

## Finalised guidance

# FG15/9: Market studies and market investigation references

## A guide to the FCA's powers and procedures

July 2015

## 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 FSMA<sup>1</sup>, we have competition law powers, including powers under EA02 to carry out market studies and make market investigation references (MIRs)<sup>2</sup> which relate to the provision of financial services to the Competition and Markets Authority (CMA) for detailed investigation.<sup>3</sup> These competition law powers may also be exercised by the CMA, whose powers extend to all sectors of the UK economy. Accordingly we are a 'concurrent regulator' having concurrent competition law functions (concurrent functions).
- 1.3 We can also use our 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)
  - 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)<sup>4</sup>

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<sup>1</sup> Section 234I to section 234O FSMA

<sup>2</sup> Section 234I and section 234M FSMA

<sup>3</sup> We also have powers to enforce the Competition Act 1998.

<sup>4</sup> 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

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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.<sup>5</sup> The FCA has three operational objectives<sup>6</sup> of:

- securing an appropriate degree of protection for consumers<sup>7</sup>
- protecting and enhancing the integrity of the UK financial system<sup>8</sup>
- 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<sup>9</sup>

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
- the new power to make MIRs (see section 5 below)

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<sup>5</sup> Section 1B(2) FSMA

<sup>6</sup> 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.

<sup>7</sup> Section 1C FSMA

<sup>8</sup> Section 1D FSMA

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

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<sup>10</sup>, and we may carry out market studies under the provisions of EA02 (EA02 market studies).<sup>11</sup> 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<sup>12</sup>

2.6 The concurrent function of keeping the market under review is to be carried out with a view to ensuring we have sufficient information to take informed decisions and to carry out our other functions effectively.<sup>13</sup>

### 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 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 3.31) whether we have followed either a FSMA or an EA02 process

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

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<sup>10</sup> Section 234M FSMA

<sup>11</sup> Section 234I FSMA

<sup>12</sup> Section 130A(2) EA02

<sup>13</sup> Section 234M(2) FSMA

- 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

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- 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 234C FSMA<sup>14</sup>
  - 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 Division  
Strategy and Competition  
Financial Conduct Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS
- Email: [CompetitionMailbox@fca.org.uk](mailto:CompetitionMailbox@fca.org.uk)  
Tel: 0845 606 9966 (call rates may vary), 0300 500 0597
- 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

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<sup>14</sup> 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 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.

of markets to study. We decide on a case-by-case basis whether to open a market study and have regard to several factors, including:

- The prospects for and likely impact of any intervention in the market. This will be a combination of the scale of harm and/or market size, and the potential impact of intervening to address the issue in question.
- The scope for the FCA to intervene effectively (taking into account, for example, domestic versus international issues, the impact of harmonising EU legislation and the FCA's regulatory perimeter).
- The prospects for intervention to have a wider impact, e.g. deterrent effects or clear read-across to other markets.
- How the issue in question fits in with any upcoming regulatory developments or ongoing activity at a domestic, EU or wider international level. For example: are there other current investigations taking place that are considering the issue? Is there any change expected 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**

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2.15 Before launching a market study, we consider what might be preventing the market working well for consumers. We consider what information, data and analysis might indicate whether or not the market is working well, in order to shape our investigation and help us to decide what information to seek. We may consult third parties regarding the availability of such information. We may engage external parties on particular aspects of the market study. We produce an initial project plan and establish the resources we need.

- 2.16 We decide whether to launch a FSMA market study or an EA02 market study. In either case, we consult the CMA<sup>15</sup>, and we will also consult the PSR as appropriate.<sup>16</sup> We cannot launch an EA02 market study if the CMA or the PSR has launched such a study into the same market.<sup>17</sup> The CMA and PSR are subject to reciprocal obligations.<sup>18</sup> 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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<sup>15</sup> 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.

<sup>16</sup> Under section 60(4) FSBRA, we must consult the PSR before exercising our concurrent functions under EA02.

<sup>17</sup> Section 234I(8) FSMA and section 60(5) FSBRA for the CMA and PSR respectively.

<sup>18</sup> 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 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.<sup>19</sup>

<sup>19</sup> Unlike EA02 market studies, there are no statutory deadlines within which a FSMA market study must be completed. See paragraph 4.4.



- 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

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- 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 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.<sup>20</sup> 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 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 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.<sup>21</sup> The FCA as a whole aims to coordinate its various activities regarding data requests, in order to be proportionate and manage the burden

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<sup>20</sup> 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.

<sup>21</sup> For further information on our data strategy please see: <http://www.fca.org.uk/news/fca-data-strategy>.

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 PRA, subject to complying with the provisions governing disclosure under FSMA (as set out in section 6).

### Analysis and interim report

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- 3.10 We use the information and data we collect to examine how the market functions, and to assess whether the market is working well for 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 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

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- 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

- our conclusions on the issues considered

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

### Remedies

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3.16 If we conclude that a market is not functioning well, we may intervene using a number of remedial measures, including:

- 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.

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.

3.22 Market-wide remedies such as changing or potentially withdrawing existing rules or publishing general guidance will usually entail a consultation exercise.<sup>22</sup> 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 publish an account of those representations as well as our response.

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 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 include using own initiative variation powers or own initiative requirement powers<sup>23</sup>, cancelling permissions, public censure, imposing financial penalties as well as filing for injunction orders or restitution orders.

3.25 Firm specific remedies do not entail a public consultation process. In the vast majority of cases we will seek to agree with the relevant firm 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 own initiative variation powers or own initiative requirement powers.

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.

3.27 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

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

<sup>23</sup> 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.

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

3.28 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.<sup>24</sup>

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

3.30 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.

3.31 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).

3.33 Where we have reasonable grounds to suspect that features of a market are adversely affecting competition we can refer a market or a feature of several markets to the CMA for an in-depth investigation, or accept undertakings in lieu of making a reference. If we wish to make such a market investigation reference, we must consult any persons whose

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<sup>24</sup> Available at <http://fshandbook.info/FS/html/FCA/DEPP>

interests we consider may be substantially impacted by this proposed decision. See section 5.

### Effectiveness and proportionality, equality and diversity

- 3.34 We aim to ensure that any intervention is effective and proportionate to the concerns identified.<sup>25</sup> We must have regard to the regulatory principles in section 3B FSMA when exercising our general functions, including rule-making.<sup>26</sup> There are eight principles, of which three in particular will generally be relevant when considering intervention:
- the efficiency principle - the need to use the resources of each regulator in the most efficient and 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
- 3.35 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).
- 3.36 Accordingly, we carry out an assessment of proportionality of our proposed remedies and will consult on the draft measures when required.<sup>27</sup>
- 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.<sup>28</sup>

### On-going review

- 3.38 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.

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<sup>25</sup> We note what the CMA has said regarding effectiveness and proportionality in the context of its assessment of possible remedies following a market investigation: CC3 (revised) April 2014. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284390/cc3\\_revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf), Part 4 in general and paragraphs 334 to 347 in particular.

<sup>26</sup> Section 1B(5) FSMA states that when exercising our general functions, we must have regard to the regulatory principles found in section 3B FSMA.

<sup>27</sup> We have no obligation to consult on firm-specific enforcement powers.

<sup>28</sup> Our website provides more information: [www.fca.org.uk/about/operate/corporate-responsibility/diversity](http://www.fca.org.uk/about/operate/corporate-responsibility/diversity) (including a link to our Annual Diversity Report).

### **Urgent intervention**

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- 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 harm to competition in the interests of consumers or to secure an appropriate degree of consumer protection, e.g. use temporary product intervention rules, or firm-specific powers such as an own initiative variation of permission.

## 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 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

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

- the scope of the market study
- the period during which representations may be made to the FCA in relation to the study, and
- the timescales within which the study will be completed<sup>29</sup>

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

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<sup>29</sup> Section 130A(3) EA02



consulting relevant persons within six months of publication of the market study notice.<sup>30</sup>

- Where we do not propose to make an MIR, but have received (non-frivolous) representations in response to a market study notice arguing that a reference should be made, we must, within six months of publication of the market study notice, publish notice of our proposed decision and begin the process of consulting relevant persons.<sup>31</sup>
- Where we do not propose to make an MIR and no representations have been made in response to a market study notice arguing that a reference should be made, we must publish a notice of our decision not to make a reference within six months of publication of the market study notice.<sup>32</sup>
- We must publish a market study report setting out our findings and the action (if any) we propose to take, within 12 months of publication of a market study notice.<sup>33</sup> When our decision is (a) to make an MIR, (b) not to make an MIR (when non frivolous representations have been received to the effect a reference should be made) or (c) to accept undertakings in lieu of an MIR, the market study report must in particular contain the decision, the reasons for the decision and such information we consider appropriate for facilitating a proper understanding of our reasons for the decision.<sup>34</sup>
- Where a market study report sets out a decision to make an MIR, the reference must be made at the same time as the report is published.<sup>35</sup>

### Research and information-gathering

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

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- 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

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<sup>30</sup> Section 131B(1) EA02

<sup>31</sup> Section 131B(1) EA02

<sup>32</sup> Sections 131B(2) and (3) EA02

<sup>33</sup> Section 131B(4) EA02

<sup>34</sup> Section 131B(5) EA02

<sup>35</sup> Section 131B(6) EA02

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

- 4.7 As noted, where we propose to make an MIR, or not to make an MIR where we have received non-frivolous submissions urging such a reference, we must consult on this within six months of publication of the market study notice (paragraph 4.4). We will do this in an interim report. We must consult any persons on whose interests we consider making an MIR would have a substantial impact.<sup>36</sup>
- 4.8 When consulting, we must give our reasons so far as practicable, having regard to the restrictions imposed by the timetable for making the decision, and any need to keep the proposal or the reasons for it, confidential.<sup>37</sup> We will make any responses to our proposal to make or not to make an MIR available for public inspection unless the respondent requests otherwise and we accept its request. See further section 6 regarding our treatment of information.

### Final report

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- 4.9 If we receive no submissions urging an MIR and are not ourselves minded to make such a reference, we must publish that decision within six months of the market study notice (see paragraph 4.4).<sup>38</sup>
- 4.10 We must within 12 months of publication of a market study notice publish a market study report setting out our findings and the action (if any) we propose to take (paragraph 4.4).<sup>39</sup> In particular, we must decide whether or not to make an MIR (see section 5). The report will contain our reasons for this decision.
- 4.11 Following an EA02 market study we may use our FSMA powers (see paragraphs 3.16 to 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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<sup>36</sup> Sections 131A(2)(b) and (4) EA02

<sup>37</sup> Sections 131A(5) and (6) EA02

<sup>38</sup> Section 131B(3) EA02

<sup>39</sup> Section 131B(4) EA02

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

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

### **The 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').<sup>40</sup> 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). 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<sup>41</sup>:
- the structure of the market concerned or any aspect of that structure
  - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned
  - 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 the whole of each market concerned.<sup>42</sup> The legal criteria for an ordinary reference or a

<sup>40</sup> Section 131(1) EA02

<sup>41</sup> Section 131(2) EA02

<sup>42</sup> Sections 131(2A) and (6) EA02

cross-market reference are the same (see paragraph 5.1), although only features that relate to conduct can be the subject of a cross-market reference.<sup>43</sup>

- 5.5 We have the power to make an MIR if the applicable legal test is met, even without having completed an EA02 market study. However, if we propose to do this, we must consult any persons on whose interests we consider making an MIR would have a substantial impact.<sup>44</sup>

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

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- 5.6 A market investigation entails detailed examination by the CMA of whether there is an adverse effect on competition in the market(s) referred and, if so, what remedial action may be appropriate. Following its investigation, the CMA has a duty to take such action as it considers reasonable and practicable to remedy any adverse effect on competition it identifies, which may include behavioural and/or structural remedies.
- 5.7 While we have powers under 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)<sup>45</sup> in deciding whether or not to make an MIR, i.e. we expect to make an MIR where all of the following criteria are met:
- It would not be more appropriate to deal with the competition issues identified by applying CA98 or using other powers available to us.
  - It would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference (see paragraphs 5.9 to 5.12).
  - The scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it.
  - There is a reasonable chance that appropriate remedies will be available.<sup>46</sup>

### Undertakings in lieu of a reference

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- 5.9 Section 154 EA02 gives the FCA the power to accept undertakings instead of making an MIR. In exercising this power we must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any adverse effects on competition identified (and any detrimental effects on customers so far as they result or

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<sup>43</sup> Sections 131(1) and(2A) EA02

<sup>44</sup> Section 169 (2) EA02

<sup>45</sup> *Market Investigation References: Guidance about the making of references under Part 4 of the Enterprise Act* paragraph 2.1. [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284399/oft511.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf)

<sup>46</sup> The CMA's powers to impose remedies are described in the CMA's *Market investigations guidelines*: CC3, Part 4. [www.gov.uk/government/publications/market-investigations-guidelines](http://www.gov.uk/government/publications/market-investigations-guidelines)

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.<sup>47</sup> We must consider any representations arising from the publication of the notice. There is a power for the Secretary of State to intervene at this stage if he or she believes that wider public interest matters are relevant to the case. The Secretary of State is able to block the acceptance of undertakings in lieu when he or she believes that a public interest consideration specified in the legislation (currently only national security) is relevant. In such a case, the outcome may be other undertakings in lieu of a reference.
- 5.12 When an undertaking in lieu is accepted, we may not make an MIR involving the same services for a period of 12 months unless we consider the undertaking has been breached or we have been given false or misleading information by the person responsible for giving the undertaking.

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<sup>47</sup> The list of all the points to be included in such notices is given in section 155(2) EA02.

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

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

### Information gathering

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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.<sup>48</sup>

#### 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.<sup>49</sup> It is a

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<sup>48</sup> See paragraph 3.8 and footnote 21 above with regard to our data strategy.

<sup>49</sup> Section 177 FSMA

criminal offence for a person to falsify, conceal, destroy or otherwise dispose 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.<sup>50</sup>

### EA02

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

- to give notice requiring any person to attend a specified place to give evidence to the 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<sup>51</sup>

6.7 We can use these powers against any person, whether or not they carry out activities that we regulate.<sup>52</sup>

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.<sup>53</sup>

6.9 It is a criminal offence for a person intentionally to alter, suppress or destroy any document which the person has been required by notice to produce.<sup>54</sup> 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.<sup>55</sup>

6.10 Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).<sup>56</sup> Persons committing a criminal offence are liable, on summary conviction, to an unlimited fine, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.<sup>57</sup>

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<sup>50</sup> Section 177 FSMA

<sup>51</sup> Section 174(1)(a) and sections 174(3) to (5) EA02

<sup>52</sup> Section 174 EA02

<sup>53</sup> Sections 174A(1) to (3) EA02

<sup>54</sup> Section 174A(4) EA02

<sup>55</sup> Sections 174A(4) and (5) EA02

<sup>56</sup> Competition and Markets Authority (Penalties) Order 2014 (SI 2014/559)

<sup>57</sup> Section 174A(6) EA02 and section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act.

- 6.11 The FCA is under a statutory obligation to issue its own statement of policy for penalties under section 174A(1) to (3) EA02. For the sake of consistency with the CMA, the practice of other concurrent regulators in relation to such penalties<sup>58</sup> 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.<sup>59</sup>

### Use and disclosure of information by the FCA

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- 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 CA98.<sup>60</sup>
- 6.13 The framework for our disclosure of information that we receive or obtain will be determined by the context in which it has been provided to, or obtained by, us and under which legislation. In particular, whether we carry out a FSMA market study or an EA02 market study will affect the framework for disclosure of information received by us in the context of that study.

### FSMA

- 6.14 When we receive information for the purposes of, or in discharge of, our statutory functions under FSMA, e.g. a FSMA market study, which is not in the public domain and relates to a person's business or other affairs, the information will be 'confidential information' under section 348 FSMA. Information which is already publicly available, or which is aggregated in a format so that it cannot be attributed to a particular firm or individuals, is excluded from the definition of confidential information in FSMA.
- 6.15 However, when we receive information for the purposes of, or in discharge of, our concurrent functions, the disclosure of this information is expressly excluded from the FSMA regime and will instead be dealt with under the rules set out in EA02. In other words, information received by the FCA for the purposes of or in discharge of its concurrent functions can only be disclosed by the FCA under Part 9 EA02, not under FSMA (see paragraphs 6.18 to 6.20).<sup>61</sup>
- 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

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<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> However, there may be restrictions on our use of information if we receive it from other authorities.

<sup>61</sup> Section 348(7) FSMA



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 Gateway Regulations.<sup>62</sup> 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.<sup>63</sup> This imposes a general restriction on the disclosure of information relating to the affairs of an individual or any business of an undertaking which we obtain during the exercise of our EA02 functions (referred to as 'specified information') to other persons.<sup>64</sup> The restriction applies during the lifetime of an individual or while the undertaking continues in existence (for the individual or business to which the specified information relates, respectively). Only disclosure falling within one of the 'information gateways' is permitted, as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents<sup>65</sup> or where the disclosure is made for the purpose of facilitating the exercise of any of our statutory functions.<sup>66</sup>
- 6.19 Even when Part 9 of EA02 and one of its information gateways apply, we must have regard to certain considerations before making a disclosure. In particular, we must have regard to the three considerations set out in section 244 EA02:
- The need to exclude from disclosure (so far as it is practicable to do so) any information whose disclosure we consider to be contrary to the public interest.
  - The need to exclude from disclosure (so far as practicable) commercial information we consider might significantly harm the legitimate business interests of the undertakings; or information relating to the private affairs of an individual which we think might significantly harm that individual's interests.
  - The extent to which the disclosure of information relating to the private affairs of an individual or of commercial information is necessary for the purpose for which we are permitted to make the disclosure.
- 6.20 We will apply these three considerations on a case-by-case basis when we are considering disclosure of specified information.

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<sup>62</sup> Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)

<sup>63</sup> Section 348(7) FSMA

<sup>64</sup> Section 237 EA02

<sup>65</sup> Section 239 EA02

<sup>66</sup> Section 241 EA02

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

### **Transparency**

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