

## Draft Guidance

**Draft Guidance on the PSR's approach as a competent authority for designation of alternative switching schemes under the Payment Accounts Regulations 2015**

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# 1 Overview

This guidance sets out the PSR's approach to designating alternative switching schemes, as set out in the Payment Accounts Regulations 2015 (the PARs), and our approach to monitoring their compliance with the PARs.

It also includes guidance on our powers and processes under the PARs, and guidance on penalties for non-compliance with the PARs.

## Introduction

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- 1.1 On 23 July 2014, the European Parliament and the Council of the European Union adopted the Payment Accounts Directive (PAD), which was published in the Official Journal of the European Union on 28 August 2014.<sup>1</sup>
- 1.2 PAD sets common regulatory standards across EU Member States that must be met in order to:
  - improve transparency and comparability of current account fees
  - facilitate current account switching
  - ensure access to bank accounts with basic features
- 1.3 The UK government consulted with industry on the implementation of PAD<sup>2</sup> and subsequently published the Payment Accounts Regulations 2015 (the PARs) in December 2015<sup>3</sup>, which transpose the EU directive into UK law.
- 1.4 Part 3 of the PARs requires payment system providers (PSPs) to provide a switching service for payment accounts (see Chapter 2 of this guidance for clarification on the requirements for PSPs to provide a switching service and payment accounts that may be in scope).
- 1.5 PSPs can satisfy that requirement:
  - by providing a switching service which meets the requirements of Schedule 3 of the PARs
  - or by being a member of an alternative switching scheme designated by the PSR as meeting the requirements of Regulation 15(2) of the PARs.
- 1.6 In this Guidance we refer to alternative arrangements as “alternative switching schemes” and “designated switching schemes”.

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<sup>1</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL\\_2014\\_257\\_R\\_0008](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_257_R_0008)

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/477200/PAD\\_consultation\\_responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477200/PAD_consultation_responses.pdf)

<sup>3</sup> [http://www.legislation.gov.uk/uksi/2015/2038/pdfs/ukxi\\_20152038\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/2038/pdfs/ukxi_20152038_en.pdf)

## **Our role as a UK competent authority for the PARs**

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- 1.7 PAD requires EU Member States to designate national “competent authorities” with investigation and enforcement powers to ensure that the rules are applied, with adequate resources to do so.<sup>4</sup>
- 1.8 In the UK, the Treasury has appointed the FCA as the competent authority for PAD to ensure that PSPs offer their customers a switching service between payment accounts denominated in the same currency.
- 1.9 The PSR is the competent authority for designating any alternative switching schemes, for ensuring that they continue to meet the requirements for designation, and for taking any enforcement action.
- 1.10 We cannot provide a definitive interpretation of the PARs or the PAD. That is ultimately a matter for the courts. We can only set out our approach when acting as the relevant competent authority in the UK.
- 1.11 The provisions of the PARs which relate to the PSR’s role come into force on 18 September 2016.

## **The purpose of this document**

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- 1.12 This document explains PSR’s approach in relation to our functions under the PARs.
- 1.13 This guidance represents our intended practice at the date of publication, but it may be revised from time to time to reflect changes in best practice. We will consult on any revised guidance before its implementation.
- 1.14 This guidance provides for flexibility in its application. This means that we will have regard to the guidance when exercising our functions under the PARs, but that when the facts of an individual case reasonably justify it, we may adopt a different approach.<sup>5</sup>
- 1.15 We may issue general guidance from time to time on substantive or operational matters, where we believe information or advice is needed. This may include any matters relating to our functions under the PARs.<sup>6</sup>
- 1.16 This guidance will be of interest to potential operators of alternative switching schemes, and the PSPs who participate or propose to participate in them.
- 1.17 The guidance includes:
- the designation criteria
  - the application process
  - our approach to monitoring compliance of designated services
  - our fees
  - our powers and processes under the PARs

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4 PAD, Article 21.

5 This is also in line with our statutory powers which recognise that “directions and requirements given or imposed may differ as between different applications” PARs Schedule 4, paragraph 2(3)

6 PARs Schedule 4, paragraph 14

- penalties under the PARs

1.18 The guidance does not attempt to describe all provisions of the PARs in detail. Please refer to the text of the legislation for a complete description of the PSR's statutory functions and powers under the PARs.

## 2 Alternative arrangements for switching

This chapter describes:

- What a switching service is
- What an alternative switching scheme is
- Who the competent authority is in each case

- 2.1 PSPs have an obligation to provide a switching service between payment accounts denominated in the same currency. The PARs set out the requirements that a switching service must comply with in terms of the responsibilities of the transferring PSP (which the consumer is switching away from), and the receiving PSP (which the consumer is switching to).
- 2.2 PAD provides that EU Member States may establish or maintain alternative measures for switching provided that they meet certain criteria. The PARs define such measures as ‘alternative arrangement[s]’ for switching<sup>7</sup>. PSPs can choose to fulfil their obligation to provide switching services by being a member of a designated switching scheme.
- 2.3 The purpose of this chapter is to clarify the difference between switching services offered by a PSP, and an alternative switching scheme.

### What is a switching service?

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- 2.4 Under the PARs, ‘switching’ (or ‘switching service’) means “upon a consumer’s request, transferring from one PSP to another either the information about all or some standing orders for credit transfers, recurring direct debits and recurring incoming credit transfers executed on a payment account, or any positive payment account balance from one payment account to the other, or both, with or without closing the former payment account”.<sup>8</sup>
- 2.5 A switching service must be offered between payment accounts in scope of the PARs that are denominated in the same currency and opened or held with a PSP in the UK. Switching services provided by PSPs must comply with the requirements in Schedule 3 of the PARs<sup>9</sup> concerning, broadly, authorisation by the consumer, tasks for the transferring and receiving PSPs, and fees. The FCA has published draft guidance on its approach to regulating switching services.<sup>10</sup>

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<sup>7</sup> PARs, Regulation 15

<sup>8</sup> PARs, Regulation 2

<sup>9</sup> PARs, Schedule 3, paragraph 14(2)

<sup>10</sup> <https://www.fca.org.uk/static/fca/article-type/consultation%20paper/cp16-07.pdf>. When we publish our final guidance we propose to provide a link to the FCA’s final guidance.

- 2.6 The term 'payment account' is defined in PAD as "an account held in the name of one or more consumers which is used for the execution of payment transactions".<sup>11</sup> The PARs define this further as "an account held in the name of one or more consumers through which consumers are able to place funds, withdraw cash and execute and receive payment transactions to and from third parties, including the execution of credit transfers, but does not include any of the following types of account provided that the account is not used for day-to-day payment transactions: savings accounts; credit card accounts where funds are usually paid in for the sole purpose of repaying a credit card debt; current account mortgages or e-money accounts".<sup>12</sup>

## **What is an alternative switching scheme?**

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- 2.7 A designated switching scheme is a scheme that the PSR has designated as such, having met the criteria set out in Regulation 15(2) of the PARs. These are referred to in Chapter 3 of this guidance.
- 2.8 PSPs who are party to a designated switching scheme are exempt from the requirements in Schedule 3 of the PARs, provided that:
- they remain party to that designated switching scheme<sup>13</sup>; and
  - a switch is initiated and completed between two PSPs which are both members of a designated switching scheme.
- 2.9 Currently some PSPs are members of the Current Account Switch Service (CASS), which is operated by Bacs. PSR anticipates that CASS will apply to be designated as an alternative switching scheme. Firms which are not members of CASS will be required to develop a switching service which complies with the PARs. Firms which are CASS members will have to meet the PARs requirements associated with completing a switch where the receiving or sending firm is not a member of CASS.

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<sup>11</sup> PAD, Article 2(3)

<sup>12</sup> PARs, Regulation 2

<sup>13</sup> PARs, Regulation 14(2)



# 3

## Designation criteria for alternative switching schemes

This chapter explains when a switching scheme can be designated as an alternative arrangement. It must:

- be clearly in the interest of the consumer
- impose no additional burden on the consumer
- enable the switch to be completed within a specified timeframe.

This chapter also describes the information applicants should provide to help us assess their compliance with the three designation criteria.

- 3.1 The PARs provide that three criteria must be met by a scheme in order for it to be designated as an alternative switching scheme.<sup>14</sup> The scheme:
- a. is clearly in the interest of the consumer
  - b. does not impose upon the consumer any burden additional to those imposed upon the consumer by paragraphs 2 to 6 of Schedule 3 of the PARs
  - c. ensures that the procedure for switching is completed at least within the same overall timeframe that applies in the case of a switching service that meets the requirements of paragraphs 2 to 6 of Schedule 3 of the PARs
- 3.2 In this chapter we describe our approach to the assessment of schemes against these three criteria, and the information we will seek from the applicants for that purpose. Applicants should provide this information at the time of application, along with any supporting material.
- 3.3 We may take into account other information we hold in relation to services provided by the applicant. We may seek clarification of any information provided, and ask for additional information from the operator if we consider it necessary. We also have the power to ask for information directly from the members of the scheme, or other relevant parties for the purpose of fulfilling our functions under the PARs.<sup>15</sup>

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<sup>14</sup> PARs, Regulation 15(2)

<sup>15</sup> PARs, Schedule 4, paragraph 7

## **a. The switching service is clearly in the interest of the consumer**

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- 3.4 The legislation does not define, or provide any guidance, as to the test required for assessing 'the switching service is clearly in the interest of the consumer'.
- 3.5 We will consider what is likely to be clearly in the interest of the consumer on a case by case basis. We do not intend to set specific performance standards for switching services seeking to be designated as alternative arrangements. In general, we would expect the performance of an alternative switching scheme to be no worse than that of switching services required by the PARs<sup>16</sup> and the benefits it provides to be at least equivalent to those provided by switching services. However we recognise that, while a comparison with switching services may be useful to a degree, it would not necessarily indicate whether or not the consumer interest test is met.
- 3.6 We consider that some qualitative assessment is appropriate when assessing whether a service meets the consumer interest test.
- 3.7 We will determine whether the switching scheme operates in the interest of the consumer by assessing the evidence provided by the operator, and any supplemental information we may request.
- 3.8 Applicants must present a case explaining how their switching scheme operates in the interest of the consumer.
- 3.9 All applicants should submit the rules of their switching service and any guidance relating to it.<sup>17</sup>
- 3.10 To assist in our assessment under the consumer interest test, applicants should also provide the following information:
- 3.11 For schemes existing before 18 September 2016
- The total number of switches made over the 12 months preceding the date of the application.<sup>18</sup>
  - The average consumer confidence scores over the last year (including customer awareness and satisfaction). The operator should be able to provide us with the process it has in place to measure consumer satisfaction. This can be in the form of a survey or the number of complaints dealt with by the operator.
  - The number of instances compensation was paid to consumers due to a switching error, and the total value of this compensation.
  - Information on switching system outages over the last year.
  - The process that the operator (or its members) has in place to deal with consumer complaints.
- 3.12 Applicants should explain how they have addressed any potential concerns arising from the evidence supporting their application. For example, if the evidence shows a large number of complaints of a particular type, the operator should explain what action it has taken and the anticipated effect of such action.

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<sup>16</sup> Schedule 3 of the PARs

<sup>17</sup> PARs Schedule 4, paragraph 2(5)

<sup>18</sup> Prospective applicants may contact the PSR in advance to discuss the beginning and end dates of the 12 month period

3.13 Schemes that propose to start operating after 18 September 2016 should present any other relevant material or evidence to support their application.

**b. The switching service does not impose upon the consumer any burden additional to those imposed by paragraphs 2 to 6 of Schedule 3 of the PARs**

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3.14 The PARs require that the service provided by a designated switching scheme does 'not impose upon the consumer any burden additional to those imposed by paragraphs 2 to 6 of Schedule 3' of the PARs. The PARs provide that:

- The consumer must authorise the transferring and receiving PSPs to carry out their tasks in the switching process. The PARs allow consumers to identify incoming credit transfers, standing orders for credit transfers and direct debits, and to specify the date on which these should be executed from the new account.
- The consumer can specifically request that the transferring PSP transmits a list of existing credit transfers, standing orders and direct debits to the consumer (as well as to the receiving PSP). The receiving PSP is able to request from the consumer any further information needed to inform payers and payees of the change to the consumer's payment account. Alternatively, the consumer can choose to provide this information directly to his or her payers and payees.
- The transferring PSP is responsible for :
  - exchanging relevant information for standing orders and direct debits
  - redirecting and no longer accepting incoming credit transfers and direct debits
  - cancelling outgoing standing orders and transferring any positive account balance
  - closing the old payment account
- The receiving PSP has responsibility for:
  - setting up standing orders for credit transfers
  - making necessary preparations for accepting direct debits
  - informing payers and payees who make recurring credit transfers to and direct debits from the consumer's account about the change and requesting the relevant information to enable it to do so.
- PSPs must, on request, provide consumers with details of their standing orders and direct debits free of charge. Transferring or receiving PSPs may charge for other services, subject to some restrictions<sup>19</sup>, that they undertake as part of the switching process, provided the fee is reasonable and does not exceed the actual cost of carrying out the relevant task.

3.15 On the basis of these requirements, the assessment of 'no additional burden' has two key strands to it:

- no additional burden in terms of consumer obligations; and

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<sup>19</sup> PARs, Schedule 3, paragraph 6(4)

- no additional burden in terms of consumer fees.
- 3.16 Applicants should demonstrate that their alternative switching scheme is no more burdensome than the requirements of paragraphs 2 to 6 of Schedule 3 of the PARs.
- 3.17 Applicants should provide evidence to support their application, and to help us with our assessment. Such information may include:
- Obligations imposed upon consumers during the switching process (for example documents to be signed with each PSP involved in the switching process).
  - The number of times that a consumer is required to contact the transferring or receiving PSP during a switch, and the reasons for each contact.
  - The fees or charges incurred by the consumer in using the switching service operated by the scheme.

**c. The switching service, provided by the scheme, ensures that the procedure for switching is completed at least within the same overall timeframe (12 business days) that applies in the case of a switching service that meets the requirements of paragraphs 2 to 6 of Schedule 3 of the PARs**

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- 3.18 Applicants should set out the timeline of the services provided by the switching scheme, together with individual members' responsibilities (as set out in their schemes rules), and demonstrate that this is consistent with the PARs requirements. The application should also discuss any potential risks to this timeline, and any processes in place to help prevent or mitigate the frequency and magnitude of these risks.
- 3.19 Where historic evidence over a period of 12 months or more is available, applicants should provide this to support their application and to help us with our assessment. Where available, evidence may include:
- The target number of days for switching, how frequently that target is exceeded and, if exceeded, by how many days on average.
  - The number of switches made successfully within the 12 day limit, and what proportion this is of total switches.

**For new schemes to be designated post 18 September 2016**

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- 3.20 The applicant will need to provide sufficient detail explaining how the alternative switching service they propose to operate meets the criteria set out in Regulation 15(2) of the PARs and provide the proposed rules of their service, any guidance relating to it and details of the proposed scope and membership of the scheme.

## 4 Applying for designation

This chapter explains:

- who can apply for designation
- how to apply
- how to get a designation certificate
- why an application may be refused
- why an existing designation may be cancelled

### Who can apply for designation?

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- 4.1 Any person may apply to us to designate their switching service as an alternative arrangement.<sup>20</sup>
- 4.2 We will publish notices of applications for designations.

### How to apply to us for designation

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- 4.3 Applicants should send an email to [PARsimplementation@psr.org.uk](mailto:PARsimplementation@psr.org.uk), stating their intention to apply. We will then agree the best way to receive the application in a secure and confidential manner.
- 4.4 Applications must be submitted electronically.
- 4.5 Applicants must submit the following documentation for assessment against the three designation criteria:
- a covering letter which presents the applicant's case for designation
  - a copy of the switching service rules and any guidance relating to it<sup>21</sup>, including details of the specific services that are provided as part of the overall switching service
  - a copy of the code of conduct (or equivalent) specifying any timeframes demanded of member PSPs
  - information demonstrating how the switching service complies (or will comply in the case of schemes established after 18 September 2016) with the three designation criteria outlined in Chapter 3

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<sup>20</sup> PARs, Schedule 4, paragraph 2(1)

<sup>21</sup> As specified in PARs, Schedule 4, paragraph 2(5)

- a declaration signed by an authorised officer of the operator attesting that all information provided is accurate, up to date and not misleading

- 4.6 Applicants must pay an application fee at the time of application, as referred to in Chapter 6.
- 4.7 Applicants who wish to operate as a designated switching scheme when the PARs come into effect on 18 September 2016 must submit their application, including full supporting material, by [10] June 2016. We cannot guarantee that applications made after that date will be processed by 18 September 2016. A switching scheme may continue to operate after 18 September 2016 but PSPs which are members of a non-designated switching scheme will need to meet their obligations under Regulation 14 of the PARs.
- 4.8 On receipt of the application and supporting information from the operator of a switching scheme, PSR will review the evidence submitted and contact the applicant to discuss any gaps or requirements for further information.

### **Receiving the designation certificate**

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- 4.9 An applicant who provides all the necessary documentation, is assessed and judged by the PSR to have met the three designation criteria and has paid the application fee will receive a designation certificate. The certificate will identify the operator of the alternative switching scheme and declare the scheme to be a designated switching scheme in accordance with the PARs.
- 4.10 The designation certificate will specify the date from which the designation comes into effect. The designation will continue to apply unless we consider it appropriate to cancel the designation. We discuss cancellation in more detail below.

### **Refusal of an application**

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- 4.11 If PSR is not satisfied that an application meets the three designation criteria or the applicant has not paid the application fee at the time of application (see Chapter 6), PSR will not issue a designation certificate. We will write to the applicant explaining the reasons for such a refusal. The applicant has the right to appeal (see Chapter 7).

### **Cancellation of designation**

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- 4.12 The PSR is responsible for monitoring the ongoing compliance of designated alternative switching schemes with the PARs requirements. As part of our monitoring process we will review compliance annually, and at any other time following receipts of complaints (see Chapter 5).
- 4.13 The PSR has the power to cancel a designation certificate at any time if we find that the designated switching scheme no longer meets the PARs requirements. Under these circumstances, PSR will write to the operator of the service stating the reason(s) for the cancellation at least three months before the cancellation takes effect, unless the seriousness of the breach and non-compliance require the cancellation to have immediate effect.<sup>22</sup>
- 4.14 The operator has the right to appeal our decision to the Upper Tribunal (see Chapter 7).
- 4.15 An operator may request that PSR cancels its designation certificate at any time.

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<sup>22</sup> PARs Schedule 4, paragraph 6

## 5 Monitoring compliance with the PARs

In this chapter we describe how the PSR will monitor designated switching schemes to ensure they continue to meet the PARs' requirements. This involves:

- gathering and assessing evidence provided by the operators of designated switching schemes; and
- assessing complaints made to us about a designated switching scheme.

### **Compliance reporting by the operators of designated switching schemes**

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- 5.1 The PSR is responsible for monitoring whether a designated switching scheme continues to meet the designation requirements set out in the PARs. For that purpose we will undertake annual monitoring activities. The purpose of our monitoring will be to identify any problems arising, and what actions the operator(s) is taking to mitigate them. We may ask for more information to help us understand the problems.
- 5.2 Each year, two months before their designation anniversary, the operators of designated switching schemes must submit a Compliance report and other documentation to PSR, to help us monitor compliance. We will review the submissions and confirm whether or not the alternative switching scheme is still compliant with the Regulation 15(2) of the PARs.
- 5.3 As with the initial designation, the majority of the information that we will use for monitoring the compliance of designated schemes will come directly from the operators of the schemes. However, in some instances (such as where we have received a complaint or where the operator does not have the necessary information), we may also require scheme members or other relevant parties to submit information to us directly.<sup>23</sup> PSR has the power to cancel a designation certificate if it finds that the designated switching service is no longer compliant with the three designation criteria set out in Regulation 15(2) of the PARs.<sup>24</sup>

### **Information to support annual compliance monitoring**

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- 5.4 The information needed for monitoring will be similar to that used at the application stage and we will use it to assess whether the scheme remains compliant with the PARs requirements. In some instances, however, we may also require a person<sup>25</sup> to submit information to us directly.

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<sup>23</sup> PARs, Schedule 4, paragraph 6(2)

<sup>24</sup> PARs, Schedule 4, paragraph 6(1)

<sup>25</sup> PARs Schedule 4, paragraph 7

5.5 The information we expect to consider for the annual compliance review would include:

- A covering document explaining how the designated service is still compliant and, in particular, identifying:
  - any changes to the switching service
  - any changes to the rules or code of conduct
  - any practical deviations from the rules or code of conduct, why they have occurred, and the steps that have been taken to address them
- A copy of the switching scheme's latest rulebook and guidance documents.
- A copy of the latest code of conduct (or equivalent) for member PSPs.
- Evidence demonstrating ongoing compliance with the three designation criteria listed in Chapter 3. This evidence will cover the period since the last designation anniversary.

5.6 The list of information is not exhaustive and information requests may vary in individual cases. PSR may seek additional information to address issues raised during the course of the review. We may request any information we reasonably require from an operator or the scheme members (see Chapter 7 for more details).

5.7 If appropriate, PSR has the power to request information from other parties, including member PSPs which we may require in connection with our functions under Schedule 4 of the PARs.<sup>26</sup>

## Complaints handling

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5.8 The PSR will consider complaints we receive from consumers or other affected parties in determining whether or not a scheme should remain a designated switching scheme.

5.9 We would consider complaints that have a bearing on the three designation criteria. Examples of complaints we may investigate may include the following:

- recurring complaints associated with errors in process (e.g. Standing Orders, Direct Debits or balances that were not transferred correctly)
- recurring complaints associated with delays with the service provided by the designated scheme

5.10 We will also seek information on what actions the operator and its members have taken in addressing these complaints.

5.11 We will assess the frequency and severity of the complaints in conjunction with an assessment of the operator's submission. The assessments will be used as part of the process to determine whether or not the operator continues to meet the three designation criteria.

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<sup>26</sup> PARs Schedule 4, paragraph 7(1)



## 6 Fees

The PARs provide for our fee-raising powers in relation to the designation of alternative switching schemes. This chapter sets out our guidance in relation to the practical implementation of our fee-raising powers under the PARs.

### Obligation to pay PSR fees under the PARs

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- 6.1 The PARs enable the PSR to collect two types of fee, a one-off application fee from the operator(s) of any alternative switching scheme who apply to be certified as a designated switching arrangement, and annual fees from the operator(s) of any designated switching scheme.
- 6.2 The annual fee reflects the costs of PSR exercising its PARs functions<sup>27</sup> in relation to the designated switching scheme. For the fee year 2016/17 only, the annual fee will include the PSR's set-up costs in relation to its PARs functions.
- 6.3 Annual fees for the PSR's work under the PARs can be recovered only from the operator of a designated switching scheme.

### Time of payment

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#### Application fee

- 6.4 An applicant applying for designation of an alternative switching scheme must pay the application fee in full and without deduction at the time of making its application as detailed at paragraph 4.11. We will not treat an application as having been made until this fee has been paid by the applicant.<sup>28</sup>

#### Annual fee

- 6.5 The annual fee is only charged once a switching scheme has been designated.
- 6.6 Under the PARs, designated switching schemes must pay the first annual fee to the PSR before the expiry of a 12-month period commencing on the date on which the designation certificate is issued<sup>29</sup>, with subsequent fees due annually before the anniversary of the designation certificate having been issued.

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<sup>27</sup> PARs, Schedule 4, paragraph 5(2)

<sup>28</sup> PARs, Schedule 4, paragraph 4(3)

<sup>29</sup> PARs, Schedule 4, paragraph 5(3) (a)

- 6.7 Annual fees will be invoiced by the PSR in advance, rather than in arrears. Where our costs vary significantly from estimates at the time of the invoice, we will adjust subsequent annual fees as necessary to ensure cost-reflectivity in compliance with PARs<sup>30</sup>.
- 6.8 The first annual fee will be invoiced by the PSR in the four weeks after we issue the designation certificate.
- 6.9 In subsequent years, at least two months before each anniversary of the designation certificate having been issued, the PSR will issue an invoice for the annual fee for the subsequent fee year.
- 6.10 The operator of a designated switching scheme must pay its annual fee in full by the due date which will be before the designation anniversary. In any event, we should receive payment before the designation anniversary.

### **Method of payment**

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- 6.11 An operator of a designated switching scheme should pay its fees by electronic credit transfer and should notify the PSR if it intends to pay in another way.

### **Late payments**

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- 6.12 If an operator of a designated switching scheme does not pay the total amount of its annual fee before the end of the date on which it is due, we will seek to recover it as a debt as well as any additional costs incurred in relation to the late payment of the annual fee.<sup>31</sup>

### **VAT**

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- 6.13 Regulatory fees invoiced directly by the PSR are outside the scope of VAT.

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<sup>30</sup> PARs Schedule 4, paragraph 5(2)

<sup>31</sup> PARs Schedule 4, paragraph 5

# 7

## Other powers and procedures under the PARs

Our powers and procedures regarding the designation of alternative switching schemes are set out in Chapter 3. This chapter sets out information on the other powers of the PSR under the PARs and the procedures that we will generally apply when exercising them.

### Our powers under the PARs

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- 7.1 Under the PARs, we have a range of powers. These include, among others, the powers to<sup>32</sup>:
- request information from a person
  - give a direction to the operator<sup>33</sup>
  - impose financial penalties on the operator
  - apply for an injunction if a person fails to comply with a request for information or the operator does not comply with a direction
- 7.2 This guidance sets out practical information on how we will exercise these powers, where we have determined that it is appropriate to do so.

### Requesting information

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#### Overview of information powers

- 7.3 The PSR has the power<sup>34</sup> to require a person to provide information which we think will help determine whether to issue a designation certificate or which we otherwise require in connection with any of our other functions under Schedule 4 of the PARs.
- 7.4 The PSR might use this power to obtain information to assist, for example, in assessing whether there has been a compliance failure by an operator.
- 7.5 The PSR may request information through a formal written notice which may set out the form or manner in which the information should be provided, a specified time period which this information should cover, and the time in which the information must be provided.
- 7.6 The PSR expects to give recipients of information requests advance notice so that they can manage their resources accordingly. Where it is practical and appropriate to do so, we will send the

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<sup>32</sup> See PARs, Schedule 4, Paragraph 7

<sup>33</sup> "Operator means the operator of a switching service which has been designated as an alternative arrangement" PARs, Schedule 4, paragraph 1

<sup>34</sup> PARs, Schedule 4, paragraph 7(1)

information request in draft, and take account of comments on the scope of the request, the actions that will be required in responding, and the deadline by which information must be provided. In certain circumstances, it will not be appropriate to provide advance notice or to send information requests in draft (for example, if it would be inefficient because the request is for a small amount of information or it relates to a complaint received by the PSR in respect of the service provided by the operator which may need to be assessed promptly).

- 7.7 The notice to provide information will inform the recipient of our right to apply to the court for an order to ensure the recipient's compliance with the information notice. Furthermore, in the case of an operator of an alternative switching scheme, the notice to provide information will inform the operator of our power to impose a financial penalty if the operator does not comply with the notice.

## **Giving a direction to the operator**

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### **Overview of the powers**

- 7.8 We can give directions in writing to an operator for the purposes of ensuring that the switching service continues to meet the requirements of regulation 15(2) of the PARs. Such directions can require or prohibit a specified action in the operation of the designated switching scheme. We can also give directions on standards to be met in the operation of the switching service.
- 7.9 The direction will inform the operator of our power to impose a penalty if the operator fails to comply with the direction, as well as our power to apply to the court for an injunction to ensure that the operator complies with the direction.

### **Deciding whether to give a direction**

- 7.10 Before giving a direction, the PSR will normally send the operator a notice of the proposed direction. That notice will give our reasons for proposing the direction, as well as the next steps and the timescale for representations to be made. Where applicable, the notice will also set out the proposed implementation timescale (that is, the period between the issuing of the direction and its commencement). In urgent cases, the PSR may give directions without giving notice.
- 7.11 When we give notice, we will normally allow 14 days for the operator to make representations in writing. We will take into account the circumstances of each case allowing more time if appropriate or less time in urgent cases. We will consider representations received. If we do not seek a meeting, the operator may request one stating why it is necessary. We will consider such requests and we may decide to convene a meeting.
- 7.12 The PSR might decide to share the draft direction more widely and seek the views of other stakeholders. We will balance the interests of a wider consultation with fairness to the operator and may seek their views before deciding to share the proposed direction. We will take account of representations received in deciding whether to give a direction.
- 7.13 When a decision is taken to give direction, a final notice of a direction or a requirement will be addressed to the operator. Where appropriate to do so, we may publish the direction on our website and bring it to the attention of the relevant persons. We will set out the reasons for the action taken. We will specify the commencement date of the direction.
- 7.14 We will decide whether to publish a direction based on the circumstances of each case. We will balance the interests of transparency in the exercise of our functions and wider awareness of our decisions with fairness to the operator. In deciding whether to publish a direction, we may seek the views of the operator.

## Enforcing compliance with our requirements

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- 7.15 The PSR's powers under PARs to ensure compliance with our requirements include the following:
- we can apply to court for an injunction if an operator fails to comply with a direction or a person has failed to comply with a notice to provide information
  - we can impose financial penalties on operators who fail to comply with a direction or with a notice to provide information
- 7.16 Where PSR imposes a penalty or obtains an injunction, our normal practice will be to publish details of the non-compliance and the measure we have taken. Our normal practice will be to publish the penalty imposed. This is described in more detail in Chapter 8, Statement of penalty principles.
- 7.17 Subject to the decision-making process described below, we may impose a financial penalty in any situation when we have sufficient evidence that an operator has failed to comply with an information notice under Schedule 4, paragraph 7 of the PARs, or has failed to comply with a PSR direction that was addressed to it. An operator might approach us to disclose that it has failed to comply with an information notice or a direction. It might further undertake to change its practice, bring the compliance failure to an end and give assurances on how it will ensure it will comply in future. Any financial penalty in such cases may take into account the fact that the operator has proactively informed us of the compliance failure; see Chapter 8 for more details.

## Imposing financial penalties

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- 7.18 The PSR may impose a penalty either where the operator has failed to comply with a direction or a notice to provide information. We will consider each compliance failure on its merits and determine whether to impose a penalty and, if so, the amount of the penalty. If a penalty is imposed, the payment is payable to the PSR and may be enforced by the PSR as a debt. We may also seek to recover any additional costs incurred in relation to the late payment of the penalty.
- 7.19 We are required to prepare a statement of the principles we will apply in determining whether to impose a financial penalty and the amount of any penalty.<sup>35</sup> This statement is contained in the Chapter 8.
- 7.20 In applying the statement of penalty principles, we must apply the version in force at the time of the failure to comply with the requirements<sup>36</sup> (compliance failure).
- 7.21 We must also review the statement from time to time and revise it if necessary. The latest statement of penalties will be published on our website.

## Enforcement decisions

- 7.22 The PSR Enforcement Decisions Committee (EDC) will decide whether to impose a financial penalty for failure to comply with a direction or information notice issued under PARs, where it is satisfied that a compliance failure has been committed.
- 7.23 The EDC is a committee of the PSR Board. EDC members are appointed by the PSR Board on the basis of their relevant experience and expertise. In each case, the three-person decision-making panel is formed of the EDC Chairman (or, in their absence, the Deputy Chairman) and two other

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<sup>35</sup> PARs, Schedule 4, Paragraph 9(3)

<sup>36</sup> PARs Schedule 4, paragraph 9; PARs Schedule 4, paragraph 11

EDC members selected by the EDC Chairman. The EDC panel is separate from the case team that investigated and decided that a compliance failure had been committed and recommended to the EDC that enforcement action be taken. The EDC has its own legal advisers and support staff, who may themselves be PSR staff.

***Issuing a warning notice in financial penalty cases***

7.24 If we consider that it is appropriate to impose a financial penalty for non-compliance, we will issue a warning notice. The warning notice will be issued before the operator is required to make the penalty payment.

***Deciding whether to issue a warning notice***

7.25 The decision to issue a warning notice is made by the EDC.

7.26 In deciding to issue a warning notice, the EDC will

- settle the wording of the warning notice
- set out the terms of the warning notice, for example:
  - the time the operator has to make representations (at least 21 days)
  - who the operator should address representations to
  - the format, content and length of representations
  - whether the operator should be given any material relevant to the issue of the notice

7.27 If the EDC decide to issue a warning notice, we will make appropriate arrangements for the notice to be given.

***Contents of the warning notice***

7.28 The warning notice will set out details of the compliance failure it relates to and the PSR's proposal to impose a financial penalty. The warning notice will state the factual and legal basis for the proposed action and the PSR's reasons for proposing it.

7.29 If the PSR proposes to publish details of any proposed financial penalty, this will be included in the wording set out in the warning notice.

***Access to underlying material***

7.30 There is no statutory requirement to provide a recipient of a warning notice with any material, such as written submissions and documents that we considered when deciding to issue a notice. However, we will consider in each case whether it is appropriate to provide it – for example, whether access to underlying material is necessary for the recipient to understand the case against it.

7.31 If documents or submissions are covered by our confidentiality obligations, such material will only be provided to the recipient of the warning notice where there is lawful authority to do so. For example, this could be where we have received the consent of the person who supplied the information and from the person the information is about.

### ***Making representations to the EDC***

- 7.32 Once a warning notice has been issued, the recipient will have at least 21 days to make representations to the EDC in writing.
- 7.33 The format and content of any representations is a matter for the recipient of the warning notice. However, the representations should be confined to the material necessary for the EDC's determination of whether the factual and legal basis for the proposed action is correct and whether the proposed action is appropriate. Representations should clearly identify the facts, legal grounds or reasons for contesting the proposed action. Representations should be as concise as possible.
- 7.34 A recipient of a warning notice may apply to the EDC for an extension of the time to make representations, stating why it is necessary and why it is not possible to respond adequately in the period already provided.
- 7.35 A single member of the EDC will decide whether to grant an extension. In considering the application, they will balance the interests of fairness to the applicant and those of procedural efficiency.
- 7.36 If the recipient of a warning notice indicates that they wish to make oral representations, the EDC staff in conjunction with the Chairman or a Deputy Chairman of the EDC, will arrange a meeting (an oral hearing) at which the relevant decision-making panel to receive those representations.
- 7.37 The EDC Chairman or Deputy Chairman will be the Chair of the oral hearing. They will specify the running order and timings and ensure that representations run to time. They may also intervene if oral representations merely reiterate or restate representations previously made in writing, or do not meaningfully advance the EDC's understanding of those representations. Any member of the decision-making panel may pose questions to the operator making the oral representations to clarify the representations being made.

### ***The final decision of the EDC***

- 7.38 If representations were made, the EDC will consider those representations when reaching its decision on whether it is appropriate to impose a financial penalty.
- 7.39 If no representations were made, the EDC will generally regard as undisputed the matters set out in the warning notice. In such circumstances, the decision to impose a financial penalty can be taken by the EDC Chairman or Deputy Chairman alone, without the need to convene or consult all the other members of the decision-making panel, if the EDC Chairman or Deputy Chairman so determines.
- 7.40 If the EDC decides to impose a financial penalty, it will determine the amount of any penalty. See Chapter 8 of this document, which contains our statement of the principles we will apply in determining whether to impose a penalty and the amount of that penalty.

### ***Communication of the EDC's decision***

- 7.41 Following the decision of the EDC, we will, as soon as reasonably practicable, give the operator a written notice of our decision (the 'decision notice') stating whether or not we will impose a financial penalty for the compliance failure and, if so, the amount of that penalty.
- 7.42 When the EDC decides to impose a financial penalty for a compliance failure, the decision notice will state the penalty amount and the payment date, which will typically be 14 days following the issue of the decision notice.

7.43 We will make appropriate arrangements for the collection of the financial penalty.

### **Settlement decision processes for financial penalty cases**

- 7.44 Settlement has many potential advantages, including the saving of the operators' resources and our own, and the prompt communication of compliance messages to the payments industry. As such, we consider that it is normally in the public interest for matters to be settled, and early, if possible.
- 7.45 Accordingly, an operator may settle with us by agreeing to the imposition of a financial penalty for a compliance failure, rather than contesting our decision.
- 7.46 Settlements are still regulatory decisions. We would not normally agree to detailed settlement discussions until we have a sufficient understanding of the nature and gravity of the suspected compliance failure to make a reasonable assessment of the appropriate outcome. However, an operator may enter into settlement discussions with us at any time, if we both agree.
- 7.47 Settlement discussions between the operator and us are likely to revolve around the discussion of a draft warning notice based on evidence obtained by us, or on sufficient agreed facts to support a regulatory decision.
- 7.48 Settlement decisions must be taken jointly by two settlement decision makers (SDMs), who will be senior PSR staff. Neither of the SDMs will have been directly involved in establishing the evidence on which the settlement decision is based. The SDMs may, but need not, participate in settlement discussions between the operator and the PSR.
- 7.49 The SDMs may accept the proposed settlement by deciding to issue a warning notice. Alternatively, they may decline the proposed settlement, in which case settlement discussions might continue.
- 7.50 The warning notice will constitute our proposed decision about the compliance failure and will set out the details of the non-compliance and the financial penalty that we propose to impose.
- 7.51 Once a warning notice has been issued and the operator has confirmed that it agrees with its contents, the SDMs will conclude the settlement by deciding to issue a final decision notice. The decision notice constitutes our regulatory decision about that compliance failure.
- 7.52 In recognition of the benefits and savings afforded by settlement, the financial penalty specified in the warning notice may be reduced to reflect the timing of the settlement (that is, the stage of the process when settlement is concluded).
- 7.53 The amount of the financial penalty specified in the warning notice will take into account all the factors in our statement of penalty principles (see Chapter 8) apart from the settlement discount that will be applied if the settlement is concluded. If a settlement is concluded, the discount will be detailed in the decision notice.
- 7.54 Where the EDC issue a warning notice, compliance failure proceedings may still be settled, if appropriate. In these circumstances, settlement discussions will still be carried out by our staff and decisions made by the SDMs. Consequently, if the settlement discussions break down and the matter proceeds through a contested administrative process through the EDC, the EDC will not be told about any admissions or concessions made during settlement discussions.



## Applying for an injunction

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- 7.55 We can also enforce some of our regulatory decisions by applying to the court for injunctive relief.<sup>37</sup> Our powers to seek injunctions apply in relation to a person who has failed to comply with a notice to provide information, or to the operator of a designated switching scheme who has failed to comply with a direction.
- 7.56 In making a decision to apply to the court, we will consider whether the legal test that the court will apply is met, as well as the nature, impact and seriousness of the non-compliance and whether injunctive relief is appropriate.
- 7.57 On our application, the court may make an order requiring the person or operator to take steps to remedy the non-compliance or mitigate its effect<sup>38</sup>, if it is satisfied that there has been non-compliance and those steps could be taken to remedy it or mitigate its effect. The steps may include:
- requiring a person to provide us with information we required, or
  - requiring the operator to comply with a direction, or
  - requiring the operator or other person to take the steps the court directs to remedy the non-compliance.

## The right to appeal

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- 7.58 Paragraph 12 of Schedule 4 of the PARs sets out the circumstances in which affected parties can appeal to the Upper Tribunal against our decisions:
- where we have refused any application for a designation certificate;
  - where we have given notice that the PSR intends to cancel a designation certificate; or
  - where we require an operator to pay a penalty under paragraph 9 of Schedule 4 for failing to comply with an information notice or a direction.
- 7.59 In determining an appeal, the Tribunal must apply the same principles as would be applied by a court on an application for judicial review.
- 7.60 Our decisions under the PARs, like all administrative decisions, can be the subject of judicial review by the courts.

### *Transparency*

- 7.61 It will be our normal practice to publish:
- Details of any designation made;
  - A penalty imposed by the EDC on operators and details of the compliance failure that lead to it;
  - Details of a compliance failure that we are satisfied that has taken place but which we do not propose to refer the matter to the EDC to impose a penalty

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<sup>37</sup> PARs Schedule 4, paragraph 11

<sup>38</sup> PARs Schedule 4, paragraph 11(2)

- Details of any injunction obtained

7.62 Before publishing any of the details mentioned above we will consider whether publication is appropriate and will balance this with considerations of fairness to the parties concerned.

## Contacting us

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### Complaints (about non-compliance)

7.63 If you want to make a complaint about an operator's breach of the requirements under regulation 15(2) PARs or a PSR direction made under the PARs, you can contact us by post (address below) or by email to: [PSRcomplaints@psr.org.uk](mailto:PSRcomplaints@psr.org.uk).

### For general purposes

7.64 You can contact us for general purposes (for example, to provide us with information which is likely to be of relevance to our work, or to request a meeting) by post or by email to: [contactus@psr.org.uk](mailto:contactus@psr.org.uk).

7.65 We will endeavour to respond to all general enquiries or correspondence seeking a response within 12 working days of receipt.

### Our postal address

7.66 You can contact us by post at:

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

# 8

## Statement of penalty principles under the Payment Accounts Regulations 2015 (PARs)

### Introduction

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- 8.1 This chapter sets out our statement of penalty principles. It covers penalties for non-compliance with PSR directions or formal information requests.
- 8.2 In this document a 'compliance failure' means a failure by an operator to comply with:
- a notice to provide information issued under paragraph 7, Schedule 4 of the PARs
  - a direction given by the PSR under paragraph 8, Schedule 4 of the PARs
- 8.3 This chapter contains our statement of the principles which we will apply in determining whether to impose a penalty; and the amount of that penalty. We are required to prepare this statement of principles under Paragraph 9 (3), Schedule 4 of PARs
- 8.4 Details of the processes that we will generally apply in relation to our compliance functions under PARs, including rights of appeal, are set out in Chapter 7.
- 8.5 We will have regard to this statement of principles:
- in respect of any compliance failure which occurred, or is continuing, on or after 18 September 2016
  - in deciding whether to impose a penalty
  - in determining the amount of any penalty
- 8.6 We will apply this statement of principles in respect of all operators of switching services which have been designated as alternative arrangements. We may, from time to time, revise this statement of principles. Any revised statement will be issued for consultation and published.

### Deciding whether to impose a penalty

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- 8.7 We will consider the full circumstances of each individual case when determining whether or not to impose a financial penalty.
- 8.8 Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive, and not all of these factors may be applicable in a particular case. There may also be other factors, not listed here, that are relevant in an individual case. The factors we may consider include:
- the nature, seriousness, duration, frequency and impact of the compliance failure
  - the behaviour of the operator after the compliance failure has been identified

- the previous compliance history of the operator
- what we had said in any guidance or other materials published by us which were current at the time of the behaviour in question
- action to be taken by another competent authority: where a competent authority proposes to take action in respect of the same compliance failure which is under consideration by us, or one similar to it, we will consider whether the other competent authority's action would be adequate to address our concerns, or whether it would be appropriate for us to take our own action
- the extent to which there is uncertainty or complexity in the interpretation of a PARs prohibition or requirement, where the issue has not been the subject of previous guidance or statements by the PSR or another competent authority or by the courts

8.9 Where we impose a financial penalty, our normal practice will be to also publish details of the compliance failure. We will only refrain from publishing details of a financial penalty in exceptional circumstances.

### **Determining the appropriate level of the financial penalty**

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8.10 Our penalty-setting regime is based on the following general principles:

- **Disgorgement:** Operators should not benefit from any compliance failure.
- **Discipline:** Operators should be penalised for wrongdoing.
- **Deterrence:** To deter the operators who commit compliance failures, and other operators, from committing them in future.

8.11 The total penalty amount payable may be made up of two elements: (i) disgorgement of the benefit received as a result of the compliance failure; and (ii) a financial penalty reflecting the seriousness of the compliance failure. These elements are incorporated in the framework below. We recognise that the overall penalty arrived at must be appropriate and proportionate to the failure.

### **Our framework in detail**

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8.12 The factors and circumstances relevant to determining the appropriate level of penalties set out below are not exhaustive. Not all of the factors or circumstances listed will necessarily be relevant in a particular case and there may be other factors or circumstances not listed which are relevant.

#### **First element – disgorgement**

8.13 We will seek to deprive an operator of the economic benefit derived directly from, or attributable to, the compliance failure (which may include any profit made or loss avoided) where it is practicable to quantify this. We may also charge interest on the disgorgement.

8.14 Where an operator agrees to carry out a remedial programme (which may include redress to compensate those who have suffered a loss or not realised a profit as a result of the compliance failure), we will take this into consideration. In such cases the final penalty might not include a disgorgement element, or the disgorgement element might be reduced.

## Second element – the penalty

### *Step 1 – the seriousness of the compliance failure*

- 8.15 The penalty is calculated separately from, and in addition to, any disgorgement. We will determine a figure for the penalty that reflects the seriousness of the compliance failure. In many cases, the amount of revenue generated by an operator from a particular business activity is indicative of the harm or potential harm that its compliance failure may cause. In such cases we will determine a figure which will be based on a percentage of the annual gross revenues derived by the alternative switching arrangement service operator from the business activity in the UK to which the compliance failure relates.<sup>39</sup> Where appropriate we may consider an operator's associated 'billings' (i.e. the revenues invoiced to third parties) for example where revenues information is not available or differs from billings.
- 8.16 The following factors may be relevant to determine the appropriate level of financial penalty:
- *Deterrence*: when determining the appropriate level of penalty, we will have regard to the principal purpose for which we impose sanctions, namely to promote high standards of regulatory behaviour by deterring operators of a designated switching schemes who have committed compliance failures from committing further compliance failures and helping to deter other operators from committing similar compliance failures.
  - The nature of the compliance failure including the following considerations:
    - The nature of the PSR's directions or information request which the operator failed to comply with
    - the duration, frequency and repetition of the compliance failure
    - the extent to which the operator's senior management were aware of the compliance failure, their involvement in it, and the timing and adequacy of any steps taken to address it.
  - The impact or potential impact of the compliance failure on the PSR carrying out its functions under the PARs
  - The extent to which the compliance failure was deliberate or reckless

### *Step 2 – mitigating and aggravating factors*

- 8.17 We may increase or decrease the amount of the financial penalty arrived at after Step 1 (but not including any amount to be disgorged) to take into account factors which aggravate or mitigate the compliance failure.
- 8.18 The following list of factors may have the effect of aggravating or mitigating the compliance failure:
- the behaviour of the operator in bringing (or failing to bring) the compliance failure to our attention quickly, effectively and comprehensively
  - the degree of cooperation the operator showed during the investigation of the compliance failure and whether this enabled us to conclude our investigation promptly and efficiently

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<sup>39</sup> Annual revenues realised in the year prior to the PSR's final decision notice or termination of the relevant compliance failure, whichever is earlier.

- any remedial steps the operator has taken, or has committed to take, since the failure was identified, how promptly they were taken, and their effectiveness
- whether the operator had previously been informed about our concerns in relation to the issue or behaviour in question
- whether the operator had previously undertaken to perform or not perform a particular act or behaviour which relates to the failure
- the previous disciplinary record and general compliance history of the operator
- whether our guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials
- whether adequate steps have been taken by the operator to achieve a clear and unambiguous commitment to comply with the PSR direction or information request – together with appropriate steps relating to regulatory risk identification, risk assessment, risk mitigation and review activities
- whether the failure is due (in whole or in part) to the actions of a third party and whether the operator of the designated switching scheme was or ought to have been aware of it, and took or ought to have taken reasonable steps to avoid the compliance failure
- the size, financial resources and other circumstances of the operator of the designated switching scheme on whom the penalty is to be imposed

***Step 3 – adjustment for deterrence***

8.19 If we consider that the figure arrived at after Step 2 is insufficient to deter the operator concerned then we may increase the penalty. Circumstances where we may do this include (but are not limited to):

- where the value of the penalty is too small to be a credible and effective deterrence
- where there has been previous action by us or another competent authority in respect of the same or similar issues
- where there is a risk that similar compliance failures will be committed again by the operator or by other operators

***Step 4 – discounts***

8.20 We may reduce the penalty where the operator has agreed a financial penalty and other terms (a settlement) in recognition of the benefits of such agreements. Details of our policy on settlement discounts are provided in paragraphs 8.28 to 8.32.

8.21 We may reduce the penalty in cases of serious financial hardship. Details of our policy on serious financial hardship are provided in paragraphs 8.22 to 8.26.

## Serious financial hardship

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- 8.22 It is only in exceptional cases that we would grant a discount to a penalty based on a claim of serious financial hardship for the reasons set out in paragraphs 8.24 to 8.30.
- 8.23 We would expect not-for-profit organisations to have in place effective arrangements with their owners, shareholders, guarantors or direct participants (as the case may be) to call for sufficient funds to pay any financial penalty we impose.
- 8.24 Where a decision to impose a penalty on an operator could have an adverse impact on the stability of, or confidence in, the UK financial system, or where we consider that such a risk exists, we will liaise with the Bank of England before taking such a decision.
- 8.25 We intend to determine the level of financial penalties in proportion to the compliance failure. Where an operator claims that payment of the penalty proposed by us (resulting from Steps 1, 2 and 3) will cause it serious financial hardship, we will consider whether to reduce only if:
- the operator provides verifiable evidence that payment of the penalty will cause them serious financial hardship or could have an adverse impact on the stability of or confidence in the UK financial system; and
  - the operator provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by us about its financial position.
- 8.26 Even where the operator has satisfied us that payment of the financial penalty would cause serious financial hardship, we may consider the compliance failure to be so serious that it is not appropriate to reduce the penalty. We will consider all the circumstances of such cases, including whether:
- An individual who has the ability to exercise control or material influence over the management or operation of the operator:
    - directly derived a financial benefit from the compliance failure and, if so, the extent of that financial benefit
    - that individual acted fraudulently or dishonestly with a view to personal gain
  - previous action by us in respect of similar compliance failures has failed to improve industry standards
  - an operator has spent money or dissipated assets or otherwise used financial arrangements in anticipation of enforcement action with a view to frustrating or limiting the impact of enforcement action.

## Settlement discount

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- 8.27 As set out in paragraph 8.14 and for the avoidance of doubt, any settlement discount does not apply to disgorgement of any financial benefit derived directly from the compliance failure (under the first element of paragraph 8.13).
- 8.28 Operators subject to enforcement action may want to agree the amount of any financial penalty and other conditions with us. We recognise the benefits of such agreements, in that they offer the potential for securing earlier protection for parties that the PARs is intended to benefit and for saving us and the operator the costs. As a result we may reduce the penalty to reflect the timing of any settlement agreement.

- 8.29 Our approach will be to agree in principle with the operator the amount of a financial penalty following our statement of principles as set out here. This starting figure (resulting from Steps 1, 2 and 3) will take no account of the existence of the settlement discount. Such amount (A) will then be reduced by a percentage of (A) according to the stage in the process at which agreement is reached. The maximum percentage reduction will be no more than 30% of A. The resulting figure (B) will be the amount actually payable. However, where part of a proposed penalty specifically equates to the disgorgement of any profit accrued, or loss avoided, then the percentage reduction will not apply to that part of the penalty.
- 8.30 It will not usually be appropriate to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.
- 8.31 However, in exceptional cases we may accept that there has been a substantial change in the nature or seriousness of the action being taken against the operator, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases we may both agree that the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible.
- 8.32 In cases where we apply a discount to the penalty for settlement, the fact of settlement and the level of the discount will be set out in the final decision notice.

## **Apportionment**

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- 8.33 In a case where we are proposing to impose a financial penalty on an operator for two or more separate and distinct compliance failures, we will consider whether it is appropriate to identify in the warning notice and final decision notice how the penalty is apportioned between those separate and distinct areas. Apportionment will not, however, generally be appropriate in other cases.

## **Payment of financial penalties**

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- 8.34 Financial penalties must be paid to the PSR and may be enforced by the PSR as a debt as provided for in paragraph 9 of Schedule 4 of the PARs.
- 8.35 Financial penalties must be paid within the period (usually 14 calendar days) that is stated on the final decision notice. Our policy in relation to reducing a penalty because its payment may cause a participant serious financial hardship is set out in paragraphs 8.23 to 8.26.
- 8.36 We will consider agreeing to defer the due date for payment of a penalty, or accepting payment by instalments where, for example, the operator requires a reasonable time to raise funds to enable the totality of the penalty to be paid within a sensible period. Each case will be treated on its facts and extra time will not be given where the operator could or should have organised its business affairs to allow it to pay within the specified time.
- 8.37 If an operator of a designated switching scheme does not pay the penalty before the due date, we may seek to recover it as a debt. We may also seek to recover any additional costs incurred in relation to the late payment of the penalty.
- 8.38 We will remain vigilant to any attempt by to seek to avoid or pass on the financial consequences of any penalty to third parties in circumstances where it would be unlawful or inappropriate to do so.



# Glossary

Expression or abbreviation	Definition
<b>alternative switching scheme</b>	A switching scheme which provides switching services and that has applied to the PSR for designation as an alternative arrangement under Regulation 15(1) PARs.
<b>Bacs</b>	The regulated payment system which processes payments through two principal electronic payment schemes: Direct Debit and Bacs Direct Credit. The payment system is operated by Bacs Payment Schemes Limited (BPSL).
<b>CASS (Current Account Switch Service)</b>	A 7-day switch service that makes it easier for customers to switch their current account. It is described at <a href="http://www.simplerworld.co.uk">http://www.simplerworld.co.uk</a> .
<b>compliance failure</b>	A failure an operator of a designated alternative switching scheme to comply with a direction given under paragraph 8, Schedule 4 PARs or with a notice to provide information made under paragraph 7, Schedule 4 PARs
<b>consumer</b>	A natural person who is acting for purposes which are outside his trade, business, craft or profession.
<b>designated alternative switching scheme</b>	An alternative switching scheme that has been designated by the PSR as an alternative arrangement under the PARs.
<b>designation certificate</b>	A certificate issued by the PSR pursuant to paragraph 3, Schedule 4 of the PARs.
<b>FCA</b>	Financial Conduct Authority
<b>fee year</b>	1 April to 31 March inclusive.
<b>member PSP</b>	-see participant-
<b>operator (of an alternative switching scheme)</b>	The operator of a switching scheme which has been designated as an alternative switching scheme by the PSR in accordance with Regulation 15(1) PARs.
<b>PAD (EU Payment Accounts Directive)</b>	Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, published in the Official Journal of the EU on 28 August 2014.
<b>PARs (The Payment Accounts Regulations 2015)</b>	The Payment Accounts Regulations 2015 (SI 2015/2038), which implement the PAD in the UK, as amended from time to time.
<b>participant(s)</b>	For the purpose of this document, a participant is a PSP which is also a member of a designated alternative switching scheme.
<b>PSP (payment service provider)</b>	A PSP, in relation to a payment system, means any person who provides services to consumers or businesses who are not participants in the system, for the purposes of enabling the

transfer of funds using that payment system. This includes direct PSPs and indirect PSPs.

In the context of PARs, PSP has the same meaning as in the PSRs 2009 but it does not include:

A credit union within the meaning of the Credit Union Act 1979, the Credit Unions Northern Ireland Order 1985;

National Savings and Investments;

and the Bank of England.

<b>PSR (Payment Systems Regulator)</b>	The Payment Systems Regulator Limited, the body corporate established by the FCA under section 40(1) of Financial Services Banking Reforming Act (FSBRA).
<b>'switching' or 'switching service'</b>	Upon a consumer's request, transferring from one PSP to another either the information about all or some standing orders for credit transfers, recurring direct debits and recurring incoming credit transfers executed on a payment account, or any positive payment account balance from one payment account to the other, or both, with or without closing the former payment account.
<b>the Treasury</b>	Her Majesty's Treasury

