FINANCIAL CONDUCT AUTHORITY
PAYMENT SYSTEMS REGULATOR

Policy Statement PSR PS15/2

Response to PSR Consultation CP15/1: PSR Competition Concurrency Guidance

In this Policy Statement we report on the main issues arising from Consultation Paper 15/1, *PSR Competition Concurrency Guidance,* and publish the finalised guidance.

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You can download this Policy Statement from our website: www.psr.org.uk

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Introduction

1.1 Following consultation earlier this year, we are publishing two documents:

- final guidance on our Competition Act 1998 (CA98) powers and procedures
- final guidance on our market reviews, market studies and market investigation reference powers and procedures

1.2 This consultation response document sets out our views on the responses to the consultation.

Who does this affect?

1.3 Our market reviews, market studies, market investigation reference functions and procedures, and our CA98 functions and procedures, are relevant to all parties who operate or use payment systems in the UK. These include payment system operators, banks, building societies and other payment service providers (PSPs), infrastructure providers, service users (including businesses), trade bodies, consumer groups, and other parties interested in payment systems in the UK. Our concurrent competition powers extend beyond the scope of participants in regulated payment systems under the Financial Services (Banking Reform) Act 2013 (FSBRA): they enable us to carry out CA98 investigations, conduct EA02 market studies, and make market investigation references concerning persons and activities not regulated by the PSR under FSBRA, but which relate to participation in payment systems.

Is this of interest to consumers?

1.4 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 payment systems in the UK.

Context

1.5 From 1 April 2014 we have had powers under the Enterprise Act 2002 (EA02), and from 1 April 2015 we have had powers under CA98. This means we have powers in relation to the participation in payment systems to carry out market studies and make market investigation references to the Competition and Markets Authority (CMA) under the EA02, and we have powers in relation to participation in payment systems to enforce the prohibitions on anti-competitive behaviour in CA98 and the Treaty on the Functioning of the European Union (TFEU).

1.6 These same 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 payment systems, the CMA and the PSR have 'concurrent powers' and the PSR is a 'concurrent regulator'. The FCA also obtained similar powers concurrent with the CMA in relation to the provision of financial services.

1.7 The powers under CA98 and EA02 are additional to our ability to use our FSBRA regulatory powers[1] to advance our competition, innovation and service-user objectives, [2] and to conduct market reviews using our FSBRA information gathering powers.

1.8 Earlier this year, we consulted on:

- draft guidance on our powers and procedures under CA98, to be issued under section 52 CA98
- draft guidance on market reviews under FSBRA and on market studies and making market investigation references under EA02, to be issued under section 96 FSBRA

1.9 These documents were based extensively on the equivalent draft documents published for consultation by the FCA contemporaneously with our guidance consultation (CP15/1). In finalising these documents, in addition to considering responses to the PSR's own consultation we have considered responses to the FCA's consultation where these raise issues that are relevant to our equivalent or similar functions in respect of payment systems.

1.10 Jointly with the FCA we also held a meeting with stakeholders on 6 March 2015 to provide an opportunity for engagement on the draft guidance documents. Many of the comments made echoed the written responses we received to our and the FCA's consultation. We have taken into account the comments made in that meeting in finalising our guidance.

1.11 Our aim has been to adopt procedures similar to those of the FCA in respect of its concurrent powers, in recognition of the advantages of alignment for stakeholders who are active in the UK financial services sector as well as being participants in UK payment systems. However, the PSR's procedures and our guidance on them have been developed in a way that reflects the differences between the PSR and the FCA, including differences in our respective statutory functions, objectives, duties and powers.

1.12 In this consultation response document, we set out the feedback received, our response and indicate whether any changes have been made to guidance in our response.

Summary of feedback and our response

1.13 A summary of feedback received and our responses is set out in Chapter 2 for our CA98 Guidance and in Chapter 3 for our market reviews, market studies and market investigation references guidance (Markets Guidance). The summary covers:

- responses made exclusively to the PSR's consultation
- responses made to both the PSR's and the FCA's consultations where the respondent indicated that it considered its comments to be relevant to both
- responses made to the FCA's consultation where these raise issues that are relevant to our equivalent or similar functions in respect of payment systems

1 See sections 54 to 58 FSBRA
2 See sections 50 to 52 FSBRA

Guidance on our Competition Act 1998 powers and procedures (CA98 Guidance)

1.14 Overall the responses received were supportive of the proposals and the concurrent power of the PSR to enforce competition law in relation to participation in payment systems. For example, one said that the draft guidance *'gives a clear and comprehensive statement of how the PSR proposes to exercise its concurrent competition powers'*.

1.15 We received requests for clarity on a range of issues (e.g. our view of CMA guidance where it is more detailed than ours, how we choose when to take a CA98 case, information gathering and use, and some procedural points), which we have provided where appropriate.

1.16 There were two issues in particular on which we received several substantive comments. First, we received comments on our proposed settlement procedures, and in particular whether parties that wish to settle CA98 cases with us would have to waive their right of appeal to the Competition Appeal Tribunal (CAT). After reflection, we decided that this is not a requirement with respect to CA98 settlements with the PSR, although we may require waivers for the settlement of regulatory enforcement cases under FSBRA.

1.17 Secondly, we also received submissions with regard to the requirements of Principle 1 (now General Direction 1) on which we were consulting in our November 2014 Consultation Paper (CP14/1) and the extent to which this would require participants in regulated payment systems to bring their contraventions of competition law to the PSR's attention. Following consultation, Principle 1 was modified and adopted by the PSR as General Direction 1, thus: *'A participant must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of the PSR's statutory objectives and duties'.* This Direction requires participants in regulated payment systems to bring contraventions of competition law to the PSR's attention.

1.18 We were asked to provide guidance on how we would use information provided to us under Principle 1 in CA98 procedures. We were asked whether the disclosure obligation is consistent with relevant law and does not infringe the privilege against self-incrimination. In the longer term we may develop general guidance on compliance with General Direction 1, including (but not limited to) disclosure of competition law infringements. We would consult on this guidance in the normal way. There were also concerns about the relationship between this obligation and the leniency programme run by the CMA under CA98. The obligation under General Direction 1 is, and must be, independent of the voluntary activity of applying for leniency, and we explain the scope of the General Direction 1 obligation and its interaction with competition law in this document (see paragraphs 2.18 and 2.41 to 2.44 and our responses below). We are satisfied that the General Direction 1 obligation and the leniency programme share common aims and the processes themselves do not conflict.

Guidance on our market reviews, market studies and market investigation reference powers and procedures (Markets Guidance)

1.19 We received relatively few submissions on our proposed guidance on market reviews, market studies and market investigation references. They mainly related to our choice of tool (i.e. EA02 or FSBRA), information gathering and use, and avoiding unnecessary burdens on participants. We have aimed to provide clarity and explanation as appropriate. We have also added minor amendments and clarifications to the description of the launch of PSR market reviews, in the light of recent experience from the launch of our infrastructure and indirect access market reviews.

Next steps

1.20 The finalised guidance explains how we will carry out investigations under CA98 (CA98 Guidance), and market reviews under FSBRA and market studies and market investigation references under EA02 (Markets Guidance).

1.21 These guidance documents represent the PSR's procedures as at the date of publication. We will keep these documents under review and may revise them from time to time – for example, to reflect changes to our practice and procedures in the light of our developing experience or because of changes in the law. Our website will always contain the most up-to-date versions.

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

2.1 In this chapter, we summarise the responses received to our consultation on our draft CA98 Guidance. We also set out our response and a summary of any changes made to the CA98 Guidance as a result.

General comments

2.2 A theme across virtually all responses was respondents' support for the PSR aligning its approach with that of the CMA. Respondents emphasised the need for coordination with the CMA and other regulators.

2.3 Some respondents requested that we should be clearer when we are departing from CMA guidance and why. Further, they asked that, where CMA guidance provides more detail than the draft guidance we published, the PSR should confirm that it will take the same approach as the CMA. They sought guidance to assist parties navigating the interface between FSBRA and competition powers and more detailed guidance on the application of competition law in the payments industry.

2.4 One respondent said that they would like the PSR to demonstrate in its final policies that it is an economic regulator concerned about the functioning of markets rather than conduct. Another said that the PSR should set out clearly the policy goals that it will pursue in the application of its concurrent competition powers.

Our response

We have sought to provide concise guidance on how we will exercise the powers given to us to enforce the prohibitions in CA98 and Articles 101 and 102 TFEU. In some respects, we must follow the CMA rules set out in The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458) and we must have regard to CMA guidance. In other respects, we have discretion (for example, on the degree of transparency on opening a case). In such cases we have aimed to identify the processes that we think will allow us to enforce the prohibitions most effectively and efficiently. We have not sought to duplicate all the guidance that the CMA has issued, with its greater experience. However, where CMA Guidance is more detailed than ours in a material respect, we shall consider such guidance in deciding how to proceed.

We have not set out detailed substantive guidance on how we will apply competition law in relation to participation in payment systems: we do not have sufficient experience to add to the guidance available from the precedents created by UK and EU authorities, and discussed in academic journals and text books. However, in principle, competition law (and economics) apply to the payments industry just as it does to all sectors of the UK economy, even though the characteristics of the services and markets may be specific.

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This guidance is focused on procedural aspects of our CA98 powers. Information about PSR policy goals is provided in our Policy Statement PS15/1 of March 2015 and on our website, which sets out how we will pursue our policy objectives, roles and responsibilities as an economic regulator. We will consider providing more detailed substantive guidance in the light of the PSR's experience in due course.

Change to guidance

We have added a statement in paragraph 1.6 that we will consider CMA guidance where it is more detailed than ours in a material respect in deciding how to proceed.

Prioritisation principles

2.5 Respondents said that the PSR should align its prioritisation process for opening a CA98 investigation with that of the CMA (or make clear that it is adopting the same approach). One respondent said that the prioritisation framework for competition cases should make explicit reference to the PSR's Administrative Priority framework for regulatory cases.

2.6 One respondent asked what the difference is where CMA Guidance refers to the 'likelihood of a successful outcome' and the draft CA98 Guidance refers to the prospects of 'determining whether or not there has been an infringement'.

Our response

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. 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 (see paragraphs 3.7 and 3.8 of our CA98 Guidance).

CMA16 paragraphs 4.18 to 4.20 say what the CMA means by 'likelihood of a successful outcome'.[3] These factors are captured in paragraph 3.7 of our CA98 Guidance. The likelihood of determining whether or not there has been an infringement is one aspect of what the CMA refers to as the 'likelihood of a successful outcome'.

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf

Change to guidance

We have included in the CA98 Guidance at paragraph 3.8 a cross reference to the PSR's Administrative Priority Framework, which relates to the exercise of all our statutory objectives, functions and duties. It should be read alongside the CA98 Guidance.

Choice of tools

2.7 Some respondents requested that we provide more detail on, or examples of, how we will approach a decision on choice of tools – for example, the extent to which this will depend on considerations of procedure, evidential requirements, timing etc. They sought greater clarity on how we would fulfil our primacy obligation.

Our response

We consider that our concurrent powers complement our regulatory powers. Several factors are relevant to our choice of tool, but broadly, our focus will be on choosing the tool that will enable us most efficiently and effectively to achieve the best outcomes for those who use payment systems. Having said that, some behaviour may fall for investigation most naturally under competition law (e.g. price-fixing; strategic behaviour by a dominant undertaking to exclude rivals).

Primacy is a focused legal obligation that applies as a result of section 62 FSBRA when we propose to exercise one of the five identified FSBRA powers. The CA98 Guidance sets out how we will approach the decision as to which tool is 'more appropriate'. We will generally aim to consider both the availability and appropriateness of action under CA98 when we encounter a competition issue within the payments industry.

Change to guidance

New paragraphs 2.18 and 2.19 are added to explain that CA98 is one of a number of legal tools available to us to address competition issues, which we will consider in appropriate cases. Changes made to paragraph 2.26 to provide greater clarity on our choice of tool.

Information gathering and use of information

2.8 Respondents asked that we confirm that where separate requests are made under different information-gathering powers, steps are taken to minimise the administrative burden on participants (to avoid duplication and overlap between requests for information under different statutes). One asked that we cite a legal source for the statement that we can use information from one source for other purposes: it said that such dual use should not be permitted and may conflict with EU law.

2.9 Other respondents also said that the PSR's use of information should be clarified and that we should not use information received in the context of competition powers for enforcement outside of competition law; leniency information should only be used for CA98.

2.10 We were urged to provide clearer guidance on gateways under FSBRA for use of information in CA98 proceedings. One respondent referred to the risk of 'flip-flopping' between CA98 and FSBRA procedures.

Our response

We make significant efforts to ensure the burden we impose on participants by our requests for information is proportionate, and repeat that commitment in the CA98 Guidance.

The relevant legislation that applies to us (in particular section 91 of FSBRA and Part 9 of EA02) requires us to observe any applicable restrictions on the use and/or disclosure of information. Subject to those restrictions, and those described below in relation to leniency information, the PSR is not prevented from using information properly obtained under one power for our functions under another.

We and the CMA are keen to preserve the incentives for parties to apply for leniency, in order to deter, detect, destabilise and end cartels. The PSR and CMA have agreed that leniency information[4] which the CMA passes to the PSR may only be used by the PSR for the application and enforcement of the competition law prohibitions,[5] unless the leniency applicant agrees otherwise. The restriction on use also applies to any information a resulting PSR CA98 investigation obtains. However, leniency information can also be used to remind a participant in a regulated payment system of any obligation it may have General Direction 1.

This restriction on use does not affect the PSR's use of information obtained from other sources (such as through a General Direction 1 disclosure).

In addition, the PSR has signed a statement agreeing to the terms of the Commission Notice on cooperation within the Network of Competition Authorities which includes restrictions on the use that can be made of certain information disclosed by other European Competition Network (ECN) members, and on the transfer of information as between ECN members.[6]

We see no conflict between our ongoing regulatory functions and any investigation under CA98.

We will be clear when dealing with parties which power we are using.

Change to guidance

New paragraph 4.6 is added to set out our commitment to ensure burdens on participants are proportionate. Paragraph 4.11 is further developed to explain how we may use information. New paragraphs 6.5 to 6.8 are added to explain the use the PSR may make of leniency information provided by the CMA.

4 Leniency information for these purposes includes any information which came into the possession of any of the CMA, its predecessor bodies, or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under the Chapter I prohibition CA98 or Article 101 TFEU. It includes any information that investigative measures resulting from the leniency application obtain.

5 That is, the Chapter I and II prohibitions of CA98, and Articles 101 and 102 TFEU.

6 OJ C 101, 27.04.2004, p. 43. We note in this context that Article 28 of Regulation 1/2003, which relates to professional secrecy, also applies to information received under Articles 11 and 12 of that Regulation.

Parallel/sequential proceedings

2.11 Some respondents sought further clarification on our possible use of CA98 powers in parallel or sequentially with our other powers. They asked whether parties might face multiple fines for the same conduct. They referred to double jeopardy (*ne bis in idem)* issues if there were other sanctions as well as CA98 fines.

Our response

As noted, we consider that our concurrent powers complement our regulatory powers and give us additional tools to ensure that payment systems work well for those who use them. It is possible that those powers may overlap in some respects, which is why we may have to choose which power is best suited to address the issue we face. It is also possible that we may wish to use more than one set of powers (for instance, conduct that infringes CA98 might also reveal impediments to access to payment systems). However, in exercising our powers we will respect the principle of proportionality, and take account of fines levied by authorities in connected cases.

Change to guidance

Paragraph 2.20 is further developed to make it clear that we will take account of fines levied by authorities in connected cases.

Case allocation PSR/CMA

2.12 Respondents sought further guidance on how it is determined who will take a CA98 case.

Our response

Regulations 4 and 5 of The Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536) set out how cases will be allocated between the CMA and PSR (and other concurrent regulators). We shall aim to agree on case allocation with the CMA but, in the absence of agreement, the CMA will decide. *Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries* (CMA10, March 2014) sets out a non-exhaustive list of factors relevant to the decision as to which authority is better or best-placed (see its paragraph 3.22). We will consider in due course, in the light of further experience, whether it is possible to give further guidance on this question.

Change to guidance

No change made in response to these comments.

Division between conduct of investigation and supervision

2.13 One respondent asked how the FCA and PSR will ensure division between investigations under CA98 and the ongoing supervision of participants in regulated payment systems (in the PSR's case) or regulated firms (in the FCA's case).

Our response

As noted above, we see no conflict between our ongoing regulatory functions and any investigation under CA98. We note also that, distinct from the FCA, the PSR does not have a supervision function.

Change to guidance

No change made in response to this comment.

Transparency about substance of case

2.14 Respondents urged the PSR to give industry as much information as possible about its thinking and allow participants to comment on proposed actions. This includes updates to the progress of CA98 investigations beyond the procedural stages and anticipated timing of the investigation and the scope of information requests.

Our response

The CA98 Guidance sets out in paragraphs 4.3 to 4.5 the process we intend to follow when investigating CA98 cases to ensure that we meet our transparency principle with respect to the parties under investigation and formal complainants, and that the rights of defence of parties are respected. This will help to ensure that investigations proceed efficiently.

Change to guidance

We have added a statement in paragraph 1.6 that we will consider CMA guidance where it is more detailed than ours in a material respect in deciding how to proceed. No further changes.

Transparency about issuing of Statement of Objections and other case announcements

2.15 Some respondents said that we should provide advance notice of the date and advance sight of any announcements to parties regarding a CA98 case. Clarity was sought about whether the PSR will name parties when we announce the issuing of a Statement of Objections. It was also said that we should align our practices with those of the CMA and announce the opening of an investigation.

2.16 One respondent said that more detail should be provided on the conduct of oral hearings equivalent to CMA guidance and making clear that generally third parties will not be permitted to attend the addressee's oral hearing. The same respondent said that where more than one party receives a draft penalty statement a non-confidential copy of each party's draft penalty statement should be available for inspection by the other parties.

Our response

The CA98 Guidance sets out the process we propose to follow when investigating CA98 cases to ensure that we meet our transparency principle and that the rights of defence of parties are respected. We will consider on a case-by-case basis whether it is appropriate for interested third parties to be present at oral hearings.

We do not wish to catch parties by surprise with regard to the dates of any announcements, and so will keep them informed to the extent practicable while complying with our legal obligations, and to the extent that doing so would not prejudice ongoing investigations. We may give advance sight of notices, although we are mindful of the need to handle market-sensitive or otherwise confidential information with care. We anticipate naming parties when we announce the issue of a Statement of Objections (in line with CMA practice).

Change to guidance

Changes have been made to paragraph 5.6 regarding keeping parties informed of the anticipated case timetable. We have added a statement in paragraph 1.6 that, where CMA guidance is more detailed than ours in a material respect, we shall consider such guidance in deciding how to proceed.

Access to file and confidentiality

2.17 Respondents asked for detail on access to the evidence that is relevant to our investigation. They also sought detail on the circumstances in which the PSR will consider it appropriate to establish a confidentiality ring and the measures that the PSR will consider it appropriate to establish in order to protect confidentiality.

Our response

Parties against whom we propose to make an infringement decision have the right of access to the file. The case file might include commercially sensitive information relating to another party and/or a third party. In such a case, there is a difficult balance between respecting rights of defence and protecting the commercial information of the other party and/or third party.

We will consider how to ensure that rights of defence are respected. We will consider whether and when is appropriate to establish a confidentiality ring in a given case as set out in paragraph 5.10 of our CA98 Guidance. A data room might be another solution to enable access to the file to be granted to a limited number of advisers representing the party under investigation, who have given undertakings not to use or disclose the information, other than to make submissions to the investigating authority. However, data rooms are not necessary and/or appropriate in every case.

Change to guidance

No change made in response to these comments.

Leniency

2.18 Clarity was sought around the interaction between concurrent powers and leniency applications. One respondent queried the legal basis for the PSR to accept leniency applications. It submitted that if the PSR does accept applications directly, then it must clarify that the CMA will be bound by any grant of leniency by them. Respondents raised timing issues relating to making PSR General Direction 1 (and the FCA Principle 11) disclosures, noting that the leniency application should come first.

Our response

The PSR can accept leniency applications with respect to CA98 and which are made in accordance with the CMA's leniency policy.[7] However, we do not have the experience of the CMA, do not have its established leniency enquiry line, and cannot grant immunity for the cartel offence established by section 188 of EA02. We therefore expect leniency applications to be made directly to the CMA in most cases and we have not developed separate procedures for the making of such applications to us.

Participants in regulated payment systems have an ongoing obligation to be transparent with us under General Direction 1, and this includes being transparent about actual or possible infringements of competition law. Applying for leniency is an option available to undertakings and individuals who have participated in cartel activity.[8] It is a voluntary step that parties may, for their own reasons, choose not to take. Accordingly, the General Direction 1 obligation cannot be tied to the discretionary activity of applying for leniency.

7 The CMA's penalties policy is set out in OFT423. More detailed guidance on leniency is in OFT1495. Both documents have been adopted by the CMA Board.

8 Cartel activity is defined for the purposes of the CMA's leniency policy for undertakings as agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing. *See Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, July 2013, OFT1495, which has been adopted by the CMA Board.

We do not think that the General Direction 1 regime and the CMA leniency regime conflict: participants can meet the requirements of both regimes if they act promptly.[9] See further paragraphs 2.41 to 2.44 and our response, below.

Change to guidance

Paragraphs 6.3 and 6.4 are further developed to clarify the PSR's position with respect to leniency applications. New paragraph 6.5 is added to emphasise the independence of the General Direction 1 obligation on participants in a regulated payment system from the option to apply for leniency. See also paragraphs 6.6 to 6.9.

Settlement procedure: general

2.19 Respondents asked that we clarify the roles of case sponsors and settlement decision makers in settlement discussions. It was submitted that we should avoid any suggestion of Competition Decisions Committee (CDC) involvement and any suggestion that admissions or other statements made during settlement discussions will be used subsequently in contested proceedings. Respondents sought clarification on procedure generally, including any departures from CMA settlement procedures and whether we would consider hybrid settlements (i.e. where some parties to a multiparty investigation settle and others do not).

Our response

Our CA98 Guidance sets out that 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). If a case settles before a Statement of Objections (SO) is issued, no CDC would be appointed. If an SO has been issued, the CDC would be made aware of the discussions because of the timing implications, but would generally not be involved in the discussions themselves. However, it is possible that there may be exceptional cases where we consider it appropriate for the CDC to oversee the settlement discussions and remain decision makers on the case. We would expect to hold any settlement discussions on the basis that neither PSR staff nor the person concerned would seek to rely against the other on any admissions or statements made if the settlement discussions fail and the matter is considered subsequently by the CDC, and we have made this clearer in the guidance. We may consider hybrid settlements (i.e. where some parties to a multiparty investigation settle and others do not) though we note the difficulties these may entail.

9 See OFT1495, paragraph 3.11.

Change to guidance

We have clarified in paragraph 6.18 that we would expect to hold any settlement discussions on the basis that neither PSR staff nor the person concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the CDC. We have also clarified that the CDC would not be involved in the settlement discussions other than in exceptional circumstances.

Settlement procedure: waiver of right of appeal

2.20 We received many submissions on our proposal that parties to settlement agreements with the PSR may be required to confirm that they will not appeal a subsequent infringement decision to the Competition Appeal Tribunal (CAT). These submissions are summarised below.

2.21 Respondents said that requiring waiver of appeal rights was not appropriate, wrong as a matter of principle, unnecessary, and disproportionate. They said that this approach would be contrary to s46 CA98, Article 6 ECHR, and Article 47 of the Charter of Fundamental Rights. Respondents said that this approach was inconsistent with the CMA and European Commission approaches, which both allow settling parties to appeal the resulting infringement decision.

2.22 Respondents said that the risk of losing a settlement discount is sufficient and a proportionate disincentive to appeal. They said that parties would be in a very different position depending on which authority undertakes the investigation. There would be no appeal available if PSR rules of procedure were not followed or penalty calculations are discriminatory. They said that further facts or evidence may come to light after settlement. It was also objected that the later decision against the settling party may not reflect the basis of earlier settlement, and that appeals can be avoided by maintaining consistency between the basis of settlement and the basis of decision. One respondent said that the waiver requirement was not appropriate where the settling party does not know how the nature, scope and duration of the infringement will be presented in the infringement decision.

2.23 Two respondents specifically acknowledged that other sector regulators may require a waiver of the right to appeal in sector regulatory enforcement settlements.

Our response

This was one of two issues that were most heavily commented upon (the other related to the implications of our General Direction 1 obligation). We have considered the submissions carefully.

We have decided that if a party wishes to settle a CA98 case investigated by the PSR, we would not require that party to waive its rights of appeal. This is the approach followed by some other concurrent regulators and the CMA in CA98 cases.

We may require a settling party in a regulatory case under FSBRA to waive its rights of appeal. This is consistent with the approach of some other concurrent regulators with respect to their regulatory enforcement action.

Change to guidance

We have changed paragraph 6.14 of the CA98 Guidance to reflect the fact that we will not require a settling party to waive any rights of appeal but they would forego any settlement discount on making an appeal.

Complaints by parties

2.24 One respondent asked where complaints by parties outside the remit of the Procedural Officer should be raised (such as regarding the scope of information requests).

Our response

Complaints in the first instance should be made to the case team. They may be escalated to the case sponsors. Parties may also bring complaints via the PSR Complaints Scheme. Ultimately an administrative decision of a relevant official may potentially be judicially reviewed. These points are dealt with in paragraphs 2.3 to 2.7 of the CA98 Guidance.

Change to guidance

No change made in response to this comment.

Interim measures

2.25 Some respondents asked that we provide more guidance on factors relevant to deciding whether interim measures are justified, and their possible content. They asked us to confirm that we will follow the CMA's approach. One respondent urged the PSR to take account of the impact of publishing information such as interim measures, bearing in mind the effect this could have on stability, investment and innovation. Another said that it was not clear whether parties would have a right to appeal such an order.

Our response

The CMA sets out relevant factors in *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), paragraphs 8.12 to 8.16. We will have regard to these.

A decision of the PSR to direct interim measures, like any administrative decision, is subject to judicial review.

See paragraphs 2.15 and 2.16 and our response above on our approach to transparency in case announcements.

Change to guidance

We have set out in paragraphs 1.6 and 4.13 that we will have regard to the factors set out by the CMA.

Commitments

2.26 One respondent suggested that we share any third party responses to the commitments (through public consultation) with the offeror of the commitments. It also suggested that we follow the CMA's approach (as set out in paragraph 10.20 of CMA8) of holding a meeting with offerors of commitments for the purposes of informing them of the general nature of the consultation responses received and any amendments required to the commitments that it considers are necessary.

Our response

Replicating the approach set out in paragraph 10.20 of CMA8 appears to be a sensible step. We will consider on a case-by-case basis the extent to which it is appropriate to share responses to a consultation on commitments with the offeror of commitments and will be mindful of confidentiality concerns.

Change to guidance

We have revised paragraph 4.21 to reflect the approach set out in paragraph 10.20 of CMA8.

Internal checks and balances

2.27 One respondent asked us to provide assurances on internal checks and balances before decisions are taken.

2.28 One respondent said that it should be made clear that the CDC members will have competition expertise. Two respondents said that the CDC should be separate and independent from the PSR case team that will be responsible for the CA98 investigation.

Our response

Our CA98 Guidance sets out our procedural framework intended to ensure compliance with applicable law and to safeguard parties' rights of defence. Internally, case sponsors may seek additional quality assurance reviews. This will also be an option available to the CDC in any given case.

The CDC will be drawn from experts with relevant experience including competition law enforcement. The CDC will be the final decision maker as opposed to the case investigation team and as such is separate and independent.

Change to guidance

No change made in response to these comment.

General Direction 1 regulatory duty of cooperation and disclosure: general

2.29 We received submissions with regard to the requirement under our proposed Principle 1 (which, following consultation, was modified and adopted as General Direction 1) and the extent to which this would require participants in regulated payment systems to bring contraventions of competition law to the PSR's attention.

2.30 At the time of our consultation on our draft CA98 Guidance, our proposed Principle 1 was also still the subject of consultation on our overall regulatory approach (in November 2014). The PSR subsequently adopted General Direction 1, thus: *'A participant must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of the PSR's statutory objectives and duties'*.

2.31 For CA98 procedural purposes, we were asked to provide guidance on how we will use Principle 1 information in CA98 procedures. One respondent said that if Principle 1 is adopted the PSR should provide guidance as to the extent to which it would expect to be notified of actual or potential breaches of competition law under Principle 1 and that it should consult on such guidance.

2.32 The main concerns and comments related to:

- the proposed substantive scope of the disclosure obligation (e.g. how would this apply to effects-based infringements or situations where the practice benefited from block exemption)
- the geographic scope of the obligation (e.g. would this apply to competition infringements outside the UK)
- the absence of a materiality threshold
- the tension or inconsistency with the privilege against self-incrimination in circumstances where the disclosure obligation effectively requires the participant to admit to an infringement or possible infringement
- the interaction between the disclosure obligation and leniency
- the timing of a disclosure (e.g. whether the obligation was triggered by an actual investigation being launched by a competition or other authority or whether this would arise at an earlier stage)
- disclosure of notification submissions in private damages actions
- retroactive effect

- the unintended consequences of the obligation, including flooding the PSR with failsafe applications and the corporate governance effects of parties reporting on a broad spectrum of conduct

2.33 Although the more detailed comments were made in response to the FCA consultation and proposed changes to its Handbook, we have considered such comments in the context of General Direction 1 to the extent relevant and appropriate to the PSR's functions, objectives and procedures.

Our response

General Direction 1 requires participants in regulated payment systems to bring contraventions of competition law to the PSR's attention. In the longer term and in light of experience and best practice we may develop general guidance on General Direction 1, which would be subject to consultation in the normal way.

Our response on the interaction between General Direction 1 and leniency is considered at paragraph 2.18 above and 2.41 to 2.44 below. Below, we consider comments made on the substantive scope of the obligation.

Change to guidance

We have updated the CA98 Guidance to reflect the now-adopted formulation of General Direction 1 (previously proposed Principle 1). See paragraph 3.2.

General Direction 1: privilege against self-incrimination

2.34 A number of respondents considered that the General Direction 1 disclosure obligation might breach the privilege against self-incrimination, in light of the European Court of Human Rights' comments on the quasi-criminal nature of competition law infringements and the criminal cartel offence under EA02. It was also submitted that the obligation conflicts with the ECHR.

Our response

The application of the privilege against self-incrimination to competition law investigations, and to the stages before an active investigation, is complex and nuanced. We think the following general points are relevant:

- We note the comments that under the case-law of the ECHR, competition law has a 'quasi-criminal' nature. However, the law already ensures sufficient protection of the privilege against self-incrimination in competition law cases. In that regard, the PSR will respect the safeguards contained in section 30A CA98.

We also make the following more specific points:

- A key concern with the privilege against self-incrimination is the use as evidence of admissions obtained under compulsion. We are aware of this concern in relation to competition law investigations and will take account of this accordingly. In particular we seek neither admission nor confessions as part of a disclosure under General Direction 1.

We expect to be given the facts and circumstances that indicate that an infringement has or may have occurred. This might be obvious (e.g. receiving an information request from an authority such as the CMA setting out its concerns that the recipient may have infringed the law), or it may be that factors have come to light internally that cause a participant in a regulated payment system concern. In this case, we expect that participant to be transparent with us.

- We think the legal position is sufficiently clear that compelling disclosures for regulatory purposes does not infringe the privilege against self-incrimination. While a notification under General Direction 1 might lead to enforcement action under CA98 or TFEU, its origins are in our regulatory functions. For example, a General Direction 1 notification may indicate (amongst other things) a wider problem for market access or that those who use payment systems are not appropriately considered.
- We believe in any event that concerns around the use of a particular piece of evidence in the context of establishing a CA98 breach will satisfactorily be addressed by the strong procedural safeguards that have been put in place to protect the subject of those proceedings. These include access to the file, the ability to make representations before the CDC, and appeal on the merits to the CAT. Moreover, the PSR will comply with the safeguards provided in section 30A CA98.
- Additionally, once we launch an investigation, undertakings cannot be forced to admit they have committed an infringement but must answer factual questions and provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.[10]

Accordingly, we are satisfied that our proposal does not infringe the privilege against self-incrimination.

Change to guidance

No change made in response to these comments.

General Direction 1: materiality threshold

2.35 Many respondents submitted that in its proposed form, the obligation could require disclosure of any infringements, however minor or insignificant. Many respondents were also concerned that the FCA's SUP handbook gave guidance that the requirement was to notify where a firm 'has or may have' infringed the law, as it could require notification when there was no clear indication that there had in fact been any infringement.

2.36 Respondents said that there were particular issues given the complex nature of competition law assessment. Parties which may be approaching a dominant position might be required to notify arrangements in case they would amount to an abuse, without being certain of whether they are dominant and irrespective of whether it was clear whether there is an abuse. One respondent said that even where all the relevant facts are known, it might still be difficult to know whether there has been a breach. It was submitted that the notification requirement could have a chilling effect on competition, if parties were deterred from entering pro-competitive arrangements if they felt obliged to notify them.

10 Case 374/87 *Orkem v Commission* ECLI:EU:C:1989:387, [1989] ECR 3283.

2.37 A number of respondents considered that the introduction of the obligation could result in obligations similar to the pre-Modernisation system of 'pre-notification' in which parties could notify agreements falling within Article 101(1) TFEU to the European Commission in order to obtain an exemption under Article 101(3) TFEU, if the conditions set out in that provision were satisfied. It was submitted that the obligation might require notification in circumstances where a party itself considered that the conduct did not infringe the law (e.g. because it satisfied the criteria for exemption). Another respondent submitted that it would require parties to conduct a self-assessment under Article 101(3).

2.38 One respondent submitted that breaches of merger rules should be excluded. Several respondents pointed to the administrative burden for the PSR in assessing the disclosures.

Our response

We are keen that parties approach the General Direction 1 obligation in a sensible and proportionate way as regards possible competition law infringements, just as they will do for other possible breaches of regulatory requirements or laws that are relevant to General Direction 1. We have no intention of re-introducing pre-notification and fully support self-assessment by parties of their own compliance with competition law.

Several respondents urged the FCA and PSR to adopt the thresholds of 'material' or 'significant' infringements. We note that there is a materiality threshold inherent in the concept of 'infringement' of the prohibitions in CA98 and TFEU, to the extent that there must be an appreciable effect on competition and trade within the UK or between Member States (respectively). In line with the purpose of General Direction 1, we are concerned with issues relevant to our consideration of matters which could '**materially** adversely impact advancement of the PSR's statutory objectives and duties' (emphasis added).

With regard to the concern that the FCA's use – in its SUP handbook amendments in respect of its Principle 11 – of the phrase 'may have infringed' was too vague or indeterminate, and would result in a large number of 'fail safe' notification, we note that the PSR has not yet issued any guidance on its General Direction 1 obligation. We will take account of the consultation responses received by FCA and PSR on this point in developing any future guidance we decide to issue in relation to General Direction 1. In the meantime, we expect participants to take a sensible approach to the interpretation of General Direction 1 and to engage with us if they are uncertain about what it requires.

We do **not** consider that the General Direction 1 obligation is limited to disclosures that participants 'have infringed' competition law. This would either entail a very limited set of notifications (for instance, it could be argued that only an infringement decision by a competent authority upheld on appeal would qualify) or it would require an admission of liability that we do not seek. Participants in regulated payment systems should therefore notify us of their possible infringements of competition law where these could materially adversely impact on the advancement of the PSR's statutory objectives and duties.

Change to guidance

No change made in response to these comments.

General Direction 1: application to any applicable competition law and unregulated activities

2.39 A number of respondents considered that the FCA's SUP handbook statement that the obligation to notify applied to a breach of 'any applicable competition law' was too broad as it could catch infringements which have no impact on the relevant regulated activities. It was proposed that the obligation be limited to breaches of UK or other EEA competition laws (while another respondent sought confirmation of its assumption that the scope was UK and EU). Another respondent submitted that breaches of merger control obligations should be explicitly carved out.

2.40 A number of respondents were concerned at the proposal that the obligation would extend to breaches of competition law in relation to unregulated activities (in the case of the FCA) or non-designated payment systems (in the case of the PSR). One respondent submitted that this would create an uneven playing field, placing a more onerous burden on those parties whose activities were regulated.

Our response

Our interest is not limited to possible enforcement action under CA98 and the TFEU, since the purpose of General Direction 1 is to ensure the PSR is informed about matters which could materially adversely impact advancement of the PSR's statutory objectives and duties. Accordingly, competition law of other jurisdictions may be relevant and infringements of such law could be within the scope of the General Direction 1 obligation. Competition law infringements (actual or potential) overseas may be of real relevance in the context of global payment systems that facilitate payments to and/or from UK service users.

Change to guidance

No change made in response to these comments.

General Direction 1: timing of the disclosure obligation and interaction with leniency regimes

2.41 Many respondents commented on the timing of a disclosure (e.g. whether the obligation was triggered by an actual investigation being launched by a competition or other authority or whether this would arise at an earlier stage).

2.42 It was submitted that timing was particularly an issue in relation to suspected cartel behaviour, as the making of a leniency application requires a concrete basis for suspicion of cartel activity and a genuine intention to confess. It was queried whether the notification obligation could render the voluntary nature of leniency applications redundant and that it might undermine the leniency regime.

2.43 It was asked whether the notifying participants would still be able to benefit from the leniency policy. Another respondent also asked whether a disclosure made by one party about a cartel with another would prevent that other from receiving immunity from the CMA or European Commission in relation to the same activity.

2.44 It was also submitted that the notification obligation may be in conflict with requirements in leniency policies not to disclose the fact of the leniency application.

Our response

See paragraph 2.18 and our response, above. Participants in regulated payment systems have an ongoing obligation to be transparent with us under General Direction 1, and this extends to actual or possible infringements of the prohibitions in the CA98 and Articles 101 and 102 TFEU. Applying for leniency is an option available to undertakings and individuals who have participated in cartel activity.[11] It is a voluntary step that parties may, for their own reasons, choose not to take. Accordingly, the General Direction 1 obligation cannot be tied to the discretionary activity of applying for leniency.

We make the following specific points with regard to the interaction between a possible leniency application and the duty to self-report under General Direction 1:

- The CMA and PSR share an interest in detecting, deterring, destabilising and ending cartels. The CMA's leniency programme applies to all sectors of the UK economy, and we believe that the obligation on a participant in a regulated payment system under General Direction 1 can only add to its incentives not to engage in cartel behaviour, or to report if it does.
- We would collaborate with the CMA in the event of a notification to us of cartel activity, and would not require any party to take actions that might tip off fellow cartelists, without consulting the CMA.[12]
- With regard to the concern that parties may not be eligible for full immunity from the CMA if they have already notified under General Direction 1, we note the conditions for immunity (known as 'Type A' leniency) marker are that there is no pre-existing investigation and the applicant is the first to apply. A disclosure under General Direction 1 does not itself remove either condition, although it may increase the prospect that a formal investigation is launched before a leniency application has been made. If a 'Type A' leniency marker is unavailable because there is a pre-existing investigation, then a 'Type B' leniency marker may be available for the first applicant. However, in such cases immunity would be discretionary. Leniency applicants are encouraged to approach the CMA as early as possible.[13]
- The contents of a disclosure for the purposes of General Direction 1 are not the same as those required by the CMA in an application before it grants a leniency marker: in particular, a General Direction 1 disclosure need not contain an admission or reflect an intention to confess; we are, rather, concerned with the underlying circumstances and facts.
- Accordingly, we do not think that the General Direction 1 and CMA leniency regimes conflict: participants can meet the requirements of both regimes if they act promptly.[14]

11 Cartel activity is defined for the purposes of the CMA's leniency policy for undertakings as agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing. See *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, July 2013, OFT1495, which has been adopted by the CMA Board.

12 Further, we note that only the CMA can grant leniency in respect of, the cartel offence contained in section 188 EA02. Businesses considering whether the criminal cartel offence is relevant should consult the CMA in order to ensure that they do not prejudice the ability of their employees to benefit from immunity or leniency. Businesses considering applying for leniency should have regard to the CMA's guidance. See OFT1495, and in particular paragraphs 3.8 to 3.14 on conducting internal investigations and paragraphs 3.24 to 3.28 on maintaining confidentiality and securing evidence.

13 The CMA may grant a marker for leniency on a provisional basis, with some time given to provide the additional information necessary for the marker to be confirmed. The CMA sets a relatively low evidential threshold for the gaining of a marker, namely a concrete basis for a suspicion of cartel activity and a demonstration of a genuine intention to confess. See OFT 1495, paragraph 3.11.

14 See OFT1495.

However, participants who are concerned about the interaction of disclosures under General Direction 1 and the CMA's leniency regime should contact us and the CMA and we will work together and discuss how best to proceed based on the individual circumstances of the case.

Change to guidance

We have revised the CA98 Guidance to reflect these points. See paragraphs 6.5 to 6.9.

General Direction 1: notifications in writing

2.45 A number of respondents were concerned about the statement in the FCA's SUP handbook that the disclosure of a competition law infringement should be made in writing unless the participant has made or will make an oral application for leniency or immunity covering the same subject matter to a competition authority. It was submitted that there could be concerns about written notifications being subject to disclosure obligations in private damages actions or to other competition authorities not only in cartel cases in relation to which a leniency application might be made.

Our response

We note the particular sensitivity around potential leniency applications. As noted, General Direction 1 disclosures need contain no admissions, but should report facts or circumstances that might cause a participant concerns that competition law may have been infringed. We think this should limit concerns relating to private actions for damages. In any event, we do not think that this factor should be persuasive: any exposure to damages would result from infringement of competition law, and it is participants' responsibility to avoid this.

We will give consideration to the consultation responses received by the FCA and PSR in developing any future guidance we decide to issue in relation to General Direction 1. We would consult on such guidance in the normal way. In the meantime, parties should raise any queries with the PSR directly.

Change to guidance

No change made in response to these comments.

General Direction 1: whether the disclosure obligation has retroactive effect

2.46 A number of respondents were concerned as to whether the disclosure obligation has retroactive effect and suggested guidance on this point should be provided. It was submitted that the need for notifications of behaviour prior to a certain date should be excluded.

Our response

General Direction 1 came into effect on 30 April 2015. Since that date, participants in regulated payment systems have been required to disclose to the PSR appropriately anything relating to the participant which could materially adversely impact on the advancement of the PSR's statutory objectives and duties. It is not correct to think of this disclosure obligation being applicable only to facts and circumstances which post-date the coming into force of the direction. General Direction 1 is not limited in this way. If facts or circumstances pre-date 30 April 2015 but have the potential to materially adversely impact on the advancement of our statutory objectives and duties going forward, participants should be disclosing these matters to us.

Change to guidance

No change made in response to these comments.

General Direction 1: onward disclosure

2.47 One respondent submitted that it was unclear whether the disclosures would fall within Article 6(5)(a) of the EU Damages Directive, so that they cannot be disclosed until the regulator has closed proceedings. The respondent sought clarity on how disclosures would be dealt with since they might be made in the absence of any proceedings.

2.48 The same respondent also sought clarification on whether disclosures would be 'specified information' under EA02 and, therefore, not available for disclosure in response to FOIA.

Our response

We are bound by significant restrictions relating to our disclosure of information, in particular contained in section 91 of FSBRA and Part 9 of EA02. We handle all material received under General Direction 1 accordingly. In the first instance, such material is handled under FSBRA, since General Direction 1 is a regulatory obligation imposed under our FSBRA powers. Material gathered subsequent to the launch of a CA98 investigation using our CA98 powers would be 'specified' within the meaning of Part 9 of the EA02. Material covered by either section 91 FSBRA or Part 9 of EA02 will be protected from FOIA disclosure. Art 6(5)(a) of the EU Damages Directive only applies to information prepared for proceedings, so it is unlikely the disclosures would be covered.

Change to guidance

No change made in response to these comments.

Payments to whistleblowers

2.49 One respondent said that the regulatory toolkit should be expanded to include payments to whistleblowers. It emphasised the increasingly international nature of payments and the need to provide adequate incentive for disclosures.

Our response

We note that some authorities provide financial incentives to encourage disclosure of regulatory breaches. The experience in this area on the effectiveness of such incentives is mixed. We will keep the position under review in light of best practices.

Change to guidance

No change made in response to this comment.

3
Market reviews, market studies and market investigation references: A guide to the PSR's powers and procedures

3.1 In this chapter, we set out a summary of responses we received to our consultation on the draft guidance on our powers and procedures for conducting market reviews under FSBRA and market studies and making market investigation references under EA02 (Markets Guidance). We set out below our response, and a summary of any changes made to the Markets Guidance as a result, for each point in turn.

FSBRA market reviews or EA02 market studies?

3.2 Some respondents requested that we should identify which power we are using to conduct the market review or market study and that the guidance documents are not clear as to when the PSR will carry out a FSBRA market review and when it will carry out an EA02 market study. A more detailed explanation was requested on the issue of when we will use a FSBRA market review as opposed to an EA02 market study.

3.3 There was also a concern that FSBRA market reviews will be used to avoid statutory deadlines under EA02. One respondent stated that the PSR should adopt EA02 market study timelines for a FSBRA market study.

3.4 There was also feedback on the need to clarify the position on changing track on a market review/study as there was a concern that a change between FSBRA and EA02 could allow the PSR to take advantage of information gathering powers available under EA02.

3.5 Some respondents commented that there is no legislative basis for using regulatory powers following an EA02 market study and that a market investigation reference should only be made following an EA02 market study. In other words, FSBRA powers should only be used following FSBRA market review and a market investigation reference should only be made after an EA02 market study.

3.6 One respondent said that the PSR should clarify its procedural standards for market investigations.

Our response

Our Markets Guidance was based on a careful reading of the applicable statutes and legislation and so reflects our understanding of the functions that they have conferred upon us. We have specific information gathering powers under both FSBRA and EA02.

The terms of reference for any market review under FSBRA or any market study under EA02 will identify which statutory power we are using to conduct that exercise.

In our view, we may choose whether to use our FSBRA or EA02 powers to conduct a market review or study. We identified no reason to distinguish between FSBRA market reviews and EA02

market studies on the basis of whether the market study is to be competition based or otherwise.

In considering whether to conduct a market review (under FSBRA) or a market study (under EA02), we would take account of the aim(s) of the review/study. An EA02 market study can be used to consider the extent to which there are adverse effects on consumers and how these might be remedied. A FSBRA market review might have a similar aim, or might instead (or also) be focused on advancing our competition, innovation and service-user objectives in other ways (e.g. by considering the extent to which there could be untapped potential for innovation or improvements in the experience of service users).

Our indicative timetable of 12 months for FSBRA market reviews is closely aligned with the timeframe for an EA02 market study and provides adequate certainty and transparency for parties. FSBRA market reviews may take more or less time than the statutory deadlines applicable to EA02 market studies, depending on the range of objectives being advanced in an individual market review, and the remedies that might result.

We are not prohibited from switching between our FSBRA and EA02 powers when conducting market reviews and market studies, although in practice we would aim to use the most appropriate tool from the outset.

Similarly, there is no statutory prohibition on using our FSBRA powers at the end of an EA02 market study or making a market investigation reference at the end of a FSBRA market review. We think this raises no issues of inappropriateness or procedural unfairness. Any remedies imposed using FSBRA powers have their own associated due process and procedural safeguards which adequately protect the interests of those affected. We may exercise those powers where we have the evidence necessary. We are satisfied that such evidence might come from either a market review under FSBRA or an EA02 market study. Likewise, we may make a market investigation reference if the statutory test for a reference is met, and that test does not require that an EA02 market study has been completed. We would consult on any proposal to make a market investigation reference.

Change to guidance

Paragraphs 2.8 and 2.9 are further developed.

Avoiding unnecessary or multiplicity of reviews

3.7 Respondents said that we should exercise our market review and study powers appropriately and proportionately.

3.8 One respondent said that before launching a market review the PSR should take account of the value of transactions handled by a given system and the availability of alternatives to the payment system in question.

3.9 One respondent said that the PSR should not conduct parallel market reviews under FSBRA and market studies under EA02. More generally, respondents said that the PSR should take into account the burden placed on industry when it decides to launch a market review/study. Another concern highlighted was that of PSR initiating market reviews or studies to educate itself generally of market conditions.

Our response

We will always consider the appropriateness of undertaking a market review/study and clearly articulate our reasons for launching the exercise. In the interests of sound administration and ensuring that burdens on affected parties are proportionate, we expect not to conduct separate market reviews and studies on the same or related areas. However, this may not always be possible and much will depend on the focus of each market review or study. We aim to ensure the impact of our market review/study on affected parties, and the industry, is proportionate by not sending multiple requests for information we have previously collected. We will consult with the CMA before launching an EA02 market study or a FSBRA market review, and the CMA is subject to reciprocal obligations with regard to EA02 market studies. We will also consult with the FCA as appropriate (and indeed we are required to do so in respect of EA02 market studies).

Change to guidance

Paragraphs 2.16 and 3.8 are further developed.

Dual-use of information

3.10 One respondent raised the issue that if a concurrent regulator collects information as part of a market review or study and then uses this information in separate proceedings under other legislation, this would be a breach of the procedural rights of defence of the party. In support, the respondent drew attention to Article 28(1) of Regulation 1/2003.

Our response

See response under paragraphs 2.8 to 2.10 above where we discuss the legal framework applying to the PSR's gathering and use of information. There is nothing to prevent us using information properly obtained under one set of powers for our functions under another. Information that we hold is subject to strict legislative provisions (principally section 91 of FSBRA or Part 9 of EA02). Whichever power is used to obtain information will cover its use and disclosure. Article 28(1) of Regulation 1/2003 applies to information gathered under that Regulation, which does not apply to information we gather under our market review/study powers. We also note that we do not collect information under Articles 17 to 22 of Regulation 1/2003 for the PSR's own investigations. We will respect the safeguards provided in FSBRA and EA02.

As noted, any enforcement action under the CA98 entails substantial procedural safeguards to protect the interests of parties. There are also substantial and comparable procedural safeguards for any enforcement action under FSBRA.

Change to guidance

No change made as a result of this comment.

Transparency and engagement

3.11 Respondents generally encouraged the PSR to be as transparent as possible. It was suggested that we have a dedicated webpage for market reviews/studies that provides details of the various steps involved for each market review/study, a tentative timetable and details of project directors, team leaders and senior decision makers involved.

3.12 It was also suggested that the PSR should increase engagement with participants before we produce our interim report. This will help to minimise burdens on participants once the interim report is published. It was also suggested that the PSR should consult participants on information requests before making the requests.

3.13 Some respondents commented that there should be consultation with the CMA before launching a market study, that the CMA should be subject to a reciprocal obligation and that there may be some merit in conducting joint market studies in some instances.

3.14 Some respondents requested greater transparency in the remedies, in particular, on reducing barriers to entry. It was stated that this will allow new entrants to compete effectively with large incumbents.

3.15 One respondent asked for caution against short term use of an authority's regulatory toolkit to remedy a competition issue, where market investigation may be the most appropriate course of action. Another emphasised the need for a party's business model to be understood.

Our response

We may publicly consult on the draft terms of reference for a market reviews and we expect to engage with affected parties during the initial stages of a market review. The purpose of an interim report is to set out our evidential basis and provisional views and gather further stakeholder responses before we reach a final decision. We do not consider it appropriate to commit to undertaking additional consultation in advance of the interim report, though there may be times when it is appropriate to consult on particular points. We will therefore consider what additional engagement is appropriate (whether with individual parties or more widely) on a case-by-case basis.

We agree with the recommendation that we should generally engage with affected parties regarding draft requests for information before making the requests. This is likely to allow us to ask targeted and fruitful questions and is likely to reduce the time taken to conduct the market review. However, this may not be possible and appropriate in every case.

As the Markets Guidance states, we will consult the CMA before launching an EA02 market study or a FSBRA market review, and the CMA is subject to reciprocal obligations with regard to EA02 market studies. We see benefits in conducting a joint market study in some cases and will do so where we think this is the most effective and efficient way to proceed.

We favour transparency. For example, we recently consulted on the proposed terms of reference for our indirect access and infrastructure FSBRA market reviews.[15]

The issue of selecting the most appropriate remedies is specific to the focus of each market review or study. The comments on this topic are more relevant for each individual market review or study rather than the Markets Guidance. We will make a market investigation reference and/or use our regulatory tools where appropriate. This determination will be made on a case-by-case basis.

The precise levels of transparency and engagement with affected parties largely depend on the sensitivity of information and the complexity of the market study, as well as the number of parties affected.

Change to guidance

No change made in response to these comments.

Information gathering

3.16 The responses we received were mainly concerned with managing the burden on affected parties resulting from repeated requests.

3.17 We were asked to clarify how we will minimise the burden on affected parties in light of the large volumes and complexity of information generally requested. Respondents highlighted that the cumulative burden of repeat and discrete requests has the potential to restrict the affected party from pursuing other commercial opportunities.

3.18 Some respondents asked that parties be compensated for responding to information requests.

3.19 We received feedback that information disclosed by the PSR to another person should be restricted to the purposes which have initially compelled its disclosure.

3.20 One respondent asked whether the PSR will consider using third parties to collate and report on research and analysis.

Our response

We will be proportionate and balanced when carrying out a market review/study or otherwise collecting information. We recognise that compiling and submitting requested information may be burdensome. However, such information requests and corresponding market reviews and studies are essential to enable us to fulfil our statutory functions and make payment systems work well for those who use them. We do not have the power to compensate parties for responding to information requests.

In addition to the restrictions on use of leniency information referred to above, our information use and disclosure is subject to strict statutory constraints, particularly those in section 91 FSBRA and Part 9 of EA02. We will observe these as we use or disclose information, as appropriate.

A detailed description of the PSR's information gathering and investigation powers under FSBRA

15 See: https://www.psr.org.uk/psr-publications/market-reviews

can be found in the PPG.[16]

We may consider using third parties to collate and report on research and analysis in appropriate cases, subject always to respecting the statutory constraints on disclosure of information.

Change to guidance

Paragraph 3.8 is further developed to emphasise the principle of proportionality.

Rights of defence

3.21 We received feedback that parties which are subject to a market review should have rights of defence that are at least as comprehensive as those offered in a CA98 investigation. There was also a concern that if a CA98 issue comes to light during a market review/study, the full procedure applicable to a CA98 case should be followed.

Our response

We have designed our processes for market reviews and market studies to ensure that they are fair and appropriate according to the circumstances, including any remedial or other action we may take following a market review or market study.

A market review or study is not an enforcement procedure and does not involve penalties on parties. Any remedies are prospective with a view to making markets work better, rather than ex post, to sanction past misconduct (as is the case with CA98 enforcement, for example). Accordingly, reference to 'rights of defence' appears misplaced. However, affected parties have multiple opportunities to make submissions to us during our market review or studies: at the outset following publication of our terms of reference; in response to our interim report; possibly in response to our final report; and, if we propose specific remedies, due process and (depending on the remedy we propose) consultation. Accordingly, the PSR will take into account how parties' interests may be affected at multiple stages throughout the market review and market study processes.

If we do encounter infringements of competition or regulatory law in the course of market reviews or studies, we may consider taking action, and will follow the applicable procedures under CA98 or FSBRA.

16 See paragraphs 25.1 to 29.4 of the PPG.

Change to guidance

No change made in response to these comments.

Action taken by the PSR

3.22 Respondents said that the PSR should make clear in its guidance that when taking action it will have regard to the principles of proportionality.

3.23 In the event that the PSR believes that behavioural remedies or other less intrusive options will not adequately address its concerns, one respondent asked whether the PSR will impose structural remedies itself or make a market investigation reference to the CMA.

Our response

As stated in paragraph 3.19 of our Markets Guidance, the action that the PSR might take at the end of a FSBRA market review includes structural measures.

Change to guidance

Paragraph 3.19 is further developed to reflect that we will have regard to the principles of proportionality in relation to remedies.

'No surprises'

3.24 Respondents urged the PSR to give industry as much information as possible as to its thinking and to allow participants to comment on proposed actions. This included areas for market reviews/studies, updates on the progress and status of our work, anticipated timings and the scope of information requests.

Our response

We appreciate the need for transparency and openness about our work, including our FSBRA market reviews and EA02 market studies. We recognise also the need to keep our policies and procedures under review and to update our guidance in the light of decisional practice and experience. This will help to ensure that parties are not surprised by the likely stages or steps in a PSR market review/study.

Change to guidance

We have made amendments to our Markets Guidance, including at paragraphs 2.15, 3.2 and 3.14. We have also included a cross-reference to our Administrative Priority Framework (at paragraph 2.13) and reflected amendments to our Powers and Procedures Guidance on how we will seek representations and consult on proposed regulatory actions (see paragraphs 3.23 and 3.24).

Annex 1
Glossary and abbreviations

This table includes the glossary and abbreviations and acronyms used for the purposes of this consultation response document, the CA98 Guidance and Markets Guidance.

Term or acronym	Description
Administrative Priority Framework	The PSR's Administrative Priority Framework, published at https://www.psr.org.uk/administrative-priority-framework, helps the PSR to use its resources in the most efficient and effective way to further the PSR's statutory objectives, functions and duties
CA98	Competition Act 1998
CA98 Guidance	*'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', included as **Annex 3** to this document
CA98 Rules	SI 2014/458. Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014
case sponsor	Each CA98 investigation will have a case sponsor who will take certain decisions in the investigation including whether there is sufficient evidence to issue a Statement of Objections or to close a case on grounds of administrative priorities
CAT	Competition Appeal Tribunal
CC3	CMA's Guidelines for market investigations: *Their role, procedures, assessment and remedies*
CDC	PSR's Competition Decisions Committee
CMA	Competition and Markets Authority
CMA4	CMA's Administrative penalties: *Statement of Policy on the CMA's approach*
CMA8	CMA's *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*
CMA10 or Concurrency Guidance	CMA's *Concurrent application of competition law to regulated industries*

Term or acronym	Description
CMA16	CMA's *Prioritisation principles for the CMA*
CMA24	CMA's *'Baseline' annual report on concurrency – 2014*
CP14/1	*PSR CP 14/1: A new regulatory framework for payment systems in the UK* of November 2014, published at https://www.psr.org.uk/psr-cp-141-new-regulatory-framework-payment-systems-uk
CP15/1	*PSR CP 15/1: PSR competition concurrency guidance* of January 2015, published at https://www.psr.org.uk/psr-publications/consultations/psr-cp-15.1
Formal Complainant	More extensive procedural rights are provided to 'Formal Complainants' in CA98 investigations. In addition to having submitted a formal, written complaint to the CMA, Formal Complainants must be, or be likely to be, materially affected by the agreement(s) or conduct complained about.
EA02	Enterprise Act 2002
ECN	European Competition Network
ECHR	European Convention on Human Rights
EDC	Enforcement Decisions Committee
EEA	European Economic Area
EU Damages Directive	Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014 OJ L 349/1)
FCA	Financial Conduct Authority
FOIA	Freedom of Information Act 2000
FSBRA	Financial Services (Banking Reform) Act 2013
FSMA	Financial Services and Markets Act 2000
General Direction 1	The PSR's General Direction 1 on participants' relationships with the PSR, published at https://www.psr.org.uk/how-psr-regulates/regulatory-framework-and-approach/general-directions
market review	A review of the market under FSBRA
market study	A study of the market under EA02

Term or acronym	Description
Markets Guidance	*'Market reviews, market studies and market investigation references: A guide to the PSR's powers and procedures'*, included as **Annex 4** to this document
MIR	Market Investigation Reference under EA02
NCA	National Competition Authority
(our) objectives	The PSR's statutory objectives as set out in ss.50-52 FSBRA – these are the competition objective, the innovation objective and the service-user objective
OFT	Office of Fair Trading, a predecessor body to the Competition and Markets Authority, along with the Competition Commission
OFT401	OFT's *Agreements and concerted practices*
OFT402	OFT's *Abuse of a dominant position*
OFT407	OFT's *Enforcement*
OFT423	OFT's *Guidance as to the appropriate amount of a penalty*
OFT1495	OFT's *Applications for leniency and no-action in cartel cases – OFT's detailed guidance on the principles and process*
operator	In relation to a payment system, an operator means any person with responsibility under the system for managing or operating it; and any reference to the operation of a payment system includes a reference to its management (see also s.42(3) FSBRA)
participant (in a payment system)	This includes payment system operators, payment services providers, and infrastructure providers (see also s.42(2) FSBRA)
payment system	A payment system is a system which is operated by one or more persons in the course of business (for the purpose of enabling persons to make transfers of funds), and includes a system which is designed to facilitate the transfer of funds using another payment system (see also s.41 FSBRA)
PPG	PSR's Powers and Procedures Guidance, published at https://www.psr.org.uk/powers-and-procedures-guidance
PS15/1	*PSR PS 15/1: A new regulatory framework for payment systems in the UK* of March 2015, published at https://www.psr.org.uk/psr-ps-151-new-regulatory-framework-payment-systems-uk

Term or acronym	Description
PSP (Payment Services Provider)	A PSP, in relation to a payment system, means any person who provides services to persons who are not participants in the system for the purposes of enabling the transfer of funds using the payment system (see also s.42(5) FSBRA)
Procedural Officer	The person performing the function of Procedural Officer in accordance with paragraph 2.4 of the PSR's CA98 Guidance
PSR	Payment Systems Regulator
PSR Complaints Scheme	A voluntary scheme set up by the PSR to enable persons to make complaints about the PSR, with an Independent Complaints Commissioner
regulated payment system	A payment system designated by the Treasury pursuant to s.43 FSBRA
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003 OJ L 1/1)
SDM	Settlement Decision Maker – the person(s) performing this function in accordance with paragraphs 6.16 and 6.17 of the CA98 Guidance
Service user	Service user means those who use, or are likely to use, services provided by payment systems
SI 2014/458 or CA98 Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014
SI 2014/536 or Concurrency Regulations	The Competition Act 1998 (Concurrency) Regulations 2014
SI 2014/559	Competition and Markets Authority (Penalties) Order 2014
SI 2014/882	The Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014
SO	Statement of Objections
SUP Handbook	FCA's (Supervision) Handbook
TFEU (Treaty on the Functioning of the European Union)	The Consolidated Version of the Treaty on the Functioning of the European Union (2012 OJ C 326/47)
the Treasury/HMT	Her Majesty's Treasury
UKCN	United Kingdom Competition Network

Annex 2
List of non-confidential respondents

Respondents to FCA Consultation CP15/1 (noting in their response that they were making points that were equally or specifically relevant to the PSR or sharing their FCA response with the PSR)

1. Ashurst LLP
2. Baker & McKenzie LLP
3. BBA
4. City of London Law Society
5. Clifford Chance LLP
6. Linklaters LLP
7. Lloyds Banking Group
8. Virgin Money

Respondents to PSR Consultation CP15/1

9. Association of Independent Risk & Fraud Advisors
10. Bacs
11. CHAPS
12. Diners Club UK
13. Faster Payments
14. Korea Exchange Bank
15. MasterCard
16. MRM
17. Slaughter and May
18. Visa Europe
19. YourCash Europe

Annex 3
CA98 Guidance (finalised)

Contents

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 such as the FCA may also exercise them in this sector.

Introduction

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.[1]

1.2 As from 1 April 2015, under the concurrency provisions in the Financial Services (Banking Reform) Act 2013 (FSBRA),[2] we have had powers under CA98 in relation to agreements and conduct relating to participation in payment systems.[3] 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.[4] 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. These powers are covered separately in the PSR's Markets Guidance.

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 We do not have powers to prosecute the criminal cartel offence in section 188 EA02.

2 Sections 59 to 66 FSBRA

3 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), has had 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 https://www.fca.org.uk/news/ps15-18-fca-competition-concurrency-guidance-handbook-amendments

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

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[5] in relation to 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.[6]

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), both adopted by the CMA Board, which apply to all areas of economic activity, including the payments industry.[7] We have not sought to duplicate all the guidance that the CMA has issued, with its greater experience. However, where CMA guidance is more detailed than ours in a material respect, we shall consider such guidance in deciding how to proceed.

Legislative context and other guidance documents

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[8]
- Competition Act 1998
- 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[9]
- the CMA's statement of policy in relation to the imposition of penalties under section 40A CA98[10]
- the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments under section 31A CA98[11]

5 Article 35 of Regulation 1/2003 requires Member States to designate National Competition Authorities (NCAs) to apply Articles 101 and Article 102 TFEU. The PSR is designated as a NCA by Regulation 3 of the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004.

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

7 These guidance documents are available on the CMA's website at https://www.gov.uk/cma, along with all other CMA guidance, or OFT guidance adopted by the CMA Board, referred to in this document.

8 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.

9 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). We are required to have regard to this guidance by virtue of section 38(8) CA98.

10 CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach*. We are required to have regard to this guidance by virtue of section 40B(6) CA98.

11 OFT407 *Enforcement* (which has been adopted by the CMA Board). We are required to have regard to this guidance by virtue of section 31D(8) CA98.

1.9 The CMA's Guidance on concurrent application of competition law to regulated industries (Concurrency Guidance)[12] explains how the concurrency regime operates in relation to CA98.

1.10 This guidance sets out how we will carry out enforcement action under our powers under CA98.[13] Our approach will be informed by the statutory rules that apply to CA98 enforcement. We refer where relevant in this guidance to the CMA's Procedural Guidance[14] and other guidance documents.

1.11 This guidance represents the PSR's procedures as at the date of publication. We may revise this guidance from time to time – for example, to reflect changes to our practice and procedures in the light of our developing experience or because of changes in the law. Our website will always contain the most up-to-date version.

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

13 For guidance on the processes and procedures that the we will apply in relation to our regulatory functions under FSBRA, see our *Powers and Procedures Guidance*: https://www.psr.org.uk/powers-and-procedures-guidance

14 *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

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 regulatory functions. This guidance sets out our approach to transparency in relation to 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[15], whose details can be found on our website. They may consider complaints that relate to:

- deadlines for parties to respond to information requests, to 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). They will not otherwise be involved in the investigation.

2.7 The PSR has a process for the investigation of complaints made against us. Anyone who is directly affected by the PSR's actions or inactions – or anyone acting on such a person's behalf – can file a complaint against the PSR. Details of the complaints scheme and guidance on how to make a complaint are available on our website.[16] However, we note that we expect complaints in relation to CA98 procedural matters to be within the scope of the Procedural Officer's jurisdiction and that they 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)

15 Their 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

16 See: www.psr.org.uk/complaints-against-psr

- directions and interim measures in relation to agreements or conduct

2.9 A party can also appeal the imposition of an administrative penalty imposed on it under section 40A CA98[17] 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

2.11 We are a national competition authority (NCA) for the purposes of Regulation 1/2003 and as such are a member of the European Competition Network (ECN). 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.[18]

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.[19]

Case allocation under concurrency arrangements and the UKCN

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.[20] 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 authority that will be

17 See footnote 33 in relation to administrative penalties.

18 Article 11(6), Regulation 1/2003

19 Article 3, Regulation 1/2003

20 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.

responsible for a case depends on which one is better or best placed to do so.[21] We will cooperate with the CMA and other concurrent regulators to ensure the effective and efficient handling of 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. The PSR's Memorandum of Understanding (MoU) with the CMA sets out the framework for our cooperation.[22]

2.16 We are part of the UK Competition Network (UKCN), which is an alliance of the CMA and UK sector regulators that 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

2.18 The PSR has a broad range of legal tools to address competition concerns, and when considering a competition issue, we will assess the appropriateness of the available tools when deciding what action, if any, to take. These tools include market reviews under FSBRA and market studies under EA02 or enforcement action under CA98 or FSBRA. While we have a specific primacy obligation in section 62 FSBRA, this applies only to the five powers listed (see paragraphs 2.23 to 2.24).

2.19 Our guiding principle will be to choose the tool that will allow us most efficiently and effectively to investigate and if necessary remedy the possible harm that we have identified. To a large extent, this will be influenced by the facts in front of us (see paragraph 2.26 for examples). Procedural factors may be relevant: for instance, as noted (paragraph 1.2), our concurrent powers extend beyond the participants in the payment systems that we regulate.

2.20 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 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.[23] We will also take into account penalties levied by authorities in connected cases.

2.21 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, and we aim to be proportionate in respect of the use of our formal information gathering powers.

2.22 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.

21 See Concurrency Guidance paragraph 3.22, which contains a list of factors relevant to which authority will be best placed.

22 See: https://www.psr.org.uk/how-psr-regulates/memorandums-understanding. [*Note: Our wesbite will be updated with the MoU agreed and adopted by the CMA and the PSR.*]

23 The PSR's guidance on the imposition of penalties under FSBRA is set out in our *Penalties Guidance*, available at https://www.psr.org.uk/psr-penalties-guidance.

'Primacy'

2.23 We are bound by statutory provisions giving 'primacy' to CA98 enforcement in certain situations.[24] This means that, before exercising certain of our powers set out in FSBRA (listed in paragraph 2.24 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.

2.24 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)
- 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

2.25 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.[25]

2.26 As noted above at paragraph 2.18, we have a broad range of legal tools to address competition concerns. Some cases would appear to fall more naturally for investigation under CA98 (such as collusion amongst rivals to fix prices or allocate customers or markets; unilateral strategic conduct by a participant to exclude rivals). In others 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.

24 Section 62 FSBRA

25 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; there may be greater flexibility with competition law, compared to ex ante regulation which may be reviewed only periodically; and 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.[26]
- Super-complaints from bodies designated under section 68 FSBRA.[27]
- 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 Participants in regulated payment systems should bring actual and possible contraventions to the PSR's attention, as they are obliged to do under General Direction 1, thus: *'A participant must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of the PSR's statutory objectives and duties'*. See also paragraphs 6.5 to 6.9.

26 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 by the CMA.

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

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

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

Email: PSRcomplaints@psr.org.uk

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).[28] 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 section188 EA02.

Deciding whether to open an investigation – Prioritisation assessment

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 (see paragraphs 2.18 and 2.19)
- the resources required to carry out the investigation

28 http://www.fca.org.uk/site-info/contact/whistleblowing

3.8 These criteria are illustrative, rather than exhaustive. We also draw attention to the PSR's Administrative Priority Framework, which applies to the exercise of all our statutory objectives, functions and duties.[29] 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.

3.9 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).

3.10 While we may assess the strength and quality of the available evidence, an administrative 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 parties 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

3.11 If we decide to open a formal investigation under CA98, we will generally send the party or parties 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. We will generally also inform the person who has provided the information resulting in the case (for example, the person making a complaint). However, we will not communicate with the party or parties under investigation nor with third parties 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 publish basic information about the investigation, in accordance with our powers under section 25A CA98 (for example, if we consider that it may assist us in our investigation or is necessary for market stability). If we publish information identifying a party whose activities are being investigated, and subsequently decide to terminate the investigation into that party, we will (in compliance with our statutory obligations) publish a notice stating that the activities of that party are no longer being investigated.

29 See: https://www.psr.org.uk/administrative-priority-framework

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

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:

- To decide 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 6.10 to 6.19).

4.2 These decisions are described in more detail in the relevant paragraphs, including in relation to the additional approvals needed for certain decisions.

Keeping parties informed

4.3 The PSR expects to provide case updates to parties under investigation and Formal Complainants either by telephone or in writing. We will also offer 'state of play' meetings to parties under investigation. We use these meetings to ensure that the parties are 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.

4.4 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.

4.5 The PSR will keep parties under investigation and Formal Complainants to the investigation informed of the anticipated case timetable and any changes to this.

Information gathering

4.6 In order to reach well-evidenced decisions, we may need detailed information and data. We expect to require this both from the subjects of our investigations and from third parties. We appreciate that providing such information may be onerous, and we will seek to make the process as efficient as possible (without prejudicing the ongoing investigation). This may entail sharing draft information requests before they are formally issued, or discussing with parties how they hold data in order to tailor our requests to their systems.

4.7 Once we have 'reasonable grounds for suspecting'[30] 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.[31] In summary, we:

- Can issue requests for information and documents (commonly referred to as section 26 notices) in writing.
- Can conduct compulsory interviews with any individual connected to a party under investigation.[32]
- 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 impose a penalty on any business or individual who (without reasonable excuse) does not comply with our information gathering powers.[33]

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 Guidance*)[34], and other than where prohibited

30 This is the legal test under section 25 CA98.

31 *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, March 2014 (CMA8), Chapter 6

32 Under section 26A CA98

33 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 will 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).

34 See: https://www.psr.org.uk/powers-and-procedures-guidance

by law, 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.

4.9 The CMA's Procedural Guidance describes the limits on its powers of investigation under CA98.[35] Those limits apply equally to the PSR so that we:

- cannot require the production or disclosure of privileged communications[36]
- cannot force a party 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.[37]

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, case law and restrictions relating to the use of leniency information shared with us by other competition authorities set out in paragraph 6.7 (see also section 7).

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

4.12 Under section 35 CA98, we have the power to require a party to comply with temporary directions (referred to as 'interim measures') while we complete the investigation. In summary, we can require a party 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 party 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. When we consider whether to impose interim measures, we will have regard to the factors set out in CMA8 paragraphs 8.12 to 8.16.

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.

35 See its Chapter 7

36 See section 30 CA98

37 However, the PSR may nonetheless need to disclose such Information. Part 9 EA02 applies to the disclosure of information gathered under CA98.

- 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 party 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 party a reasonable opportunity to make representations. Given the nature of the interim measures process, the time allowed may be short.

- We will allow the party 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 party 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 party 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 party 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 party against which the directions are sought, and the interim measures application will continue as set out in paragraph 4.14.

Possible outcomes of investigation

4.16 There are several ways in which an investigation under CA98 can be resolved.[38] 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 penalty and/or directions on the party or parties 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).
- 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 parties 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 party about its future conduct (see paragraphs 4.19 to 4.22).

4.17 Infringement decisions[39], 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 2.22), 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 parties for the purposes of addressing the competition concerns that we are investigating in a particular case. Commitments are binding promises from a party 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[40] and the CMA's process when considering commitments (e.g. paragraph 10.20 of CMA8)[41]. 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. After receiving responses to this consultation on the proposed commitments, we will have a meeting with each party that has offered commitments to inform them of the general nature of responses received and to indicate whether we consider that changes are necessary to the commitments before we would consider accepting them. If the parties offer material modifications to the proposed commitments, we will allow interested third parties a further period of at least six working days in

38 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.

39 Other than in settlement cases, for which, see paragraphs 6.10 to 6.19 below.

40 Annexe A in *Enforcement* (OFT407), which has been adopted by the CMA Board.

41 *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), March 2014

which to comment on the modified commitments. We may repeat the process, although we do not wish the process of considering commitments to become unduly protracted.

4.22 If we accept commitments, then we cannot continue the investigation, make a final decision, or order interim measures.[42] However, we can take such action if we have reasonable grounds to suspect that there has been a material change in circumstances, a party 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.[43]

42 Section 31B(1) CA98
43 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 non-confidential version of the Statement of Objections, if they could materially 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 Letter 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

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 party 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 party or parties 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 parties 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

5.4 The Statement of Objections sets out our provisional view and proposed next steps. It gives the party 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[44] 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 keep parties under investigation and Formal Complainants informed of the anticipated case timetable and any changes to this as far as is possible and practicable while complying with our legal obligations, and to the extent that doing so would not prejudice ongoing investigations. 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

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.[45] 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 parties 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 a confidentiality ring (within which confidential information may be disclosed to a defined group) or a data room at a specified location (within which access to confidential information may be given to a defined group).

Involving third parties

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.

44 See paragraphs 5.27 and 5.28 below in relation to the issuing of a draft penalty statement.
45 Confidential information and internal information are defined in Rule 1(1) of the CA98 Rules.

Responding to the Statement of Objections

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.[46]

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.[47]

5.21 We will consider holding multi-party oral hearings in appropriate cases, such as where there are differing views on key issues. We will also consider on a case-by-case basis whether it is appropriate for interested third parties to be present at oral hearings.

46 See paragraph 2.4 above.
47 Rule 6(7) and (8) of the CA98 Rules

Steps following representations

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.

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.[48] This will set out the key aspects[49] 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.[50] 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.

48 Rule 11 of the CA98 Rules

49 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.

50 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), which has been adopted by the CMA Board. We must have regard to the CMA's Guidance on penalties for the time being in force.

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.[51]

Possible decisions

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 :

- that an infringement decision should be issued, or
- that a decision that there are no grounds for action[52] should be issued

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 the Competition Decisions Committee is satisfied that the legal test for establishing an infringement is met, we will issue an infringement decision to each party that has found to have infringed the law.[53] 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.[54] If a party fails to comply with our directions, we may seek a court order to enforce them.[55]

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, it will decide to close the case.

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

51 Rule 6 of the CA98 Rules

52 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 parties 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.

53 Section 31 CA98 and Rule 10(1) of the CA98 Rules

54 Sections 32 and 33 CA98

55 Section 34 CA98

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.

6
Penalties, leniency and settlement

- If we find a competition law infringement, we may impose a penalty.
- We will have regard to the CMA's leniency policy when imposing penalties under CA98, meaning that we will grant immunity from, or a reduction in the penalty imposed on, a party 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

6.1 If the Competition Decisions Committee finds an infringement of the prohibitions in Chapter I or Chapter II of CA98/ Article 101(1) or 102 TFEU, it may decide to impose a penalty on the infringing party or parties. 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[56] and the parties' written and oral representations on the draft penalty calculation.

Leniency and the General Direction 1 regulatory duty of cooperation and disclosure

6.2 Under leniency arrangements, parties who have participated in cartel activity such as price-fixing or market sharing can choose to give detailed confessions of their infringements. If that information provides a sufficient basis for a credible CA98 investigation to be taken forward, provided certain other conditions[57] are complied with, they will receive complete immunity from penalties for those infringements in return. Even where there is a pre-existing CA98 investigation, leniency and corresponding penalty reductions may also be available (in differing degrees) to parties that confess their infringements and provide information that adds significant value to that pre-existing CA98 investigation.

56 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, which has been adopted by the CMA Board. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf

57 The requirements for the grant of immunity and leniency can be found in full in OFT1495 *Applications for leniency and no-action in cartel cases – OFT's detailed guidance on the principles and process*, which has been adopted by the CMA Board. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf

6.3 We will have regard to the CMA's penalties guidance and will apply the CMA's leniency policy when pursuing enforcement under CA98.[58] This means that we will grant immunity from a penalty, or give a reduction in the penalty, for the infringements of competition law, to an undertaking satisfying the criteria set out in the CMA's leniency policy.

6.4 We expect leniency applications to be made directly to the CMA (in particular, since we do not have concurrent powers under EA02 in relation to the prosecution of the cartel offence, and cannot grant immunity from prosecution in relation to this offence).

6.5 A participant in a regulated payment system must comply with its obligation under General Direction 1.[59] It must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of our statutory objectives and duties. This obligation is independent of the voluntary decision to apply for leniency: a step that a participant in a regulated payment system may choose not to take.[60]

6.6 Under the provisions for concurrent enforcement of the competition prohibitions by the CMA and sector regulators such as the PSR, we and the CMA will share between ourselves information on actual and possible cases relating to participation in payment systems (which may include leniency information[61]), subject to the restrictions in applicable legislation (including Part 9 EA02 and section 91 FSBRA).

6.7 We will use leniency information that we receive from the CMA only for the purpose of enforcement of the competition prohibitions unless the leniency applicant agrees otherwise. This restriction on use also applies to any information a resulting PSR CA98 investigation obtains. However, the fact that an applicant has applied for leniency will not prevent us from using information obtained by us from other sources or that applicant (e.g. pursuant to its General Direction 1 disclosure obligation), to take enforcement action under FSBRA or any other legislation.

6.8 When we receive leniency information from the CMA, we may also contact the leniency applicant to remind it of any obligation it might have to notify relevant matters to us under General Direction 1.

6.9 We expect prompt notification under General Direction 1 regardless of whether a participant in a regulated payment system is considering applying for leniency. While disclosures under General Direction 1 will depend on the event in question, the PSR expects to discuss matters with participants in regulated payment systems at an early stage. We do not think that the General Direction 1 regime and the CMA leniency regime conflict: participants in regulated payment systems can meet the requirements of both regimes if they act promptly.[62] However, participants who are concerned about the interaction of disclosures under General Direction 1 and the CMA's leniency regime should contact us and the CMA and we will work together and discuss how to proceed based on the individual circumstances of the case.

58 See OFT423 and OFT1495, both of which have been adopted by the CMA Board.

59 See: https://www.psr.org.uk/psr-general-directions

60 This obligation is different from the conditions under which an applicant may receive leniency. A notification under General Direction 1 is not sufficient to constitute an application for leniency.

61 Leniency information for these purposes includes information which came into the possession of any of the CMA, its predecessor bodies, or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under the Chapter I prohibition CA98 or Article 101 TFEU. It includes any information that investigative measures resulting from the leniency application obtain.

62 Participants considering applying for leniency should have regard to the CMA's guidance. See OFT1495, adopted by the CMA Board, and in particular paragraphs 3.8 to 3.14 on conducting internal investigations and paragraphs 3.24 to 3.28 on maintaining confidentiality and securing evidence. Participants considering whether the criminal cartel offence is relevant should consult the CMA as necessary in order to ensure that, in complying with their General Direction 1 obligations, they do not prejudice the ability of their employees to benefit from immunity or leniency.

Settlement

6.10 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 6.14) and
- we issue an infringement decision but impose a reduced penalty on the settling party (see paragraph 6.13)

6.11 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.

6.12 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

6.13 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 party 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 are capped at a level of 20% for settlement pre-Statement of Objections and at 10% for settlement post-Statement of Objections. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation.

6.14 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.
- Unless the settling party itself successfully appeals the infringement decision, the decision will remain final and binding as against it, even if another addressee of the infringement decision successfully appeals it.
- If the settling party appeals the decision it will no longer benefit from the settlement discount.
- 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.

6.15 Parties must not disclose without the consent of the PSR 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.[63]

Settlement decision procedure

6.16 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).

6.17 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.

6.18 We would expect to hold any settlement discussions on the basis that neither we nor the party concerned would seek to rely against each other on any admissions or statements made in the course of the settlement discussions if settlement discussions fail and the matter becomes contested (in an infringement decision or a subsequent appeal from a contested decision[64]) or in other proceedings. The Competition Decisions Committee (if it has been appointed) will be informed that one or more parties are exploring the possibility of settlement (because this will extend the case timetable) but would not be involved in the settlement discussions other than in exceptional circumstances.

63 See also paragraph 14.20 of CMA8 on the same point.

64 Where a party settles with the PSR and that party appeals the settlement decision against it, the PSR may use admissions made during the course of the settlement negotiations.

6.19 The terms of any proposed settlement will be put in writing[65] 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.

65 The PSR may consider a reasoned request from the settling party to provide the confirmation that it accepts the settlement requirements orally, however such oral statements must 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 specified information is received by us in connection with our CA98 functions, it will be dealt with 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

7.1 The applicable legal framework for our use and disclosure of information is determined according to the statutory context in which the information was received by the PSR. 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 disclose information that we have gathered under our FSBRA powers in a CA98 investigation, we must apply the relevant FSBRA disclosure provisions.[66]

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 is not possible to ascertain from it information that can be attributed to a particular person, is not considered confidential information under 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 regime set out in EA02 (in other words, information we receive for the purposes of

66 The converse would also apply for disclosure of information gathered under a CA98 investigation in 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).[67]

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 restricts the disclosure of 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 the restriction on disclosure, allowing the disclosure of confidential information to third parties in certain prescribed circumstances. If a gateway is not applicable, we may not release confidential information without the requisite consent(s).

7.5 The full set of gateways is set out in Regulations made under FSBRA.[68] They include disclosure to assist the PSR in the discharge of its functions, and disclosure to the FCA, the Prudential Regulation Authority and the CMA to assist them in the discharge of their functions. When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

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.[69] 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.[70] 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 Disclosure is permitted if it falls within one of the 'information gateways' as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents[71] or where the disclosure is made for the purpose of facilitating the exercise by us of any of our statutory functions.[72]

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

67 Section 91(6) FSBRA
68 The Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/882)
69 Section 91(6) FSBRA
70 Section 237 EA02
71 Section 239 EA02
72 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 fairness in our processes, 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

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 businesses or individuals.

Annex 4
Markets Guidance (finalised)

Contents

1 Introduction

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

1.1 Market reviews and market studies are the principal ways in which we investigate the market for payment systems, or the markets for services provided by payment systems, to see how well they are working for service users (i.e. those who use, or are likely to use, services provided by payment systems). They are in line with our competition, innovation and service-user objectives (see paragraph 2.2). If we find that the markets we review or study could be made to work better, we have a range of powers to take appropriate action.

1.2 As from 1 April 2014, under the concurrency provisions in FSBRA relating to the EA02,[1] we have competition law powers under the EA02 to carry out market studies and make market investigation references (MIRs) which relate to participation in payment systems to the Competition and Markets Authority (CMA) for detailed investigation.[2] These competition law powers may also be exercised by the CMA, whose powers extend to all sectors of the UK economy. Accordingly, we are a 'concurrent regulator' having concurrent competition law functions (concurrent functions).

1.3 We can also use our information-gathering power under section 81 FSBRA to carry out market reviews.

1.4 This document describes:

- our powers to carry out market reviews under FSBRA or market studies under our concurrent functions and the provisions of EA02, and explains how we choose which powers to use (section 2)

1 Section 59 FSBRA
2 As from 1 April 2015, we also have powers to enforce the Competition Act 1998.

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

2
Our powers to carry out market reviews and market studies

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

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

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

FSBRA market reviews

2.2 Under FSBRA, the PSR has three statutory objectives:

- to promote effective competition in the market for payment systems and the markets for services provided by payment systems in the interests of service users ('the competition objective')[3]
- to promote the development of, and innovation in, payment systems in the interests of service users ('the innovation objective')[4]
- to ensure that payment systems are operated and developed in a way that takes account of, and promotes, the interests of service users ('the service-user objective')[5]

3 Section 50 FSBRA
4 Section 51 FSBRA
5 Section 52 FSBRA

2.3 We have a range of regulatory powers including:

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

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

EA02 market studies

2.5 For the purpose of our concurrent functions[11] we have the function of keeping under review the market for payment systems, and the markets for services provided by payment systems,[12] and we may carry out market studies under the provisions of EA02 (EA02 market studies).[13] We may do this when we need to:

- consider the extent to which a matter in relation to the participation in payment systems used to provide services in the United Kingdom has or may have effects adverse to the interests of consumers (including any person who uses, or is likely to use, services provided by payment systems in the course of a business carried on by that person)[14]
- assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects[15]

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

6 Section 54 FSBRA
7 Section 55 FSBRA
8 Sections 56 and 57 FSBRA
9 Section 58 FSBRA
10 These are described in detail in paragraphs 25.1 to 29.4 of the PSR's *Powers and Procedures Guidance* (PPG), available at https://www.psr.org.uk/powers-and-procedures-guidance
11 That is, our functions under EA02 (section 59 FSBRA) and the Competition Act 1998 (section 61 FSBRA).
12 Section 64 FSBRA
13 Section 59 FSBRA
14 Section 130A EA02 and sections 59(4)(c) and 59(6)(a) FSBRA
15 Section 130A EA02
16 Section 64(2) FSBRA

FSBRA market review or EA02 market study?

2.7 At the outset of any review/study, we have an open mind as to whether a market is in fact working well for service users or not, and accordingly, we do not have a decided view as to whether we need to take action to make the market work better. Only once we have gathered evidence, analysed it and sought the views of interested parties can we form a view of what the outcome of a review/study should be.

2.8 We have a broad choice as to which procedure to follow. We have a broadly similar range of powers to take action available to us under both FSBRA and EA02 procedures. In particular, we may:

- make an MIR whether or not we have first conducted an EA02 market study, as long as the statutory test for making an MIR is met (see paragraph 5.1)
- use our powers under FSBRA to take action in respect of participants in regulated payment systems (see paragraphs 3.16 to 3.26) whether we have followed either a FSBRA or an EA02 process

2.9 Accordingly, we will decide on a case-by-case basis whether to pursue a FSBRA market review or an EA02 market study. In considering whether to conduct a FSBRA market review or an EA02 market study, we would take account of the aim(s) of the review/study. An EA02 market study can be used to consider the extent to which there are adverse effects on consumers and how these might be remedied. A FSBRA market review might have a similar aim, or might instead (or also) be focused on advancing our competition, innovation or service-user objectives in other ways (for example, by considering the extent to which there could be untapped potential for innovations or improvements in the experience of service users).

2.10 There are different procedural requirements and timetables for FSBRA market reviews and EA02 market studies (described in sections 3 and 4). One difference is that we have different sets of powers under FSBRA and EA02 to gather information (see section 6) and this may influence our choice of tool.

Choosing which markets to review or study

2.11 We identify markets for payment systems and the services they provide that appear not to be working well for service users and/or matters concerning those markets that may be impeding competition, using information from a range of sources, such as:

- own-initiative desk research or intelligence-gathering, including from previous market reviews/studies
- our regulatory activities under FSBRA in respect of participants in regulated payment systems
- internal papers and analyses
- complaints, including super-complaints from bodies designated under section 68 FSBRA[17]
- applications made under sections 56 and 57 FSBRA
- general market intelligence
- other regulators

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

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

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

Email: PSRcomplaints@psr.org.uk

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

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

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

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

The pre-launch stage

2.15 Before launching a market review/study, we consider what might be preventing the market working well for service users. We consider what information, data and analysis might indicate whether or not the market is working well, in order to shape our investigation and help us to decide what information to seek. We may consult third parties regarding the availability of such information. We may engage external parties on particular aspects of the market review/study. We produce an initial project plan and establish the resources we need. In some cases, it may be necessary to undertake some preliminary work to define the scope of our FSBRA market reviews (given that they may involve competition, innovation and/or service-user interest issues). We may do so through consultation on draft terms of reference, for example.

2.16 We decide whether to launch a FSBRA market review or an EA02 market study. In either case, we will consult the CMA[19], and we will also consult with the FCA as appropriate.[20] We cannot launch an EA02 market study if the CMA or FCA has launched such a study into the same matter.[21] The CMA and FCA are subject to reciprocal obligations.[22] If the CMA or FCA has launched or is about to launch an EA02 market study, we will take this into account in deciding whether or not to launch a FSBRA market review. We will aim to avoid duplication, and may work jointly with the CMA or FCA on an EA02 market study.

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

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

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

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

3
How we carry out FSBRA market reviews

Overview

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

Phase	Detail
Launch	• Announce publicly the intentions of the market review and the issues under consideration • Indicate the scope of the matters on which views and evidence are sought • Engage with relevant stakeholders, including, as appropriate, Operators, PSPs, trade bodies, service users, consumer bodies, government departments and other regulators
Research	• Fully define the data requirements for the market review • Collect and request data and information • Carry out market research, business model analysis, interviews, roundtables and other research as appropriate
Analysis and Interim Report	• Assess how well the market is working for service users and any evidence of issues/market failures • Assess extent of any service-user/consumer detriment • Publish interim report outlining analysis, preliminary conclusions and, where practicable and appropriate, proposed solutions for addressing any concerns identified
Report	• Publish final report including analysis, conclusions and, where appropriate, the action we propose to take
Outcomes	• Use existing powers and processes to develop and implement proposed actions (including, for example, making directions, publishing guidance and making proposals for enhanced industry action) • If required, conduct formal consultation on proposed actions

Launch

3.2 We announce the launch of any market reviews we carry out under FSBRA on our website and via a regulatory information service. We will generally set out:

- The information-gathering powers which we may exercise in conducting the market review.
- The scope of the market review (which may be through the publication of final terms of reference). The scope may include the questions we are seeking to answer or the hypotheses we are trying to test (such as ways in which the market might be made to work better for service users).
- The period during which initial representations may be made to the PSR in relation to the review.
- The timescales within which we expect to complete the review. This will usually be one year from launch to report, but may vary depending on the specific circumstances of the review.[23]

3.3 In launching the review publicly, we invite all relevant participants in payment systems, trade bodies, service users (including consumers) and representative bodies, government departments and other regulators (UK and international) to provide us with information and data. In line with the PSR's general policy on responses to formal consultations, we will seek to publish views or submissions in full or in part (see section 6 regarding our treatment of information). Respondents should seek to limit claims for confidential treatment to the minimum necessary. If respondents include extensive tracts of confidential information in their submissions, we would ask that they submit non-confidential versions which they consent for us to publish. We will also not accept blanket claims of confidentiality, and will require respondents to identify specific information over which confidentiality is claimed, and to explain the basis for this claim.

3.4 For each market review, we will provide a clear point of contact for stakeholders.

Research

3.5 We gather information about the market to see how well it is working for service users. A market review may involve gathering specific information from a broad set of stakeholders (e.g. participants in payment systems, trade bodies, service users (including consumers) and representative bodies, government departments and other regulators (UK and international)). We will also use our own data, past reviews/studies, other papers and any previous analysis we have conducted, in order to limit the information-gathering burden on stakeholders.

3.6 We gather this information through questionnaires, desk research, surveys and working with other regulators. We may also meet with stakeholders to discuss issues raised by the review.

3.7 We may ask for information on an informal basis without using our statutory information-gathering power under section 81 FSBRA. We would typically expect regulated participants to assist us with such a request, in line with their duty of cooperation and disclosure under General Direction 1, thus: *'A participant must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of the PSR's statutory objectives and duties*'. We may also ask for information from organisations and individuals that we do not regulate.' Alternatively, we may use

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

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

3.8 In order to reach well-evidenced decisions, we may need detailed information and data. We recognise that providing this can be onerous for the parties that supply it to us. Accordingly, before making requests for information and documents, we scope our requests carefully in light of the purpose for which the information is sought, the availability of relevant information from other sources, including information held by the PSR already, and the ease with which respondents can provide the information we need. The PSR as a whole aims to coordinate its various activities regarding data requests, in order to be proportionate and manage the burden on any given respondent, and this also applies to our market review activity. Section 6 describes how we must treat information we receive.

3.9 Where appropriate, we may also share data and coordinate with other authorities, such as the CMA, the FCA and the Prudential Regulation Authority (PRA), subject to complying with the provisions governing disclosure under FSBRA (as set out in section 6).

Analysis and interim report

3.10 We use the information and data we collect to examine how the market functions, and to assess whether the market is working well for service users. We consider the evidence and views we receive with reference to the issues identified. We investigate our initial views in the review, taking into account the feedback from stakeholders and information gathered during the review.

3.11 When assessing competition, we consider all the features of the market, including the competitive constraints that suppliers of payment systems or the services they provide face from current rivals, the ability of new suppliers to enter the market (and how this entry might be constrained by costs, applicable regulation and other factors), and the ability of service users (including consumers) to obtain, assess and act on information relevant to their usage decisions.

3.12 We will publish an interim report (other than in exceptional circumstances – for example, where we have decided not to proceed with the market review), presenting our analysis and preliminary conclusions and, where practicable and appropriate, include possible remedies to address any concerns identified. The timing and form of these interim reports and statements on possible remedies vary according to the needs of particular reviews.

3.13 We set a deadline for interested parties to make submissions on our interim report and any possible remedies, which will usually be a minimum of 15 days, depending on what is appropriate in a specific case. Again, in line with the PSR's general policy on responses to formal consultations, we will seek to publish views or submissions in full or in part and respondents should seek to limit claims for confidential treatment to the minimum necessary (see further paragraph 3.3 above). See also section 6 regarding our treatment of information.

Report

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

- a description of the market(s) and issue(s) we considered

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

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

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

Outcomes

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

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

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

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

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

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

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

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

General action

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

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

Specific action

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

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

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

27 See paragraphs 5.1 to 5.5 of the PPG.

28 See paragraphs 4.1 to 4.5 of the PPG.

29 See paragraphs 16.1 to 16.5 of the PPG.

3.25 Additionally, we may also open investigations into the nature, conduct or state of business of any participant in a regulated payment system.[30] We may also open investigations into suspected compliance failures.[31] If we take the view that a warning notice should be issued in relation to any compliance failure, we will recommend such action to the Enforcement Decisions Committee (EDC). More information on enforcement action (including EDC warning notices and decision notices) can be found in the PPG.[32]

3.26 We also have the option to apply to the civil courts for injunctive relief to enforce certain of our regulatory decisions. Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers to publish details or impose a financial penalty.[33]

3.27 It is also possible that during a market review, we identify potential infringements of other laws, such as competition law, and we may open an investigation accordingly, or refer the matter to other enforcement agencies.

Market investigation references

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

Effectiveness and proportionality, equality and diversity

3.29 We aim to ensure that any action we take is effective and proportionate to the concerns identified.[34] We must have regard to the regulatory principles in section 53 FSBRA when exercising our general functions relating to payment systems, including giving general directions, and determining the general policy and principles by reference to which the PSR performs its particular functions.[35] We consider that these regulatory principles are also relevant when we are carrying out market reviews under FSBRA, and also when we carry out market studies under EA02. There are eight principles, three of which in particular will generally be relevant when considering intervention:

- the efficiency principle – the need to use the resources of each regulator in the most efficient and economical way
- the proportionality principle – that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction
- the transparency principle – the principle that the regulators should exercise their functions as transparently as possible

30 Section 83(1) FSBRA

31 Section 83(2) FSBRA

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

33 See further paragraphs 24.1 to 24.4 of the PPG.

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

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

3.30 In addition, we will be mindful, as appropriate, of the five high-level 'better regulation' principles in the Legislative and Regulatory Reform Act 2006, including proportionality and transparency, and the additional requirements of the Regulators' Code.[36] Accordingly, we carry out an assessment of the proportionality of our proposed actions and will consult on the draft measures as appropriate.

3.31 We consider Equality and Diversity Implications as part of our decision-making processes in line with our public sector equality duty under the Equality Act 2010. In particular, we will assess the likely equality and diversity impacts and rationale of our proposals to assess whether they give rise to any concerns as a result of any protected characteristic.[37]

Ongoing review

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

Urgent action

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

36 See the Legislative and Regulatory Reform Act 2006 (LRRA) principles around the exercise of regulatory functions at http://www.legislation.gov.uk/ukpga/2006/51/contents, and the 6 April 2014 Regulators' Code at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf.
37 Our website provides more information: https://www.psr.org.uk/corporate-responsibility

4
How we carry out EA02 market studies

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

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

Launch and timescale

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

- the scope of the market study
- the period during which representations may be made to the PSR in relation to the study, and
- the timescales within which the study will be completed[38]

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

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

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

38 Section 130A(3)EA02
39 Section 131B(1)EA02

- Where we do not propose to make an MIR, but have received (non-frivolous) representations in response to a market study notice arguing that a reference should be made, we must, within six months of publication of the market study notice, publish notice of our proposed decision and begin the process of consulting relevant persons.[40]

- Where we do not propose to make an MIR and no representations have been made in response to a market study notice arguing that a reference should be made, we must publish a notice of our decision not to make a reference within six months of publication of the market study notice.[41]

- We must publish a market study report setting out our findings and the action (if any) we propose to take, within 12 months of publication of a market study notice.[42] When our decision is (a) to make an MIR, (b) not to make an MIR (when non-frivolous representations have been received to the effect a reference should be made) or (c) to accept undertakings in lieu of an MIR, the market study report must in particular contain the decision, the reasons for the decision and such information we consider appropriate for facilitating a proper understanding of our reasons for the decision.[43]

- Where a market study report sets out a decision to make an MIR, the reference must be made at the same time as the report is published.[44]

Research and information gathering

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

Analysis and interim report

4.6 We anticipate conducting similar types of analysis for EA02 market studies as we do for FSBRA market reviews. However, the binding legal obligation on us to reach a preliminary view and make a proposal as to whether or not to make an MIR within six months of launching an EA02 market study may affect the amount of information we can gather and the extent of the analysis that we may carry out before deciding whether or not a market should be referred for investigation by the CMA (see section 5).

4.7 As noted, where we propose to make an MIR, or not to make an MIR where we have received non-frivolous submissions urging such a reference, we must consult on this within six months of publication of the market study notice (paragraph 4.4). We will do this in an interim report. We must consult any persons on whose interests we consider making an MIR would have a substantial impact.[45]

4.8 When consulting, we must give our reasons so far as practicable, having regard to the restrictions imposed by the timetable for making the decision, and any need to keep the proposal or the reasons for it, confidential.[46] We will make any responses to our proposal to make or not to make

40 Section 131B(1) EA02
41 Sections 131B(2) and (3) EA02
42 Section 131B(4) EA02
43 Section 131B(5) EA02
44 Section 131B(6) EA02
45 Sections 131A(2)(b) and (4) EA02
46 Sections 131A(5) and (6) EA02

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

Final report

4.9 If we receive no submissions urging an MIR and are not ourselves minded to make such a reference, we must publish that decision within six months of the market study notice (see paragraph 4.4).[47]

4.10 We must within 12 months of publication of a market study notice publish a market study report setting out our findings and the action (if any) we propose to take (see paragraph 4.4).[48] In particular, we must decide whether or not to make an MIR (see section 5). The report will contain our reasons for this decision.

4.11 Following an EA02 market study we may use our FSBRA regulatory powers (see paragraphs 3.16 to 3.26), and any such proposed action will be set out in the EA02 market study report (see paragraph 4.4).

47 Section 131B(3) EA02
48 Section 131B(4) EA02

5
Market investigation references and undertakings in lieu of a reference

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

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

5.1 We have the power to refer a market to the CMA where we have reasonable grounds to suspect that any feature, or combination of features, of a market or markets for payment systems and the services they provide in the UK prevents, restricts or distorts competition (an 'ordinary reference').[49] The task of the CMA on a reference is focused on competition, while our market reviews/studies may explore broader issues (see paragraphs 2.2 to 2.6). The CMA has 18 months to complete its investigation (extendable by 6 months), which is a more detailed examination into whether there is an adverse effect on competition in the markets referred.

5.2 A 'feature' of a market may be[50]:

- 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[51]
- any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services

49 Section 131(1)EA02

50 Section 131(2)EA02

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

5.3 'Conduct' includes any failure to act (whether intentional or not) and any other unintentional conduct.[52]

5.4 We may also make a 'cross-market reference': that is, to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.[53] The legal criteria for an ordinary reference or a cross market reference are the same (see paragraph 5.1), although only features that relate to conduct can be the subject of a cross-market reference.[54]

5.5 We have the power to make an MIR if the applicable legal test is met, even without having completed an EA02 market study. However, if we propose to do this, we must consult any persons on whose interests we consider making an MIR would have a substantial impact.[55]

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

5.6 A market investigation entails detailed examination by the CMA of whether there is an adverse effect on competition in the market(s) referred and, if so, what remedial action may be appropriate. Following its investigation, the CMA has a duty to take such action as it considers reasonable and practicable to remedy any adverse effect on competition it identifies, which may include behavioural and/or structural remedies.

5.7 While we have powers under FSBRA, they do not extend beyond participants in regulated payment systems.[56] Accordingly, a key factor in deciding whether to make an MIR will be whether we foresee the need to implement remedies affecting persons that are not participants in regulated payment systems.

5.8 Otherwise, we intend to follow the CMA's own approach as set out in *Market Investigation References* (OFT511)[57] in deciding whether or not to make an MIR, i.e. we expect to make an MIR where all of the following criteria are met:

- It would not be more appropriate to deal with the competition issues identified by applying CA98 or using other powers available to us.
- It would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference (see paragraphs 5.9 to 5.12).
- The scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it.
- There is a reasonable chance that appropriate remedies will be available.[58]

52 Section 131(3)EA02

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

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

55 Section 169 (2) EA02

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

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

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

Undertakings in lieu of a reference

5.9 Section 154 EA02 gives the PSR the power to accept undertakings instead of making an MIR. In exercising this power we must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any adverse effects on competition identified (and any detrimental effects on customers so far as they result or may be expected to result from such adverse effects). We may also have regard to the effect of the possible undertakings on any relevant customer benefits arising from a feature or features of the markets concerned.

5.10 In practice, we expect that undertakings in lieu of a reference are unlikely to be common. We may not have completed a sufficiently detailed investigation of a competition problem to be able to judge whether particular undertakings will achieve 'as comprehensive a solution as is reasonable and practicable'. Seeking to negotiate undertakings with several parties with different interests is likely to pose serious practical difficulties, especially within the 12 months provided under an EA02 market study.

5.11 Before accepting any undertaking in lieu of a reference, we must publish the proposed undertaking in a notice. This must state the purpose and effect of the undertaking and identify the adverse effect on competition and any resulting detrimental effect on customers that the proposed undertaking is intended to remedy.[59] We must consider any representations arising from the publication of the notice. There is a power for the Secretary of State to intervene at this stage if he or she believes that wider public interest matters are relevant to the case. The Secretary of State is able to block the acceptance of undertakings in lieu when he or she believes that a public interest consideration specified in the legislation (currently only national security) is relevant. In such a case, the outcome may be other undertakings in lieu of a reference.

5.12 When an undertaking in lieu is accepted, we may not make an MIR involving the same services for a period of 12 months unless we consider the undertaking has been breached or we have been given false or misleading information by the person responsible for giving the undertaking.[60]

59 The list of all the points to be included in such notices is given in section 155(2) EA02.
60 Section 156(1) EA02

6
Information gathering, use and disclosure in market reviews and market studies

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

Information gathering

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

FSBRA

6.2 Under section 81 FSBRA, the PSR may by notice in writing require a person to provide the PSR with information or documents that it requires in connection with its functions under Part 5 FSBRA. The PSR can also apply, in certain circumstances, to a justice of the peace for a warrant to enter premises where documents or information are held.[62]

6.3 The PSR may also appoint investigators who will have the power to require a person to attend and answer questions, or to provide any information or document required by the investigator.[63] These requirements can only be imposed so far as the investigator reasonably considers the questions, or the provision of information or production, to be relevant to the purposes of the investigation.[64]

61 See paragraphs 3.7 and 3.8.
62 Section 88 FSBRA
63 Sections 83 and 85 FSBRA
64 Section 85(4) FSBRA

6.4 Failure to comply, without reasonable excuse, with an information requirement, or other requirement imposed by an investigator, may be treated as a contempt of court.[65] Furthermore, if a person knows or suspects that an investigation is being conducted,[66] it is a criminal offence for that person to falsify, conceal, destroy or otherwise dispose of documents[67] which he knows or suspects to be relevant to the investigation,[68] unless he can show that he had no intention to hide the facts disclosed in those documents from the investigator.[69] A person could also be guilty of a criminal offence if, in purported compliance with a requirement, he knowingly or recklessly provides information that is false or misleading in a material particular.[70]

6.5 A detailed description of the PSR's information-gathering and investigation powers can be found in the PPG.[71]

EA02

6.6 Under our concurrent functions, we have powers under EA02:

- to give notice requiring any person to attend a specified place to give evidence to the PSR or a person nominated for the purpose
- to give notice requiring any person to produce specified documents or categories of documents that are in that person's custody or under his control
- to give notice requiring any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner[72]

6.7 Like section 81 FSBRA, we can use these powers against any person.[73]

6.8 Where the PSR considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice issued by the PSR using its EA02 investigatory powers or intentionally obstructed or delayed another person in copying documents produced to that other person, the PSR has the power to impose an administrative penalty.[74]

6.9 It is a criminal offence for a person intentionally to alter, suppress or destroy any document which the person has been required by notice to produce.[75] Where an act is capable of constituting both (a) a failure warranting an administrative penalty and (b) a criminal offence, the PSR cannot impose a financial penalty if it has brought criminal proceedings against the person. Similarly, criminal proceedings cannot be brought against the person if an administrative penalty has been imposed in respect of the same act.[76]

6.10 Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily

65 Sections 90(1) and 90(2) FSBRA
66 Or is likely to be conducted.
67 Or to cause or permit this to occur.
68 Section 90(4) FSBRA
69 Section 90(5) FSBRA
70 Section 90(6) FSBRA
71 See paragraphs 25.1 to 29.4 of the PPG.
72 Section 174(1)(a) and sections 174(3) to (5) EA02
73 Section 174 EA02
74 Sections 174A(1) to (3) EA02
75 Section 174A(4) EA02
76 Sections 174A(4) and (5) EA02

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

6.11 The PSR is under a statutory obligation to issue its own statement of policy for penalties under section 174A(1) to (3) EA02. For the sake of consistency with the CMA, the practice of other concurrent regulators in relation to such penalties[79] and with the PSR's approach to penalties for failure to comply with information-gathering powers in CA98 investigations, the PSR has adopted the CMA's penalty policy (CMA4: *Administrative penalties: Statement of Policy on the CMA's approach*, January 2014) as its policy on penalties under sections 174(1) to (3) EA02.[80]

Use and disclosure of information by the PSR

6.12 We can use information we receive in the course of undertaking a FSBRA market review or an EA02 market study for our other functions, such as FSBRA regulatory action, including compliance failure proceedings, or enforcement of the prohibitions in the Competition Act 1998.[81]

6.13 The applicable legal framework for the disclosure of information is determined by the statutory context in which it was received by. In particular, whether we carry out a FSBRA market review or an EA02 market study will determine the legal framework for disclosure of information received by us in the context of that review/study.

FSBRA

6.14 When we receive information for the purposes of, or in discharge of, our statutory functions under FSBRA (for example, during a FSBRA market review) which is not in the public domain and relates to a person's business or other affairs, the information will be 'confidential information' under section 91 FSBRA. Information which is already publicly available, or which is in aggregated form so that it is not possible to ascertain from it information relating to a particular person, is not considered confidential information under FSBRA.

6.15 However, when we receive information for the purposes of, or in discharge of, our concurrent functions, the disclosure of this information is expressly excluded from the FSBRA regime and will instead be dealt with under the regime set out in EA02. In other words, information received by the PSR for the purposes of or in discharge of its concurrent functions can only be disclosed by the PSR under Part 9 EA02, not under FSBRA (see paragraphs 6.18 to 6.21).[82]

6.16 Where we have obtained information under FSBRA rather than in connection with our concurrent competition functions (see paragraph 6.18), FSBRA provisions on disclosure will apply. Section 91 FSBRA restricts the disclosure of confidential information unless we have the consent of the person who provided the information (and the person to whom the information relates, if different) or a gateway applies. A gateway is an exception to the restriction on disclosure, allowing the disclosure of confidential information to third parties in certain prescribed circumstances. If a gateway is not applicable, we may not release confidential information without the requisite consent(s).

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

78 Section 174A(6) EA02

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

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

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

82 Section 91(6) FSBRA

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

EA02

6.18 When we receive information in connection with the exercise of our concurrent functions, including EA02 market studies, Part 9 EA02 will apply to any disclosure of such information.[84] This imposes a general restriction on the disclosure of information relating to the affairs of an individual or any business of an undertaking which we obtain during the exercise of our EA02 functions (referred to as 'specified information') to other persons.[85] The restriction applies during the lifetime of an individual or while the undertaking continues in existence (for the individual or business to which the specified information relates, respectively). Disclosure is permitted if it falls within one of the 'information gateways', as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents[86] or where the disclosure is made for the purpose of facilitating the exercise of any of our statutory functions.[87]

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

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

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

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

83 Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/8820)
84 Section 91(6) FSBRA
85 Section 237 EA02
86 Section 239 EA02
87 Section 241 EA02
88 Section 241(1) and (4) EA02

Transparency

6.22 We have noted throughout this document that we will make submissions available for public inspection unless the respondent requests otherwise (see paragraphs 3.3, 3.13, 4.3 and 4.8). We will seek parties' views on which parts of their submission are confidential before deciding if, and if so how much, information should be redacted prior to making them publicly available. We will apply the relevant legislation in making this decision: for FSBRA market reviews, see paragraphs 6.14 to 6.17; for EA02 market studies, see paragraphs 6.18 to 6.21.

6.23 We may in addition publish working papers or other relevant documents, in the interests of transparency and to allow interested parties to make better-informed submissions. Again, we will apply the relevant legislation when considering disclosure of information, depending on how we gathered the information.

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