

Draft Guidance for designated representative bodies on making a super-complaint under s.68 FSBRA

March 2015

Note: this guidance will be reissued in final form once the Treasury has designated representative bodies under section 68 FSBRA

1. Purpose

- 1.1 The Financial Services (Banking Reform) Act 2013 (FSBRA) provides that certain representative bodies may complain to the Payment Systems Regulator (PSR). These “super-complaints” should be about a feature, or combination of features, of a market for services provided by payment systems in the UK that is, or appears to be, significantly damaging the interests of service-users. We must respond to such a super-complaint within 90 calendar days.
- 1.2 This process is intended to provide representative bodies with a mechanism to raise issues with us about features of the market that may be affecting service-user interests. A service-user is any person that uses, or is likely to use services provided by payment systems. While this may include service-users who do not reside in the UK, there may be a more limited range of actions that we can take for complaints about damage to the interests of those service-users.
- 1.3 Our super-complaints process has been modelled on the ‘super-complaints’ mechanism applicable to the Competition and Markets Authority (CMA) provided for in section 11 of the Enterprise Act 2002. Under section 70 FSBRA, we are required to provide guidance on the presentation of a reasoned case for a super-complaint under section 68 FSBRA. This guidance is intended to fulfil that requirement. It also aims to help designated representative bodies make comprehensive and robust super-complaints so that we can respond in a manner that addresses a super-complainant’s concerns most appropriately.
- 1.4 We will continue to engage with other economic regulators including the Competition and Markets Authority (CMA) and Financial Conduct Authority (FCA) on their approach to super-complaints and to share best practices, as appropriate. We will keep our Super-Complaints Guidance under review and amend and update it as appropriate in light of experience.

2. Who can bring a super-complaint?

- 2.1 The Treasury decides which representative bodies should be able to make super-complaints. The Treasury can make any organisation a designated representative body provided it “represents the interests of service-users of any description”.¹
- 2.2 The Treasury [will be publishing] criteria to be applied by it in determining whether to make or revoke a designation. Designated representative bodies will be informed bodies that are used to representing the interests of consumers and service-users, including small businesses, who are users of payment systems and services provided by payment systems. Designated bodies are run independently, and with impartiality and integrity, and they are able to provide clear reasoning and evidence in support of any super-complaint they make.
- 2.3 [This guidance will be updated once the Treasury has designated bodies as designated representative bodies for the purposes of making a super-complaint under section 68 FSBRA².]
- 2.4 Representative bodies that want to apply for designated status should contact the Treasury for further information or can find information [link to Treasury guidance when available – to be inserted in final document].
- 2.5 In this guidance we refer to designated representative bodies that are making a super-complaint as “super-complainants”.
- 2.6 Where a body considers that it is in a strong position to represent the interests of service-users but does not believe that it would meet the conditions for designation by the Treasury such a body may want to contact us for further information on how it can represent the interests of its service-users most effectively. We may be able to advise such a body on how to pursue a complaint with us or with another body, including by working with a designated super-complainant.

¹ Section 68(3)(a) FSBRA

² [To be inserted]

3. How to process a super-complaint

- 3.1 When making a super-complaint, the super-complainant should write to us setting out the reasons why, in its view, a UK market for services provided by payment systems has a feature, or a combination of features, that is, or appears to be, significantly damaging the interests of service-users and should therefore be investigated. The super-complaint should be clearly identified as such.
- 3.2 Super-complainants are encouraged to discuss their complaints with us before submitting a formal super-complaint. This may allow us to suggest an alternative course of action to the super-complainant, or inform them of other work we are doing that is likely to address the issues it intends to raise.
- 3.3 If the complaint is suitable for the super-complaints process, early discussion of it will also enable us to highlight any gaps in the information or analysis the super-complainant is proposing to provide. If we have information that may be relevant to the super-complaint, an early discussion may also help us do some preliminary investigative work before formally receiving the complaint. Where relevant, a designated representative body that is also designated to make super-complaints to the CMA or FCA may want to discuss their super-complaint with those authorities before deciding where best to submit their complaint.
- 3.4 Super-complaints and related enquiries should be submitted electronically to PSRSuper-Complaints@psr.org.uk or in hard copy to:

PSR Super-complaints
The Payment Systems Regulator Limited
25 The North Colonnade
Canary Wharf
London E14 5HS
- 3.5 We will aim to acknowledge a super-complaint within one working day of receipt if submitted electronically. Acknowledgement of receipt of a super-complaint does not signify that we consider it to have merit, to be complete or indicate that we intend to investigate it. We may need to ask for more information in order to evaluate the super-complaint and to decide whether to investigate further.

4. Features of the UK market

4.1 The super-complainant should highlight the features of the relevant market for services provided by payment systems that may be significantly damaging the interests of service-users. FSBRA³ provides that a feature of a market in the UK for services provided by payment systems is to be read as a reference to:

- 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 services in the market concerned, or
- any conduct relating to the market concerned of customers of any person who supplies or acquires services.

4.2 This may cover, for instance, super-complaints about issues arising from the characteristics of a payment system or services provided by or to such a system, or from the conduct of any participant or participants⁴ in payment systems, whether or not the system has been designated for the purposes of FSBRA. "Conduct" or behaviour includes any failure to act (whether or not intentional) and any other unintentional conduct.⁵

4.3 While we may consider super-complaints about any feature of a market for services provided by payment systems, we may have limited authority to take action in certain circumstances. This may especially be the case where another regulator is already dealing with the matter or may be better placed to address the concerns raised, such as the FCA or CMA. In these circumstances we will work, where appropriate, with other authorities to establish which one is best placed to deal with the super-complaint. We will agree with the FCA and CMA how we will engage with each other in such circumstances to ensure that any super-complaint is dealt with appropriately.

4.4 For the purposes of making a super-complaint, a market must be in the UK and includes:

- any market which operates in the UK (or part of the UK) and in another country or territory (or in a part thereof), and
- any market that operates only in a part of the UK.

4.5 We expect that a cross-border issue that may affect service-users in the UK or that involves participants in UK payment systems is likely to satisfy this requirement.

4.6 We will not consider an issue that solely affects service-users, participants in payment systems or markets in overseas jurisdictions.

³ Section 68(4) FSBRA

⁴ Participants in payment systems are Operators, Infrastructure Providers and Payment Service Providers as defined under s.42 FSBRA.

⁵ Section 68(4) FSBRA

5. The interests of service-users

5.1 The super-complainant should set out why it considers that a feature of the relevant market for services provided by payment systems is, or may be, significantly damaging the interests of service-users, including, where applicable:

- the features of the relevant market, including any details about market practice, features and/or pricing in relation to the relevant service
- details of the conduct of the relevant participants in payment systems identified as significantly damaging the interests of service-users
- details of any relevant PSR principles, directions, requirements, guidance or other relevant legislation, guidance, or policies (for instance, EU rules) that the relevant participants in payment systems may be failing to comply with or that may otherwise be relevant to protecting the interests of service-users
- whether harm falls disproportionately on a certain class or classes of service-users
- how the relevant feature of the market is or may be causing damage to the interests of the relevant class or classes of service-user, including the impact and extent of the damage or potential damage and an explanation of how this has been assessed or estimated, and
- an indication of what outcome(s) the super-complainant is seeking in order to address the damage to service-users that has been identified.

5.2 It is not necessary for a super-complaint to demonstrate that the interests of service-users have actually been damaged. Where a super-complaint does not demonstrate that service-users are actually suffering harm, super-complainants should provide us with clear information about why they consider that service-user interests are at risk of being damaged.

5.3 Super-complaints should relate to the interests of service-users generally or to those of a specific class or classes of service-user identified in the complaint. Complaints about damage to the interests of individual service-users should be addressed in writing to us.⁶

5.4 Where possible, all matters raised in the super-complaint should be supported by documented facts and evidence. While we do not expect super-complainants to provide the level of evidence necessary for us to take formal action, the information provided by the super-complainant should be sufficient to enable us to determine whether we need to carry out further investigation.

5.5 Where relevant and feasible, the super-complainant should try to provide us with evidence about:

- details of the market (including details about the nature of the service concerned) to which the super-complaint relates, and whether there are particular aspects of the service causing actual or potential problems for service-users
- whether the super-complaint relates to the market as a whole or only to certain participants in payment systems or parts of the market

⁶ See Our Powers & Procedures Guidance – email: PSRcomplaints@psr.org.uk.

- details of service-user needs, how easy it is for them to use the services provided by payment systems and the general quality of the services they receive
- whether particular aspects of the services provided by payment systems, the way in which they are sold or provided, lack of transparency or difficulties in properly assessing cost, risks and benefits of different systems, present particular problems for service-users
- the terms on which the services provided by payment systems are supplied, including the level and structure of fees, charges or other costs associated with the services
- any costs incurred or practical difficulties experienced by service-users as a direct result of switching to alternative suppliers or of seeking to exit or terminate a service
- practices by payment systems participants in the relevant sector that may be restricting or distorting competition, or stifling innovation
- whether the relevant service is only supplied together with other services rather than separately
- whether service-users or specific classes of service-users are facing barriers to accessing relevant services
- the steps the super-complainant has already taken or attempted to take in relation to the issue (or the steps the service-users which the super-complainant represents have already taken or attempted to take in relation to the issue)
- details of any industry codes of practice or guidance that apply to the service, and
- any other matter that may be relevant to assessing whether a feature or combination of features of the relevant market is or may be significantly damaging the interests of service-users.

6. How will super-complaints be handled?

- 6.1 We will examine the contents of the super-complaint in more detail to determine if it meets the criteria set out above, that is:
- the super-complainant is a designated representative body
 - the super-complaint is about a feature, or the combination of features, of a market in the UK for services provided by payment systems, and
 - there is a reasoned case showing that the feature, or combination of features, complained of is, or appears to be, significantly damaging the interests of service-users.
- 6.2 All the criteria must be satisfied for the complaint to receive super-complaint status.
- 6.3 If the super-complaint satisfies these criteria, we will assess the quality of information and evidence supplied. We will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. Where we find that a reasoned case for complaint has not been made or that it requires clarification, we will contact the designated body as soon as possible requesting further information or clarification. Where a request for clarification or further information is made, the super-complainant will be given a set time period within which to respond. If it fails to do so, we may consider making a formal response that no action will be taken regarding the complaint. We may choose to meet with the designated body making the complaint to raise any immediate questions about the evidence submitted and to offer a broad indication of our lines of enquiry.
- 6.4 We may then carry out wider enquiries, with a view to testing the evidence provided and obtaining any further information we consider necessary to form a reasoned view on whether the complaint justifies further action. Exactly how we do this will be determined on a case-by-case basis, but may involve:
- internal research
 - requests for information
 - carrying out a review of the relevant participants in payment systems
 - approaching relevant businesses or trade associations for information
 - publishing information that we already hold
 - approaching consumer organisations, trading standards departments, government departments and/or other public bodies for information
 - initiating other work such as a market study, market review, research or commissioning a report
 - consultation with the Bank of England, the FCA, the Prudential Regulation Authority, the PSR Panel or any other relevant body, or
 - any other action we deem necessary and appropriate.

- 6.5 We will keep the super-complainant informed of material developments in the progress of the case and the super-complainant can contact us to clarify issues or for further information as appropriate. Any discussions held with the super-complainant will be subject to the general restrictions on us relating to the disclosure of confidential information in section 91 FSBA.
- 6.6 If a super-complainant considers that its super-complaint contains commercially confidential information, it must explain why this information is commercially confidential, and it must provide a separate non-confidential version of the complaint. Super-complainants should avoid making claims of confidentiality over entire documents unless there are good grounds for doing so.

7. What action will result from a super-complaint?

7.1 We are required under section 69 FSBRA to publish a response to the super-complaint within 90 calendar days setting out how we propose to deal with the complaint, explaining in particular whether we have decided to take any action and, if so, what action, and the reasons for our decision. Any action we take will be subject to the usual procedures and controls that may be relevant to that action. For example, if we propose to make general directions or requirements as a response to a super-complaint, we will follow our general consultation process⁷ for making general directions. The possible outcomes of a super-complaint include, but are not limited to:

- regulatory action by us (including, but not limited to, taking enforcement action against a participant or participants in a regulated payment system, or launching a market review under our regulatory powers)
- using our competition law powers (including launching an investigation into anti-competitive conduct of a participant or launching a market study)
- initiating a review of our relevant directions, requirements or guidance
- referring the complaint to another authority or regulatory agency that may be better able to address the complaint
- initiating further assessment of the matters raised in the complaint
- deciding that no action should be taken, or
- dismissing the super-complaint as unfounded, frivolous or unnecessary.

7.2 It is possible that following the submission of a super-complaint, a super-complainant may be able to achieve a resolution of the matters raised with the subject of the super-complaint directly. We will consider such developments when determining whether to take action and the nature of such action. The fact that a super-complainant has been able to achieve a resolution of the matters in the super-complaint to its own satisfaction does not of itself prevent us from taking further action where we deem this to be appropriate and proportionate.

⁷ Section 104 FSBRA

8. Publicity for super-complaints

- 8.1 It is for a super-complainant to decide whether or not to issue a press notice recording its super-complaint. However, super-complainants should consult with us to avoid jeopardising investigations that could be hampered by prior disclosure of the super-complaint. In such circumstances, the agreement of the super-complainant may be sought to keep the existence of the super-complaint confidential for a period.
- 8.2 It should be noted, however, that we are required to publish our response to the super-complaint. As a minimum, this publication will include a non-confidential version of the complaint and our reasons for our proposals on our website. If it is appropriate, a press notice may also accompany the response.
- 8.3 In some circumstances we may decide that it would also be appropriate to issue a press notice ourselves when we receive a super-complaint, for example if the announcement of the super-complaint was to be combined with a public request for information. This will be decided on a case-by-case basis. Super-complainants may be encouraged to create a public summary of their complaint, where not already in the public domain, to encourage interested parties to submit relevant information to us.