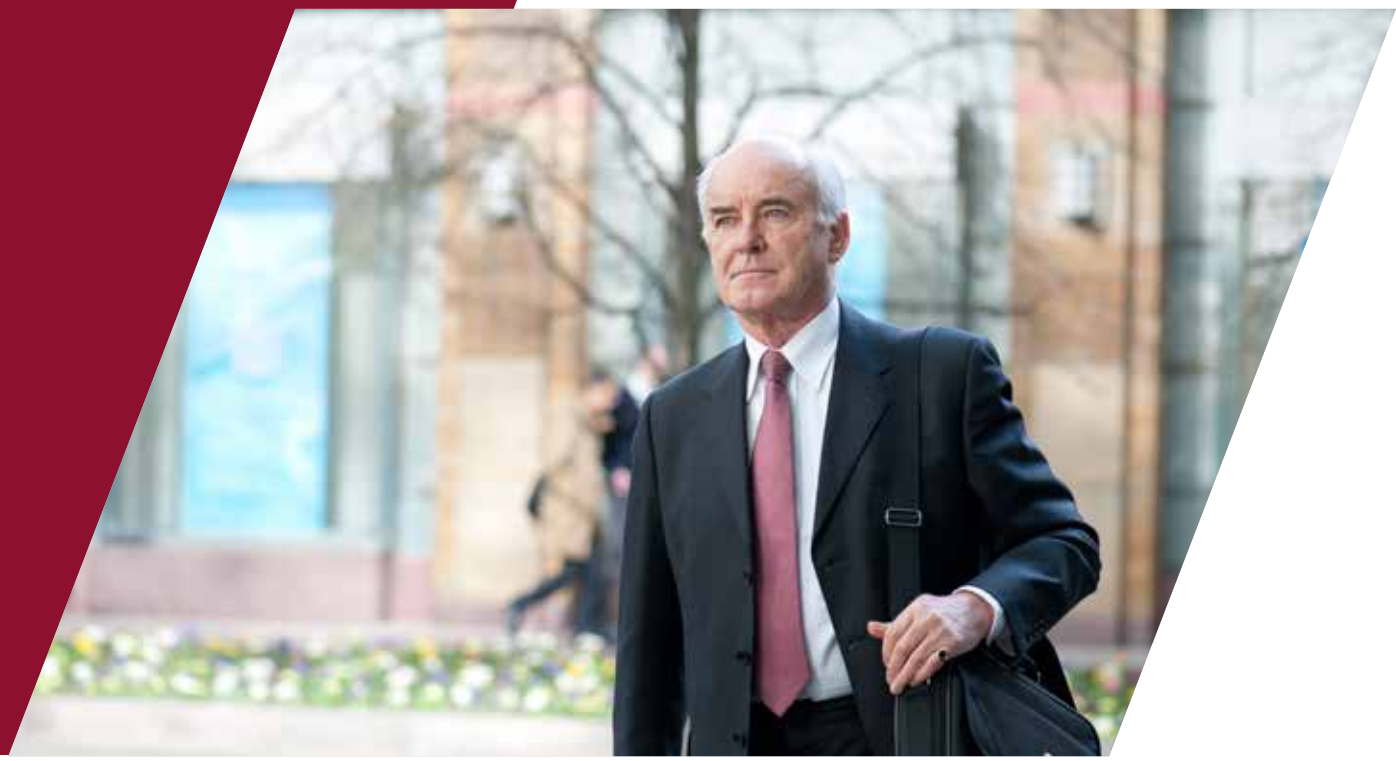
Financial Conduct Authority

FCA Competition Concurrency Guidance and Handbook amendments:

Feedback on CP15/01, finalised guidance and rules

July 2015



Policy Statement

PS15/18

Contents

In this Policy Statement we report on the main issues arising from Consultation Paper 15/01 *FCA Competition Concurrency Guidance and Handbook amendments*. At the end of this document, we attach versions showing the amendments made to the versions on which we consulted. The final versions are published separately on the FCA's website.

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Abbreviations used in this document

CA98	Competition Act 1998
CAT	Competition Appeal Tribunal
CDC	Competition Decisions Committee
CMA	Competition and Markets Authority
DEPP	Decision Procedure and Penalties Manual
EA02	Enterprise Act 2002
ECtHR	European Court of Human Rights
FSMA	Financial Services and Markets Act 2000
PSR	Payment Systems Regulator
SI	Statutory Instrument
TFEU	Treaty on the Functioning of the European Union

1. Overview

Introduction

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

- final guidance on our functions and procedures under Competition Act 1998 (CA98) issued under section 52 CA98
- final guidance on our market studies and market investigation reference functions and procedures under Enterprise Act 2002 (EA02) and the Financial Services and Markets Act 2000 (FSMA) issued under section 139A FSMA
- final legislative instrument to introduce minor amendments to the FCA Handbook as adopted by the FCA Board

1.2 In this Policy Statement, we set out our views on the responses to the consultation, and publish comparison versions in the annexes which show the changes to the versions of the guidance and legislative instrument on which we consulted.

Who does this affect?

1.3 All businesses operating in financial services are affected by:

- our CA98 functions and procedures, and
- our market study and market investigation reference functions and procedures

1.4 The SUP 15 rules and guidance affect all authorised firms.

Is this of interest to consumers?

1.5 Our functions, procedures and rules do not directly affect consumers. However, we have designed our procedures with the aim of using our powers effectively and efficiently. This should benefit consumers of all types of financial services through detecting, enforcing against and deterring anti-competitive behaviour by firms.

Context

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

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

1.8 These powers are additional to our ability to use FSMA powers in pursuit of the FCA's competition objective.

1.9 Earlier this year, we consulted on:

- draft guidance on our functions and procedures under CA98, to be issued under section 52 CA98
- draft guidance to be issued under section 139A FSMA on market studies under EA02 and the FSMA and making market investigation references, and
- a draft legislative instrument to introduce minor amendments to the FCA Handbook, to be adopted by the FCA Board.

1.10 In this policy statement, we set out the feedback received on our consultation and our finalised guidance and Handbook amendments. They are published in appendices showing the amendments made to the drafts we consulted on. The guidance is available in final form on our website.[1]

Summary of feedback and our response

1.11 A summary of feedback received and our responses is set out in chapters 2, 3, and 4 for our CA98 guidance, market study and market investigation reference guidance and Handbook amendments respectively.

Guidance on our CA98 functions and procedures

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

1.13 We received more substantive comments on our proposed settlement procedures, and in particular whether parties that wish to settle CA98 cases with us will have to waive their right of appeal to the Competition Appeal Tribunal (CAT). After reflection and for the reasons set out in paragraph 2.15, we decided to proceed on the basis on which we consulted; that is, to

1 www.fca.org.uk/about/what/promoting-competition

retain the option that parties may be required to waive their right of appeal as a condition of settlement.

1.14 We also received submissions with regard to the requirement to notify under Principle 11 and SUP 15. For CA98 procedural purposes, we were asked to provide guidance on how we will use Principle 11 information in CA98 cases. There were also concerns about the relationship between this obligation and the leniency programme run by the CMA under CA98. We consider this point below (paragraph 1.18) and in chapter 4.

Guidance on our market studies and market investigation reference functions and procedures

1.15 We received relatively few submissions on our proposed Market Studies Guidance. They mainly related to our choice of tool (i.e., EA02 or FSMA), information gathering and use, and avoiding unnecessary burdens on firms. We have aimed to provide clarity and explanation as appropriate.

Rules on disclosure of competition law infringements to the FCA

1.16 Our proposed rule changes aim to reinforce the obligation on authorised firms to report to us actual or possible infringements of applicable competition law. Few submissions were received in relation to the proposed amendment to SUP 15.3.15R (which relates to investigations by authorities) and those received were largely supportive.

1.17 By contrast, most respondents to the consultation raised concerns in relation to the proposed introduction of SUP 15.3.32R, the reporting duty relating to actual or possible competition law infringements. The concerns raised related in particular to timing, scope, whether the duty might conflict with the privilege against self-incrimination, and the interaction with competition leniency policy. Several respondents made drafting suggestions for the proposed rule.

1.18 After carefully considering the responses, we have retained the text on which we consulted with some modifications. We are satisfied that the obligation does not infringe the privilege against self-incrimination. We explain the scope of the obligation in this document, which is less extensive than some respondents thought. We have introduced the qualification that only 'significant' infringements need be reported, and have also added a new rule in SUP 15 Annex 1 which applies SUP 15.3.32R – 15.3.35G to incoming EEA and Treaty firms. Finally, the obligation under this rule is, and must be, independent of the voluntary activity of applying for leniency. We are satisfied that the obligation and the leniency programme share common aims (in the detection of wrongdoing) and the processes themselves do not conflict. We will work closely with the CMA to ensure this.

Compatibility statement, mutual societies and cost benefit analysis

1.19 The final rules set out in Appendix 3 do not differ significantly from the draft rules on which we consulted. We have made a new amendment to SUP 15 Annex 1 to clarify that the application of SUP 15.3.32R – 15.3.35G to incoming EEA and Treaty firms is the same as the application of Principle 11 to those firms.

1.20 We consider that the statement of compatibility with our objectives and general duties published in the consultation paper remains valid, as the final rules do not differ significantly from the draft rules on which we consulted in our consultation paper.

1.21 Section 138K(3) of FSMA require that, where the final rules differ from the draft published under section 138I(1)(b), the FCA must prepare a statement setting out its opinion whether or

not the impact of the rule is significantly different from the impact of the proposed rule on (i) mutual societies and (ii) on mutual societies as compared to other authorised persons, and if so, details of the differences.

1.22 We do not consider that the impact of the final rules will be significantly different from the impact of the proposed rules on either mutual societies or on mutual societies as compared to other authorised persons.

1.23 In the consultation paper we stated that no cost benefit analysis was required because the rules only clarified a pre-existing obligation. We respond in chapter 4 to comments received that a cost-benefit analysis was in fact required. For the reasons set out in our response in chapter 4, we do not consider the addition to SUP 15 Annex 1 imposes any increase in costs.

Next steps

1.24 The finalised guidance represents our procedures in conducting investigations under CA98 and market studies and market investigation references under FSMA and EA02.

1.25 We will keep these procedures under regular review and will update them if our understanding of best practice changes.

1.26 The Handbook amendments have effect from 1 August 2015.

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

2.1 In this chapter, we set out a summary of feedback received on our consultation on our draft guidance on our powers and procedures under CA98. We set out our response and a summary of any changes made to the guidance as a result, for each point in turn.

General comments

2.2 Some respondents submitted that we should be clearer when we are departing from CMA guidance and why. Further, they asked that, where CMA guidance provides more detail than the draft guidance we published, the FCA should confirm that it will take the same approach as the CMA. One respondent also stated that the CMA's procedure as set out in its guidance is based on 17 years' experience of enforcing the CA98, which in turn derives from the decades of experience of the European Commission and the European Courts in applying EU competition law. The FCA should, therefore, not ignore existing enforcement practice. It was also suggested that, since there are three regulators in the financial services sphere (the CMA, FCA and PSR, of which two are new), investigations that involve regulatory and competition powers should be consolidated where possible. The respondent also requested that there be adequate transparency regarding FCA and PSR enforcement processes to demonstrate the checks and balances around the uses of regulatory and competition powers. Respondents also sought guidance to assist firms navigating the interface between FSMA and competition powers and more detailed guidance on application of competition law in financial services.

Our response

We have sought to provide concise guidance, like other sectoral regulators, on how we will exercise the powers given to us on 1 April 2015 to enforce the competition prohibitions in the CA98 and Articles 101 and 102 TFEU in relation to the provision of financial services. These powers are concurrent, in that the CMA (and potentially other regulators) may also be able to exercise them. In some respects we are bound by CMA rules and must have regard to CMA guidance. In others, we have discretion. In such cases we have aimed to identify the processes that we think will allow us to enforce the prohibitions most effectively and efficiently. We have not sought to duplicate all the guidance that the CMA has issued, with its greater experience. However, where CMA guidance is more detailed than ours in a material respect, we shall consider what such guidance provides in deciding how to proceed.

At this stage, we have not set out detailed substantive guidance on how we will apply competition law in financial services: we do not have sufficient practical

experience to add to the guidance available from the precedents created by UK and EU authorities, and discussed in academic journals and textbooks. It is worth noting that there are many different types of activity within the financial services sector. Nonetheless, we may consider providing more detailed substantive guidance in due course. However, in principle, competition law (and economics) apply to financial services just as it does to all sectors of the UK economy, even though the characteristics of the services and markets may be specific.

Change to guidance

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

Prioritisation principles

2.3 One respondent asked what the difference is where CMA guidance refers to the likelihood of 'a successful outcome' and the FCA draft guidance refers to the prospects of 'determining whether or not there has been an infringement'. Another respondent queried how the FCA will apply its prioritisation criteria in light of the Principle 11 obligation on authorised firms to notify us of competition law infringements.

Our response

CMA16 paragraphs 4.18 to 4.20 say what the CMA means by 'success'.[2] These factors are captured in what is now paragraph 3.7 of our guidance. Accordingly, we referred to 'determining whether or not there has been an infringement', (rather than 'success') in order to differentiate from those points and to provide clarity. We will consider what, if any, action should be taken in respect of any disclosures under Principle 11 and this could include possible action under CA98. This would be subject to applying our prioritisation criteria as with any other potential CA98 infringement of which we become aware. We deal generally with the use of Principle 11 information for CA98 purposes below in paragraphs 2.6 and 4.13.

Change to guidance

No changes made.

2 www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf

Choice of tools

2.4 Some respondents requested that we provide more detail on, or examples of, how we will approach a decision on choice of tools, e.g. the extent to which this will depend on considerations of procedure, evidential requirements, timing etc. They sought greater clarity on how we will fulfil our primacy obligation. They said that the FCA should be considering the appropriateness of CA98 enforcement in all cases, not just where primacy applies.

Our response

We consider that our concurrent functions complement the powers we already hold (including those under FSMA), and give us an additional tool to ensure that the markets in financial services work well in the interests of consumers. Several factors are relevant to our choice of tool, but broadly, we wish to achieve the best outcomes for consumers most efficiently. Having said that, some behaviour would fall for investigation most naturally under competition law (e.g., price-fixing; strategic behaviour by a dominant undertaking to exclude rivals) while others would fall more naturally under our FSMA powers.

Primacy is a focused legal obligation that applies as a result of section 234K FSMA only when we propose to exercise one of six identified FSMA powers. We set out in paragraph 2.23 (now 2.25) of the guidance how we will approach the decision as to which tool is 'more appropriate'. We agree with the 'all cases' comment to the extent that we will generally aim to consider both the availability and appropriateness of action under CA98 when we encounter a competition issue within the financial services sector, as one of a number of legal tools potentially available to us.

Change to guidance

New paragraphs 2.18 and 2.19, explaining that the CA98 is one of a number of legal tools available to us to address competition issues, which we will consider in appropriate cases. Changes made to paragraph 2.26 to develop factors on our choice of tool.

Information gathering/use of information

2.5 Respondents asked that we confirm that, where separate requests are made under different information-gathering powers, steps are taken to minimise the administrative burden on firms (to avoid duplication/overlap between requests for information under different statutes). One asked that we cite a legal source for the statement that we can use information from one source for other purposes: it said that such dual-use should not be permitted and may conflict with EU law, specifically Article 28(1) of Regulation 1/2003.

2.6 Other respondents also said that the FCA's use of information should be clarified – it should not use information received in the context of competition powers for enforcement outside of competition law; leniency information should only be used for CA98. One pointed to a

conflict between the statement that supervision is separate from investigation, if we can use information from other sources for the investigation. It was submitted that we should provide clearer guidance on gateways under FSMA for use in CA98 proceedings. One referred to the risk of 'flip-flopping' between CA98 and FSMA procedures.

Our response

We already make significant efforts to ensure the burden we impose on firms by our requests for information is proportionate, and are happy to repeat that commitment in the guidance.

With respect to the 'dual use' of information, we think a key reason for the FCA having concurrent powers is that we already hold significant intelligence and expertise in the financial services sector: were we prevented from using the information we hold to exercise the powers we now have, that advantage would be lost. We have examined the relevant law that applies to us (in particular Part 23 of FSMA and Part 9 of the Enterprise Act 2002) and are satisfied that there is nothing to prevent us from using information properly obtained under one power for our functions under another. In doing so, we must observe the restrictions that might apply to the use and/or disclosure of any given piece of information imposed by the Act under which it was gathered or received.

We and the CMA are keen to preserve the incentives for firms to apply for leniency, in order to deter, detect, destabilise and end cartels. The FCA and CMA have agreed that leniency information[3] which the CMA passes to the FCA may only be used by the FCA for the application and enforcement of the competition law prohibitions,[4] unless the leniency applicant agrees otherwise. This restriction on use also applies to any information a resulting FCA CA98 investigation obtains. However, leniency information can also be used to remind a regulated firm of any obligations it may have to the FCA under Principle 11 or, with regard to approved persons, Principle 4 of the FCA's Statements of Principle for Approved Persons.

This use-restriction does not affect the FCA's use of information obtained from other sources (such as through a Principle 11 disclosure or a leniency application made to the FCA).

In addition, the FCA has signed a statement agreeing to the terms of the Commission Notice on cooperation within the Network of Competition Authorities. This includes restrictions on the use that can be made of certain information disclosed by other European Competition Network (ECN) members, and on the transfer of information as between ECN members.[5]

We see no conflict between our on-going supervisory functions and any investigation under CA98. As a practical matter, the two will be run by separate

3 Leniency information for these purposes is any information which came into the possession of any of the CMA, its predecessor bodies, or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under the Chapter 1 prohibition or Article 101 TFEU. It includes any information that an investigation resulting from the leniency application obtains.

4 That is, the Chapter 1 and 2 prohibitions of CA98, and Articles 101 and 102 TFEU.

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

teams, although we will liaise internally to avoid conflicts and to ensure burdens on firms are proportionate.

With regard to 'flip-flopping', each power we have is subject to its own due process and we shall be clear when dealing with firms which power we are using. As noted, our aim is to achieve the best outcomes for consumers most efficiently, and this will guide our choice of tool. As a proportionate regulator, we would not switch tools without good reason.

Change to guidance

New paragraph 4.7 repeats our commitment to ensure burdens on firms are proportionate. Paragraph 4.12 is developed to explain our use of information. New paragraphs 6.4 to 6.7 explain the use the FCA may make of leniency information provided by the CMA.

Parallel/sequential proceedings

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

Our response

As noted, we consider that our concurrent functions complement the powers we already hold (including those under FSMA), and give us an additional tool to ensure that the markets in financial services work well in the interests of consumers. It is possible that those powers may overlap in some respects, which is why we may have to choose which power is best suited to address the issue we face. It is also possible that we may wish to use more than one set of powers (for instance, conduct that infringes the CA98 might also reveal weaknesses in a firm's internal controls or be relevant to FSMA threshold conditions or an individual's fitness). However, in exercising our powers we will respect the principle of proportionality, and take account of fines levied by authorities in connected cases.

Change to guidance

Paragraph 2.20 amended and expanded to clarify our approach.

Case allocation FCA/CMA

2.8 One respondent sought further guidance on how it is determined who will take a CA98 case.

Our response

Regulations 4 and 5 of The Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536) set out how cases will be allocated between the CMA and FCA (and indeed other concurrent regulators). We shall aim to agree on case allocation with the CMA, but in the absence of agreement, the CMA will decide. Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries (CMA10, March 2014) elaborates. Its paragraph 3.22 sets out a non-exhaustive list of factors relevant to the decision as to which authority is better or best placed. We and the CMA are keen that we use our CA98 powers in appropriate financial services cases and we will consider in due course, in the light of further experience, whether it is possible to give further guidance on this question.

Change to Guidance

No change made in response to this comment.

Division between conduct of investigation and supervision

2.9 One respondent asked how we will ensure division between investigation and supervision.

Our response

We anticipate that our supervisory function will continue as normal throughout any CA98 investigation. We shall liaise as appropriate to ensure cohesion and to minimise burdens on firms to the extent possible. As a practical matter, investigation and supervision will be run by separate teams, although with appropriate knowledge sharing to ensure efficiency. Accordingly, we will follow current FCA practice where an authorised firm or person becomes subject to enforcement action.

Change to guidance

No change made in response to this comment.

Transparency to parties about the substance of case

2.10 One respondent said that we should share developing thinking on the substance of a case early on.

Our response

The draft guidance sets out the process we propose to follow in investigating CA98 cases. This aims to respect our obligations under the applicable law and so to respect the rights of defence of parties. This will help to ensure that investigations proceed efficiently. We may, in our discretion, provide additional information to subjects as to our thinking during the investigation and will seek to ensure that subjects are kept appraised of the progress of the investigation.

Change to guidance

No change made in response to this comment.

Access to file

2.11 The same respondent said that data rooms should be a standard part of the process and we should set out guidance on their workings to minimise any timing implications. Rules of access would need to be adequate.

Our response

Parties against whom we propose to make an infringement decision have the right to inspect the evidence relevant to our investigation. This might include commercially sensitive information relating to another party and/or a third party. In such a case, there is a difficult balance between respecting the party's right of defence and protecting the commercial information of the other party and/or third party. A data room might be the solution to this tension, whereby access to the information is granted to a limited number of advisers representing the party under investigation, who have given undertakings not to use or disclose the information, other than to make submissions to the investigating authority. Data rooms can be expensive and cumbersome, and are not necessary and/or appropriate in every case. Accordingly, we anticipate that we may set them up where appropriate, but do not intend to commit to them in every case or to set out guidance on their working at this stage.

Change to Guidance

No change made in response to this comment.

Transparency about issuing of Statement of Objections and other case announcements

2.12 Some respondents said that we should provide advance notice of the date and advance sight of any announcements to parties. We should clarify whether the FCA will name parties when we announce the issuing of a Statement of Objections. Finally, we should align with the CMA and announce opening of any investigation.

Our response

The draft guidance sets out the process we propose to follow in investigating CA98 cases. This aims to respect our obligations under the applicable law, and in particular to respect the rights of defence of parties, which in turn will help us take better decisions. We may make additional disclosure to the extent that that would assist us in conducting our investigations, however, we will not commit to such additional disclosure as a matter of course. We do not wish to catch parties by surprise with regard to the dates of any announcements, and so will keep them informed to the extent possible while complying with our legal obligations, and to the extent that doing so would not prejudice on-going investigations. We may give advance sight of notices, although we are mindful of the need to handle market sensitive information with care. We will normally name parties when we announce the issue of a Statement of Objections, in line with CMA practice.

Change to Guidance

Change made to paragraph 5.6 regarding advance notice of timing.

Leniency

2.13 One respondent queried the legal basis for the FCA to accept leniency applications. It submitted that, if the FCA does accept applications directly, then it must clarify that the CMA will be bound by any grant of leniency by the FCA. Respondents raised timing issues relating to making Principle 11 disclosures – the leniency application should come first.

Our response

We must have regard to the CMA's fining policy, which together with its more detailed guidance on principles and process, sets out its leniency policy.[6] Accordingly, we are satisfied that we can accept leniency applications made

6 The CMA's fining policy is set out in OFT423; its more detailed guidance on leniency is in OFT1495. Both documents have been adopted by the CMA board. Cartel activity is defined for the purposes of the CMA's leniency policy for undertakings as agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter 1 prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing. See Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process, July 2013, OFT1495.

in accordance with the CMA's leniency policy. However, we do not have the experience of the CMA, do not have its established leniency inquiry line, and cannot grant immunity for the cartel offence established by section 188 of the EA02. We therefore expect leniency applications to be made direct to the CMA in most cases, and have not developed separate procedures for the making of such applications to us.

Regulated firms have an on-going obligation to be transparent with us under Principle 11,[7] and this extends to actual or possible infringements of the Chapter 1 and 2 prohibitions in CA98 and Articles 101 and 102 TFEU. Applying for leniency is an option available to undertakings and individuals who have participated in cartel activity. It is a voluntary step that firms may, for their own reasons, choose not to take. Accordingly, the Principle 11 obligation cannot be tied to the discretionary activity of applying for leniency. See further chapter 4, which sets out that we do not think that the Principle 11 regime and the CMA leniency regime conflict: firms can meet the requirements of both regimes if they act promptly. Firms considering applying for leniency should have regard to the CMA's guidance.[8] However, firms who are concerned about the interaction of notifications under Principle 11 and the CMA's leniency regime should contact us and the CMA and we will work together and discuss how to proceed based on the individual circumstances of the case.

Change to guidance

Paragraphs 6.2 and 6.3 developed to explain our ability to accept leniency applications but our expectation that leniency applications will be made to CMA. New paragraph 6.4 added to emphasise the independence of the Principle 11 obligation on regulated firms and individuals from the option for cartellists to apply for leniency. See also new paragraphs 6.5 to 6.8 regarding our use of leniency information transferred to us by the CMA and the relationship of the leniency application process and the Principle 11 notification process.

Settlement procedure: general

2.14 Respondents asked that we clarify the roles of case sponsors and settlement decision makers in settlement discussions. It was submitted that we should avoid any suggestion of Competition Decisions Committee (CDC) involvement and any suggestion that admissions or other statements made during settlement discussions will be used subsequently in contested proceedings. Respondents sought clarification on procedure generally, including any departures from CMA/FCA settlement procedures, whether we would consider hybrid settlements, and the nature of the settlement decision that will be published (in particular the level of detail and the nature of findings).

7 Approved persons have an equivalent obligation under Principle 4 of the FCA's Statements of Principle for Approved Persons.

8 See OFT1495 *(ibid)*, and in particular paragraphs 3.8 – 3.14 on conducting internal investigations and paragraphs 3.24-3.28 on maintaining confidentiality and securing evidence.

Our response

Our draft guidance set out that a settlement agreement will be agreed by the Case Sponsor and approved by two members of the FCA's senior management, known as Settlement Decision Makers. If a case settles before a Statement of Objections is issued, no Competition Decisions Committee would be appointed. If a Statement of Objections has been issued, the Competition Decisions Committee would be made aware of the discussions because of the timing implications but would generally not be involved in the discussions themselves. However, it is possible that there may be exceptional cases where we consider it appropriate for the Competition Decisions Committee to oversee the settlement discussions and remain decision makers on the case. We would expect to hold any settlement discussions on the basis that neither the FCA nor the person concerned would seek to rely against the other on any admissions or statements made, if the matter is considered subsequently by the Competition Decisions Committee or in other proceedings. We have made this clearer in the guidance. We may consider hybrid settlements (i.e., where some parties to a multiparty investigation settle and others do not) though we note the difficulties these may entail. If we proceed to adopt an infringement decision following settlement, that decision would substantially reflect the admission made.

Change to guidance

We have clarified in paragraph 6.17 that we would expect to hold any settlement discussions on the basis that neither FCA staff nor the person concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the Competition Decisions Committee. We have also clarified that the CDC would not be involved in the settlement discussions other than in exceptional circumstances.

Settlement procedure: waiver of right of appeal

2.15 We received many submissions on our proposal that parties to settlement agreements with the FCA should waive their rights to appeal to the CAT. This paragraph summarises those submissions. They said that requiring waiver of appeal rights was not appropriate, wrong as a matter of principle, unnecessary, and disproportionate. They said it was contrary to section 46 CA98, Article 6 ECHR, and Article 47 of the Charter of Fundamental Rights, and was inconsistent with the CMA and EC approaches, which both allow settling parties to appeal the resulting infringement decision. Parties said that the risk of losing a settlement discount is sufficient and a proportionate disincentive to appeal. Firms would be in a very different position depending on which authority undertakes the investigation. They said that such a waiver would mean there would be no appeal available if FCA rules of procedure were not followed or penalty calculations were discriminatory. It was submitted that further facts or evidence may come to light after settlement and that the later decision against the settling party may not reflect basis of earlier settlement; appeals could be avoided by maintaining consistency between basis of settlement and basis of decision. It was submitted that a waiver was not appropriate where the settling party does not know how the nature, scope and duration of the infringement will be presented in the infringement decision.

Our response

This was one of two issues that were most heavily commented upon (the other related to our proposed Rule Book amendment to SUP 15). We have considered the submissions carefully. However, we have decided to proceed as proposed, so that if a party wishes to settle a CA98 case investigated by the FCA, it is likely to have to agree to waive its right of appeal. In reaching this decision, we had in mind the following points:

- Settlement is voluntary for parties: no respondent appears to have acknowledged that if parties do not like the process the FCA offers, they are free not to settle.

- The point of settlement is procedural economy and finality for both firms and the FCA. Making a waiver of appeal rights a condition of settlement is a proportionate measure to ensure that.

- There is no legal requirement that settling parties can always appeal. We note that, while several respondents referred to Article 6 ECHR, they did not provide well-reasoned arguments as to why it requires that there should always be a right of appeal in CA98 cases. The European Court of Human Rights has held that neither the letter nor the spirit of Article 6 prevents a person from waiving of their own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.[9] However, such a waiver must, if it is to be effective for Convention purposes, be: established in an unequivocal manner;[10] freely entered into;[11] and must not run counter to any important public interest.[12] We are therefore satisfied that Article 6 permits a party to waive its appeal rights as part of a CA98 settlement agreement.

- We may run parallel investigations under CA98 and other legislation, such as FSMA, related to the same underlying facts. In such cases, it will be more efficient, and leave less room for confusion, if the settlement processes open to parties are the same under both sets of legislation.

- We appreciate that the procedure that the CMA offers does not require settling parties to waive their rights of appeal, and that there are benefits in consistent procedures between concurrent regulators. However, there is no legal requirement for us to adopt a particular approach, and we are keen to adopt the most efficient and effective procedures that will help us achieve the best outcomes for consumers and the UK economy. The FCA has significant experience and expertise of enforcement and settlement (in particular under FSMA), which we wish to bring to bear when exercising our powers under the CA98.

9 Case *Hermi v. Italy* [GC], 18114/02, 18 October 2006, para. 73; Case *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 Nov 2000.

10 Case *Oberschlick v Austria*, Series A no. 204, 23 May 1991, p. 23, para. 51-52; Case *Barberà, Messegué and Jabardo*, Series A no. 176, 6 December 1988, p. 35, para. 82.

11 Case *Poitrimol v. France*, Series A no. 277-A, 23 Nov 1993, para. 31; referring also to Case *Pfeifer and Plankl v. Austria*, Series A no. 227, 25 Feb 1992, pp. 16-17, para. 37.

12 Case *Hermi v. Italy* [GC], para. 73; Case *Sejdovic v. Italy* [GC], 56581/00, 1 Mar 2006, para. 86; and Case *Håkansson and Sturesson v. Sweden*, Series A no. 171-A, 21 February 1990, para. 66 (in which ECtHR held that waiving the right to a public hearing in a case concerning a Government's decision to compulsory auction property did not run counter to any important public interest).

- A right of appeal would reduce our incentives to agree to settle a case, knowing that a company might appeal the settlement and so waste the resources we had invested in that process.

- A settlement agreement, including admission, would describe the infringement in respect of which the firm is settling by reference to a statement of objections or, if entered into before the issuing of a Statement of Objections, a summary statement of facts. The infringement decision would substantially reflect the admissions made by the settling party.

In light of these points, and after careful consideration, we have decided that we may ask parties that choose to settle a CA98 case with us to waive their right of appeal to the CAT, in the interest of efficient and effective CA98 enforcement, and of making the best use of our resources.

Change to guidance

No change made in response to these comments.

Complaints by parties

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

Our response

Complaints in the first instance should be made to the case team. They may be escalated to the Case Sponsors. Ultimately they may be brought to the CAT or potentially to the High Court on application for judicial review. Parties may also bring complaints to the FCA Complaints Scheme. These points are dealt with in paragraphs 2.3 to 2.8 of the final Guidance.

Change to guidance

No change made in response to this comment.

Interim measures

2.17 Some respondents asked that we provide more guidance on factors relevant to deciding whether interim measures are justified and their possible content. They asked us to confirm that we will follow the CMA's approach.

Our response

The CMA sets out relevant factors in CMA8 paragraphs 8.12 to 8.16. We will have regard to these.

Change to guidance

We have set out in paragraph 4.14 that we will have regard to the factors set out by the CMA.

Commitments

2.18 One respondent suggested that the FCA share any third party responses to the commitments (through public consultation) with the offeror of the commitments. It also suggested we follow the CMA's approach in paragraph 10.20 of CMA8 in holding a meeting with the offeror of commitments to set out the nature of the consultation responses and any amendments required to the commitments.

Our response

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

Change to guidance

We have elaborated on this in paragraph 4.22.

Internal checks and balances

2.19 One respondent asked us to provide assurances on internal checks and balances before decisions are taken. Another respondent requested greater clarity on how the CDC will be selected.

Our response

Our draft guidance sets out a comprehensive framework that complies with applicable law and safeguards parties' rights of defence. Internally, case sponsors may seek additional quality assurance reviews. This will also be an option available to the CDC in any given case. However, we note that further checks and balances bring a cost (in terms of delay, duplication, payroll) as well as a benefit in terms of potentially enhanced quality. Accordingly, we do not commit to further processes and procedures beyond those set out in our guidance. The FCA is in the process of recruiting persons who can be appointed to the CDC.

Change to guidance

No change made in response to this comment.

Privilege against self-incrimination

2.20 Numerous respondents made submissions with regard to the requirement to self-report under Principle 11 and SUP 15. For CA98 procedural purposes, they asked us to provide guidance on how we will use Principle 11 information in CA98 procedures.

Our response

We received many submissions on this point, and we consider it in our response to the submissions received on our proposals to amend the Handbook, SUP 15. See paragraph 4.13 of this document.

Change to guidance

No change made in response to this comment.

Sharing draft penalty calculations

2.21 One respondent suggested that, where more than one party receives a draft penalty statement, each party should be given the opportunity to inspect the draft penalty statement issued to each of the other parties. The respondent also states that CMA guidance provides that a non-confidential version of each party's draft penalty statement will be made available for inspection by other parties.

Our response

We set out in paragraph 5.27 of the draft guidance that we would provide access to any new documents on the file when we issue a draft penalty statement. This would include non-confidential versions of the draft penalty statements issued to other addressees of the Statement of Objections if applicable.

Change to guidance

No change made in response to this comment.

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

3.1 In this chapter, we summarise the feedback we received on our consultation on the draft guidance on our powers and procedures for conducting market studies under FSMA and EA02 and market investigation references under EA02. We set out below our response, and a summary of any changes made to the guidance as a result, for each point in turn.

FSMA or EA02 market studies?

3.2 Some respondents requested that we should identify which power we are using to conduct the market study and that the guidance documents are not clear as to when the FCA will carry out a FSMA market study and when it will carry out an EA02 market study. One respondent suggested that the guidance documents should follow the CMA's approach or expressly acknowledge departure. A more detailed explanation was requested on the issue of when we will use a FSMA market study as opposed to an EA02 market study.

3.3 Respondents also stated that the FCA should carry out competition-based market studies under EA02 and not FSMA. FSMA powers, instead, should be used to conduct market studies that focus on consumer protection, market integrity and innovation. There was also a concern that FSMA market studies will be used to avoid statutory deadlines under EA02. One respondent stated that the FCA should adopt EA02 market study timelines for a FSMA market study.

3.4 We also received feedback that FCA should clarify its position on changing track on a market study as there is a concern if the FCA switches from FSMA to EA02 to take advantage of information-gathering powers available under EA02.

3.5 Some respondents commented that there is no legislative basis for using FSMA powers following an EA02 market study and that a Market Investigation Reference should only be made following an EA02 market study. In other words, FSMA powers and remedies should only be used following a FSMA market study and a Market Investigation Reference should only be made after an EA02 market study. One respondent said it would be inappropriate and procedurally unfair to proceed with a Market Investigation Reference after a FSMA market study as FSMA market studies do not follow the same procedures as an EA02 market study.

3.6 Another respondent stated that FCA should carefully consider the evidential and procedural safeguards that are built into the competition legislation where binding remedies are only available after a full market investigation. This will apply to the FCA where it considers using alternate powers under FSMA to impose remedies at the market study stage.

Our response

Our draft guidance was based on a careful reading of the applicable statutes and so reflects our understanding of the functions that they have given us.

The terms of reference for any market study will identify which statutory power we are using to conduct that market study.

In our view, we may choose whether to use our FSMA and/or EA02 powers to conduct a market study. We see no basis for introducing a false distinction between the two on the basis suggested by some respondents since we identified no statutory reason to distinguish between EA02 and FSMA market studies on the basis of whether the market study is to be competition based or otherwise.

Our indicative timetable of 12 months for FSMA market studies is closely aligned with the timeframe for an EA02 market study and provides adequate certainty and transparency for firms. FSMA market studies may take longer than the statutory deadlines applicable to EA02 market studies due to the greater range of issues and options that we might cover, and remedies that might result.

We are not prohibited from switching between our FSMA and/or EA02 powers when conducting market studies. If a FSMA market study indicates that we should study firms or activities falling outside the FSMA regulatory perimeter, we may use our EA02 powers (following the associated process). In practice, however, we aim to scope a study at the outset, in order to avoid the need to use more than one set of powers. Doing so could present practical issues, including in relation to the different statutory regimes that would apply to the disclosure of information gathered using either set of powers.

Similarly, there is no statutory prohibition on using our FSMA powers at the end of an EA02 market study or making a Market Investigation Reference at the end of a FSMA market study. We think this raises no issues of inappropriateness or procedural unfairness. Any remedies imposed using FSMA powers have their own associated due process and procedural safeguards that adequately protect the interests of those affected. We may exercise those powers where we have the evidence necessary. We are satisfied that such evidence might come from a study conducted either under FSMA or under EA02. Likewise, we may make a Market Investigation Reference if the statutory conditions are fulfilled, and these do not include that we have completed an EA02 market study. We would consult on any proposal to make a Market Investigation Reference.

Change to guidance

Paragraphs 2.8 and 3.2 modified.

Avoiding multiplicity

3.7 One respondent asked us to ensure that there is only one market study and/or thematic review into any one issue at any one time. Another respondent commented that the FCA should take into account the burden placed on industry when it decides to launch a market study. Another concern highlighted was that of the FCA initiating market studies to educate itself generally of market conditions.

Our response

In the interests of sound administration and ensuring that burdens on firms are proportionate, we expect not to conduct parallel market studies on the same or related areas. However, this may not always be possible and much will depend on the focus of each market study. We aim to ensure the impact of our market study on firms and the industry is proportionate, by ensuring we do not send multiple requests for information we have previously collected. As noted below (following paragraph 3.15) we will consult the CMA before launching a FSMA or EA02 market study, and the CMA is subject to reciprocal obligations with regard to EA02 studies. We would also consult the PSR as appropriate.

Change to Guidance

Paragraph 3.8 modified.

Dual-use of information

3.8 One respondent raised the issue that, if the FCA collects information as part of a FSMA or EA02 market study and then uses this information in separate proceedings under other legislation, this would be a breach of the procedural rights of defence of the party. In support, the respondent drew attention to Article 28(1) of Regulation 1/2003.

Our response

See response under paragraph 2.6. We are satisfied that there is nothing to prevent us using information properly obtained under one set of powers for our functions under another. Information that we hold is subject to strict legislative provisions (principally Part 23 of FSMA or Part 9 EA02). Whichever power is used to obtain information will cover its use and disclosure. Article 28(1) of Regulation 1/2003 applies to information gathered under that Regulation, which does not apply to information we gather under our market study powers. (In addition, we do not collect information under Articles 17 to 22 of Regulation 1/2003 for the FCA's own investigations.) We will respect the safeguards provided in FSMA and EA02.

As noted, any enforcement action under the CA98 entails substantial procedural safeguards to protect the interests of parties. This applies equally to action

under FSMA. Accordingly, we do not think that any party can be prejudiced by 'dual use' of information. Further, we think a key benefit of concurrency is that concurrent regulators are expert in, and hold significant information regarding, their sectors. This is certainly the case with regard to the FCA and financial services. This benefit would be lost were we not able to use the information we hold. It would also be more burdensome for parties if we had to re-gather information already in our possession under different legal regimes.

Change to guidance

No change made as a result of this comment.

Transparency and engagement

3.9 Respondents generally encouraged the FCA to be as transparent as possible. It was suggested that the FCA has a dedicated webpage for market studies that provides details of the various steps involved for each market study, a tentative timetable and details of project directors, team leaders and senior decision-makers involved.

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

3.11 Some respondents commented that the FCA should consult the CMA before it launches a market study, that the CMA should be subject to a reciprocal obligation, and that there may be some merit in conducting joint market studies in some instances.

3.12 Respondents also asked us to consider whether the CMA and FCA will submit public responses to market studies carried out by the other as it will be helpful and in the public interest.

3.13 Some respondents requested greater transparency in the remedies proposed in paragraph 3.19 of the draft guidance, in particular, on reducing barriers to entry. It was stated that this will allow new entrants to compete effectively with large incumbents. Some respondents also stated that, in some cases, structural remedies may be necessary to address the lack of competition in UK retail banking.

3.14 One respondent asked the FCA to be cautious against short-term use of its regulatory toolkit to remedy a competition issue, where a market investigation may be the most appropriate course of action.

3.15 It was also highlighted by one respondent that the FCA should develop a consistent set of procedural standards as the respondent had experienced substantial inconsistencies. This included a wide variety of transparency in communicating the identities of the case team, engagement with market players, prior consultation on content of questionnaires, as well as proposed findings before publication and the attendance of decision-makers.

Our response

We regularly engage with firms during the initial stages of a market study, and we invite representations on our published terms of reference. The purpose of an interim report is to set out our evidence and provisional views and gather further stakeholder responses before we reach a final decision. We do not consider it appropriate to commit to undertaking additional consultation in advance of the interim report, though there may be times when we wish to consult on particular points.

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

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

We favour transparency. For example, the FCA published its response to the CMA's provisional decision to refer personal current accounts and SME banking for in-depth investigation.[13]

The issue of selecting the most appropriate remedies is specific to the focus of each market study. The comments on this front are more relevant for each individual market study rather than the draft guidance. We will make a Market Investigation Reference and/or use our regulatory tools where appropriate. This determination will be made on a case-by-case basis.

We will endeavour to standardise our procedures on transparency and engagement with firms as far as is possible. However, the precise levels of transparency and engagement with firms largely depend on the sensitivity of information, the complexity of the market study as well as the number of firms affected.

Change to Guidance

No change made in response to these comments.

13 www.fca.org.uk/static/documents/market-studies/fca-response-cma-sme-banking.pdf

Information gathering

3.16 The responses we received on this front were mainly concerned with the issue of the FCA gathering information from outside the FSMA regulatory perimeter and managing the burden on firms resulting from repeated requests.

3.17 Specifically, concerns were expressed about the fact that, under a market study, we can gather information from any person whether or not they are regulated under FSMA. Another respondent asked us to clarify how we will minimise the burden on firms in light of the large volumes and complexity of information generally requested. Respondents highlighted that the cumulative burden of repeat and discrete requests has the potential to restrict the target firm from pursuing other commercial opportunities. One respondent asked us to consider the fact that any costs incurred by firms to respond to market studies will eventually be passed on to consumers while another suggested that the FCA should recompense firms for fulfilling information requests.

3.18 On this, the respondent requested further guidance on what would be considered as a reasonable excuse for failing to comply with an information requirement.

3.19 Finally, we received feedback that information disclosed by the FCA to another person should be restricted to the purposes that have initially compelled its disclosure.

Our response

Our concurrent competition powers extend beyond the FSMA regulatory perimeter. This allows us to gather information and conduct market studies concerning persons and activities not regulated by the FCA. We will be proportionate and balanced when initiating any market study or collecting information from persons not regulated by the FCA. As explained in our response above, we will also consult with the CMA before launching FSMA or EA02 market studies and take into account any comments or feedback they may have on this front.

We recognise that compiling and submitting requested information may be onerous. However, such information requests and corresponding market studies are essential to allow us to fulfil our statutory functions and are aimed at making markets more competitive. We referred in our draft guidance to the FCA's Data Strategy[14], which sets out our aim to be proportionate in our data requests, fully articulating the need for the data and ensuring that we make full use of data which the FCA already holds.

While we note the request to compensate firms for satisfying information requests, we cannot do so. Further, our practice has been that the majority of information requests sent as part of a market study are voluntary. We cannot set out details of circumstances where a refusal to comply with a compulsory request for information can be excused as it will depend on the facts of each case.

Our information use and disclosure is subject to strict statutory constraints, particularly those in Part 23 of FSMA and Part 9 EA02, in addition to the

14 www.fca.org.uk/your-fca/documents/corporate/the-fca-data-strategy-how-we-will-manage-use-data

restrictions on use of leniency information referred to in the box following paragraph 2.6. We will observe these as we use and if we disclose information, as appropriate.

Change to Guidance

Paragraph 3.8 modified.

Rights of defence

3.20 We received feedback that firms which are subject to a market study should have rights of defence that are at least as comprehensive as those offered in a CA98 investigation. This includes the right to inspect the information gathered by the FCA including non-confidential version of information on other firms and to challenge the FCA's findings and appeal a final market study report. It was submitted that neither the draft guidance nor the Decision Procedure and Penalties Manual (DEPP) protects the rights of defence to the same extent as procedures in CA98 investigations.

3.21 The respondent also claimed that the FCA should inform firms if they might become subject to firm-specific remedies as soon as it becomes a possibility so that such firms are afforded the maximum opportunity to seek the necessary advice.

3.22 There was also a concern whether, if a CA98 issue comes to light during a market study, the FCA would follow the full procedure applicable to a CA98 case and would not take 'short cuts'.

Our response

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

If we do encounter misconduct in the course of market studies, we may consider taking action, following the applicable procedures under CA98 or FSMA.

Change to guidance

No change made in response to these comments.

Remedies

3.23 A respondent requested clarification on whether the FCA can impose structural remedies unilaterally or will make a Market Investigation Reference to the CMA and recommend such a course of action.

3.24 Another respondent considered that any structural remedies in retail banking should be undertaken by the CMA as it has experience in other sectors that also involve oligopolies.

Our response

As stated in paragraph 3.19 of our guidance, the FCA can impose structural remedies at the end of a FSMA market study. However, we note the experience and expertise of the CMA, and will take this into account in any decision of whether or not to make a Market Investigation Reference.

The comment concerning retail banking is specific to a particular market (which is currently subject to an in-depth investigation by the CMA). The guidance concerns procedural matters that apply to all market studies.

Change to guidance

No change made in response to these comments.

4. Amendments to the Supervision Manual of the FCA Handbook

4.1 In our consultation paper, we set out the amendments we proposed to make to Part 15 of the Supervision Manual of the FCA Handbook to clarify the disclosure obligation on authorised firms. We set out proposals relating to two sections:

- Amendment to SUP 15.3.15R to refer explicitly to 'competition authority' in the list of bodies in relation to which firms must notify the FCA immediately if disciplinary measures or sanctions have been imposed on them by such a body, or where a firm becomes aware that one of those bodies has started an investigation into its affairs
- Introduction of rule SUP 15.3.32R in Part 15 of the Supervision Manual, requiring disclosure of suspected competition law infringements, and related guidance

4.2 In this chapter, we summarise responses received to our consultation on the proposed amendments. The majority of submissions related to the proposed introduction of SUP 15.3.32R.

4.3 We set out our response for each point in turn.

General comments

4.4 Some respondents queried whether the proposed rule changes applied to all firms.

Our response

The proposed amendments relate to Chapter 15 of the Supervision Manual in the FCA Handbook. Accordingly, they are only binding on authorised persons. They do not introduce disclosure obligations for unauthorised firms. SUP 15.1 contains rules about application and the Glossary in the FCA Handbook sets out the precise definition of 'firm' as used in SUP 15.[15]

We have added a row to the Table in SUP15 Annex 1 to make clear that SUP 15.3.32R to 15.3.35G have the same application to incoming EEA firms as Principle 11.

15 http://fshandbook.info/FS/html/FCA/Glossary/F

Proposed amendment to SUP 15.3.15R

General comments

4.5 In general, very few submissions were made specifically in relation to the proposed introduction of a reference to 'competition authority' in the list of bodies named in SUP 15.3.15R(3). Several respondents were supportive, viewing it as consistent with, and clarifying, the existing obligation in SUP 15.3.15R.

4.6 However, one respondent considered that the proposed amendment in SUP 15.3.15R (as well as the proposed addition of SUP 15.3.32R) would be inconsistent with the condition of confidentiality set out in many leniency regimes. This respondent also submitted that the obligation was in breach of the privilege against self-incrimination and involved an excessively broad scope (relating to breaches anywhere in the world and not containing any materiality threshold).

Our response

We consider the issue of 'self-incrimination' below. We note that only one respondent submitted that these issues affected the proposed amendment to SUP 15.3.15R. As the obligation relates to notification, when a firm becomes aware that an investigation has been opened, that such an investigation has been opened (as well as notification when a competition authority imposes a disciplinary measure or sanction), we do not think that the privilege against self-incrimination is relevant in this context.

With regard to the condition of confidentiality in leniency regimes, we think this can be addressed by the openness of the relevant firm with the relevant authorities and good cooperation between the FCA and CMA. The principal aim of the confidentiality obligation is to avoid alerting fellow cartellists or otherwise endangering an on-going investigation.[16] This issue should not prevent a firm from respecting its Principle 11 obligations to the FCA or require the disapplication of this rule.

In relation to the scope of the obligation, any breach by the firm outside of the UK and/or of non-UK or EU competition laws could still be relevant to the FCA as it may reflect issues with, for example, the firm's systems and controls, and/or fitness and propriety of the firm or individuals, such that it falls within the scope of the Principle 11 disclosure obligation.

Meaning of 'has started an investigation'

4.7 In relation to the obligation to notify the appropriate regulator immediately if a competition authority has started an investigation into its affairs, one respondent submitted that it is not always clear when a competition authority has started an investigation. For example, whether it would be the point at which a leniency application is made, or where a competition authority sends an information request. Another respondent asked for clarification as to whether the obligation applies to an investigation once the threshold of 'reasonable grounds for suspecting' under section 25 CA98 has been met rather than, for example, when the CMA has made preliminary enquiries. Both respondents suggested that it would be helpful if the FCA clarified

16 See OFT1495 *(ibid)*, and in particular paragraphs 3.8 – 3.14 on conducting internal investigations and paragraphs 3.24-3.28 on maintaining confidentiality and securing evidence.

the point at which a competition investigation has started for the purpose of the disclosure obligation.

Our response

SUP 15.3.15R is not a new requirement and we are not aware that its interpretation has caused problems for firms in the past. We do not consider that there are particular features of competition law that give rise to a greater need to give guidance in relation to investigations by competition authorities than for investigations by the other bodies mentioned in SUP 15.3.15R. We note that the rule requires a notification when the firm becomes aware that a competition authority has started an investigation into a firm's affairs. It will generally be clear when a firm becomes aware of an investigation, for example if the firm receives an information request about its conduct. In contrast, the internal steps of an investigating authority may not be apparent to any particular firm, and nor would the receipt by a competition authority of a leniency application by another firm necessarily be known to the firm.

Proposed introduction of SUP 15.3.32R

General comments

4.8 While several respondents were supportive of a rule in principle to make explicit the disclosure obligation on authorised firms in relation to competition law infringements, and/or noted that it was consistent with self-reporting obligations on firms, a number of respondents considered that no separate rule relating to competition law infringements was necessary. Many respondents submitted that the proposed rule would significantly extend the scope of the disclosure obligation in Principle 11, going beyond what the FCA could 'reasonably expect' notice of. Another respondent also stated that analogous requirements under SUP 15 are limited to actual and significant breaches or infringements.

4.9 One respondent considered that it was unclear what the general purpose of the rule is (whether regulatory functions of the FCA, detection of CA98 infringements or deterrence). This respondent also considered that there are only explicit disclosure obligations in relation to a small number of statutes and there was no reason to treat competition law differently to other legislation which firms might breach.

4.10 It was submitted that an obligation to self-report could weaken firms' incentives to audit their affairs as such internal processes might give rise to a notification requirement. Another respondent considered that the disclosure obligation would expose regulated firms to potentially unmeritorious and costly private damages actions on the basis of nothing more than something that 'may' constitute a breach of competition law.

4.11 It was also submitted that it was not appropriate for the FCA, as a concurrent regulator, to have more powers than the CMA through such disclosure obligations. Another respondent considered that it was appropriate to make explicit the obligation to notify competition law infringements under Principle 11, albeit that it had concerns about the scope of the proposed obligation.

4.12 A number of respondents proposed alternative drafting to deal with the issues they had raised.

Our response

At the outset, we note that Principle 11 is a well-established Handbook rule which has applied in essentially its current form since 1999. It requires firms and individuals that choose to be active in providing financial services to be open and transparent with the FCA as their regulator. Our intention in proposing the amendments to the Supervision Manual of the FCA Handbook was to reinforce what we consider has always been the case: that firms or individuals who are aware of possible infringements of competition law that they may have committed should bring them to our attention, just as they should bring possible breaches of other requirements to our attention. While this applied before our concurrent powers vested, we see the arrival of those powers and the new guidance we are producing on the exercise of our Competition Act and market studies functions as a timely moment to highlight this obligation.

The proposals drew few comments from the financial services sector (though some comments were received in relation to scope) – but caused significant concern amongst competition lawyers in private practice. There appeared to us to be a clear cultural difference between the financial services sector where participants are familiar and comfortable with Principle 11 and its application, and the competition sector, where it appears novel.

In light of this, we hold to the position that regulated firms and individuals must be transparent with us, but we are sympathetic to some of the more specific concerns which we address below.

Privilege against self-incrimination

4.13 A number of respondents considered that the disclosure obligations set out in SUP 15.3.32R might breach the privilege against self-incrimination, in light of the European Court of Human Rights' comments on the quasi-criminal nature of competition law infringements and the criminal cartel offence under EA02. It was submitted that the proposed rule was inconsistent with other rules in SUP 15.3 which only require potential criminal matters to be notified once a prosecution has been brought or conviction sought. One trade association considered that this would become more pertinent if the FCA passed information to the CMA which could prosecute the cartel offence. It was also submitted that the obligation conflicts with the ECHR and that an analogy could be drawn with case law regarding requests for information under Regulation 1/2003 where ECJ confirmed that obtaining from an applicant an acknowledgement of its participation in a cartel violated the privilege against self-incrimination. One respondent representing the competition bar took the view that information obtained under SUP 15 would be inadmissible in competition law proceedings.

Our response

The application of the privilege against self-incrimination to competition law investigations, and to the stages before an active investigation, is complex and nuanced. At the outset, we note that authorised firms and people choose to be active in financial services and so be regulated by us. The Principle 11 duty is one of the responsibilities, voluntarily assumed, that comes with the licence to operate in the supply of financial services in the UK. We also note that under the case-law of the European Court of Human Rights, competition law has a

'quasi-criminal' nature and that UK competition law specifically protects the privilege against self-incrimination in section 30A CA98.

We make the following points:

- We think the legal position is sufficiently clear that disclosures required for regulatory purposes do not infringe the privilege against self-incrimination. While a notification under Principle 11 might lead to enforcement action under CA98, its origins are in our regulatory functions. A notification may indicate (amongst other things): a wider problem for market integrity for a particular sector or market; firm cultural failings that suggest that the firm does not take its responsibilities seriously or that consumers are not appropriately considered; inadequacies in a firm's systems and control framework, or the skills and expertise of individuals involved; and/or issues with regard to the honesty and integrity of specific individuals.

- A key concern of the privilege against self-incrimination is the use as evidence of admissions obtained under compulsion. However, we seek neither admission nor confessions as part of a disclosure under Principle 11. We expect to be notified of the facts and circumstances that indicate that an infringement has or may have occurred. This might be obvious (eg receipt of an information request by an authority such as the CMA setting out its concerns that the recipient may have infringed the law), or it may be that factors have come to light internally to cause a regulated firm concern. In this case, we expect that firm to be transparent with us, just as it should be if it became aware of, say, money laundering concerns.

- We believe in any event that concerns around the use of a particular piece of evidence in the context of establishing a CA98 breach will be satisfactorily addressed by the strong procedural safeguards that have been put in place to protect the subject of those proceedings. These include access to file, the ability to make representations before the CDC, and appeal on the merits to the CAT. Moreover, the FCA will comply with the safeguard provided in section 30A CA98.

- Additionally, if we launch an investigation, the rules familiar to competition lawyers apply: undertakings cannot be forced to admit they have committed an infringement, but must answer factual questions and provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.[17]

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

Materiality threshold

4.14 Many respondents submitted that in its proposed form, the obligation could require disclosure of any infringements however minor or insignificant. This was contrasted to the use in other parts of SUP 15.3 of thresholds such as 'material' or 'significant'. It was submitted that this meant it would significantly expand the scope of the existing obligation on authorised firms to notify matters of which the FCA would reasonably expect notice. Many respondents were also

17 Case 374/87 *Orkem v Commission of the European Communities*

concerned that the requirement was to notify where a firm 'has or may have' infringed the law, as it could require notification when there was no clear indication that there had in fact been any infringement.

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

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

4.17 Several respondents proposed that the FCA should include a materiality threshold such as 'significant infringement'. It was suggested that the FCA should provide a non-exhaustive list of what would constitute a significant infringement.

4.18 One respondent submitted that breaches of merger rules should be excluded. Several respondents pointed to the administrative burden for the FCA in assessing the disclosures made by firms.

Our response

We are keen that firms approach this obligation in a sensible and proportionate way for possible competition law infringements, just as they do for possible breaches of other requirements. We have no intention of re-introducing pre-notification and fully support self-assessment by firms of their own compliance with competition law. The process of self-assessment also alleviates concerns around firms that are approaching a dominant position. Such firms should conduct internal assessment of their commercial agreements and conduct to ensure they do not infringe competition laws. A reporting obligation does not change the process of self-assessment that firms ought to undertake.

Several respondents urged us to adopt the thresholds of 'material' or 'significant' infringements. We note that, although there is a materiality threshold inherent in the concept of 'infringement' of the prohibitions in CA98 and TFEU, to the extent that there must be an appreciable effect on competition and trade within the UK or between Member States (respectively), our intention was only to require disclosure of matters likely to be relevant to the purpose of Principle 11. This includes but is not limited to, issues relevant to our consideration of firms' fitness to conduct authorised business, individuals' fitness to perform functions in relation to regulated activity, and/or the advancing of our operational objectives.

In light of this, we have decided to qualify the self-reporting obligation so that it only captures 'significant' infringements. This is in line with our approach to other self-reports of actual or possible infringements, and to avoid firms making 'fail-safe' notifications of conduct or agreements. We have also provided guidance on the meaning of 'significant'.

With regard to the concern that 'may have infringed' was too vague or indeterminate, and would result in a large number of 'fail safe' notifications, we expect regulated firms and persons to take a sensible approach. This formulation applies equally to other rules, notably the similar rules in SUP 15.3.11R, without apparent difficultly.

We decided not to limit the obligation to 'has infringed' as this might imply either that we sought only a very limited set of notifications (for instance, it could be argued that only an infringement decision by a competent authority upheld on appeal would qualify) or that we were requiring an admission of liability that we do not seek.

Application of the proposal to any applicable competition law, unregulated activities and activities of other members of the group

4.19 A number of respondents considered that the obligation to notify a breach of 'any applicable competition law' was too broad as it could catch infringements which have no impact on UK financial services. It was proposed that the obligation be limited to breaches of UK or other EEA competition laws (while another respondent sought confirmation of its assumption that the scope was UK and EU). It was submitted by one respondent that to the extent that material issues arise outside the UK or EEA, these would in any event be captured by Principle 11 on the basis that they would constitute matters of which the FCA would reasonably expect notice. Another respondent submitted that breaches of merger control obligations should be explicitly carved out.

4.20 A number of respondents were concerned at the proposal that the obligation would extend to breaches of competition law in relation to unregulated activities. One respondent submitted that this would create an uneven playing field, placing a more onerous burden on FCA-authorised entities with activities outside of financial services.

4.21 One respondent sought clarification, in light of the statement in the consultation paper that takes into account the activities of other members of a group, that the application would the same as for Principle 11 and SUP 15 currently. That is, breaches by unregulated group entities would not always be notifiable, and firms would need to apply judgment in determining whether such issues are sufficiently relevant or significant as to affect the reporting obligations of the authorised firm.

Our response

The scope of the reporting obligation in relation to group entities is consistent with that set out for Principle 11 in PRIN 1.1.5G, 1.1.6G and 3.3.1R, which is reflected in SUP 15.1.4R. Our interest is not limited to possible enforcement action under CA98 and TFEU, since the purpose of Principle 11 and SUP 15.3 is to ensure we are informed about matters that might be relevant to any aspect of our remit. Accordingly, breaches of the competition law of other jurisdictions

may be relevant and are potentially within the scope of the Principle 11 duty to self-report and the rule.

However, it should be noted that the obligation in SUP 15.3.32R applies to infringements by the regulated firm itself (i.e. the authorised legal entity), and not to infringements by other members of the firm's corporate group that may be part of the same undertaking for competition law purposes and so the obligation may be narrower than some respondents appear to have thought. Breaches by other group companies may however require notification under Principle 11 itself, so far as they may affect the authorised firm, whether directly or indirectly.

Steps being taken to rectify the infringement

4.22 Several respondents queried the obligation in SUP 15.3.32R(4)(c) to notify the steps being taken to rectify the infringement. In particular, it was queried whether this was compatible with the obligation to notify immediately that a firm suspects that there may have been an infringement and/or with the obligation in leniency policies not to take steps that might tip off other cartelists about the investigation.

Our response

As noted above, we intend firms to take a sensible approach with regard to the Principle 11 obligation and the duty to notify possible competition law infringements. The proposed guidance indicates that firms should notify us of steps that have been taken or that the firm intends to take. This means that a notice that the firm has so far done nothing but intends to take steps (or, for instance, is in discussion with the CMA) would meet the requirement in certain circumstances. Firms should not delay in informing us because they are uncertain how to proceed (see further below with regards to leniency applications).

Change to Handbook amendments

We have retained the text of the proposed 15.3.32R(4)(c) but, consistent with existing SUP 15.3.14G, in the form of guidance rather than a rule. As such, the text provides guidance on how the rule can be complied with, but does not mean that it is the only way of complying with the disclosure obligation.

Timing of the reporting obligation and interaction with leniency regimes

4.23 Many respondents submitted that the obligation to report 'as soon as' the firm has information is too vague. It was submitted that it would allow no opportunity for a firm to assess the behaviour, and that this was especially the case given the fact that competition law analysis is rarely straightforward and would require an assessment of anti- and pro-competitive effects.

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

that give rise to a civil competition law and a criminal (cartel) offence. There is a risk that such notification may have to be made before a prosecution is initiated or a conviction obtained and that this is contrary to the position in SUP 15.3.11 R(1)(c) and 15.3.15R(4).

4.25 One respondent considered that the guidance was unclear on whether firms may make a preliminary and precautionary disclosure followed by another disclosure once it has had the opportunity to investigate further, or whether it could legitimately wait until it had conducted an initial investigation and then approach the FCA and CMA simultaneously.

4.26 It was asked whether the notifying firms would still be able to benefit from the leniency policy. In particular, it was submitted that the FCA, CMA or European Commission might use information received under Principle 11 to start an investigation, which would mean that Type A immunity would no longer be available. Another respondent also asked whether a disclosure made by one firm about a cartel with another firm would prevent that other firm from receiving immunity from the CMA or EC in relation to the same activity.

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

Our response

As noted above, regulated firms have an on-going obligation to be transparent with us under Principle 11, and this extends to actual or possible infringements of the prohibitions in the CA98 and Articles 101 and 102 TFEU. Applying for leniency is an option available to undertakings and individuals who have participated in cartel activity.[18] It is a voluntary step that firms may, for their own reasons, choose not to take. Accordingly, the Principle 11 obligation cannot be tied to the discretionary activity of applying for leniency.

We make the following specific points with regard to the interaction between a possible leniency application and the duty to notify under Principle 11:

- The CMA and FCA share an interest in detecting, deterring, destabilising and ending cartels. The CMA's leniency programme applies to all sectors of the UK economy, and we believe that the obligation on regulated firms within the financial services sector to notify under Principle 11 can only add to their incentives not to engage in cartel behaviour, or to report if they do.

- We would collaborate with the CMA in the event of a notification to us of cartel activity, and would not require any firm to take actions that might tip off fellow cartelists without consulting the CMA.[19]

- With regard to the concern that parties may not be eligible for full immunity from the CMA if they have already notified the FCA under Principle 11, we note the conditions for immunity (known as 'Type A' leniency) are that

18 Cartel activity is defined for the purposes of the CMA's leniency policy for undertakings as agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter 1 prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing. See *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, July 2013, OFT1495 (adopted by the CMA).

19 Further, we note that only the CMA can grant leniency in regard of the cartel offence contained in section 188 EA02. Firms considering whether the criminal cartel offence is relevant should consult the CMA in order to ensure that they do not prejudice the ability of their employees to benefit from immunity or leniency.

there is no pre-existing investigation and that the applicant is the first to apply. A notification under Principle 11 does not in itself remove either condition, although it may increase the prospect that an investigation has been launched before a leniency application has been made.[20] If 'Type A' leniency is unavailable because there is a pre-existing investigation, then 'Type B' leniency may be available for the first applicant. However, in such cases immunity would be discretionary.

- The contents of a notification are not the same as those required by the CMA in an application before it grants a leniency marker: in particular, a self-report need not contain an genuine intention to confess or admission; we are, rather, concerned with the underlying circumstances and facts.

Accordingly, we do not think that the Principle 11 regime and the CMA leniency regime conflict: firms can meet the requirements of both regimes if they act promptly.[21] However, firms who are concerned about the interaction of notifications under Principle 11 and the CMA's leniency regime should contact us and the CMA and we will work together and discuss how to proceed based on the individual circumstances of the case.

Notifications in writing

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

4.29 One respondent queried whether, if a firm makes an oral disclosure to the FCA, CMA and EC, and then decided not to proceed with a leniency application with the CMA and EC, the disclosure would remain valid or if the firm would need to make a written disclosure immediately after withdrawing the leniency application.

4.30 It was submitted that the carve-out for matters where a leniency application will be made was in conflict with confidentiality obligations under leniency regimes in the UK and EU.

Our response

Notifications required from firms under other notification rules in SUP 15 must be given in writing, as set out in SUP 15.7.1R (unless provided solely in compliance with Principle 11). We noted the particular sensitivity around potential leniency applications and so made allowance for that. We see no need to extend the exemption any further than we proposed.

20 If there is a pre-existing investigation, then immunity would be discretionary for the first leniency applicant. The CMA may grant a marker for leniency on a provisional basis, with some time given to provide the additional information necessary for the marker to be confirmed. The CMA sets a relatively low evidential threshold for the gaining of a marker, namely a concrete basis for a suspicion of cartel activity and a demonstration of a genuine intention to confess. Leniency applicants are encouraged to approach the CMA as early as possible. See OFT 1495, *Applications for leniency and no-action in cartel cases*, paragraph 3.11

21 See OFT1495 *(ibid)*, paragraph 3.11.

As noted, notifications under Principle 11 need contain no admissions, but should report facts or circumstances that might cause the regulated firm or person concerns that competition law may have been infringed. We think this should limit concerns relating to private actions for damages. In any event, we do not think that this factor should be persuasive: any exposure to damages would result from infringement of competition law, and it is regulated firms' and persons' responsibility to avoid this.

Whether the rules have retroactive effect

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

Our response

Our view is that SUP 15.3.32R only reinforces the existing obligations in Principle 11 and SUP 15.3 that already require notification of competition infringements, and therefore the rule has no 'retroactive' effect.

FCA's onward disclosure of disclosures received by firms

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

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

Our response

We are bound by significant restrictions relating to our disclosure of information, in particular contained in Part 23 of FSMA and Part 9 of the Enterprise Act 2002. We handle all material received under Principle 11 notifications accordingly. In the first instance, such material is handled under the FSMA regime, since Principle 11 is a regulatory obligation. Material gathered subsequent to the launch of a CA98 investigation using our CA98 powers would be 'specified' within the meaning of Part 9 of the Enterprise Act. Material covered by either section 348 FSMA or Part 9 of the Enterprise Act 2002 will be protected from Freedom of Information Act disclosure. Art 6(5)(a) of the EU Damages Directive only applies to information prepared for proceedings, so it is unlikely the disclosures would be covered.

Cost benefit analysis

4.34 One respondent submitted that a cost benefit analysis was required in light of the extensions (as they saw it) of the reporting obligation.

Our response

A cost benefit analysis is not required if a rule imposes no increase in costs, or only an increase of minimal significance. Since our proposal is not a new substantive obligation, no cost benefit analysis is required. For compliant firms, there is no or negligible cost since they will already be reporting the required material. For non-compliant firms, there might be a small cost of increasing the amount of reporting, but this is likely to be small and such cost would have been considered at the time of introducing Principle 11. We note that firms should be complying, so any costs will be the result of their own failure to comply. We have no mandatory form for such notifications and so it should be open to firms to self-report without incurring significant costs. If firms choose to undertake additional competition law compliance checks and reviews, any associated costs would arise from their obligations to comply with competition law rather than from the reporting obligations.

We also note that, to the extent that the rule increases competition law compliance and aids us in fulfilling our FSMA functions, there should be significant benefits.

The amendment to SUP 15 Annex 1 clarifies that the application of SUP 15.3.32R – 15.3.35G is the same as the application of Principle 11. For the reasons set out above, we do not consider this imposes any increase in costs.

Spurious civil claims

4.35 Some respondents stated that given the wide scope of the disclosure obligation, SUP 15.3.32R may also give rise to an increased risk of spurious civil claims being brought against firms, or the risk of fishing expeditions by civil claimants. This is because third party claimants are likely to seek copies of disclosures of infringements of competition law made to the FCA.

Our response

Information received under Principle 11 and/or SUP 15.3.32R would be dealt with under section 348 FSMA. As set out in chapter 7 of the draft guidance, FSMA restricts the disclosure of confidential information other than as permitted under the Gateway Regulations.

Negative clearance

4.36 One respondent claimed that, since firms no longer have the ability to notify their agreements to the EU or UK competition authorities to obtain negative clearance, it appears perverse to require firms to notify such agreements to the FCA.

Our response

The obligation to report infringements of competition law is not a new obligation and has applied under existing FCA rules even in the absence of a negative clearance regime under EU law. The reinforcement introduced as part of our consultation process does not have a perverse effect.

Annex 1
List of non-confidential respondents

1. Addleshaw Goddard LLP
2. Ashurst LLP
3. Baker & Mckenzie LLP (EU Competition and Trade)
4. Baker & Mckenzie LLP (Regulatory)
5. BBA
6. Berwin Leighton Paisner LLP
7. BP Oil International Limited, Britannic Trading Limited and Britannic Energy Trading Limited
8. Building Societies Association
9. Callcredit Information Group
10. City Of London Law Society Competition Law and Regulatory Law Committees
11. Clifford Chance LLP
12. Joint Working Party on Competition Law of the Bar Council and Law Societies of England & Wales, Scotland and Northern Ireland
13. Linklaters LLP
14. Lloyds Banking Group plc
15. Macfarlanes LLP
16. Maclay Murray & Spens LLP
17. Norton Rose Fulbright LLP
18. Shearman & Sterling LLP
19. Shoosmiths LLP
20. Slaughter And May
21. Virgin Money plc

Appendix 1
CA98 guidance (showing changes from version as consulted on)

IMPORTANT NOTE:

This document shows the amendments made to the text of the Competition Act 1998 (CA98) guidance following publication of the draft for consultation on 15 January 2015. Text that has been inserted is underlined. Striking through indicates deleted text.

This document has been produced to assist interested stakeholders for information only and should not be relied on. Please refer to http://www.fca.org.uk/about/what/promoting-competition for the guide adopted by the FCA.

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 relation to the provision of financial services ~~sector~~.
- Our competition law functions are 'concurrent' – the CMA and possibly other regulators may also exercise them in this sector.

COMPARISON VERSION

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~~'Financial services' 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~~These powers are covered in separate guidance ~~does not cover these powers~~available on our website.

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~~1 and Chapter ~~II~~2 CA98 and/or Article 101 and Article 102 TFEU

[1] We do not have powers to prosecute the criminal cartel offence in section 188 of ~~the Enterprise Act 2002~~EA02.
[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.

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]

1.6 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] We have not sought to duplicate all the guidance that the CMA has issued, with its greater experience. However, where CMA guidance is more detailed than ours in a material respect, we shall consider its guidance in deciding how to proceed.

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]
- CA98
- ~~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~~
- FSMA
- Financial Services Act 2012
- ~~Enterprise Act 2002~~
- EA02
- 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~~section 36 CA98[7]

[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.
[5] ~~Available at www.gov.uk/cma~~ Available at www.gov.uk/government/collections/cma-ca98-and-cartels-guidance
[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.

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- the CMA's statement of policy in relation to the imposition of penalties under ~~s40A~~section 40A CA98[8]
- the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments under ~~s31A~~section 31A 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.

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 the 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.

COMPARISON VERSION

[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~~ CMA10, available at www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries
[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 (NCA) 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.

COMPARISON VERSION

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.

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).

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

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~~They 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~~They 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.~~section 46 CA98 have a right of appeal on its merits to the Competition Appeal Tribunal (CAT). These decisions are:

- whether the Chapter ~~I~~1 or Chapter ~~II~~2 prohibition, or the prohibition in Article 101 or 102 TFEU has been infringed
- the imposition of a penalty for an infringement of Chapter ~~I~~1 or Chapter ~~II~~2 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

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

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

COMPARISON VERSION

- not releasing commitments pursuant to a request made under section 31A(4)(b)(i) CA98
- releasing commitments under section 31A(4)(b)(ii)
- directions and interim measures in relation to agreements or conduct

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~~1 or Chapter ~~II~~2 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 (~~an 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~~1 or Chapter ~~II~~2 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]

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

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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).

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~~that 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~~that have a duty to promote competition in the interests of consumers. The UKCN's Statement of Intent can be found as an annex to the Concurrency Guidance.

2.17 The 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 The FCA has a broad range of legal tools to address competition concerns, and when considering a competition issue, we shall consider the appropriateness of the available tools when deciding what action, if any, to take. These tools include market studies under FSMA and EA02 or enforcement action under CA98 or FSMA. We also have more general regulatory and rule-making powers. While in relation to CA98 we have a specific primacy obligation (set out in section 234K FSMA), this applies only to the six powers listed (see paragraphs 2.23 to 2.26).

[20] The prescribed functions include the opening of a formal investigation and the taking of a decision within the meaning of ~~s.~~section 46(3) CA98, including a decision as to whether the Chapter ~~I~~1 or Chapter ~~II~~2 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]*~~ The memorandum of understanding is available on the FCA and CMA websites.

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

~~2.18~~2.20 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] We will also take into account fines levied by authorities in connected cases.

~~2.19~~2.21 We will make clear when using our formal information-gathering powers which powers we are using and the nature of the suspected infringement(s) that we are investigating. Where more than one of our enforcement powers is considered to be potentially appropriate, we may make separate information requests under different information gathering powers. However, we will seek to decide as early as possible what is likely to be the most appropriate power(s) to deal with the specific agreement or conduct in question.

~~2.20~~2.22 In some circumstances we may begin an investigation under CA98 and subsequently decide that action under our other powers is more appropriate, or vice versa. In such cases we will inform the party or parties involved.

'Primacy'

~~2.21~~2.23 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 2.24 below), we have a duty to consider whether it would be more appropriate to proceed under CA98. If we consider that it would be more appropriate to proceed under CA98, we must do so rather than exercise that other power.

~~2.22~~2.24 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

[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~~.~~/FS/html/FCA/DEPP.

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- 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~~2.25 We will determine on a case-by-case basis whether it may be more appropriate to proceed under CA98. We will look at the potential harm to competition raised by the conduct or agreement in question, the resource and timing implications of the actions available to us, and the potential outcomes (including their suitability for addressing the issues identified) and deterrent effect of those actions. Other factors may also be relevant to our considerations.[24]

~~2.24~~2.26 ~~In some cases~~Accordingly, some cases are likely to fall more naturally for investigation under CA98 (such as collusion amongst rivals to fix prices or allocate customers; unilateral strategic conduct by a firm to exclude rivals). In others it will be clear that CA98 is not the appropriate legal instrument, for example, if the proposed action relates to behaviour of a single undertaking that is not dominant, or if the behaviour does not appear likely to be capable of affecting competition. 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.

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[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 to think in terms of the effects of their activities rather than compliance with specific rules; the greater flexibility of competition law 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 ~~I~~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 ~~P~~potential CA98 ~~I~~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 234~~G~~C 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~~over regulated firms.
- Market studies or other own-initiative work or intelligence-gathering.

3.2 Regulated firms should bring their own actual and possible 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] See further paragraphs 1.1-6.8.

[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.

[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.

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

Competition ~~Department~~
~~Policy, Risk and Research~~ Division
Strategy & Competition
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 ~~W~~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~~EA02.

Deciding ~~W~~whether to ~~O~~open an ~~Investigation – Prioritisation Assessment~~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)

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

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- the risks involved in taking on a case (including the likelihood of determining whether or not there has been an infringement)
- whether other tools are available that would be more appropriate to achieve the same or a better outcome (see paragraphs 2.18 and 2.19)
- the resources required to carry out the investigation

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~~an administrative decision not to conduct an investigation, or to close an investigation after it has been opened, is not a decision on the merits of the case. It does not imply any view about the merits of a complaint or whether there has been a breach of competition law. Our choice of whether to take enforcement action is a question of how we use our resources effectively and efficiently. In some cases it may be appropriate to deal with suspected infringements of competition law without formal enforcement action. For example, we may alert 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~~We will also generally inform the person who has provided the information resulting in the case (for example, the person making a complaint). However, we will not communicate either with the business(es) under investigation or with third parties at the start of an investigation if this may prejudice the investigation (for example, where we intend to conduct unannounced inspections), and we may need to limit the amount of information provided if there are good grounds for doing so (for example, to protect the identity of a whistleblower or a complainant).

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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.

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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~~case team and ~~D~~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 4.17).
- To make an interim measures direction (see paragraphs 4.13-4.16).
- To accept commitments offered by a party under investigation (see paragraphs 4.20-4.23).
- Whether a case is appropriate for settlement (see paragraphs 6.9-6.19).

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

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

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

~~4.7~~4.8 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:

- ~~C~~can issue requests for information and documents (commonly referred to as section 26 notices) in writing.
- ~~C~~can conduct ~~formal~~compulsory interviews with any individual connected to a business under investigation.[31]
- ~~H~~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.

[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

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- ~~M~~may fine any business or individual who (without reasonable excuse) does not comply with our information gathering powers.[32]

~~4.8~~4.9 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~~4.10 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~~4.11 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~~4.12 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 and restrictions relating to the use of leniency information shared with us by other competition authorities set out in paragraph 6.6 (see also section 7).

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

~~4.12~~4.13 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

[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).
[33] ~~http://fshandbook.info/FS/html/FCA/EG/link/PDF~~ 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).

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~~4.13~~4.14 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. When we consider whether to impose interim measures, we will have regard to the factors set out in CMA8 paragraphs 4.13 to 4.16.

~~4.14~~4.15 In terms of the procedure we will follow:

- Any application should be made to the case team in writing, providing as much detail as possible as to why the grounds set out in section 35 CA98 are met.
- The Case Sponsor may provisionally decide to give an interim measures direction (a provisional decision which may follow a complaint or be on our own initiative). We will write to the business to which the directions are addressed setting out the terms of the proposed directions and the reasons for giving them.
- We will also allow that business a reasonable opportunity to make representations. Given the nature of the interim measures process, the time allowed may be short.
- 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~~4.16 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

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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~~their 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 4.15.

Possible outcomes of investigation

~~4.16~~4.17 There are several ways in which an investigation under CA98 can be resolved.[37] In summary:

- We will issue a Statement of Objections where our provisional view is that the conduct under investigation amounts to an infringement. After doing this and receiving the parties' representations, we can issue a final decision that the conduct amounts to an infringement, and can impose a fine and/or directions on the business(es) concerned (see sections 5 and 6).
- We can issue a decision that there are no grounds for action (either before or after issuing a Statement of Objections) if we have not found sufficient evidence of an infringement (see section ~~6~~5).
- We can close our investigation on the grounds of administrative priorities at any time (before or after issuing a Statement of Objections). In these circumstances, we may also write to 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 4.20~~—~~-4.23~~).~~).

~~4.17~~4.18 Infringement decisions[38], penalty decisions and decisions that there are no grounds for action will be taken by the Competition Decisions Committee (see ~~chapters~~sections 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~~4.19 As noted (paragraph 2.22), it is possible that information obtained during an investigation under CA98 may lead to and/or be used in enforcement action under FSMA.

[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.
[38] Other than in settlement cases, for which, see paragraphs ~~6.4~~6.9-~~6.14~~6.19 below.

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Commitments

~~4.19~~4.20 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~~4.21 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~~4.22 We will give notice of any proposal to accept commitments and allow at least eleven working days for interested third parties to give their views on the proposed commitments. After receiving responses to this consultation, we will have a meeting with each business that offered commitments to inform them of the general nature of responses received and to indicate whether we consider that changes are required to the commitments before we would consider accepting them. If the parties offer material modifications to the proposed commitments, we will allow interested third parties a further period of at least six working days ~~within~~ which to comment on the modified commitments. We may repeat the process, although we do not wish the process of considering commitments to become unduly protracted.

~~4.22~~4.23 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]

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[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 materially assist our investigation.
- Addressees have the opportunity to make written and oral representations, which will be considered by a Competition Decisions Committee who will be appointed after the issuing of the Statement of Objections.
- If necessary, we may issue a Supplementary Statement of Objections or a 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~~1 or Chapter ~~II~~2 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.

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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 keep businesses informed of the timing of steps in our investigation as far as is possible and practicable while complying with our legal obligations, and to the extent that doing so would not prejudice on-going investigations. We will normally announce the issue of a Statement of Objections on our website and make an announcement on a regulatory information service. However, we may decide not to announce the issue of a Statement of Objections, or may vary the extent of any publication, depending on the circumstances of the case and in particular the market sensitivity of any information we would otherwise publish. However, in any situation and at any time, listed companies may need to consider their own market disclosure obligations.

Access to the File

5.7 At the same time as issuing the Statement of Objections, we will also give the addressee(s) of the Statement of Objections the opportunity to inspect the file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.

5.8 We will allow addressee(s) of the Statement of Objections a reasonable opportunity (typically six to eight weeks), to inspect copies of disclosable documents on the file. These are documents that relate to matters contained in the Statement of Objections, excluding certain confidential information and 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.

[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.

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

Involving ~~Third Parties~~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.

[44] See paragraph 2.4 above.

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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]

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

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

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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 ~~A~~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.

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]

[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.~~www.gov.uk/government/collections/cma-ca98-and-cartels-guidance. We must have regard to the CMA's Guidance on penalties for the time being in force.
[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~~4.17), we may close a case on

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5.30 As noted in ~~paragraphs 2.18 - 2.20~~paragraph 2.22, we may consider that information discovered during a CA98 investigation may justify taking action under ~~its~~our 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.

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

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

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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

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6 Penalties, leniency and settlement

- If we find a competition law infringement, we may impose a penalty.
- We will ~~apply~~have regard to 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~~1 or Chapter ~~II~~2 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~~

Leniency and the regulatory duty of cooperation and disclosure

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~~ Leniency may also be also available (in differing degrees) to firms that provide information that adds significant value to a pre-existing CA98 investigation. We will have regard to the CMA's Penalties guidance and will apply the CMA's leniency policy

[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~~.www.gov.uk/government/collections/cma-ca98-and-cartels-guidance. 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)~~

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when pursuing enforcement under CA98.[56] 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.

~~6.2~~6.3 ~~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~~EA02 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.~~

~~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.~~

6.4 A firm regulated by us under FSMA has a duty under Principle 11 of the Principles for Businesses to deal with its regulators in an open and cooperative way, and must disclose to us appropriately anything relating to the firm of which we would reasonably expect notice.[57] A person in relation to whom we or the PRA has given approval to perform a controlled function under FSMA has a duty under Principle 4 of the Statements of Principle for Approved Persons to deal with us, the PRA and other regulators in an open and cooperative way, and must disclose appropriately any information of which we or the PRA would reasonably expect notice. These obligations are independent of the voluntary decision to apply for leniency: a step that firms or individuals may choose not to take.[58]

6.5 Under the provisions for concurrent enforcement of the competition prohibitions by the CMA and sector regulators such as the FCA, we and the CMA will share between ourselves information on actual and possible cases in the financial services sector (which may include leniency information[59]), subject to the restrictions in applicable legislation (including Part 9 of EA02 and Part 23 of FSMA).

6.6 We will use leniency information that we receive from the CMA only for the purpose of enforcement of the competition prohibitions unless the leniency applicant agrees otherwise. This restriction on use also applies to any information a resulting FCA CA98 investigation obtains. However, the fact that an applicant has applied for leniency will not prevent us from using information obtained by us from other sources or that applicant

[56] See OFT423 (*ibid*) and OFT1495 *Applications for leniency and no-action in cartel cases- OFT's detailed guidance on the principles and process* (www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)
[57] See also the notification requirements in SUP 15.3 of the FCA Handbook.
[58] These obligations are different from conditions under which an applicant may receive leniency. SUP 15.3.35G of the FCA's Handbook provides guidance that a notification under SUP 15.3 is not in itself sufficient to count as a leniency application.
[59] Leniency information for these purposes is any information which came into the possession of any of the CMA, its predecessor bodies, or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under the Chapter 1 prohibition or Article 101 TFEU. It includes any information that an investigation resulting from the leniency application obtains.

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(e.g. pursuant to its self-reporting obligations), to take enforcement action under FSMA or any other legislation.

6.7 When we receive leniency information from the CMA, we may also contact the leniency applicant to remind it of any obligations it might have to notify relevant conduct to us under Principle 11 of the FCA's Principles for Businesses or Principle 4 of the FCA's Statements of Principle for Approved Persons.

6.8 We require prompt notification under Principle 11[60] regardless of whether a firm is considering applying for leniency. The FCA Handbook provides further guidance on Principle 11, for example in SUP 15.3.9G, and this makes clear that while notifications will depend on the event in question, the FCA expects to discuss matters with firms at an early stage. We do not think that the Principle 11 regime and the CMA leniency regime conflict: firms can meet the requirements of both regimes if they act promptly.[61] However, firms who are concerned about the interaction of notifications under Principle 11 and the CMA's leniency regime should contact us and the CMA and we will work together and discuss how to proceed based on the individual circumstances of the case.

Settlement

~~6.4~~6.9 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~~1 or Chapter ~~II~~2 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 6.13), and
- we issue an infringement decision but impose a reduced penalty on the settling party (see paragraph 6.12~~)~~).

~~6.5~~6.10 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.

[60] The requirement to notify also arises from Principle 4 of the FCA's Statements of Principle for Approved Persons.
[61] Firms considering applying for leniency should have regard to the CMA's guidance. See OFT1495 *(ibid)*, and in particular paragraphs 3.8–14 on conducting internal investigations and paragraphs 3.24-28 on maintaining confidentiality and securing evidence.

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- 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~~6.11 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~~6.12 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~~%.~~% for settlement pre-Statement of Objections and at 10% for settlement post-Statement of Objections. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. ~~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~~6.13 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.

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- 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~~6.14 The settling party may be required to confirm that they will not appeal a subsequent infringement decision to the Competition Appeal Tribunal.

~~6.10~~6.15 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~~6.16 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~~6.17 The Settlement Decision Makers will not have been directly involved in establishing the evidence on which the decision is based. They may, but need not, be involved in the discussions exploring possible settlement. If they approve the decision of the Case Sponsor to settle the case, they will formally issue the infringement and penalty decision.

~~6.13~~6.18 ~~Whenever we enter into~~We would expect to hold any settlement discussions ~~we may agree with~~on the basis that neither we nor 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 settlement discussions fail and the matter becomes contested (in an infringement decision or a subsequent appeal from a contested decision[62]~~).~~) or in other proceedings. 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~~not be involved in the settlement discussions other than in exceptional circumstances.

~~6.14~~6.19 The terms of any proposed settlement will be put in writing[63] 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.

[62] 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.
[63] 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.

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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 specified information is received by us in connection with our CA98 functions, it will be ~~treated as 'specified information'~~dealt with 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.

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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.[64]

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.

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

[64] The converse would also apply ~~were we to wish to~~for use and ~~disclose~~disclosure of information gathered under a CA98 investigation during a FSMA enforcement procedure.

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~~).~~.)[65]

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.[66] 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.[67] 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.[68] 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[69] or where the disclosure is made for the purpose of facilitating the exercise by us of any of our statutory functions.[70]

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:

[65] Section 348(7) FSMA
[66] Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)
[67] Section 348(7) FSMA
[68] Section 237 EA02
[69] Section 239 EA02
[70] Section 241 EA02

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

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

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Appendix 2
Market studies guidance (showing changes from version as consulted on)

IMPORTANT NOTE:

This document shows the amendments made to the text of the market studies and market investigations reference guidance following publication of the draft for consultation on 15 January 2015. Text that has been inserted is underlined. Striking through indicates deleted text. Text indicated by two strike-through lines has been moved elsewhere in the document, indicated by text that is underlined twice.

This document has been produced to assist interested stakeholders for information only and should not be relied on. Please refer to http://www.fca.org.uk/about/what/promoting-competition for the guide adopted by the FCA.

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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 the provision of 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.

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- 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]

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[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 broad 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~~The FCA 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]

2.3 We have a range of relevant functions and powers including:

- the function of supervising firms and powers which can be exercised specifically for authorised persons to advance the competition or other objectives
- the rule-making power

[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.

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- ~~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 broad 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 3.16 ~~to 3.27~~ to 3.31) 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

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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 6.4), 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 234~~G~~C 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
Strategy and Competition
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,~~the Financial Service (Banking Reform) Act 2013 (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.

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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~~ 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~~ Is there any change 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 the Competition Act 1998 (CA98~~,~~), or supervisory action), or by another authority (Payment Systems Regulator (PSR~~/~~)/Prudential Regulation Authority (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

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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 will also consult the PSR as appropriate.[16] We cannot launch an EA02 market study if the CMA or the PSR has launched such a study into the same market.[17] The CMA ~~is~~and PSR are subject to reciprocal obligations.[18] If the CMA or PSR 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 or PSR on a market study.

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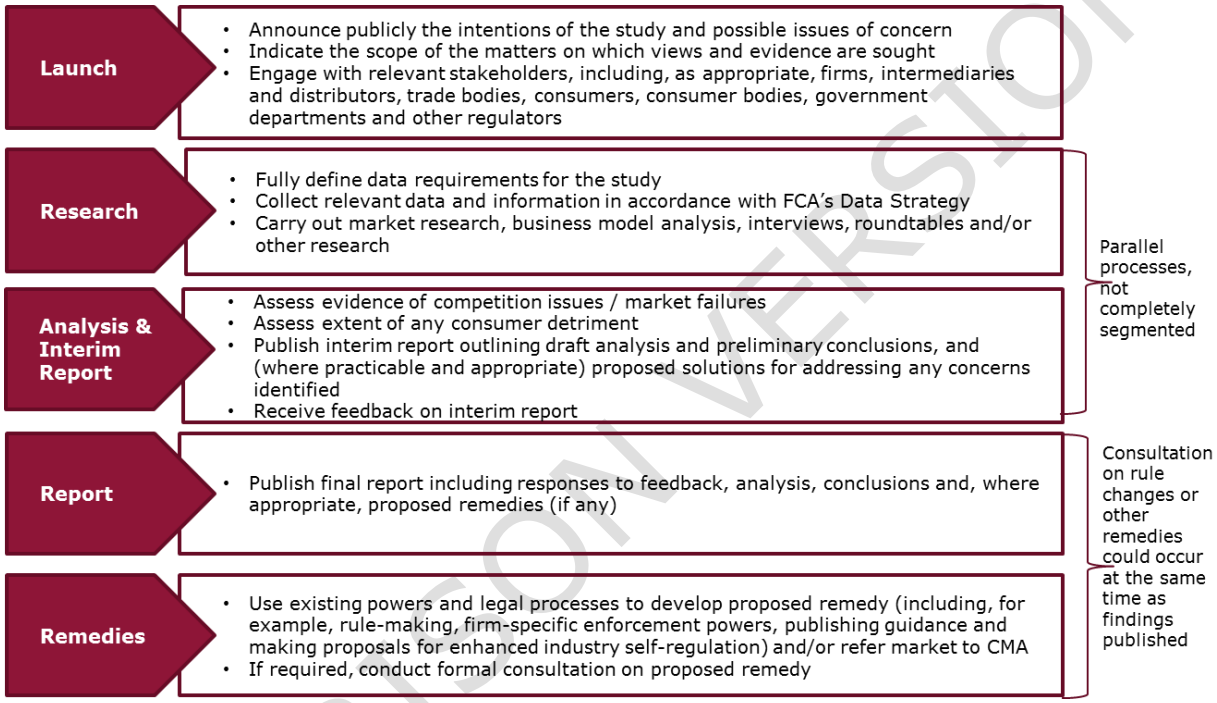
[15] In line with the general principle of cooperation set out in our Memorandum of Understanding with the CMA, and our duty under section 234I(7) of FSMA for EA02 market studies.
[16] Under section 60(4) FSBRA, we must consult the PSR before exercising our concurrent functions under EA02.
[17] Section 234I(8) FSMA and section 60(5) FSBRA for the CMA and PSR respectively.
[18] Sections 234I(7) and (8) FSMA and section 60(4) and (5) FSBRA for the CMA and PSR respectively.

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 power under which we are conducting the market study.
- 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.[19]

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

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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~~an informal 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.[20] We may use our powers under FSMA to require regulated firms to provide us with information or data (see paragraphs 6.2 to 6.4). To understand how ~~competition works in~~well the markets we regulate work, 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).

3.8 ~~Before~~In order to reach well-evidenced decisions, we usually need large amounts of information and data. We recognise that providing this can be onerous for the firms that supply it to us. Accordingly, 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, including information already held by the FCA, and the ease with which respondents can provide the information we need.[21] The FCA as a whole aims to coordinate its various activities regarding data requests, in order to be proportionate and manage the burden

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

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on any given firm~~.~~, and this also applies to our market study activity. 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),~~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~~will publish an interim report~~,~~ (other than in exceptional circumstances), 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
- our responses to feedback received and our analysis

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- 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~~a market is not ~~working~~functioning 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[22], 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).~~
- market wide remedies (see paragraphs 3.21 to 3.23),
- firm-specific remedies (paragraphs 3.24 to 3.31)
- making an MIR to the CMA (paragraphs 3.32 to 3.33).

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.

~~[22] 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.~~

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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.
- 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, include (but are 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.

~~3.21~~3.22 Market-wide remedies such as changing or potentially withdrawing existing rules or publishing general guidance will usually entail a consultation exercise.[23] 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~~3.23 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

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

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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

3.24 Firm-specific remedies~~, on the other hand,~~ include using own initiative variation powers or own initiative requirement powers[24], cancelling permissions, public censure, imposing financial penalties as well as filing for injunction orders or restitution orders.

~~3.23~~3.25 Firm specific remedies do not entail ~~any~~a 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 include~~s~~ own initiative variation powers or own initiative requirement powers.

~~3.24~~3.26 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~~3.27 Additionally, we may also open investigations into firm conduct~~.~~ which may have breached our rules. 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
- will satisfy itself that the action recommended is appropriate in all the circumstances
- will decide whether to give the notice~~,~~
- will decide the terms of the proposed notice

~~3.26~~3.28 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.[25]

[24] 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 CA98 which might be identified in the course of its market study. The CMA has concurrent functions in this respect.

[25] Available at http://fshandbook.info/FS/html/FCA/DEPP

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~~3.27~~3.29 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~~3.30 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~~3.31 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

3.32 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. However, we may accept undertakings in lieu of making a reference (see section 5 for more detail).

~~3.30~~3.33 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~~3.34 We aim to ensure that any intervention is effective and proportionate to the concerns identified.[26] We must have regard to the regulatory principles in section 3B FSMA when exercising our general functions, including rule-making.[27] There are eight principles, of

[26] 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.

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

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which ~~the most~~three in particular will generally be relevant ~~to us~~ when considering intervention ~~are~~:

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

~~3.32~~3.35 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~~3.36 Accordingly, we carry out an assessment of proportionality of our proposed remedies and will consult on the draft measures when required.[28]

~~3.34~~3.37 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.[29]

On-going review

~~3.35~~3.38 ~~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~~3.39 In the majority of circumstances we complete the market study procedures outlined above (paragraphs 3.1 to 3.15) before implementing remedies. However, in exceptional circumstances, where we identify a need to act more quickly, we may intervene early to prevent ~~the~~ harm to competition in the interests of consumers~~, e.g.~~ or to secure an appropriate degree of consumer protection, e.g. use temporary product intervention rules, or firm-specific powers such as an ~~OIVOP~~own initiative variation of permission.

[28] We have no obligation to consult on firm-specific enforcement powers.
[29] Our website provides more information: ~~http://www.fca.org.uk/about/governance/corporate-responsibility/diversity~~www.fca.org.uk/about/operate/corporate-responsibility/diversity (including a link to our Annual Diversity Report).

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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[30]

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:

- 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

[30] Section 130A(3) EA02

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consulting relevant persons within six months of publication of the market study notice.[31]

- 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.[32]
- 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.[33]
- 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.[34] 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.[35]
- 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.[36]

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~~In contrast to our FSMA powers, which may only be used to require information from firms that we regulate, and certain persons connected with them (see paragraphs 6.2 to 6.4), ~~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

[31] Section 131B(1) EA02
[32] Section 131B(1) EA02
[33] Sections 131B(2) and (3) EA02
[34] Section 131B(4) EA02
[35] Section 131B(5) EA02
[36] Section 131B(6) EA02

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gather and the extent of the analysis that we may carry out before deciding whether or not a market should be referred for investigation by the CMA (see section 5).

4.7 As noted, where we propose to make an MIR, or not to make an MIR where we have received non-frivolous submissions urging such a reference, we must consult on this within six months of publication of the market study notice (paragraph 4.4). We will do this in an interim report. We must consult any persons on whose interests we consider making an MIR would have a substantial impact.[37]

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.[38] 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). [39]

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).[40] 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 3.16 to ~~3.29~~3.31), and any such proposed action will be set out in the EA02 market study report (see paragraph 4.4).

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[37] Sections 131A(2)(b) and (4) EA02
[38] Sections 131A(5) and (6) EA02
[39] Section 131B(3) EA02
[40] 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~~may 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').[41] 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~~The CMA 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[42]:

- 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.

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

[41] Section 131(1) EA02
[42] Section 131(2) EA02

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the whole of each market concerned.[43] 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.[44]

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.[45]

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)[46] 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.[47]

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

[43] Sections 131(2A) and (6) EA02
[44] Sections 131(1) and(2A) EA02
[45] Section 169 (2) EA02
[46] *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
[47] 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

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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.[48] We must consider any representations arising from the publication of the notice. There is a power for the Secretary of State to intervene at this stage if he or she believes that wider public interest matters are relevant to the case. The Secretary of State is able to block the acceptance of undertakings in lieu when he or she believes that a public interest consideration specified in the legislation (currently only national security) is relevant. In such a case, the outcome may be other undertakings in lieu of a reference.

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

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[48] 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.

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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.[49]

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).

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.[50] It is a

[49] See paragraph 3.8 and footnote 21 above with regard to our data strategy.

criminal offence for a person to falsify, conceal, destroy or otherwise disposes~~s~~ 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.[51]

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[52]

6.7 We can use these powers against any person, whether or not they carry out activities that we regulate.[53]

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.[54]

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.[55] 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.[56]

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

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[50] Section 177 F~~M~~SMA
[51] Section 177 FSMA
[52] Section 174(1)(a) and sections 174(3) to (5) EA02
[53] Section 174 EA02
[54] Sections 174A(1) to (3) EA02
[55] Section 174A(4) EA02
[56] Sections 174A(4) and (5) EA02

case of a daily penalty).[57] Persons committing a criminal offence are liable, on summary conviction, to ~~a fine not exceeding the statutory maximum~~an unlimited fine, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.[58]

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[59] 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.[60]

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.~~[61]CA98.[62]

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

[57] Competition and Markets Authority (Penalties) Order 2014 (SI 2014/559)
[58] Section 174A(6) EA02~~. It should be noted that~~ and section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act ~~2012 provides for the statutory maximum fine on summary conviction to become an unlimited fine. When this section comes into force, the statutory maximum fine will change accordingly~~.
[59] 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.
[60] 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.
[61] ~~However, there may be restrictions on our use of information if we receive it from other authorities.~~
[62] However, there may be restrictions on our use of information if we receive it from other authorities.

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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).[63]

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.[64] 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.

EA02

6.18 When we receive information in connection with the exercise of our concurrent functions, including EA02 market studies, Part 9 EA02 will apply to any disclosure of such information.[65] 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.[66] 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[67] or where the disclosure is made for the purpose of facilitating the exercise of any of our statutory functions.[68]

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.

[63] Section 348(7) FSMA
[64] Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)
[65] Section 348(7) FSMA
[66] Section 237 EA02
[67] Section 239 EA02
[68] Section 241 EA02

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- 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~~7~~, 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.

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Appendix 3
Made rules (legal instrument)
(showing changes from version as consulted on)

COMPARISON OF DRAFT AND FINAL LEGAL INSTRUMENT 15 JULY 2015

IMPORTANT NOTE:

This document shows the amendments made to the text of the legal instrument following publication of the draft for consultation on 15 January 2015. Text that has been inserted following consultation is underlined twice. Striking through indicates deleted text.

This document has been produced to assist interested stakeholders for information only and should not be relied on. Refer to http://fshandbook.info/FS/html/FCA/ for the legal instrument adopted by the FCA.

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~~Disclosure of Competition Law Infringements Instrument 2014~~COMPETITION LAW INFRINGEMENT (DISCLOSURE) INSTRUMENT 2015

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"):

~~Section~~(1) section 137A (The FCA's general rules~~)~~);
(2) section 137T (General supplementary powers); and
(3) 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*].~~1 August 2015.

Amendments to the FCA 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~~Infringement (Disclosure) Instrument 201~~4~~5.

By order of the Board of the Financial Conduct Authority
~~*date*~~
2 July 2015

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~~committed a significant infringement of 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~~a significant 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.

15.3.33 G A notification ~~must~~under *SUP* 15.3.32R should include:

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

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

(3) 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.

15.3.34 G In determining whether a matter is significant, a *firm* should have regard to the actual or potential effect on competition, any customer detriment, and the duration of any infringement and implications for the *firm's* systems and controls.

15.3.~~33~~35 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*.

…

15 Annex 1 R Application of SUP 15 to incoming EEA firms and incoming Treaty firms

…

Applicable Sections		Application
SUP 15.3.2G	Insolvency, bankruptcy and winding up	Apply in so far as responsibility for the matter in question is not reserved by an *EU* instrument to the *firm's Home State regulator*
SUP 15.3.32R to SUP 15.3.35G	Competition law infringements	Apply in so far as responsibility for the matter in question is not reserved by an *EU* instrument to the *firm's Home State regulator*
…		

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Financial Conduct Authority

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