

Consultation paper

CP16/4

Draft guidance on our approach to handling applications under sections 56 and 57 FSBRA



We are asking for comments on this consultation paper by 5pm on Friday 16 September 2016.

You can send your comments and responses to our consultation questions by emailing us at iamr@psr.org.uk.

If you email us, we would be grateful if you could provide your response in a Word document (rather than, or in addition to, providing your response as a PDF).

You may respond in writing to the address below (although we ask for respondents to provide their responses electronically wherever possible).

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

Generally we will seek to publish views or submissions in full or in part. This reflects our duty to have regard to our regulatory principles, which include those relating to:

- publication in appropriate cases
- exercising our functions as transparently as possible

We ask respondents to minimise elements of your submission which you want us to treat as confidential. We will assume you give us consent to publish material which is not marked as confidential. If you include extensive tracts of confidential information in your submission, please also submit a non-confidential version which you consent for us to publish. We will not accept blanket claims of confidentiality, and will require you to identify specific information you want to remain confidential, and to explain why you want confidentiality.

We will not generally disclose confidential information that relates to the business or affairs of any person.

You can download this consultation paper from our website: www.psr.org.uk.

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We are consulting on our draft guidance on the exercise of our powers to grant new access to, and to vary the terms of existing access to, certain regulated payment systems, and for the use of services provided by those payment systems.

We welcome stakeholders' comments on this draft guidance.

The purpose of this consultation

1. The Payment Systems Regulator (PSR) has powers under section 56 of the Financial Services (Banking Reform) Act 2013 (FSBRA) to grant payment service providers (PSPs) access to certain regulated payment systems.¹ We also have powers under section 57 FSBRA to vary the terms of agreements for access to certain regulated payment systems. These powers also enable us to vary the fees and charges payable in connection with the use of services provided by regulated payment systems. We can only use these powers if a person submits a formal application to us.
2. We are consulting on draft guidance as to how we will assess applications under sections 56 and 57 FSBRA. We welcome stakeholder comments on our draft guidance.

Draft guidance

3. Our draft guidance is intended to provide guidance on what businesses should do if they are in dispute over the provision of access to regulated payment systems or if there is a dispute over the fees or charges for the use of services provided by regulated payment systems, and how we intend to handle applications we receive in relation to such disputes. It applies to participants in the eight payment systems currently designated by HM Treasury under FSBRA: Bacs, Cheque and Credit (C&C), CHAPS, Faster Payments Scheme (FPS), LINK, Northern Ireland Cheque Clearing (NICC), MasterCard and Visa ('the regulated payment systems'). It does not apply to enabling direct access to those regulated payment systems (LINK, MasterCard and Visa) to which the Payment Services Regulations 2009² apply, nor does it directly affect the approach we will take in enforcing our general directions related to access.³
4. Our draft guidance explains our proposed approach to assessing section 56 and 57 applications, and the process we propose to follow if we receive an application. In its final form, the guidance

¹ Regulated payment systems in this document refers to those designated under FSBRA.

² See s.108(1) FSBRA and The Payment Services Regulations 2009 (SI 2009/209), which implement the EU Payment Services Directive 2007/64/EC in the UK, as amended from time to time.

³ PSR General Direction 2 (Access) – non-PSR 2009 regulated payment system operators (2015) and *General Direction 3 (Access) – PSR 2009 regulated payment systems (2015)*, as amended from time to time: www.psr.org.uk/how-psr-regulates/regulatory-framework-and-approach/general-directions.

will replace paragraphs 7 to 13 of our Powers and Procedures Guidance (PPG)⁴, which will no longer apply. The approach in the draft guidance is broadly consistent with the approach set out in paragraphs 7 to 13 of the PPG, but provides more information and detail about our intended approach when considering section 56 and 57 applications.

5. Our indirect access market review enabled us to gather further detailed evidence to develop a deeper understanding of the supply of indirect access.⁵ As part of the review we had a number of meetings and discussions with indirect access providers (IAPs) and indirect PSPs (IPSPs) who were in dispute over new or existing access arrangements. We indicated in our interim report (published in March 2016) that we would use the review to inform the development of guidance on how we would assess section 56 and 57 applications.
6. In formulating this draft guidance we have also taken account of:
 - our objectives and duties under FSBRA
 - other relevant legislation, legal considerations and ongoing work
 - the market context

Our objectives and duties under FSBRA

7. In giving guidance and determining general policy and principles by which we perform our FSBRA functions, we are required, in so far as possible, to act in a way which advances our statutory objectives.
8. Our statutory objectives are to promote effective competition, to promote innovation and to ensure payment systems are operated and developed in the interests of service-users (the people and businesses that use services provided by payment systems). This means that businesses that need access to payment systems to provide competitive, innovative and dynamic services to their customers should be able to obtain the access they seek without unnecessary barriers or burdens.
9. In addition to acting in a way which advances our payment systems objectives, we are also required to have regard to:
 - the importance of maintaining UK financial system stability and confidence in it
 - the importance of payment systems in relation to the performance of functions by the Bank of England in its capacity as a monetary authority
 - the PSR's regulatory principles under section 53 FSBRA
10. We have noted statements made in Parliament⁶ that we are expected not to exercise these powers in a way that requires access providers to take on undue operational or compliance risks, or that would expose them to additional risks that would be unreasonable for them to bear.
11. We are also required to consider first using our competition powers in certain circumstances. This means that, before exercising our sections 56 and 57 powers, we have a duty to consider whether it would be more appropriate to proceed under the Competition Act 1998 (CA98).
12. We also have ongoing discussions with the FCA, HMRC and the PRA/Bank of England with respect to our programme of work and questions of common regulatory interest, such as the use of the

4 PSR Powers and Procedures Guidance (PPG) (2015), as amended from time to time: www.psr.org.uk/powers-and-procedures-guidance

5 <https://www.psr.org.uk/psr-publications/market-reviews/MR1513-final-report-supply-of-indirect-access-payment-systems>

6 Hansard 27 Nov 2013 : Column 1420.

sections 56-57 powers, in particular in relation to questions of stability and confidence in the UK financial system.

Other relevant legislation, legal considerations and ongoing work

13. In developing the guidance we have considered various legal factors and considerations including:

- The EU Payment Services Directive (PSD1)⁷ and the Second EU Payment Services Directive (PSD2).^{8,9} Relevant provisions within these directives include rules for proportionate, objective and non-discriminatory access to payment systems. Those rules must not inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk and business risk, and to protect the financial and operational stability of the payment system.
- We also have duties under EU law in respect of the UK's obligations, including those under the Third EU Money Laundering Directive (MLD).¹⁰ In practice this means that we must avoid implementing measures that frustrate the obligations under the MLD, so we will be mindful of the MLD's objectives and requirements when we exercise our section 56 and 57 powers in individual cases.
- Our wider access programme of work, including our direct access and governance work¹¹, the development of the IAP Code of Conduct¹² (which many IAPs have committed to) and our market review into the provision of indirect access.¹³
- The operators of the regulated interbank payment systems are already subject to various requirements relating to access under our General Direction 2.¹⁴ These require them, in particular, to have direct access requirements that are '*objective, risk-based and publicly disclosed [and which permit] fair and open access*' to their regulated payment systems. As the wording of this requirement differs from the wording of our proposed test for our sections 56 and 57 powers, we may consider in due course whether to bring General Direction 2 into line with this substantive test. We welcome stakeholders' views on this.
- The four main IAPs (Barclays, HSBC, LBG and RBS) are subject to our Specific Direction 1.¹⁵ This requires them to publish clear and up-to-date information about their indirect access services in respect of access to, and use of, any non-card regulated payment system.

7 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC of 13 November 2007, published in the Official Journal of the EU on 5 December 2007.

8 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, published in the Official Journal of the EU on 23 December 2015.

9 These FSBA powers only apply to regulated payment systems. They do not apply to enabling direct access to payment systems regulated under the Payment Services Regulations 2009 (SI 2009/209). These regulations implement into UK law the obligations under PSD1, whose access provisions only affect some of the regulated payment systems (specifically, LINK, MasterCard and Visa). PSD1 is due to be repealed by the PSD2 (on or before 2018). In addition to the existing requirements with respect to the LINK, MasterCard and Visa regulated payment systems, PSD2 introduces indirect access requirements in relation to some other regulated payment systems, and, under EU law, we must not adopt measures which are liable to either compromise the PSD2 objectives or hinder the introduction of uniform operating restrictions throughout the EU.

10 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, published in the Official Journal of the EU on 25 November 2005.

11 www.psr.org.uk/psr-focus/access

12 www.accesstopaymentssystem.co.uk/code-of-conduct

13 www.psr.org.uk/psr-publications/market-reviews/MR1513-final-report-supply-of-indirect-access-payment-systems

14 General Direction 2 (Access) – non-PSR 2009 regulated payment system operators, published on 25 March 2015, in force from 30 June 2015: www.psr.org.uk/how-psr-regulates/regulatory-framework-and-approach/general-directions

15 PSR *Specific direction 1 (Access: sponsor banks)* (2015): www.psr.org.uk/psr-specific-direction-1

The market context

14. We have considered various aspects of the market context in which these powers would be applied in developing this guidance, including the following:
- The guidance needs to be flexible enough to encompass a range of contexts. For example, this could include circumstances where there are a number of actual or potential providers, applications involving direct and indirect access, or applications for the variation of fees.
 - The decision to give a PSP access can raise a number of commercial, technical and operational risks for an access provider. These risk exposures can have UK, EU and international dimensions.
 - Indirect access is typically only one of a range of banking services that an IAP provides to a PSP. Generally IAPs assess client revenues on a 'whole relationship' basis, not on the individual elements and services within that relationship.

The assessment framework and proposed substantive test

15. Sections 56 and 57 do not specify how we should assess applications. The PSR has a broad discretion as to how it uses these powers and will do so to make sure that payment systems work well for the people and the organisations that use them.
16. We are committed to promoting access to payment systems in a way in which PSPs' access is not impeded more than is necessary to appropriately safeguard against the specific risks associated with supplying that access.
17. To determine whether access has been impeded 'more than is necessary', our preferred approach is to have regard to the following substantive test when we assess applications:
- Whether an access provider's access requirements and approach to supplying access (including the terms, conditions, fees and charges on which any access is offered) to a regulated payment system are proportionate, objective and non-discriminatory, and do not prevent, restrict or inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk, and business risk and to protect the financial and operational stability of that regulated payment system.*
18. This test is consistent with the requirements of PSD1 and PSD2. The Government's current policy intention is to implement PSD2 from January 2018. Before PSD2 is implemented in the UK, we are required to not frustrate the policy intent of that legislation. However, this guidance only relates to the exercise of our section 56 and 57 powers, and does not cover matters concerning compliance with current or future EU Directives.
19. The substantive test will apply to both direct and indirect access applications, and in a range of different market and competitive contexts. Therefore, when developing the guidance, we considered whether any variation to the substantive test would be more appropriate for section 56 and 57 applications in the period up until when PSD2 is implemented.
20. We considered the appropriateness of including specific reference to 'non-discrimination' in our proposed substantive test. The advantage of removing this term would be that it recognises that the substantive test will apply to a range of market and competitive contexts, and that in some of these contexts, such as where there are multiple access providers, a non-discrimination provision might have the unintended effect of softening or restricting competition among access providers.
21. On balance, while we are mindful of the potential risks of including a non-discrimination provision in our preferred substantive test, we intend to ensure that the risks of inappropriately applying the

non-discrimination provision are addressed by careful consideration of the characteristics of the market and competitive context in which an individual application is made. This will include the extent of actual and potential competition in the supply of access.

22. We have also considered the merits of using the wording of PSR General Direction 2 in this context, which currently applies to operators of most interbank regulated payment systems (FPS, Bacs, CHAPS and C&C). General Direction 2 requires that operators have *'objective, risk-based and publicly disclosed access requirements'* which *'permit fair and open access'* to that regulated payment system.
23. An advantage of this wording is that it already applies to operators of most interbank regulated payment systems and would therefore ensure consistency between the application of our section 56 and 57 powers on the one hand, and compliance with and enforcement of General Direction 2 on the other hand. However, some of the requirements included in General Direction 2 may not be appropriate to all of the market and competitive contexts in which the substantive test could be applied. For example, the General Direction 2 language would require that indirect access providers publicly disclose their access policies, and adopt fair and open access policies. While such policies are appropriate in contexts where there is only one access provider such as an operator, they are less appropriate, and potentially restrictive of competition, in contexts where there are multiple providers of an access service (such as for indirect access).
24. A significant disadvantage of varying the proposed substantive test is that the test would then have to be amended when PSD2 is implemented in the UK. Any deviation from the PSD2 approach might also frustrate the future implementation of PSD2.
25. We therefore consider it is more appropriate for us to adopt the substantive test set out in paragraph 17 above, which is consistent with the requirements of PSD1 and PSD2. This approach will ensure consistency across access policies and section 56 and 57 applications, and will avoid the need to modify that substantive test when PSD2 is implemented in the UK.
26. We welcome stakeholders' views on our proposed substantive test, and whether there is any merit in us adopting variations to this test.

Questions

- Q1: Do you agree with our proposed approach to handling section 56 and 57 applications, as set out in our draft guidance document?**

In particular:
- Q2: Do you agree with our preferred substantive test that we could apply when we assess applications (as set out in paragraph 17 above and paragraphs 6.11 of the draft guidance)?**
- Q3: Do you consider it would be helpful or necessary to bring General Direction 2 into line with the substantive test we are proposing for our section 56 and 57 powers?**
- Q4: Do you have any other comments on the draft guidance?**

Next steps

- 27.** If you have any comments on this consultation paper, send them to us by 5pm on **Friday 16 September 2016**, preferably in Word or other searchable electronic formats. Please also note our comments on confidentiality on the inside cover page of this consultation paper.
- 28.** Once we have considered the responses to this consultation we will publish final guidance, taking into account feedback we receive on the draft guidance.
- 29.** We will keep this guidance under review and may amend it as appropriate in light of our experience of applying the guidance, or in response to legal, regulatory or market changes. We expect to review this guidance around the time when the requirements of PSD2 are implemented into UK law.

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25 The North Colonnade Canary Wharf
London E14 5HS
Telephone: 0300 456 3677 or +44 20 7066 1000 from abroad
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