragraphs 3.1 to 3.15) before implementing remedies. However, in exceptional circumstances, where we identify a need to act more quickly, we may implement remedies early to prevent the harm to competition in the interests of service-users, e.g. give a specific direction or impose a specifically-imposed requirement.

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<sup>33</sup> 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](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.

<sup>34</sup> 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.

<sup>35</sup> We have no obligation to consult on specific directions or specifically-imposed requirements.

<sup>36</sup> [Insert link(s) to PSR website in final version of guidance.]

## 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 remedy powers following an EA02 market study are broadly 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

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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 completed<sup>37</sup>

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.<sup>38</sup>
- 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,

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<sup>37</sup> Section 130A(3)EA02

<sup>38</sup> Section 131B(1)EA02

within six months of publication of the market study notice, publish notice of our proposed decision and begin the process of consulting relevant persons.<sup>39</sup>

- 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.<sup>40</sup>
- 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.<sup>41</sup> 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.<sup>42</sup>
- 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.<sup>43</sup>

## Research and information gathering

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- 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

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- 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.<sup>44</sup>
- 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.<sup>45</sup> We will make any responses to our proposal to make or not to make 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.

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39 Section 131B(1) EA02

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

41 Section 131B(4) EA02

42 Section 131B(5) EA02

43 Section 131B(6) EA02

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

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

## Final report

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- 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).<sup>46</sup>
- 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).<sup>47</sup> 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).

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<sup>46</sup> Section 131B(3) EA02

<sup>47</sup> 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 will do this where we have reasonable grounds to suspect that features of the market are adversely affecting competition, and use of our other powers would not be more appropriate.
- 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

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- 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 in the UK for the supply or acquisition of financial services prevents, restricts or distorts competition (an 'ordinary reference').<sup>48</sup> The task of the CMA on a reference is focussed on competition, while our market reviews/studies may explore broader issues (see paragraphs 2.2 to 2.6). It has 18 months to complete its investigation, 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 include<sup>49</sup>:
- 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 concerned<sup>50</sup>
  - any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services
- 5.3 'Conduct' includes any failure to act (whether intentional or not) and any other unintentional conduct.

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<sup>48</sup> Section 131(1)EA02

<sup>49</sup> Section 131(2)EA02

<sup>50</sup> 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.

- 5.4 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.<sup>51</sup> 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.<sup>52</sup>
- 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.<sup>53</sup>

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

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- 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.<sup>54</sup> 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)<sup>55</sup> 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.<sup>56</sup>

### Undertakings in lieu of a reference

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- 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).

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<sup>51</sup> Sections 131(2A) and (6) EA02

<sup>52</sup> Sections 131(1) and (2A) EA02

<sup>53</sup> Section 169 (2) EA02

<sup>54</sup> That is, those payment systems designated as regulated payment systems by the Treasury. See further sections 43 to 48 FSBRA.

<sup>55</sup> *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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf)

<sup>56</sup> 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>

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.<sup>57</sup> 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.

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<sup>57</sup> The list of all the points to be included in such notices is given in section 155(2) 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 meeting summaries.

### Information gathering

6.1 Although we expect firms to provide us with information on a voluntary basis, we have formal powers with which we can gather information under FSBRA and EA02.<sup>58</sup>

#### 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.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> It is a criminal offence for a person to falsify, conceal, destroy or otherwise dispose of documents<sup>63</sup> which he knows or suspects to be relevant to the investigation,<sup>64</sup> unless he can show that he had no

<sup>58</sup> See paragraphs 3.7 and 3.8.

<sup>59</sup> Section 88 FSBRA

<sup>60</sup> Sections 83 and 85 FSBRA

<sup>61</sup> Section 85(4) FSBRA

<sup>62</sup> Sections 90(1) and 90(2) FSBRA

<sup>63</sup> Or to cause or permit this to occur.

<sup>64</sup> Section 90(4) FSBRA

intention to hide the facts disclosed in those documents from the investigator.<sup>65</sup> 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.<sup>66</sup>

6.5 A detailed description of the PSR's information gathering and investigation powers can be found in the PPG.<sup>67</sup>

## 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 manner<sup>68</sup>

6.7 Like section 81 FSBRA, we can use these powers against any person.<sup>69</sup>

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.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup>

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 penalty).<sup>73</sup> Persons committing a criminal offence are liable, on summary conviction, to a fine not exceeding the statutory maximum, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.<sup>74</sup>

6.11 The PSR is currently 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

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65 Section 90(5) FSBRA

66 Section 90(6) FSBRA

67 See paragraphs 25.1 to 29.4 of the PPG.

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

69 Section 174 EA02

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

71 Section 174A(4) EA02

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

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

74 Section 174A(6) EA02 It should be noted that section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides for the statutory maximum fine on summary conviction to become an unlimited fine. When this section comes into force, the statutory maximum fine will change accordingly.

concurrent regulators in relation to such penalties<sup>75</sup> 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.<sup>76</sup>

## Use and disclosure of information by the PSR

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- 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.<sup>77</sup>
- 6.13 The framework for our disclosure of information that we receive or obtain will be determined by the context in which it has been provided to, or obtained by, us and under which legislation. In particular, whether we carry out a FSBRA market review or an EA02 market study will affect the framework for disclosure of information received by us in the context of that study.

## FSBRA

- 6.14 When we receive information for the purposes of, or in discharge of, our statutory functions under FSBRA, e.g. 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 aggregated in a format so that it cannot be attributed to a particular person, is excluded from the definition of confidential information in 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 rules 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).<sup>78</sup>
- 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 prevents us from disclosing 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 our duty of confidentiality, allowing the disclosure of confidential information to third parties in certain circumstances. If we do not have a gateway, we may not release confidential information without the relevant consent(s).
- 6.17 The full set of gateways is set out in Regulations made by the Treasury under FSBRA<sup>79</sup> They include disclosure to the FCA and the Prudential Regulation Authority to assist them in the discharge of their public functions, and disclosure of information not subject to single market restrictions to the CMA for the purpose of assisting it to discharge its functions (including under CA98). When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

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<sup>75</sup> All other concurrent regulators (other than the FCA) are obliged to have regard to the CMA's statement of policy on such penalties.

<sup>76</sup> 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.

<sup>77</sup> However, there may be restrictions on our use of information if we receive it from other authorities.

<sup>78</sup> Section 91(6) FSBRA

<sup>79</sup> Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/8820)

## 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.<sup>80</sup> 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.<sup>81</sup> 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). Only disclosure falling within one of the 'information gateways' is permitted, as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents<sup>82</sup> or where the disclosure is made for the purpose of facilitating the exercise of any of our statutory functions.<sup>83</sup>
- 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.

## Transparency

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- 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 meeting summaries, 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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<sup>80</sup> Section 91(6) FSBRA

<sup>81</sup> Section 237 EA02

<sup>82</sup> Section 239 EA02

<sup>83</sup> Section 241 EA02

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