FINANCIAL CONDUCT AUTHORITY
PAYMENT SYSTEMS REGULATOR

The PSR's proposed approach to monitoring and enforcing the revised Payment Services Directive (PSD2)

April 2017

Contents

1. Overview

This document contains guidance on our approach to monitoring compliance with Regulation 61 and Part 8 of the Payment Services Regulations 2017. We are the competent authority for these articles. Regulation 61 concerns information on ATM withdrawal charges, and Part 8 concerns access to payment systems and bank accounts.

Introduction

1.1 The Payment Services Directive 2007/64/EC (PSD1) has had legal effect since 1 November 2009. This legislation provides the legal foundation for an EU single market for payments, to establish safer and more innovative payment services across the EU.[1] PSD1 was implemented in the UK through the Payment Services Regulations 2009 ('the 2009 Regulations').

1.2 On 25 November 2015, the European Parliament and the Council of the European Union adopted the EU Directive 2015/2366 on payment services in the internal market (PSD2). It was published in the Official Journal of the European Union on 23 December 2015.[2] PSD2 repeals the earlier Directive.

1.3 The Treasury is in the process of transposing PSD2 requirements into national law with the UK Payment Services Regulations 2017 ('the PSRs 2017'), which set out the role, powers and competences of the competent authorities in the UK.

Our role as a UK competent authority under the Payment Services Regulations 2017

1.4 The Financial Conduct Authority (FCA) will be the competent authority responsible for monitoring and enforcing compliance with the PSRs 2017, with the exception of some articles – including those which the Payment Systems Regulator (PSR) has been appointed as a competent authority for. We are responsible for monitoring compliance with Regulation 61 (Information on ATM withdrawal charges) and Part 8 (Access to payment systems and bank accounts) of the PSRs 2017 in the UK, and for taking enforcement action where appropriate. Part 8 of the PSRs 2017 comprises Regulations 102 to 105. Both the PSR and the FCA have been appointed as competent authorities for monitoring and enforcing compliance with Regulation 105 (Access to bank accounts).

1.5 For information about the FCA's powers and procedures as competent authority under the PSRs 2017, please refer to chapter 10 of the FCA's Approach Document.[3]

1.6 We will cooperate with other competent authorities in the UK and other Member States as appropriate. This will include working closely with the FCA to monitor and enforce compliance with Regulation 105 (Access to bank accounts) in the UK.

1.7 PSD2 is a maximum harmonisation directive requiring all Member States to implement these rules as national law by 13 January 2018. The interpretation of what PSD2 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 own approach as the competent authority in the UK.

1 EU Commission press release, 8 October 2015.
2 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2366&from=EN
3 www.fca.org.uk/publications/consultation-papers/implementation-revised-payment-services-directive-psd2-cp17-11

1.8 In exercising our regulatory functions under the PSRs 2017, we must take a number of principles into account. These include the need to use our resources in the most efficient way and to be transparent in the exercise of these functions.[4]

The purpose of this document

1.9 This document provides guidance on the approach that we intend to take in relation to our functions under the PSRs 2017. These designate us as a competent authority for monitoring and enforcing compliance with requirements in Regulation 61 and Part 8 of the PSRs 2017.

1.10 This guidance represents our approach at the date of publication. We may revise it from time to time to reflect changes in best practice or the law and our experience in carrying out our functions. We will follow this guidance when we exercise our functions under the PSRs 2017, but may adopt a different approach when the facts of an individual case reasonably justify it.

1.11 Chapter 2 of this document will be of direct interest to

- four-party payment card systems and their participants
- three-party card systems with licensees
- interbank payment systems that are designated under the EU Settlement Finality Directive (SFD)[5] and payment service providers (PSPs) that use their services

Chapter 3 will be of particular interest to all credit institutions and Payment Institutions (PIs), and Chapter 4 to all independent ATM deployers (IADs). The guidance may also be of interest to end users, who should benefit from the protections provided by the PSRs 2017, and well-functioning payment systems and services.

1.12 This guidance is made under Regulation 134 of the PSRs 2017. It does not try to describe all the provisions of the PSRs 2017 in detail. Part 10 of that legislation describes our statutory functions and powers under the PSRs 2017 in full.

1.13 From time to time, we may issue general guidance on substantive or operational matters where we think information or advice is needed. This includes the operation of specified provisions of the PSRs 2017 and any matters relating to our functions under this legislation.

1.14 The text of the PSRs 2017 is paramount. If there is any inconsistency between the PSRs 2017 and any part of this guidance, the text of PSD2 and the PSRs 2017 takes precedence.

1.15 Guidance on our powers, procedures and penalties under the PSRs 2017 is set out in Appendix 1.[6]

4 Regulation 124(2) and Regulation 106(3)
5 Directive 98/26/EC on settlement finality in payment and securities settlement systems incorporated into UK law by The Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (as amended). Designated systems in the UK for the purpose of Regulation 104 are currently CHAPS, Bacs and FPS.
6 Part 10 of the PSRs 2017.

2. Access to payment systems (Regulations 103 and 104 of the PSRs 2017)

The guidance in this chapter covers the PSRs 2017's provisions on:

- prohibition on restrictive rules on access to payment systems (Regulation 103)
- indirect access to payment systems designated under the Settlement Finality Directive (Regulation 104)
- our role as the sole competent authority for monitoring and enforcing compliance with Regulations 103 and 104

2.1 This chapter is relevant to:

- payment system operators
- direct participants in payment systems designated under the SFD[7] who provide indirect access to those systems
- all authorised or registered PSPs who access or want to access those payment systems

This chapter may also be of interest to customers of PSPs that have access to payment systems.

2.2 Regulations 103 and 104 of the PSRs 2017 concern access to payment systems operating in the UK. Regulation 103 reflects the existing provisions of Part 8 of the 2009 Regulations to a large extent, with some important changes in scope. Regulation 104 is a new addition. As was the case with the 2009 Regulations, the key aim of these Regulations is to ensure that authorised PSPs are allowed access to payment systems in the UK on an objective, proportionate and non-discriminatory basis.

2.3 We are the sole competent authority for monitoring and enforcing compliance with Regulations 103 and 104.

2.4 Regulation 104 applies to SFD-designated payment systems. In the UK, the Bank of England is the authority that designates payment systems under the SFD. In the UK, the following payment systems have been designated under the SFD:

- Bacs (operated by Bacs Payment Systems Limited)
- CHAPS (operated by CHAPS Clearing Company)
- Faster Payments Scheme (FPS) (operated by the Faster Payments Scheme Limited)
- Cheque and Credit Clearing (C&C) (operated by the Cheque and Credit Clearing Company Limited)

7 Directive 98/26/EC on settlement finality in payment and securities settlement systems incorporated into UK law by The Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (as amended)

2.5 Cheque systems are out of scope for PSD2 on the basis that the Directive only regulates electronic payments and not cheques. For the purpose of this provision, at the time of publication, the payment systems in scope of Regulation 104 are Bacs, CHAPS and FPS.

2.6 Regulation 103 applies to payment systems that are not designated under the SFD. Under the PSRs 2017,[8] provisions relating to access to payment systems apply to:

- interbank systems
- four-party card systems
- three-party card systems with licensees

This is a change from the access regulations under Part 8 of the 2009 Regulations, which did not apply to three-party card systems operating with licensees.[9]

2.7 In deciding which systems should be subject to the Payment Card Interchange Fee Regulations 2015 (which implement the EU Interchange Fee Regulation), we reviewed the business models of all the card payment systems operating in the UK. This review allowed us to identify all four-party systems and three-party card systems with licensees. We concluded that Mastercard, Visa Europe, JCB International (JCB), Diners Club International (Diners) and China UnionPay (CUP) are four-party systems, and American Express (Amex) is a three-party system operating with licensees.

2.8 Regulation 103 applies to all these card systems (including Amex) and LINK, which is a non-SFD designated interbank system. The legal requirements relate to access for all different categories of payment system members (for example, associate members, principal members etc). Therefore they cover all types of access to the systems involved. LINK has only one tier of membership.

8 See Regulation 102 of the PSRs 2017.

9 A three-party system may license third party PSPs to carry out some issuing or acquiring activity (or both activities), while continuing to both issue cards and acquire transactions itself. In this setting, the system is the licensor. We note that Amex has currently challenged the Treasury's interpretation of the EU PSD2 on whether access obligations in Art. 35 should be extended to three party schemes with licensees. Legal challenge is pending before the Court of Justice of the European Union.

The PSRs 2017 and FSBRA

2.9 Schedule 8, paragraph 5 of the PSRs 2017 amends section 108 of the Financial Services (Banking Reform) Act 2013 (FSBRA). The amended section 108 prohibits us from exercising our powers[10] under FSBRA to enable a person to get or maintain access to a payment system if Regulation 103 or 104 of the PSRs 2017 apply to that person's access arrangements. Consequently, if a scheme is covered by the PSRs 2017 we will use our powers under those regulations to monitor and enforce the scheme's compliance with their access provisions. We may use our FSBRA powers to consider applications for access to FSBRA regulated systems that are not in scope of the PSRs 2017.[11] Therefore, at the time of publication:

- We will use our PSRs 2017 powers to monitor and enforce compliance by LINK, Visa, Mastercard, JCB, Diners, China Union Pay (CUP) and Amex[12] with the access obligations set out in Regulation 103 of the PSRs 2017.
- We will use our PSRs 2017 powers to monitor and enforce compliance by direct participants offering indirect access (sponsorship services) to Bacs, FPS and CHAPS as set out in Regulation 104 of the PSRs 2017.
- We will use our FSBRA powers to consider applications for direct access to SFD-designated payment systems that are also designated by the Treasury under FSBRA: Bacs, Cheque and Credit (C&C), CHAPS, FPS and Northern Ireland Cheque Clearing (NICC) (FSBRA designated systems).
- Credit unions are not regulated under the PSRs 2017. Therefore we will consider any access application or requirement related to a credit union under our FSBRA powers.

2.10 Table 1 summarises which payment systems are covered by which powers for direct and indirect access:

Table 1: Our access powers

	PSRs 2017	FSBRA sections 56 and 57
Direct access	**Regulation 103:** Visa, Mastercard, LINK, JCB, Diners, CUP, Amex	Bacs, CHAPS, FPS, C&C, NICC
Indirect access	**Regulation 103:** Visa, Mastercard, LINK, JCB, Diners, CUP, Amex **Regulation 104:** Bacs, FPS, CHAPS	C&C, NICC

10 Powers under sections 54 to 58 of FSBRA.

11 The PSR has powers under section 56 of FSBRA to grant PSPs access to certain regulated payment systems. We also have powers under section 57 FSBRA to vary the terms of agreements for access to certain regulated payment systems. See our consultation paper CP16/4, *Our approach to handling applications under sections 56 and 57 FSBRA*: www.psr.org.uk/psr-publications/consultations/PSR-CP164-handling-applications-under-s56-s57

12 Amex inclusion in the list is subject to the pending legal challenge on the scope of Art. 35(1) incorporated in Regulation 103 of the PSRs 2016 (see footnote 9).

Regulation 103: Prohibition on restrictive rules on access to payment systems

2.11 Regulation 103 is about the nature of rules that payment system operators can set for PSPs to access their systems.

2.12 This section sets out:

- the requirements of Regulation 103, including which payments systems are in scope of this Regulation
- the application of the requirements
- a summary of how we will monitor compliance with Regulation 103

2.13 As set out above, Regulation 103 applies in respect of LINK, Mastercard, Visa Europe, JCB, Diners Club International, CUP and Amex.

2.14 Regulation 103 applies to rules on access to a relevant payment system by authorised or registered PSPs. PSPs for the purposes of Regulation 103 are defined in the PSRs 2017[13] as:

a. authorised payment institutions

b. small payment institutions

c. registered account information service providers

d. EEA authorised payment institutions

e. EEA registered account information service providers

f. electronic money institutions

g. credit institutions

h. the Post Office Limited

i. the Bank of England, the European Central Bank and the national central banks of EEA States other than the United Kingdom, other than when acting in their capacity as a monetary authority or carrying out other functions of a public nature, and

j. government departments and local authorities, other than when carrying out functions of a public nature

2.15 Credit unions are not regulated persons for the purpose of the PSRs 2017.

2.16 Regulation 103 also covers existing PSPs with access to payment systems, as well as prospective PSPs – that is, persons who have made an application to the FCA or the relevant competent authority in its home EEA State, to be authorised or registered as any of the PSPs listed above.

13 Regulation 2 of the PSRs 2017

The requirements of Regulation 103

2.17 Regulation 103 contains five essential requirements concerning relevant systems' access rules or conditions:

- They must be proportionate, objective and non-discriminatory (POND).
- They must not prevent, restrict or inhibit access more than is necessary to safeguard against specific risks or protect the stability of the payment system.
- They must not restrict effective participation in other payment systems.
- They must not discriminate (directly or indirectly) between different authorised or different registered PSPs in relation to the rights, obligations or entitlements of participants in the payment systems.
- They must not impose restrictions on the basis of institutional status.

2.18 Any system access rule or requirement must be justifiable by the operator in those terms. This means that an operator must be able to demonstrate that their system rules and conditions comply with the legal requirements set out in the PSRs 2017. This includes rules and conditions relating to the provision, variation and termination of access.

Rules or conditions governing access must be POND

2.19 When considering whether payment systems operators are complying with this Regulation, we may consider the following factors (this is a non-exhaustive list):

- Do the payment system's rules and conditions allow the payment system operator to consider the PSP's individual circumstances, including the specific costs, risks and revenues it may present?
- Do the payment system's rules apply similar terms and conditions to all PSPs that engage in similar transactions or have a similar profile, taking risk considerations into account (in other words, are they all non-discriminatory)? We may ask the payment system to explain any differences.
- Can the payment system objectively justify each of its rules and conditions relating to the provision, variation or termination of access?
- Are the payment system's rules and conditions relating to the provision, termination and variation of access proportionate? Are the requirements in the rules proportionate to the risks imposed on the payment system? We may therefore assess proportionality by reference to the interests of the payment system and the risks it needs to manage.

2.20 This is not an exhaustive list and it will be the responsibility of the operators of relevant payment systems to ensure that their access rules comply with the requirements of Regulation 103.

Rules or conditions governing access must not prevent, restrict or inhibit access or participation more than is necessary to safeguard against specific risks or protect the financial and operational stability of the payment system

2.21 Regulation 103 requires that rules or conditions governing access to or participation in a payment system need to be POND. However, payment system operators must make sure that their rules and conditions for access do not prevent or inhibit access to the system or impose unnecessary restrictions on access or participation in the system.

2.22 The rules and conditions can take account of legitimate specific risks to the payment system's business (such as settlement risk, operational risk or business risk), and/or to the financial and operational stability of the payment system, of providing, varying or terminating access. Any inhibitions or restrictions must be justified and go no further than necessary to mitigate the risks set out in Regulation 103 and protect the stability of the system.

2.23 We may assess in detail any restrictions or inhibitions imposed by a payment system's rules or conditions to understand the particular restrictions involved, how they are necessary to safeguard the interests of the payment system and how they mitigate the specific risks the payment system has identified.

Rules or conditions must not restrict effective participation in other payment systems

2.24 The rules and conditions on access to a payment system must not restrict PSPs, payment service users (including, for example, the customers of a PSP that is seeking access) or other payment systems from effective participation in other payment systems.

Rules or conditions must not discriminate directly or indirectly between different authorised PSPs or different registered PSPs in relation to the rights, obligations or entitlements of participants in the payment system

2.25 Payment systems' rules and conditions must give all relevant authorised and registered PSPs (as set out in paragraph 2.14 above) the same opportunity to meet access requirements and access payment systems. The wording of the rules and their effect must not be discriminatory.

Rules or conditions must not impose any restrictions on the basis of institutional status

2.26 Rules and conditions should not restrict participation in the payment system based on institutional status. Rules and conditions should take account of the individual circumstances of specific PSPs. Payment system rules that impose blanket rules or conditions restricting access or participation for broad categories of PSPs, without considering the specific risks posed by the business and ways in which a PSP might mitigate the risks, are unlikely to be compliant with this requirement.

Monitoring compliance

2.27 Part 10 of the PSRs 2017 sets out our powers in relation to ensuring compliance with the requirements of those Regulations. To assist us in monitoring compliance with the access provisions contained in Regulation 103, we propose to issue a direction under our PSRs 2017 powers requiring relevant systems to provide us with a compliance report on an annual basis.[14] This will include, for example, a self-assessment by the operator on its compliance with the requirements of Regulation 103, details of all expressions of interest by PSPs in potentially securing access to its payment system in the relevant period and the outcome of such expressions of interest. We will engage with the payment system operators as to the detailed content, timing and arrangements for submission of initial compliance reports.

2.28 We will also consider any complaints received in relation to compliance with the access provision, and act on them as appropriate. Any party that wants to complain about a breach of Regulation 103 should contact us in writing. Please refer to our complaint process set out in paragraphs 1.8 to 1.13 of our powers and procedures guidance (PPG) (a draft of our PPG can be found at Appendix 1 of this document).

14 Paragraphs 1.126 – 1.142 of our PSRs 2017 Powers and procedures guidance explain our powers to issue directions under these Regulations.

2.29 The information we receive may be used as the basis of compliance-focused discussions between us and the relevant party. Where appropriate, we may require parties to provide additional data or information during each year.

2.30 We propose to review our approach to monitoring, including the usefulness of compliance reports, three years after the PSRs 2017 come into effect in the UK.

2.31 If we find that an access provider has failed to comply with the requirements of PSD2, we have powers to publish details of the compliance failure, impose a financial penalty for the compliance failure (and publish details of that penalty), and to make a direction or seek an injunction to bring the compliance failure to an end or remedy the compliance failure.

2.32 We would expect payment system operators to maintain arrangements to ensure their criteria are applied in a manner that ensures their rules and conditions remain POND. These arrangements should ensure the consistent application of those rules and conditions in practice to every individual application.

2.33 Such arrangements might cover, for example, how clear accountability for decisions is achieved, how relevant staff are trained and how compliance is monitored internally.

2.34 While we do not have express powers under PSRs 2017 to direct a payment system to grant access to a specific PSP, we can make directions[15] requiring or prohibiting specified actions for certain purposes. For example, we could require an access provider to change its rules governing access so that they become POND, and to reconsider applications it had previously refused under non-compliant rules. Directions like these may result in the same outcome of remedying a PSP's access issue.

2.35 We may decide in certain circumstances that it may be appropriate to carry out an in-depth review of any issues in order to understand if there are any wider implications arising from the compliance with these Regulations.[16]

Regulation 104 – Indirect access to designated systems

2.36 Regulation 104 imposes certain requirements and prohibitions on the way in which participants in SFD designated payment systems treat requests from other authorised or registered PSPs[17] for access to those payment systems (i.e. requests for indirect access). Under this Regulation, requests for access include new applications and decisions on existing service provision – i.e. variation and withdrawal of access.

2.37 Regulation 104 also requires participants to provide full reasons to a PSP if they refuse or withdraw indirect access.

2.38 Participants for the purposes of SFD (and therefore Regulation 104) are defined as having a relationship with the payment system. In the UK, these are the direct participants in those payment systems. The requirements of Regulation 104 only apply to (direct) participants in the relevant payment systems[18] that provide indirect access to other PSPs (that is, participants who are existing indirect access providers (IAPs)). In this chapter, any reference to an IAP means an IAP that is a direct participant in a payment system.

2.39 We refer in this document to indirect payment service providers (IPSPs) as those PSPs (as defined under the PSRs 2017) which are seeking indirect access to payment systems or already have an existing indirect access arrangement with an IAP.

15 Regulation 125 of the PSRs 2017.
16 Under the PSRs 2017, we have various powers to gather information and to conduct investigations. For example, we can obtain information for the purposes of carrying out a review using our power under Regulation 135 of the PSRs 2017.
17 Please see definition of PSPs to which this provision applies in paragraph 2.42.
18 See paragraphs 2.4 to 2.10 for an explanation of which payment systems are in scope of Regulations 103 and 104.

2.40 This section sets out:

- the requirements of Regulation 104 including which payment systems are within the scope of this provision
- the application of the requirements
- a summary of how PSR will monitor compliance with Regulation 104

2.41 As set out above, for the purpose of this provision, at the time of publication, the payment systems in scope are Bacs, CHAPS and FPS.

2.42 For the purposes of Regulation 104, PSPs include:

(a) authorised payment institutions

(b) small payment institutions

(c) registered account information service providers

(d) EEA authorised payment institutions

(e) EEA registered account information service providers

(f) electronic money institutions

(g) credit institutions

(h) the Post Office Limited

(i) the Bank of England, the European Central Bank and the national central banks of EEA States other than the United Kingdom, other than when acting in their capacity as a monetary authority or carrying out other functions of a public nature, and

(j) government departments and local authorities, other than when carrying out functions of a public nature

2.43 The Regulation also covers a person who has made an application to the FCA or the relevant competent authority in its home EEA State, to be authorised or registered as any of the PSPs listed above. References to PSPs in this chapter include prospective PSPs in this category, as well as existing PSPs with access to the payment system.

2.44 Part 10 of the PSRs 2017 sets out our powers in relation to the enforcement of Regulation 104. Please refer to paragraph 1.75 to 1.125 of our PSRs 2017 PPG for full details.[19]

The requirements of Regulation 104

2.45 The Regulation requires IAPs that are participants in SFD designated payment systems to treat the provision of indirect access in a POND manner. If an IAP decides not to grant access when requested, or to withdraw access, it must provide full reasons to the IPSP.[20]

19 Our PPG can be found at Appendix 1.
20 Regulation 104(3)

2.46 In addition, IAPs must not

- prevent, restrict or inhibit access to or participation in the system more than is necessary to safeguard against specific risks or to protect the financial and operational stability of their business or the payment system
- discriminate, whether directly or indirectly, between different authorised PSPs or different registered PSPs in relation to their rights, obligations or entitlements in relation to access or participation in the system, or
- impose any restrictions on the basis of the institutional status of a PSP

Requests for indirect access to payment systems must be treated in a POND manner

2.47 We agree with the position that the Treasury sets out in its consultation on the draft PSRs 2017:

'[Regulation 104…] does not impose an absolute obligation for credit institutions to grant indirect access to all PSPs that request it. The decision to work with a given PSP is still a commercial one, with credit institutions able to take into account cost and risk. However, where a PSP does provide indirect access, it must consider any new applications from other PSPs and take decisions regarding service provision in an objective, proportionate and non-discriminatory manner. The government believes that to achieve this PSPs must:

- have in place appropriate internal processes to be able to consider decisions on providing indirect access services on a case-by-case basis; and
- be in a position to communicate their criteria for indirect access clearly to current and prospective customers.'[21]

2.48 'Decisions regarding service provision' include decisions about the variation or withdrawal of existing access.

2.49 A non-exhaustive list of factors that we may consider in monitoring and assessing whether an IAP has complied with the requirements of Regulation 104 in its treatment of a request or variation or termination of indirect access by an IPSP includes:

- Has the IAP considered the PSP's individual circumstances, including the specific costs, risks and revenues it may present?
- Has the IAP offered the PSP similar terms and conditions to other PSPs that engage in comparable transactions or have a similar profile, taking risk considerations into account (in other words are they non-discriminatory)? We may ask the IAP to explain any differences.
- Can the IAP objectively justify a decision not to supply access? We expect the IAP to be able to give the IPSPs a sound justification for its decision (see further below).
- Is the IAP's decision to refuse or withdraw access proportionate? Could the IAP's concerns be addressed in a way that is less onerous than refusing or withdrawing access, but equally effective (for example, by charging a higher price or requiring additional reporting as opposed to restricting access entirely)?

21 *Implementation of the revised EU Payment Services Directive II*, HM Treasury, 2 February 2017: www.gov.uk/government/consultations/implementation-of-the-revised-eu-payment-services-directive-psdii

IAPs must not prevent, restrict or inhibit access to or participation in the system more than is necessary to safeguard against specific risks such as settlement risk, operational risk or business risk, or to protect the financial and operational stability of the participant or the payment system

2.50 An IAP must be sure that its terms and conditions for access do not inhibit access to the system or impose unnecessary restrictions on access or participation in the system. IAPs can take account of legitimate specific risks[22] to their business or the system in considering whether any restrictions are appropriate and necessary. Any inhibitions or restrictions must be justified and go no further than necessary to mitigate the risks set out in Regulation 104 and protect the stability of the system or the IAP.

2.51 We may assess in detail any restrictions or inhibitions imposed by an IAP to understand the particular restrictions involved, how they are necessary to safeguard the interests of the IAP or the payment system and how they mitigate the specific risks the IAP has identified.

IAPs must not discriminate directly or indirectly between different PSPs in relation to the rights, obligations or entitlements of such providers in relation to access to or participation in the system

2.52 IAPs must give all authorised and registered PSPs (as set out in paragraph 2.25 above) the same opportunity to meet access requirements and access payment systems. They must ensure that the terms and conditions for access and for continuing participation in the system do not discriminate in relation to any of the PSPs (whether new or existing PSPs) with indirect access, as regards their rights, entitlements and obligations.

2.53 IAPs should consider not only the wording of their terms and conditions but also their effect, to ensure that they do not operate in a discriminatory way. They may need to consider changes where that is appropriate.

IAPs must not impose any restrictions on the basis of institutional status

2.54 IAPs must not restrict participation in the payment system based on institutional status. For example, there should be no pre-determined difference based on whether a PSP is an authorised payment institution or an electronic money institution. IAPs' treatment of requests for access should take account of the individual circumstances of specific PSPs. IAPs that impose blanket rules or conditions restricting access for broad categories of PSPs, without considering the specific risks posed by the business and ways in which a PSP might mitigate the risks, are unlikely to be compliant with this requirement.

Providing reasons when access is refused, varied or terminated

2.55 An IAP must provide an IPSP with 'full reasons' if it refuses or withdraws access.[23]

2.56 Our view is that a refusal of a request for access would cover a situation where an IAP refused to grant access following consideration of a request, and also where the IAP prevented a potential applicant who wanted to make a request for access to payment services from doing so.

2.57 It may be the case that a potential IPSP has been provided with the relevant information by an IAP and wishes to apply for access to payment systems, but has been told it is not eligible to do so or has not been permitted to progress its request in a timely manner. We would regard this as a refusal and expect it to be notified to the IPSP with full reasons for the refusal. Similarly, a refusal to grant access following consideration of a request should be notified to the IPSP with full reasons for the refusal.

2.58 Once an IPSP or potential IPSP has been granted access to the payment system(s) it applied for, any withdrawal or cancellation of this access by the IAP should be notified to the IPSP with full reasons.

22 See Regulation 104(2)(b)(i)
23 Regulation 104(3).

2.59 We will expect reasons given to relate specifically to the individual IPSP, and include reasons why the IAP has decided to refuse or withdraw access for the particular IPSP. We are unlikely to consider blanket or generic statements to constitute 'full reasons'. For example, where an IPSP falls 'outside an IAP's commercial appetite', the IAP should explain the factors that contributed to this assessment. Where an IPSP falls 'outside an IAP's risk appetite', the IAP should explain what elements of the IPSP's business present too great a risk. If an IPSP has a business model, or operates in a region, that the IAP considers 'risky', the IAP should explain how the individual access seeker fits the profile.

Monitoring compliance

2.60 We expect the IAPs to have conducted appropriate assessments and analysis and to have clear policies and processes in place to demonstrate compliance with the requirements of Regulation 104.

2.61 We would expect IAPs to maintain arrangements to ensure they treat requests for access to payment systems, including decisions on variation and withdrawal of access, in a POND manner. These arrangements should ensure the consistent treatment in practice of every individual request and decision.

2.62 Such arrangements might cover, for example, how clear accountability for decisions is achieved, how relevant staff are trained and how compliance is monitored internally.

2.63 In any investigation into compliance with this Regulation, we may request information on the way in which the IAP has treated the IPSP (or potential IPSP), and whether it has engaged meaningfully and constructively with the IPSP. For example, has it allowed sufficient time to discuss the refusal, variation or withdrawal of access? Has the IAP given the IPSP a meaningful opportunity to address any concerns the access provider may have?

2.64 Similarly, we may consider whether the PSP has responded to any requests for information from the IAP within appropriate timescales, and whether the PSP has taken concrete and timely steps to address the access provider's concerns.

2.65 We will consider any complaints received in relation to compliance with the access provision, and act on them as appropriate. Any party that wants to complain about a breach of Regulation 104 should contact us in writing. Please refer to our complaint process (see paragraphs 1.11 to 1.21 of our draft Powers And Procedures Guidance in Annex 1).

2.66 If we find that an IAP has failed to comply with the requirements of the PSRs 2017, we have powers to publish details of the compliance failure, impose a financial penalty for the compliance failure (and publish details of that penalty), and make a direction or seek an injunction to bring the compliance failure to an end or remedy the compliance failure.

2.67 While we do not have express powers under PSD2 to direct an IAP to grant access to a specific IPSP, we can give a direction to an IAP requiring or prohibiting specified actions.[24] For example, we could require an IAP to change its approach to assessing or withdrawing access so that it follows a POND framework, and to reconsider applications it had previously refused under a non-compliant approach. Directions like these may result in the same outcome of remedying a PSP's access issue. We may decide in certain circumstances that it may be appropriate to carry out an in-depth review of any issues in order to understand if there are any wider implications arising from the compliance with these Regulations.[25]

24 Regulation 125.
25 Under the PSRs 2017, we have various powers to gather information and to conduct investigations, and we can obtain information for the purposes of carrying out a review using our information-gathering power under Regulation 135 of the PSRs 2017.

3. Access to payment account services (Regulation 105 of the PSRs 2017)

3.1 Both the FCA and the PSR are responsible for monitoring compliance with Regulation 105 of the PSRs 2017. In this chapter, unless stated otherwise, references to 'we' or 'us' mean the FCA and the PSR together.

3.2 This chapter sets out the FCA's and PSR's guidance on how we will apply the provisions of Regulation 105, which deals with PSPs' access to payment account services. It is relevant to credit institutions that provide such services and to PSPs and prospective PSPs who wish to access these services in order to provide their own payment services. For the purposes of Regulation 105 and this chapter, 'PSPs' means:

- authorised payment institutions
- small payment institutions
- registered account information service providers
- EEA-authorised payment institutions
- EEA-registered account information service providers
- electronic money institutions

3.3 Regulation 105 does not cover the provision of payment account services to other credit institutions or other types of PSP not listed above.

3.4 The Regulation also covers a person who has made an application to the FCA or the relevant competent authority in its home EEA State, to be authorised or registered as any of the PSPs listed above. References to PSPs in this chapter include prospective PSPs in this category.

3.5 In line with the Treasury's interpretation (put forward as part of its consultation on the implementation of PSD2), we consider 'payment account services' provided by credit institutions to include the provision of payment accounts used for the purposes of making payment transactions on behalf of clients, safeguarding accounts and operational accounts. As per Regulation 105(2), access to these services must be sufficiently extensive to allow the PSP to provide payment services to its own customers in an unhindered and efficient manner.

The requirements of Regulation 105

3.6 Regulation 105 requires that credit institutions must grant PSPs access to payment account services on a POND basis. The Regulation also requires credit institutions to:

- provide PSPs that enquire about access to payment account services with the criteria that the credit institution applies when considering requests for such access
- maintain arrangements to ensure those criteria are applied in a manner which ensures that access to payment account services is granted on a POND basis
- ensure that, where access is provided, it is sufficiently extensive to allow the PSP to provide payment services in an unhindered and efficient manner, and
- notify the FCA of the reasons where access is refused or withdrawn

3.7 We provide guidance on each of these requirements below.

Granting PSPs access to payment account services on a POND basis

3.8 The Treasury states in its consultation paper that 'the Regulation does not impose an absolute obligation for credit institutions to grant access. The decision to work with a given payment institution is still a commercial one, with credit institutions able to take into account cost and risk.'

3.9 We agree with this statement. In our view, the effect of Regulation 105 is to ensure that a credit institution that provides payment account services should consider applications from PSPs individually and on their own merits. It should not have blanket policies restricting access to those services for broad categories of PSPs, without considering the specific risks posed by the business and ways in which a PSP might mitigate the risks.

3.10 This approach means that credit institutions should not deal generically with whole categories of customers or potential customers. Instead, we expect credit institutions to recognise that the costs, risks and potential revenues associated with different business relationships in a single broad category will vary, and to manage those differences appropriately. Regulation 105 reinforces the need to determine applications for banking services by PSPs not simply by reference to membership of a particular category of business, but by taking account of the individual circumstances of the specific applicant. This aligns with the expectations the FCA has set out for an effective risk-based approach to managing money-laundering risk by credit institutions.

3.11 A non-exhaustive list of the factors we may consider when assessing whether a credit institution is granting access on a POND basis includes the following (not all of which will necessarily be relevant to all cases):

- Has the credit institution considered the applicant's individual circumstances, including the specific costs, risks and revenues it may present?
- Has the credit institution applied the same criteria or offered the applicant similar terms and conditions to other PSPs that engage in comparable transactions or have a similar profile, taking risk considerations into account (in other words, is it acting in a non-discriminatory way)? We may ask the credit institution to explain any differences.
- Can the credit institution objectively justify a decision not to grant access? If a credit institution has not given a sound justification for its decision, we may require it to provide further reasons. See paragraphs 3.35 to 3.36 below on 'Providing duly motivated reasons to the FCA'.
- Is the credit institution's decision not to grant access to an applicant proportionate? We may assess whether the criteria applied by the credit institution to the individual applicant, or the information and evidence required to support the application, go beyond what is reasonably necessary to identify and address any concerns the credit institution might have in relation to granting the PSP access.
- Could the credit institution's concerns be addressed in a way that is less onerous than refusing or withdrawing access, but equally effective (for example, by charging a higher price or requiring additional reporting, as opposed to restricting access entirely)?

3.12 Factors relating to the process by which the decision was reached will also be relevant to our assessment, for example:

- Has the credit institution provided an opportunity to discuss the application and/or the criteria meaningfully and constructively with the applicant? Has the applicant been given a meaningful opportunity to address any concerns the credit institution may have?
- Has the applicant responded to any requests for information or evidence from the credit institution within appropriate timescales? Has the applicant taken concrete and timely steps to address the credit institution's concerns?

Providing criteria to potential applicants

3.13 When a PSP or prospective PSP is seeking access to payment account services for the purpose of providing payment services (referred to here as a 'potential applicant'), it is important that credit institutions are transparent about the requirements the potential applicant will need to meet in order to be granted access (i.e. the credit institution's 'criteria'). Regulation 105 requires credit institutions to provide these criteria in response to access enquiries from potential applicants.

3.14 As a preliminary point, we would generally expect credit institutions to clearly signpost the channels through which potential applicants can make enquiries about access to payment account services (for example, a dedicated email address or telephone line). Through these channels information should be readily available about the payment account services offered by the credit institution, how to apply and the estimated timeframe for decisions to be made on applications.

3.15 Where enquiries are made, credit institutions should provide their criteria to the potential applicant in written form, or, where it is made publicly available – for example, on a website – direct the enquiring party to the relevant information.

3.16 The information that credit institutions provide should be clear and sufficiently comprehensive so that an applicant could reasonably understand what they are expected to do when making an application. However, this does not extend to disclosing commercially sensitive information about the credit institution's business strategies or risk appetites.

3.17 We would expect credit institutions to be able to objectively justify and explain how the criteria, including any minimum eligibility requirements or exclusions, provided to the potential applicant are necessary to achieve the credit institution's objectives and to address the risks it has to mitigate – that is, we would expect the criteria to be based on POND principles.

3.18 As a minimum, we would expect the information provided to the potential applicant to cover all areas against which the credit institution will assess the applicant and its business. For example, this could include setting out for the potential applicant:

- information about the payment account services the credit institution offers
- any exclusions or minimum eligibility requirements that must be met, or
- the information and evidence the credit institution will require from the potential applicant in support of the application in order to make a decision whether or not to provide payment account services

3.19 We would also expect credit institutions to keep their criteria under review and update them from time to time in light of experience.

Maintaining arrangements to ensure criteria are applied on a POND basis

3.20 Credit institutions are required to maintain arrangements to ensure their criteria are applied in a manner which ensures access to payment account services is granted on a POND basis. These arrangements should ensure the consistent application of those criteria in practice to every individual application.

3.21 Such arrangements might cover, for example, how clear accountability for decisions is achieved, how relevant staff are trained and how compliance is monitored internally. However, it will be up to each credit institution to be able to demonstrate it is maintaining appropriate arrangements.

3.22 We would expect credit institutions to maintain a record of these arrangements and the governance for setting and making changes to the criteria or their application.

Granting sufficiently extensive access

3.23 Regulation 105 requires that access to payment account services is sufficiently extensive to allow the PSP to provide payment services in an unhindered and efficient manner.

3.24 In assessing whether credit institutions are meeting this requirement, we will consider whether PSPs are able to access the services that are essential to their business activities. In most cases this is likely to include, as a minimum, a payment account (that can be used to execute transactions on behalf of the PSP's users); a business current account (for holding salaries, working capital etc.) and a safeguarding account. For some PSPs, additional products or services may also be essential to support the PSP's specific business activities (for example the ability to make cash deposits may be essential to a business operating within a cash heavy model). We would also expect the credit institution to grant access to such additional services on a POND basis in accordance with Regulation 105 and this chapter.

3.25 Regulation 105 does not require credit institutions to provide types of products and services that they do not already provide. However, we would expect credit institutions to provide clear information to potential applicants on the products and services that are available (including the terms and conditions that apply) as well as the criteria that the credit institution will apply when deciding whether to grant access to such services.

3.26 Similarly, a credit institution may withdraw certain payment account services (or related services) from a PSP or prospective PSP if it can demonstrate that the decision has been made on a POND basis. If any aspect of the payment account service is withdrawn which prevents or obstructs the PSP or prospective PSP from providing its intended payment services, this should be treated as a withdrawal of access and the FCA should be notified in accordance with Regulation 105(3) and the following section.

Notifying the FCA where access is refused or withdrawn

3.27 Regulation 105(3) requires a credit institution to provide the FCA with duly motivated reasons where it (i) refuses a PSP or a prospective PSP's request for access to payment account services or (ii) withdraws such access. Under Regulation 105(3), the FCA will share notifications with the PSR.

Refusal and withdrawal

3.28 Our view is that a refusal of a request for access would cover a situation where a credit institution refused to grant access following consideration of an application and where the credit institution prevented a potential applicant who wanted to make an application for payment account services from doing so.

3.29 It may be the case that a potential applicant has been provided with the relevant information and criteria by a credit institution and wishes to apply to access payment account services, but has been told it is not eligible to do so or has not been permitted to progress its application in a timely manner. We would regard this as a refusal and expect it to be notified to the FCA with duly motivated reasons for the refusal.

3.30 Similarly, a refusal to grant access following consideration of an application should be notified to the FCA with duly motivated reasons.

3.31 Once a PSP or potential PSP has been granted access to the payment account services it applied for, any withdrawal or cancellation of this access by the credit institution should be notified to the FCA with duly motivated reasons.

When the FCA should be notified of refusal or withdrawal

3.32 Regulation 105(3) requires a credit institution to provide the FCA with duly motivated reasons if it refuses a request for access, or withdraws access to payment account services.

3.33 Under FCA notification rule SUP 15.14.6 we require the credit institution to notify the FCA of the reasons at the same time as it informs the applicant of its refusal. If for any reason the credit institution does not notify the applicant of its refusal, the credit institution must submit the notification to the FCA immediately following the decision to refuse access in accordance with FCA notification rule SUP 15.14.7. This also applies in the case of a potential applicant being denied access to the application process, which we treat as a refusal for the purposes of Regulation 105(3).

3.34 Notifications of withdrawal of access should be made to the FCA at the point that the credit institution gives notice to the PSP or potential PSP that it will terminate the contract for the provision of the whole or part of the payment account services.

Providing duly motivated reasons to the FCA

3.35 In the event of a refusal or withdrawal, a credit institution must submit the notification form NOT003 AIS/PIS denial, completed in accordance with the notification rule SUP 15.14.3D.

3.36 We will expect 'duly motivated reasons' given in the notification to relate specifically to the individual circumstances of the PSP or prospective PSP. We are unlikely to consider blanket or generic statements to constitute 'duly motivated reasons'. For example, where a PSP or prospective PSP falls 'outside a credit institution's commercial appetite', the credit institution should explain the factors that contributed to this assessment. Where a PSP or potential PSP falls 'outside a credit institution's risk appetite', the credit institution should explain what elements of the PSP's business present too great a risk.

Monitoring compliance

3.37 The FCA and PSR must each maintain arrangements designed to enable payment service users and other interested parties to submit complaints to it that a requirement imposed by or under Regulation 105 has been breached by a credit institution. We (the FCA and the PSR) will consider complaints from individuals that allege infringements of Regulation 105, together with, and in light of, information we receive in notifications under Regulation 105(3).

3.38 A decision on whether the PSR, FCA or both regulators should investigate and take action in relation to potential infringements indicated by notifications, complaints or both, will be made on a case-by-case basis, taking into account the nature of the information received and the roles and responsibilities of each regulator.

3.39 Each regulator, in its capacity as competent authority, will use its own procedures in order to carry out its duties under the PSRs 2017. For the FCA's procedures and processes as competent authority under the PSRs 2017, please refer to chapter 14 of the FCA approach document. PSR's procedures and processes as competent authority under the PSRs 2017 are included in its PSRs 2017 PPG, a draft of which can be found at Appendix 1 of this PSR approach document.

4. Information on ATM withdrawal charges (Regulation 61 of the PSRs 2017)

The guidance in the chapter covers the PSRs 2017's provision on information on ATM withdrawal charges to be provided by independent ATM deployers

4.1 This chapter is relevant to independent ATM deployers (IADs). The guidance may also be of interest to end users of the ATM services that IADs provide.

4.2 PSD1 excluded from its scope payment services offered by deployers of ATMs independent from account-servicing PSPs. The EU Commission considers that the exclusion has stimulated the growth of independent ATM services in many Member States. In the Commission's view, excluding that fast-growing part of the ATM market from the scope of PSD2 completely could lead to confusion about ATM withdrawal charges. In cross-border situations, this could lead to double charging for the same withdrawal by the account-servicing PSP and by the ATM deployer. Consequently, PSD2 requires ATM operators to comply with specific transparency provisions.[26]

4.3 Regulation 61 sets out the information that an IAD must provide to the users of their ATM services.

The requirements of Regulation 61

4.4 A provider of cash withdrawal services[27] operating ATMs must provide specific information to a customer before the withdrawal and on receipt of the cash. The information requirement applies to all cash withdrawals made from ATM machines operated in the UK by IADs.

26 Preamble 18 of PSD2.
27 Paragraph 2(o) of Schedule 1 to the PSRs 2017 sets out the cash withdrawal services provided through ATMs to which Regulation 61 applies. Preamble 18 of PSD2 explains that this provision applies to deployers of ATMs independent from account servicing PSPs (that is, IADs).

Information required

4.5 Before the customer carries out a cash withdrawal, and on receipt of cash, IADs must provide the following information:

- Information required prior to the conclusion of a single payment service contract:
  - all charges payable by the payment service user to the user's PSP
  - where applicable, a breakdown of those charges
  - where applicable, the actual or reference exchange rate to be applied to the payment transaction[28]
- Information required after receipt of the payment order:
  - the amount of the payment transaction in the currency used in the payment order
  - the amount of any charges for the payment transaction payable by the payer
  - where applicable, a breakdown of the amounts of such charges
  - where applicable, the exchange rate used in the payment transaction by the payer's PSP or a reference to it, when this is different from the rate provided before the single payment contract was concluded, and the amount of the payment transaction after that currency conversion[29]
- Information for the payee after execution:
  - the amount of the payment transaction in the currency in which the funds are at the payee's disposal
  - the amount of any charges for the payment transaction payable by the payee
  - where applicable, a breakdown of the amounts of such charges
  - where applicable, the exchange rate used in the payment transaction by the payee's PSP, and the amount of the payment transaction before that currency conversion[30]
- Currency and currency conversion:
  - Where a currency conversion service is offered prior to the initiation of the payment transaction at an ATM, the party offering the currency conversion service to the payer must disclose to the payer all charges as well as the exchange rate to be used for converting the payment transaction[31] (Dynamic Currency Conversion).[32]

28 Regulation 43(2)(c) and (d).
29 Regulation 45(b), (c) and (d).
30 Regulation 46(b), (c) and (d).
31 Regulation 57(2)(a).
32 Dynamic currency conversion (DCC) is a financial service in which cardholders, when making a payment or an ATM withdrawal in a foreign country, have the cost of a transaction converted to their home currency at the point of sale. DCC allows customers to see the amount their card will be charged, expressed in their home currency.

Monitoring compliance

4.6 All IADs are members of LINK, Visa or Mastercard, which operate the UK's ATM network. These payment systems already have rules requiring all members (including IADs) to ensure the information listed in Regulation 61 is provided to customers when offering ATM withdrawal services. We will work together with LINK, Visa and Mastercard to ensure that all IADs comply with information requirements set out in the payment system's rules.

4.7 We will also monitor compliance using any complaints we receive. The information we receive may be used as the basis of compliance-focused discussions between us and the relevant party.

4.8 We may decide in certain circumstances that it may be appropriate to carry out an in-depth review of any issues in order to understand if there are any wider implications arising from compliance with this provision.[33]

33 Under the PSRs 2017, we have various powers to gather information and to conduct investigations, and we can obtain information for the purposes of carrying out a review using our information gathering powers under Regulation 135 of the PSRs 2017.

Annex 1
Our draft powers and procedures under the Payment Services Regulations 2017

1. Our draft powers and procedures under the Payment Services Regulations 2017

Introduction

Scope of this guidance

1.1 This guidance sets out the processes and procedures that we will generally apply in relation to our functions under the Payment Services Regulations 2017 ('PSRs 2017'). We are the competent authority for the purposes of Regulation 61 (information on ATM withdrawal charges) and Part 8 of the PSRs 2017[34]. We are co-competent with the Financial Conduct Authority (FCA) for the purposes of Regulation 105 (access to bank accounts).

1.2 This document:

- Provides information on how stakeholders can complain to the PSR if they believe a payment system operator or payment service provider (PSP) subject to the requirements of Regulation 61 or Part 8 of the PSRs 2017 is in breach of those requirements. It also explains how we will handle complaints.
- Sets out the powers we have to investigate potential compliance failures, and provides guidance on how we will exercise them. This includes powers to obtain information and appoint investigators.
- Explains our powers to take enforcement action where we find that a compliance failure has occurred, and provides guidance on how we will decide what, if any, enforcement action to take.
- Details our powers to give specific or general directions to regulated persons, and provides guidance on how we will decide whether to issue a direction. It also sets out how a regulated person who is subject to a direction we have given can appeal against it.
- Explains the principles we will follow when deciding:
  - whether to impose a financial penalty for failure to comply with the PSRs 2017
  - the amount of the penalty
  - whether to publish details of the compliance failure or the penalty

It also sets out how a person may appeal against a decision to impose a penalty or publish details.

1.3 This guidance represents our approach at the date of publication. We may revise it from time to time to reflect changes in best practice or the law and our experience in carrying out our functions under the PSRs 2017. We will follow this guidance when we exercise our functions under the PSRs 2017, but may adopt a different approach when the facts of an individual case reasonably justify it.

1.4 The text of the PSRs 2017 is paramount. If there is any inconsistency between the PSRs 2017 and any part of this guidance, the text of PSD2 and the PSRs 2017 takes precedence.

34 See Regulation 124-Functions of the PSR.

1.5 This guidance is made under Regulation 134 of the PSRs 2017. It does not try to describe all the provisions of the PSRs 2017 in detail. Part 10 of that legislation describes our statutory functions and powers under the PSRs 2017 in full.

Our powers under the PSRs 2017

1.6 Under the PSRs 2017 we are the competent authority for imposing requirements in relation to rules on access to payment systems, indirect access to designated systems and access to bank accounts, and in relation to providing information on ATM withdrawal charges.[35]

1.7 The PSRs 2017 give us a range of powers[36] over regulated persons (persons that an obligation, restriction or prohibition is imposed on by a 'directive requirement'). A directive requirement is an obligation, prohibition or restriction imposed by Regulation 61 or Part 8 of the PSRs 2017.[37] Our powers include:

- powers to give directions to remedy or prevent compliance failures, to obtain information or require or prohibit specified actions (Regulation 125)
- powers to impose sanctions where parties have failed to comply with a directive requirement or a direction we have given (Regulation 127(1))
- powers to gather information and to conduct investigations (Regulation 135)
- powers to publish details of a compliance failure and/or of a financial penalty imposed (Regulation 126)

1.8 Our powers under the PSRs 2017 are focused on ensuring compliance with the directive requirements. For example, we might require a payment system's access rules to be rewritten to be compliant with the directive requirements; or we might require a payment system to reassess whether to grant access to a PSP in accordance with its rules and the directive requirements. We might seek to impose sanctions where a regulated person fails to comply with the requirements under the PSRs 2017 to have compliant access rules or treat a request for access in an objective, proportionate and non-discriminatory (POND) manner. The exercise of our enforcement powers may result in a payment system giving a PSP access where it had previously refused to do so.

1.9 We are responsible for monitoring compliance with Regulation 61 and Part 8 of the PSRs 2017 in the UK and for taking enforcement action where appropriate. 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 FCA, which is the competent authority with respect to the majority of the provisions of the PSRs 2017. As mentioned above, the PSR and the FCA are both competent authorities in respect of monitoring and enforcing compliance with Regulation 105.

1.10 This guidance sets out practical information on how we propose to exercise our PSRs 2017 powers, where we have determined that it is appropriate to do so.

35 Regulations 61 and 102-105 PSRs 2017.
36 Part 10 of the PSRs 2017 sets out the range of powers.
37 'Regulated person' and 'directive requirement' are defined in Regulation 123.

Complaints – reporting a compliance failure[38]

1.11 We will consider complaints that a compliance failure has occurred. A compliance failure is a failure by a regulated person to comply with a directive requirement, or a direction we give under Regulation 125 of the PSRs 2017.[39]

1.12 For example, we may receive a complaint from a PSP that the rules governing access to a payment system are not POND or that they restrict effective participation in another payment system (failure to comply with Regulation 103).

1.13 Both the FCA and the PSR are competent authorities in relation to Regulation 105 (access to bank accounts). Complaints about a failure to comply with Regulation 105 can be sent to us and/or the FCA. We will coordinate with the FCA in deciding whether to take forward a complaint about compliance with Regulation 105.

1.14 In order for us to consider complaints and assess whether there has been a compliance failure, we will need detailed information on the nature of the alleged failure and any action the complainant believes we should take. As a minimum, the complainant should provide us with the following information:

- the identity of the complainant
- which PSP(s) their complaint is about
- the factual details of the situation and the compliance failure the complaint is about
- whether they have already approached the PSP(s)
- whether other entities have been involved in either the complaint process or the compliance failure

1.15 Reports or complaints about compliance failures should be made to:

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

Email: PSRcomplaints@psr.org.uk

1.16 We will aim to acknowledge a complaint within two working days from receipt. Where appropriate, we will inform the complainant of the existence of the Financial Ombudsman Service.[40]

Handling a complaint about a compliance failure

1.17 When we receive a complaint, we will assess whether we have enough information to determine whether the matter is within our legal powers. We may ask the complainant for more detail if necessary. If we decide that the matter is not within our legal powers, we will tell the complainant.

1.18 When we receive the complaint, we will consider whether or not there appears to have been a compliance failure. If we consider it is appropriate, we may formally open a case. In deciding whether to formally open a case and pursue an investigation, we will take the factors listed in Regulation 106(3) into account [41], including the need to use our resources in the most economic and efficient way.

38 This section takes account of guidelines the European Banking Authority (EBA) has set for competent authorities on handling complaints about PSD2.
39 Regulation 123.
40 Regulation 133(2) of the PSRs 2017 and EBA guidelines requirement.
41 Regulation 124(2) requires that, in determining the general policy and principles by reference to which we perform particular functions under the PSRs 2017, we must have regard to the factors set out in Regulation 106(3).

1.19 We will gather further information as necessary for us to determine whether there has been a compliance failure and, if so, what action (if any) we should take to remedy it. We may need to make enquiries to help us understand the alleged breach. The first step will usually be to send a non-confidential version of the complaint to the party (or parties) named as the subject of the complaint. 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 complainant before deciding to disclose any confidential information.

1.20 We might also seek information from other parties, through the exercise of our powers to obtain information or documents, by obtaining a report from a regulated person, or appointing a skilled person to provide a report. We may convene meetings with the parties we are investigating or who have made a complaint, separately or jointly.

1.21 If we consider that a compliance failure has occurred, we will decide whether to take enforcement action, and whether to publish details of it.[42] In deciding whether to take enforcement action, we will take the factors listed in Regulation 106(3) into account.

Information-gathering and investigation powers

Introduction

1.22 If we decide to open an investigation into potential non-compliance with the PSRs 2017, we have a range of powers we can use to gather information for our investigation. We can obtain information ourselves, using powers to require a person to provide information or documents. We can appoint a skilled person, or require a regulated person to appoint a skilled person, to provide a report. We can also appoint an investigator. This could be a member of our staff, a member of the FCA's staff or an external person. We would decide whether to take these steps depending on the nature and circumstances of each case.

Overview of our powers

1.23 We have various powers under the PSRs 2017 to gather information and to conduct investigations.[43] 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

1.24 We have the power to require a person to provide information and documents that we need to exercise our statutory functions under the PSRs 2017.[44]

1.25 For example, we might use this power to obtain information or documents to help us determine 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 1.40 to 1.41 below on the use of appointed investigators), we generally expect to use their information-gathering powers (see paragraphs 1.42 to 1.48 below).

1.26 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 how information or documents should be provided and will specify the deadline for responses.

42 Regulation 126(a)
43 Regulation 135 provides that our information and investigation powers under sections 81 to 93 of FSBRA apply to the PSRs 2017, subject to some amendments adapting them to suit the PSRs 2017.
44 Regulation 135 and section 81 of FSBRA.

1.27 Typically we will give recipients of information requests advance notice so that they can manage their resources accordingly. Where it is practical and appropriate, 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 give 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

1.28 We have the power to require a regulated person to provide a report by a skilled person on any matter relating to that person's compliance with the directive requirements.[45] We can also appoint a skilled person to provide a report.[46]

1.29 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 the nature of the matters that led us to decide that the report was necessary, and the possible uses of the results of that report.

1.30 A skilled person's report may assist us in determining whether there has been a compliance failure or whether it is appropriate to investigate a suspected compliance failure.

1.31 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[47]

1.32 We expect to give notice before we require a skilled person's report, so that the regulated person can manage its resources accordingly. Where it is practical and appropriate, 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 do (or the assistance they will need) and the deadline for providing the report. We will assess each case to determine whether it would be appropriate to provide such notice and opportunity to comment before formally requiring a report to be provided.

1.33 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 to pay any expenses we incur. 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.

45 Regulation 135 of the PSRs 2017 and section 82(1) of FSBRA.
46 Regulation 135(1) PSRs 2017 and section 82 FSBRA.
47 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.

Search and seizure powers

1.34 We have the power to apply to a justice of the peace for a warrant to enter premises where documents or information are held.[48] The circumstances under which we may apply for a search warrant include:

- when a person has been issued with a notice requiring the provision of information or documents and has failed (wholly or in part) to comply with the requirement and the documents or information are on the premises specified in the warrant, or
- when there are reasonable grounds for believing that, if a 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 from the premises of the regulated person, tampered with or destroyed

1.35 A warrant authorises a police constable, or a person in the company of and under the supervision of a police constable, to:

- 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

1.36 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.

1.37 During a search, 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. We will adopt the same approach to electronic information, endeavouring 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 as soon as reasonably practicable.

Non-compliance

1.38 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).

1.39 As is the case with FSBRA, the PSRs 2017 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)[49]

48 Regulation 135 PSRs 2017 and section 88 FSBRA.
49 Regulation 135 PSRs 2017 and section 90 FSBRA.

The use of appointed investigators

Appointed investigators

1.40 We may appoint one or more investigators to investigate a suspected compliance failure. [50]

1.41 An appointed investigator could be a member of our staff, a member of the FCA's staff[51] or an external person. Appointed investigators can exercise certain investigatory powers not otherwise exercisable by the PSR (see paragraphs 1.42 to 1.48).

Powers exercisable by appointed investigators

1.42 Investigators will have powers (under Regulation 135 of the PSRs 2017 and section 85 of FSBRA) to:

- require persons under investigation, persons connected with them, or any persons who, in the investigator's opinion, may be able to give relevant information, to provide information and answer questions in interview[52]
- require any person to produce documents

1.43 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.

1.44 The appointed investigator(s) will exercise these powers by issuing formal notices in writing (which we will refer to as 'investigatory requirement notices'). These notices will set out the requirements and the deadlines for compliance.

1.45 We expect to give recipients of investigatory requirement notices advance warning so that they can manage their resources accordingly. 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.

1.46 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 timeframe.

1.47 The time allowed 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.

1.48 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.

Written notice of the appointment of investigators

1.49 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 this would be appropriate.[53]

50 Regulation 135 of the PSRs 2017 and section 83(2) of FSBRA.
51 Regulation 135 of the PSRs 2017 and Section 84(5) of FSBRA.
52 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.
53 Section 84(2) and (3) of FSBRA set out when we must give written notice of the appointment of the investigator to the person who is the subject of the investigation and exceptions.

1.50 When we issue a notice of the appointment of investigator(s), it will specify the provision under which the investigator(s) were appointed and the reasons for their appointment.

1.51 If we do not issue a notice of the appointment of investigator(s) at the time we appoint them, we will normally issue the notice when we exercise our statutory powers to require information from the person under investigation – provided that the notification will not prejudice our ability to conduct the investigation effectively.

Scoping discussions

1.52 If notice is given at the start 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

1.53 There may be limits on how specific we can be about the nature of our concerns in the early stages of an investigation.

1.54 In addition to the initial scoping discussions, we will maintain a dialogue with the person under investigation throughout the process.

Changes to the scope of an investigation

1.55 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.

1.56 If there is a change in the scope or conduct of the investigation we may give written notice of the change.

1.57 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.[54] We cannot give a definitive list of such circumstances, but they 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

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

Notice of the termination of investigations

1.59 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.

54 Section 84(9) FSBRA.

Approach to information and document requirements

1.60 Investigators will normally use their powers to require the provision of information or documents, rather than seeking them on a voluntary basis. This is for reasons of fairness, transparency and efficiency. However, it might occasionally be appropriate to depart from this practice – for example, where the investigators are gathering information from third parties who are not regulated persons within the scope of the PSRs 2017.

1.61 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.

1.62 Investigatory requirement notices requiring the provision of information or documents are discussed in paragraphs 1.42 to 1.48 above.

1.63 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

1.64 Investigators will normally use their powers to require people to answer questions at an interview, rather than seeking this on a voluntary basis. This is for reasons of fairness, transparency and efficiency. However, it might sometimes be appropriate to depart from this practice – for example, where the investigators are gathering information from third parties who are not regulated persons within the scope of the PSRs 2017.

1.65 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.

1.66 Investigatory requirement notices requiring the attendance and answering of questions at an interview are discussed in paragraphs 1.42 to 1.48 above.

1.67 When an investigator interviews a person, we will allow the person to be accompanied by a legal adviser. Where appropriate, we will explain what use can be made of their answers in proceedings against them. If the interview is recorded, the person will be given copies of the recording and any transcript.

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

1.68 Investigators may find that there has been a compliance failure by the person under investigation. We may decide to recommend to the Enforcement Decisions Committee (EDC) that details of a compliance failure be published or that a financial penalty be imposed for a compliance failure.[55] 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.

1.69 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.

55 The EDC is a three-person committee of our board. EDC members are appointed based on their relevant experience and expertise. They are separate from the investigation team for a case, although the EDC has support staff and legal advisers who may be our staff.

1.70 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

1.71 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.

1.72 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.

1.73 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.

1.74 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

1.75 We may publicise information regarding the appointment and use of investigators. For example, we may publish a summary of the subject matter of the investigation on our website, along with the identity of the person under investigation. We may also publish details of what action, if any, we ultimately decide to take.

1.76 We will consider the circumstances of each case, including the interests of transparency (including enabling participants in payment systems, service users and the wider public to understand the nature of our concerns and what we are doing to address them) and the interests of the person under investigation.

1.77 We may consult the person under investigation and take account of any evidence they provide that suggests that publishing information about the investigation would be unfair.

Enforcement action

Introduction

1.78 This section explains our powers to take enforcement action where we find that a compliance failure has occurred. It provides guidance on how we will decide what, if any, enforcement action to take. It explains how we might decide to impose a financial penalty or publish details of a compliance failure.

Overview of the powers

1.79 A compliance failure under the PSRs 2017 is a failure by a regulated person to comply with a directive requirement or a direction we have given under Regulation 125.[56] We have the power to take enforcement action in relation to a compliance failure.[57] This includes the power to:

- publish details of the compliance failure (Regulation 126 (a))
- impose a financial penalty for the compliance failure (Regulation 127(1)) and publish details of that penalty (Regulation 126(b))
- seek an injunction to bring the compliance failure to an end or remedy the compliance failure (Regulation 129)
- give a direction requiring or prohibiting the taking of specified action (Regulation 125(3))

1.80 In considering what enforcement action, if any, to take, we will be mindful that the publication of the details of a compliance failure can itself act as a sanction, and a deterrent against compliance failures.

1.81 We might find that there has been a compliance failure, for example, in the following circumstances:

1. After conducting an investigation in response to a compliance report received from a regulated person or a complaint made to us about a compliance failure.
2. After conducting an investigation commenced at our own initiative.
3. xA report by a skilled person reveals a compliance failure.

1.82 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 breach to an end and give assurances on how it will avoid a future breach of directive requirements. We reserve the option to publish details of a compliance failure[58] or impose a financial penalty[59] in such cases, subject to the decision-making process described below, if we are satisfied that a compliance failure has occurred and that the sanction is appropriate.

Publication of compliance failure and imposition of financial penalties

1.83 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.[60]

1.84 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.

1.85 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 and publish it on our website.[61] This statement is contained in the next chapter of this document. In applying the statement of penalty principles, we must apply the version in force at the time of the compliance failure. We must review the statement from time to time and revise it if necessary.[62]

56 Regulation 123.
57 Regulation 123.
58 Regulation 126.
59 Regulation 127.
60 Regulation 126.
61 Regulation 127(3) and 127(4)(a).
62 Regulation 127(4) (c).

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

1.86 Decisions on whether to publish details of, or to impose a financial penalty for, a compliance failure will be taken by the EDC. The EDC will satisfy itself that a compliance failure has been committed and determine whether publication of details of the compliance failure and/or the imposition of a financial penalty is appropriate.

1.87 The EDC is a three-person committee of our board. EDC members are appointed based on their relevant experience and expertise. The committee is formed of the EDC Chairman (or, in their absence, the Deputy Chairman) and two other EDC members selected by the Chairman. They are separate from the investigation team for the case. The EDC has support staff and legal advisers who may be our staff.

Our recommendation to the EDC to issue a warning notice

1.88 If we decide to publish details of, or impose a financial penalty for, a compliance failure, we will recommend to the EDC that it should issue a warning notice.[63]

1.89 A recommendation to issue a warning notice may arise from a formal investigation involving appointed investigators (see paragraphs 1.40 to 1.77 above on the use of appointed investigators).

1.90 When we consider it appropriate, or the EDC requests it, we will provide the EDC with relevant supporting documents and evidence.

Deciding whether to issue a warning notice

1.91 The decision to issue a warning notice is made by the EDC. In deciding to issue a warning notice, the EDC will:

- Decide the wording of the warning notice.
- 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). The recipient will be given at least 21 days to make representations.[64]

1.92 If the EDC decides to issue a warning notice, we will make appropriate arrangements for the notice to be given as soon as is reasonably practicable.

Contents of the warning notice

1.93 The warning notice will set out details of the compliance failure 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.

1.94 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.

63 Regulation 128.
64 Regulation 128(b).

Access to underlying material

1.95 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, it may be appropriate to provide the recipient with the written submissions and documents that the EDC considered when deciding whether 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.

1.96 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[65] or where we have received the consent of the person from whom the information was received and (if different) the person to whom the information relates.

Making representations to the EDC

1.97 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 deadline for representations and who they should be addressed to.

1.98 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. 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.

1.99 A single member of the EDC will decide whether to grant an application for an extension. In doing so, they will consider the interests of fairness to the applicant and procedural efficiency, including the impact the delay would have on any other stakeholders or generally.

1.100 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.

1.101 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. 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 EDC's final decision

1.102 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.

65 Regulation 135(2) provides that the FSBRA (Disclosure of Confidential Information) Regulations 2014 apply for the purposes of the PSRs 2017, with certain amendments.

1.103 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.

1.104 If the EDC decides to publish details of a compliance failure, it will decide what details to publish.

1.105 If the EDC decides to impose a financial penalty, it will determine the amount. See Chapter 5 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

1.106 Following the EDC's decision, 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, and/or impose a financial penalty for, the compliance failure. Where we impose a financial penalty, our normal practice will be to also publish details of the compliance failure.

1.107 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 tell the recipient of the notice the day on which we intend to publish the details of the compliance failure.

1.108 When the EDC decides to impose a financial penalty for a compliance failure, the decision notice will state the amount. We will also tell the recipient of the notice the date for payment of the penalty, which will typically be 14 days following the issue of the decision notice.

1.109 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 against a decision to publish details of a compliance failure or to impose a financial penalty

1.110 Regulation 130 of the PSRs 2017 provides that decisions to publish the details of a compliance failure[66] in respect of a compliance failure are appealable to the Competition Appeal Tribunal (CAT) by any person affected by the decision. The CAT must apply the same principles as would be applied by a court on an application for judicial review.[67] The CAT must either dismiss the appeal or quash the whole or part of the decision to which the appeal relates. If it quashes all or part of the decision, the CAT may refer the matter back to us with a direction to reconsider in accordance with the CAT's ruling.[68] The CAT may not direct us to take any action which we would not otherwise have the power to take.

1.111 Under Regulation 132 of the PSRs 2017, a person may appeal against our decision to impose a penalty, the amount of the penalty, or the date by which the penalty, or part of it, must be paid.[69] The CAT may uphold the penalty, set it aside, decide on a different amount, and/or vary the date for payment.[70]

66 Regulation 130(1)(b) and Regulation 130(2).
67 Regulation 131(4).
68 Regulation 131(5) and (6).
69 Regulation 132(2).
70 Regulation 132(5).

1.112 An appeal can be made against a decision to publish details of a compliance failure or impose a financial penalty by sending the CAT a notice in accordance with its rules[71] within the time limit specified in the rules.[72]

1.113 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.[73]

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

1.114 Settlement has potential advantages, including the saving of industry resources and our own, and the prompt communication of compliance messages to the payments industry.

1.115 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.

1.116 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.

1.117 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.

1.118 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 us and the regulated person.

1.119 The SDMs may accept the proposed settlement by deciding to issue a warning notice. Alternatively, they may decline the proposed settlement and discussions might continue.

1.120 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.

1.121 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 issuing a final decision notice. The decision notice constitutes our regulatory decision about that compliance failure.

1.122 In recognition of any benefits and savings afforded by settlement, any financial penalty specified in the warning notice may be reduced to reflect the stage the process has reached when settlement is concluded.

1.123 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 explained in the decision notice.

71 Under Regulation 131(8), CAT rules mean rules under section 15 Enterprise Act 2002 www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf

72 Regulation 131(2) and (3), Regulation 132(3) and (4). In the absence of a specific time limit in the PSRs 2017 or the CAT rules, the position would be as set out in Rule 9(1) of the CAT rules, 'within two months of the date on which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier'.

73 Regulation 132(6).

1.124 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.

1.125 All settlement communications are made without prejudice. 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

1.126 We may apply to the court for an injunction to enforce the directive requirements and our directions under the PSRs 2017.[74] 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.

1.127 In deciding whether to apply to the court, we will consider the legal test that the court will apply, as well as the nature, impact and seriousness of the actual or potential compliance failure and whether injunctive relief is appropriate.

1.128 On our application, the court may make an order:

- Restraining the conduct which constitutes the compliance failure, if it is satisfied that there is a reasonable likelihood of a compliance failure taking place or, if a compliance failure has taken place, that it is reasonably likely to continue or be repeated.[75]

- Requiring a regulated person to take steps to remedy a compliance failure if satisfied that there has been a compliance failure by a regulated person and that there are steps which could be taken to remedy it. The court may make an order requiring anyone else who appears to have been knowingly concerned in the compliance failure, to take steps to remedy it.[76]

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

Giving directions

Overview of the powers

1.130 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 a directive requirement or the application of a directive requirement to a person. We can also give directions to remedy or prevent a failure to comply with a directive requirement, including to prevent continued non-compliance.[77]

1.131 Directions can be 'specific' or 'general', depending on whether they are addressed only to certain regulated persons (for example, a named PSP) or whole classes of regulated persons (for example, all operators of payment systems).

74 Regulation 129.
75 Regulation 129(1).
76 Regulation 129(2).
77 Regulation 125.

Before giving a specific direction

1.132 Before giving a specific direction[78], we will normally give addressees notice of a proposed direction, giving our reasons for proposing it, and setting out the next steps and the deadline for representations. We will also set out the proposed implementation period (the period between issuing any direction and its commencement). In urgent cases, we may give specific directions without giving notice if we believe that a delay in issuing a direction may result in a detriment to a specified person or to others, or is otherwise inappropriate.

1.133 Where we give notice of a proposed specific direction, we will normally allow at least 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 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 with the addressee.

1.134 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 consider the interests of such wider consultation and the interests of the specific addressees of the proposed direction.

1.135 We will take account of representations received in deciding whether to give a specific direction.

1.136 The addressee of a specific direction will also be provided with reasons for our decision. If we decide to give a specific direction, we will specify the commencement date of the direction.

1.137 We may also publish the direction on our website. We will decide whether to publish a specific direction based on the circumstances of each case. We will consider the interests of transparency in the exercise of our functions, wider awareness of our decisions and the interests of the specific addressees of the direction.

Before giving a general direction

1.138 Before giving a general direction[79], we will consult publicly by publishing a draft of the direction on our website and inviting representations on it.

1.139 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.[80]

1.140 When we publish a draft general direction it will be accompanied by a cost benefit analysis, an explanation of its purpose, our reasons for proposing it and notice that representations may be made to us within a specified time.[81] 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.[82] 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.

78 Regulation 125(4)(b).
79 Regulation 125(4)(a) and Section 104 of FSBRA as amended by Regulation 136(2).
80 Section 104(10) of FSBRA.
81 Section 104 (3) of FSBRA.
82 Section 104(11) of FSBRA.

1.141 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 issues involved.

1.142 We will take account of consultation responses received in deciding whether to give a general direction.

1.143 Where we decide to give a general direction, we will publish it.

1.144 We will also publish an account, in general terms, of representations made during the consultation and our response to them.

Appeals against directions

1.145 Regulation 130(1)(a) of the PSRs 2017 provides that decisions to give specific directions are appealable to the 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.[83] The CAT rules set out the period within which an appeal must be made.[84]

1.146 Decisions to give general directions are not appealable to the CAT unlike specific directions (see Regulation 130(a)). Our decisions on whether to give directions, like all administrative decisions, can be the subject of judicial review by the courts.

Contacting us

Complaints (about non-compliance)

1.147 If you wish to make a complaint about a breach of the PSRs 2017 or a PSR direction made under the PSRs 2017, you can contact us by post, or email us at: PSRcomplaints@psr.org.uk.

For general purposes

1.148 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

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

Our postal address

1.150 You can contact us by post at:

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

83 Regulation 131.
84 The period for appeal would be two months in the absence of any specific provision for time limits: www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf

2. Statement of penalty principles

Introduction

2.1 This chapter sets out our statement of penalty principles. It covers penalties for non-compliance with the requirements of the PSRs 2017 and directions given by the PSR under the PSRs 2017. Under Regulation 127 of the PSRs 2017, we may require a regulated person (any person on whom an obligation, restriction or prohibition is imposed by a directive requirement[85]) to pay a penalty in respect of a compliance failure. We may publish details of a compliance failure or a penalty we have imposed.[86]

2.2 A 'compliance failure' means a failure by a regulated person to comply with:

(a) a directive requirement (an obligation, prohibition or restriction imposed by Regulation 61 (information on ATM withdrawal charges) or Part 8 (access to payment systems and bank accounts) of the PSRs 2017[87], or

(b) a direction we give under Regulation 125 under the PSRs 2017

2.3 This document contains our statement of the principles 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 127(3) of the PSRs 2017. Details of the procedures that we will generally apply in relation to our functions under the PSRs 2017, including rights of appeal, are set out in the previous chapter.

2.4 We will have regard to this statement of principles:

- in respect of any compliance failure which occurred, or is continuing, on or after [date the PSRs 2017 come into force]
- in deciding whether to impose a penalty
- in determining the amount of any penalty
- in deciding whether to publish details of a compliance failure

2.5 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.

2.6 We may, from time to time, revise this statement of principles. Any revised statement will be issued for consultation and published.

85 Regulation 123.
86 Regulation 126.
87 Regulation 123.

Deciding whether to impose a penalty

2.7 We will consider the full circumstances of each individual case when determining whether or not to impose a financial penalty. The principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour.

2.8 We set out below 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 PSD2 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, or one similar to it, we will consider whether that action would be adequate to address our concerns, or whether it would be appropriate for us to take our own action
- the extent to which there is uncertainty or complexity in the interpretation of a prohibition or requirement, where the issue has not been the subject of previous guidance or statements by us, another competent authority or the courts

2.9 Where we impose a financial penalty, our normal practice will be to also publish details of the compliance failure. However, in any individual case, four options are open to us. We can:

- impose a financial penalty, but not publish details of the compliance failure
- not impose a financial penalty, but publish details of the compliance failure
- impose a financial penalty and publish details of the compliance failure
- not impose a financial penalty and not publish details of the compliance failure

2.10 In deciding which of these enforcement options is the most appropriate, we will consider all the relevant circumstances of the case. The key factors are 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 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 cooperated with us fully and immediately, and has taken effective remedial action, this may be a factor in favour of only publishing details of the compliance failure, rather than also imposing a financial penalty
- if the compliance failure is more serious, 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 derived an economic benefit (including making a profit or avoiding 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 benefit from its compliance failure
- 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
- our approach, or that of other competent authorities 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, 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

2.11 Where we impose a financial penalty, our normal practice will be to also publish details of that financial penalty under Regulation 126(a) of the PSRs 2017. We will only refrain from publishing details of a financial penalty in exceptional circumstances.

Determining the appropriate level of the financial penalty

2.12 Our penalty-setting regime is based on these 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.

2.13 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 2.17 to 2.19).
- **Second element:** The financial penalty, calculated as follows:
  - Step 1: In addition to any disgorgement (see first element), determining a figure which reflects the seriousness of the compliance failure and the size and financial position of the regulated person (see paragraphs 2.20 to 2.21).
  - Step 2: Where appropriate, adjusting the Step 1 figure to take account of any aggravating or mitigating circumstances (see paragraphs 2.22 to 2.23).
  - Step 3: Where appropriate, increasing the amount arrived at after Steps 1 and 2, to ensure that the penalty has an appropriate and effective deterrent effect (see paragraph 2.24).
  - 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 2.25 and 2.33 to 2.39)
    - 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 2.27 to 2.32)

2.14 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 2.33).

2.15 We recognise that the overall penalty must be appropriate and proportionate to the compliance failure. We may decrease the level of the penalty if we consider that it is disproportionately high compared 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.

2.16 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

First element – disgorgement

2.17 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.

2.18 Where the success of a regulated person's business model is dependent on failing to comply with obligations or prohibitions under the PSRs 2017, or with directions given by us under the PSRs 2017, and the compliance failure is at the core of the regulated person's activities, we will seek to deprive the regulated person of all the financial benefit derived from such activities.

2.19 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 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

2.20 The penalty is calculated separately from, and in addition to, any disgorgement. A compliance failure may cause costs or harm in addition to the financial benefit derived by the regulated person responsible. 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 we 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.[88] 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.

2.21 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 PSRs 2017 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 PSRs 2017 (taking into account the provisions of the PSRs 2017 and their explanatory recitals).
- The extent to which the compliance failure was deliberate or reckless.

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

Step 2 – mitigating and aggravating factors

2.22 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 2.17 to 2.19) to take into account factors which aggravate or mitigate the compliance failure.

2.23 The following list of factors may aggravate or mitigate the compliance failure:

- the behaviour of the regulated person in bringing (or failing to bring) the compliance failure to our attention (or the attention of other competent authorities, where appropriate) quickly, effectively and comprehensively
- 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 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 Directive obligations or prohibitions imposed on it, and with our directions under the PSRs 2017, throughout the organisation (from the top down) – together with appropriate steps relating to regulatory risk identification, risk assessment, risk mitigation and review activities[89]

89 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.

- 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

2.24 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 has failed to improve

  – the relevant behavioural standards of the regulated person

  – 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 an increase to the penalty

Step 4 – discounts

2.25 We may seek to agree the amount of any financial penalty and other terms with the regulated person. In recognition of the benefits of such agreements, we may reduce the amount of the financial penalty to reflect the stage at which we reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated under the first element, pursuant to paragraphs 2.17 to 2.19. Details of our policy on settlement discounts are provided in paragraphs 2.33 to 2.39.

2.26 Details of our policy on serious financial hardship are provided in paragraphs 2.27 to 2.32.

Serious financial hardship

2.27 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 2.29 to 2.32.

2.28 We note that many PSPs authorised by the FCA or the Prudential Regulation Authority (PRA) are subject to their own prudential requirements. Payment systems operating in the UK are not subject to formal prudential requirements.

2.29 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.

2.30 Subject to paragraphs 2.27 to 2.29, 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 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

2.31 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.

2.32 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

2.33 As set out in paragraph 2.14 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 2.13).

2.34 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. We recognise the benefits of such agreements, in that they offer the potential for securing earlier protection for parties that the PSRs 2017 is intended to protect, and provide cost savings for us and the regulated person. We will therefore reduce the penalty that might otherwise be payable to reflect the timing of any settlement agreement.

2.35 In appropriate cases, we will engage 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. Where part of a proposed penalty specifically equates to the disgorgement of any profit accrued, or loss avoided, the reduction will not apply to that part of the penalty.

2.36 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 reduction in the 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.

2.37 Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement, and invite dispute 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.

2.38 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.

2.39 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

2.40 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

2.41 Financial penalties will be paid to the Treasury after deducting our enforcement costs as provided for in Regulation 136(3)(e) of the PSRs 2017 and Schedule 4, paragraph 10(1) of FSBRA.

2.42 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 2.27 to 2.32.

2.43 We will consider deferring 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 total penalty to be paid within a sensible period. We will not allow extra time where the regulated person could or should have organised its business affairs in order to allow it to pay within the specified time.

2.44 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.[90]

2.45 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)[91] 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 127 of the PSRs 2017. We would typically expect regulated persons who are not subject to GEN to comply with these general principles.

90 Including, potentially, any attempt by a regulated person to withdraw from participation in a 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.

91 See http://fshandbook.info/FS/html/FCA/GEN/6/1

Annex 2
Glossary

Term or abbreviation	Description
ATM (automated teller machine)	An electromechanical device that enables authorised users, typically using machine-readable plastic cards, to withdraw cash from their accounts and/or access other services (for example, to make balance enquiries, transfer funds or deposit money).
ATM deployer	A company which owns and operates ATMs.
CAT	The Competition Appeals Tribunal.
direct access	A PSP has direct access to a payment system if the PSP is able to provide services for the purposes of enabling the transfer of funds using the payment system as a result of arrangements made between the PSP and the operator.
EDC	The Enforcement Decisions Committee of the Payment Systems Regulator.
end user	A consumer, business or other entity that uses a service provided by a payment system as a payer or a payee, and that is not acting as a PSP.
EU Settlement Finality Directive (SFD)	Directive 98/26/EC on settlement finality in payment and securities settlement systems, published in the Official Journal of the EU on 11 June 1998 (implemented in the UK by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999).
FCA	The Financial Conduct Authority.
FSBRA	The Financial Services (Banking Reform) Act 2013.
IFR (EU Interchange Fee Regulation)	Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, published in the Official Journal of the EU on 19 May 2015.
independent ATM deployer (IAD)	An ATM deployer which does not issue payment cards.
indirect access	Access to a regulated payment system through a contractual arrangement with a direct PSP to enable it to provide services (for the purposes of enabling the transfer of funds using that regulated payment system) to persons who are not participants in the system.

indirect access provider (or IAP)	A PSP that provides indirect access to a payment system to other PSPs for the purpose of enabling the transfer of funds within the United Kingdom. This is the case irrespective of whether the IAP provides the indirect PSP with a unique sort code (i.e. whether or not the indirect PSP is listed as the 'owning bank' for a sort code in the Industry Sort Code Directory, with the IAP listed as the 'settlement bank') or not.
IPSP	Indirect payment service providers (PSPs) which are seeking indirect access to payment systems or already have an existing indirect access arrangement with an IAP.
operator (payment system operator)	In relation to a payment system, any person with responsibility under a payment system for managing or operating it; any reference to the operation of a payment system includes a reference to its management.
payee	A natural or legal person who is the intended recipient of funds which have been the subject of a payment transaction.
payer	A person who holds a payment account and allows instructions to be given to transfer funds from that payment account, or who gives instructions to transfer funds.
payment service provider (PSP)	A PSP, in relation to a payment system, means any person who provides services to consumers or businesses who are not participants in the system, for the purposes of enabling the transfer of funds using that payment system. This includes direct PSPs and indirect PSPs.
payment transaction	An action of transferring funds, initiated by the payer or on its behalf or by the payee.
POND	Proportionate, objective and non-discriminatory.
PSD	Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, published in the Official Journal of the EU on 5 December 2007 (implemented in the UK through the Payment Services Regulations 2009).
PSD2	Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, published in the Official Journal of the EU on 23 December 2015.
PSRs 2017	The Payment Services Regulations 2017.
SDMs	The Settlement Decision Makers of the Payment Systems Regulator.
SFD designated payment systems	In the UK: Bacs (operated by Bacs Payment Systems Limited) CHAPS (operated by CHAPS Clearing Company) Faster Payments Scheme (FPS) (operated by the Faster Payments Scheme Limited) Cheque and Credit Clearing (C&C) (operated by the Cheque and Credit Clearing Company Limited)

25 The North Colonnade
Canary Wharf
London E14 5HS
Telephone: 0300 456 3677
Website: www.psr.org.uk