

# Specific Direction 2 on competitive procurement of central infrastructure (Bacs)

June 2017

Varied December 2021

This is a consolidated version of Specific Direction 2 as varied by Specific Direction 2a

# Specific Direction 2 (Procurement: Bacs)

## 1 Recitals

### Whereas:

- 1.1** The *operator* of *Bacs* has been operating the *Bacs* payment system with the use of *central infrastructure services* provided under the *existing central infrastructure contract*.
- 1.2** For the reasons set out in its infrastructure market review final report<sup>1</sup> and remedies decision<sup>2</sup>, the *Payment Systems Regulator* has concluded that any future contract for *central infrastructure services* must be competitively procured. The *Payment Systems Regulator* also concluded that such a procurement should take place at least every ten years.
- 1.3** In order to ensure that any competitive procurement is undertaken in the absence of barriers to competition created by the use of bespoke *messaging standards*, the *Payment Systems Regulator* has further concluded that the *central infrastructure services* provided under the first *central infrastructure* contract competitively procured in accordance with this specific direction should be capable of receiving and sending all relevant messages (used in the payment system) in the *ISO 20022 messaging standard*. This would not apply to contracts following the first competitively procured contract.
- 1.4** The *Payment Systems Regulator* has concluded that in order for the benefits of competition to arise as soon as possible, *central infrastructure services* should be supplied in accordance with a contract selected following a competitive procurement at the earliest opportunity. In accordance with the *existing central infrastructure contract* this is from 1 December 2020, upon 24 months' notice to terminate that contract being given by either party on or after 1 Dec 2018.
- 1.5** Significant changes are taking place in the payments industry, in particular in relation to the *Forum's* proposed implementation of the anticipated *New Payments Architecture*. The dates for implementation are not yet confirmed. Therefore, this direction makes

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1 PSR MR15/2.3, *Market review into the ownership and competitiveness of infrastructure provision: final report* (July 2016).

2 PSR MR15/2.5, *Market review into the ownership and competitiveness of infrastructure provision: remedies decision* (June 2017).

provision to amend the date for compliance for transitional arrangements in relation to the *New Payments Architecture*.

- 1.6** The *Payment Systems Regulator* will consider whether to amend the date for compliance by reference to whether, in its opinion, it would not be efficient to run a competitive procurement in accordance with this specific direction for the *central infrastructure* contract from 1 December 2020 in light of the implementation of the *New Payments Architecture*, having regard to the expected duration and value of that contract or any other factors related to the transition to the *New Payments Architecture*. The *Payment Systems Regulator* may impose conditions requiring the *operator* to ensure that any contract in place from 1 December 2020 until the date specified is in the interest of service-users and provides value for money, for example, where appropriate, by requiring a more limited procurement to take place, as provided for by paragraph 4.7.
- 1.7** The *operator* of *Bacs* would need to make arrangements to allow all system participants to have migrated, where applicable, by the date the *existing central infrastructure contract* will terminate, to either:
- a. the implementation of the *New Payments Architecture*, or
  - b. a competitively procured *central infrastructure* contract, which may, where applicable, be a transitional contract in anticipation of the implementation of the *New Payments Architecture* in due course
- 1.8** The *Payment Systems Regulator* recognises that there may be exceptional circumstances where it would be appropriate to grant an exemption from the duty to comply with one or more of the obligations set out in this direction. Section 5 therefore envisages the possibility of such an exemption being granted. This may be an exemption from some of the obligations set out in this direction, such that a more limited procurement exercise is undertaken, or it may be an exemption from all obligations set out in this direction. The latter would delay the requirement to undertake a competitive procurement to such date as is specified by the *Payment Systems Regulator* in its exemption decision, rather than requiring this to occur in accordance with the timeline envisaged in paragraph 4.7.
- 1.8a** In April 2018, the *operator* applied under Section 4 for a later date than 2 December 2020 to be specified for the purposes of paragraph 2.1. The *Payment Systems Regulator* subsequently specified 2 December 2023.
- 1.8b** In December 2021 the *Payment Systems Regulator* gave Specific Direction 2a to vary this Specific Direction. This implemented its decisions on lowering risks to successful delivery of the *New Payments Architecture*<sup>3</sup>. In particular, Specific Direction 2a varies Specific Direction 2 as described in paragraphs 1.8c to 1.8f.
- 1.8c** The deadline for the purposes of paragraph 2.1 of 2 December 2023 was replaced by a power for the *Payment Systems Regulator* to notify the *operator* of a deadline.

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3 PSR CP21/8, Lowering risks to New Payments Architecture delivery (July 2021)

- 1.8d** The *operator* cannot extend the *existing central infrastructure contract* for *Bacs* or replace it with a new contract for the supply of *central infrastructure* services for *Bacs*, or a successor to *Bacs*, unless the *Payment Systems Regulator* has:
- a. notified it of a deadline for the purposes of paragraph 2.1, or
  - b. not objected to the *operator* extending the *existing central infrastructure contract* or *entering into a new contract*.
- 1.8e** The *operator* must report to the *Payment Systems Regulator* by 31 March 2023 to set out its plans for considering the future of *Bacs* (and to report subsequently on its work to deliver those plans).
- 1.8f** Section 4 is varied so that the *Payment Systems Regulator* may change a deadline that applies for the purposes of paragraph 2.1 where this is required because of the implementation of the *New Payments Architecture*. This gives flexibility to the *Payment Systems Regulator* to change the date, and in doing so recognises that such flexibility is appropriate given the circumstances of the programme to deliver the *New Payments Architecture*, particularly its size and scale.

## Powers exercised and purpose

- 1.9** The *Payment Systems Regulator* makes this specific direction in accordance with section 54(3)(c) (Regulatory and competition functions – directions) of the Financial Services (Banking Reform) Act 2013 (the Act). In accordance with section 54(3)(c), this specific direction applies to persons of a specified description.
- 1.10** The *Payment Systems Regulator* has had regard in particular to the following provisions of the Act:
- a. sections 49 to 53 (General duties of regulator)
  - b. section 62(2)(a) (Duty to consider exercise of powers under Competition Act 1998)
- 1.11** The *Payment Systems Regulator* makes this direction for the reasons set out in its infrastructure market review final report<sup>4</sup> and remedies decision.<sup>5</sup>
- 1.12** The purpose of this specific direction is to ensure that if the *operator* of *Bacs* procures any *central infrastructure*, it is procured competitively in accordance with this specific direction.

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4 PSR MR15/2.3, *Market review into the ownership and competitiveness of infrastructure provision: final report* (July 2016).

5 PSR MR15/2.5, *Market review into the ownership and competitiveness of infrastructure provision: remedies decision* (June 2017)

# Direction

**NOW the PSR gives the following specific direction to the *operator of Bacs*:**

## 2 Requirement to procure

**2.1** Subject to section 5, the *operator of Bacs* must take such action as is necessary to ensure that any *central infrastructure* contract in place on or after such date as the *Payment Systems Regulator* may notify the operator of in writing, or such later date as specified by the *Payment Systems Regulator* in accordance with section 4 below, has been procured in accordance with paragraph 2.2.

**2.1a** The *Payment Systems Regulator* will publish a copy of the notification on its website<sup>6</sup> within seven days of giving it.

**2.2** The procurement must include the following steps:

- a. development of a strategy for the procurement
- b. consultation with service-users, including PSPs and end users, and taking into account the views of service-users expressed in the context of the *Forum's* work where relevant
- c. fair and transparent engagement with *potential providers*
- d. development and execution of a transparent and objective process to shortlist *potential providers* for the *competitive tender*
- e. development and execution of a *competitive tender* that is based on transparent and objectively justifiable criteria, and is likely to attract two or more bids
- f. selection of the *central infrastructure* provider(s) in accordance with the *competitive tender* described at (e)

**2.3** In relation to any *central infrastructure* contract which is in place on the date notified, or specified, under paragraph 2.1, the *operator of Bacs* must ensure that the *central infrastructure services* provided under any such contract are capable of receiving and sending all relevant messages (used in the payment system) in the *ISO 20022 messaging standard*.

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<sup>6</sup> psr.org.uk

- 2.3a** The *operator* must not enter into a new central infrastructure contract unless:
- (1) the *Payment Systems Regulator* has notified it of the date the contract must be in place by under paragraph 2.1, or specified a later date in accordance with Section 4, and it has complied with the requirements of this Section in procuring the contract, or
  - (2) it has given notice of its intention to enter into the contract under the non-objection process (see Section 2A), and the *Payment Systems Regulator* has given notice in writing that it does not object.
- 2.3b** The *operator* must not extend the *existing central infrastructure contract* (including by exercising any options to do so in the contract) unless it has given notice of its intention to extend under the non-objection process (see Section 2A), and the *Payment Systems Regulator* has given notice in writing that it does not object.
- 2.3c** The *operator* must comply with any conditions the *Payment Systems Regulator* gives under paragraph 2A.6.
- 2.3d** Paragraphs 2.3a to 2.3c do not prevent services or system functionality being provided for in a contract as additional functionality where paragraph 2.3a of Specific Direction 3 is satisfied in relation to that functionality.
- 2.4** The *operator* of *Bacs* must ensure that any *central infrastructure* contract it enters into does not provide for the provision of *central infrastructure services* for a period exceeding ten years.
- 2.5** The *operator* of *Bacs* must have regard to the work of the *Forum* in fulfilling its obligations under this Specific Direction 2, including in particular in relation to:
- a. establishing service-user needs for the payment system, including taking into account the views of service-users expressed in the context of the *Forum's* work
  - b. the proposal to create the *consolidated operator*
  - c. the proposal to implement a common messaging standard for one or more *regulated payment systems*, including *Bacs*
  - d. the proposal to develop a *New Payments Architecture* for certain *regulated payment systems*
  - e. the likely timing of the implementation of the proposals referred to in (a) to (c)

## 2A Non-objection process

- 2A.1** If the *operator* wishes to give notice under paragraph 2.3a(2) or 2.3b, it must do so in writing.

**2A.2** In the notice, the *operator* must set out:

- a. the date on which it proposes to enter into the contract or extension (or, if not known, the best estimate available)
- b. the purpose of entering into, or extending, the contract
- c. details of its consultation in relation to the new contract or extension (including on the implications for competition, innovation, service-users and the New Payments Architecture), including the responses and its consideration of them
- d. a copy of the proposed contract, or, if the contract is being extended, the contract with any proposed changes highlighted
- e. a summary of the terms of the contract or, if the contract is being extended, a summary of the changes to the terms of the contract
- f. information not covered by sub-paragraphs (a) to (e) that it considers will assist the Payment Systems Regulator, in particular information relevant to the matters set out in paragraph 2A.4.

**2A.3** The *Payment Systems Regulator* may:

- a. waive the requirement for the operator to provide any of the material mentioned in paragraph 2A.2 (to any extent)
- b. require further material that it considers appropriate for the non-objection process

**2A.4** In deciding whether to object (and whether to attach conditions to not objecting), the *Payment Systems Regulator* will take into account matters it considers relevant, including:

- a. whether the *operator* has consulted interested parties adequately, and how it has taken their views into account
- b. the strength of the operator's arguments for its intended course of action (including the risks involved), and how it compares to alternative actions it has considered (or should have considered)
- c. the implications for competition, innovation, and service-users, including consumers and businesses
- d. the implications for the benefits of the New Payments Architecture
- e. the implications for the operator's ability to comply with all its obligations under this Specific Direction 2

**2A.5** The *Payment Systems Regulator* will notify the operator in writing whether or not it objects.

**2A.6** The *Payment Systems Regulator* may attach conditions to a notification that it is not objecting (for example, conditions about the services to be included in the contract).

## 3 Reporting requirements

- 3.1** On or before 31 March 2023, the *operator* must provide the *Payment Systems Regulator* with a report setting out its plans for considering the future of the *Bacs* system (including *Bacs* payment services such as Direct Credits and Direct Debits). The report must include milestones, and the timeline for meeting those milestones.
- 3.2** The *operator* must report to the *Payment Systems Regulator* on its work to deliver the plans referred to in paragraph 3.1. This reporting requirement applies until the *Payment Systems Regulator* notifies the *operator* in writing that it has ended.
- 3.3** The report referred to in paragraph 3.2 must include the *operator's* conclusions, as applicable to the stage reached on the work and any changes to the plans referred to in paragraph 3.1.
- 3.4** The *operator* must submit the first report required under paragraph 3.2 on or before 31 December 2023. It must submit subsequent reports within nine months of the date the previous report was provided.
- 3.5** If the *Payment Systems Regulator* has notified the *operator* of *Bacs* of a date under paragraph 2.1, the *operator* must report to the *Payment Systems Regulator* on its work under Section 2 of this Direction. This reporting requirement applies until the *Payment Systems Regulator* notifies the *operator* in writing that it has ended. As a minimum, each report must include:
- a. a description of the *operator's* progress in relation to the procurement steps in paragraph 2.2
  - b. evidence demonstrating that, and a description of how, each of the requirements outlined at paragraph 2.2 has been, or will be, fulfilled, including:
    1. evidence demonstrating that, and a description of how, the *operator* has taken into account the results of its consultation with interested parties
    2. evidence demonstrating that, and a description of how, the *operator* has taken into account the results of its engagement with potential providers
  - c. evidence demonstrating that, and a description of how, the requirement outlined at paragraph 2.5 has been, or will be, fulfilled, including the *operator's* plans in relation to any application it may make in accordance with Section 4.
- 3.6** The *operator* must submit a report on or before 31 March, 30 June, 30 September and 31 December each year. The *Payment Systems Regulator* will notify the *operator* of the date on which the first report is due when it gives notice of the date under paragraph 2.1.
- 3.7** In respect of a report required under paragraph 3.1, 3.2 or 3.5, the *Payment Systems Regulator* may:
- a. add to the matters that the *operator* must include in the report



- b. remove the requirement to cover any particular matter in the report
- c. suspend the requirement on the operator to provide a report, either for a specified period or indefinitely
- d. change the frequency of the reports
- e. require the *operator* to submit a report on, or before, a different date
- f. require the *operator* to submit a report by reference to an event (for example, whether a milestone in the plans referred to in paragraph 3.1 has been met) or a report triggered by the event (for example, the completion of a milestone)

It will notify the *operator* of any of these changes in writing.

**3.8** A change made under paragraph 3.7(a) or (b) can apply to a specific report, a number of reports, for a period of time or for an indefinite period.

**3.9** The *Payment Systems Regulator* may publish a report, or require the *operator* to publish it. The *operator* must comply with any deadline that the *Payment Systems Regulator* sets for this.

**3.10** The *Payment Systems Regulator* will take account of issues around confidentiality in deciding what should be published. In particular, it may require the *operator* to provide a version of the report that excludes confidential information for publication.

## 4 Application to the *Payment Systems Regulator* to extend the date for compliance for transitional arrangement in relation to the *New Payments Architecture*

**4.1** The *Payment Systems Regulator* may specify a date later than a date notified under paragraph 2.1 (or a previously specified date) for the purposes of paragraph 2.1 where, in its opinion, this is required because of the implementation of the *New Payments Architecture*.

**4.2** The *operator* of *Bacs* may apply to the *Payment Systems Regulator* seeking a date to be specified for the purposes of paragraph 2.1.

**4.3** [omitted]

**4.4** [omitted]

**4.5** Applications under paragraph 4.2 must include:

- a. the date the *operator* proposes is specified
- b. an explanation of why, in the *operator's* view, a later date is required because of the implementation of the *New Payments Architecture*
- c. the steps the *operator* has taken to meet its obligations under this Specific Direction
- d. an explanation of the consequences, in the *operator's* view, of its application being rejected
- e. information about the alternatives to making an application that the *operator* has considered, and its reasons for rejecting them
- f. information about any engagement the *operator* has had with its stakeholders about whether to make an application, including the extent and nature of the engagement and the views of stakeholders

**4.5a** The *Payment Systems Regulator* may require further material that it considers appropriate to its determination of the application.

**4.6** The *Payment Systems Regulator* will consider the application provided and all facts it considers relevant at the time.

**4.7** The *Payment Systems Regulator* may reject an application or specify the date sought in the application, or such other date as it sees fit, and may make the specification of such later date subject to compliance by the *operator* with any conditions set out in its decision. Such conditions may, in particular, include a requirement that the *operator* undertakes steps in relation to any interim contract for *central infrastructure services* (for example, certain of the steps outlined at paragraph 2.2).

## 5 Exemption for exceptional circumstances

**5.1** The *operator* of *Bacs* may apply to the *Payment Systems Regulator* for an exemption from the duty to comply with one or more of the obligations set out in this Specific Direction 2. Such applications must include:

- a. the exceptional circumstances which the *operator* maintains justify the application
- b. the steps which the operator is taking, or proposing to take, to mitigate any risks arising from its non-compliance
- c. whether, and when, the operator expects to recommence compliance with all of its obligations under this Specific Direction 2

**5.2** The *Payment Systems Regulator* may reject an application or approve it in whole, or in part, and may make such approval subject to compliance with any conditions.

- 5.3** Where the *Payment Systems Regulator* has approved an application, the *operator* must comply with its obligations under this Specific Direction 2 before such date as the *Payment Systems Regulator* specifies in the approval of the application.

## 6 Application

- 6.1** This specific direction applies to the *operator* of *Bacs*.
- 6.2** The *operator* of *Bacs* may, where appropriate, fulfil its obligations set out in this Specific Direction 2 jointly with one or more of the *operator(s)* of *FPS* and *Cheque and Credit*. The *operator* of *Bacs* remains individually subject to the obligations set out in this specific direction regardless of any joint compliance.

## 7 Commencement

- 7.1** This specific direction comes into force on 20 June 2017.
- 7.2** This specific direction shall continue in force until such time as it is varied or revoked by the *Payment Systems Regulator*.

## 8 Citation

- 8.1** This specific direction may be cited as Specific Direction 2 (Procurement: *Bacs*).

## 9 Interpretation

- 9.1** General Provisions GP2 and GP3 are incorporated into this specific direction and are to be read as a direction under section 54 of the Act for the purposes of this specific direction.
- 9.2** The headings and titles used in this specific direction are for convenience and have no legal effect.
- 9.3** The Interpretation Act 1978 applies to this specific direction as if it were an Act of Parliament except where words and expressions are expressly defined.
- 9.4** References to any statute or statutory provisions shall be construed as references to that statute or statutory provision as amended, re-enacted or modified, whether by statute or otherwise.

## 9.5 In this specific direction:

<b>Act</b>	Means the Financial Services (Banking Reform) Act 2013
<b>Bacs</b>	Means the <i>Bacs regulated payment system</i> designated by HM Treasury under section 43 of the Act in March 2015
<b>central infrastructure</b>	Means the whole, or any part of, a package of systems and services, comprising hardware and software, provided under contract to an <i>operator</i> for the purposes of operating <i>Bacs</i> (or a system that forms part of the <i>New Payments Architecture</i> , to the extent it is intended to be a successor to <i>Bacs</i> ), including the processing of funds transfers
<b>central infrastructure contract</b>	Means a contract between an <i>operator</i> and another person for the provision of <i>central infrastructure</i>
<b>central infrastructure provider</b>	Means an infrastructure provider when providing <i>central infrastructure</i>
<b>Cheque and Credit</b>	Means the Cheque and Credit <i>regulated payment system</i> designated by HM Treasury under section 43 of the Act in March 2015
<b>competitive tender</b>	Means a process by which an <i>operator</i> invites and evaluates bids for the provision of <i>central infrastructure</i>
<b>Consolidated operator</b>	The person created in furtherance of the <i>Forum's</i> proposal to consolidate the person who is responsible, at 20 June 2017, for fulfilling the role of <i>operator</i> of <i>Bacs</i> with the persons responsible for fulfilling the role of <i>operator</i> for one or more other <i>regulated payment systems</i>
<b>enter into a new central infrastructure contract</b>	Includes amending a central infrastructure contract within the meaning of Specific Direction 3 in order to provide for <i>central infrastructure</i> within the meaning of this Direction
<b>existing central infrastructure contract</b>	Means the agreements between BPSL and Vocalink of 7 November 2014, as amended from time to time
<b>existing messaging standard</b>	Means the Standard 18 messaging standard
<b>Faster Payments Scheme (FPS)</b>	Means the Faster Payments Scheme <i>regulated payment system</i> designated by HM Treasury under section 43 of the Act in March 2015
<b>Forum</b>	The Payments Strategy <i>Forum</i>
<b>infrastructure provider</b>	Has the meaning given by section 42(4) of the Act

<b>ISO 2022 messaging standard</b>	An international financial messaging standard developed to facilitate electronic data interchange between financial institutions, and which supports interoperability between all parties in the payments process
<b>New Payments Architecture</b>	Means the proposed new architecture for certain <i>regulated payment systems</i> , known as the simplified payments platform, as set out in the <i>Forum's</i> November 2016 document, 'A Payments Strategy for the 21st Century'
<b>operator</b>	Has the meaning given by section 42(3) of the Act
<b>payment system</b>	Has the meaning given by section 41 of the Act
<b>Payment Systems Regulator</b>	Means the body corporate established under Part 5 of the Act
<b>potential provider</b>	Means a person who is a <i>central infrastructure</i> provider or who, in future, has the potential to become a <i>central infrastructure</i> provider
<b>procurement</b>	Means the process of entering into a contract for the acquisition, by an <i>operator</i> , of <i>central infrastructure</i> from another person chosen by that <i>operator</i>
<b>regulated payment system</b>	Means a payment system designated by HM Treasury under section 43 of the Act in March 2015

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