Financial Conduct Authority

FCA Competition Concurrency Guidance and Handbook amendments

January 2015

Consultation Paper CP15/1

Contents

We are asking for comments on this Consultation Paper by 13 March 2015.

You can send them to us using the form on our website at:
www.fca.org.uk/your-fca/documents/consultation-papers/cp15-01-response-form.

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Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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1. Overview

Introduction and context

1.1 The FCA obtains concurrent competition powers on 1 April 2015.[1] This means we will have powers to enforce the prohibitions on anti-competitive behaviour in the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (TFEU) in relation to the provision of financial services. We will also have powers to carry out market studies, and make market investigation references to the Competition and Markets Authority (CMA) under the Enterprise Act 2002 (EA02), in relation to the provision of financial services.

1.2 These competition powers may also be exercised by the CMA with regard to financial services and other sectors of the economy. This means that, in respect of financial services, the CMA and the FCA will have 'concurrent powers' and the FCA will be a 'concurrent regulator'.

1.3 These powers are additional to our ability to use FSMA powers in pursuit of the FCA's competition objective.[2]

1.4 The Payment Systems Regulator was created as an autonomous subsidiary of the FCA on 1 April 2014. It already has concurrent powers under EA02, and will obtain concurrent powers under CA98 on 1 April 2015. Its concurrent competition powers relate to the participation in payment systems. The Payment Systems Regulator will consult on its own guidance on its concurrent powers shortly.

Overview

1.5 In this consultation we are seeking views on three separate documents:

- draft guidance on our powers under CA98, to be issued under section 52 CA98 (Appendix 1)
- draft guidance on market studies under EA02 and the Financial Services and Markets Act 2000 (FSMA) and making market investigation references, to be issued under section 139 FSMA (Appendix 2)
- a draft legislative instrument to introduce minor amendments to the FCA Handbook, to be adopted by the FCA Board (Appendix 3)

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

2 The FCA has an operational objective to promote effective competition in the interests of consumers, as set out in section 1E FSMA.

1.6 An introduction to each of these draft documents is provided in Chapters 2, 3 and 4 of this consultation paper.

1.7 We have set out specific questions for consideration in Chapters 2, 3 and 4, but would welcome any other feedback you may have. The closing date for comments is 13 March 2015.

Who does this consultation affect?

1.8 This consultation will be of interest to all regulated firms and all businesses (whether or not they are required to be regulated) who provide financial services.

Is this of interest to consumers?

1.9 This consultation does not directly affect consumers. However, consumers may be interested to learn more about how we will use our new competition powers.

1.10 We have designed our procedures with the aim of using our powers effectively and efficiently. This should benefit consumers through detecting, enforcing against and deterring anti-competitive behaviour by firms.

Cost-benefit analysis

1.11 Under section 138I of FSMA, when the FCA wishes to introduce any new rules it must publish a cost benefit analysis (CBA) along with the proposed rules. This is an estimate of the costs and of the benefits that will result from the rule being made. The CBA requirement does not apply where we only clarify existing obligations, consider that there will be no increase in costs or the cost increase will be of minimal significance.

1.12 In this consultation, the CA98 Guidance document (Appendix 1) is made under section 52 CA98 and is not subject to the FSMA CBA requirement. The EA02 Guidance document (Appendix 2) does not introduce any new rules, while the proposed amendments to the Supervision Manual (Appendix 3) only clarify a pre-existing obligation. Further, we take the view that any costs associated with the proposals in this consultation will be of minimal significance, if any. A CBA has, therefore, not been prepared.

Equality and diversity considerations

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

Next steps

1.14 Please provide your comments by 13 March 2015. We will reflect on the feedback received before finalising the guidance documents and legal instrument and issuing a feedback statement as soon as possible after we get our concurrent competition powers on 1 April 2015.

1.15 It is anticipated that the Payment Systems Regulator will consult on its concurrent powers shortly. The FCA and Payment Systems Regulator are willing to receive submissions dealing with both sets of guidance documents jointly.

2.
A guide to the FCA's powers and procedures under the Competition Act 1998

Summary of our proposals

2.1 The changes on 1 April 2015, when we obtain our concurrent competition powers, are institutional – all undertakings are already subject to competition law. However, the FCA (as well as the CMA and, in the case of EU law, the European Commission) will now be able to investigate and enforce against breaches of UK and EU competition law where they relate to the provision of financial services.

2.2 We consider it is appropriate to provide procedural guidance on how we will use our new powers. This is also in line with our duty under section 52 CA98[3] to consult on and issue general advice and information about the application of the competition law prohibitions and our enforcement of those prohibitions.

2.3 The draft guidance set out in Appendix 1 focuses on the procedural aspects of the FCA's powers of enforcement under CA98. These include how we will identify potential infringements and decide whether to open a formal investigation, and who will be the decision-makers for certain key decisions in such an investigation. In preparing this guidance, we have been mindful of the statutory framework within which we must operate, and our existing practices in enforcement under other legislation (for example, FSMA). We have had regard both to our enforcement procedures relating to such other legislation, and other authorities' CA98 procedures, notably the CMA. In many respects, our processes are equivalent to those of the CMA. In others, we have incorporated aspects of our established enforcement processes under FSMA, such as settlement.

2.4 This guidance will be available on the Competition pages of the FCA website (www.fca.org.uk). It will also be available as a link from the FCA Handbook website, but it is important to note that it is relevant to all businesses that operate in the financial services sector, and is not limited to authorised firms or to regulated activities.

Q1: Do you agree with our proposals on how we will carry out CA98 investigations as set out in Appendix 1?

Q2: Do you have any comments on the scope or content of the draft guidance provided in Appendix 1?

3 Which applies to the FCA by virtue of s.234J(4) FSMA.

3. Market studies and market investigation references: A guide to the FCA's powers and procedures

Summary of our proposals

3.1 We wish to provide guidance on how we will use our new powers under EA02. These relate to the provision of financial services and are not limited to activities we regulate under FSMA or other legislation, or to activities regulated by other bodies.

3.2 We also wish to update the document we published in October 2013 entitled *'How we carry out market studies'*[4] (which precedes our concurrent powers under EA02) in light of our experience in practice of conducting market studies using our FSMA powers.

3.3 Appendix 2 therefore comprises draft guidance on our market studies procedures and our powers to make market investigation references to the CMA. This sets out the differences between EA02 and FSMA market studies (in particular, the different information gathering powers that apply). It will replace '*How we carry out market studies*', which will be withdrawn.

3.4 Under section 174E EA02 we are required to issue (after appropriate consultation) a statement of policy in relation to the enforcement of notices given under section 174 EA02, and in particular about the considerations relevant to the determination of the nature and amount of any penalty imposed.[5] For the sake of consistency with the CMA, the practice of other concurrent regulators in relation to such penalties[6], and the FCA's approach to penalties for failure to comply with information-gathering powers in CA98 investigations,[7] we propose to adopt the CMA's policy[8] as our policy on penalties under section 174(1)-(3). This is set out in the draft guidance.

3.5 The guidance also sets out the framework for the use and disclosure of information obtained using our EA02 or FSMA powers.

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

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

4 http://www.fca.org.uk/static/documents/market-studies/how-we-carry-out-market-studies.pdf

5 Under section 174A(1) or (3) EA02

6 All other concurrent regulators (other than the Payment Systems Regulator) are obliged to have regard to the CMA's statement of policy on such penalties.

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

8 CMA4: *Administrative penalties: Statement of Policy on the CMA's approach*, January 2014

4. Draft legal instrument: amendments to the FCA Handbook

Handbook amendments

4.1 Appendix 3 comprises a draft legal instrument introducing certain rule changes in the FCA Handbook.

4.2 Unlike the guidance in Appendix 1 and Appendix 2, which are relevant to all financial service sector firms, the Handbook amendments apply to authorised firms only.

Supervision manual

4.3 We propose two changes to the Supervision Manual: an amendment of SUP 15.3.15 R and a new Rule and Guidance to be introduced at the end of SUP15, as described below.

4.4 SUP 15.3.15 R requires a firm to notify the FCA when it has been sanctioned or faced disciplinary measures from a statutory or regulatory authority, professional organisation or trade body - or if it becomes aware that such a body has started an investigation into its affairs. The change adds an explicit reference to 'competition authorities' to SUP 15.3.15 R, to clarify the extent of the firm's obligation. We do not consider that any specific guidance is required for this change to the Rule, as it is consistent with the obligations on firms in relation to notifying proceedings or investigations opened, or sanctions imposed, by other (non-FCA) regulators.

4.5 The new Rule and guidance to be introduced at the end of SUP15 requires disclosure of competition law infringements. It is in line with other obligations in SUP15, but creating a separate section will allow for any further changes to deal with competition law infringements without affecting other guidance on SUP 15.3.11 R.

4.6 The obligation in the new Rule, SUP 15.3.32 R, is that a firm must notify the FCA if it infringes any applicable competition law. The firm must do this in writing immediately it becomes aware, or has information which reasonably suggests, that an infringement has occurred or may have occurred. However, it will be possible for a firm to make such a notification orally where it has made, or will make, an oral application for leniency or immunity covering the same subject matter to any competition authority.

4.7 The changes proposed to SUP15 are a reflection of the existing disclosure obligations on firms under Principle 11[9], i.e. the obligation on firms to notify the FCA of anything '*relating to the*

9 Principle 11 (at PRIN 2.1.1 R) states *'A firm must deal with its regulators in an open and cooperative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.'*

firm of which that regulator would reasonably expect notice'. However, we recognise the benefit in introducing amendments in SUP15 to make the obligation explicit in light of the FCA's competition objective and our new concurrent competition powers. Nonetheless, the obligation is not new.

4.8 The disclosure obligation applies to unregulated and regulated activities alike, and takes into account the activities of other members of a group.

4.9 For the avoidance of doubt, firms must make their own assessment of the legality of their agreements and conduct under competition law, in line with their obligations under Regulation 1/2003[10] and CA98, as amended, which ended the previous system of notifying agreements to competition authorities for individual exemption. This is reflected in the guidance included as SUP 15.3.33 G, under which any delay or failure by the FCA to take enforcement action should not be taken by firms to mean that the reported agreement or conduct does not infringe competition law.

4.10 Firms should also note that compliance with their Principle 11 and SUP15 obligations is compulsory, and should be distinguished from applications for lenient treatment under the CMA's leniency policy, which are made on a voluntary basis.

CBA and compatibility statement

4.11 As noted above, the proposed amendments to the Supervision Manual (Appendix 3) only clarify a pre-existing obligation: therefore, no CBA has been undertaken for the new rule.

4.12 Section 138I(2)(d) of FSMA requires us to explain why we believe our proposed rules are compatible with our strategic objective, advance one or more of our operational objectives, and have regard to the regulatory principles in section 3B of FSMA. In addition, section 138K(2) of FSMA requires us to state whether the proposed rules will have a significantly different impact on mutual societies as opposed to other authorised persons.

4.13 The proposals set out above are compatible with our duties under section 1B FSMA. In particular, we consider that they support our strategic objective of ensuring that the relevant markets work well, as they help ensure that we are made aware of relevant information such as competition law investigations involving authorised firms. The proposal will advance our operational objective of promoting effective competition in the interests of consumers by ensuring that we are informed of potential competition law infringements and can take appropriate action if necessary.

4.14 We have had regard to the regulatory principles set out in section 3B FSMA. In particular, the proposals are consistent with the need to use our resources in the most efficient and economic way, the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits it is expected to deliver and the principle that the regulators should exercise their functions as transparently as possible. In addition, we note that the proposed rule will not impose a new burden on authorised firms, which are already subject to an obligation to disclose to the FCA anything relating to the firm of it would reasonably expect notice.

10 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the [TFEU], OJ L1, 4.1.2003, p. 1

4.15 We do not consider that the proposed rule will have a significantly different impact on mutual societies than on other authorised firms.

Q5: Do you have any comments on the draft legal instrument set out in Appendix 3, including the scope of the disclosure obligation?

Appendix 1
The FCA's concurrent competition enforcement powers for the provision of financial services

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

1. Overview

- We have powers to enforce the prohibitions under UK and EU competition law on anti-competitive agreements and conduct in the financial services sector.
- Our competition law functions are 'concurrent' – the CMA and possibly other regulators 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 and Markets Act 2000 (FSMA)[2], we have competition law powers, including powers under CA98 in relation to agreements and conduct relating to the provision of financial services.[3] The term 'financial services' is not defined but, in our view, includes any service of a financial nature such as banking, credit, insurance, personal pensions or investments. This therefore extends beyond financial services regulated by us or other bodies.

1.3 We also have powers to carry out market studies as provided by the Enterprise Act 2002 (EA02) and to refer markets to the Competition and Markets Authority (CMA) for detailed investigation. This guidance does not cover these powers.

1.4 These competition powers may also be exercised by the CMA with regard to all sectors of the economy so, in respect of financial services, the CMA and the FCA have concurrent competition law functions ('concurrent functions') and the FCA is a 'concurrent regulator'.

1.5 This guidance explains how we will exercise our concurrent functions in respect of the prohibitions in Chapter I and Chapter II CA98 and/or Article 101 and Article 102 TFEU in relation to the provision of financial services within the UK, in particular the enforcement processes we will follow, and how these relate to our other powers and duties.[4]

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

2 Sections 234I to 234O FSMA

3 On 1 April 2014, the Payment Systems Regulator was established as the regulator for payment systems in the UK. The Payment Systems Regulator is a subsidiary of the FCA with its own statutory objectives and board. The Payment Systems Regulator has been given concurrent powers under CA98 and EA02 in relation to participation in payment systems, and will issue its own guidance on its concurrent powers.

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

1.6 This document focuses on the procedural aspects of the FCA's powers of enforcement under CA98. For guidance on the application of the CA98 prohibitions, please refer to the CMA's guidance documents, including *Agreements and concerted practices* (OFT401) and *Abuse of a dominant position* (OFT402), which apply to all areas of economic activity, including financial services.[5]

Legislative context and other guidance documents

1.7 The legal framework for the FCA's CA98 concurrent enforcement powers in relation to the provision of financial services in the UK includes (but is not limited to):

- Articles 101 and 102 TFEU and Regulation 1/2003[6]
- The Competition Act 1998
- The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (CA98 Rules)
- Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations)
- Financial Services and Markets Act 2000
- Financial Services (Banking Reform) Act 2013
- Financial Services Act 2012
- 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 s36 CA98[7]
- the CMA's statement of policy in relation to the imposition of penalties under s40A CA98[8]
- the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments under s31A CA98[9]

1.9 The CMA's Guidance on concurrent application of competition law to regulated industries (Concurrency Guidance)[10] explains how the concurrency regime operates in relation to CA98.

5 Available at www.gov.uk/cma

6 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.

7 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).

8 CMA 4 *Administrative Penalties: Statement of Policy on the CMA's Approach*

9 OFT 407 *Enforcement*

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

1.10 This guidance sets out how we will carry out enforcement action under our new powers under CA98. Our approach will be informed by our general enforcement policy,[11] subject to the statutory rules that apply to CA98 enforcement. We refer where relevant in this guidance to CMA's Procedural Guidance[12] and other guidance documents.

1.11 We may revise our guidance from time to time, e.g. in light of our experience or because of changes in the law. Our website will always contain the most up to date version.

11 See our Enforcement Guide, available at http://fshandbook.info/FS/html/FCA

12 *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 FSMA 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. Our general approach to transparency as a financial services regulator is set out in the FCA transparency framework.[13] However, the legal framework for the disclosure of information gathered under CA98 is different from that for information gathered under our other functions. This guidance sets out what we propose to publish about our CA98 investigations and how we will liaise with parties under investigation and third parties.

2.2 We are also committed to ensuring fair treatment in the exercise of our powers: this protects the rights of those we are investigating and of third parties, and assists us in our decision-making. We must carry out our investigations and make decisions in a procedurally fair, transparent and proportionate manner, according to the standards of administrative law. In addition, we must comply with the Human Rights Act 1998.

13 August 2013, available at http://www.fca.org.uk/static/fca/documents/feedback-statements/fca-transparency-framework.pdf

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 FCA's Procedural Officer[14], whose details can be found on our website. He or she may consider complaints that relate to:

- deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections
- requests for treatment of confidential information in documents on the FCA's case file, in a Statement of Objections or in a final decision
- requests for disclosure or non-disclosure of certain documents on the FCA'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 FCA 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 6 below). He or she will not otherwise be involved in the investigation.

2.7 In addition, the FCA operates a Complaints Scheme, details of which are found on our website.[15] However, we expect that complaints in relation to procedural matters within the scope of the Procedural Officer's jurisdiction will be more appropriately dealt with by the Procedural Officer, who is established for that purpose.[16] Ultimately, a party with sufficient interest can seek judicial review in the High Court of an administrative decision taken by the FCA.

2.8 Parties whose agreements or conduct are the subject of a decision specified in s.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

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

15 http://www.fca.org.uk/about/governance/complaining-about-us

16 However, the complaint can nonetheless be taken up by the complaints investigator under section 87 of the Financial Services Act 2012.

- releasing commitments under section 31A(4)(b)(ii)
- 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. 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 FCA, 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 the provision of financial services are concurrent with those of the CMA and, in certain instances, other regulators that have concurrent functions over the provision of some financial services (for example the Payment Systems Regulator).

17 See footnote 32 in relation to administrative penalties.
18 Article 11(6), Regulation 1/2003
19 Article 3, Regulation 1/2003

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 regulator that will be 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 financial services. If agreement cannot be reached, the CMA may determine which relevant competent authority should exercise their power. We have entered into a memorandum of understanding with the CMA which 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 which have a duty to promote competition in the interests of consumers. The UKCN's Statement of Intent can be found as an annex to the Concurrency Guidance.

2.17 The FCA 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 FSMA

2.18 Anti-competitive agreements or abusive conduct by authorised firms may breach obligations under FSMA or other legislation, as well as competition law. In addition, they may call into question the fitness and propriety of those authorised firms or individual approved persons. Accordingly, there may be instances in which we take enforcement action under our other powers as well as CA98, in parallel or sequentially. We will consider our obligations to act reasonably and proportionately when considering taking other enforcement action (such as imposing fines, disqualification or suspensions) and, for example, the level of any fine to be imposed.[23]

2.19 We will make clear when using our formal information-gathering powers which powers we are using and the nature of the suspected infringement(s) that we are investigating. Where more than one of our enforcement powers is considered to be potentially appropriate, we may make separate information requests under different information gathering powers. However, we will seek to decide as early as possible what is likely to be the most appropriate power(s) to deal with the specific agreement or conduct in question.

2.20 In some circumstances we may begin an investigation under CA98 and subsequently decide that action under our other powers is more appropriate, or vice versa. In such cases we will inform the party or parties involved.

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

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

22 The memorandum of understanding can be found on our website, http://www.fca.org.uk/your-fca/documents/mou/mou-between-the-fca-and-cma *[MOU will be updated to reflect concurrent powers]*

23 The FCA's guidance on the imposition of penalties under FSMA is set out in the Decision Procedures and Penalties Manual, available at www.fshandbook.info.

'Primacy'

2.21 We are bound by statutory provisions giving 'primacy' to CA98 enforcement in certain situations. This means that, before exercising certain of our powers set out in FSMA (listed in paragraph 2.22 below), we have a duty to consider whether it would be more appropriate to proceed under CA98. If we consider that it would be more appropriate to proceed under CA98, we must do so rather than exercise that other power.

2.22 The specified powers are the powers under:

- section 55J(2) FSMA to vary or cancel a Part 4A permission (to carry out regulated activities)
- section 55L FSMA to impose or vary a requirement on an authorised person with a Part 4A permission
- section 88E FSMA to take action against a sponsor firm (to advance our operational objectives)
- section 89U FSMA to take action against a primary information provider to advance our operational objectives
- section 192C FSMA to give a direction to a qualifying parent undertaking
- section 196 FSMA to impose a requirement (intervention in respect of incoming firms)

2.23 We will determine on a case-by-case basis whether it may be more appropriate to proceed under CA98. We will look at the potential harm to competition raised by the conduct or agreement in question, the resource and timing implications of the actions available to us, and the potential outcomes (including their suitability for addressing the issues identified) and deterrent effect of those actions. Other factors may also be relevant to our considerations.[24]

2.24 In some cases it will be clear that CA98 is not the appropriate legal instrument, for example, if the proposed action relates to behaviour of a single undertaking that is not dominant, or if the behaviour does not appear likely to be capable of affecting competition. By way of example, this could include action under section 55J(2) or section 55L FSMA taken on the basis of a firm's non-compliance with a Financial Ombudsman Service award against the firm, non-payment of FCA fees or repeated failure to pay FCA fees except under threat of enforcement action, or failure to take out professional indemnity insurance.

24 See the CMA's 'Baseline' annual report on concurrency, April 2014, CMA 24, paragraph 47, which states that the use of competition law may encourage companies think in terms of the effects of their activities rather than compliance with specific rules; the greater flexibility of competition compared to *ex ante* regulation which may be reviewed only periodically; and that the application of competition law in regulated sectors may set a precedent across the regulated sector and more widely in the economy.

3. Case Initiation

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

Sources of Potential CA98 Investigations

3.1 We may be alerted to possible CA98 infringements from a variety of sources:

- Complaints from the public or businesses. Such complainants may be granted 'Formal Complainant' status by the FCA.[25]
- Super-complaints from bodies designated under section 234G FSMA,[26] such as Which?, the Consumer Council Northern Ireland, Citizens Advice and the Federation of Small Businesses.
- 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.
- Applicants for leniency.
- Our own enquiries and supervisory activities of regulated firms.
- Market studies or other own-initiative work or intelligence-gathering.

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

26 We have produced guidance on how designated bodies can bring a super-complaint (*Guidance for designated Consumer Bodies on making a Super-complaint under s234C* (FG13/1)). This guidance should be read in light of the fact that, following the commencement of amendments to FSMA made by FS(BR)A, a super-complaint cannot be made to the FCA if it is a complaint which could be made to the Payment Systems Regulator by a designated representative under section 68 FS(BR)A.

3.2 Regulated firms should bring their own contraventions to the FCA's attention, as they are obliged to do under Principle 11 of the Principles for Businesses and rules in the FCA's Supervision manual.[27]

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

Competition Department
Policy, Risk and Research Division
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Email: CompetitionMailbox@fca.org.uk
Tel: 0845 606 9966 (call rates may vary), 0300 500 0597

3.4 We also have a Whistleblowing programme, details of which can be found on our 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 FCA 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 section 188 of the Enterprise Act 2002.

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

27 Principle 11 of the FCA Handbook requires authorised firms to notify the FCA of anything *"relating to the firm of which that regulator would reasonably expect notice"*. This includes, for example, competition law infringements.

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

- whether other tools are available that would be more appropriate to achieve the same or a better outcome
- the resources required to carry out the investigation

3.8 These criteria are illustrative, rather than exhaustive. Before launching any CA98 investigation we will consult the CMA, and discuss whether it (or possibly another concurrent regulator) should lead the investigation. Ultimately, the CMA may decide this (see paragraphs 2.14 and 2.15).

3.9 We will keep our prioritisation assessment of any particular case under review and it may be that we need to close an investigation once it has been opened, if our assessment of its priority changes. The CMA has the power to take over an investigation we have opened (see paragraph 2.15).

3.10 While we may assess the strength and quality of the available evidence, a decision not to conduct an investigation, or to close an investigation after it has been opened, is not a decision on the merits of the case. It does not imply any view about the merits of a complaint or whether there has been a breach of competition law. Our choice of whether to take enforcement action is a question of how we use our resources effectively and efficiently. In some cases it may be appropriate to deal with suspected infringements of competition law without formal enforcement action. For example, we may alert businesses to possible concerns without formally opening an investigation. Our prioritisation assessment underlies our decision as to whether or not to investigate a matter. However, if the FCA 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 FCA (see paragraphs 2.14 - 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 business(es) under investigation a case initiation letter setting out brief details of the conduct which we are investigating, the relevant legislation, our indicative proposed timetable, and contact details. However, we will not do so at the start of an investigation if this may prejudice the investigation (for example, where we intend to conduct unannounced inspections), and we may need to limit the amount of information provided if there are good grounds for doing so (for example, to protect the identity of a whistleblower or a complainant).

3.12 We may in some circumstances (e.g. if we consider that it may assist us in our investigation or is necessary for market stability) publish basic information about the investigation, in accordance with our powers under section 25A CA98. If we publish information identifying a business whose activities are being investigated, and subsequently decide to terminate the investigation into that business, we will (in compliance with our statutory obligations) publish a notice stating that the activities of that business are no longer being investigated.

4.
Conduct of the investigation

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

The Case Team and Decision-makers

4.1 The FCA 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 FCA. Each investigation will have a Case Sponsor (who may be two people), who will take the following decisions, as appropriate:

- Whether there is sufficient evidence to issue a Statement of Objections (see paragraphs 5.1-5.6).
- 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 4.12-4.15).
- To accept commitments offered by a party under investigation (see paragraphs 4.19-4.22).
- Whether a case is appropriate for settlement (see paragraphs 6.4-6.14).

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

4.3 We will maintain a clear division between the conduct of the investigation and the ongoing supervision of authorised firms under FSMA.

Keeping parties informed

4.4 The FCA expects to provide case updates to businesses under investigation and Formal Complainants either by telephone or in writing. We will also offer 'state of play' meetings to businesses under investigation. We use these meetings to ensure that the business is aware of the stage the investigation has reached, and inform it of the next steps and the likely timing of these, subject to any restrictions due to confidentiality or market sensitivity.

4.5 We are likely to hold state of play meetings after a case has been formally opened (unless this could prejudice the ongoing investigation), before the decision is taken to issue a Statement of Objections (see section 5) and after we have received the oral and written representations on the statement of objections.

4.6 The FCA will keep businesses under investigation and Formal Complainants to the investigation informed of the anticipated case timetable and any changes to this.

Information Gathering

4.7 Once we have 'reasonable grounds for suspecting'[29] 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.[30] In summary, we:

- Can issue requests for information and documents (commonly referred to as section 26 notices) in writing.
- Can conduct formal interviews with any individual connected to a business under investigation.[31]
- Have the power to enter business and domestic premises, require the production of documents and take copies of documents. Such entry may be either with or (for business premises) without a warrant. If we have obtained a warrant, we may search for and seize documents.
- May fine any business or individual who (without reasonable excuse) does not comply with our information gathering powers.[32]

29 This is the legal test under section 25 of CA98.

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

31 Under section 26A of CA98

32 Under section 40A of the CA98, we may impose penalties for parties failing to comply with our investigation gathering powers without reasonable excuse. In determining whether, and if so how, to proceed under section 40A CA98, we must have regard to the CMA's Policy Statement on Administrative Penalties (*Administrative penalties: Statement of Policy on the CMA's approach* (CMA 4)). 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).

4.8 We also have extensive powers to obtain information from those subject to our regulation under FSMA (as set out in the FCA's Enforcement Guide)[33], and as noted (see paragraph 2.20) we may use information we obtain in other ways during an investigation under CA98. However, once we have decided to launch an investigation under CA98, we would use the tools provided by CA98 in order to conduct that investigation.

4.9 The CMA's Procedural Guidance describes the limits on its powers of investigation under CA98.[34] Those limits apply equally to the FCA so that we:

- cannot require the production or disclosure of privileged communications[35]
- cannot force a business to provide answers that would require an admission that it has infringed the law
- are subject to strict rules governing the extent to which we are permitted to disclose confidential and sensitive information (see section 7)

4.10 We expect to receive a separate non-confidential version of any document or materials containing sensitive or otherwise confidential information, along with a clear explanation as to why the redacted information should be considered confidential.[36]

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 FSMA, subject to and in accordance with the relevant legislation and case law (see also section 7).

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

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

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

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

4.14 In terms of the procedure we will follow:

- Any application should be made to the case team in writing, providing as much detail as possible as to why the grounds set out in section 35 CA98 are met.

33 http://fshandbook.info/FS/html/FCA/EG/link/PDF

34 See its Chapter 7.

35 See section 30 of CA98.

36 However, the FCA may nonetheless need to disclose such information pursuant to one of the statutory gateways (set out in EA02 for 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 business to which the directions are addressed setting out the terms of the proposed directions and the reasons for giving them.

- We will also allow that business a reasonable opportunity to make representations. Given the nature of the interim measures process, the time allowed may be short.

- We will allow the business to inspect documents on our file, other than those parts that are confidential (see section 7).

- After taking into account any representations, and having satisfied ourselves as to the adequacy of the evidence we are relying upon, taking into account all the circumstances of case, we will make our final decision and inform the applicant and any Formal Complainants and the business against which the order is being sought. The Case Sponsor is responsible for deciding whether to give an interim measures direction, subject to obtaining the approval of a Director of Division.

- We will publish any interim measures direction we issue.

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

- We will consult the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out the principal reasons for rejecting the application.

- We will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.

- If the comments from the applicant or Formal Complainant contain confidential information, a separate non-confidential version must be submitted at the same time (see section 7 on handling confidential information). We may provide this non-confidential version to the business under investigation if we think it would be appropriate to do so, such as where it may be relevant for the rights of defence.

- We will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided, if the Case Sponsor still decides to reject the application, we will send a letter to the applicant and any other Formal Complainants and normally the business against which the directions are sought to inform them and give our reasons.

- However, if the comments and/or additional information from any of these parties leads the Case Sponsor to change his or her provisional view and to decide that we should make an interim measures direction, we will inform the applicant, any other Formal Complainants, and the business against which the directions are sought, and the interim measures application will continue as set out in paragraph 4.14.

Possible outcomes of investigation

4.16 There are several ways in which an investigation under CA98 can be resolved.[37] In summary:

37 See paragraph 7.11 below in relation to taking action using the FCA's powers under other statutes, which could be in addition to one of the outcomes listed below.

- We will issue a Statement of Objections where our provisional view is that the conduct under investigation amounts to an infringement. After doing this and receiving the parties' representations, we can issue a final decision that the conduct amounts to an infringement, and can impose a fine and/or directions on the business(es) concerned (see sections 5 and 6).

- We can issue a decision that there are no grounds for action (either before or after issuing a Statement of Objections) if we have not found sufficient evidence of an infringement (see section 6).

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

- We can accept commitments from a business about its future conduct (see paragraphs 4.19 – 4.22).

4.17 Infringement decisions[38], penalty decisions and decisions that there are no grounds for action will be taken by the Competition Decisions Committee (see chapters 5 and 6). All other decisions are the responsibility of the Case Sponsor, although the Case Sponsor will need the agreement of a Director of Division for any decision to accept commitments.

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

Commitments

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

4.20 We will have regard to the CMA's guidance on the circumstances in which it may be appropriate to accept commitments.[39] If we choose to accept commitments we will close our investigation and not take an infringement decision.

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

4.22 If we accept commitments, then we cannot continue the investigation, make a final decision, or order interim measures.[40] However, we can take such action if we have reasonable grounds to suspect that there has been a material change in circumstances, a business has not adhered to the commitments we accepted, or if the information that led us to accept the commitments was incomplete, false, or misleading in a material particular.[41]

38 Other than in settlement cases, for which, see paragraphs 6.4-6.14 below.

39 Annexe A in *Enforcement* (OFT407)

40 Section 31B(1) CA98

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

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

5.1 Where our provisional view is that the conduct under investigation amounts to an infringement, we will issue a Statement of Objections to each business we consider to be responsible for the infringement (the addressee(s)). The Case Sponsor is responsible for the decision to issue a Statement of Objections, after consultation with other senior officials within the FCA.

5.2 A Competition Decisions Committee comprising at least three people will be appointed to be the final decision-maker on whether or not the business/es under investigation have infringed the prohibitions contained in Chapter I or Chapter II of CA98/ Article 101(1) or 102 TFEU, once the Statement of Objections has been issued. It will be drawn from a panel appointed by the FCA Board to act as decision-makers in CA98 cases.

5.3 We will inform those businesses of the identity of the Competition Decisions Committee members. However, the case team will remain the primary contact for parties, which will remain in place, and parties should not contact the Competition Decisions Committee directly.

The Statement of Objections

5.4 The Statement of Objections sets out our provisional view and proposed next steps. It gives the business accused of a breach of competition law an opportunity to know the full case against it and, if it chooses to do so, to respond formally.

5.5 The Statement of Objections will set out the facts and our legal and economic assessment of them which led to the provisional view that an infringement has occurred. It will also set out any action we propose to take, such as imposing financial penalties[42] and/or issuing directions to stop the infringement if we believe it is ongoing, as well as our reasons for taking that action.

5.6 We will normally announce the issue of a Statement of Objections on our website and make an announcement on a regulatory information service. However, we may decide not to announce the issue of a Statement of Objections, or may vary the extent of any publication, depending on the circumstances of the case and in particular the market sensitivity of any information we would otherwise publish. However, in any situation and at any time, listed companies may need to consider their own market disclosure obligations.

Access to the File

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 FCA internal documents.[43] Section 7 sets out the statutory framework for the disclosure of information. A person to whom we disclose information which is not made publically available must not make any onward disclosure of that information without our consent.

5.9 We may, if appropriate, exclude routine administrative documents from the file and list them in a schedule, allowing businesses to access specific documents upon request. Routine administrative documents would be those which do not relate to the substance of matters set out in a Statement of Objections, and could include, for example, correspondence setting up meetings.

5.10 In appropriate circumstances, we may consider establishing confidentiality rings (within which confidential information may be disclosed to a defined group) or data rooms (within which access to confidential information may be given to a defined group).

42 See paragraphs 5.27-5.28 below in relation to the issuing of a draft penalty statement.

43 Confidential information and internal information are defined in Rule 1(1) of the CA98 Rules.

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.

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.[44]

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 FCA staff 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.[45]

44 See paragraph 2.4 above.

45 Rule 6(7) and (8) of the CA98 Rules

5.21 We will consider holding multi-party oral hearings in appropriate cases, such as where there are differing views on key issues.

Steps following representations

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 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.[46] This will set out the key aspects[47] 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.[48] 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.

46 Rule 11 of the CA98 Rules

47 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.

48 Rule 11 of the CA98 Rules. For further information on how the CMA calculates the appropriate amount of a penalty, see *Guidance as to the appropriate amount of a penalty* (OFT423) available at: www.gov.uk/cma. 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.[49]

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 to issue:

- an infringement decision, or
- a decision that there are no grounds for action[50]

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

Infringement decision

5.31 If we are satisfied that the legal test for establishing an infringement is met, we will issue an infringement decision to each business that the Competition Decisions Committee has found to have infringed the law.[51] 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.[52] If a business fails to comply with our directions, we may seek a court order to enforce them.[53]

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

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

Decision that there are no grounds for action

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

49 Rule 6 of the CA98 Rules.

50 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 FCA may also accept commitments from businesses to address its competition concerns at any stage, but we anticipate that we would be unlikely to do so at a very late stage, such as following receipt of the representations from the addressee(s) of the Statement of Objections.

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

52 Sections 32-33 CA98

53 Section 34 CA98

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

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

6.
Penalties, leniency and settlement

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

Penalties

6.1 If we find an infringement of the prohibitions in Chapter I or Chapter II of CA98/ Article 101(1) or 102 TFEU, we may impose a penalty on the infringing undertaking(s). The infringement decision will explain how the Competition Decisions Committee decided upon the appropriate level of penalty, having taken into account our statutory obligations in fixing a financial penalty[54] and the parties' written and oral representations on the draft penalty calculation.

Leniency

6.2 Under leniency arrangements, those who have participated in cartel activity such as price-fixing or market sharing can choose to give detailed confessions of their infringements, in return for significant reductions in, or complete immunity from, penalties for that infringement. We will apply the CMA's leniency policy[55] when imposing fines under CA98 where the investigation arises out of a leniency application to the CMA and where the case is transferred to us under concurrency arrangements. We expect leniency applications to be made directly to the CMA (in particular since we do not have concurrent powers under the Enterprise Act 2002 in relation to the prosecution of the cartel offence, and cannot grant immunity from prosecution in relation to this offence). However, if a firm were to choose to apply to us directly for leniency and it satisfied the relevant criteria, we would have regard to the CMA's Penalty Guidance and apply the CMA's leniency policy in relation to CA98 enforcement.

54 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 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.*

55 See OFT423 (ibid) and OFT1495 *Applications for leniency and no-action in cartel cases – OFT's detailed guidance on the principles and process* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)

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

Settlement

6.4 Settlement is a voluntary process in which:

- a party admits that it has been party to an agreement or has been engaged in conduct which infringes one or more of the prohibitions in Chapter I or Chapter II of CA98/ Article 101(1) TFEU or 102 TFEU
- the party agrees to a streamlined administrative procedure for the remainder of the investigation (see paragraph 6.8), and
- we issue an infringement decision but impose a reduced penalty on the settling party (see paragraph 6.7)

6.5 The decision to engage in settlement discussions and to settle is at our discretion. The circumstances in which we are likely to consider it appropriate to settle a case will depend on several factors:

- Whether we consider that we have a sufficient understanding of the nature and gravity of the suspected infringement to make a reasonable assessment of the appropriate outcome.
- The likely procedural efficiencies and resource savings that can be achieved.
- The number of parties in a case.
- In multi-party cases, the number of parties interested in pursuing settlement discussions.
- The prospect of reaching a settlement in a reasonable time. We will not allow parties to use settlement discussions in order to delay an investigation. We will set clear and challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from the formal process.

6.6 The settlement procedure is separate from leniency or the commitments procedure, though it is possible for a leniency applicant to benefit from both leniency and settlement discounts.

Requirements for settlement

6.7 We will require a settling party to take a number of actions:

- Admit liability in relation to the nature, scope and duration of the infringement. The scope of the infringement will include, as a minimum, the material facts of the infringement as well as the legal characterisation of the infringement.
- Cease the infringing behaviour immediately from the date that it enters into settlement discussions with us, where it has not already done so. It must also refrain from engaging again in the same or similar infringing behaviour.

- Confirm it will pay a penalty set at a maximum amount. This maximum penalty (which will apply provided the business continues to follow the requirements of settlement) will reflect the application of a settlement discount to the penalty that would otherwise have been imposed. This discount will reflect the circumstances of the case, in particular whether the case is being settled before or after issue of a Statement of Objections. Settlement discounts will be capped at a level of 20%. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount available for settlement pre-Statement of Objections will be up to 20% and that available for settlement post-Statement of Objections will be up to 10%.

6.8 In addition, in order to achieve the our objective of resolving the case efficiently, settling parties must confirm that they accept that:

- There will be a streamlined administrative process for the remainder of the investigation. This may include streamlined access to file arrangements (e.g. through access to key documents only and/or through the use of a confidentiality ring), no written representations on the Statement of Objections (except in relation to manifest factual inaccuracies), no oral hearings, no separate draft penalty statement after settlement has been reached and no Competition Decisions Committee being appointed (see paragraph 5.2).

- There will be an infringement decision against the settling party.

- The decision will remain final and binding as against it, even if another addressee of the infringement decision successfully appeals it.

- The settling party may be required to undertake to assist us in any continued investigation or in a defence should another party appeal a decision in the case.

6.9 The settling party may be required to confirm that they will not appeal a subsequent infringement decision to the Competition Appeal Tribunal.

6.10 Parties should not disclose the fact or content of settlement discussions to other persons unless required by law or regulatory requirements, apart from information about the matter to which the infringement decision relates once made public.

Settlement decision procedure

6.11 A decision to initiate a settlement procedure will be taken by the Case Sponsor, subject to approval by at least two members of the FCA's senior management, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least Head of Department level (the Settlement Decision Makers). At least one of the Settlement Decision Makers will not be from the Enforcement and Financial Crime Division.

6.12 The Settlement Decision Makers will not have been directly involved in establishing the evidence on which the decision is based. They may, but need not, be involved in the discussions exploring possible settlement. If they approve the decision of the Case Sponsor to settle the case, they will formally issue the infringement and penalty decision.

6.13 Whenever we enter into settlement discussions we may agree with the party concerned that we would not seek to rely against each other on any admissions or statements made in the course of the settlement discussions if the matter becomes contested (in an infringement decision or a subsequent appeal from a contested decision[56]). The Competition Decisions Committee (if it has been appointed) will be informed that one or more businesses are exploring the possibility of settlement (because this will extend the case timetable) but would generally otherwise be unlikely to be involved in the settlement discussions.

6.14 The terms of any proposed settlement will be put in writing[57] 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.

56 If we do not require a settling party to waive its right of appeal, and that party appeals a settlement decision against it, the FCA may use admissions made during the course of the settlement negotiations.

57 Though the FCA may consider a reasoned request from the settling business to provide the confirmation that it accepts the settlement requirements orally, which will be transcribed at the FCA's premises.

7. Disclosure and use of information by FCA in CA98 investigations

- We must handle confidential information carefully and may not disclose it other than in accordance with either FSMA or EA02 (as applicable).
- The framework for disclosure of information by us is governed by the context in which we have obtained it.
- Where information is received by us in connection with our CA98 functions, it will be treated as 'specified information' under EA02 and is excluded from the FSMA 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 FCA

7.1 The framework for our use and disclosure of information will be determined by the context in which it has been provided to, or obtained by, us and under which legislation. We may use information that we have received from many lawful sources in conducting investigations under CA98. However, we may only disclose such information under the applicable legal regime. Accordingly, when we wish to use and disclose information that we have gathered under our FSMA powers in a CA98 investigation, we must apply the relevant FSMA disclosure provisions.[58]

Disclosure under FSMA

7.2 When we receive information for the purposes of, or in discharge of, our statutory functions under FSMA 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 348 FSMA. Information which is already publicly available, or which is aggregated in a format so that it cannot be attributed to a particular firm or individuals, is excluded from the definition of confidential information in FSMA.

58 The converse would also apply were we to wish to use and disclose information gathered under a CA98 investigation during a FSMA enforcement procedure.

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 FSMA regime and will instead be dealt with under the rules set out in EA02 (in other words, information we receive for the purposes of or in discharge of our concurrent competition law functions can only be disclosed by us under Part 9 EA02, i.e. not under FSMA). (See paragraphs 7.6 to 7.9).[59]

7.4 Where we have obtained information under FSMA rather than in connection with our concurrent functions (see paragraph 7.6), FSMA provisions on disclosure will apply. Section 348(1) FSMA prevents us from disclosing confidential information unless we have the consent of the person who provided the information (and the person about whom the information relates, if a different person) or a 'gateway' applies. A gateway is an exception to our duty of confidentiality, allowing the disclosure of confidential information to third parties in certain circumstances. If we do not have a gateway, we may not release confidential information without the relevant consent(s).

7.5 The full set of gateways is set out in the so-called Gateway Regulations.[60] They include a gateway to the Prudential Regulation Authority to assist it in the discharge of its public functions, and disclosure of information not subject to single market restrictions to the CMA for the purpose of assisting it to discharge its functions (including under CA98). When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

Disclosure under EA02

7.6 When we receive information in connection with the exercise of our concurrent functions, Part 9 of the EA02 will apply to any disclosure of such information.[61] 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.[62] The restriction applies during the lifetime of an individual or while the undertaking continues in existence (for the individual or business to which the specified information relates, respectively).

7.7 Only disclosure falling within one of the 'information gateways' is permitted, as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents[63] or where the disclosure is made for the purpose of facilitating the exercise by us of any of our statutory functions.[64]

7.8 Even when Part 9 of 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

59 Section 348(7) FSMA
60 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)
61 Section 348(7) FSMA
62 Section 237 EA02
63 Section 239 EA02
64 Section 241 EA02

- 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

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

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

Taking action under other powers

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 FCA from a member to the ECN or the CMA do not apply to information received by the FCA directly from firms or individuals.

Appendix 2
Market studies and market investigation references: A guide to the FCA's powers and procedures

1. Introduction

- Market studies are the principal way in which we investigate markets to see how well they are working for consumers.
- We may carry out market studies either under our powers under the Financial Services and Markets Act 2000 (FSMA) or 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 intervene to make a market more competitive.

1.1 Market studies are the principal way in which we investigate markets to see how well they are working for consumers. They are in line with our competition, consumer protection and market integrity objectives (see paragraph 2.2). If we find that the markets we study could be made to work better, we have a range of powers to introduce appropriate remedies.

1.2 As from 1 April 2015, under the concurrency provisions in the Financial Services and Markets Act (FSMA)[1], we have competition law powers, including powers under the Enterprise Act 2002 (EA02) to carry out market studies and make market investigation references (MIRs)[2] which relate to financial services to the Competition and Markets Authority (CMA) for detailed investigation.[3] 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 powers under FSMA to carry out market studies.

1.4 This document describes:

- our powers to carry out market studies under FSMA or under our concurrent functions and the provisions of EA02, and explains how we choose which powers to use (section 2)
- how we carry out studies under FSMA and the remedies that may follow (section 3)

1 Section 234I to section 234O FSMA
2 Section 234I and section 234M FSMA
3 We also have powers to enforce the Competition Act 1998.

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

4 This document updates and replaces the guidance in "How we carry out market studies" to reflect our EA02 powers. We will update it from time to time and the up to date version will appear on our website.

2.
FSMA and EA02 Market Studies

- We may carry out market studies under FSMA or our concurrent functions and the provisions of EA02.
- We have a choice as to which tool to use.
- We will choose which markets to 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 consumers, and what we will need to do to investigate this, before launching a market study.

The FCA's powers to carry out market studies

2.1 We have powers to conduct market studies either under FSMA or under our concurrent functions and the provisions of EA02.

FSMA market studies

2.2 Under FSMA, the FCA has the strategic objective of ensuring that the relevant markets function well.[5] It has three operational objectives[6] of:

- securing an appropriate degree of protection for consumers[7]
- protecting and enhancing the integrity of the UK financial system[8]
- promoting effective competition in the interests of consumers in the markets for regulated financial services, or services provided by a recognised investment exchange in carrying on regulated activities[9]

5 Section 1B(2) FSMA

6 Section 1B(3)(c)) and section 1E(1) FSMA. It also has the operational objectives of consumer protection and integrity: see section 1B, section 1C and section 1D FSMA.

7 Section 1C FSMA

8 Section 1D FSMA

9 In respect of which it is, by virtue of section 285(2) FSMA, exempt from the general prohibition.

2.3 We have a range of functions and powers including:

- the function of supervising firms and powers which can be exercised specifically to advance the competition or other objectives
- the rule-making power
- the power to impose requirements on authorised persons
- the new power to make MIRs (see section 5 below)

2.4 Under FSMA, we can carry out market studies (FSMA market studies), using information that we routinely receive from firms we regulate, 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. While we have regard to all our objectives (paragraph 2.2), we see FSMA market studies as one of our principal tools for pursuing our competition objective.

EA02 market studies

2.5 For the purpose of our concurrent functions we have the function of keeping under review the market for financial services[10], and we may carry out market studies under the provisions of EA02 (EA02 market studies).[11] We may do this when we wish to:

- consider the extent to which a matter in relation to the acquisition or supply of financial services in the United Kingdom has or may have effects adverse to the interests of consumers
- assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects[12]

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.[13]

FSMA or EA02 market study?

2.7 At the outset of any study, we have an open mind as to whether a market is in fact working well for consumers or not, and accordingly, we do not have a decided view as to whether we need to intervene 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 study should be.

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

- make an MIR whether or not we have conducted an EA02 market study, as long as the legal criteria for making an MIR are met (see paragraph 5.1)
- use our powers under FSMA to impose remedies on firms that we regulate (see paragraphs 3.15 to 3.27) whether we have followed either a FSMA or an EA02 process

10 Section 234M FSMA
11 Section 234I FSMA
12 Section 130A(2) EA02
13 Section 234M(2) FSMA

2.9 Accordingly, we will decide on a case by case basis whether to pursue a FSMA or an EA02 market study.

2.10 There are different procedural requirements and timetables for FSMA and EA02 market studies (described in sections 3 and 4). One important difference is that we may only use FSMA powers to require information from firms that we regulate and certain persons connected with them (paragraphs 6.2 to 6.5), whereas we may use our EA02 powers more broadly (paragraphs 6.6 to 6.7). Accordingly, if we wish to gather information from firms that we do not regulate under FSMA and it is possible that we may need to use formal powers to do so, then this may influence our choice of tool.

Choosing which markets or features of a market to study

2.11 We identify markets for financial services that appear not to be working well for consumers 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 studies
- our supervisory activities of regulated firms
- internal papers and analyses
- complaints, including Super-complaints from bodies designated under section 234G FSMA[14]
- general market intelligence

2.12 We welcome information from industry participants, representative groups and the public about markets 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:

Competition Department
Policy, Risk and Research Division
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Email: CompetitionMailbox@fca.org.uk
Tel: 0845 606 9966 (call rates may vary), 0300 500 0597

14 These include Which?, the Consumer Council Northern Ireland, Citizens Advice and the Federation of Small Businesses. We have produced guidance on how designated bodies can bring a super-complaint (*Guidance for designated Consumer Bodies on making a Super-Complaint under s234C* (FG13/1)). This guidance should be read in light of the fact that, following the commencement of amendments to FSMA made by FS(BR)A, a super-complaint cannot be made to the FCA if it is a complaint which could be made to the Payment Systems Regulator by a designated representative under section 68 FS(BR)A.

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

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

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

The pre-launch stage

2.15 Before launching a market study, we consider what might be preventing the market working well for consumers. 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 study. We produce an initial project plan and establish the resources we need.

2.16 We decide whether to launch a FSMA market study or an EA02 market study. In either case, we consult the CMA[15], and we cannot launch an EA02 market study if the CMA has launched such a study into the same market.[16] The CMA is subject to reciprocal obligations.[17] If the CMA has launched or is about to launch a study under EA02, we will take this into account in deciding whether or not to launch a FSMA market study. We will aim to avoid duplication, but might work jointly with the CMA on a market study.

15 In line with the general principle of cooperation set out in our Memorandum of Understanding with the CMA, and our duty under section 234I(7) of FSMA for EA02 market studies.

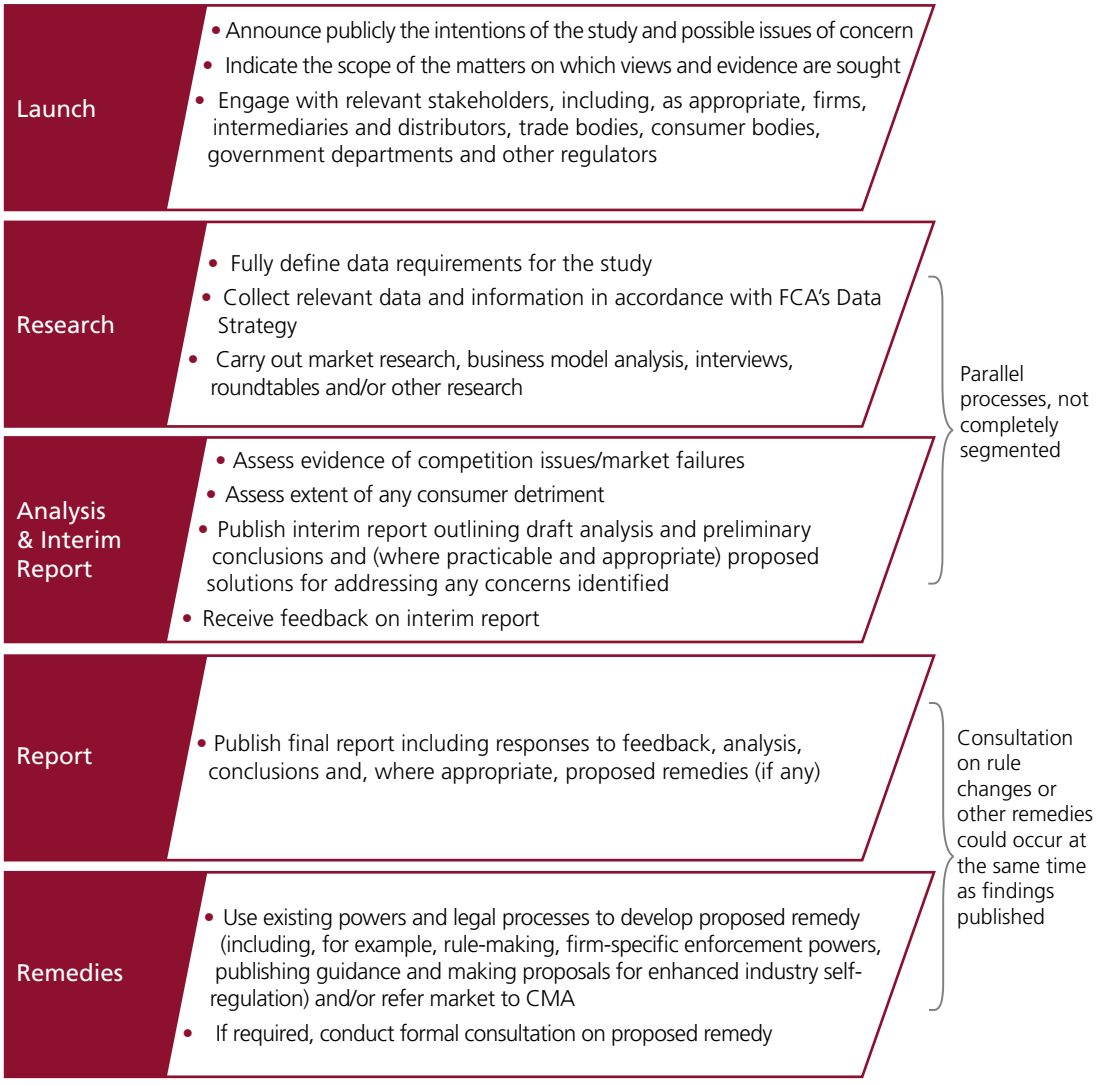
16 Section 234I(8) FSMA

17 Sections 234I(7) and (8) FSMA

3.
How we carry out FSMA market studies

Overview

3.1 The following figure illustrates the stages of a typical FSMA market study.



Launch

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

- The scope of the market study.
- The period during which initial representations may be made to the FCA in relation to the study.
- The timescales within which we expect to complete the study. This will usually be one year from launch to report, but may vary depending on the specific circumstances of the study.[18]

3.3 In launching the study publicly, we invite all relevant firms, intermediaries and distributors, trade bodies, consumers and consumer bodies, government departments and other regulators (UK and international) to provide us with information and data. In line with the FCA's general policy on responses to formal consultations, we will make submissions available for public inspection unless the respondent requests otherwise and we accept its request (see section 6 regarding our treatment of information).

3.4 For each market study, we inform stakeholders of the issues that concern us and describe our initial views on the reasons that the market may not be working well for consumers. We 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 consumers (see paragraph 2.13). Each market study involves gathering specific information from a broad set of stakeholders (e.g. firms, intermediaries and distributors, trade bodies, consumers, consumer bodies, government departments and other regulators (UK and international)). We will also use our own data, past studies, other papers and any previous analysis we have conducted, in order to limit the information-gathering burden on firms

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

3.7 We may ask for information on a voluntary basis, and where we do, we will expect firms to assist us with our information requests, in line with their duty of cooperation and disclosure under Principle 11 of the FCA Handbook.[19] We may use our powers under FSMA to require regulated firms to provide us with information or data (see paragraphs 6.2 to 6.5). To understand how competition works in the markets we regulate, we may also ask for information from organisations and individuals that we do not regulate (although answering such requests will be on a voluntary basis, see paragraph 2.10).

18 Unlike EA02 market studies, there are no statutory deadlines within which a FSMA market study must be completed. See paragraph 4.4.

19 Under Principle 11, a firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

3.8 Before making requests for information and data from market participants, we scope our requests carefully in light of the purpose for which the information is sought, the availability of relevant information from other sources, and the ease with which respondents can provide the information we need.[20] The FCA as a whole aims to coordinate its various activities regarding data requests, in order to manage the burden on any given firm. Section 6 describes how we must treat confidential information we receive.

3.9 Where appropriate, we may also share data and coordinate with other authorities, such as the CMA and the Prudential Regulation Authority (PRA), subject to complying with the provisions governing disclosure under FSMA (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 consumers. We consider the evidence and views we receive with reference to the issues identified. We investigate and test our initial views in the study, taking into account the feedback from stakeholders and information gathered during the study.

3.11 When assessing competition, we consider all the features of the market, including the competitive constraints that suppliers 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 consumers to obtain, assess and act on information relevant to their purchasing decisions.

3.12 We usually publish an interim report, presenting our analysis and preliminary conclusions and, where practicable and appropriate, include possible remedies to address any concerns identified. The timing and form of these interim reports and statements on possible remedies vary according to the needs of particular studies.

3.13 We set a deadline for interested parties to make submissions on our interim report and any possible remedies, of usually a few weeks. Again, in line with the FCA's general policy on responses to formal consultations, we will make submissions available for public inspection unless the respondent requests otherwise and we accept its request (see paragraph 3.3). See further section 6 regarding our treatment of information.

Report

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

- a description of the market(s) and issue(s) we considered
- the reasons for carrying out the study
- a description of the methodologies used to collect and analyse the data

20 For further information on our data strategy please see: http://www.fca.org.uk/news/fca-data-strategy

- our responses to feedback received and our analysis
- our conclusions on the issues considered

3.15 If appropriate, we will also publish our proposals for remedies to any issues that we have identified.

Remedies

3.16 If we conclude that competition is not working well for consumers, we may intervene to promote effective competition using a number of remedial measures, including:

- Market wide remedies, including (but not restricted to):
  - Rule-making. This includes changing or potentially withdrawing existing rules and making recommendations to the PRA to change or withdraw rules.
  - Publishing general guidance. This covers guidance issued under Section 139A about the operation of FSMA or specified parts of it, about any rules made using the rule-making powers or guidance about any of FCA's functions.
  - Proposing enhanced industry self-regulation. This refers to providing the financial services industry an opportunity to develop measures that ensure compliance and improve consumer welfare.
- Firm-specific remedies. This includes using own initiative variation powers or own initiative requirement powers[21], cancelling permissions, public censure, imposing financial penalties as well as filing for injunction orders or restitution orders.
- Making an MIR to the CMA. The purpose of an MIR is typically to investigate markets where it appears that competition is adversely affected by the structure of a market, by the firms operating in the market or by conduct of the firms' customers or suppliers. We may also accept undertakings in lieu of making a reference (see section 5 for more detail).

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

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

3.19 The nature of any action we take depends on the individual circumstances of each case, and could include:

- Measures that affect how firms engage with consumers – e.g., determining the information to be provided to consumers, or limiting the sale of two or more products in a bundle.

21 The FCA may vary a firm's permission on its own initiative or impose a requirement on a firm on its own initiative under section 55J or 55L of FSMA. http://fshandbook.info/FS/index.jsp. The FCA also has powers to take enforcement action against infringements of the Competition Act 1998 which might be identified in the course of its market study. The CMA has concurrent functions in this respect.

- Market-opening measures to reduce barriers to entry and expansion.
- Measures to control outcomes.
- Structural measures where behavioural remedies (or other less intrusive options) would not adequately address our concerns, e.g. the divestment of assets or businesses, provided that these are proportionate measures. In such cases, we need to show that a higher degree of intrusion is necessary.

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

Market-wide remedies

3.21 Market-wide remedies such as changing or potentially withdrawing existing rules or publishing general guidance will usually entail a consultation exercise.[22] Where appropriate, we will consult other regulators, including the PRA, on the proposed remedy and also publish a draft of the rules or guidance to invite public representations on it. We will have regard to any representations received and eventually publish an account of those representations as well as our response. Additionally, we will also notify the Treasury if we issue, amend or revoke general guidance.

3.22 We may also encourage self-regulation within the financial services industry, e.g. implementing codes of conduct. Such measures aid our efforts in ensuring compliance and improve consumer welfare. The aim is to establish a partnership with the financial services industry where market participants may be better placed to develop solutions that can be easily implemented and are tailored to our concerns.

Firm-specific remedies

3.23 Firm specific remedies, on the other hand, do not entail any public consultation process. In the vast majority of cases we will seek to agree with the relevant firm on the steps it must take to address our concerns. However, where we consider it appropriate to do so, we will exercise our formal powers under FSMA, which includes own initiative variation powers or own initiative requirement powers.

3.24 The own initiative variation power is a power to remove or vary a firm's regulatory permissions, e.g. by restricting the range of regulated activities it may carry on, or the way in which it carries on the activities covered by its permission. The own initiative requirement power is a power to impose requirements on a firm and amounts to a power of direction. We may use these powers where it is desirable to advance any of our operational objectives, including the competition objective.

3.25 Additionally, we may also open investigations into firm conduct. If we take the view that a warning notice or first supervisory notice should be issued in relation to any conduct, we will recommend such action to the relevant decision maker. For first supervisory notices, we will recommend whether the action should take effect immediately, on a specified date, or when the matter is no longer open to review. The decision maker:

- will consider whether the material on which the recommendation is based is adequate to support it
- may seek additional information about or clarification of the recommendation
- satisfy itself that the action recommended is appropriate in all the circumstances

22 However, we may dispense with the obligation to consult on rules if doing so would prejudice the interests of consumers (see section 138L FSMA).

- will decide whether to give the notice,
- will decide the terms of the proposed notice

3.26 The next steps would be a Decision Notice or a Second Supervisory Notice. Please refer to DEPP 2.3 of our FCA Handbook for more details on this.

3.27 We also have the option to apply to the civil courts for injunctions and restitution orders. An injunction order may:

- restrain the contravention of certain requirements
- direct remedial action to be taken when there has been such a contravention, or
- freeze the assets of someone who has contravened requirements or has been knowingly involved in a contravention

3.28 A restitution order will require compensation to be paid by a person who has contravened a requirement, or has been knowingly involved in a contravention, to those who have suffered loss as a result of the contravention. In some circumstances, we also have the power to directly require someone to pay restitution by taking into account the profits accrued and/or the extent of the loss or adverse effect suffered. Restitution moneys are payable to those who have been directly affected by the contravention or offence, or to whom profits are attributable.

3.29 It is also possible that during a market study, 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

3.30 Where we have reasonable grounds to suspect that features of a market are adversely affecting competition, and where the use of our powers set out above would not be more appropriate, we can refer a market or a feature of several markets to the CMA for an in-depth investigation, or accept undertakings in lieu of making a reference. If we wish to make such a market investigation reference, we must consult any persons whose interests we consider may be substantially impacted by this proposed decision. See section 5.

Effectiveness and proportionality, equality and diversity

3.31 We aim to ensure that any intervention is effective and proportionate to the concerns identified.[23] We must have regard to the regulatory principles in section 3B FSMA when exercising our general functions, including rule-making.[24] There are eight principles, of which the most relevant to us when considering intervention are:

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

23 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. 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.

24 Section 1B(5) FSMA states that when exercising our general functions, we must have regard to the regulatory principles found in section 3B FSMA.

- the transparency principle – the principle that the regulators should exercise their functions as transparently as possible

3.32 In addition, we are subject to the Legislative and Regulatory Reform Act 2006 which requires that we have regard to certain high-level principles, including proportionality and transparency, when exercising certain regulatory functions, including policy work (but not rule-making).

3.33 Accordingly, we carry out an assessment of proportionality of our proposed remedies and will consult on the draft measures when required.[25]

3.34 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.[26]

On-going review

3.35 We have ongoing duties under FSMA to ensure that markets in financial services work well for consumers (see paragraphs 1.1, 2.2, 2.5). We will keep the effectiveness and proportionality of any remedy that we implement following a FSMA market study or an EA02 market study under review.

Urgent intervention

3.36 In the majority of circumstances we complete the market study procedures outlined above (paragraphs 3.1 to 3.14) before implementing remedies. However, in exceptional circumstances, where we identify a need to act more quickly, we may intervene early to prevent the harm to competition in the interests of consumers, e.g. use temporary product intervention rules, or firm-specific powers such as an OIVOP.

25 We have no obligation to consult on firm-specific enforcement powers.

26 Our website provides more information: http://www.fca.org.uk/about/governance/corporate-responsibility/diversity (including a link to our Annual Diversity Report).

4.
How we carry out EA02 market studies

- The stages of an EA02 market study are similar to those of a FSMA study.
- 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: we may use FSMA powers only to require information from firms that we regulate and certain persons connected with them, whereas under our concurrent functions, we may use our EA02 powers more broadly when conducting an EA02 market study.
- Our remedy powers following an EA02 market study are broadly similar to those following a FSMA market study.

4.1 The stages of an EA02 market study are similar to those of a FSMA market study (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 FCA in relation to the study, and
- the timescales within which the study will be completed[27]

4.3 In line with the FCA'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:

27 Section 130A(3)EA02

- 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.[28]

- 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.[29]

- 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.[30]

- 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.[31] 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.[32]

- 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.[33]

Research and information-gathering

4.5 We will carry out research for an EA02 market study in the same way as for a FSMA study. However, we have a different set of formal powers with which we can require information. We may use FSMA powers only to require information from firms that we regulate, and certain persons connected with them (see paragraphs 6.2 to 6.5), but we may use our EA02 powers more broadly (paragraphs 6.6 to 6.7) when carrying out an EA02 market study.

Analysis and interim report

4.6 We anticipate conducting similar types of analysis under EA02 market studies as we do under FSMA market studies. 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).

28 Section 131B(1)EA02
29 Section 131B(1)EA02
30 Sections 131B(2) and (3)EA02
31 Section 131B(4)EA02
32 Section 131B(5)EA02
33 Section 131B(6) EA02

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.[34]

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.[35] We will make any responses to our proposal to make or not to make an MIR available for public inspection unless the respondent requests otherwise and we accept its request. See further section 6 regarding our treatment of information.

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). [36]

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 (paragraph 4.4).[37] 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 FSMA powers (see paragraphs 3.15 to 3.29), and any such proposed action will be set out in the EA02 market study report (see paragraph 4.4).

34 Sections 131A(2)(b) and (4) EA02
35 Sections 131A(5) and (6) EA02
36 Section 131B(3) EA02
37 Section 131B(4)EA02

5. Market investigation references and undertakings in lieu of a reference

- We can refer a market, or a feature of several markets, to the CMA for in-depth investigation.
- We will do this where we have reasonable grounds to suspect that features of the market are adversely affecting competition, and use of our other powers would not be more appropriate.
- It is possible for us to accept undertakings in lieu of making a reference, if we think they would address our competition concerns.

The FCA'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 in the UK for the supply or acquisition of financial services prevents, restricts or distorts competition (an 'ordinary reference').[38] The task of the CMA on a reference is focussed on competition, while our market studies (under either FSMA or the EA02) may explore broader issues (see paragraphs 2.2 to 2.6). It has 18 months to complete its investigation, which is a more detailed examination into whether there is an adverse effect on competition in the markets referred.

5.2 A 'feature' of a market may include[39]:

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

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

38 Section 131(1)EA02
39 Section 131(2)EA02

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.[40] 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.[41]

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.[42]

Factors FCA 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 FSMA, they do not extend beyond the firms that we regulate. Accordingly, a key factor in deciding whether to make an MIR will be whether we foresee the need to implement remedies affecting firms that we do not regulate.

5.8 Otherwise, we intend to follow the CMA's own approach as set out in *Market Investigation References* (OFT511)[43] 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.[44]

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

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

42 Section 169 (2)EA02

43 *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

44 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 FCA 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.[45] 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.

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

6. Information gathering, use and disclosure in market studies

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

Information gathering

6.1 Although we expect firms to provide us with information on a voluntary basis, we have formal powers with which we can gather information under FSMA and EA02.[46]

FSMA

6.2 Under section 165(1) FSMA, the FCA may by notice in writing given to an authorised person, require that person:

- to provide specified information or information of a specified description, or
- to produce specified documents or documents of a specified description

6.3 Under section 165(4) FSMA, section 165 FSMA applies only to information and documents reasonably required in connection with the exercise by the FCA of functions conferred on it by or under FSMA.

6.4 The FCA 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. The investigator can only impose these requirements if it reasonably considers the questions, or the provision of information or documents, to be relevant to the purpose of the investigation (under sections 167 and 171 FSMA).

46 See paragraph 3.7 and footnote 20 above with regard to our data strategy.

6.5 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.[47] It is a criminal offence for a person to falsify, conceal, destroy or otherwise disposes of documents (or cause or permit this to occur) which he knows or suspects to be relevant to the investigation, unless he shows that he had no intention to hide the facts disclosed in those documents from the investigator. A person could also be guilty of a criminal offence if, in purported compliance with a requirement, knowingly or recklessly provides information that is false or misleading.[48]

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 FCA 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[49]

6.7 We can use these powers against any person, whether or not they carry out activities that we regulate.[50]

6.8 Where the FCA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice issued by the FCA using its EA02 investigatory powers or intentionally obstructed or delayed another person in copying documents produced to that other person, the FCA has the power to impose an administrative penalty.[51]

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.[52] Where an act is capable of constituting both (a) a failure warranting an administrative penalty and (b) a criminal offence, the FCA 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.[53]

6.10 Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).[54] Persons committing a criminal offence are liable, on summary conviction, to a fine not exceeding the statutory maximum, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.[55]

47 Section 177 FMSA
48 Section 177 FSMA
49 Section 174(1)(a) and sections 174(3) to (5) EA02
50 Section 174 EA02
51 Sections 174A(1) to (3) EA02
52 Section 174A(4) EA02
53 Sections 174A(4) and (5) EA02
54 Competition and Markets Authority (Penalties) Order 2014 (SI 2014/559)
55 Section 174A(6) EA02. It should be noted that s85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides for the statutory maximum fine on summary conviction to become an unlimited fine. When this section comes into force, the statutory maximum fine will change accordingly.

6.11 The FCA is currently under a statutory obligation to issue its own statement of policy for penalties under section 174A(1) to(3) EA02. For the sake of consistency with the CMA, the practice of other concurrent regulators in relation to such penalties[56] and with the FCA's approach to penalties for failure to comply with information-gathering powers in CA98 investigations, the FCA 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.[57]

Use and disclosure of information by the FCA

6.12 We can use information we receive in the course of undertaking a FSMA market study or an EA02 market study for our other functions, such as in supervisory action, disciplinary enforcement under FSMA or enforcement of the prohibitions in the Competition Act 1998.[58]

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

FSMA

6.14 When we receive information for the purposes of, or in discharge of, our statutory functions under FSMA, e.g. a FSMA market study, 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 348 FSMA. Information which is already publicly available, or which is aggregated in a format so that it cannot be attributed to a particular firm or individuals, is excluded from the definition of confidential information in FSMA.

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 FSMA regime and will instead be dealt with under the rules set out in EA02. In other words, information received by the FCA for the purposes of or in discharge of its concurrent functions can only be disclosed by the FCA under Part 9 EA02, not under FSMA (see paragraphs 6.18 to 6.20).[59]

6.16 Where we have obtained information under FSMA rather than in connection with our concurrent functions (see paragraph 6.18), FSMA provisions on disclosure will apply. Section 348(1) FSMA prevents us from disclosing confidential information unless we have the consent of the person who provided the information (and the person to whom the information relates, if different) or a gateway applies. A gateway is an exception to our duty of confidentiality, allowing the disclosure of confidential information to third parties in certain circumstances. If we do not have a gateway, we may not release confidential information without the relevant consent(s).

6.17 The full set of gateways is set out in the so-called Gateway Regulations.[60] They include disclosure to the Prudential Regulation Authority to assist it in the discharge of its public functions, and disclosure of information not subject to single market restrictions to the CMA for the purpose of assisting it to discharge its functions (including under CA98). When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

56 All other concurrent regulators (other than the Payment Systems Regulator) are obliged to have regard to the CMA's statement of policy on such penalties.

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

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

59 Section 348(7) FSMA

60 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)

EA02

6.18 When we receive information in connection with the exercise of our concurrent functions, including EA02 market studies, Part 9 of EA02 will apply to any disclosure of such information.[61] 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.[62] The restriction applies during the lifetime of an individual or while the undertaking continues in existence (for the individual or business to which the specified information relates, respectively). Only disclosure falling within one of the 'information gateways' is permitted, as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents[63] or where the disclosure is made for the purpose of facilitating the exercise of any of our statutory functions.[64]

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

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

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

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

Transparency

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 FSMA market studies, see paragraphs 6.14 to 6.16; for EA02 market studies, see paragraphs 6.18 to 6.20.

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

61 Section 348(7) FSMA
62 Section 237 EA02
63 Section 239 EA02
64 Section 241 EA02

Appendix 3
Draft legal instrument: Amendments to the Supervision Manual

Disclosure of Competition Law Infringements Instrument 2014

Powers exercised by the Financial Conduct Authority

A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):

(1) Section 137A (The FCA's general rules)
(2) section 139A (Power of the FCA to give guidance)

B. The rule-making powers listed above are specified for the purpose of section 138G (Rule-making instruments) of the Act.

Commencement

C. This instrument comes into force on [*date*].

Amendments to the Handbook

D. The Supervision manual (SUP) is amended in accordance with the Annex to this instrument.

Citation

E. This instrument may be cited as the Disclosure of Competition Law Infringements Instrument 2014.

By order of the Board of the Financial Conduct Authority
date

Annex

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text.

15.3 General notification requirements

…

Civil, criminal or disciplinary proceedings against a firm

15.3.15 R A *firm* must notify the *appropriate regulator* immediately if:

…

(3) disciplinary measures or sanctions have been imposed on the *firm* by any statutory or regulatory authority, competition authority, professional organisation or trade body (other than the *appropriate regulator*) or the *firm* becomes aware that one of those bodies has started an investigation into its affairs; or

…

…

Competition law infringements

15.3.32 R (1) A *firm* must notify the *FCA* if it has or may have infringed any applicable competition law.

(2) A *firm* must make the notification as soon as it becomes aware, or has information which reasonably suggests, that an infringement has, or may have, occurred.

(3) (a) A *firm* must make the notification in writing unless (3)(b) applies.

(b) A *firm* may make the notification orally where it has made or will make an oral application for leniency or immunity covering the same subject matter to any competition authority.

(4) A notification must include:

(a) information about any circumstances relevant to the infringement or possible infringement;

(b) identification of the law that has or may have been or is or may be being infringed; and

(c) information about any steps which the *firm* or other *person* has taken or intends to take to rectify or remedy the infringement or prevent any future potential occurrence.

15.3.33 G (1) Where a *firm* notifies the *FCA* under *SUP* 15.3.32R, the *firm* should not infer or assume that any lack of (or delay in) a response, objection or enforcement activity by the *FCA* or any other competition authority means that the agreement or conduct:

(a) does not infringe competition law; or;

(b) is, or will be, immune from enforcement.

(2) Notification under *SUP* 15.3.32R is not sufficient to constitute an application for leniency or immunity from penalty in any subsequent investigation under Chapter 1 of the Competition Act 1998 or article 101 of the *Treaty*.

Financial Conduct Authority

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