

## Draft Guidance

GC 15/2

**Guidance on the PSR's approach as a competent authority for the  
EU Interchange Fee Regulation**

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# 1

## Overview

- This document contains guidance on our approach to monitoring compliance with the Interchange Fee Regulation (IFR) provisions capping interchange fees or equivalent issuer compensation (Articles 3, 4 and 5) and business rules provisions already or soon to be in force (Articles 6, 11 and 12).
- It also includes guidance on our powers and procedures under the IFR as well as guidance on penalties for non-compliance with the IFR.

### Introduction

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- 1.1 On 29 April 2015, the European Parliament and the Council of the European Union adopted the Interchange Fee Regulation (IFR), which was published in the Official Journal of the European Union on 19 May 2015.<sup>1</sup>
- 1.2 The IFR imposes requirements directly on payment card schemes, issuing and acquiring payment service providers (PSPs), processing entities, other technical service providers and, in limited circumstances, merchants. We expect these parties to read, interpret and comply with the provisions of the IFR. If they do not comply they will be at risk of private legal action by affected parties or deprived beneficiaries, or possible enforcement action by the PSR or other competent authorities.

### The PSR's role as a UK competent authority for the IFR

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- 1.3 The PSR is responsible for monitoring compliance with the IFR in the UK and for taking enforcement action where appropriate.<sup>2</sup> We will cooperate with other competent authorities both in the UK and in other Member States as appropriate. This will include close cooperation with the Financial Conduct Authority (FCA) in monitoring compliance with Articles 11 and 12 in the UK.
- 1.4 The IFR is European law that is directly applicable in the UK. The interpretation of what the IFR requires and how parties comply with it are ultimately questions of European law for the national and EU courts. We cannot provide definitive interpretations – we can only set out our approach when acting as the competent authority in the UK.

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<sup>1</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.123.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.123.01.0001.01.ENG)

<sup>2</sup> The Statutory Instrument that will give the PSR its powers was published on 17 November 2015. It is available at [www.legislation.gov.uk/ukSI/2015/1911/contents/made](http://www.legislation.gov.uk/ukSI/2015/1911/contents/made).

## The purpose of this document

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- 1.5 This document provides Guidance on the approach that the PSR will generally apply in relation to its functions under the Payment Card Interchange Fee Regulations 2015 (the PCIFRs), which designates the PSR as a competent authority for the IFR.
- 1.6 This Guidance represents the PSR's practice at the date of publication. It may be revised from time to time to reflect changes in best practice or the law and the PSR's developing experience in monitoring and enforcing compliance with the IFR. The PSR will apply this guidance flexibly. This means that the PSR will have regard to the guidance when exercising its functions under the PCIFRs but that, when the facts of an individual case reasonably justify it, the PSR may adopt a different approach.
- 1.7 The draft Guidance will be of interest to payment card schemes and participants, and those who use the services the schemes provide.
- 1.8 The Guidance includes:
- the classification of schemes for IFR purposes
  - interchange fee caps and the possible exemption from those caps for some three-party schemes
  - the business rule provisions that will be in force by 9 December 2015
  - our approach to monitoring compliance with the IFR
  - our powers and procedures under the IFR
  - penalties under the IFR
- 1.9 The Guidance is made under Regulation 13 of the PCIFRs. It does not attempt to describe in detail all the provisions of the PCIFRs. Interested parties are advised to refer to the text of that legislation for a complete description of the PSR's statutory functions and powers.
- 1.10 From time to time, we may issue general guidance on substantive or operational matters where we believe information or advice is needed. This includes the operation of specified provisions of the IFR and the PCIFRs and any matters relating to our functions under those pieces of legislation.

## 2

# Classification of card schemes

- The IFR defines two broad types of card 'scheme' which are affected by some or all of its provisions.
- The IFR caps on interchange fees apply to four-party schemes.
- Three-party schemes are not subject to the interchange fee caps unless they have licenced separate PSPs to carry out issuing or acquiring activity, or they issue cards with a co-branding partner or through an agent. However, the Treasury has proposed to exempt such schemes from the domestic interchange fee caps for three years, subject to a market share test.

- 2.1 The IFR defines two broad types of card payment systems (which it refers to as 'schemes'). These are:
- four-party schemes
  - three-party schemes
- 2.2 Some three-party schemes may operate with licensee issuers and/or acquirers, or issue cards with a co-branding partner or through an agent. The IFR treats these schemes in the same way as four-party schemes.

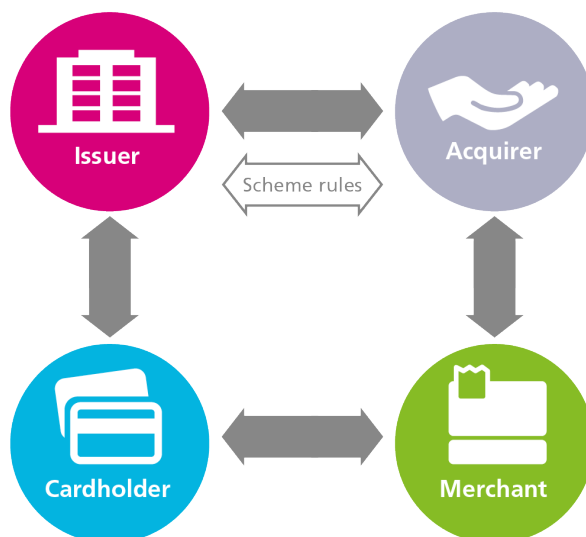
### **The meaning of 'parties' and 'schemes'**

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- 2.3 In the schemes defined by the IFR, the term 'parties' refers to the acquirers, issuers and their downstream customers. Article 2(16) of the IFR defines a 'payment card scheme' as a "single set of rules, practices, standards and/or implementation guidelines for the execution of card-based payment transactions ... and includes any specific decision-making body, organisation or entity accountable for the functioning of the scheme".

## Four-party schemes

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2.4 As defined by Article 2(17) of the IFR, four-party scheme transactions involve these four parties:

- the issuer (the cardholder's PSP)
- the acquirer (the merchant's PSP)
- the cardholder
- the merchant

2.5 Four-party schemes involve relationships between:

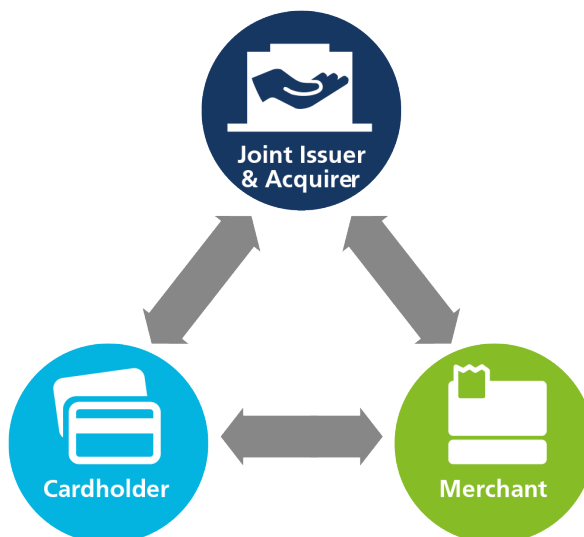
- the cardholder and the merchant
- the merchant and the acquirer
- the acquirer and the issuer
- the issuer and the cardholder

2.6 In a four-party scheme, the scheme rulebook sets the terms of dealing between the issuer and acquirer.

2.7 Four-party schemes are regulated under the IFR, including the provisions which cap the interchange fees payable between the acquirer and the issuer and the provisions of Article 7 on the separation of scheme and processing activities.

## Three-party schemes

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2.8 As defined by Article 2(18) of the IFR, three-party scheme transactions involve only these three parties:

- a joint issuer and acquirer
- the cardholder
- the merchant

2.9 Three-party schemes involve three relationships between the parties:

- the cardholder and the merchant
- the merchant and the acquirer
- the issuer and the cardholder

2.10 Because the scheme provides the issuing and acquiring services itself, it does not need to intermediate between the two.

2.11 Three-party schemes are regulated under the IFR, but are **not** covered by:

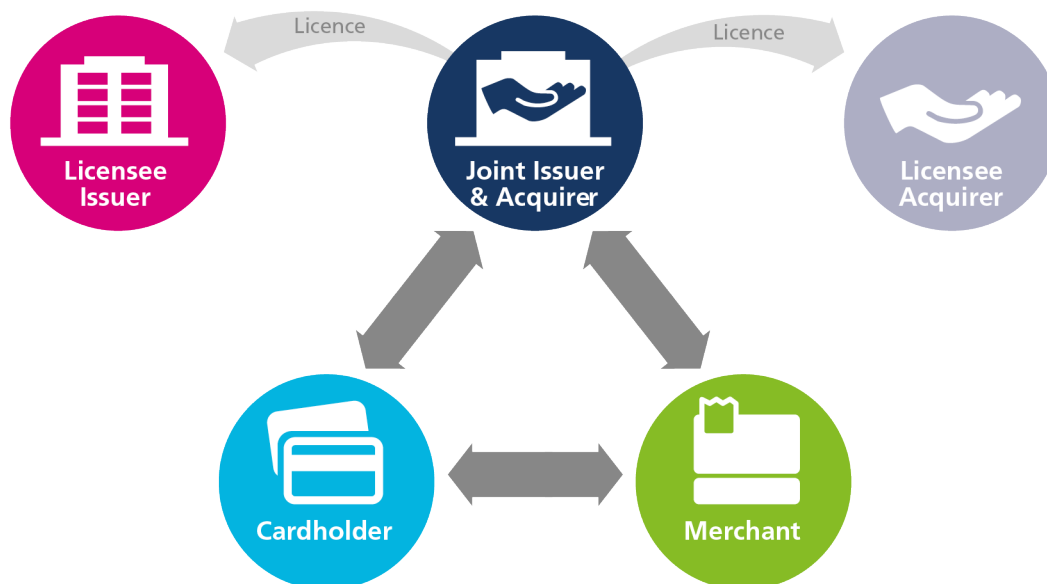
- the capping of the interchange fees payable between the acquirer and the issuer
- the provisions of Article 7 on the separation of scheme and processing activities



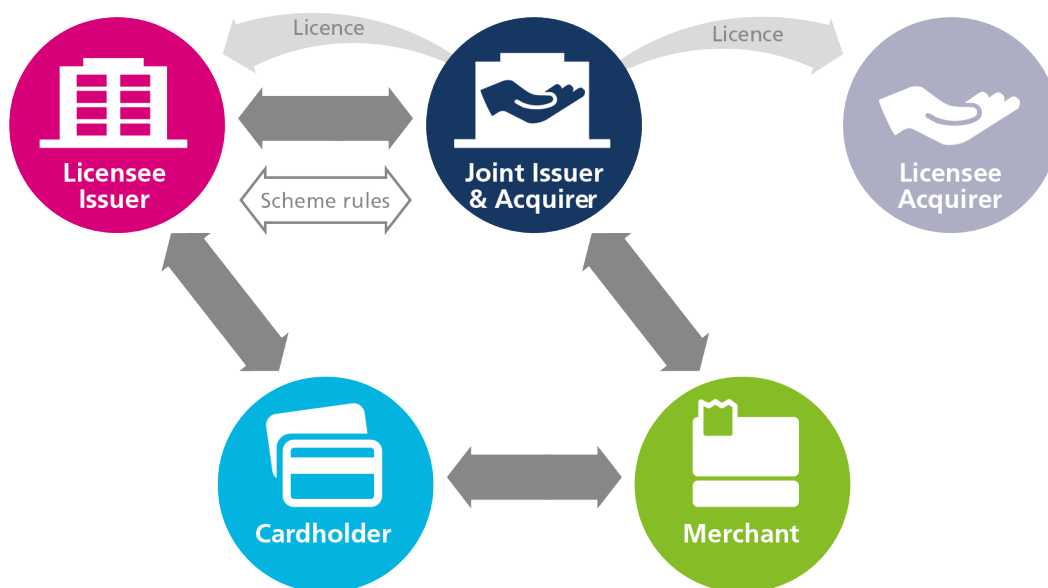
### Three-party schemes operating with licensees

- 2.12 A three-party scheme may 'outsource' some issuing or acquiring activity (or both activities) to licensees, while continuing to both issue cards and acquire transactions itself. In this setting, the scheme is the licensor.
- 2.13 Article 1(5) of the IFR states that "when a three-party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four-party payment card scheme". This is because some transactions now involve four parties rather than three (although licensees may not be involved in every transaction).
- 2.14 The diagrams below illustrate the four different types of transactions that could take place within three-party schemes operating with licensees. As explained, they are to be treated as four-party schemes under the IFR even though some transactions involve only three parties. The diagrams show, using dark grey arrows, relationships between parties in:

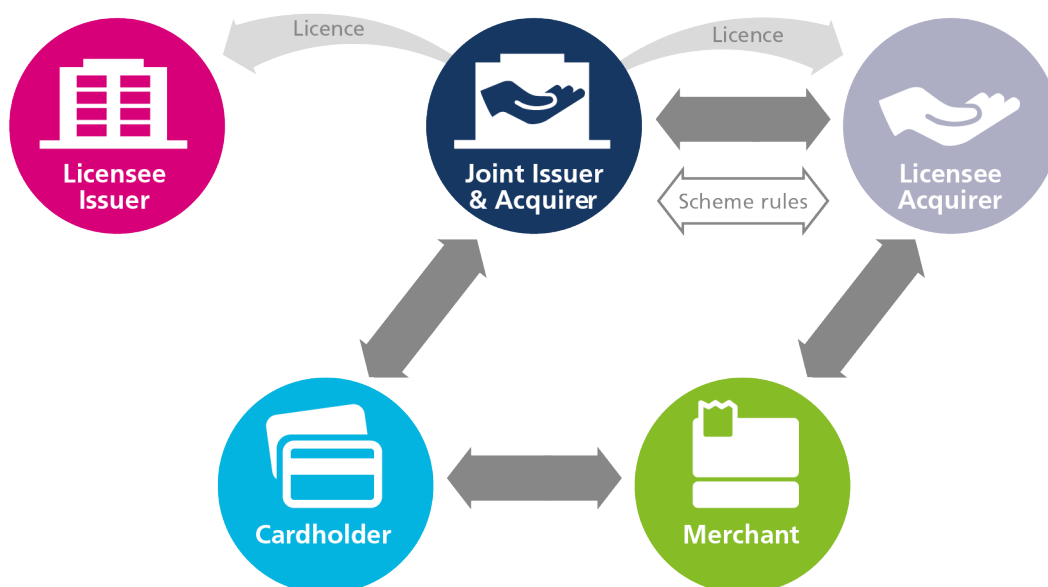
- transactions not involving a licensee issuer or acquirer
- transactions involving a licensee issuer
- transactions involving a licensee acquirer
- transactions involving both a licensee issuer and acquirer



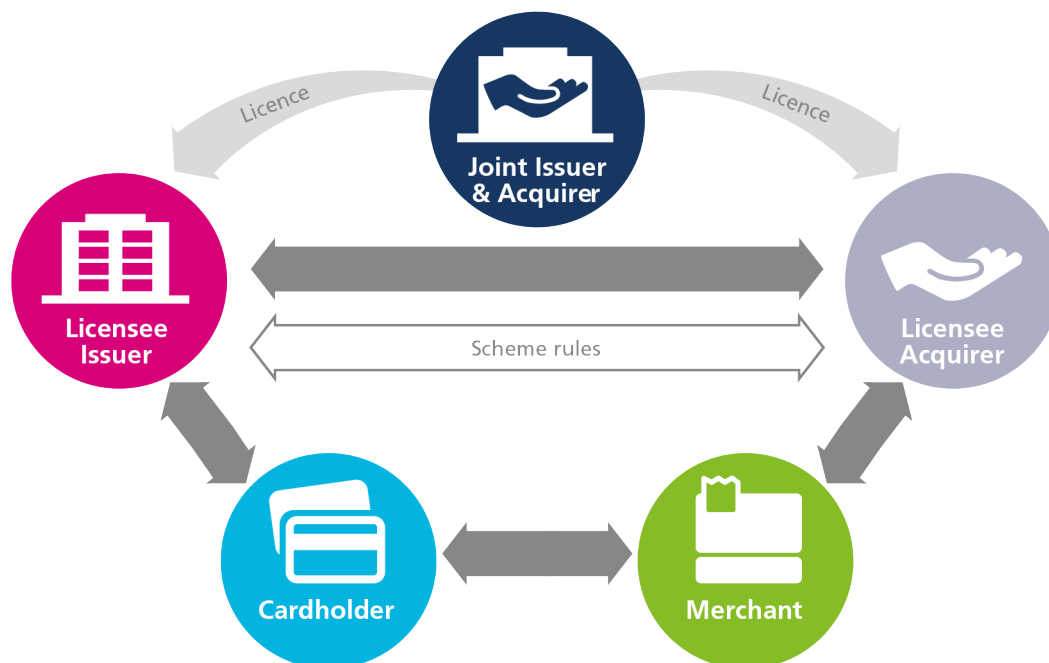
Transactions not involving a licensee issuer or acquirer



Transactions involving a licensee issuer



Transactions involving a licensee acquirer



**Transactions involving both a licensee issuer and a licensee acquirer**

- 2.15 In a three-party scheme operating with licensee issuers there are either three or four parties involved in a card transaction, depending on whether the card is issued directly by the scheme, or by the licensee. For example with a licensee-issued card (see first diagram on previous page), the four parties are:
- the licensee issuer
  - the acquirer (the licensor)
  - the cardholder
  - the merchant
- 2.16 In this example there are four relationships between the parties:
- the cardholder and the merchant
  - the merchant and the acquirer (the licensor)
  - the acquirer (the licensor) and the licensee issuer
  - the licensee issuer and the cardholder
- 2.17 In a three-party scheme operating with licensees, the scheme provides both the issuing and acquiring services for some transactions. However, sometimes it will only provide one of those services, and sometimes neither. When it does not provide both services, the scheme rulebook sets the terms of dealing between the issuer and acquirer.
- 2.18 Article 1(5) states that three-party schemes operating with licensees are regulated under the IFR, including the provisions capping the interchange fees payable between the acquirer and the issuer. This also applies to three-party schemes that issue card-based payment instruments with a co-branding partner or through an agent.

- 2.19 However, the Treasury has decided to grant these schemes a time-limited exemption from the domestic interchange fee caps under Article 1(5) of the IFR, as long as the value of their annual UK domestic card-based payment transactions is less than 3% of all UK domestic card-based payment transactions.<sup>3</sup> The exemption will end by 9 December 2018 at the latest and it only applies to domestic transactions – those in which the issuer, merchant and acquirer are all in the UK.

## Classification of payment card schemes to which the IFR applies and which operate in the UK

- 2.20 The table below shows the classification of payment card schemes to which the IFR applies and which operate in the UK.

Scheme	Classification of the scheme (based on definitions in IFR)	Explanation
<b>MasterCard</b>	Four-party scheme	MasterCard operates a card payment system in which it grants licences to issuing and acquiring PSPs. MasterCard does not undertake its own issuing or acquiring.
<b>Visa Europe</b>	Four-party scheme	Visa Europe operates a card payment system in which it grants licences to issuing and acquiring PSPs. Visa Europe does not undertake its own issuing or acquiring.
<b>American Express (Amex)</b>	Three-party scheme operating with licensees (and treated as a four-party scheme)	Amex operates a card payment system in which it undertakes its own issuing and acquiring. Amex also grants licences to issuing and/or acquiring PSPs.
<b>Diners Club International</b>	Four-party scheme	Diners Club International operates a card payment system in which it grants licences to issuing and acquiring PSPs. Diners Club International undertakes its own acquiring but it does not undertake its own issuing.
<b>JCB International</b>	Four-party scheme	JCB International operates a card payment system in which it grants licences to issuing and acquiring PSPs. JCB International undertakes its own acquiring but it does not undertake its own issuing.
<b>UnionPay International</b>	Four-party scheme	UnionPay International operates a card payment system in which it grants licences to issuing and acquiring PSPs. UnionPay International does not undertake its own issuing or acquiring.

<sup>3</sup> See [www.legislation.gov.uk/uksi/2015/1911/contents/made](http://www.legislation.gov.uk/uksi/2015/1911/contents/made).

## Transactions not affected by the IFR

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- 2.21 Article 1 of the IFR defines its scope, including which card-based payment transactions it covers. The IFR does not apply to:
- cards that can only be used to buy goods/services at the premises of the issuer or within a limited network (for example, store cards)
  - cards that can only be used to buy a limited range of goods/services (for example, fuel purchasing cards)
- 2.22 The IFR does not apply to ATM cash withdrawal transactions (whether on ATM-only cards or debit/credit cards with this functionality). The scope of the IFR provisions, read alongside the explanatory recitals, appears to be limited to purchase transactions – payments involving the transfer of funds between a payer (the cardholder) and a payee (the merchant). The IFR describes card payment schemes in these terms. For example, recital 28 defines the two main business models (three-party and four-party schemes) in terms that expressly include the involvement of both a cardholder and a merchant.
- 2.23 If a card payment system provides cards that can be used both for purchase transactions and ATM cash withdrawals (whether over the card payment system's own network or that of another payment system operator, such as LINK), the IFR only applies to the purchase transactions.

## 3

# Interchange fee caps

- This chapter describes the interchange fee caps that apply to domestic and cross-border transactions.
- Interchange fees include both direct and indirect payments from acquirers to issuers.

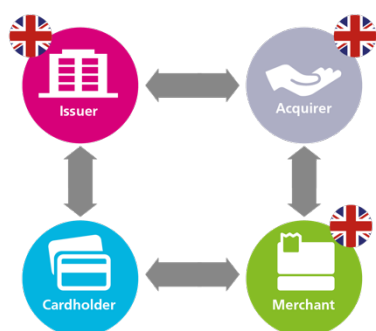
### Cross-border or domestic transactions: applicable interchange fee caps

- 3.1 The diagrams below paragraph 3.8 show four card payment transaction scenarios, where at least one of the issuer and the acquirer is in the UK. We describe whether these are classified as cross-border or domestic transactions under the IFR and set out the applicable interchange fee caps.
- 3.2 These diagrams represent the definitions of cross-border and domestic transactions set out in Article 2(8) and 2(9) of the IFR.<sup>4</sup>
- 3.3 The diagrams set out the interchange fee **caps**, not the interchange fees for a given transaction. These are determined by the card schemes for multilateral or 'default' interchange fees, or by the issuing and acquiring PSPs where there are bilateral arrangements.
- 3.4 **Cross-border and domestic credit card transactions** are capped on a per-transaction basis. This means that the issuer should receive from the acquirer (and the acquirer should pay to the issuer) **no more than** 0.3% of the value of any credit card transaction. However, the actual fee can be less (if the scheme or the PSPs have set an interchange fee lower than the cap, or if a Member State sets a lower cap for domestic credit card transactions).
- 3.5 **Cross-border debit card transactions** are capped on a per-transaction basis. This means that the issuer should receive from the acquirer (and the acquirer should pay to the issuer) **no more than** 0.2% of the value of any cross-border debit card transaction. Again, the actual fee can be less.
- 3.6 For **domestic debit card transactions**, the Treasury has chosen to apply a weighted average cap.<sup>5</sup> This is set at 0.2% of the average value of all domestic debit card transactions made within a scheme in the previous year.

<sup>4</sup> Note that in these diagrams 'merchant' is synonymous with 'point-of-sale'.

<sup>5</sup> See [www.legislation.gov.uk/uksi/2015/1911/contents/made](http://www.legislation.gov.uk/uksi/2015/1911/contents/made).

- 3.7 This means that interchange fees can vary for individual categories and types of transaction within a scheme. They may be more than or less than 0.2% of the value of an individual transaction. Interchange fees should be set so that, if transaction values are distributed among the categories in the same way as the previous year, the weighted average fee is not more than 0.2% of the average value of **all** transactions.
- 3.8 In the following diagrams the UK and EU flags represent the location of the issuer, the acquirer and the merchant. The EU flag represents an EEA country that is not the UK.

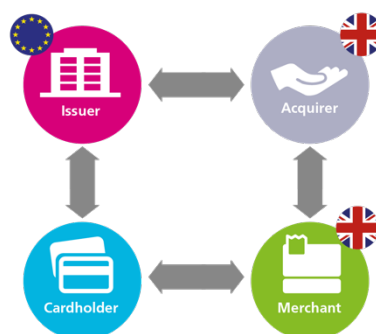


#### IFR classification: Domestic transaction (UK)

Interchange fee cap: 0.3% per transaction (credit cards), 0.2% weighted average (debit cards).

Debit card interchange fees will be capped at 0.2% per transaction from 9 December 2020, or sooner if the Treasury decides.

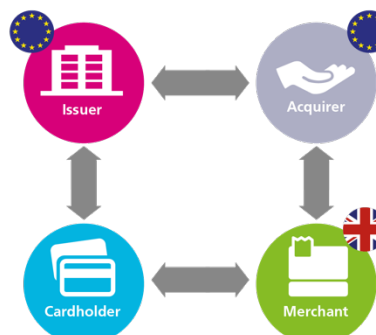
Card schemes variously refer to these as UK country-specific, intra-country or domestic transactions.



#### IFR classification: Cross-border transaction

Interchange fee cap: 0.3% per transaction (credit cards), 0.2% per transaction (debit cards).

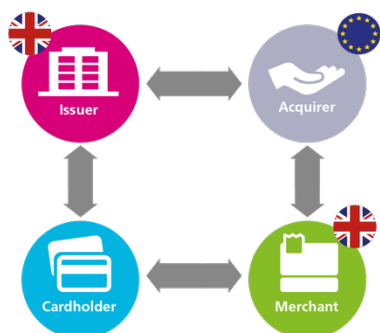
Card schemes variously refer to these as *intra-European/EEA*, or *intra-regional transactions*.



#### IFR classification: Cross-border transaction

Interchange fee cap: 0.3% per transaction (credit cards), 0.2% per transaction (debit cards).

Card schemes variously refer to these as *intra-European/EEA*, or *intra-regional transactions*.



### IFR classification: Cross-border transaction

Interchange fee cap: 0.3% per transaction (credit cards), 0.2% per transaction (debit cards).

Card schemes variously refer to these as UK *country-specific*, *intra-country* or *domestic* transactions.

They may also be described as cross-border acquired domestic transactions.

Since 1 January 2015, some of these transactions made on Visa consumer cards have been eligible for fixed per-transaction interchange fees of 0.3% (credit cards) and 0.2% (debit cards), by virtue of binding commitments made by Visa to the European Commission.

From 9 December 2015, all of these transactions (whether on MasterCard or Visa consumer cards) will be subject to the cross-border interchange fee caps.

- 3.9 The PSR is the only competent authority for domestic transactions. Cross-border transactions place responsibility on more than one competent authority: the PSR will have a role for transactions in which either the issuer or acquirer is in the UK.

## Consumer or commercial cards

- 3.10 The interchange fee caps set out above only apply to **consumer** card transactions. Commercial card transactions are exempt from the IFR interchange fee caps by virtue of Article 1(3)(a).
- 3.11 The definition of a commercial card is set out in Article 2(6) of the IFR. It states:
- “‘Commercial card’ means any card-based payment instrument issued to undertakings or public sector entities or self-employed natural persons which is limited in use for business expenses where the payments made with such cards are charged directly to the account of the undertaking or public sector entity or self-employed natural person.”*
- 3.12 Recital 38 of the IFR contains language similar to Article 2(6) but explains that it is “important to define a commercial card as a payment instrument used only for business expenses charged directly to the account” of the same parties referred to in Article 2(6).
- 3.13 We will monitor and enforce the interchange fee caps provided for in the IFR **except** for commercial card transactions where the business account is **directly** debited (those cards being exempt from the caps by virtue of Article 1(3)(a)). In industry terminology, these cards are known as ‘centrally settled’ or ‘centrally paid’. The fact that the individual cardholder might receive a statement or ‘bill’ showing the transactions made on that specific card will not affect this classification, as long as the card issuer does not take a payment from the individual cardholder’s current account. In industry terminology, this type of transaction might be referred to as ‘individually billed, centrally settled’.



## Direct and indirect interchange fees

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- 3.14 The interchange fee caps which apply to consumer debit and credit card transactions limit the fees that are paid between the acquirer and the issuer. Interchange fees are capped on a per-transaction basis. However, as noted above, the Treasury has chosen to take advantage of a national discretion available under Article 3(3) of the IFR and has decided to allow a weighted average for domestic debit card transactions.<sup>6</sup>
- 3.15 Interchange fees are usually deducted from the face value of transactions made on an issuer's cards when the issuer settles with the acquirer. This is an example of an interchange fee paid **directly** from the acquirer to the issuer.
- 3.16 Under the anti-circumvention provisions of Article 5 of the IFR, the fees that the acquirer pays **indirectly** to the issuer are also treated as interchange fees and subject to the caps. These indirectly paid fees include any agreed remuneration received by the issuer from any third party that:
- links the issuer and the acquirer
  - receives fees from the acquirer (whether directly or indirectly)
- 3.17 The scheme is an example of a third party that links the issuer and the acquirer, but it is not the only one. Other intermediaries may sit between the scheme and the issuer or acquirer. There may also be a chain of more than one intermediary that enables the issuer to receive fees from the acquirer indirectly.
- 3.18 When assessing whether they are complying with the interchange fee caps, issuers and acquirers should take account of both direct and indirect forms of payment between acquirers and issuers.
- 3.19 Under Articles 3, 4 and 5 of the IFR, **issuers** must ensure that any fees received (whether directly or indirectly) from acquirers in respect of a card-based payment transaction do not exceed the relevant interchange fee cap. This involves taking account of all sources of agreed remuneration (including net compensation<sup>7</sup>) that they receive from acquirers, and from parties who might themselves receive fees from acquirers. If interchange fees are capped on a per-transaction basis, and an issuer receives an interchange fee at the level of the cap, the issuer should receive no additional remuneration from the acquirer for that transaction, directly or indirectly.
- 3.20 **Acquirers** might only be able to see the interchange fees they pay directly to issuers. Therefore, under Articles 3, 4 and 5 of the IFR the primary responsibility of acquirers is to ensure that these interchange fees do not exceed the caps. However, acquirers should also be proactive in ascertaining whether any fees that they pay to other parties (such as the scheme or another intermediary) are being passed back to issuers (whether in full or in part). If interchange fees are capped on a per-transaction basis, and an acquirer pays an interchange fee at the level of the cap, the acquirer should pay no additional remuneration to the issuer for that transaction, directly or indirectly.
- 3.21 Article 5 of the IFR (the prohibition on circumvention) should be read alongside Article 2(10) and 2(11), which define the terms 'interchange fee' and 'net compensation' respectively, as well as explanatory recital 31.

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<sup>6</sup> See [www.legislation.gov.uk/ukxi/2015/1911/contents/made](http://www.legislation.gov.uk/ukxi/2015/1911/contents/made).

<sup>7</sup> Net compensation is the total fee income that issuers receive in respect of card transactions net of the fees they pay in respect of the same.

## 4

# Exemption from domestic interchange fee caps for three-party schemes operating with licensees: market share calculation

- The exemption of three-party schemes operating with licensee issuers and/or acquirers (and those that issue cards with a co-branding partner or through an agent) is subject to a market share condition: the value of the scheme's annual UK domestic transactions must be no more than 3% of the UK total.
- The PSR will be responsible for calculating the market shares of these schemes and deciding if they qualify for the exemption.
- This chapter sets out the elements we will include in the market share calculation.

- 4.1 Under Article 1(5) of the IFR, the UK Government has decided<sup>8</sup> to grant a time-limited exemption from domestic interchange fee caps to three-party schemes which:
- operate with licensee issuers and/or acquirers, or
  - issue cards with a co-branding partner or through an agent
- 4.2 We will refer to these as 'exemptible three-party schemes'.
- 4.3 To qualify for the exemption, the value of a scheme's annual domestic transactions must be less than 3% of all card-based transactions in the UK. This means transactions where the issuer, acquirer and merchant are all located in the UK.<sup>9</sup>
- 4.4 On 9 December 2018, the exemption will end and all three-party schemes operating with licensees will be subject to the domestic interchange fee caps. The Treasury may decide to end the exemption earlier.
- 4.5 From 9 December 2015, all three-party schemes operating with licensees will automatically (and unavoidably) be subject to cross-border interchange fee caps.
- 4.6 The Treasury has stated that the PSR should gather the relevant information and assess whether an exemptible three-party scheme exceeds a 3% share of all UK domestic card transactions.

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<sup>8</sup> See [www.legislation.gov.uk/ukxi/2015/1911/contents/made](http://www.legislation.gov.uk/ukxi/2015/1911/contents/made).

<sup>9</sup> See the definitions of 'domestic' and 'cross-border' transactions in Article 2 of the IFR and also Chapter 3 of this document.

4.7 There will be two aspects of this factual exercise:

- i. **Identify the relevant scheme(s):** We will identify any three-party scheme directly issuing cards and acquiring transactions in the UK who also operates with UK-based licensee issuers or acquirers, or who issue cards with a co-branding partner or through an agent.
- ii. **Collect and analyse data:** We will collect and analyse the data necessary to calculate whether a scheme's annual domestic transactions are above or below 3% of the value of all UK domestic card-based payment transactions, as set out in Article 1(5).

## The market share calculation

4.8 As set out in Article 1(5) of the IFR, the market share calculation should be based on transaction value rather than volume. This means that we will look at the total value of purchases made on cards rather than the number of card purchase transactions.

4.9 The calculation includes a numerator (X) and a denominator (Y), with the market share being expressed as X as a percentage of Y. Below, we illustrate the elements of each and explain why they are included.

### X as a percentage of Y:

**Where X** = Value of all card-based payment transactions made under an exemptible three-party scheme in the UK

**Where Y** = Value of all card-based payment transactions made in the UK

Term	Explanation
<b>value</b>	The amount of all transactions (i.e. the monetary amount of all items purchased).
<b>card-based</b>	<p>A card-based payment transaction is "a service based on a payment scheme's infrastructure and business rules to make a payment transaction by means of any card, telecommunication, digital or IT device or software if this results in a debit or credit card transaction" (see Article 2(7)). It includes, for example, both physical and virtual cards and the use of mobile wallets and tokenisation.</p> <p>All card types are included in this definition, whether 'pay later' or 'pay now' cards. For the avoidance of doubt, this includes credit, charge, deferred debit, immediate debit and prepaid cards. Moreover, both consumer cards and commercial cards are included in the definition.</p> <p>The market share calculation described in Article 1(5) refers to 'card-based payment transactions'. Therefore, for the purposes of the Article 1(5) exemption test, the market share calculation:</p> <ul style="list-style-type: none"> <li>includes transactions based on both consumer and commercial cards</li> <li>includes transactions based on credit, charge, deferred debit, immediate debit and prepaid cards.</li> </ul>

Term	Explanation
<b>payment transactions</b>	<p>Card transactions that result in the transfer of funds from the payer (the cardholder) to the payee (the merchant).</p> <p>The IFR does not apply to cash withdrawals at an ATM or at the counter of a PSP. However, the IFR does apply to the purchase of cash from a merchant (for example, buying foreign currency at a bureau de change, or getting cashback when buying groceries at a supermarket).</p>
<b>exemptible three-party scheme</b>	<p>Article 1(5) states that <i>"when a three-party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four-party payment card scheme"</i>.</p> <p>Article 1(5) also tells us that <i>"in relation to domestic payment transactions, such a three-party payment card scheme may be exempted [...]"</i></p> <p>An exemptible three-party scheme is one that is capable of handling UK domestic card payment transactions that involve three or four parties, viewed in its totality. This means a scheme which carries on direct issuing and acquiring activity and has granted licences to issuers and/or acquirers, or issues cards with a co-branding partner or through an agent.</p> <p>We do not consider that it is appropriate to look at the system more narrowly than this (e.g. by only examining transactions on cards issued by licensee issuers which necessarily involve four parties rather than three). This is because Article 1(5) says that it is the scheme that may be exempted, not the arrangements between the scheme and its licensees.</p>
<b>in the UK</b>	<p>For a transaction to be made 'in the UK', it must be a UK domestic transaction as defined under the IFR. This means that the issuing entity, the acquiring entity and the merchant must be located in the UK. Where one or more of these parties is located outside of the UK, the transaction is not made 'in the UK'. Where one or more of those parties is located elsewhere in the EU, such a transaction would be made 'in the EU' but it would not be relevant for the purposes of the UK market share calculation.</p> <p>UK means the United Kingdom of Great Britain and Northern Ireland.</p>

## **When the market share will be calculated**

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- 4.10 The IFR does not specify when the market share of exemptible three-party schemes should be calculated. For consistency and ease, we will adopt the same approach as that laid down in Article 3(4) of the IFR for monitoring domestic debit interchange fee caps where a Member State permits a weighted average approach.
- 4.11 For the first market share calculation we will use the value of transactions for the period from 9 September 2014 to 8 September 2015. If the value of transactions made under an exemptible three-party scheme in the UK between these dates is more than 3% of the value of all transactions made in the UK in the same period, that scheme will not qualify for exemption and must comply with the relevant interchange fee caps from 9 December 2015.
- 4.12 For subsequent calculations we will use the value of transactions for the period commencing 1 January and ending 31 December. Therefore, if the value of transactions made under an exemptible three-party scheme in the UK between 1 January and 31 December is more than 3% of the value of transactions made in the UK in the same period, that scheme will not qualify for exemption and must comply with the relevant interchange fee caps from 1 April of the following year.

## 5 Business Rules

- The Guidance in this chapter covers the business rules that will be in force by 9 December 2015.
- It will be updated in due course to cover the business rules that come into force on 9 June 2016.

### Article 6: Licensing

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5.1 This Article states:

*“Any territorial restrictions within the Union or rules with an equivalent effect in licensing agreements or in payment card scheme rules for issuing payment cards or acquiring card-based payment transactions shall be prohibited.*

*Any requirement or obligation to obtain a country-specific licence or authorisation to operate on a cross-border basis or rule with an equivalent effect in licensing agreements or in payment card scheme rules for issuing payment cards or acquiring card-based payment transactions shall be prohibited.”*

5.2 We would consider any exclusive territory clause or other territorial restriction limiting a PSP’s ability to freely operate as an acquirer, issuer, or both, within the EEA to be a breach of this provision. We note that the term ‘territorial restrictions’ is not defined in the IFR but consider that it may include technical or operational requirements that have this effect.

5.3 While we will not set out an exhaustive list of actions that would be considered to breach this provision, examples include requirements that mean an issuer or acquirer:

- may operate in only one Member State
- may not operate in one or more Member States
- is restricted from beginning issuing or acquiring activity in a Member State

5.4 We would also consider any requirement to obtain a country-specific license or authorisation to operate on a cross-border basis to be a breach of this provision. In essence, there may only be a single license for all countries in the EEA.

5.5 This provision will apply to three-party schemes operating with licensees (or issuing cards with a co-branding partner or through an agent) and four-party schemes. For the avoidance of doubt, the PSR will be responsible for monitoring infringements of the licensing provision in the UK; infringements in other Member States will be investigated by the competent authorities of those Member States.

## Article 11: Steering rules

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- 5.6 Payment instruments entail different costs to the merchant, with some being more expensive than others. The steering rules aim to ensure that, except where a particular instrument is imposed by law or cannot be refused due to its legal tender status, the merchant should be free to steer payers towards a specific payment instrument. The Article states:

*“Any rule in licensing agreements, in scheme rules applied by payment card schemes and in agreements entered into between card acquirers and payees preventing payees from steering consumers to the use of any payment instrument preferred by the payee shall be prohibited. This prohibition shall also cover any rule prohibiting payees from treating card-based payment instruments of a given payment card scheme more or less favourably than others.*

*Any rule in licensing agreements, in scheme rules applied by payment card schemes and in agreements entered into between card acquirers and payees preventing payees from informing payers about interchange fees and merchant service charges shall be prohibited.*

*Paragraphs 1 and 2 of this Article are without prejudice to the rules on charges, reductions or other steering mechanisms set out in Directive 2007/64/EC and Directive 2011/83/EU.”*

- 5.7 We will not attempt to set out an exhaustive list of possible steering practices that merchants should be free to use. However, they include:
- providing information on the fees that the merchant faces for accepting different payment instruments (and different types of card)
  - asking the customer to pay in a different way
  - minimum transaction amounts for a given payment instrument
  - differential pricing (such as surcharging, or offering a discount for using a given payment instrument)
- 5.8 In respect of surcharging as a form of steering practice, merchants must comply with applicable consumer protection law.<sup>10</sup> In this context, we note specifically the Consumer Protection from Unfair Trading Regulations 2008 which prohibit unfair commercial practices, including misleading actions and misleading omissions, and the Consumer Rights (Payment Surcharges) Regulations 2012, which provide that a trader must not charge consumers more than it costs the trader to accept a particular method of payment.<sup>11</sup>
- 5.9 We also note that the revised EU Directive on Payment Services (PSD2), adopted by the Council of the European Union on 16 November 2015, will limit merchants’ ability to impose surcharges. Under Article 62(4), Member States must legislate to ensure that payees do not charge for card-based payment transactions where the interchange fees are regulated under Chapter II of the IFR. This means that, once the PSD2 has been transposed into national law, merchants will not be able to surcharge consumer debit and credit card transactions involving separate issuers and acquirers where both PSPs are located in the EEA. They will still be able to surcharge consumer card transactions where the issuer and the acquirer are the same entity (as with three-party schemes). They will also be able to surcharge commercial card transactions (as defined in the IFR).

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<sup>10</sup> The PSR does not enforce consumer protection law but relevant bodies include the Competition and Markets Authority and local authority Trading Standards services.

<sup>11</sup> The Consumer Rights (Payment Surcharges) Regulations 2012 implement in the UK Article 19 of the EU Consumer Rights Directive (2011/83/EU). Guidance on these Regulations has been prepared by the Department of Business, Innovation and Skills. See: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/175298/13-719-guidance-on-the-consumer-protection-payment-surcharges-regulations-2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175298/13-719-guidance-on-the-consumer-protection-payment-surcharges-regulations-2012.pdf)

- 5.10 If any restriction on merchants' ability to steer consumers is included in an agreement between any combination of schemes, acquirers and merchants, it is considered void and unenforceable. The remainder of the agreement will continue to be effective as long as the rule was not an essential part of it.
- 5.11 Since this rule came into force on 8 June 2015, we would expect acquirers to have begun a replacement plan for all contracts/documentation where such a restriction is included. If contracts were not replaced by 8 June 2015, acquirers should have taken all reasonable steps to communicate the changes to merchants by other means. Changes to card scheme rules should have been communicated on or before 8 June 2015.
- 5.12 As we explain in Chapter 6, both the PSR and the FCA will be responsible for monitoring infringements of the steering rules in the UK.

## **Article 12: Information to the payee on individual card-based payment transactions**

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- 5.13 This Article requires the acquirer to communicate certain information to the merchant for each card-based payment transaction. The Article states:

*"After the execution of an individual card-based payment transaction, the payee's payment service provider shall provide the payee with the following information:*

- (a) the reference enabling the payee to identify the card-based payment transaction;*
- (b) the amount of the payment transaction in the currency in which the payee's payment account is credited;*
- (c) the amount of any charges for the card-based payment transaction, indicating separately the merchant service charge and the amount of the interchange fee.*

*With the payee's prior and explicit consent, the information referred to in the first subparagraph may be aggregated by brand, application, payment instrument categories and rates of interchange fees applicable to the transaction.*

*Contracts between acquirers and payees may include a provision that the information referred to in the first subparagraph of paragraph 1 shall be provided or made available periodically, at least once a month, and in an agreed manner which allows payees to store and reproduce information unchanged."*

- 5.14 The following paragraphs describe our expectations of acquirers under this Article.

### **Communication to the merchant**

- 5.15 The specified information may be either provided to merchants (sent or given directly to the merchant – for example, on paper or, where the contract provides, by email) or made available to them (so the merchant can obtain it when they choose – for example, by accessing a secure website).
- 5.16 The information must be in a clear and comprehensible form and in a medium that the merchant can store and reproduce whenever required.
- 5.17 Where the information is made available, it must be easily accessible and the acquirer should clearly explain to the merchant that the information is being made available and how to obtain it. While we will not set out an exhaustive list of how acquirers might comply with this provision, they could, for example, write to merchants explaining the type of information that is available and how merchants



can access it. Acquirers might also include information about accessing the information in their regular communications with merchants. We would consider any requirements for merchants to call a certain number or email acquirers each time they wish to obtain the information as meaning that the information is not readily available to merchants.

- 5.18 Article 12(1) indicates that where there are no card-based payment transactions there is no obligation under the IFR to provide the specified information to merchants.

### Information to be provided

- 5.19 Article 2(12) of the IFR defines a merchant service charge (MSC) as “*a fee paid by the payee to the acquirer in relation to card-based payment transactions*”. We consider that, under this definition, one-off or periodic fees are not part of the MSC: the MSC relates to the fees and charges that are payable on each transaction. Such fees may be fixed for each transaction or related to the value of the transaction.
- 5.20 Article 12 states that interchange fees should be indicated separately from MSCs. Traditionally, the interchange fee would be considered to be an element of the MSC. However, Article 12 indicates that the MSC does not include interchange fees and so the merchant is to be given both:
- the MSC (including all per-transaction charges associated with accepting the individual card-based transaction, but excluding interchange fees and the fixed cost of services such as terminal provision)
  - the applicable interchange fee for that transaction (disaggregated from and displayed separately from the remainder of the MSC)

### Merchant’s consent

- 5.21 Article 12(1) states that, by default, acquirers must provide the information described above to merchants for each card-based payment transaction. This information can only be aggregated if the merchant has given *prior and explicit* consent to the acquirer. If this happens, the information may be aggregated by brand, application, payment instrument categories and rates of interchange fees applicable to the transaction.
- 5.22 ‘Consent’ means a permission given freely and without coercion or undue influence. We consider that explicit consent means that the merchant must confirm to the acquirer that it wishes to receive aggregated information. A presumption of consent to receive aggregated information unless the payee states otherwise would not be considered explicit consent. Explicit consent need not be given in writing but the acquirer should consider how it would demonstrate that it had complied with these rules.
- 5.23 As explained in Chapter 6, both the PSR and the FCA will be responsible for monitoring infringements of this Article in the UK.

## 6

# Monitoring and enforcement of the IFR

- In this chapter we set out our approach to monitoring compliance with the IFR.
- We will gather compliance reports from relevant parties.
- We will ask for independently audited data that demonstrates compliance with the interchange fee caps.
- We will investigate complaints about non-compliance with the IFR subject to a decision that such an investigation is an administrative priority.

- 6.1 In this chapter we describe how we will monitor compliance with the IFR provisions that will be in force by 9 December 2015. The chapter will be updated in due course to include the provisions that enter into force on 9 June 2016.

### Monitoring compliance with Articles 3, 4 and 5

- 6.2 We will monitor compliance with the interchange fee caps in the IFR by requiring schemes and issuing and acquiring PSPs to provide us with evidence under our IFR information-gathering powers (see Chapter 7). We will also consider any complaints received in relation to compliance with the interchange fee caps, and act on them as appropriate.
- 6.3 We will ask relevant parties to submit an annual report confirming that they have complied with Articles 3, 4 and 5. Those parties will be required to provide supporting evidence (including data on transaction values, interchange fees and issuer net compensation) which should be certified by an independent auditor. The report and supporting evidence may then be used as the basis of compliance-focused discussions between the PSR and the party providing the report. Where appropriate, we may require parties to provide additional data or information during the year.

### Debit card transactions

- 6.4 In respect of the weighted average interchange fee cap for domestic debit card transactions, Article 3(5) of the IFR provides for the competent authority to request in writing that payment card schemes and/or PSPs provide information necessary to verify the correct application of that cap and the calculation of annual transaction values referred to in Article 3(3). Following a written request from us, parties will be required to provide any information necessary to verify the correct application of the weighted average approach. This information should be certified by an independent auditor.
- 6.5 Article 3(5) of the IFR also stipulates the date by which the information described in the previous paragraph must be sent to the competent authority. Annual transaction values for the reference period 1 January to 31 December would need to be provided before 1 March the following year. The interchange fees that satisfy the weighted average cap apply from 1 April.

- 6.6 In respect of the first calculation, annual transaction values for the reference period 9 September 2014 to 8 September 2015 would need to be provided before a date to be specified by the PSR. The interchange fees that satisfy the weighted average cap apply from 9 December 2015.

### **Credit card transactions and prohibition of circumvention**

- 6.7 In addition to receiving information necessary for the verification process of the application of Article 3 (see paragraphs 6.4 to 6.6 above), we will also require information to be submitted annually demonstrating compliance with the interchange fee cap for consumer credit card transactions (Article 4) and the prohibition of circumvention (Article 5). This information should be certified by an independent auditor.
- 6.8 We propose to align the timetable for providing this data with that for debit card data described above. As such, information for the reference period 1 January to 31 December would need to be provided before 1 March the following year.
- 6.9 We will engage separately with schemes, issuers and acquirers as to the information and data requirements.

### **Monitoring compliance with Articles 6, 11 and 12**

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#### **Article 6**

- 6.10 Four-party schemes and three-party schemes operating with licensee issuers and/or acquirers (or issuing cards with a co-branding partner or through an agent) will be expected to confirm to us in writing that they are compliant with the provisions on licensing, describing the steps taken to become compliant, including how they have dealt with any territorial restrictions that previously applied.
- 6.11 After we receive the initial compliance report, we may engage with the scheme providing the report to discuss whether any further action is needed for that system to be compliant.
- 6.12 We then intend to follow a mainly complaints-led approach to monitoring compliance with this provision of the IFR. Complaints should be sent to the PSR.

#### **Article 11**

- 6.13 For each card scheme affected by Article 11, the scheme and each acquirer participating in that scheme will be expected to confirm to us in writing that it is compliant with the provisions on steering rules, describing what they have done to become compliant and when the changes were made.
- 6.14 After we receive the initial compliance report, we may engage with the scheme or the acquirer providing the report to discuss whether any further action is needed for that party to be compliant.
- 6.15 The FCA will also have a role in monitoring compliance with Article 11 and taking action where appropriate.<sup>12</sup> The initial compliance reports submitted to the PSR will be shared with the FCA.
- 6.16 Following submission of the initial compliance reports we intend to follow a mainly complaints-led approach to monitoring compliance with this provision of the IFR. Complaints may be sent to either the PSR or FCA. A decision on whether the PSR, FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

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<sup>12</sup> See HM Treasury (2015) 'Interchange fee regulation: consultation response'

## Article 12

- 6.17 Each acquirer affected by Article 12 will be expected to confirm to us in writing that it is compliant with the requirement to provide information to the payee on individual card-based payment transactions, describing what they have done to become compliant. We would expect each acquirer to provide details on the type of information provided to merchants, how this information is provided or made available and, where merchants have provided express consent to receiving aggregate information, how the consent is obtained and documented.
- 6.18 Following receipt of the initial compliance report, we may engage with the acquirer providing the report to discuss whether any further action is needed for that party to be compliant.
- 6.19 The FCA will also have a role in monitoring compliance with Article 12 and taking enforcement action where appropriate.<sup>13</sup> The initial compliance reports submitted to the PSR will be shared with the FCA.
- 6.20 Following submission of the initial compliance reports we intend to follow a mainly complaints-led approach to monitoring compliance with this provision of the IFR. Complaints may be sent to either the PSR or FCA. A decision on whether the PSR, FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

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<sup>13</sup> See [www.legislation.gov.uk/uksi/2015/1911/contents/made](http://www.legislation.gov.uk/uksi/2015/1911/contents/made).

# 7

## Our powers and procedures under the IFR

### Introduction

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#### Scope of this chapter

- 7.1 This chapter relates to the processes and procedures that the PSR will generally apply in relation to its functions under the Payment Card Interchange Fee Regulations 2015 (the PCIFRs), which designates the PSR as a competent authority for Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (the 'Interchange Fee Regulation' or 'IFR').

#### Our powers under the PCIFRs

- 7.2 The PCIFRs operate by assigning the PSR new functions and powers in connection with the IFR, and by applying (or applying with modification) certain pre-existing provisions of the Financial Services (Banking Reform) Act 2013 (FSBRA) for IFR purposes. Under the PCIFRs, we have a range of powers over regulated persons (that is, any persons on whom an obligation or prohibition is imposed by any provision of the IFR). These include among others:
- powers to give directions (Regulation 4)
  - powers to enforce our directions and the obligations or prohibitions imposed by the IFR where parties do not comply (Regulations 5 to 8)
  - powers to gather information and to conduct investigations (Regulation 14)
- 7.3 This chapter sets out practical information on how we will exercise these powers, where we have determined that it is appropriate to do so.

### Giving directions

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#### Overview of the powers

- 7.4 We can, by giving a direction to a regulated person, require or prohibit the taking of a specified action for certain purposes. We can give directions to obtain information about compliance with the IFR or its application to a person. We can also give directions to remedy or prevent a failure to comply with the IFR, or to provide compensation or redress to a person who has suffered a loss as a result of such a failure.<sup>14</sup>

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<sup>14</sup> Regulation 4

- 7.5 Directions can be 'specific' or 'general', depending on whether they are addressed only at certain regulated persons (for example, a named operator of a card payment system) or whole classes of regulated persons (for example, all operators of card payment systems).

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

- 7.6 Before giving a specific direction, we will normally send addressees a notice of a 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, we may give specific directions without giving notice.
- 7.7 Where we give notice, we will normally allow 14 days for addressees to make representations in writing. We will take into account the circumstances of each case. In some situations, it might be appropriate to give more time for representations to be made. In urgent cases, the period in which representations can be made might be shortened. We will consider written representations received alongside any views expressed orally in any meeting(s) held between the addressees and the PSR case team or staff during the window for representations. If the PSR does not seek such a meeting itself, an addressee may request one. In doing so, the addressee should state why a meeting is necessary. We will consider such requests and we may decide to convene a meeting between the addressee and the PSR case team or staff.
- 7.8 Where a proposed specific direction is likely to have wider implications or relevance beyond the specific addressees, we might decide to share the draft direction more widely and seek the views of other stakeholders. We will balance the interests of such wider consultation with fairness to the specific addressees of the proposed direction. In deciding whether to share the draft direction more widely, we may seek the views of the specific addressees.
- 7.9 We will take account of representations received in deciding whether to give a specific direction.
- 7.10 When a decision is taken to give a specific direction, a final notice of a direction or a requirement will typically be addressed to the relevant persons. Alternatively, and where appropriate to do so, we may publish the direction on our website and bring it to the attention of the relevant persons. Either way, we will set out the reasons for the action taken. We will specify the commencement date of the direction.
- 7.11 We will decide whether to publish a specific 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 specific addressees of the direction. In deciding whether to publish a direction, we may seek the views of the specific addressees.

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

- 7.12 Before giving a general direction, we will normally consult publicly by publishing a draft of the direction on our website and inviting representations on it. We might also issue a press release drawing attention to the draft, write directly to regulated persons, or take such other steps as we see fit to draw attention to the proposal.
- 7.13 However, we are not required to publish a draft direction if we consider that the delay involved would be prejudicial to the interests of service users.
- 7.14 When we publish a draft direction it will be accompanied by a cost-benefit analysis, an explanation of its purpose, our reasons for proposing it and a notice that representations may be made to us within a specified time. However, we will not publish a cost-benefit analysis where we do not consider that the proposal will lead to any significant increase in costs. Where the costs or benefits

cannot reasonably be estimated, or where it is not reasonably practicable to produce an estimate, we will give our opinion and an explanation of it.

- 7.15 In responding to consultations on proposed general directions, respondents are urged to pay attention to the instructions and the timescale for responses in the consultation notice accompanying the draft direction. We will normally allow 4 to 12 weeks for representations to be made in writing. The precise duration of the consultation will depend on the complexity of the proposed action and the other circumstances of the case, including, for example, the extent to which there has already been meaningful engagement with stakeholders on the particular issues.
- 7.16 We will take account of consultation responses received in deciding whether to give a general direction.
- 7.17 Where we decide to give a general direction, we will publish it.
- 7.18 We will also publish an account, in general terms, of representations made during the consultation and our response to them.

## **Appeals**

- 7.19 Regulation 9 of the PCIFRs provides that decisions to give specific directions are appealable to the Competition Appeal Tribunal (CAT) by any person who is affected by the decision. The CAT must apply the same principles as would be applied by a court on an application for judicial review.
- 7.20 Decisions to give general directions are not appealable to the CAT unlike specific directions (see Regulation 9(a)).
- 7.21 Our decisions on whether to give directions, like all administrative decisions, can be the subject of judicial review by the courts.

## **Disputes between a payee and its payment service provider**

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### **Overview of the powers**

- 7.22 Regulation 12 of the PCIFRs provides a mechanism whereby a payee ('the applicant') having a dispute with its payment service provider (PSP) arising under the IFR can complain to and seek resolution of the dispute by the PSR.
- 7.23 In such cases, the applicant will make a formal application. Following such applications, we can exercise any of our powers under the PCIFRs, including giving a direction or taking enforcement action, where we decide that doing so would be an administrative priority (see our Administrative Priority Framework, available on our website: [www.psr.org.uk](http://www.psr.org.uk)). We understand that the timely resolution of disputes is important and we will try to reach a determination as soon as possible in the circumstances of each dispute that we decide to investigate.
- 7.24 In response to an application, we might decide to take informal action rather than to exercise our formal powers. We might take informal action before and/or after we decide to investigate a dispute.

### **Making an application**

- 7.25 For us to properly consider disputes that are escalated to us and to assess whether the payee's complaint is justified, we will need applications to contain detailed information on the nature of the dispute and the remedy that is sought. A common format for making such applications will also assist us in the task of processing and considering them.

- 7.26 Guidance on the format and content of applications is set out in Appendix 1. Parties making an application should ensure that the information provided is specific and relevant and does not go beyond what is needed to resolve the dispute. The submission of unnecessary or irrelevant information or evidence could delay our assessment of the application. In certain cases, particularly for smaller companies or individuals, we may consider relaxing some of these requirements.
- 7.27 We will expect that parties to a dispute will have first sought to resolve their disagreements between themselves and through available alternative dispute resolution processes, which may include attempts at mediation. Where an applicant has not done (or attempted) this, we may decide that it is not appropriate to handle the application or to exercise any of our powers, at least until the applicant has demonstrated that they have reasonably pursued such alternative routes to resolve their dispute.
- 7.28 If you are a potential applicant and need any further guidance on how to make an application, please contact us by email at [PSRapplications@psr.org.uk](mailto:PSRapplications@psr.org.uk)
- 7.29 Applications should be made to:
- Post: Payment Systems Regulator, 25 The North Colonnade, Canary Wharf, London, E14 5HS
- Email: [PSRapplications@psr.org.uk](mailto:PSRapplications@psr.org.uk)
- 7.30 If an applicant considers that its application contains confidential information, it should provide a separate non-confidential version which can be copied to the other party (or parties) to the dispute, as well as explaining why it considers that the information is confidential.

### **Following receipt of an application**

- 7.31 Where applications are submitted by email, we will aim to acknowledge receipt within one working day.
- 7.32 Following receipt, we will review the application and assess whether it contains the requisite information and documentation. We will assess whether there is enough detail in the application to be able to consider it properly. We may need to revert to the applicant for further detail if this is lacking.
- 7.33 If we are satisfied that we have been provided with sufficient information by the applicant to consider the application, we will allocate an initial enquiry number to the dispute and open an initial enquiry. The initial enquiry phase involves the PSR considering whether or not the payee's complaint appears to be justified and, if so, whether or not it might be appropriate to exercise our formal powers under the PCIFRs. We may decide that it is not appropriate for us to exercise our formal powers for various reasons, including that there are alternative means available for resolving the dispute or that using our formal powers would not be an administrative priority.
- 7.34 Applications may require clarification on certain points and the PSR may need to raise these with the parties. We may also need to undertake some enquiries to assist us in understanding the dispute. The first step will usually be to send a non-confidential version of the application to the other party (or parties) to the dispute named in the application. However, where we consider it appropriate, and where it is permitted by legislation, we may also disclose confidential information. We expect to seek the views of the applicant before deciding to disclose any confidential information.
- 7.35 As part of the initial enquiry phase, we may convene meetings with parties to the dispute, separately or jointly.
- 7.36 As soon as practicable after we have decided whether or not a payee's complaint appears to be justified and that it might be appropriate for us to exercise our formal powers, we will inform the parties to the dispute of our decision and the reasons for it.



## Where we decide to handle a dispute

- 7.37 If we have decided that a payee's complaint appears to be justified and that it might be appropriate for us to exercise our formal powers, we will open a case and allocate a case number. We may publish details of the dispute, including the business names of the applicant and the other parties, on our website.
- 7.38 We will proceed to gather information necessary for us to determine whether we should exercise any of our formal powers (and how we might exercise them) or take any other steps that we consider appropriate to resolve the dispute. We might seek information from the other party or parties to the dispute, or third parties, through the exercise of our power to obtain information or documents, or by obtaining a report from a regulated person, or appointing a skilled person to provide a report. We may convene meetings with the parties to the dispute, separately or jointly.
- 7.39 Deciding to handle a dispute and gather further information does not bind us to exercising our formal powers, such as giving a direction or to take enforcement action. Our information gathering might reveal that there are no grounds for such action (perhaps because there are alternative means of resolving the dispute, or because we discover that the complaint is unjustified). Alternatively, we may decide that exercising our powers is not an administrative priority.

## Publication of updates and final determination

- 7.40 We may publish updates on our website in connection with those disputes that we decide to handle. We may also indicate what final determination was made, such as whether we considered that there were no grounds for action, that action was not an administrative priority, that we would exercise our formal powers, or that alternative action was more appropriate. We will decide whether to publish updates or final determinations of disputes based on the circumstances of each case. In doing so, we will balance the interests of transparency and wider awareness of the PSR's work and decision-making process with fairness to parties to the dispute. In making these decisions, we may seek the views of the parties to the dispute on what we expect to publish. We will not include commercially confidential information in any published updates or final determinations.
- 7.41 When the final determination of an application is published, we may also publish the non-confidential version of the initial application.

## Enforcement action

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### Overview of the powers

- 7.42 A compliance failure is the failure of a regulated person to comply with:
- an obligation or prohibition imposed by the IFR, or
  - a direction given by the PSR under Regulation 4 of the PCIFRs
- 7.43 We have the power to take enforcement action in relation to these compliance failures. This includes the power to:
- publish details of the compliance failure (Regulation 5)
  - impose a financial penalty for the compliance failure (Regulation 6) and publish details of that penalty (Regulation 5(b))
  - seek an injunction to bring the compliance failure to an end, remedy the compliance failure or restrain dealing with assets (Regulation 8)

- 7.44 Subject to the decision-making process described below, we may publish details of a compliance failure or impose a financial penalty in any situation when we have sufficient evidence that a regulated person has failed to comply with an IFR obligation or prohibition, or has failed to comply with a PSR direction that was addressed to it. For example, we might find that there has been a compliance failure following:
- an investigation in response to a complaint made to us about non-compliance with the IFR or a PSR direction, or following an application by a payee about a dispute with its PSP
  - an investigation commenced at our own initiative into compliance with the IFR or a PSR direction
  - a report of a skilled person which reveals a compliance failure
- 7.45 A regulated person might also proactively approach us to disclose or declare a compliance failure. It might further undertake to change its practice, bring the compliance failure to an end and give assurances on how future compliance failures will be avoided. We reserve the option to publish details of a compliance failure or impose a financial penalty in such cases, subject to the decision-making process described below, if we are satisfied that a compliance failure occurred and that the sanction is appropriate.

### **Publication of compliance failures and imposition of financial penalties**

- 7.46 We will consider each compliance failure on its merits and determine whether the publication of details relating to the compliance failure and/or relating to the imposition of a financial penalty is appropriate.
- 7.47 If, following the decision-making process described below, we decide to publish details of a compliance failure, those details (including, if relevant, the details of any financial penalty imposed) will generally be published on our website. We might also issue a press release.
- 7.48 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>15</sup> This statement is contained in the next chapter of this document.
- 7.49 In applying the statement of penalty principles, we must apply the version in force at the time of the compliance failure. We must also review the statement from time to time and revise it if necessary.

### **Deciding whether to publish details of a compliance failure or to impose a financial penalty**

- 7.50 Decisions on whether to publish details of, or to impose a financial penalty for, a compliance failure will be taken by the PSR Enforcement Decisions Committee (EDC). The EDC will satisfy itself that a compliance failure has been committed and determine whether publication of details of the compliance failure or the imposition of a financial penalty is appropriate.
- 7.51 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 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.

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<sup>15</sup> Regulation 6(3)

***PSR recommendation to the EDC to issue a warning notice***

- 7.52 If we consider that it is appropriate to publish details of, or impose a financial penalty for, a compliance failure, we will recommend to the EDC that a warning notice should be issued. We may submit a draft warning notice to the EDC, along with our recommendation.
- 7.53 A recommendation to issue a warning notice may arise from a formal investigation involving appointed investigators (see paragraphs 7.122 to 7.152 below on the use of appointed investigators). In such cases, our recommendation to the EDC will usually be accompanied by the investigation report produced.
- 7.54 When we consider it appropriate, or the EDC requests it, relevant supporting documents or evidence will be provided to the EDC.

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

- 7.55 The decision to issue a warning notice is made by the EDC.
- 7.56 In deciding to issue a warning notice, the EDC will:
- settle the wording of the warning notice, and
  - make any relevant decisions associated with the issue of the warning notice (for example, the relevant period for the recipient of the notice to make representations and whether the recipient should be provided with any material relevant to the issue of the notice)
- 7.57 If the EDC decides to issue a warning notice, we will make appropriate arrangements for the notice to be given.

***Contents of the warning notice***

- 7.58 The warning notice will set out details of the compliance failure it relates to and the EDC's proposal to publish details of the compliance failure and/or to impose a financial penalty. The warning notice will state the factual and legal basis for the proposed action and the EDC's reasons for proposing it.
- 7.59 When the EDC proposes to publish details of a compliance failure, the warning notice will set out the wording that it intends to publish. If the EDC 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***

- 7.60 There is no statutory requirement to provide a recipient of a warning notice with any underlying material. However, the EDC will consider in each case whether it is appropriate to do so. In some cases, the EDC may consider it appropriate to provide the recipient with the written submissions and documents that the EDC considered when reaching the decision to issue a warning notice. The EDC will consider whether access to underlying material is likely to be necessary for the recipient of a warning notice to understand the case against it.
- 7.61 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, there may be authority to disclose material where an exception applies under the Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/882) or where we have received the consent of the person from whom the information was received and (if different) to whom the information relates.

***Making representations to the EDC***

- 7.62 Once a warning notice has been issued, the recipient will have at least 21 days to make representations to the EDC in writing. The EDC will, when issuing a warning notice, state the time in which representations are to be made and to whom those representations should be addressed.
- 7.63 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 identify clearly what facts, legal grounds or reasons for the proposed action the recipient of the warning notice is contesting. Representations should be as concise as possible. The EDC may also signal, when the warning notice is issued, the expected format, content and length of representations that can be made to it.
- 7.64 In some circumstances, the EDC may agree to an extension of the time in which the recipient of a warning notice can make representations. A recipient of a warning notice must apply to the EDC for such an extension and must state why the extension is necessary and, in particular, why it is not possible to respond adequately in the period already provided.
- 7.65 A single member of the EDC will decide whether to grant an application for an extension. In considering the application, they will balance the interests of fairness to the applicant and those of procedural efficiency.
- 7.66 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 fix a date for a meeting (an oral hearing) at which the relevant decision-making panel will receive those representations.
- 7.67 The EDC Chairman or Deputy Chairman will be the Chair of the oral hearing. They will specify the running order and timings of the oral hearing, and will ensure that representations run to time during the hearing. 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 person making the oral representations to clarify the representations being made.

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

- 7.68 If representations were made, the EDC will consider those representations when reaching its decision on whether it is appropriate to publish details of a compliance failure or impose a financial penalty.
- 7.69 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 publish details of the compliance failure or to impose a financial penalty can be taken by the EDC Chairman or Deputy Chairman alone, without the need to convene or consult the other members of the decision-making panel, if the EDC Chairman or Deputy Chairman so determines.
- 7.70 If the EDC decides to publish details of a compliance failure, it will settle the wording of those details to be published.
- 7.71 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***

- 7.72 Following the decision of the EDC, we will, as soon as practicable, give the subject of the decision a written notice (the 'decision notice') stating whether or not we will publish details of, or impose a financial penalty for, the compliance failure.
- 7.73 When the EDC decides to publish details of a compliance failure, the decision notice will set out the wording that we will publish (including, if the EDC so decides, the details of any financial penalty imposed). We will also inform the recipient of the notice of the day on which we intend to publish the details of the compliance failure.
- 7.74 When the EDC decides to impose a financial penalty for a compliance failure, the decision notice will state the amount of the penalty that we will impose. We will also inform the recipient of the notice of the date for payment of the penalty, which will typically be 14 days following the issue of the decision notice.
- 7.75 We will make appropriate arrangements for the details of the compliance failure to be published and/or for the collection of the financial penalty.

### **Appeals**

- 7.76 Regulation 9 of the PCIFRs provides that decisions to publish the details of a compliance failure or to impose a financial penalty in respect of a compliance failure are appealable to the CAT by any person who is affected by the decision.
- 7.77 When the EDC decides to impose a financial penalty for a compliance failure, and an appeal against the decision is made to the CAT, the penalty is not required to be paid until after the appeal has been determined.
- 7.78 Our decisions on whether to publish the details of a compliance failure or to impose a financial penalty in respect of a compliance failure, like all administrative decisions, can be the subject of judicial review by the courts.

### **Settlement decision procedure: uncontested decisions to publish details of a compliance failure or to impose a financial penalty**

- 7.79 Settlement has many potential advantages, including the saving of industry resources and our own, and the prompt communication of compliance messages to the card payments industry. As such, we consider that it is normally in the public interest for matters to be settled, and early, if possible.
- 7.80 Accordingly, a regulated person may settle with us by agreeing to the publication of details of and/or the imposition of a financial penalty for a compliance failure, rather than contesting our decision.
- 7.81 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, a regulated person may enter into settlement discussions with us at any time, if both the regulated person and we agree.
- 7.82 Settlement discussions between the regulated person 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.
- 7.83 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 regulated person and the PSR.

- 7.84 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.
- 7.85 The warning notice will constitute our proposed decision about the compliance failure and will set out the details of the compliance failure that we propose to publish and/or the financial penalty that we propose to impose.
- 7.86 Once a warning notice has been issued and the regulated person 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.
- 7.87 In recognition of the benefits and savings afforded by settlement, any 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).
- 7.88 The amount of the financial penalty specified in the warning notice will take into account all the factors in our statement of penalty principles (contained in the following chapter) apart from the existence of 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.
- 7.89 Compliance failure proceedings may still be settled, if appropriate, where a warning notice has been issued by the EDC. In these circumstances, settlement discussions will still be undertaken by our staff and decisions made by the SDMs.
- 7.90 All settlement communications are made without prejudice. 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.

## Injunctions

- 7.91 Applying to the court for injunctive relief is another way that we can enforce the IFR and our directions under the PCIFRs.<sup>16</sup> Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers to publish details or impose a financial penalty.
- 7.92 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 actual or potential compliance failure and whether injunctive relief is appropriate.
- 7.93 On our application, the court may make an order:
  - restraining the conduct, if it is satisfied that there is a reasonable likelihood of a compliance failure or, if a compliance failure has taken place, that it is reasonably likely to continue or be repeated
  - requiring the regulated person, and anyone else who appears to have been knowingly concerned in the compliance failure, to take steps to remedy it, if it is satisfied that there has been a compliance failure and that steps could be taken to remedy it, or

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<sup>16</sup> Regulation 8

- restraining the regulated person or the other person (as the case may be) from dealing with any assets which it is satisfied the person is reasonably likely to deal with, if it is satisfied that there has been a compliance failure or that the person may have been knowingly concerned in a compliance failure<sup>17</sup>

7.94 We may seek only one type of order or several, depending on the circumstances of each case.

## Information gathering and investigation powers

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### Overview of our powers

7.95 We have various powers to gather information and to conduct investigations.<sup>18</sup> In any particular case we will decide which powers, or combination of powers, are the most appropriate to use.

### Power to obtain information or documents

7.96 We have the power to require a person to provide information and documents which we need to exercise our statutory functions under the PCIFRs.<sup>19</sup>

7.97 We might use this power to obtain information or documents to assist, for example, in determining whether there has been a compliance failure by a regulated person. However, where one or more investigators have been appointed to investigate a suspected compliance failure (see paragraphs 7.122 to 7.152 below on the use of appointed investigators), we generally expect to use the information-gathering powers exercisable by those investigators (see paragraphs 7.106 to 7.112 below).

7.98 Requests for the provision of information and documents will be made through a formal written notice (known as an information request). The notice will set out the form or manner in which information or documents should be provided and will specify the deadline for responses.

7.99 We expect to give recipients of information requests advance notice so that they can manage their resources accordingly. Also, where it is practical and appropriate to do so, we will send the 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).

### Reports by skilled persons

7.100 We have the power to require a regulated person to provide a report by a skilled person which we need to exercise our statutory functions under the PCIFRs. We can also appoint a skilled person to provide a report.<sup>20</sup>

7.101 We expect to use these powers where particular skills or specialist knowledge are required to produce a report. We will make it clear, to the regulated person and to the skilled person, what the nature of the matters was that led us to decide that a skilled person's report was necessary, and the possible uses of the results of that report.

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<sup>17</sup> The court may also make an order freezing assets under its inherent jurisdiction.

<sup>18</sup> Regulation 14 PCIFRs and sections 81 to 90 FSBRA

<sup>19</sup> Regulation 14 PCIFRs and section 81 FSBRA

<sup>20</sup> Regulation 14 PCIFRs and section 82 FSBRA



- 7.102 A skilled person's report may assist us in determining whether there has been a compliance failure or if it is appropriate to conduct an investigation into a suspected compliance failure.
- 7.103 Where we require a regulated person to provide us with a skilled person's report, we will issue a notice in writing (known as a notice to provide a skilled person's report). This notice will specify such things as:
- the procedure by which the skilled person is to be nominated or approved by us
  - the terms of the appointment of the skilled person
  - the procedures to be followed and the obligations of the regulated person in the production of the skilled person's report
  - practical matters, such as arrangements for interaction between the skilled person and us
  - the subject matter which the report must cover and the form the report should take
  - the deadline for the submission of the report<sup>21</sup>
- 7.104 We expect to give advance notice before we require the provision of a skilled person's report, so that the regulated person can manage its resources accordingly. Also, where it is practical and appropriate to do so, we will send the notice to provide a skilled person's report in draft and take account of comments on the scope and contents of the report, the work that the skilled person will be required to undertake (or the assistance they will require) and the deadline by which the report must be provided. We will assess each case on its facts to determine whether it would be appropriate to provide such advance notice and an opportunity to comment before formally requiring a report to be provided.
- 7.105 When we require a regulated person to provide a report by a skilled person, that regulated person will pay for the services of the skilled person. When we appoint a skilled person to produce a report, we may direct the regulated person who is the subject of the report to pay any expenses we incur. In both situations, we will consider the cost implications of skilled persons' reports and the facts and circumstances of each case, including the availability of alternative options for gathering information on the matter concerned.

## **Powers exercisable by appointed investigators**

- 7.106 We may appoint investigators to conduct an investigation into a suspected compliance failure (see paragraphs 7.122 to 7.152 below on the use of appointed investigators). If investigators are appointed, they will have powers (under Regulation 14 PCIFRs and section 85 FSBRA) to:
- require persons under investigation (and persons connected with them), or any persons who, in the investigator's opinion, are or may be able to give relevant information, to provide information and to attend and answer questions in interview<sup>22</sup>
  - require any person to produce documents
- 7.107 The requirements described above may be imposed only so far as the investigator reasonably considers them to be relevant to the purposes of the investigation.

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<sup>21</sup> Following the appointment of the skilled person, we may also give specific directions to the regulated person about the procedures to be followed and their obligations under the notice to provide a skilled person's report.

<sup>22</sup> Any persons who, in the investigator's opinion, are or may be able to give relevant information may also be required to give the appointed investigators all assistance in connection with the investigation as they are reasonably able to give.



- 7.108 The appointed investigator(s) will exercise these powers by issuing formal notices in writing (known as investigatory requirement notices). These notices will set out the requirements and the deadlines for compliance.
- 7.109 We expect to give recipients of investigatory requirement notices advance warning so that they can manage their resources accordingly. Also, when it is practical and appropriate to do so, we will send the investigatory requirement notice in draft and take account of comments on the scope of the requirements, the actions that will be required in complying with them, and the deadline for compliance. In certain circumstances it will not be appropriate to provide advance warning or to send investigatory requirement notices in draft – for example, if we think it would prejudice the investigation.
- 7.110 We do not expect to send draft investigatory requirement notices when the information or document requirements are straightforward and we consider that it is reasonable to expect the information or documents to be made available within our specified time frame.
- 7.111 The time frame for comments on a draft investigatory requirement notice would usually be no more than three working days. After considering any comments, we will then confirm or amend the investigatory requirement notice.
- 7.112 Once we have formally issued an investigatory requirement notice (whether or not it has been preceded by a draft), we will not usually agree to an extension of time for complying with the notice, unless compelling reasons are provided to support an extension request.

## Search and seizure powers

- 7.113 We have the power to apply to a justice of the peace for a warrant to enter premises where documents or information are held.<sup>23</sup> The circumstances under which we may apply for a search warrant include:
- when a person has been issued with an information request or an investigatory requirement notice requiring the provision of information or documents and has failed (wholly or in part) to comply with the requirement, or
  - when there are reasonable grounds for believing that, if an information request or an investigatory requirement notice requiring the provision of information or documents were to be issued to a regulated person, the requirement would not be complied with or the information or documents would be removed, tampered with or destroyed
- 7.114 A warrant obtained under Regulation 14 PCIFRs and section 88 FSBRA authorises a police constable, or a person in the company of and under the supervision of a police constable, to do the following:
- enter and search the premises specified in the warrant
  - take possession of any information or documents appearing to be of a kind for which the warrant was issued
  - take any other steps which may appear to be necessary to preserve or prevent interference with such information or documents
- 7.115 During the search, we may require any person on the premises to provide an explanation of relevant information or documents, or to state where such information or documents can be found.

<sup>23</sup> Regulation 14 PCIFRs and section 88 FSBRA

- 7.116 During a search under warrant, we would expect to take copies of documents rather than to seize originals, when it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize original documents, we expect to return these to the participant in a regulated payment system as soon as reasonably practicable to do so. We will adopt the same approach with respect to electronic copies, in that we will endeavour to take copies of hard-drives where it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize hard-drives, laptops, or other data-storage devices, we expect to return these to the participant in a regulated payment system as soon as reasonably practicable to do so.

## **Non-compliance**

- 7.117 If a person does not comply with an information or investigatory requirement imposed under any of our statutory powers, they can be dealt with by the courts as if they were in contempt of court (when penalties can be a fine, imprisonment or both).
- 7.118 As is the case with FSBRA, the PCIFRs provide for criminal offences where:
- a person who knows that an investigation is being or is likely to be conducted falsifies, conceals, destroys or otherwise disposes of a document which they know or suspect would be relevant to the investigation, or causes or permits this to happen
  - a person responding to an information or investigatory requirement knowingly or recklessly provides false or misleading information
  - a person intentionally obstructs the exercise of any rights conferred by a warrant (i.e. our search and seizure powers)<sup>24</sup>

## **Voluntary provision of information**

- 7.119 We may, where appropriate to do so, make use of voluntary information requests rather than formal requests under our statutory powers. We understand that some parties may prefer to receive a voluntary information request while others may prefer to receive a formal information request. Where we have sought information voluntarily but the recipient of the request considers that it would be helpful for this to be formalised into a statutory request, they should discuss this with the PSR case team in the first instance.
- 7.120 Information may also be provided to us voluntarily, without us requesting it. For example, regulated persons may commission an internal investigation or a report from an external law firm or other professional adviser and decide to pass a copy of this report to us. Such reports can be very helpful for us when an investigation (for example, into a suspected compliance failure) is anticipated or is underway.
- 7.121 Regulated persons are not obliged to share the content of legally privileged reports they are given or advice they receive. It is for the participant to decide whether to provide such material to us. But a participant's willingness to volunteer the results of its own investigation would be welcomed and is something that we may take into account when deciding what action to take, if any.

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<sup>24</sup> Regulation 14 PCIFRs and section 90 FSBRA

## The use of appointed investigators

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### Appointed investigators

- 7.122 We may appoint one or more investigators to investigate a suspected compliance failure where it appears to us that there are circumstances suggesting that one may have occurred.<sup>25</sup>
- 7.123 An appointed investigator could be a member of the PSR's staff, a member of the FCA's staff or an external person. Appointed investigators are able to exercise certain investigatory powers not otherwise exercisable by the PSR (see paragraphs 7.106 to 7.112 above).

### Written notice of the appointment of investigators

- 7.124 We may give written notice of the appointment of investigators to the person under investigation. We will assess each case on its facts to determine whether it would be appropriate to provide written notice.
- 7.125 When a notice of the appointment of investigator(s) is issued, it will specify the provision under which the investigator(s) were appointed and the reasons for their appointment.
- 7.126 If a notice of the appointment of investigator(s) is not issued at the time investigator(s) are appointed, we will normally issue the notice at the time we exercise our statutory powers to require information from the person under investigation, provided that such notification will not prejudice our ability to conduct the investigation effectively.

### Scoping discussions

- 7.127 If notice is given at the outset of an investigation (when investigators are appointed), we will generally hold scoping discussions with the person under investigation close to the start of the investigation. The purpose of these discussions is to give the parties an indication of:
- why we have appointed investigators (including the nature of and reasons for our investigation)
  - the scope of the investigation
  - how the process is likely to unfold
  - the individuals and documents the team will need access to initially
- 7.128 However, there is a limit as to how specific we can be about the nature of our concerns in the early stages of an investigation.
- 7.129 In addition to the initial scoping discussions, there will be an ongoing dialogue with the person under investigation throughout the investigative process.

### Changes in the scope of an investigation

- 7.130 If the nature of our concerns change significantly from those notified to the person under investigation and we are satisfied that it is appropriate to continue the investigation, we may change the scope accordingly.

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<sup>25</sup> Regulation 14 PCIFRs and section 83(2) FSBRA

- 7.131 If there is a change in the scope or conduct of the investigation we may give written notice of the change.
- 7.132 One situation (but not the only situation) in which we will give written notice of the change is where we think that the person under investigation is likely to be significantly prejudiced if they are not made aware of this. We cannot give a definitive list of all the circumstances in which a person under investigation is likely to be significantly prejudiced by not being made aware of a change in the scope or conduct of an investigation. However, it may include situations where there may be unnecessary costs from dealing with an aspect of an investigation which we no longer intend to pursue.

### **Appointment of additional investigators**

- 7.133 In some cases, we will appoint additional investigators during the course of the investigation. If this happens and we have previously told the person under investigation that we have appointed investigators, then we will normally give the person written notice of the additional appointment(s).

### **Notice of the termination of investigations**

- 7.134 When we have given the person under investigation written notice that we have appointed investigators and later we decide to discontinue the investigation without any present intention to take further action, we will confirm this to the person, as soon as we consider it appropriate to do so.

### **Approach to information and document requirements**

- 7.135 Appointed investigators will normally use the powers exercisable by them to require the provision of information or documents, rather than seeking information or documents on a voluntary basis. This is for reasons of fairness, transparency and efficiency. However, it might occasionally be appropriate to depart from this standard practice in limited circumstances, for example where the investigators are gathering information from third parties with no professional connection with the card payments industry.
- 7.136 Appointed investigators will make it clear to the person concerned whether they are required to provide information or documents (through the use of an investigatory requirement notice) or whether information or documents are being sought on a voluntary basis.
- 7.137 Investigatory requirement notices requiring the provision of information or documents are discussed in paragraphs 7.106 to 7.112 above.
- 7.138 As delays in the provision of information and/or documents can have a significant impact on the efficient progression of an investigation, we expect recipients to respond to investigatory requirement notices in a timely manner and within applicable deadlines.

### **Approach to interviews**

- 7.139 Appointed investigators will normally use the powers exercisable by them to require the attendance and answering of questions at an interview, rather than seeking this on a voluntary basis. This is for reasons of fairness, transparency and efficiency. However, it might be appropriate to depart from this standard practice in limited circumstances, for example where the investigators are gathering information from third parties with no professional connection with the card payments industry.
- 7.140 Appointed investigators will make it clear to the person concerned whether they are required to attend and answer questions at an interview (through the use of an investigatory requirement notice) or whether this is being sought on a voluntary basis.

- 7.141 Investigatory requirement notices requiring the attendance and answering of questions at an interview are discussed in paragraphs 7.106 to 7.112 above.
- 7.142 When we interview a person, we will allow them to be accompanied by a legal adviser, if they wish. We will also, where appropriate, explain what use can be made of their answers in proceedings against them. If the interview is recorded, the person will be given a copy of the recording of the interview, along with a copy of any transcript.

### **Preliminary findings letters and preliminary investigation reports (as regards compliance failures)**

- 7.143 Appointed investigators may find that there has been a compliance failure by the person under investigation. The PSR may decide to recommend to the EDC that details of a compliance failure be published or that a financial penalty be imposed for a compliance failure. In cases where our recommendation to the EDC is based on the findings of appointed investigators, our recommendation will usually be accompanied by an investigation report.
- 7.144 When we propose to submit an investigation report to the EDC, we expect to send a preliminary findings letter to the person under investigation first. The letter will normally annex the investigators' preliminary investigation report. Comments will be invited on the contents of the preliminary findings letter and the preliminary investigation report.
- 7.145 Preliminary findings letters serve a very useful purpose in focusing decision-making on the contentious issues in the case. This makes for better quality and more efficient decision-making. However, there are circumstances in which we may decide that it is not appropriate to send out a preliminary findings letter. These include when:
- the person under investigation consents to not receiving a preliminary findings letter
  - it is not practicable to send a preliminary findings letter, for example when there is a need for urgent action
  - we believe that no useful purpose would be achieved in sending a preliminary findings letter, for example, when we have already substantially disclosed our case to the person under investigation and they have had an opportunity to respond
- 7.146 If a preliminary findings letter is sent, it will set out the facts which the appointed investigators consider relevant to the matters under investigation (normally, as indicated above, by means of an annexed preliminary investigation report). We will then invite the person under investigation to confirm that those facts are complete and accurate, or to provide further comment.
- 7.147 We will generally allow a reasonable period of time for a response to this letter. This period will depend on the circumstances of the case, but we would normally allow 14 days. We will consider any responses received within the period stated in this letter, but we are not obliged to take into account any responses received after this time.
- 7.148 If we send a preliminary findings letter and then decide not to take any further action, we will communicate this decision promptly to the person under investigation.
- 7.149 When we submit an investigation report to the EDC, with a recommendation that details of a compliance failure be published or that a financial penalty be imposed, we will inform the person under investigation promptly after the submission of that report.

## Transparency in respect of appointed investigators

- 7.150 We may wish to publicise information regarding the appointment and use of investigators. For example, we may wish to publish on our website a summary of the subject matter of the investigation and the identity of the person under investigation. We may also wish to publish details of what action, if any, we ultimately decide to take (such as the issuing of a warning notice or a decision notice).
- 7.151 We will consider the circumstances of each case and balance the interests of transparency (including enabling participants in card payment systems, service users and the wider public to understand the nature of our concerns and what we are doing to address them) and fairness to the person under investigation.
- 7.152 We may consult the person under investigation and take account of any evidence they provide which suggests that publication of information about the investigation would be unfair.

## Contacting us

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### Applications about disputes

- 7.153 If you are a payee who is in a dispute with your payment service provider and wish to apply to us for resolution of the dispute, please see paragraphs 7.25 to 7.30 above and Appendix 1 below for details on how to do so.
- 7.154 Our mailbox address for such applications is: [PSRapplications@psr.org.uk](mailto:PSRapplications@psr.org.uk)

### Other complaints (about non-compliance)

- 7.155 If you wish to make a complaint about a breach of the IFR or a PSR direction made under the PCIFRs, you can contact us by post or by email to: [PSRcomplaints@psr.org.uk](mailto:PSRcomplaints@psr.org.uk).

### For general purposes

- 7.156 If you wish to 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), you can contact us by post or by email to: [contactus@psr.org.uk](mailto:contactus@psr.org.uk)
- 7.157 We will endeavour to respond to all general queries or correspondence seeking a response within 12 working days of receipt.

### Our postal address

- 7.158 You can contact us by post at:

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

## 8

# Statement of penalty principles

### Introduction

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- 8.1 This chapter sets out our statement of penalty principles. It covers penalties for non-compliance with Regulation (EU) 2015/571 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (the 'Interchange Fee Regulation' or 'IFR') and directions given by the PSR under the Payment Card Interchange Fee Regulations 2015 (PCIFRs). Under Regulation 6 of the PCIFRs, we may require a regulated person (that is, any person on whom an obligation or prohibition is imposed by any provision of the IFR) to pay a penalty in respect of a compliance failure.<sup>26</sup>
- 8.2 A 'compliance failure' means a failure by a regulated person to comply with:
- an obligation or prohibition imposed by the IFR, or
  - a direction given by the PSR under Regulation 4 of the PCIFRs
- 8.3 This document contains our statement of the principles which we will apply in determining (a) whether to impose a penalty; and (b) the amount of that penalty. We are required to prepare this statement of principles under Regulation 6(3) of the PCIFRs. Details of the procedures that we will generally apply in relation to our functions under the PCIFRs, including rights of appeal, are set out in the previous chapter.
- 8.4 We will have regard to this statement of principles:
- in respect of any compliance failure which occurred, or is continuing, on or after 9 December 2015
  - in deciding whether to impose a penalty
  - in determining the amount of any penalty
- 8.5 We will apply this statement of principles in respect of all regulated persons. This does not imply that the same compliance failure would necessarily result in the same financial penalty across and within different categories of regulated persons.
- 8.6 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.

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<sup>26</sup> In this document references to a 'regulated person' shall have the same meaning as defined in Regulation 2(1) of the PCIFRs.

- 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 regulated person after the compliance failure has been identified
  - the previous compliance history of the regulated person
  - 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 taken by us or another domestic or international competent authority under the IFR in previous similar cases
  - 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 an IFR 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.<sup>27</sup>
- 8.10 In deciding whether it is appropriate to publish details of a compliance failure (instead of imposing a financial penalty), we will consider all the relevant circumstances of the case. The key factor is the nature and seriousness of the compliance failure, but other considerations include the following non-exhaustive factors:
- whether or not deterrence may be effectively achieved by publishing details of the compliance failure
  - if the regulated person has derived an economic benefit (including made a profit or avoided a loss) as a result of the compliance failure, this may be a factor in favour of a financial penalty, on the basis that a regulated person should not be permitted to retain any benefit from its compliance failure
  - if the compliance failure is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the compliance failure; other things being equal, the more serious the failure, the more likely we are to impose a financial penalty
  - if the regulated person has brought the compliance failure to our attention, this may be a factor in favour of only publishing details of the compliance failure
  - if the regulated person has admitted the compliance failure and provided full and immediate cooperation to us, and has taken steps to put in place effective remedial action, this may be a

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<sup>27</sup> Under Regulation 5(a) of the PCIFRs we may publish details of a compliance failure by a regulated person.



factor in favour of only publishing details of the compliance failure, rather than also imposing a financial penalty

- if the regulated person has a poor compliance history this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases
- the approach of the PSR or other competent authority in similar previous cases (where appropriate, we will seek to achieve a consistent approach to our decisions on whether to impose a financial penalty or to publish details of a compliance failure)
- the impact on the regulated person concerned, although it would only be in an exceptional case that we would be prepared to agree to only publish details of the compliance failure, and not impose a financial penalty, if a penalty would otherwise be the appropriate sanction

8.11 Where we impose a financial penalty, our normal practice will be to also publish details of that financial penalty under Regulation 5(b) of the PCIFRs. 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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8.12 Our penalty-setting regime is based on the following general principles:

- **Disgorgement:** A regulated person should not benefit from any compliance failure.
- **Discipline:** A regulated person should be penalised for wrongdoing.
- **Deterrence:** Any penalty imposed should deter the regulated person who committed the compliance failure, and others, from committing further or similar compliance failures.

8.13 The total amount payable by a regulated person subject to enforcement action 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 following framework.

- **First element:** The disgorgement of any economic benefits derived directly from the compliance failure (see paragraphs 8.17 to 8.19).
- **Second element:** The financial penalty, calculated as follows:
  - Step 1: In addition to any disgorgement (see first element), the determination of a figure which reflects the seriousness of the compliance failure and the size and financial position of the regulated person (see paragraphs 8.20 to 8.21).
  - Step 2: Where appropriate, an adjustment made to the Step 1 figure to take account of any aggravating or mitigating circumstances (see paragraphs 8.22 to 8.23).
  - Step 3: Where appropriate, an upwards adjustment made to the amount arrived at after Steps 1 and 2, to ensure that the penalty has an appropriate and effective deterrent effect (see paragraph 8.24).
  - Step 4: If applicable, one or both of the following factors may be applied to the figure determined following Steps 1, 2 and 3:
    - a settlement discount (see paragraphs 8.25 and 8.34 to 8.40)

- an adjustment based on any serious financial hardship which the PSR considers payment of the penalty would cause the regulated person, or if the penalty could adversely impact the stability of or confidence in the UK financial system (see paragraphs 8.26 and 8.27 to 8.33)
- 8.14 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).
- 8.15 We recognise that the overall penalty arrived at pursuant to our framework approach must be appropriate and proportionate to the relevant compliance failure. We may decrease the level of the penalty which would otherwise be determined following Steps 1 and 2 if we consider that it is disproportionately high having regard to the seriousness, scale and effect of the compliance failure. In determining any deterrence uplift at Step 3, we will also ensure that the overall penalty is not disproportionate.
- 8.16 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.

## **Our framework for determining the level of penalties**

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### **First element – disgorgement**

- 8.17 We will seek to deprive a regulated person 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.
- 8.18 Where the success of a regulated person's business model is dependent on failing to comply with obligations or prohibitions under the IFR, or with directions given by the PSR under the PCIFRs, and the compliance failure is at the core of the regulated person's activities related to card payment systems and the services provided by card payment systems, we will seek to deprive the regulated person of all the financial benefit derived from such activities.
- 8.19 Where a regulated person 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), or where we decide to impose a redress programme, the PSR 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***

- 8.20 As noted in paragraphs 8.13 to 8.14, 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 a regulated person from a particular business activity is indicative of the harm or potential harm that its compliance failure may cause. In such cases the PSR will determine a figure which will be based on a percentage of the annual gross revenues derived by the regulated person from the business activity in the United Kingdom to which the compliance failure relates.<sup>28</sup> Where appropriate the PSR may have regard to a regulated person's 'billings' (i.e. the revenues invoiced to third parties) in respect of the relevant business activity, for example where revenues information is not available or differs from billings.

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<sup>28</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.

8.21 The following factors may be relevant to determining 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 regulated persons who have committed compliance failures from committing further compliance failures and helping to deter other regulated persons from committing similar compliance failures.
- *The nature of the compliance failure*: the following considerations may in particular be relevant:
  - the nature of the IFR obligation or prohibition imposed on, or the PSR direction given to, the regulated person which was not complied with
  - the duration and/or frequency and/or repetition of the compliance failure
  - the extent to which the regulated person's senior management were aware of the compliance failure, the nature and extent of 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 aims of the IFR (taking into account the provisions of the IFR and its explanatory recitals)
- The extent to which the compliance failure was deliberate or reckless

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

8.22 We may increase or decrease the amount of the financial penalty arrived at after Step 1 (but not including any amount to be disgorged as set out in paragraphs 8.17 to 8.19) to take into account factors which aggravate or mitigate the compliance failure.

8.23 The following list of factors may have the effect of aggravating or mitigating the compliance failure:

- the behaviour of the regulated person in bringing (or failing to bring) quickly, effectively and comprehensively the compliance failure to our attention (or the attention of other competent authorities, where appropriate)
- the degree of cooperation the regulated person showed during the investigation of the compliance failure by us, or any other competent authority working with us, and the impact of this on our ability to conclude our investigation into the compliance failure promptly and efficiently
- any remedial steps the regulated person has taken, or has committed to take, since the compliance failure was identified, how promptly they were or will be taken, and their effectiveness
- whether the regulated person has arranged its resources in such a way as to enable or avoid disgorgement and/or payment of a financial penalty
- whether the regulated person had previously been informed about our concerns in relation to the issue or behaviour in question
- whether the regulated person had previously undertaken to us or another competent authority not to perform a particular act or not to engage in particular behaviour which relates to the compliance failure, or has undertaken to perform a particular act or to engage in particular behaviour which relates to the compliance failure

- the extent to which the regulated person concerned has complied with our directions or the requests or requirements of another competent authority relating to the issue
- the previous disciplinary record and general compliance history of the regulated person in relation to us or another competent authority
- action taken against the regulated person by another competent authority that is relevant to the compliance failure in question
- 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 regulated person to achieve a clear and unambiguous commitment to compliance with the IFR obligations or prohibitions imposed on it, and with the PSR's directions under the PCIFRs, throughout the organisation (from the top down) – together with appropriate steps relating to regulatory risk identification, risk assessment, risk mitigation and review activities<sup>29</sup>
- whether the failure is due (in whole or in part) to the actions of a third party and whether the regulated person 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 regulated person on whom the penalty is to be imposed

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

8.24 If we consider that the figure arrived at after Step 2 is insufficient to deter the regulated person who committed the compliance failure, or others, from committing further or similar compliance failures, then we may increase the penalty. Circumstances where we may do this include (but are not limited to):

- where we consider that the value of the penalty is too small in relation to the compliance failure to meet our objective of credible and effective deterrence
- where previous action by us or another competent authority in respect of the same or similar issues has failed to improve the relevant behavioural standards of the regulated person which is the subject of our action and/or relevant industry behavioural standards
- where we consider that there is a risk that similar compliance failures will be committed by the regulated person or by other regulated persons in the future in the absence of such an increase to the penalty

### ***Step 4 – discounts***

8.25 The PSR and the regulated person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the PSR and the regulated person concerned reached an agreement. The

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<sup>29</sup> The mere existence of compliance activities will not be treated as a mitigating factor. The regulated person will need to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of regulatory risk. It will also need to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand. We will not, subject to some exceptions, ordinarily regard the existence of a compliance programme as a factor to warrant an increase in the amount of the penalty to be imposed against that regulated person for the compliance failure. The exceptions include situations where the purported compliance programme had been used to facilitate the compliance failure, to mislead us or another competent authority as to the existence or nature of the compliance failure, or had been used in an attempt to conceal the compliance failure.

settlement discount does not apply to the disgorgement of any benefit calculated under the first element, pursuant to paragraphs 8.13 to 8.14. Details of the PSR's policy on settlement discounts are provided in paragraphs 8.34 to 8.40.

8.26 Details of our policy on serious financial hardship are provided in paragraphs 8.27 to 8.33.

### **Serious financial hardship**

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- 8.27 Our starting point is that we consider that 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 8.28 to 8.30.
- 8.28 We note that many Payment Service Providers (PSPs) authorised by the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) are subject to their own prudential requirements.
- 8.29 In the context of penalties imposed on a regulated person for a compliance failure, we expect in particular that businesses (such as card system operators) organised as not-for-profit entities should have in place effective arrangements with their owners, shareholders, guarantors or direct participants (as the case may be) to call upon such persons to contribute sufficient funds from time to time in order to enable the business to meet its current and future debts and liabilities as they fall due. This would cover a debt owed to us as a penalty for a compliance failure.
- 8.30 With respect to any claim that a decision to impose a penalty on a regulated person could adversely impact 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.
- 8.31 Subject to paragraphs 8.27 to 8.30, our approach to determining penalties is intended to ensure that financial penalties are proportionate to the compliance failure. We recognise that penalties may affect regulated persons differently, and that we should consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of enforcement action serious financial hardship, and/or if this could adversely impact the stability of, or confidence in, the UK financial system. Where a regulated person claims that payment of the penalty proposed by us will cause it serious financial hardship, we will consider whether to reduce the proposed penalty (resulting from Steps 1, 2 and 3) only if:
- the regulated person provides verifiable evidence that payment of the penalty will cause them serious financial hardship and/or could adversely impact the stability of or confidence in the UK financial system
  - the regulated person provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by us about its financial position
- 8.32 The onus is on the regulated person to satisfy us that payment of the penalty will cause it serious financial hardship and/or that this could adversely impact the stability of, or confidence in, the UK financial system.
- 8.33 There may be cases where, even though the regulated person has satisfied us that payment of the financial penalty would cause serious financial hardship, we consider the compliance failure to be so serious that it is not appropriate to reduce the penalty. We will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether (as applicable):
- an individual who has the ability to exercise control or material influence over the management or operation of the regulated person (Individual Controller):
    - 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
- a regulated person or Individual Controller has spent money or dissipated assets or otherwise used financial structures in anticipation of enforcement action by us or another competent authority with a view to frustrating or limiting the impact of action taken by us or other competent authorities

## Settlement discount

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- 8.34 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).
- 8.35 Regulated persons subject to enforcement action may be prepared to agree the amount of any financial penalty and other conditions which we seek to impose by way of such action. We recognise the benefits of such agreements, in that they offer the potential for securing earlier protection for parties that the IFR is intended to benefit and the saving of costs to the regulated person concerned in contesting the financial penalty and to the PSR itself. The penalty that might otherwise be payable in respect of a compliance failure by the regulated person concerned will therefore be reduced to reflect the timing of any settlement agreement.
- 8.36 In appropriate cases our approach will be to discuss with the regulated person concerned to agree in principle the amount of a financial penalty having regard to 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 shall be no more than 30% of A. The resulting figure (B) will be the amount actually payable by the regulated person concerned in respect of the compliance failure. 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.
- 8.37 In certain circumstances, the regulated person concerned may consider that it would have been possible to reach a settlement at an earlier stage, and argue that it should be entitled to a greater percentage reduction in penalty. It may be, for example, that we no longer wish to pursue enforcement action in respect of all of the acts or omissions previously alleged to give rise to the compliance failure. In such cases, the regulated person concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from a greater discount. Equally, we may consider that greater openness from the regulated person concerned could have resulted in an earlier settlement.
- 8.38 Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement, and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.
- 8.39 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 regulated person concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the PSR and the regulated person concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible.

- 8.40 In cases where we apply a discount in the penalty for settlement, the fact of settlement and the level of the discount to the financial penalty that would otherwise have been imposed by us will be set out in the final decision notice.

## Apportionment

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- 8.41 In a case where we are proposing to impose a financial penalty on a regulated person 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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- 8.42 Financial penalties will be paid to the Treasury after deducting our enforcement costs as provided for in Regulation 15(3)(e) of the PCIFRs and Schedule 4, paragraph 10(1) of FSBRA.
- 8.43 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 8.27 to 8.33.
- 8.44 We will consider agreeing to defer the due date for payment of a penalty or accepting payment by instalments where, for example, the regulated person 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 regulated person could or should have organised its business affairs in order to allow it to pay within the specified time.
- 8.45 We will remain vigilant to any attempt by regulated persons 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.<sup>30</sup>
- 8.46 We have a mechanism under the Financial Services (Banking Reform Act) 2013 (FSBRA) which enables us to require participants in FSBRA regulated payment systems to justify their fees and charges. Section 57 FSBRA enables us to vary any of the terms or fees or charges payable under relevant agreements, including (but not limited to) agreements between a PSP with direct access to a regulated payment system and another person for the purposes of enabling that other person to obtain indirect access to the payment system. It would therefore be open to an Indirect PSP to apply to us under section 57 FSBRA should there be grounds for concern that the fees charged under their agreement with a Direct PSP to obtain indirect access to a payment system, represent an attempt to indemnify the Direct PSP from the financial consequences of penalties, or to otherwise pass on the effects of such penalties to Indirect PSPs.
- 8.47 In meeting their obligation to pay a penalty, regulated persons must satisfy themselves that their arrangements are consistent with public policy. For example, those regulated persons who are also subject to Chapter 6 of the General Provisions module of the FCA Handbook (GEN)<sup>31</sup> will be reminded that it contains rules prohibiting a firm or member from entering into, arranging, claiming on or making a payment under a contract of insurance that is intended to have, or has, the effect of indemnifying a relevant party against a financial penalty. We expect regulated persons who are subject to GEN to comply with those provisions as relevant for the purposes of financial penalties imposed under Regulation 6 of the PCIFRs. We would typically expect regulated persons who are not subject to GEN to comply with these general principles.

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<sup>30</sup> Including, potentially, any attempt by a regulated person to withdraw from participation in a card payment system after a penalty is imposed or when a penalty appears to be reasonably likely in order to avoid meeting liability for penalties imposed or likely to be imposed by us.

<sup>31</sup> See <http://fshandbook.info/FS/html/FCA/GEN/6/1>



# Appendix 1:

## The content of applications about disputes

### Content of applications

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- 1.1 This appendix sets out guidelines for applicants on the format and content of applications made by payees about disputes with their payment service providers (PSPs) arising under the IFR.
- 1.2 Applicants are reminded that failing to follow these guidelines may result in the application lacking sufficient information for the PSR to be able to consider it properly.
- 1.3 If an application does not contain all the necessary information, we will advise you on what else is needed before we will be able to consider the application and allocate an initial enquiry number to the dispute. (Please note that the allocation of an initial enquiry number does not mean that the PSR has decided to open a case or that it is appropriate for us handle the dispute.)
- 1.4 It would be helpful if applicants could, wherever possible, provide their application and any relevant supporting documents in Word format (ideally) or in searchable PDF format.
- 1.5 An application should contain the business name, address, telephone number and email address of the applicant and the contact details of an individual who can discuss the details of the dispute.
- 1.6 An application should contain the following information:<sup>32</sup>

#### *Section A: Overview of the application*

- The nature of the applicant's business and its scale (local, national, international).<sup>33</sup>
- The broad facts of the dispute and its commercial context.
- The IFR prohibitions or obligations which are the subject of the dispute.
- The proposed remedy or remedies for resolution of the dispute.

#### *Section B: Details of the dispute*

- The relevant card payment system(s) and acquiring PSP(s).
- The full facts of the dispute and its commercial context, including all relevant background and evidence.
- The full details of any justification given for the behaviour or action leading to the dispute.
- The reasons why an application has been made to the PSR.

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<sup>32</sup> Where the applicant considers that any information is not relevant, or believes that any information is not available, they should explain why this is the case.

<sup>33</sup> Details of relevant turnover or volumes/values of relevant transactions would also be helpful.



- The relevant provisions of the IFR (the prohibitions or obligations set out in the IFR) which the applicant considers have not been complied with by the PSP(s).
- Sufficient information and supporting evidence to enable us to understand the context and subject matter of the dispute.

### ***Section C: History of commercial negotiations***

- The full details of any negotiations which have taken place between the applicant and the other party (or parties) to the dispute, including documentary evidence of those negotiations.
- In the event that a party has refused to enter into negotiations: full details of the applicant's attempts to enter into negotiations, including evidence of those attempts.
- The details of any options or proposed solutions put forward by any party during negotiations, including what was accepted or rejected, and why.

### ***Section D: Remedy sought***

- The full details of the remedy sought by the applicant, with reasons and justifications.
- The applicant's assessment of how the remedy sought would be consistent with the PSR's functions, duties and/or regulatory principles (as set out in Regulation 3 of the PCIFRs).

### ***Section E: Supporting information and evidence***

- If applicable, copies of the relevant contract or terms which are the subject of the dispute.
- Relevant documentary evidence of commercial negotiations between the applicant and the other party (or parties) to the dispute, and a chronology of events where appropriate (see Section C).
- Any other relevant supporting information or documentary evidence.

## **Confidentiality**

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- 1.7 When submitting an application, applicants should identify information which they consider to be confidential and which, if disclosed to the other party (or parties) to the dispute, or to third parties (as the case may be), would significantly harm the legitimate interests of the party to whom the information relates. Applicants should also explain why they consider the information to be confidential.
- 1.8 Applicants should provide us with a non-confidential version of their application and any supporting documents in which they redact the information they consider to be confidential.

## Form of declaration by an officer of the company

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- 1.9 Applications should be accompanied by the following declaration by an officer of the company:

*'Before making this application to the PSR, to the best of my knowledge and belief, [company name] has sought to resolve the dispute concerned through commercial negotiation and available alternative dispute resolution processes. All information and evidence provided in making this application to the PSR is, to the best of my knowledge and belief, true and accurate.*

*Signed: [ ]*

*Position in the company: [ ]*

*Date: [ ]'*

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