PSR Payment Systems Regulator

Interchange Fee Regulation Guidance: EU withdrawal consequential changes

Annex 2

Draft amended Guidance

PSR Payment Systems Regulator

Guidance on the PSR's approach to monitoring and ensuring compliance with the Interchange Fee Regulation

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

Note: Amended text

Our proposed amendments to paragraphs in this Annex are contained in separate boxes for ease of reference. Amended and additional text is set in green and underlined. ~~Deleted text is set in red and shown struck through.~~

For ease of reading, we have only shown renumbering of chapter numbers and paragraph references within the text. We have not shown changes to paragraph numbers in the left hand margin.

Contents

1 Overview

This document contains guidance on our approach to monitoring compliance with the Interchange Fee Regulation (IFR) provisions capping interchange fees or equivalent issuer compensation (Articles 3, 4 and 5) and the business rules provisions (Articles 6, 7, 8, 9, 10,11 and 12).

It also includes guidance on our powers and procedures under the IFR, as well as guidance on penalties for non-compliance with the IFR.

Introduction

Amended text

1.1 On 29 April 2015, the European Parliament and the Council of the European Union adopted the Interchange Fee Regulation (EU IFR), which was published in the Official Journal of the European Union on 19 May 2015.[1]

1.2 The IFR is retained EU law. It was converted into UK law by the European Union (Withdrawal) Act 2018 (EUWA)[2] and 'onshored' by a statutory instrument[3] (the onshoring SI), which amended provisions to make them operate effectively after the UK's withdrawal from the EU. The IFR as it now applies in the UK came into effect at the end of the implementation period, on 31 December 2020. In this guidance, we use the term 'IFR' to refer to the provisions that apply in the UK as a result of the onshoring amendments to the retained EU law.

1.3 The IFR imposes requirements directly on payment card schemes, issuing and acquiring payment service providers (PSPs), processing entities, other technical service providers and, in limited circumstances, merchants. We expect these parties to read, interpret and comply with the provisions of the IFR. If they do not comply they will be at risk of private legal action by affected parties or deprived beneficiaries, or possible enforcement action by the Payment Systems Regulator (PSR) or other ~~competent authorities.~~ UK authorities (for example, the Financial Conduct Authority (FCA), the Competition and Markets Authority (CMA), Trading Standards).

1. ~~http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.123.01.0001.01.ENG~~ *Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions*, OJ L 123, 19.5.2015, pages 1–15: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0751
2. *The European Union (Withdrawal) Act 2018*, c. 16. Available at: https://www.legislation.gov.uk/ukpga/2018/16/contents
3. *The Interchange Fee (Amendment) (EU Exit) Regulations 2019* (SI 2019/284). Available at: www.legislation.gov.uk/uksi/2019/284/contents/made

Amended text

The PSR's role ~~as a UK competent authority for~~ in relation to the IFR

1.4 The PSR is responsible for monitoring compliance with the IFR ~~in the UK~~ and for taking enforcement action where appropriate.[4] We will cooperate with other ~~competent~~ authorities, ~~both in the UK and in other Member States,~~ as appropriate. This will include close cooperation with the ~~Financial Conduct Authority (~~FCA~~)~~ in monitoring compliance with Articles 8(2), 8(5)~~ and)~~, 8(6), 9, 10(1)~~ and)~~, 10(5), 11 and 12~~ in the UK.~~, as the FCA also has functions relating to the monitoring and enforcement of these provisions.[5]

1.5 ~~The IFR is European law that is directly applicable in the UK.~~ The interpretation of what the IFR requires and how parties comply with it are ultimately questions of ~~European~~UK law for the ~~national and EU~~ courts. We cannot provide definitive interpretations – we can only set out our approach ~~when acting as the competent authority in the UK~~.

The purpose of this document

1.6 This document provides guidance on the approach that the PSR will generally apply in relation to its functions under the Payment Card Interchange Fee Regulations 2015 (the PCIFRs)~~, which designates)~~. These require the PSR ~~as a competent authority for~~to maintain arrangements to enable it to monitor and secure compliance with the obligations, prohibitions and restrictions set out in the IFR~~.~~ and accompanying Regulatory Technical Standards (RTS) Regulation.[6]

1.7 This guidance represents the PSR's practice at the date of publication. It may be revised from time to time to reflect changes in best practice or the law and the PSR's developing experience in monitoring and enforcing compliance with the IFR. The PSR will apply this guidance flexibly. This means that the PSR will have regard to the guidance when exercising its functions under the PCIFRs but that, when the facts of an individual case reasonably justify it, the PSR may adopt a different approach.

1.8 The guidance will be of interest to payment card schemes and participants, and those who use the services the schemes provide.

4. The Statutory Instrument that gave the PSR its powers was published on 17 November 2015~~: www.legislation.gov.uk/uksi/~~. *The Payment Card Interchange Fee Regulations 2015,* (SI 2015/1911/~~contents/made~~). Available at: www.legislation.gov.uk/uksi/2015/1911/contents/made

   The PCIFRs were amended by the onshoring SI, in particular removing references to the 'competent authority'. However, the PSR's role and responsibilities remain essentially the same as they were prior to EU exit.

5. The FCA's powers in relation to the UK IFR are now contained in regulation 107 of the Payment Services Regulations 2017 (SI 2017/752) only, following the deletion of Regulation 16 of the PCIFRs.

6. The RTS Regulation as it now applies in the UK is available at: https://www.psr.org.uk/publications/policy-statements/onshoring-eu-regulatory-technical-standards-under-the-interchange-fee-regulation-eu-exit-instrument-and-policy-statement/

   For the EU Exit Instrument adopting the RTS Regulation, see: *The Technical Standards (Interchange Fee Regulation) (EU Exit) Instrument 2019.* Available at: https://psr.org.uk/publications/policy-statements/regulatory-technical-standards-regulation-under-the-uk-interchange-fee-regulation-as-applies-in-the-uk/

1.9 The guidance includes:

- the classification of schemes for IFR purposes
- interchange fee caps and the possible exemption from those caps for some three party schemes
- business rule provisions
- our approach to monitoring compliance with the IFR
- our powers and procedures under the IFR
- penalties under the IFR

1.10 The guidance is made under Regulation 13 of the PCIFRs. It does not attempt to describe in detail all the provisions of the PCIFRs. Interested parties are advised to refer to the text of that legislation for a complete description of the PSR's statutory functions and powers.

1.11 From time to time, we may issue general guidance on substantive or operational matters where we believe information or advice is needed. This includes the operation of specified provisions of the IFR and the PCIFRs and any matters relating to our functions under those pieces of legislation.

1.12 Parties should treat the text of the IFR as paramount. In the event of any inconsistency between the IFR and any part of this guidance, the IFR takes precedence.

2 Classification of card schemes

The IFR defines two broad types of card 'scheme' which are affected by some or all of its provisions: four-party schemes and three-party schemes.

Some three-party schemes operate with licensee issuers and/or acquirers, or issue card-based payment instruments with a co-branding partner or through an agent.

In this chapter, we use the IFR definitions to classify payment card schemes to which the IFR applies, and which operate in the UK at the date of publication of this guidance.

2.1 The IFR defines two broad types of card payment systems (which it refers to as 'schemes'). These are:

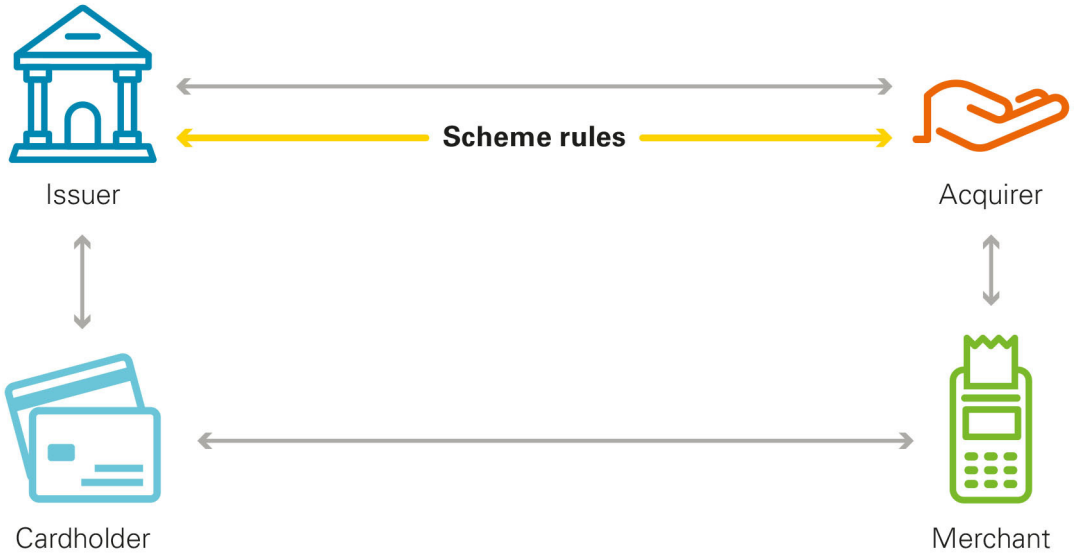
- four-party schemes
- three-party schemes

2.2 Some three-party schemes may operate with licensee issuers and/or acquirers, or issue cards with a co-branding partner or through an agent. Article 1(5) of the IFR provides that these schemes are to be treated in the same way as four-party schemes.

The meaning of 'parties' and 'schemes'

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

Four-party schemes



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

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

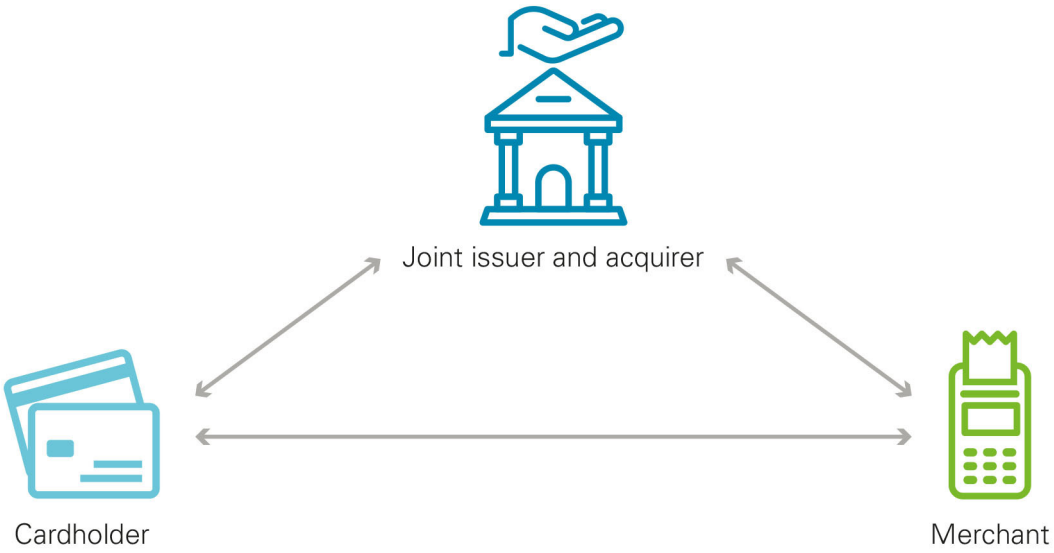
2.5 Four-party schemes involve relationships between:

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

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

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

Three-party schemes



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

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

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

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

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

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

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

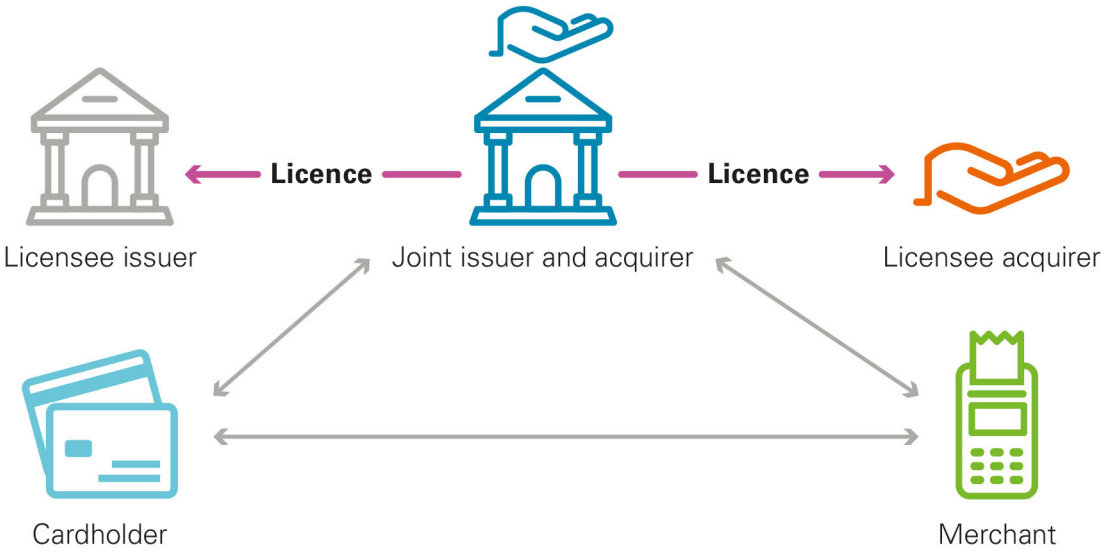
Three-party schemes operating with licensees

2.12 A three-party scheme may 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 scheme is the licensor.

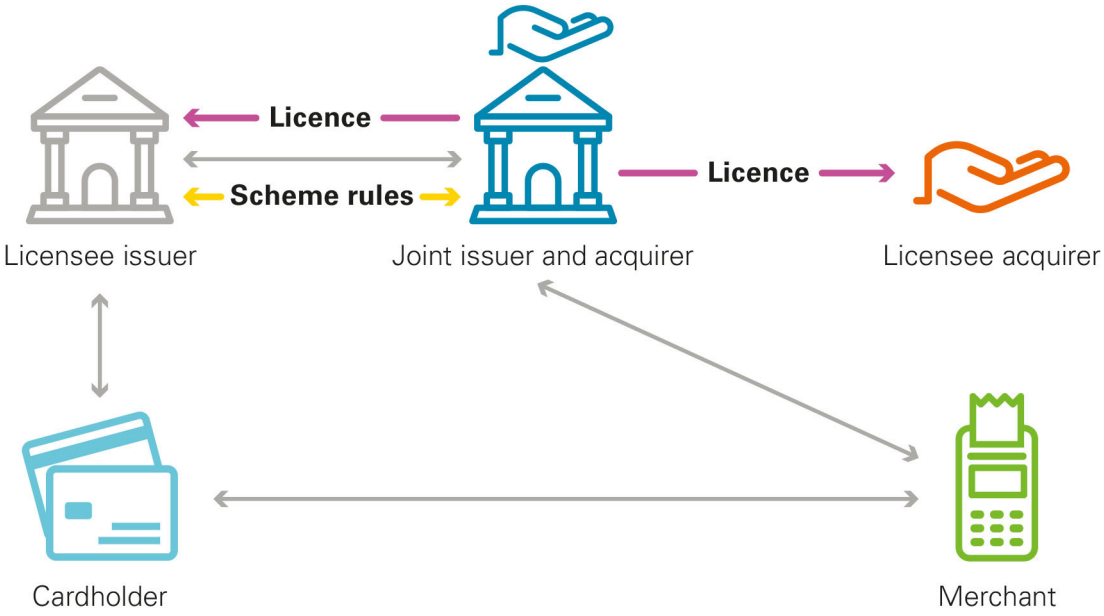
2.13 Article 1(5) of the IFR states that "when a three-party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four-party payment card scheme".

2.14 The diagrams below illustrate the four different types of transactions that could take place within three-party schemes operating with licensees. As explained, they are to be treated as four-party schemes under the IFR even though some transactions involve only three parties. The diagrams show, using dark grey arrows, relationships between parties in:

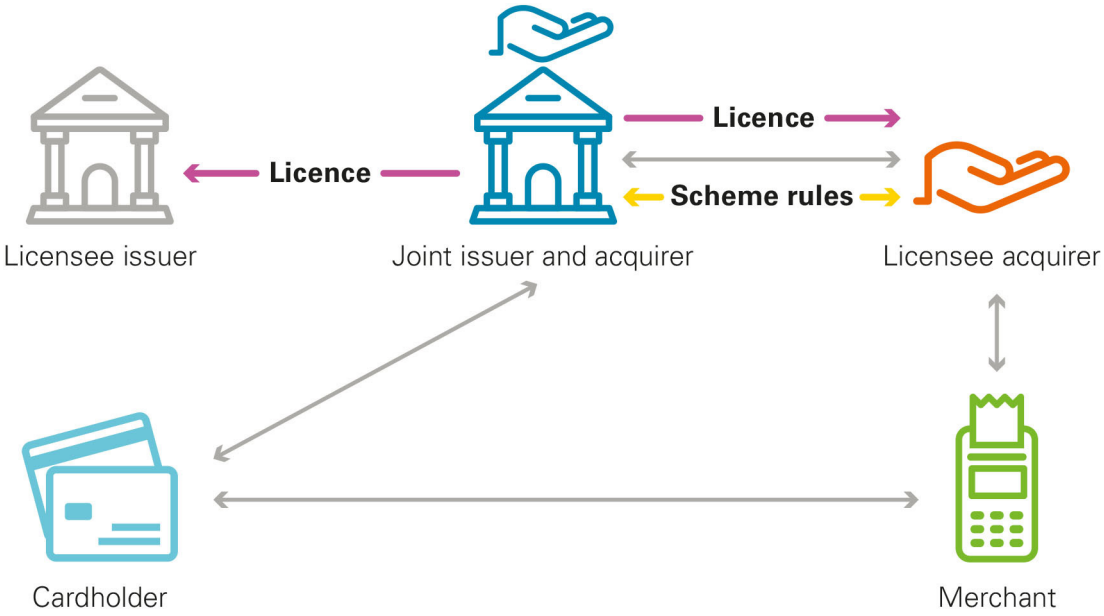
- transactions not involving a licensee issuer or acquirer
- transactions involving a licensee issuer
- transactions involving a licensee acquirer
- transactions involving both a licensee issuer and acquirer



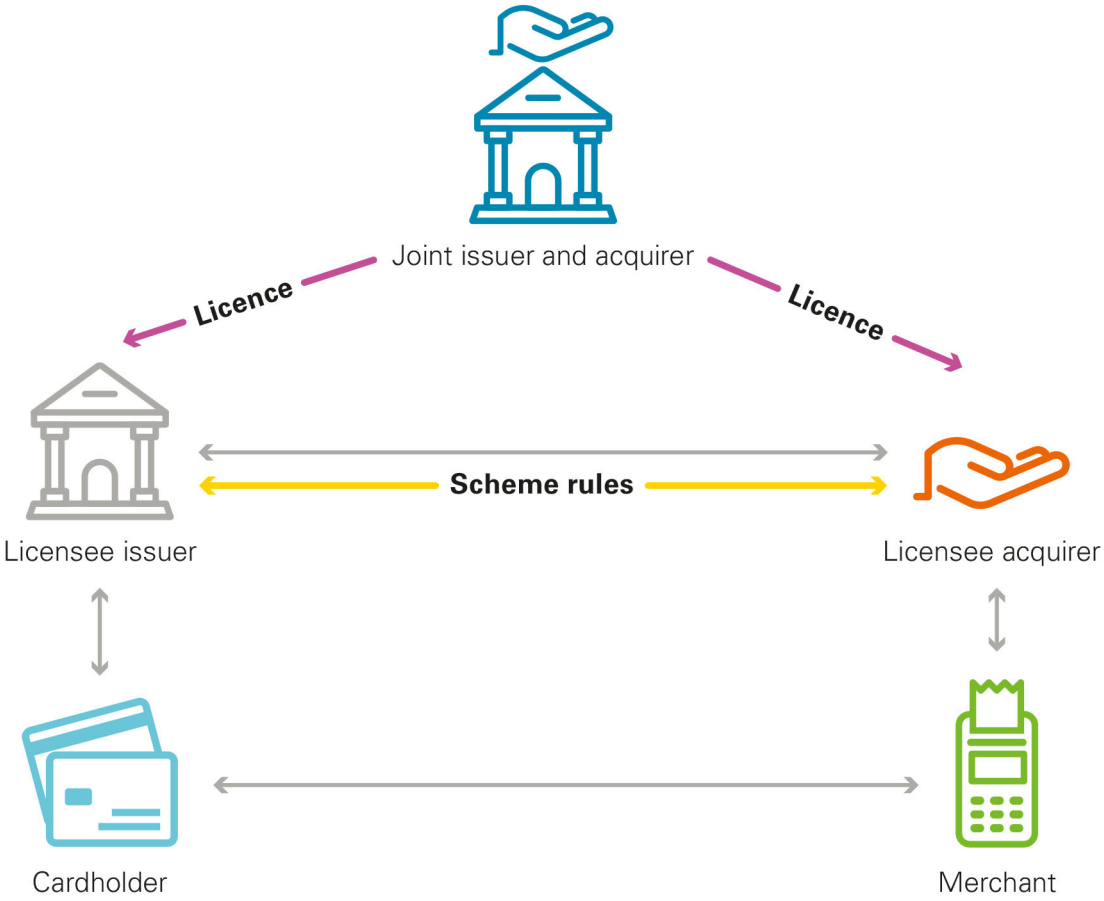
Transactions not involving a licensee issuer or acquirer



Transactions involving a licensee issuer



Transactions involving a licensee acquirer



Transactions involving both a licensee issuer and a licensee acquirer

2.15 In a three-party scheme operating with licensee issuers, there are either three or four parties involved in a card transaction, depending on whether the card is issued directly by the scheme, or by the licensee. For example, with a licensee-issued card (see first diagram on previous page), the four parties are:

- the licensee issuer
- the acquirer (the licensor)
- the cardholder
- the merchant

2.16 In this example, there are four relationships between the parties:

- the cardholder and the merchant
- the merchant and the acquirer (the licensor)
- the acquirer (the licensor) and the licensee issuer
- the licensee issuer and the cardholder

2.17 In a three-party scheme operating with licensees, the scheme provides both the issuing and acquiring services for some transactions. However, sometimes it will only provide one of those services, and sometimes neither. For those transactions when it does not provide both services, scheme rules or bilateral agreements between the scheme and the licensee set the terms of dealing between the issuer and acquirer.

2.18 The default position under Article 1(5) is that three-party schemes operating with licensees, or that issue cards with a co-branding partner or through an agent, are regulated under the IFR, including the provisions capping the interchange fees payable between the acquirer and the issuer. The interchange fee caps only apply to transactions on cards issued:

- by an issuer that is not also the acquirer, or
- with a co-branding partner or through an agent

The interchange fee caps do not apply to transactions where the scheme is both the card-issuer and the acquirer.

~~**2.19** However, Article 1(5) of the IFR provides that a Member State can grant a scheme a time-limited exemption from the domestic interchange fee caps, as long as the value of its annual card-based payment transactions made in that Member State is less than 3% of the value of all card-based payment transactions made there. The Treasury has decided to exercise this exemption in the UK (UK Exemption).[3] The UK Exemption will end by 9 December 2018 at the latest and it only applies to UK domestic transactions – those in which the issuer, merchant and acquirer are all in the UK.~~

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

2.19 The table below shows the classification of payment card schemes to which the IFR applies, and that operate in the UK at the date of publication of this guidance.

We may update this guidance, or publish an addendum to it, if the schemes operating in the UK change.

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

~~3 See: www.legislation.gov.uk/uksi/2015/1911/contents/made.~~

Scheme	Classification of the scheme (based on definitions in IFR)	Explanation
JCB International	Four-party scheme	JCB International operates a card payment system in which it grants licences to issuing and acquiring PSPs. JCB International undertakes its own acquiring but it does not undertake its own issuing.
UnionPay International	Four-party scheme	UnionPay International operates a card payment system in which it grants licences to issuing and acquiring PSPs. UnionPay International does not undertake its own issuing or acquiring.

Transactions not affected by the IFR

Amended text

2.20 Article 1 of the IFR defines its scope, including which card-based payment transactions it covers. The IFR does not apply to:

- transactions where any of the issuer, acquirer or ~~both~~point of sale (POS) are located outside the ~~European Economic Area (EEA)~~UK
- cards that can only be used to buy goods/services at the premises of the issuer or within a limited network (for example, store cards)[7]
- cards that can only be used to buy a limited range of goods/services (for example, fuel purchasing cards)

2.21 The IFR does not apply to ATM cash withdrawal transactions (whether on ATM-only cards or debit/credit cards with this functionality). The scope of the IFR provisions, read alongside the explanatory recitals, appears to be limited to purchase transactions – payments involving the transfer of funds between a payer (the cardholder) and a payee (the merchant). The IFR describes card payment schemes in these terms. For example, recital 28 defines the two main business models (three-party and four-party schemes) in terms that expressly include the involvement of both a cardholder and a merchant.

2.22 If a card payment system provides cards that can be used both for purchase transactions and ATM cash withdrawals (whether over the card payment system's own network or that of another payment system operator, such as LINK), the IFR only applies to the purchase transactions.

7. Additional examples of types of card that could fall within a limited network are available in the ~~response to Question 40 in the~~ FCA's Guidance on the scope of the Payment Services Regulations ~~2009~~2017: ~~(https://www.handbook.fca.org.uk/handbook/PERG/15.pdf).~~https://www.handbook.fca.org.uk/handbook

3 Interchange fee caps

Amended text

This chapter describes the interchange fee caps that apply to ~~domestic and cross-border~~UK transactions.

Interchange fees include both direct and indirect payments from acquirers to issuers.

Amended text

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

3.1 The ~~diagrams below paragraph 3.8 show four card payment transaction scenarios,~~ interchange fee caps set out in Articles 3 and 4 of the IFR apply to UK debit card transactions and UK credit card transactions respectively. These are transactions where both the issuer and the acquirer are in the UK. Where at least one of the issuer ~~and~~or the acquirer is ~~in the UK. We describe whether these are classified as cross-border or domestic transactions under the IFR and set out the applicable interchange fee caps.~~

~~These diagrams represent the definitions of cross-border and domestic transactions set out in Article 2(8) and 2(9) of~~ located outside the ~~IFR.~~

~~The diagrams set out~~UK, the interchange fee caps~~,~~ will not be applicable.

3.2 The interchange fee **caps** set the maximum level of interchange fees permitted for a given transaction~~.~~, which may be higher than the actual fees charged. These are determined by the card schemes for multilateral or 'default' interchange fees, or by the issuing and acquiring PSPs where there are bilateral arrangements.

3.3 ~~**Cross border and domestic**~~ **UK credit card transactions** are capped on a per-transaction basis. This means that the issuer should receive from the acquirer (and the acquirer should pay to the issuer) **no more than** 0.3% of the value of any credit card transaction. However, the actual fee can be less (if the scheme or the PSPs have set an interchange fee lower than the cap, or if ~~a Member State~~ the Treasury sets a lower cap for domestic credit card transactions). The Treasury has chosen not to ~~exercise the Member State discretion to~~ set a lower cap for ~~domestic~~UK credit card transactions.

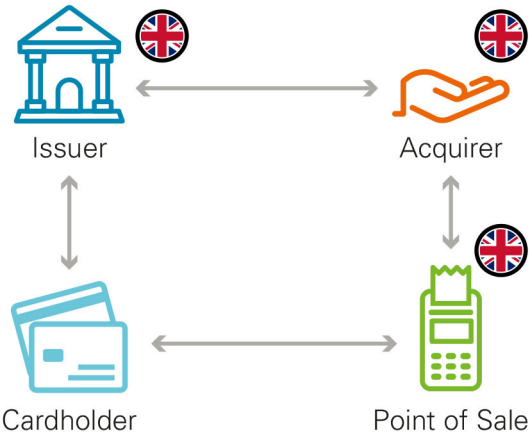
3.4 ~~**Cross border**~~ **UK debit card transactions** are capped on a per-transaction basis. This means that the issuer should receive from the acquirer (and the acquirer should pay to the issuer) **no more than** 0.2% of the value of any ~~cross border~~UK debit card transaction. Again, the actual fee can be less.

3.5 In the following diagrams, we show the four types of transaction where the point of sale (POS) is in the UK. The locations of the issuer, the acquirer and the POS are shown by the UK ~~and EU flags. The EU flag represents an EEA country that is not the UK~~flags. For each scenario, we specify whether the transaction is within scope of the IFR and therefore whether the interchange fee caps are applicable.

Amended text

3.7 ~~We do not show the diagrams for transactions where the POS is located outside of the UK. Such transactions are not UK domestic transactions, although they might be domestic transactions of another Member State. In respect of the interchange fee caps, we are the only competent authority for UK domestic transactions. Cross-border transactions place responsibility on more than one competent authority: we will have a role for transactions in which either the issuer or acquirer is in the UK, although we may need to work together with competent authorities in other Member States.~~

3.6 Where any of the issuer, the acquirer or the POS is located outside of the UK (whether within the EEA or the rest of the world), the transaction will not fall within the scope of the IFR and the caps will not apply.[8]



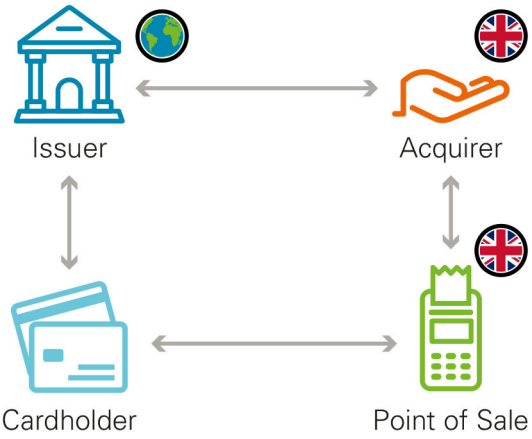
~~IFR classification: Domestic transaction (UK)~~

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

~~Debit card interchange fees will be capped at 0.2% per transaction from 9 December 2020, or sooner~~

In scope

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



~~IFR classification: Cross-border transaction~~

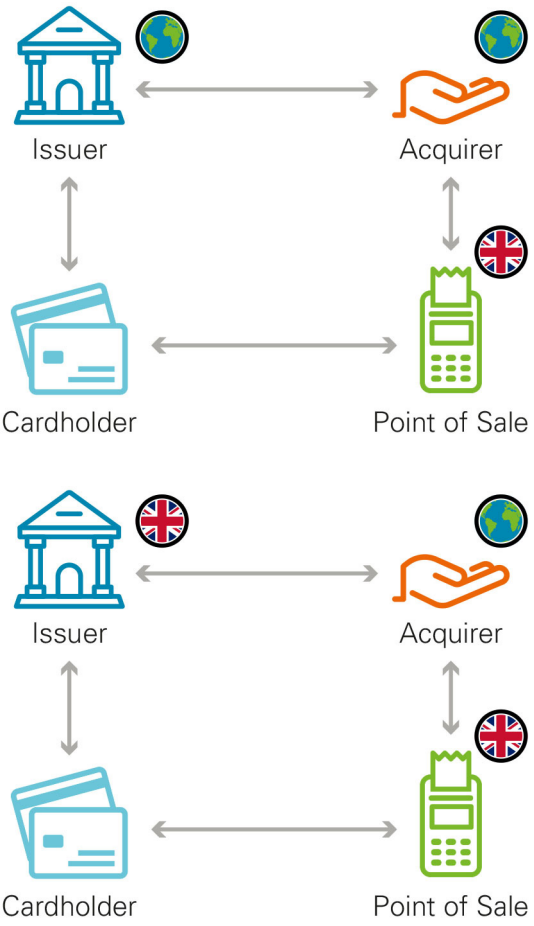
~~Interchange fee cap: 0.3% per transaction (credit cards), 0.2% per transaction (debit cards).~~

Out of scope

Interchange fee caps not applicable.

8. For transactions made in the EEA with consumer cards issued outside of the EEA (including cards issued in the UK), Visa and Mastercard have committed to capping their interchange fee levels at 0.2%/0.3% (card present) and 1.15%/1.5% (card not present) for debit and credit cards respectively. As these commitments were made to the European Commission with regards to transactions at EU merchants, the PSR does not monitor or have any role with respect to them.

Amended text



Consumer or commercial cards

3.7 The interchange fee caps set out above only apply to **consumer** card transactions. Commercial card transactions are exempt from the IFR interchange fee caps by virtue of Article 1(3)(a).

3.8 The definition of a commercial card is set out in Article 2(6) of the IFR. It states:

"'Commercial card' means any card-based payment instrument issued to undertakings or public sector entities or self-employed natural persons which is limited in use for business expenses where the payments made with such cards are charged directly to the account of the undertaking or public sector entity or self-employed natural person."

3.9 Recital 38 of the IFR contains language similar to Article 2(6) but explains that it is *"important to define a commercial card as a payment instrument used only for business expenses charged directly to the account"* of the same parties referred to in Article 2(6).

3.10 The interchange fee caps provided for in the IFR apply to all transactions **except** commercial card transactions where the funds that are used to settle with the issuer come **directly** from the business account (those cards being exempt from the caps by virtue of Article 1(3)(a)). The fact that the individual cardholder might receive a statement or 'bill' showing the transactions made on that specific card will not affect this.[9]

9. This description focuses on commercial credit card transactions. In the case of debit card transactions, the interchange fee caps provided for in the IFR apply to all transactions except for commercial card transactions where funds are directly debited from the business current account.

Direct and indirect interchange fees

Amended text

3.11 The interchange fee caps which apply to consumer debit and credit card transactions limit the interchange fees that are paid between the acquirer and the issuer. Interchange fees are capped on a per-transaction basis. ~~However, as noted above, the Treasury has chosen to take advantage of a national discretion available under Article 3(3) of the IFR and has decided to allow a weighted average for domestic debit card transactions.~~

3.12 Interchange fees are usually deducted from the face value of transactions made on an issuer's cards when the issuer settles with the acquirer. This is an example of an interchange fee paid **directly** from the acquirer to the issuer.

3.13 Under the anti-circumvention provisions of Article 5 of the IFR, the fees for payment transactions or related activities that the acquirer pays **indirectly** to the issuer are also treated as interchange fees and are subject to the caps, except where they do not have an object or effect equivalent to a direct interchange fee. Indirect interchange fees can be paid via any intermediary that:

- links the issuer and the acquirer
- receives fees from the acquirer (whether directly or indirectly)

3.14 For the avoidance of doubt, payments of fees which result from agreements between the issuer and a party that is not an acquirer, scheme or other intermediary are not interchange fees. For example, cardholder payments to issuers are not interchange fees.

3.15 The scheme is an example of a third party that links the issuer and the acquirer, but it is not the only one. Other intermediaries may sit between the scheme and the issuer or acquirer. There may also be a chain of more than one intermediary that enables the issuer to receive fees from the acquirer indirectly.

3.16 When assessing whether they are complying with the interchange fee caps, issuers and acquirers should take account of both direct and indirect fees for payment transactions or related activities paid between acquirers and issuers.

3.17 Under Articles 3, 4 and 5 of the IFR, **issuers** must ensure that any interchange fees received (whether directly or indirectly) from acquirers in respect of a card-based payment transaction do not exceed the relevant interchange fee cap. This involves taking account of all sources of agreed remuneration (including net compensation[10]) that they receive from acquirers, and from parties who might themselves receive fees from acquirers. We recognise that not all payments received by issuers from acquirers (directly or indirectly) might constitute issuer 'remuneration'. For example, where a transaction is fraudulent and the acquirer pays back the value of the transaction to the issuer, this would not be treated as issuer remuneration. If interchange fees are capped on a per-transaction basis, and an issuer receives an interchange fee at the level of the cap, the issuer should, on a net basis, receive no additional remuneration from the acquirer, scheme or other intermediary for that transaction.

~~10. See: www.legislation.gov.uk/uksi/2015/1911/contents/made.~~

10. Net compensation is the total fee income that issuers receive in respect of card transactions net of the fees they pay in respect of the same.

3.18 **Acquirers** might only be able to see the interchange fees they pay directly to issuers and might not know an issuer's net compensation position based on payments between the issuer and the scheme or other intermediaries. Therefore, we consider that, under Articles 3, 4 and 5 of the IFR, the primary responsibility of acquirers is to ensure that the direct interchange fees they pay do not exceed the caps. However, acquirers should also be proactive in ascertaining whether any fees that they pay to other parties (such as the scheme or another intermediary) are being passed back to issuers (whether in full or in part).

3.19 Article 5 of the IFR (the prohibition on circumvention) should be read alongside Article 2(10) and 2(11), which define the terms 'interchange fee' and 'net compensation' respectively, as well as explanatory recital 31.

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

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

4.1 Under Article 1(5) of the IFR, the Treasury has decided[9] to grant a time-limited exemption from domestic interchange fee caps to three-party schemes which:

- operate with licensee issuers and/or acquirers, and/or
- issue cards with a co-branding partner or through an agent

4.2 We refer to these as 'exemptible three-party schemes'.

4.3 To qualify for this exemption, the value of a scheme's annual transactions made in the UK must be less than 3% of all card-based transactions made in the UK.

4.4 On 9 December 2018, or sooner if the Treasury so decides, the exemption will end. All previously exemptible three-party schemes will then be subject to the domestic interchange fee caps in respect of transactions on cards issued:

- by an issuer that is not also the acquirer, or
- with a co-branding partner or through an agent

The domestic interchange fee caps will not apply to transactions acquired by the scheme which are made on cards issued by the scheme.

4.5 From 9 December 2015, all three-party schemes operating with licensees, and/or which issue cards with a co-branding partner or through an agent, were subject to the cross-border interchange fee caps in respect of transactions on cards issued:

- by an issuer that is not also the acquirer, or
- with a co-branding partner or through an agent

9. See: www.legislation.gov.uk/uksi/2015/1911/contents/made.

The cross-border interchange fee caps do not apply to transactions acquired by the scheme which are made on cards issued by the scheme.

4.6 The Treasury has stated that the PSR should gather the relevant information and assess whether an exemptible three-party scheme exceeds a 3% share of all UK domestic card transactions. There are two aspects of this factual exercise:

a. **Identify the relevant scheme(s)**: identify any three-party scheme directly issuing cards and acquiring transactions in the UK which also operates with UK-based licensee issuers or acquirers, or which issues cards in the UK with a co-branding partner or through an agent.

b. **Collect and analyse data**: collect and analyse the data necessary to calculate whether the value of a scheme's annual transactions made in the UK are above or below 3% of the value of all card-based payment transactions made in the UK, as set out in Article 1(5).

The market share calculation

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

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

X as a percentage of Y:

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

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

Term	**Explanation**
Value	The amount of all transactions (i.e. the monetary amount of all items purchased).
card-based	A card-based payment transaction is "a service based on a payment scheme's infrastructure and business rules to make a payment transaction by means of any card, telecommunication, digital or IT device or software if this results in a debit or credit card transaction" (see Article 2(7)). It includes, for example, both physical and virtual cards and the use of mobile wallets and tokenisation. All card types are included in this definition, whether 'pay later' or 'pay now' cards. For the avoidance of doubt, this includes credit, charge, deferred debit, immediate debit and prepaid cards. Moreover, both consumer cards and commercial cards are included in the definition. The market share calculation described in Article 1(5) refers to 'card-based payment transactions'. Therefore, for the purposes of the Article 1(5) exemption test, the market share calculation: • includes transactions based on both consumer and commercial cards • includes transactions based on credit, charge, deferred debit, immediate debit and prepaid cards

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

When the market share will be calculated

4.9 The IFR does not specify when the market share of exemptible three-party schemes should be calculated. For consistency and ease, we will adopt the same approach as that laid down in Article 3(4) of the IFR for monitoring domestic debit interchange fee caps where a Member State permits a weighted average approach.

4.10 The first market share calculation was made using the value of transactions for the period from 9 September 2014 to 8 September 2015. For subsequent calculations, in each year until the exemption ceases to apply we will use the value of transactions for the period commencing 1 January and ending 31 December. Therefore, if the value of transactions made under an exemptible three-party scheme in the UK between 1 January and 31 December is more than 3% of the value of transactions made in the UK in the same period, that scheme will not qualify for exemption and must comply with the relevant interchange fee caps from 1 April of the following year.

~~5~~4 Business Rules

The guidance in this chapter covers the business rules provisions on:

- licensing
- separation of payment card scheme and processing entities
- co-badging and choice of payment brand or payment application
- unblending
- 'Honour All Cards' rule
- steering rules
- information to the payee on individual card-based payment transactions

Article 6: Licensing

Amended text

4.1 This Article states:

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

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

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

4.3 The following is not an exhaustive list, but actions that would be considered to breach this provision include ~~requirements~~a requirement that ~~mean~~means an issuer or acquirer:

- may operate in only one ~~Member State~~part of the UK
- may not operate in one or more ~~Member States~~parts of the UK
- is restricted from beginning issuing or acquiring activity in ~~a Member State~~the UK

4.4 In essence, there may only be a single licence for ~~all countries in~~ the ~~EEA~~UK.

4.5 This provision applies to three-party schemes operating with licensees (or issuing cards with a co-branding partner or through an agent) and four-party schemes. ~~Potential infringements of the licensing provision in the UK are within the remit of the PSR; potential infringements in other Member States will be within the remit of the competent authorities of those Member States.~~

Article 7: Separation of payment card scheme and processing entities

4.6 This Article states:

"1. Payment card schemes and processing entities:

a. shall be independent in terms of accounting, organisation and decision-making processes;

b. shall not present prices for payment card scheme and processing activities in a bundled manner and shall not cross-subsidise such activities;

c. shall not discriminate in any way between their subsidiaries or shareholders on the one hand and users of payment card schemes and other contractual partners on the other hand and shall not in particular make the provision of any service they offer conditional in any way on the acceptance by their contractual partner of any other service they offer.

Amended text

~~*2. The competent authority of the Member State where the registered office of the scheme is located may require a payment card scheme to provide an independent report confirming its compliance with paragraph 1.*~~

2. . . .

3. Payment card schemes shall allow for the possibility that authorisation and clearing messages of single card-based payment transactions be separated and processed by different processing entities.

4. Any territorial discrimination in processing rules operated by payment card schemes shall be prohibited.

5. Processing entities within the ~~Union~~UK shall ensure that their system is technically interoperable with other systems of processing entities within the ~~Union~~UK through the use of standards developed by international or ~~European~~UK standardisation bodies. In addition, payment card schemes shall not adopt or apply business rules that restrict interoperability among processing entities within the ~~Union~~UK.

~~*6. The European Banking Authority (EBA) may, after consulting an advisory panel as referred to in Article 41 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council (1), develop draft regulatory technical standards*~~

6. The Payment Systems Regulator may make technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of point (a) of paragraph 1 of this Article.

~~*EBA shall submit those draft regulatory technical standards to the Commission by 9 December 2015.*~~

~~*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010."*~~

Separation (Article 7 (1))

Amended text

4.7 The European Banking Authority (EBA ~~has been~~) was given the mandate to develop regulatory technical standards (RTS) for separating payment card schemes and processing entities~~.~~ in the EU IFR. The ~~final~~EU RTS Regulation, published on 27 July 2016, sets out the requirements for payment card schemes and processing entities to comply with Article 7(1)(a) of the EU IFR.[11]

4.8 The Treasury delegated powers to the PSR under the EUWA to make technical standards in connection with Article 7(1) and maintain these in the future.[12] As a result of the onshoring of the EU IFR in domestic law, the PSR made the Technical Standards Instrument on 5 March 2019, onshoring the EU RTS regulation under its delegated powers. This came into effect on 31 December 2020, at the end of the implementation period.

4.9 Card schemes and processing entities must ensure that there is no cross-subsidisation of costs between these activities and may not charge their customers a single ('bundled') price for both activities.

4.10 Card schemes affected by Article 7(1) may not give their shareholder or subsidiary processing entities any preferential treatment (whether on price or quality) and, as set out in the RTS, may not share information of a sensitive nature that provides a competitive advantage if they have not shared the same information with other competitors. Also, card schemes may not make any of their services contingent on the customer accepting any processing service, or vice versa.

4.11 The principles in paragraph 4.10 apply equally to processing entities in respect of their treatment of payment card schemes.

Other provisions of Article 7

~~**4.11** Under Article 7(2), payment card schemes can be required to confirm their compliance with the separation requirements of Article 7(1) through an independent report to the competent authority in the Member State where the registered office of the scheme is located.~~

4.12 Article 7(3) requires that card schemes allow for the possibility that authorisation and clearing messages be handled by different processing entities. This interacts with Article 7(1), which requires that schemes do not discriminate against issuers or acquirers who use another entity for one (or both) of these processing services. For instance, prioritising the clearing of transactions which have been authorised through the card scheme's own network over transactions which have been authorised through a different processing entity would be considered a discriminatory practice.

11. ~~https://www.eba.europa.eu/documents/10180/1533605/EBA-RTS-2016-05+(Final+draft+RTS+on+payment+card+schemes+and+processing+entities+under+the+IFR).pdf~~ *Commission Delegated regulation (EU) 2018/72 of 4 October 2017 supplementing Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process.* See: https://eur-lex.europa.eu/eli/reg_del/2018/72/oj
12. This delegation of power was granted through the *Financial Regulators' Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018,* (SI 2018/576), which were made on 25 October 2018 (the 2018 Regulations): http://www.legislation.gov.uk/uksi/2018/1115/pdfs/uksi_20181115_en.pdf

4.13 Article 7(4) prohibits any territorial discrimination in a card scheme's processing rules. This includes, but is not limited to, exclusive territory clauses or other territorial restrictions which discriminate against independent processing entities. We note that the term 'territorial discrimination' is not defined in the IFR but consider that it may include technical or operational requirements that have a discriminatory effect.

Amended text

4.14 Article 7(5) has two elements, aimed at different regulated persons. The first requires processing entities within the ~~EEA~~UK to ensure that their systems are technically interoperable with other processing entities' systems, by using any of the standards developed by international or ~~European~~UK standardisation bodies. Under the second element, card schemes must not adopt or apply business rules that restrict interoperability among processing entities within the ~~EEA~~UK. Examples include limiting the choice of messaging formats, and not facilitating the use of alternative formats (for example, by restricting the use of translation services).

Article 8: Co-badging and choice of payment brand or payment application

4.15 This Article sets out obligations for card schemes, issuers, acquirers and merchants. It states:

"1. Any payment card scheme rules and rules in licensing agreements or measures of equivalent effect that hinder or prevent an issuer from co-badging two or more different payment brands or payment applications on a card-based payment instrument shall be prohibited.

2. When entering into a contractual agreement with a payment service provider, the consumer may require two or more different payment brands on a card based payment instrument provided that such a service is offered by the payment service provider. In good time before the contract is signed, the payment service provider shall provide the consumer with clear and objective information on all the payment brands available and their characteristics, including their functionality, cost and security.

3. Any difference in treatment of issuers or acquirers in scheme rules and rules in licensing agreements concerning co-badging of different payment brands or payment applications on a card-based payment instrument shall be objectively justified and non-discriminatory.

4. Payment card schemes shall not impose reporting requirements, obligations to pay fees or similar obligations with the same object or effect on card issuing and acquiring payment service providers for transactions carried out with any device on which their payment brand is present in relation to transactions for which their scheme is not used.

5. Any routing principles or equivalent measures aimed at directing transactions through a specific channel or process and other technical and security standards and requirements with respect to the handling of two or more different payment brands and payment applications on a card-based payment instrument shall be non-discriminatory and shall be applied in a non-discriminatory manner.

6. Payment card schemes, issuers, acquirers, processing entities and other technical service providers shall not insert automatic mechanisms, software or devices on the payment instrument or at equipment applied at the point of sale which limit the choice of payment brand or payment application, or both, by the payer or the payee when using a co-badged payment instrument.

Payees shall retain the option of installing automatic mechanisms in the equipment used at the point of sale which make a priority selection of a particular payment brand or payment application but payees shall not prevent the payer from overriding such an automatic priority selection made by the payee in its equipment for the categories of cards or related payment instruments accepted by the payee."

Definition of co-badging

4.16 Co-badging is defined by Article 2(31) of the IFR as a card-based payment instrument which includes:

- two or more payment brands, or
- two or more payment applications of the same brand

4.17 Article 2(30) of the IFR states that a payment brand is any signifier which denotes the payment card scheme under which card-based payment transactions may be carried out. A co-badged payment instrument will allow the payer to use any included scheme for a given transaction. For example, if PayCard and CardPay are payment brands, a co-badged payment instrument will feature both brands and allow the payer to initiate a transaction under either scheme.

4.18 Article 2(21) of the IFR states that a payment application is any computer software or equivalent loaded on a device enabling card-based payment transactions to be initiated and allowing the payer to issue payment orders. For example, a payer may have two applications loaded on to her mobile phone: one which enables her to initiate a PayCard payment transaction and the other which enables her to initiate a CardPay payment transaction. In this example, the mobile phone contains the appropriate payment applications which enable the payer to initiate a card-based payment transaction under either card scheme.

The relationship between the issuer and the payer

4.19 Article 8(2) states that 'the consumer may require two or more different payment brands on a card-based payment instrument provided that such a service is offered by the payment services provider'. The issuer can decide which payment brands to issue (for example, it may issue under the PayCard and CardPay brands, or only under the CardPay brand). The issuer can also decide whether or not to provide co-badged payment instruments.

4.20 Where an issuer provides co-badged payment instruments, a consumer may demand a co-badged instrument rather than two separate instruments. In practical terms, this is likely to arise where:

- an existing customer with a product carrying one payment brand successfully applies for another product carrying a separate brand
- a new customer successfully applies for two differently branded products simultaneously

4.21 Before a new or existing customer signs a new contract, the issuer must give them clear and objective information on all the payment brands available and their characteristics (including their functionality, cost and security).

4.22 The issuer decides which card-based payment instruments to offer its customers. The issuer can refuse to offer a customer a product, or to only offer a product subject to a customer's status and eligibility.

The relationship between the scheme and issuing and acquiring PSPs

4.23 Under Article 8(1), card schemes' rules, and the terms of licensing agreements between schemes and issuers, must not hinder or prevent issuers from co-badging two or more payment brands or payment applications. This also applies to any other measures (such as scheme practices rather than rules) which have an equivalent effect.

4.24 Under Article 8(3), if a card scheme treats any of its issuers or acquirers differently concerning co-badging (under the card scheme rules or the terms of licensing agreements with those PSPs), we expect the scheme to be able to demonstrate that the differential treatment is non-discriminatory and that objective justifications exist for it.

4.25 Under Article 8(4), card schemes cannot impose reporting requirements, obligations to pay fees or similar obligations on issuers and acquirers, for transactions that do not use their payment brand. For example, if a card bears the PayCard and CardPay brands, PayCard cannot charge a fee for transactions made using that card under the CardPay scheme.

Routing and handling of transactions

4.26 Under Article 8(5), schemes, issuers, acquirers, processing entities and other technical service providers must ensure that there is no discrimination in the way they handle transactions under different payment brands or applications by way of any routing principles or equivalent directing of transactions through a given channel or process. The same applies to other technical or security standards and requirements. For example, it would be discriminatory to prioritise routing of a transaction if the payee selects PayCard from the co-badged card instead of CardPay. Similarly, it would be discriminatory to impose additional security checks for transactions using CardPay from the co-badged card instead of PayCard.

Choice and selection of payment brand or payment application

4.27 Article 8(6) lays down three principles relevant to the choice and selection of different payment brands or payment applications from a co-badged payment instrument.

4.28 Firstly, card schemes, issuers, acquirers, processing entities and other technical service providers shall not insert automatic mechanisms, software or devices on the payment instrument or on equipment at the point of sale which limits the choice of payment brand or payment application. These parties are not permitted to 'switch off' a given payment brand or payment application. They must not programme the co-badged payment instrument, or the equipment used to accept it, in a way that limits its co-badged functionality or restricts users (that is, payers and payees) from choosing which payment brand or payment application to use.

4.29 Secondly, merchants can install automatic priority selection mechanisms in point-of-sale equipment. They are allowed to programme their equipment to default to one payment brand or application over another.

4.30 Thirdly, cardholders must generally be able to override this kind of automatic selection. This means that if a merchant accepts a brand and category of card-based payment instrument, the payer can choose to pay that way, even if the merchant's point of sale equipment does not treat it as the priority or default choice. However, Recital 40 of the IFR refers to technical feasibility, and we consider that the consumer should be given the ability to override the merchant's selection unless it is not technically feasible to do so. An example where it may not be technically feasible could be contactless payment terminals in transport networks where there is a card reader but no other point-of-sale equipment.

Article 9: Unblending

4.31 This Article states:

> *"1. Each acquirer shall offer and charge its payee merchant service charges individually specified for different categories and different brands of payment cards with different interchange fee levels unless payees request the acquirer, in writing, to charge blended merchant service charges.*
>
> *2. Acquirers shall include in their agreements with payees individually specified information on the amount of the merchant service charges, interchange fees and scheme fees applicable with respect to each category and brand of payment cards, unless the payee subsequently makes a different request in writing."*

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

Pre-contractual stage

4.33 Acquirers must offer merchant service charges (MSCs) which are broken down for the various different categories (that is, prepaid cards, debit cards, credit cards and commercial cards[13]) and different brands (such as our example of PayCard and CardPay) of payment cards with different interchange fee levels. However, if two or more of the brands or categories within a brand have the same interchange fee – or if they have no interchange fee – a single MSC may be identified for these cards as long as it is clear which brands and categories attract the same MSC. There is no requirement that the acquirer offers individually specified MSCs at different monetary values. The acquirer would satisfy the Article 9(1) requirement by offering individually specified MSCs even if they were priced identically.

4.34 Article 2(12) of the IFR defines an MSC as 'a fee paid by the payee to the acquirer in relation to card-based payment transactions'. We consider that, under this definition, one-off or periodic fees are not part of the MSC.[14] The MSC relates to the fees and charges that are payable on each transaction. These may be fixed for every transaction or related to the value of each individual transaction.

4.35 The Article 9(1) requirement applies from 9 June 2016. It applies to:

- the MSCs offered to new customers on or after that date
- changes to MSCs for existing customers on or after that date, including for rolling contracts
- contract renewals with existing customers on or after that date (even where there is no change in MSCs)

4.36 Before an acquirer can offer and charge blended MSCs to an individual merchant, it must receive a written request to do so from the merchant.

13. See Interchange Fee Regulation, Article 10(5).
14. For the avoidance of doubt, acquirers must still comply with the requirements of the Payment Services Regulations ~~2009~~2017, including in respect of all fees and charges paid by merchants to the acquirer, whether or not they are part of the MSC.

4.37 For example, if the merchant requests complete blending in writing, the acquirer is permitted to charge one single blended MSC covering all brands and categories of payment cards, irrespective of the underlying differences in interchange fee levels. Alternatively, the merchant might make a written request for partial blending (for example, grouping all credit cards of any brand, or all categories of PayCard card), in which case the acquirer is permitted to charge the specified partially blended MSCs. If the merchant does not make a written request, the MSCs must be fully unblended as described above.

4.38 An oral request by a merchant for blending is not sufficient: the request must be in writing. The IFR does not stipulate the form written requests must take. We consider that electronic forms of written communication are sufficient. Acquirers should consider the medium used, including whether it is recordable and storable, since they may be required to provide evidence that a written request was received from any merchant which is charged a blended rate.

Agreements between acquirers and merchants

4.39 Acquirers' agreements with merchants must specify the amount of each MSC and show the applicable interchange fee and scheme fees separately for each category and brand of payment cards.[15]

4.40 We recognise that interchange fees and scheme fees may differ significantly and may change frequently. For example, interchange fees may differ even amongst the same brand and category of card depending on the type of transaction (for example, cardholder present or not present, secure or non-secure, etc.), and scheme fees may differ depending on factors such as the volume of transactions. Acquirers should provide as much information to merchants on the interchange fees and scheme fees applicable to different brands and categories of cards as possible, while ensuring that the information is understandable and meaningful.

4.41 Merchants can subsequently make a request in writing to receive different information. This means that acquirers must always present merchants with an initial agreement with all relevant information as required by Article 9(2). The merchant can only ask for different charging information after this first agreement has been issued. For example, the merchant might ask to be given only the MSC information (without separate interchange fee and scheme fee elements). An oral request is not sufficient: the request must be in writing. The IFR does not stipulate the form written requests must take. We consider that electronic forms of written communication are sufficient. Acquirers should consider the medium used, including whether it is recordable and storable, since they may be required to provide evidence that a written request was received from any merchant they provided different information to.

4.42 The requirements of Article 9(2) apply to new and existing agreements with merchants.

15. For the avoidance of doubt, acquirers must still comply with the requirements of the Payment Services Regulations ~~2009~~2017, including in respect of all fees and charges paid by merchants to the acquirer, whether or not they are part of the MSC.

Article 10: 'Honour All Cards' rule

4.43 This Article states:

"1. Payment card schemes and payment service providers shall not apply any rule that obliges payees accepting a card-based payment instrument issued by one issuer also to accept other card-based payment instruments issued within the framework of the same payment card scheme.

2. Paragraph 1 shall not apply to consumer card-based payment instruments of the same brand and of the same category of prepaid card, debit card or credit card subject to interchange fees under Chapter II of this Regulation.

3. Paragraph 1 is without prejudice to the possibility for payment card schemes and payment service providers to provide that cards may not be refused on the basis of the identity of the issuer or of the cardholder.

4. Payees that decide not to accept all cards or other payment instruments of a payment card scheme shall inform consumers of this, in a clear and unequivocal manner, at the same time as they inform consumers of the acceptance of other cards and payment instruments of the payment card scheme. Such information shall be displayed prominently at the entrance of the shop and at the till. In the case of distance sales, this information shall be displayed on the payee's website or other applicable electronic or mobile medium. The information shall be provided to the payer in good time before the payer enters into a purchase agreement with the payee.

5. Issuers shall ensure that their payment instruments are electronically identifiable and, in the case of newly issued card-based payment instruments, also visibly identifiable, enabling payees and payers to unequivocally identify which brands and categories of prepaid cards, debit cards, credit cards or commercial cards are chosen by the payer."

Scheme rules and merchant service contracts

Amended text

4.44 Article 10(1), read alongside Articles 10(2) and (3), imposes limits on the kinds of 'Honour All Cards rule' (HACR) that can be imposed on merchants by card scheme rules or the terms of their merchant service contracts with acquirers. The IFR allows card schemes and acquirers to stipulate that merchants must accept all interchange fee regulated card-based payment instruments belonging to the same payment brand and same category. Card transactions where the issuer and/or the acquirer are located outside of the ~~EEA~~UK are not regulated under the IFR. Card transactions where the issuer and the acquirer are located in the ~~EEA~~UK are subject to the Article 10 limitations on permissible HACRs. This means that only certain other types of transactions can be tied to those transactions from a merchant acceptance point of view.

Amended text

4.45 The following tables show the kinds of HACR that can and cannot be imposed from 9 June 2016. For illustrative purposes, we use the hypothetical brand PayCard.

Scheme rules and merchant service contracts CAN require a merchant with an acquirer located in the ~~EEA~~UK:
who accepts one type of PayCard-branded consumer credit card issued by an issuer located in the ~~EEA~~UK to accept all types of these cards
who accepts one type of PayCard-branded consumer debit card issued by an issuer located in the ~~EEA~~UK to accept all types of these cards
who accepts one type of PayCard-branded consumer prepaid card issued by an issuer located in the ~~EEA~~UK to accept all types of these cards
who accepts one type of PayCard-branded card issued by an issuer located outside of the ~~EEA~~UK to accept all types of these cards
to be neutral as to the identity of the issuer and/or cardholder, such that if they honour a given type of PayCard-branded card for one issuer/cardholder they must honour it for all issuers/cardholders

Scheme rules and merchant service contracts CANNOT require a merchant with an acquirer located in the ~~EEA~~UK:
who accepts PayCard-branded cards belonging to one of the following categories to accept cards belonging to any other category: • consumer credit cards issued by an issuer located in the ~~EEA~~UK • consumer debit cards issued by an issuer located in the ~~EEA~~UK • consumer prepaid cards issued by an issuer located in the ~~EEA~~UK
who accepts one type of PayCard-branded commercial card issued by an issuer located in the ~~EEA~~UK to accept all types of these cards
who accepts PayCard-branded consumer cards issued by an issuer located in the ~~EEA~~UK to accept PayCard-branded commercial cards issued by an issuer located in the ~~EEA~~UK, or vice versa
who accepts PayCard-branded cards issued by an issuer located in the ~~EEA~~UK to accept PayCard-branded cards issued by an issuer located outside of the ~~EEA~~UK

Merchants' obligations in respect of the point of sale

4.46 Under Article 10(4), merchants that decide not to accept all cards of a payment card scheme must inform consumers of this at the same time, and as prominently, as they inform them of which cards will be accepted. For example, if a restaurant owner displays the PayCard logo in his window, but does not accept PayCard commercial cards, he should indicate this in his window display.

4.47 This information must be displayed, in legible and intelligible form, clearly and prominently at the entrance of the shop and at the point of sale (for example, by the till). It will not be sufficient for a merchant to only inform a customer verbally at the point of sale. Failure to inform properly may also lead to breaches of other legislation – for example, the Consumer Protection from Unfair Trading Regulations 2008.

4.48 In the case of distance sales, this information should be displayed prominently on the payee's website or any other electronic or mobile medium (such as a mobile phone app). The information should be provided in good time before the payer enters into a purchase agreement with the payee. We would expect the payer to see this information displayed prominently at the first opportunity and before the 'payment page'. The consumer must not need to click through several pages before they become aware of any limitations on card acceptance.

Electronic and visual identification of card-based payment instructions

4.49 Article 10(5) lays down requirements which enable payees and payers to identify unequivocally which brands and categories of cards the payer has chosen.

4.50 All issuers shall ensure that all their card-based payment instruments are electronically identifiable in terms of brand and category. This requirement applies to existing and new payment instruments.

4.51 Newly issued card-based payment instruments shall also be visually identifiable, displaying clearly and visibly the brand and category.

4.52 The IFR requires that any card-based payment instrument is categorised as one of the following:

[Consumer] Prepaid
[Consumer] Debit
[Consumer] Credit
Commercial

4.53 We consider that consumer cards do not need to be specifically identified with the label 'consumer' (although issuers can choose to do so), and that they can be identified by the absence of the label 'commercial'.

Article 11: Steering rules

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

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

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

Amended text

Paragraphs 1 and 2 of this Article are without prejudice to the rules on charges, reductions or other steering mechanisms set out in ~~Directive 2007/64/EC and Directive 2011/83/EU."~~ the Electronic Money Regulations 2011 and the Payment Services Regulations 2017 (PSRs 2017)."

4.55 The following is not an exhaustive list, but possible steering practices that merchants should be free to use include:

- providing information on the fees that the merchant faces for accepting different payment instruments (and different types of card)
- asking the customer to pay in a different way
- minimum transaction amounts for a given payment instrument
- differential pricing (such as surcharging, or offering a discount for using a given payment instrument)

Amended text

4.56 In respect of surcharging as a form of steering practice, merchants must comply with applicable consumer protection law.[16] In this context, we note specifically:

- **The Consumer Protection from Unfair Trading Regulations 2008** ~~which~~: These prohibit unfair commercial practices, including misleading actions and misleading omissions~~, and the~~.
- The **Consumer Rights (Payment Surcharges) Regulations 2012,** ~~which~~as amended by the PSRs 2017: These provide that a trader must not charge consumers a fee in addition to the advertised price of a transaction made with:
  - a non-commercial card for which interchange fees are regulated under the IFR
  - other non-commercial payment instruments (such as e-money)

16. The PSR does not enforce consumer protection law, but relevant bodies include the Competition and Markets Authority and local authority Trading Standards services.

Amended text

For payments made with cards not covered by the IFR (i.e. consumer cards where the issuer or acquirer is not based in the UK, and commercial cards), a trader must not charge consumers more than it costs the trader to accept a particular method of payment.[17]

~~**4.56** Merchants should note that the law on surcharging will change to limit their ability to impose surcharges when the revised EU Directive on Payment Services (PSD2)[18] is implemented in the UK.~~

4.57 If any restriction on merchants' ability to steer consumers is included in an agreement between any combination of schemes, acquirers and merchants, it is considered void and unenforceable. The remainder of the agreement will continue to be effective as long as the rule was not an essential part of it.

4.58 As we explain in Chapter 6, both the PSR and the FCA ~~will be~~are responsible for monitoring infringements of the steering rules ~~in the UK~~.

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

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

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

(a) the reference enabling the payee to identify the card-based payment transaction;

(b) the amount of the payment transaction in the currency in which the payee's payment account is credited;

(c) the amount of any charges for the card-based payment transaction, indicating separately the merchant service charge and the amount of the interchange fee.

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

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

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

17. *The Consumer Rights (Payment Surcharges) Regulations 2012* ~~implement in the UK Article 19 of~~ (SI 2012/3110), as amended by the Payment Services Regulations 2017, (SI 2017/752) and the ~~EU~~ *Consumer* ~~Rights Directive (2011/83/EU).~~*Protection (Amendment etc.) (EU Exit) Regulations 2018,* (SI 2018/1326). Guidance on ~~these~~the 2012 Regulations has been prepared by the Department of Business, Innovation and Skills. See: ~~https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175298/13-719-guidance-on-the-consumer-protection-payment-surcharges-regulations-2012.pdf~~ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718812/payment-surcharges-guidance-update.pdf

~~18. PSD2 was published in the Official Journal of the EU on 23 December 2015 and came into force on 13 January 2016.~~

Communication to the merchant

4.61 The specified information may be either provided to merchants (sent or given directly to the merchant – for example, on paper or, where the contract provides, by email) or made available to them (so the merchant can obtain it when they choose – for example, by accessing a secure website).

4.62 The information must be in a clear and comprehensible form and in a medium that the merchant can store and reproduce whenever required.

4.63 Where the information is made available, it must be easily accessible and the acquirer should clearly explain to the merchant that the information is being made available and how to obtain it. Acquirers could, for example, write to merchants explaining the type of information that is available and how merchants can access it. Acquirers might also include information about accessing the information in their regular communications with merchants. We would consider any requirements for merchants to call a certain number or email acquirers each time they wish to obtain the information as meaning that the information is not readily available to merchants.

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

Information to be provided

4.65 Article 2(12) of the IFR defines a merchant service charge (MSC) as "a fee paid by the payee to the acquirer in relation to card-based payment transactions". We consider that, under this definition, one-off or periodic fees are not part of the MSC: the MSC relates to the fees and charges that are payable on each transaction. Such fees may be fixed for each transaction or related to the value of the transaction.

4.66 Article 12 states that interchange fees should be indicated separately from MSCs. This means the merchant is to be given both:

- the MSC (including the interchange fee and all other per-transaction charges associated with accepting the individual card-based transaction, but excluding the fixed cost of services such as terminal provision)
- the applicable interchange fee for that transaction (disaggregated from and displayed separately from the MSC)

Merchant's consent

4.67 Article 12(1) states that acquirers must provide the information described above to merchants for each card-based payment transaction. This information can only be aggregated if the merchant has given prior and explicit consent to the acquirer. If this happens, the information may be aggregated by brand, application, payment instrument categories and rates of interchange fees applicable to the transaction.

4.68 'Consent' means a permission given freely and without coercion or undue influence. We consider that explicit consent means that the merchant shall confirm to the acquirer that it wishes to receive aggregated information. A presumption of consent to receive aggregated information unless the payee states otherwise would not be considered explicit consent. Explicit consent need not be given in writing but the acquirer should consider how it would demonstrate that it had complied with these rules.

Amended text

4.69 As explained in Chapter 6, both the PSR and the FCA ~~will be~~are responsible for monitoring infringements of this Article ~~in the UK~~.

~~6~~5 Monitoring and enforcement of the IFR

In this chapter we set out our approach to monitoring compliance with the IFR.

We will gather compliance reports from issuers, acquirers and schemes, where appropriate.

We will ask for data that demonstrates compliance with the interchange fee caps and may require this data to be independently audited.

We will investigate complaints about non-compliance with the IFR subject to a decision that such an investigation is an administrative priority.

5.1 In this chapter we describe how we will monitor compliance with the IFR.

Monitoring compliance with Articles 3, 4 and 5

5.2 We will monitor compliance with the interchange fee caps in the IFR by requiring schemes and issuing and acquiring PSPs to provide us with evidence on an annual basis under our IFR information-gathering powers (see Chapter 7). We will also consider any complaints received in relation to compliance with the interchange fee caps, and act on them as appropriate.

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

Debit card transactions

Amended text

5.4 In respect of the weighted average interchange fee cap for domestic debit card transactions, Article 3(5) of the IFR provides for the ~~competent authority~~PSR to request in writing that payment card schemes and/or PSPs provide information necessary to verify the correct application of that cap and the calculation of annual transaction values referred to in Article 3(3). Following a written request from us, parties will be required to provide any information necessary to verify the correct application of the weighted average approach. We may require that information to be certified by an independent auditor.

5.5 Article 3(5) of the IFR also stipulates the date by which the information described in the previous paragraph must be sent to the ~~competent authority~~PSR. Annual transaction values for the reference period 1 January to 31 December would need to be provided before 1 March the following year. The interchange fees that satisfy the weighted average cap apply from 1 April.

5.6 We will engage separately with schemes, issuers and acquirers to discuss the information and data requirements and any applicable auditor certification requirements.

Credit card transactions and prohibition of circumvention

Amended text

5.7 In addition to receiving information necessary for the verification process of the application of Article 3 (see paragraphs ~~6~~5.4 to ~~6~~5.6 above), we will also require information to be submitted annually demonstrating compliance with the interchange fee cap for consumer credit card transactions (Article 4) and the prohibition of circumvention (Article 5). We may require this information to be certified by an independent auditor.

5.8 We will align the timetable for providing this data with that for debit card data described above. As such, information for the reference period 1 January to 31 December will need to be provided before 1 March the following year.

5.9 We will engage separately with schemes, issuers and acquirers to discuss the information and data requirements and any applicable auditor certification requirements.

Monitoring compliance with Articles 6, 7, 8, 9, 10, 11 and 12

Article 6

5.10 Each four-party scheme and three-party scheme operating with licensee issuers and/or acquirers (or issuing cards with a co-branding partner or through an agent) will be expected to provide us with an initial compliance report. The report should confirm that the scheme is compliant with the provisions on licensing, describing the steps taken to become compliant, including how it has dealt with any territorial restrictions that previously applied. We will engage separately with each scheme as to the content, timing and arrangements for submission of initial compliance reports.

5.11 After we receive the initial compliance report, we may engage with the scheme providing the report to discuss whether any further action is needed for that system to be compliant.

5.12 We then intend to follow a mainly complaints-led approach to monitoring compliance with this provision of the IFR. Any party that wants to complain about a breach of Article 6 should contact us in writing.

Article 7

Separation – Article 7(1)

Amended text

~~**5.13** When appropriate, we will seek to work closely with competent authorities in other Member States to monitor compliance with Article 7(1) of the IFR, based on arrangements for requesting and sharing information received by one competent authority with other interested competent authorities.~~

5.13 Each scheme affected by Article 7(1) operating in the UK – including those without a registered office in the ~~EEA~~UK – should provide us with initial compliance reports. These reports should be sent directly to us. Where an equivalent report has been submitted to another ~~competent~~ authority, it may be more practicable for a copy of that report to be shared with us.

Amended text

5.14 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each scheme. Where appropriate, we will discuss arrangements for equivalent reports provided to other ~~competent~~ authorities to be shared with us.

5.15 After we receive the initial Article 7(1) compliance reports, we may discuss with each scheme whether any further action is needed for it to be compliant.

5.16 We then intend to follow a mainly complaints-led approach to monitoring compliance with this provision. Any party that wants to complain about a breach of Article 7(1) should contact us in writing (for example, if they have evidence of discriminatory practices breaching Article 7(1)(c)). However, we may use our powers under the Payment Card Interchange Fee Regulations 2015 (PCIFRs) to obtain information about compliance with Article 7(1) by any scheme that operates in the UK.

Amended text

~~**Independent compliance reporting under Article 7(2) of the IFR**~~

5.17 ~~Article 7(2) of the IFR allows the competent authority of the Member State where the registered office of the scheme is located to~~We may require a payment card scheme to provide an independent report confirming its compliance with the separation requirements of Article 7(1)~~. We may decide to require the provision of independent reports in respect of the card schemes affected by Article 7(1) which have registered offices in the UK)~~ using our powers under the PCIFRs.

5.18 For card schemes which operate in the UK but do not have registered offices in the UK, we expect to engage with the competent authority in the Member State where the scheme's registered office is.

Other provisions of Article 7

5.19 We will expect each scheme affected by Articles 7(3), 7(4) and 7(5) to provide us with an initial compliance report. The report should confirm that the scheme is compliant with the provisions on authorisation and clearing messages and processing rules, describing the steps taken to review business rules (and to revise them as necessary).

5.20 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each scheme.

5.21 After we receive the initial compliance report, we will discuss with each scheme whether any further action is needed for it to be compliant.

5.22 We then intend to follow a mainly complaints-led approach to monitoring compliance with these provisions. Any party that wants to complain about a breach of Articles 7(3), 7(4) or 7(5) should contact us in writing.

Article 8

The relationship between the scheme and the issuing and/or acquiring PSPs

5.23 We will expect each card scheme affected by Articles 8(1), 8(3) and 8(4) to provide us with an initial compliance report. The report should confirm that the scheme is compliant with these three requirements related to co-badging, describing the steps taken to review scheme rules and practices, and the terms of licensing agreements (and to revise them as necessary).

5.24 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each scheme.

5.25 After we receive the initial compliance report, we will discuss with each scheme whether any further action is needed for it to be compliant.

5.26 We then intend to follow a mainly complaints-led approach to monitoring compliance with these provisions. Any party that wants to complain about a breach of Articles 8(1), 8(3) or 8(4) should contact us in writing.

The relationship between the issuer and the consumer

5.27 We do not intend to request an initial compliance report from issuers affected by Article 8(2). Instead, we intend to follow a mainly complaints-led approach to monitoring compliance by issuers with the requirements under Article 8(2).

5.28 The FCA also has a role in monitoring compliance with Article 8(2) and taking action where appropriate.

5.29 Any party that wants to complain to the PSR about a breach of Article 8(2) should contact us in writing. A decision on whether the PSR, the FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

Routing and handling of transactions

5.30 We will expect each card scheme and each acquirer affected by Article 8(5) to provide us with an initial compliance report. The report should confirm that the scheme or acquirer is compliant with the provisions on routing and handling of transactions on co-badged cards, describing the steps taken to review practices and procedures (and to revise them as necessary).

5.31 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each scheme.

5.32 After we receive the initial compliance report, we will discuss with each scheme whether any further action is needed for it to be compliant.

5.33 The FCA also has a role in monitoring compliance with Article 8(5) and taking action where appropriate. We will share the initial compliance reports we receive with the FCA.

5.34 Following submission of the initial compliance reports, we intend to follow a mainly complaints-led approach to monitoring compliance by schemes and acquirers with this provision. In as far as issuers, processing entities and other technical service providers are affected by this provision, we also intend to follow a mainly complaints-led approach to monitoring their compliance. Any party that wants to complain to the PSR about a breach of Article 8(5) should contact us in writing. A decision on whether the PSR, the FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

Choice and selection of payment brand or payment application

5.35 We will expect each card scheme and each acquirer affected by Article 8(6) to provide us with an initial compliance report. The report should confirm that the scheme or acquirer is compliant with the prohibition on automatic means of limiting the choice of payment brand or payment application, describing the steps taken to review hardware and software (and to make such changes as necessary). Acquirers will also be expected to report on their arrangements for giving merchants the option to install automatic

mechanisms in point-of-sale equipment which make a priority selection of a particular payment brand or payment application and, where this option is exercised, how payees are able to override this.

5.36 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each scheme and acquirer.

5.37 After we receive the initial compliance report, we will discuss with each scheme and acquirer whether any further action is needed for it to be compliant.

5.38 The FCA also has a role in monitoring compliance with Article 8(6) and taking action where appropriate. We will share the initial compliance reports we receive with the FCA.

5.39 Following submission of the initial compliance reports, we intend to follow a mainly complaints-led approach to monitoring compliance by schemes and acquirers with this provision. We also intend to follow a mainly complaints-led approach to monitoring compliance by issuers, processing entities, other technical service providers and merchants with their own requirements under this provision in respect of hardware and software for which they are responsible. Any party that wants to complain to the PSR about a breach of Article 8(6) should contact us in writing. A decision on whether the PSR, the FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

Article 9

5.40 We will expect each acquirer affected by Article 9 to provide us with an initial compliance report. The report should confirm that the acquirer is compliant with the requirements to offer and charge unblended MSCs and to include information on the MSC components in its agreements with merchants, describing what it has done to become compliant. Where merchants have requested in writing that their acquirer charges blended MSCs and/or that the information provided in the agreement be different, we would expect each acquirer to provide details on how these written requests are made and documented.

5.41 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each acquirer.

5.42 After we receive the initial compliance report, we will discuss with each acquirer whether any further action is needed for it to be compliant.

5.43 The FCA also has a role in monitoring compliance with Article 9 and taking action where appropriate. We will share the initial compliance reports we receive with the FCA.

5.44 Following submission of the initial compliance reports, we intend to follow a mainly complaints-led approach to monitoring compliance with this provision. Any party that wants to complain to the PSR about a breach of Article 9 should contact us in writing. A decision on whether the PSR, the FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

Article 10

Scheme rules and merchant service contracts

5.45 We will expect each card scheme and acquirer affected by Article 10(1) to provide us with an initial compliance report. The report should confirm that the scheme's rules or the acquirer's merchant service contracts comply with the IFR requirements on the kind of Honour All Cards rule (HACR) that can be imposed on merchants, describing the steps taken to review these rules or contracts (and to revise them as necessary).

5.46 We will discuss the required content, timing and arrangements for submission of the initial compliance reports separately with each scheme and acquirer.

5.47 After we receive the initial compliance report, we will discuss with each scheme and acquirer whether any further action is needed for it to be compliant.

5.48 The FCA also has a role in monitoring compliance with Article 10(1) and taking action where appropriate. We will share the initial compliance reports we receive with the FCA.

5.49 Following submission of the initial compliance reports, we intend to follow a mainly complaints-led approach to monitoring compliance with this provision. Any party that wants to complain to the PSR about a breach of Article 10(1) should contact us in writing. A decision on whether the PSR, the FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

Merchants' obligations in respect of the point of sale

5.50 The PCIFRs assign a role to both the PSR and to trading law bodies in respect of the Article 10(4) obligation on merchants to display information on the cards they do and do not accept.

Amended text

5.51 The PCIFRs add Article 10(4) of the IFR to the list of ~~EU Directives and Regulations~~UK legislation which can be enforced under the regime set out in Part 8 of the Enterprise Act 2002 (EA02) by the 'general enforcers', who together are:

- the Competition and Markets Authority (CMA)
- every local weights and measures authority in Great Britain (often referred to as local authority trading standards services, or LATSS)
- the Department for the Economy in Northern Ireland (DfE)

5.52 We do not intend to undertake our own proactive monitoring activity or to request information or reports from UK merchants about their compliance with Article 10(4). However, we may respond to complaints about non-compliance by merchants that are raised with us directly or passed on to us by any of the EA02 general enforcers.

5.53 The Citizens Advice website[18] has advice for consumers on how to report a merchant to Trading Standards. They can also find out their local Trading Standards office from the Trading Standards Institute (TSI) website.[19] Any party that wants to complain to us should do so in writing. A decision on whether the PSR, CMA, LATSS or DfE, or more

18. ~~www.citizensadvice.org.uk/consumer/get-more-help/report-to-trading-standards/~~ https://www.citizensadvice.org.uk/
19. www.tradingstandards.uk/advice/index.cfm#postcodesearchform

than one of these authorities, should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each authority.

5.54 To ensure we cooperate appropriately with the general enforcers, as required under the PCIFRs, we expect to engage with them through forums including the 'Part 8 EA02 Concurrency Group'. We will also engage with the Chartered Trading Standards Institute (CTSI), which has responsibility for producing the majority of education and guidance for businesses about their responsibilities under consumer protection legislation.

Electronic and visual identification of card-based payment instruments

5.55 We do not intend to request an initial compliance report from issuers affected by Article 10(5). We intend to follow a mainly complaints-led approach to monitoring compliance by issuers with the requirements under Article 10(5) to ensure that their payment instruments are electronically and visually identifiable.

5.56 The FCA also has a role in monitoring compliance with Article 10(5) and taking action where appropriate.

5.57 Any party that wants to complain to us about a breach of Article 10(5) should contact us in writing. A decision on whether the PSR, the FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

Article 11

5.58 For each card scheme affected by Article 11, the scheme and each acquirer participating in that scheme will be expected to provide us with an initial compliance report confirming that it is compliant with the provisions on steering rules, describing what it has done to become compliant and when the changes were made. We will engage separately with each scheme and acquirer to discuss the content, timing and arrangements for submission of initial compliance reports.

5.59 After we receive the initial compliance report, we may engage with the scheme or the acquirer providing the report to discuss whether any further action is needed for that party to be compliant.

5.60 The FCA also has a role in monitoring compliance with Article 11 and taking action where appropriate.[20] The initial compliance reports submitted to the PSR will be shared with the FCA.

5.61 Following submission of the initial compliance reports, we intend to follow a mainly complaints-led approach to monitoring compliance with this provision of the IFR. Any party that wants to complain to the PSR about a breach of Article 11 should contact us in writing. A decision on whether the PSR, FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

20. See HM Treasury's Interchange fee regulation: consultation response (October 2015)

Article 12

5.62 Each acquirer affected by Article 12 will be expected to provide an initial compliance report confirming that it is compliant with the requirement to provide information to the payee on individual card-based payment transactions, describing what it has done to become compliant. We would expect each acquirer to provide details on the type of information provided to merchants, how this information is provided or made available and, where merchants have provided express consent to receiving aggregate information, how the consent is obtained and documented. We will engage separately with each acquirer to discuss the content, timing and arrangements for submission of initial compliance reports.

5.63 Following receipt of the initial compliance report, we may engage with the acquirer providing the report to discuss whether any further action is needed for that party to be compliant.

5.64 The FCA also has a role in monitoring compliance with Article 12 and taking enforcement action where appropriate.[21] The initial compliance reports submitted to the PSR will be shared with the FCA.

5.65 Following submission of the initial compliance reports, we intend to follow a mainly complaints-led approach to monitoring compliance with this provision of the IFR. Any party that wants to complain to the PSR about a breach of Article 12 should contact us in writing. A decision on whether the PSR, FCA or both regulators should work on a given complaint would be made on a case-by-case basis, taking into account the nature of the complaint and the roles and responsibilities of each regulator.

21. ~~See www.legislation.gov.uk/uksi/2015/1911/contents/made.~~ See: https://www.legislation.gov.uk/uksi/2017/752/contents

7~~6~~ Our powers and procedures under the PCIFRs

This chapter relates to the processes and procedures that the PSR will generally apply when using its powers under the Payment Card Interchange Fee Regulations 2015 (the PCIFRs) to monitor compliance with and take enforcement action in relation to the Interchange Fee Regulation (IFR).

Introduction

Amended text

6.1 The PCIFRs assign us powers and functions in connection with the IFR. We are, along with other ~~competent~~ authorities, responsible for monitoring compliance with the IFR in the UK and for taking appropriate action to address compliance issues.

6.2 The PCIFRs replicate some provisions of the Financial Services (Banking Reform) Act 2013 (FSBRA) for IFR purposes. They also apply (or apply with modification) other provisions of FSBRA to our IFR functions. This effectively allows us to use a number of our FSBRA powers in relation to any person on whom an obligation or prohibition is imposed by any provision of the IFR ('regulated persons'). These include, among others, power to:

- give a direction requiring or prohibiting the taking of specified action (Regulation 4)
- take enforcement action in relation to non-compliance with obligations under the IFR and with any directions we make under the PCIFRs (Regulations 5 to 8)
- gather information and conduct investigations (Regulation 14)

6.3 This chapter explains:

- how we receive, gather and handle information relating to our functions under the IFR
- our powers to gather information and conduct investigations under the PCIFRs, in connection with potential non-compliance with the IFR
- our power to give directions under the PCIFRs; how we will decide what, if any, action to take; what processes and procedures we will follow; and how a regulated person can appeal against our directions
- our power to take enforcement action under the PCIFRs; how we will decide what, if any, enforcement action to take; what processes and procedures we will follow; and how a regulated person can appeal against a decision to impose a penalty or publish details of any compliance failure

6.4 Stakeholders may also be interested in our Powers and Procedures Guidance, which describes the role of the PSR, our ways of working, and how we use our FSBRA powers outside of the context of the IFR.[22]

22. Powers and Procedures Guidance (June 2020): ~~www.psr.org.uk/powers-and-procedures-guidance-2020~~ https://www.psr.org.uk/publications/general/powers-and-procedures-guidance-june-2020/

Receiving, gathering and handling information

6.5 In this section, we explain how we handle complaints and other information that could lead to us taking action to address the behaviour of individual firms or wider industry. This does not include complaints about us.[23]

6.6 There are a number of ways we could receive information that might lead to us considering whether to take regulatory or enforcement action under the PCIFRs. We could receive it:

- from regulated person(s)
- from other regulators
- from firms, organisations and individuals, including consumers and whistle blowers
- through our own proactive information gathering

6.7 In the case of our own information gathering, we may have sought the information to determine whether there are any issues of concern – for example, when monitoring compliance with directions or statutory requirements (including the performance of our IFR monitoring function (see previous chapters). Alternatively, we may learn about an issue when we make enquiries for another purpose – for example, when consulting on policy development.

Amended text

6.8 When a matter relating to obligations under the IFR is brought to our attention by a third party (i.e. we did not seek the information), we will consider the issues raised and which of our powers they may relate to (if any). We are the ~~competent~~ authority for some, but not all, of the obligations, prohibitions and restrictions under the IFR.

6.9 Sometimes we receive communications about matters that do not relate to our role and functions. We will explain this to the party that raised the matter, and tell them if we are aware that another authority may have jurisdiction.

6.10 We will not usually forward the communication to that other authority. However, if it relates generally to a matter of common regulatory interest (under section 98 of FSBRA), we may share the information with the other financial services regulators in accordance with the Memorandum of Understanding (MoU) that we have with them.[24]

6.11 Where the issue appears to relate to our role and functions, we will assess it based on information available to us and consider what, if anything, we could do about it.

Amended text

6.12 Sometimes, the information may relate to issues that are within both our jurisdiction and that of another ~~competent~~ UK authority ~~and/or Member State~~. In this case, we will discuss the matter with that organisation and agree with them which of us, if any, will take further action, in accordance with the provisions of any existing MoU. This will include close cooperation with the FCA, which ~~is co-competent~~has a role in monitoring compliance with ~~us in respect of~~ Articles 8(2), 8(5~~) and~~), 8(6), 9, 10(1~~) and~~), 10(5), 11 and 12 ~~in the UK~~.

23. Details of how to complain about us and which types of complaint are subject to review by the Independent Complaints Commissioner, if you are unsatisfied with our response to your complaint, are available on our website ~~https://www.psr.org.uk/complaints-against-psr.~~ https://www.psr.org.uk/publications/general/the-psr-complaints-scheme/.
24. ~~https://www.psr.org.uk/mou-between-psr-and-other-financial-regulators~~ https://www.psr.org.uk/publications/general/mou-between-psr-and-other-financial-regulators/

6.13 Where the information raises competition issues we will consult with the CMA and, where appropriate, other competition authorities, in accordance with the concurrency regime and the CMA MoU.

Information about possible non-compliance

6.14 We handle whistleblowing complaints in accordance with our whistleblowing policy. Anyone who has information on malpractice in relation to payment systems (or the services they provide) can contact us via the FCA's Intelligence Department. You can find more details on our whistleblowing page:

www.psr.org.uk/psr-approach-whistleblowing

6.15 For other complaints and information relating to possible non-compliance with the IFR, email the IFR Compliance Monitoring Team at IFRcompliance@psr.org.uk, or write to:

IFR Compliance Monitoring Team
Payment Systems Regulator
12 Endeavour Square
London E12 1JN

If you are aware of a member of our staff or team within the PSR who is already working on the issue (or something close to it), you can contact them directly. You should also send a copy of the correspondence to the IFR Compliance Monitoring team.

6.16 If we receive a complaint or intelligence relating to non-compliance with the IFR, we will acknowledge it promptly and allocate it to an appropriate member of the PSR staff. We will then consider the issue involved and which, if any, of our powers it relates to.

Amended text

6.17 When we receive information about potential non-compliance we will not usually tell the sender whether, or how, we will take a matter forward. Our reasons for this will depend on the type of issue raised and the circumstances surrounding it. It would usually be because of legal restrictions, market sensitivity, confidentiality considerations, or because of our general approach to announcements in relation to our different types of work (see paragraphs ~~7~~6.49 to ~~7~~6.52).

General Direction 1

6.18 General Direction 1 covers regulated persons under the PCIFRs. It requires them to deal with us in an open and cooperative way whenever they interact with us, and to disclose relevant information to us.

6.19 Regulated persons should tell us when they are providing information under General Direction 1 – for example, if they bring a matter to our attention which they believe we are not actively considering. They should give us accurate information and provide supporting evidence where applicable.

6.20 In line with General Direction 1, we expect regulated persons to notify us, in an appropriate way, of anything relating to them which we would reasonably expect notice of. This would typically include telling us about any potential or actual compliance failures they are aware of.

6.21 If a regulated person is not sure if an issue is one which we would reasonably expect notice of, it should consider providing the information. Whether particular information is something we would reasonably expect notice of is for us to assess, when considering compliance with General Direction 1.

Information gathering

Amended text

6.22 We gather information in a number of other ways, all of which can broadly be categorised as either informal or formal (see paragraphs ~~7~~6.25 to ~~7~~6.27 below) information gathering.

6.23 We may seek information from regulated persons or other individuals or firms for:

- exploratory purposes (for example, gathering information about industry practices and payment system developments to inform our policy development work)
- review purposes (for example, in the context of a market review or study[25])
- monitoring purposes (in respect of compliance with our directions or requirements and any other legal obligations we have responsibility for), or
- enforcement purposes (when carrying out an investigation into potential non-compliance)

6.24 The scope and objectives of any ongoing work programme may involve more than one of the above purposes and, depending on the information received and/or gathered as part of it, may also change over time.

6.25 Informal information gathering would not involve the use of our formal information gathering or investigative powers. It may, for example, involve:

- desktop research into a particular issue
- contacting the original source of information for further detail and/or clarification of the matter raised; and/or
- asking individual regulated persons or sectors of industry to voluntarily answer questions about how they operate

Where we use these methods, regulated persons are under an obligation to cooperate with our requests, to provide accurate and timely information, and to do so in an open and honest manner under General Direction 1.

Amended text

6.26 Formal information gathering would, in contrast, involve the use of our FSBRA powers under sections 81 to 90 of FSBRA (as applied to our IFR functions by Regulation 14 of the PCIFRs). Our formal information powers can apply to anyone, not just regulated persons. For further information about these powers, and our powers to enforce compliance with them, see paragraphs ~~7~~6.53 to ~~7~~6.103.

6.27 We will decide which powers, or combination of powers, are the most appropriate to use depending on the circumstances. Where it is appropriate to do so, we may make use of voluntary information requests rather than our formal powers to require information, even when we are able to use those powers. When deciding whether to take informal or formal steps to gather information, we will consider:

- the need to preserve and protect relevant information
- the need to receive the information in a timely manner
- whether we are making multiple requests from the same person

25. We have powers under section 64 of FSBRA to review the market and under the EA02 to conduct market studies. More information on these functions is contained within our Markets Guidance, see our website.

- whether we are making similar requests from multiple persons and require consistency
- the purpose of gathering the information and the use it is intended for
- whether we may need to gather the information in a particular format, in order to be able to rely upon it in the course of our work

Information handling and confidentiality

6.28 We have a duty to protect confidential information relating to the business or other affairs of any persons (section 91 of FSBRA as applied to our IFR functions by Regulation 14 of the PCIFRs), and will only disclose information in our possession when we consider it appropriate and are able to do so lawfully.[26]

6.29 There are also general statutory considerations that govern or restrict the way in which we deal with certain types of information. For example, any personal data must be collected and processed in accordance with the Data Protection Act 2018, the General Data Protection Regulation[27], and our Data Privacy Notice.[28]

6.30 Even when information is confidential and protected under FSBRA, there may be occasions when it is appropriate for us to disclose it. One such case is where it will advance or help us to perform our public functions.[29] For example, we may need to share the information with other regulators in the interests of cooperation and coordination. We may also need to share it to a wider pool of stakeholders and seek their views on it to better understand a matter of regulatory concern and assess what, if any, action we need to take.

6.31 If our decisions may affect other parties, we may need to consider whether we should disclose confidential information in the interests of fairness. Relevant parties need to have sufficient information to understand our decisions, the basis for them, and the supporting evidence.

6.32 When considering if it would be lawful and appropriate to disclose confidential information, we will have regard to the sensitivity of the information and how best to fulfil our obligations to act fairly.

6.33 If a person considers that the information it is providing to us is so sensitive that we should not disclose it, it should make this clear to us when it provides the information.

6.34 Where we have asked for information, we will typically invite any party that has given us information to explain if, any of it should be treated as sensitive, and why. We may also ask for a version of the material that we can share with another relevant party, if the need arises.

6.35 In other circumstances, including when we receive unsolicited information, it is helpful to us if parties explain (in writing) if we should treat any information as sensitive, and why. This includes information we receive orally (by telephone or face-to-face).

26. Section 91 of FSBRA defines confidential information and imposes restrictions on its disclosure to protect confidentiality so far as possible, while ensuring that we are able to exercise our functions. The FSBRA (Disclosure of Confidential Information) Regulations 2014 (SI 2014/882) ('the Disclosure Regulations') provide a number of gateways through which we may share confidential information.
27. ~~SI 2016/679.~~ https://www.legislation.gov.uk/eur/2016/679/contents
28. ~~https://www.psr.org.uk/sites/default/files/media/PDF/PSR%20data%20privacy%20notice%20April%202019.pdf~~ https://www.psr.org.uk/publications/general/privacy-notice/
29. Regulation 3 of the Disclosure Regulations.

6.36 We will not regard a standard confidentiality statement in an email message as a request for non-disclosure, and we do not accept blanket claims of confidentiality. Persons providing information to us should identify the specific items within it that they consider to be sensitive and explain why.

6.37 When a person explains the sensitivity of the information, we will assess it and determine whether we disclose it. If we do not receive such an explanation, we will not regard the information as sensitive.

6.38 When considering whether disclosure is lawful and appropriate, we will also consider the extent of information to be disclosed and the manner of disclosure. For example, we may consider the use of ranges, summaries of information, redactions or confidentiality rings.

6.39 We may also be required to disclose certain types of information that include sensitive material, in order to meet legal obligations – for example, if we are asked to disclose a confidential consultation response under the Freedom of Information Act 2000.

Deciding when to take action

6.40 When we receive information about a potential compliance failure under the IFR, there are several possible next steps that we could take, and different potential outcomes, including:

- taking no further action
- asking the person raising the issue for more information
- making further enquiries of stakeholders to better understand the issue
- recording the issue raised for the purposes of a future review of issues raised with us
- formulating a project for inclusion in either our current or future programmes of policy work, and considering whether to take regulatory action
- considering whether to open an enforcement case

6.41 When we assess what action to take (if any), we will have regard to our organisational strategy and priorities, and the factors set out in our Administrative Priority Framework (APF).

6.42 The APF allows us to use our resources in the most efficient and effective way to further our statutory objectives, functions and duties. The APF sets out the factors we may take into account when making decisions about what action to take, under four main themes:

- impact
- resources
- risk
- strategic importance

6.43 We will also have regard to the principles contained in Regulation 3(4) of the PCIFRs when deciding what action to take. This includes taking account of the need to act efficiently and proportionately when taking action.

6.44 To assist with our assessment, we would encourage the person raising an issue with us to explain it as fully as possible, in writing, and provide supporting evidence where available.

6.45 We may use a combination of our powers and functions under the PCIFRs (sometimes alongside the powers and functions we have under other legislation). For example, we may address a widespread issue by publishing guidance for industry in combination with making one or more directions or requirements and taking enforcement action against the regulated person.

6.46 We do not use our formal powers every time a matter of regulatory concern is brought to our attention. In addition to using our formal powers, we can use other methods to try to secure good regulatory outcomes that will advance our statutory objectives. For example, we may engage with industry to help participants in payment systems and other stakeholders to find solutions to issues arising in the market, or to encourage further innovation in the provision of payment services. We might also write privately to the regulated person regarding the subject matter of the complaint to express our views and to ask it to change its behaviour.

6.47 If we first decide to take informal (rather than formal) action regarding a particular issue, this does not preclude us from using our formal powers later.

6.48 When we do decide to take action, we keep under review which action will achieve the most effective outcome throughout our consideration of the matter. This means that we may begin looking into a matter by commencing an enforcement investigation but later decide that another action is appropriate in addition to or instead of enforcement action (for example, issuing guidance to regulated persons).

Transparency of decision-making

Amended text

6.49 In some circumstances, we may want to publicise the fact that we are using, or considering using, our powers and functions, including those we have under the PCIFRs. This is distinct from when we consult on the proposed use of our regulatory powers (see paragraphs ~~7~~6.115 to ~~7~~6.119 and ~~7~~6.126 to ~~7~~6.131) and when enforcement action results in a sanction being imposed (see paragraph ~~7~~6.142).

6.50 For example, we may want to publicise the fact that we are taking, or considering whether to take, action:

- where we receive information that an incident has occurred that has had a significant impact on the provision of payment systems and/or services
- where we become aware of a matter that has the potential to significantly affect service-users of payment systems, including consumers, or
- where we open an enforcement investigation into a matter of significant strategic importance to us and/or to industry (subject to our usual approach not to publish information about the opening of an enforcement case (see paragraph ~~7~~6.143))

6.51 Where we do publish information about action taken by us, we will generally not include information that we consider to be commercially sensitive in any published updates or final determinations.

6.52 When considering whether to publicise details of any action considered or taken by us, we will consider the relevant circumstances and decide what is appropriate. We may consult with relevant parties prior to publication. Relevant factors include:

- whether publication would advance any of our statutory objectives
- whether publication would have any adverse impact on UK financial stability

- whether publication would have any adverse impact in relation to the performance of functions by the Bank of England in its capacity as a monetary authority
- the potential impact on the conduct of the case and the PSR's functions
- whether publication would have an adverse impact on the regulated person subject to the action being considered or taken which would be disproportionate to the benefits, considered in general terms, of publication
- whether any third party (a party other than one who is the subject of regulatory or enforcement action by us) would be identified through and may be prejudiced by publication
- any other issues related to fairness the regulatory principle that the PSR should exercise its functions as transparently as possible

Information gathering and investigatory powers

6.53 We have powers to gather information and conduct formal investigations under FSBRA, which, by virtue of Regulation 14 of the PCIFRs, also apply for the purposes of monitoring compliance with and taking enforcement action in respect of the obligations, prohibitions and restrictions under the IFR.[30] The PCIFRs also give us powers to give directions to any regulated person (Regulation 4(1) PCIFRs) for the purpose of obtaining information about compliance with the IFR or the application of an obligation, prohibition or restriction under the IFR to a person.

6.54 Each of our information gathering and investigatory powers can be used when we are:

- considering whether to make a direction using our direction power under Regulation 4
- considering whether to take enforcement action (whether or not we have formally opened an enforcement 'case') under Regulations 5 to 7

Information requirements

6.55 Under section 81 of FSBRA, we have the power to require any person (who may or may not be a regulated person) to provide information and documents which we require in connection with our statutory functions. A written notice issued under section 81 may require information or documents to be provided:

- in a specified form or manner
- at a specified time
- in respect of a specified period

6.56 The effect of the notice is also to require the person to whom it is addressed to preserve the requested information until it is provided to us.

6.57 Such a notice may also require a participant in a regulated payment system to notify us if events of a specified kind occur.

6.58 In addition, investigators appointed by us have additional powers under section 85 FSBRA to gather information.

30. All references in the remainder of this chapter to powers exercised under specific sections of FSBRA should be read as referring to both Regulation 14 of the PCIFRs and the relevant section of FSBRA.

6.59 We use our powers to require information or documents under sections 81 and 85 of FSBRA to help us decide whether it would be appropriate to give a direction or take enforcement action. We also use our powers to gather information for the purposes of our industry and compliance monitoring functions, including in the context of our market reviews.

6.60 When we wish to use our formal powers to require the provision of information and documents, we will use a formal written notice known as an Information Requirement Notice (IRN). In all cases, the IRN will set out the form or manner in which information or documents should be provided and will specify the deadline for responses. If information is required to be provided by way of attending before an investigator, to answer questions (a requirement to attend an interview), the IRN will specify this.

6.61 When we decide to issue an IRN other than in the context of an interview, we will always consider sending an intended recipient a draft IRN, including a proposed deadline for the provision of information, and ask for their comments. We may be able to adjust the request to reduce the burden on the intended recipient while still achieving our purpose (although there may be less scope for this if we are seeking consistent information from multiple persons). If the recipient of a draft IRN thinks they may have difficulty in providing the requested information by any proposed deadline, this should be raised with us before the time frame for providing comments expires. We will take account of any reasonable comments made by the recipient before finalising the IRN.

6.62 There may be circumstances where we do not give advance notice of an intended information requirement. One is where we believe that the information to be required is readily available and it is likely that the intended recipient of the request can provide it relatively easily. Another is if we think such advance notice may prejudice our enquiries. We may also choose not to give advance notice where we need to act quickly.

6.63 The time frame for comments on a draft IRN will be determined by what is reasonable in the circumstances but may be short, depending upon the urgency of the circumstances we are working under. After considering any reasonable comments, we will confirm or amend the IRN.

6.64 Where we require a person to attend an interview, we will generally give that person (the interviewee) advance notice that we intend to issue an IRN requiring them to attend. Before finalising the IRN we will try, as far as is reasonable and in keeping with any internal timetable, to agree with the interviewee an interview date that is suitable for both them and the investigator(s) conducting the interview.

6.65 When deciding upon the period for response, we will consider the availability, nature, complexity and volume of the information sought, together with the circumstances within which we are imposing the requirement and any representations we receive on any draft IRN. The time allowed to respond may be short, depending on what is reasonable in the circumstances.

6.66 We will generally:

- allow a recipient four weeks to respond to an IRN requiring information to be provided (other than in the context of an interview)
- issue an IRN confirming the requirement to attend an interview four weeks in advance of the interview date

However, the time allowed to respond before the interview takes place may be short, depending on the circumstances.

6.67 As delays in providing information and/or documents can have a significant impact on the efficient progress of our work, recipients should comply with IRNs in a timely manner and in accordance with deadlines or interview dates.

6.68 We will only grant applications to extend a deadline if we are satisfied that there are good reasons for doing so. We are aware that a recipient of an IRN could be responding to several requests (from us or other authorities) concurrently. Generally, this will not of itself be an acceptable reason for delay.

6.69 We ask that recipients consider the IRN when it is received. When a recipient thinks there is a risk that it may not be able to comply with a deadline to respond, it should tell us at the earliest possible opportunity. It should do this even if it is not yet in a position to apply for a deadline extension – for example, due to an insufficient understanding of the likelihood of the risk materialising and its potential impact to make the case for an extension. The recipient should fully explain the circumstances and what they are doing to mitigate the risk. Once it has enough information to support an application for an extension, it should apply without further delay.

6.70 If a recipient is aware of the risk of delay but does not raise the issue with us at the earliest opportunity, and then applies for an extension close to the deadline, we could consider this an indication that the recipient is not properly complying with the information requirement. In these circumstances, the information will still be required, and we will also consider what, if any, other action we should take. Where the requirement applies to a regulated person, this could include enforcement action in relation to non-compliance with its obligations under General Direction 1.

Amended text

6.71 Recipients are not obliged to share with us those parts of required documents over which they wish to assert legal privilege – including reports of any internal investigations. It is for recipients to decide whether to provide privileged material to us. If they redact or omit material from any documents they provide us, or seek to withhold entire documents from us on the grounds of legal privilege, they should also provide us with a description of that material and an explanation of why it is privileged. Otherwise, regulated persons should volunteer the results of their own investigations in line with General Direction 1 (see paragraphs ~~7~~6.18 to ~~7~~6.21). We expect recipients to review material before sending it to us in order to identify, and redact, any material that they wish to claim privilege over.

Skilled person reports

6.72 We have the power, under section 82 of FSBRA, to require a regulated person to provide a report by a skilled person. We ourselves can also appoint a skilled person to provide a report. When a regulated person receives notice that we intend to either require a report from a skilled person or appoint such a person to provide a report, both the regulated person and any other person who is providing (or who has at any time provided) services to it, in relation to the matter being reported upon, will be under a duty to give the appointed skilled person all such assistance as the skilled person may reasonably require.

6.73 We will do this if we need to understand better any matter relating to participation in a regulated payment system and where particular skills or specialist knowledge about the subject matter under consideration are required.

6.74 We may use a skilled person to report on an issue that may lead to us considering whether we should take action or to assess how others are implementing measures aimed at addressing the matter of regulatory concern involved.

6.75 If we require a regulated person to provide us with a skilled person's report, or where we appoint a skilled person ourselves, we will issue a notice in writing under section 82 of FSBRA (a 'Skilled Persons Report Requirement Notice'). This notice will specify the following (as determined by us):

- 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 the PSR.
- The subject matter of the report and the form the report should take.
- The deadline for submission of the report.

6.76 We will also explain to the recipient of the notice and to the skilled person the nature of the matters that led us to decide that a skilled person's report was appropriate.

6.77 Before we issue a notice requiring a skilled person's report, we will usually send a draft copy to the intended recipient and ask for comments. For example, on the scope and contents of the report, the work that the skilled person will be required to undertake (and/or the assistance they will require) and the deadline by which the report must be provided. We will take account of any reasonable comments made by the intended recipient before finalising the notice.

6.78 When we require a regulated person to provide a report by a skilled person, we will need to be satisfied that the skilled person who the regulated person proposes is suitable, considering their skills, experience and availability, their relationship with the regulated person, and any other actual or potential conflicts of interest. The regulated person will pay for the services of any skilled person they appoint.

6.79 When we appoint a skilled person to produce a report, we will generally direct the regulated person that is the subject of the report to pay any expenses we incur (including the cost of the report).

Appointing investigators

6.80 We have the power under FSBRA, in the context of the IFR, to appoint persons (the 'investigators') to conduct an investigation on our behalf where there are circumstances suggesting that there may have been a compliance failure (section 83(2) of FSBRA).

6.81 Appointed investigators can (section 85 of FSBRA) require persons to:

- attend and answer questions in interview, or otherwise provide information
- produce at a specified time and place any specified documents or documents of a specified description

This applies where the investigators reasonably consider the answer, information or documents to be relevant to the purposes of the investigation.

6.82 The investigators may exercise the above powers in relation to:

- the regulated person that is the subject of the investigation
- any person connected with the regulated person under investigation

- in an investigation into whether there has been a compliance failure, any person who in the investigator's opinion is or may be able to give information which is or may be relevant to the investigation

6.83 An appointed investigator can be any member of PSR staff or an external person (section 84(5) of FSBRA).

6.84 When we appoint investigators, we will also issue a Memorandum of Appointment (MOA). We have a duty under section 84(2) of FSBRA to notify the subject of our enquiries that we have appointed investigators, except where this would be likely to result in our work being frustrated or where a suspected compliance failure is involved. We will usually do this by informal contact in the first instance, followed by written notice of the appointment of investigators being given to the regulated person in question.

6.85 Where we give notice of the appointment of investigators, the notice will specify the provision(s) under which the investigators are appointed and the reasons for their appointment.

6.86 If we do not give notice of the appointment of investigators at the time we appoint them, we will generally issue the notice when we use our statutory powers to require information from the regulated person in question.

6.87 In some cases, we may, if necessary, appoint additional investigators to assist with our enquiries. If this happens, we will usually give the regulated person under investigation written notice of the additional appointments (unless we have not previously informed them of the investigation because to do so might be prejudicial).

6.88 Where we have appointed investigators, they will generally use the powers under section 85 of FSBRA to require the provision of information or documents, rather than seeking information or documents on a voluntary basis or under section 81 of FSBRA.

6.89 The appointed investigators will make it clear to the person concerned when they are being required to provide information or documents and when information or documents are being sought on a voluntary basis.

6.90 Where investigators impose a requirement to attend an interview, they will consider, on a case-by-case basis, what, if any, material will be disclosed to the interviewee in advance. Generally, where material is to be disclosed to an interviewee, this will be done two weeks before the interview. However, if the material is not voluminous and we think it likely that the interviewee will only need a short time to consider it before the interview, we may provide disclosure less than two weeks in advance. If we think that disclosing the material in advance may prejudice our work, we may decide to provide disclosure on the day of, or during, the interview.

6.91 When we conduct an interview, we will allow the interviewee to be accompanied by a legal advisor, if they wish. The investigators conducting the interview will explain to the interviewee how their answers could be used in proceedings against them. If the interview is recorded, we will give the interviewee a copy of the interview recording and may also give them a copy of the transcript.

Search under warrant

6.92 We have the power to apply to a justice of the peace for a warrant to enter premises under section 88 of FSBRA, in the context of the IFR. The circumstances under which we may apply for a search warrant are as follows:

- When an information requirement (under either section 81 or 85 of FSBRA) has been imposed upon any person requiring the provision of information or documents and that party has failed (wholly or in part) to comply with the requirement and some or all of the information or documents required are on the premises specified.
- When there are reasonable grounds for believing that, if an information requirement requiring the provision of information or documents were to be issued to any person, the requirement would not be complied with or the information or documents would be removed, tampered with or destroyed, and the premises specified in the warrant are premises of a participant in a regulated payment system.

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

- enter and search the premises specified in the warrant
- take possession, or copies, of any information or documents appearing to be of a kind for which the warrant was issued ('the relevant kind')
- require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind, or to state where it may be found
- take any other steps which may appear to be necessary to preserve or prevent interference with such information or documents[31]

6.94 We may use our search and seizure powers under section 88 of FSBRA when we consider the legal test for doing so to be met (that is where there has been a failure to comply with an IRN issued by us or where there are reasonable grounds for believing that a regulated person would not comply with one if issued), and where we conclude that it would be appropriate and proportionate to do so. Search warrants under FSBRA are granted by a justice of the peace sitting in private.

6.95 During a search under warrant, we will usually take copies of documents (rather than seize originals) where it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize original documents, we will return them to the subject of the search warrant as soon as it is reasonably practicable to do so.

6.96 We will likewise take copies of electronic material where it is reasonably practicable to do so and not disproportionately time-consuming. Where it is necessary to seize hard drives, laptops or other data-storage devices, we will return these to the subject of the search warrant as soon as reasonably practicable.

Non-compliance with our information gathering and investigative powers

Amended text

6.97 Failures to comply with any general or specific directions we give under the PCIFRs for the purpose of information gathering (see paragraph ~~7~~6.53 above) can be enforced by way of our enforcement powers.

6.98 If any person, without reasonable excuse, fails to comply with a requirement imposed upon them as a result of our exercising any of our powers under sections 81 to 88 of FSBRA then (as well as there being grounds for the PSR to apply to the court for a search warrant) they can, under section 90(2) of FSBRA, be dealt with by the courts as if they were in contempt of court. The penalty can be a fine, imprisonment or both.

31. Including the use of such force as is reasonably necessary.

6.99 A person who obstructs the execution of a warrant or, either knowingly or recklessly, provides false or misleading information in response to an information requirement imposed by us (section 90(6) and (8) FSBRA) may be guilty of a criminal offence. In addition, where a person who knows that we are conducting an investigation either:

- falsifies, conceals, destroys or otherwise disposes of a document which the person knows or suspects would be relevant to such an investigation, or
- causes or permits the falsification, concealment, destruction or disposal of such a document that person commits a criminal offence, unless they can show that they had no intention of concealing facts disclosed by the documents from the Investigator (section 90(4) and (5) of FSBRA).

6.100 Where a regulated person fails to comply with our information gathering and/or investigative powers, they will also fail to comply with General Direction 1. The purpose of General Direction 1 is to help drive a 'no surprises' culture and to foster cooperation between us and the regulated community. The timely provision of complete and accurate information, whether following a request or voluntarily, helps us to carry out our functions and achieve our objectives.

6.101 If a regulated person fails to comply with any of our information gathering and investigative powers, we may either take enforcement action for failing to comply with the general or the specific direction in question, and/or failing to comply with General Direction 1 or take informal action in relation to that compliance failure.

6.102 We can also use our powers under section 90 of FSBRA to:

- bring contempt of court proceedings against the regulated person who fails to comply with one of our information requirements
- bring criminal proceedings against a person who falsifies, conceals, destroys or otherwise disposes of a document that they know or suspect is relevant to an ongoing PSR investigation, or
- bring criminal proceedings against a person who obstructs the execution of a search warrant

6.103 We will decide which course of action is the most appropriate to take on a case-by-case basis.

Taking interim or urgent action

Amended text

6.104 We may use our FSBRA powers to take urgent action, including the use of interim measures, where appropriate, either to: prevent the risk of a negative impact occurring as a result of the behaviour of regulated persons, or address a negative impact that has already occurred. For example, we may consider giving a specific direction (see paragraphs ~~7~~6.113 to ~~7~~6.122) with short or no notice to prevent or address that behaviour.

6.105 As set out in the next section, before we give a direction, we will normally give the relevant regulated person(s) notice of the proposed direction, with our reasons for proposing it, setting out the next steps and the deadline for representations. However, in urgent cases, we may give directions without giving notice if we believe that a delay may result in a detriment to others, or otherwise have adverse effects on the provision of payment services. Alternatively, where the issues require urgent consideration and resolution, we may shorten the period set for submitting representations, so that we can reach a conclusion as soon as possible.

Closing a matter under consideration

6.106 If we decide to discontinue our consideration of a matter that could lead to using our direction and requirement powers, and we have previously informed regulated persons that we were considering whether to take action, we will usually confirm this to the relevant persons unless there is a good reason not to do so. We may decide to close a matter under consideration without taking any action for a variety of reasons – for example, if we think there is insufficient evidence to support taking action, or we conclude that the matter is no longer an administrative priority considering our APF criteria.

Giving directions

6.107 The PCIFRs give us powers to give directions to any regulated person to require or prohibit the taking of a specified action for certain purposes (Regulation 4(1) of the PCIFRs). We can give directions to obtain information about compliance with the IFR or the application of an obligation, prohibition or restriction under the IFR. We can also give directions to remedy or prevent a failure to comply with the IFR, or to provide compensation or redress to a person who has suffered a loss as a result of such a failure.

6.108 Directions can be 'specific' or 'general'. Specific directions are addressed only to certain regulated persons (for example, a named operator of a payment system). General directions are addressed to whole classes of regulated persons (for example, all merchant acquirers). Failures to comply with our directions and requirements are enforced by way of our enforcement powers.

Amended text

6.109 When considering how to respond to a potential issue related to our functions under the IFR, we will consider whether it would be appropriate to use our direction powers under the PCIFRs. As explained in paragraph ~~7~~6.46, we will not use our formal powers in relation to every regulatory concern that we become aware of. We will also consider other available options.

6.110 We will give directions if we think that doing so will help us fulfil our functions under the IFR, based on the evidence available to us and having regard to our APF factors and all the relevant circumstances.

6.111 When considering whether it is appropriate to make a direction, we will pursue reasonable lines of enquiry to obtain sufficient evidence to help us make that decision. This may involve gathering information through informal methods or by using our formal powers. It may also involve the appointment of investigators and the conducting of interviews.

6.112 To properly assess the issue and what, if any, action it is appropriate to take, we may also need to engage with stakeholders other than regulated persons who are, or will be, directly affected by the issue and any proposed action.

Deciding whether to give a specific direction

6.113 It may be appropriate for us to give a specific direction to one or more regulated persons in relation to an IFR-related matter that comes to our attention.

6.114 Before giving a specific direction to a regulated person, we will usually give the regulated person(s) notice and send them a draft of the proposed specific direction, accompanied by an explanation of why we believe it is appropriate to take this course of action. The draft will specify the proposed implementation date for the specific direction.

6.115 In addition, we will consider whether the proposed specific direction is likely to have wider implications or relevance beyond the subject(s) of the direction. If so, we will usually consult on the draft specific direction more widely to seek the views of affected persons.

6.116 In deciding whether, and how, to carry out such a consultation, we will take into account any issues in relation to the confidentiality of the information underlying our consideration of the direction and balance these with our obligations to act fairly. We may also seek the views of the subject(s) of the proposed direction and take these into account.

6.117 Where we give notice of/consult upon a proposed direction, we will generally allow three weeks for subject(s) of the direction and any other person to make representations to us. The precise duration of the consultation will depend on the complexity of the proposed action and the circumstances surrounding it. For example, how much meaningful engagement we have already had with stakeholders on the particular issues. When we need to act quickly, we may allow for a shorter period of consultation.

6.118 Representations should be made in writing. We may also ask to meet the intended subjects of the direction or other persons, if we consider it would assist our understanding of the issues involved and inform our decision about the appropriateness of giving a direction. We will also consider requests for meetings with us on this basis. Where we choose to hold a meeting, we will try to arrange a date convenient for both the relevant person and us, as far as is practicable.

6.119 We will take any responses we receive to the consultation into account when deciding whether to give a specific direction. Where, following consultation, we propose to make material changes to the proposed direction, we will consider whether the changes require us to re-consult.

6.120 When a decision is taken to give a specific direction, we will give a final notice of that decision directly to the subjects of the direction. That notice will set out the reasons for the action and state the commencement date of the direction.

6.121 It is our usual practice to publish the specific direction on our website. Where we have carried out a wider consultation, we will usually also publish:

- a statement explaining, in general terms, the responses we received and how we have taken the responses and other relevant factors into account when determining whether to make the direction
- the individual responses to the consultation (depending on the sensitivity of the issues involved and the sensitivity or confidentiality of the information provided)

6.122 In deciding whether to publish a specific direction, we may first seek the views of the subject of that direction. Subjects of our proposed direction should make representations to us in writing if they think that we should not publish all or part of the direction. They should also include their reasons for this. We will take such representations into account when balancing our obligations to act fairly with our duty to act transparently when performing our functions, keeping in mind the public interest in promoting wider awareness of our decisions.

Appeals

6.123 Any persons affected by our decisions to give specific directions can appeal to the Competition Appeal Tribunal (CAT) (Regulation 9 of the PCIFRs).

6.124 In determining an appeal, the CAT must apply the same principles as would be applied by a court on an application for Judicial Review. It must either dismiss the appeal or quash the whole, or part, of the decision to which the appeal relates. If the CAT quashes the whole, or part, of a decision, it may also refer the matter back to us with a direction

to reconsider the matter and make a new decision in accordance with its ruling. The CAT may not direct us to take any action which we would not otherwise have had the power to take when making our original decision (Regulation 10(7) of the PCIFRs).

Deciding whether to give a general direction

6.125 Before giving a general direction, we are required to consult the Bank of England, the FCA and the PRA as to the need for, and potential impact of, the proposed regulatory action (section 104(2) of FSBRA).

6.126 We will also generally engage in public consultation by publishing a draft of the proposed general direction on our website, along with an explanation of its purpose, our reasons for proposing it (taking into account the matters we must have regard to when performing our functions under the PCIFRs)[32], and a time frame for interested parties to respond. We will also take such other steps as we see fit to draw attention to the proposal (section 104(2) of FSBRA).

6.127 We are not required to publish a draft direction for consultation if we consider that the delay involved would be prejudicial to the interests of service-users (section 104(10) of FSBRA).

6.128 We will also, usually, publish a cost benefit analysis of the impact of the proposed general direction, including an estimate of the costs and benefits, where we consider that the proposal would lead to a significant increase in costs (section 104(3) and (11) of FSBRA). However, where it appears to us that the costs or benefits cannot reasonably be estimated, or where it is not reasonably practicable to produce an estimate, we will not include an estimate within our analysis but will give our opinion and an explanation of it instead (section 104(8) of FSBRA).

6.129 We will usually allow a minimum of three weeks for intended subject(s) of the direction and any other person to make representations to us. The precise duration of the consultation will depend on the complexity of the proposed action and the circumstances surrounding it. For example, how much meaningful engagement we have already had with stakeholders on the particular issues. When we need to act quickly, we may allow for a shorter period of consultation.

6.130 Representations should be made in writing. We may also ask to meet an intended subject of the direction, or other persons, if we consider that to do so would assist our understanding of the issues involved and inform our decision about the appropriateness of giving a direction. We will also consider requests for meetings with us on this basis. Where we choose to hold a meeting, we will seek, as far as is practicable, to arrange a date which is convenient for both the relevant person and us.

6.131 We will take any consultation responses received into account when deciding whether to impose the general direction (section 104(4) of FSBRA). Where, following consultation, we propose to make material changes to the proposed direction, we will consider whether the changes require us to re-consult.

6.132 When a decision is taken to give a general direction, we will give a final notice of that decision directly to the subjects of the direction. That notice will set out the reasons for the action and state the commencement date of the direction.

6.133 We will also publish the general direction on our website (Regulation 4(7) of the PCIFRs). This will usually be together with a statement explaining, in general terms, the responses we received and our response to them together with details of any significant differences between the draft and final general direction and an updated cost benefit analysis (if applicable) (section 104 of FSBRA). We will usually also publish or make

32. Regulation 3(4) PCIFRs

available the individual responses to the consultation, but whether we do so will depend on the sensitivity of the issues involved and the sensitivity or confidentiality of the information provided.

Appeals

6.134 Our decisions to give general directions under the PCIFRs can be appealed to the CAT in the same way as specific directions (Regulation 10 of the PCIFRs).

Taking enforcement action

6.135 Compliance failures, as defined under Regulation 2(1) of the PCIFRs, may arise from the failure of a regulated person to comply with:

- an obligation, prohibition or restriction imposed by the IFR
- a direction given by the PSR under Regulation 4 of the PCIFRs

6.136 In connection with enforcement action, the PCIFRs give us the power to:

- require a regulated person to pay a penalty in respect of a compliance failure (Regulation 6)
- publish details of any compliance failures and penalties that we have imposed (Regulation 5)

6.137 We may also seek a court injunction (or interdiction in Scotland) to:

- restrain conduct where there is a reasonable likelihood that there will be a compliance failure or there has been a compliance failure and there is a reasonable likelihood that it will continue or be repeated (Regulation 8(1))
- remedy a compliance failure or restrain asset-dealing (Regulation 8(2) and 8(3))

Investigating whether it is appropriate to take enforcement action

6.138 We take non-compliance with our directions, or any legal obligations we monitor and enforce, seriously. We look across the payment systems sector and, where appropriate, take targeted, timely and effective enforcement action to advance our statutory objectives and achieve positive outcomes, including by changing behaviour.

6.139 Information that results in our considering whether to take enforcement action (that is, the opening of an investigation into whether there has been non-compliance and, if we conclude that there has, determining whether any financial penalty should be imposed and/or whether our finding of non-compliance should be made public) can come from various sources. For example:

- information brought to our attention through a third-party complaint, report or other communication
- information brought to our attention on a regulated person's own initiative; or
- a report prepared by a skilled person, or information actively gathered by us in another way

6.140 When we have information about a possible compliance failure, we will consider the appropriate course of action to take, if any. For example, we may seek additional information before deciding whether to: open an enforcement case; take no further

action; take informal action; or make a direction. When deciding what action to take, we will have regard to a number of different factors, depending on the nature and facts of the specific case. These include the factors set out in our APF.

6.141 When considering what sanction, if any, is appropriate to impose and when calculating any financial penalty, we will follow our IFR penalties guidance (as set out in Chapter 8). This contains a statement of the principles which we will apply in determining whether to impose a penalty and the amount of any penalty.[33]

6.142 It is important that firms comply with the law and their regulatory obligations. If we find that there has been a compliance failure, our general approach will be to publish our finding (instead of, or in addition to, imposing any financial penalty). One of the purposes of taking enforcement action and imposing appropriate sanctions is to have a deterrent effect and communicate to regulated persons that non-compliance will be identified and addressed. Another is to increase public awareness of the regulatory obligations upon those we regulate.

6.143 We will not usually publish the fact that we have opened an enforcement case in respect of a particular matter at the time a case is opened. However, we may consider doing so where, for example, the matter relates to a matter of significant strategic importance to us and/or to industry.

Opening an enforcement case

6.144 The decision to open an enforcement case and investigate a compliance failure is made by two 'case openers'.[34] These may be either the Managing Director of the PSR, the Head of Policy, the Head of Regulatory and Competition Enforcement or a member of staff of at least manager level.

6.145 The case openers will have regard to several different factors, depending on the nature and facts of the specific case. These include the factors set out in the APF.

6.146 The opening of an enforcement case indicates that an investigation has begun, because there are circumstances to indicate that there have been one or more instances of non compliance, not that we have concluded that there has in fact been non compliance. During the lifecycle of the case we will keep the need for investigation, and whether the matter being considered continues to amount to an administrative priority (with reference to our APF criteria), under review and may, at any time, choose to close the case.

Amended text

6.147 When we decide to open an enforcement case, we will usually inform the regulated person under investigation of the fact and subject matter of the investigation as soon as it is practicable to do so, unless we consider that informing them at that stage would frustrate the investigation. We will usually also appoint investigators to investigate the matter formally, under section 83 of FSBRA. The procedure for appointing investigators is set out in paragraphs ~~7~~6.80 to ~~7~~6.91 above.

6.148 Once we have decided to open a case, an enforcement case team will be allocated to it. The team will consider how the case should be progressed and which of our formal powers we should use. Members of this team will be drawn from our staff based on their relevant skills and the needs of the case.

33. The PSR is required to publish such a statement by Regulation 6(3) of the PCIFRs.
34. Case openers are appointed by our Managing Director.

6.149 The case team will be comprised of staff who have not been directly involved in monitoring any conduct relating to a suspected compliance failure by the regulated person under investigation. However, staff who have previously been involved in our other monitoring, and policy work that relates to the IFR, may support and provide technical advice to the enforcement case team.

6.150 Appointed investigators will be members of the enforcement case team and will usually include the member of staff leading that team.

Amended text

6.151 Each case team will have an allocated case owner, a senior member of staff, who will have oversight of the running of the case, keep the need for continued investigation under review and supervise day-to-day decisions about case progression and the use of our investigatory powers. Each case will also have a case sponsor, who will usually have been one of the case openers and will take milestone decisions about the progress, or otherwise, of the case up until the point that it is referred to Settlement Decisions Makers (SDMs) (see paragraphs ~~7~~6.169 to ~~7~~6.191) and/or our Enforcement Decisions Committee (EDC) (see paragraphs ~~7~~6.202 to ~~7~~6.215). This will usually be our Head of Regulatory and Competition Enforcement.

6.152 Whenever we inform a regulated person that a case has been opened, we will also let them know who the case lead, case owner and case sponsor are.

6.153 When contemplating opening an enforcement case, we will also look at whether it is appropriate to apply urgently for any interim measures, either to prevent or remedy a potential or actual compliance failure.

Amended text

6.154 One option available to us is to apply to the court for an injunction, under Regulation 8 of the PCIFRs, to either prevent a compliance failure from occurring or recurring or to remedy an existing compliance failure (see paragraphs ~~7~~6.260 to ~~7~~6.264). Alternatively, we may consider using our powers to make a direction or impose a requirement to address the issues giving rise to the compliance failure pending the opening of an enforcement investigation or during its course.

Information requirements

6.155 Once we open an enforcement case, we will generally use our powers under FSBRA to gather information rather than seeking information on a voluntary basis.

6.156 Once investigators are appointed, they will normally use the additional information gathering powers available to them under section 85 of FSBRA to issue IRNs.

Amended text

6.157 The powers used, and procedures we follow for issuing IRNs in the context of an enforcement case, are the same as when we are ascertaining the appropriateness of exercising our direction-making powers (see paragraphs ~~7~~6.60 to ~~7~~6.69 above).

6.158 When issuing IRNs in the context of enforcement proceedings, however, we will usually allow only a short time for providing comments on a draft sent in advance to the regulated person under investigation (if a draft is sent) and for responding to the final IRN. This is to ensure that we can act as quickly as possible to assess how to respond and/or address any potential compliance failure. The exact time allowed will depend on the nature, complexity and volume of the information sought, together with the circumstances within which we are imposing the requirement.

Scoping the investigation

6.159 In an enforcement case, we will usually hold scoping discussions with the regulated person under investigation within one month of the case opening, unless we have delayed informing the person about the investigation on the grounds that the investigation may be frustrated by us doing so. The purpose of these discussions is to:

- introduce the enforcement case team and the respective role of enforcement, as opposed to other functions of the PSR that regulated persons may already be familiar with, such as compliance monitoring
- outline the nature of the PSR's concerns
- explain the investigation process and answer any questions the regulated person may have in this regard
- outline the next steps and key milestones
- ascertain the most effective and efficient way in which we can request information and documentation from the regulated person

6.160 The scoping discussion will also give the regulated person under investigation an opportunity to indicate whether, or to what extent, they accept that there have been any compliance failures.

6.161 There is a limit as to how specific we can be about the scope of the investigation in its early stages. The exact scope of an investigation will usually only become clear once we have gathered sufficient evidence to enable us to assess fully the number, nature, extent, duration and gravity of the compliance failures under consideration. At the early stages of an investigation, we will also be unable to share with the regulated person under investigation any information that we think may prejudice the conduct of that investigation.

6.162 When we invite a regulated person to a scoping meeting, we will provide them with an indicative outline timetable for the running of the investigation. The timetable will depend upon the scope and complexity of the investigation, and may change during the course of it, depending on the circumstances of the case – including, for example, the availability and nature of any evidence sought. If significant changes to the timetable occur, we may send the regulated person a revised timetable.

6.163 If, at any time, the nature of our concerns changes significantly from those notified to the person under investigation, and we are satisfied that it is appropriate to expand or narrow the investigation in response to that change, we may change the scope accordingly (section 84(7) of FSBRA).

Ongoing contact during investigations

6.164 We aim to maintain an ongoing dialogue between members of the enforcement case team and the regulated person under investigation, which will include updates from the case team, at appropriate intervals, as to the progress of the case. These updates will usually be by way of correspondence or telephone contact, unless we consider that a face-to-face meeting would be more appropriate.

6.165 We may also ask for a meeting with the regulated person if we think it will assist our understanding of the issues involved and inform our decision about the appropriateness of taking enforcement action. We will likewise consider requests for meetings with us on this basis.

Amended text

6.166 We will usually invite a regulated person under investigation to attend at least one update meeting before we reach the stage of producing an investigation report containing our preliminary findings (see paragraph ~~7~~6.192 to ~~7~~6.201). This will generally be once we have reviewed all of the information gathered during our investigation and have sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome. During this meeting, we will explain in more detail the nature and scope of the investigation, and update the person as to the stage that the investigation has reached, the next steps and the likely timing of these.

6.167 Where we choose to hold a meeting with a regulated person under investigation, we will seek, as far as is practicable, to arrange a date which is convenient for both the person and us and which remains in keeping with the requirements of our administrative timetable.

6.168 As our investigation evolves, we will also consider whether we need to inform the regulated person that the scope of our investigation has changed. We will generally do this when the changes are material, and where we have appointed investigators, we will inform the regulated person under investigation of a change in the scope of the investigation where it is likely to be significantly prejudiced if they are not made aware of the change (section 84(9) of FSBRA). However, the timing of our informing the person will depend upon whether we believe that providing the person with such information would be likely to result in the investigation being frustrated.

Settlement

6.169 Settlement is the process whereby we reach an agreement with a regulated person on the issues in an enforcement case, specifically that there has been one or more compliance failures and the appropriate sanction, if any.

6.170 Settlement has many potential advantages, including saving PSR and industry resources and aiding in the prompt communication of compliance messages to industry and/or the markets for payment systems and payment services. As such, we recognise that settlement may be appropriate in certain circumstances, and that the advantages of settlement should be reflected by way of a discount against any financial penalty that is imposed. Further details of our approach towards settlement discounts are set out in Chapter 8.

6.171 Regulated persons should approach settlement discussions with us in an open and cooperative manner, in line with the obligations imposed by General Direction 1. A regulated person's cooperation is one factor that we will consider when calculating the appropriate financial penalty to impose for a compliance failure.

Amended text

6.172 We are receptive to any regulated person informing us of its interest in entering into settlement discussions from an early stage of an investigation. Alternatively, if we consider that a case is suitable for settlement, we may invite the person to engage in settlement discussions with us. We are unlikely to make such a proposal or commence such discussions until we have a sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome. In particular, we would wish to ascertain whether non-compliance is ongoing. Usually this will be once we have held the update meeting described in paragraph ~~7~~6.166 above.

6.173 The decision to engage in settlement discussions and to settle is at our discretion. The decision will be taken jointly by two SDMs, appointed by our Managing Director, who may be: senior PSR staff, special advisors to our executive committee or members of the EDC, who have had no prior involvement in the enforcement case and, in the case of EDC members, who will not be involved in any aspect of the case considered at a later stage by an EDC panel.

6.174 The SDMs will consider a number of factors when making such decisions, including:

- the likely savings to our time and resources
- the prospect of reaching settlement within a reasonable time
- the number of parties in a case
- (in a multi-party investigation) whether all, or only some, of the regulated persons show interest in engaging in settlement discussions

6.175 If we consider that it is appropriate to enter into settlement discussions, we will issue the regulated person(s) under investigation with an early settlement notice, informing them that the window for early settlement, during which the maximum reduction in a financial penalty will be available if settlement is reached (30%), has commenced. The early settlement notice will specify a time frame during which the window will remain open and the date upon which it will close. An early settlement window will usually be for a period of no less than four weeks from the date of issuing the notice. The precise duration will depend on the complexity of the proposed action and the surrounding circumstances.

Amended text

6.176 Once the early settlement window closes, the maximum discount will no longer be available. Between the closure of the window and the issuing of a Warning Notice by the EDC (see paragraphs ~~7~~6.219 to ~~7~~6.227 below) a lesser discount may be available. The exact amount of the available discount will depend on the stage that the case has reached in terms of our preparation for EDC proceedings and the level of cooperation received from the regulated person(s).

6.177 Where appropriate, matters may be settled at a later stage of the enforcement process, including where the EDC has already issued a Warning Notice up until the point where it issues a Decision Notice (see paragraphs ~~7~~6.248 to ~~7~~6.254). In those cases, the procedures outlined above will continue to apply, although the reduction in penalty for settlement will not be available.

6.178 Settlement discussions will be conducted by the enforcement case team. The settlement decision will be taken jointly by the two SDMs.

6.179 The settlement discussions will involve consideration of the available facts to support a decision to take enforcement action. They will culminate in the production of either a draft Warning Notice (where the EDC has not yet issued one) or Decision Notice (where the EDC has already issued a Warning Notice). The notice will set out the terms we propose to settle the case on – i.e. details of the relevant compliance failure(s) and the sanction that we propose to impose.

6.180 There are two types of possible settlement agreement: a full agreement and a partial agreement. Under a full settlement agreement, a regulated person may accept that there has been a compliance failure and agree to the imposition of a financial penalty and/or publication of the details of a compliance failure, instead of contesting the enforcement action. Alternatively, they may wish to enter into a partial agreement under which they partly contest the proposed action. Examples of matters which may be contested include, but are not limited to:

- factual matters
- whether specified facts amount to one or more compliance failures
- the nature of the proposed sanction, including the amount of any proposed financial penalty

6.181 If a matter is settled, the regulated person will enter into a settlement agreement with us, which constitutes a binding contract. Under this agreement, the regulated person will agree to waive their rights to make representations to us about, appeal or otherwise contest our decision to take action in the way set out in the agreement.

6.182 The settlement agreement will refer to the draft of the proposed Warning and/or Decision Notice. Depending on the stage in the enforcement process at which agreement is reached, it may also include an agreement by the regulated person to:

- waive and not exercise any rights to disclosure of the relevant evidence that we rely upon in support of the matters set out in the draft notice, along with any evidence which we consider may undermine those recommendations
- not object to the giving of a Decision Notice before the expiry of the 21-day period after the giving of a Warning Notice specified under Regulation 7 of the PCIFRs

6.183 The enforcement case team will provide any draft notice and settlement agreement arising from settlement discussions to the SDMs. The SDMs may accept the proposed settlement by approving the agreement and the notice as drafted. Alternatively, the SDMs may reject the proposed settlement and may, at their discretion, direct the enforcement case team to continue the investigation and/or resume settlement discussions with a view to a different outcome.

6.184 In the case of full settlement, once the settlement agreement has been signed by all parties to it, a Decision Notice will be issued by the SDMs. Where no Warning Notice has been issued prior to settlement being reached, one will be issued in parallel with the Decision Notice.

Amended text

6.185 All settlement communications are without prejudice. Consequently, if settlement discussions break down and a matter is dealt with by way of a contested process (see paragraphs ~~7~~6.216 to ~~7~~6.254) through the EDC, the EDC will not consider any admissions or concessions made by any of the parties during settlement discussions.

6.186 Following the commencement of settlement discussions, we will consider whether it is appropriate to enter into any proposed, partial agreement or whether the matter is unsuitable for settlement. This will be considered on a case-by-case basis. When considering whether to enter into a partial settlement agreement, we will consider various factors, including:

- the extent to which the regulated person under investigation has been open and cooperative with us
- the extent to which the matters accepted by the regulated person will save our time and resources

6.187 The maximum available settlement discount for a partial agreement is 30%, where:

- that agreement is reached during the early settlement window
- all of the relevant facts are accepted and it is accepted that they amount to a compliance failure – i.e. the only remaining issue to be decided is whether a sanction should be imposed and, if so, what it should be

6.188 Where a partial agreement is reached on the same basis outside of the early settlement window, or where a partial agreement is reached on a different basis within the early settlement window (i.e. some of the issues that remain concern contested questions of fact or of non-compliance), then a lesser discount may be available. The exact amount of the available discount will depend on the stage that the case has reached in terms of our preparation for EDC proceedings and the level of cooperation from the regulated persons. The amount to be applied will be determined by the EDC, once it has made a decision on the remaining contested part of the matter.

6.189 In the case of a partial agreement, the regulated person will usually be required, as part of that agreement, to consent to the EDC being informed of both the fact and the scope of the agreement reached but not of any matters discussed during the negotiations that were not ultimately accepted as part of the agreement. This is so that the panel:

- can clearly identify the contested issues that remain for it to decide
- can, where at least one of the remaining issues to be decided is sanction, make a full assessment of the regulated person's:
  - failure to comply
  - cooperation with us throughout the enforcement process

The EDC will not, however, consider any admissions or concessions made by any regulated person during settlement discussions, unless they are recorded in the partial agreement.

6.190 The partial settlement agreement will also stipulate that the regulated person cannot, as part of later EDC proceedings, introduce evidence that seeks to re-open or undermine the agreed matters.

6.191 In the case of a partial agreement, a Warning Notice setting out the agreed and remaining contested matters will be issued by the SDMs. The EDC will issue the Decision Notice after receiving representations from the regulated person on the contested matters.

Preliminary findings

6.192 An enforcement investigation will result in the preparation of a report setting out the preliminary findings of the enforcement case team. Where investigators have been appointed, this report will be prepared by them (section 84(6) of FSBRA).

6.193 Once an investigation report has been prepared, this will be considered by the case sponsor who will assess whether, based on the information within that report and the underlying evidence gathered by the enforcement case team, either:

- there is sufficient evidence to support a preliminary finding that there has been a compliance failure; or
- there is insufficient evidence to support such a finding, at this time, and the case should be closed

6.194 If the investigation leads to a preliminary finding that there has been a compliance failure by the regulated person, we will consider the appropriate action to take on a case-by-case basis, considering our APF criteria. We may decide to take either

informal or regulatory action (using our direction powers) to rectify the failure and/or its underlying cause. Alternatively, or in addition, we may refer the matter to the EDC with a recommendation that it makes a decision in accordance with the case team's preliminary finding that a compliance failure has occurred. In addition, we may recommend that enforcement action be taken by way of imposing one or both of the available sanctions – a financial penalty and/or publication of the details of a compliance failure and/or that penalty.

6.195 If we propose to submit a recommendation to the EDC, we will normally send our preliminary findings to the regulated person first. These will be based on the investigation report prepared by the case team, which we will usually disclose in full at this stage (subject to confidentiality considerations under section 91 of FSBRA).

6.196 We will inform the regulated person of: our preliminary conclusion on whether there has been a compliance failure; whether we intend to recommend that the EDC determine that there has been a compliance failure; whether we intend to recommend that one or more of our powers of sanction should be used in the event of the EDC finding that there has been such a failure; and the facts which we consider relevant to these issues.

6.197 We will invite the regulated person's comments on our preliminary findings, and will allow a reasonable period of time for a response, to be made in writing. This period will depend on the circumstances of the case, but we will usually allow three weeks.

6.198 Communicating our preliminary findings to a regulated person under investigation before the matter is referred to the EDC serves a useful purpose in focusing on the contentious issues in the case. However, there may be circumstances in which we decide that it is not appropriate to communicate our preliminary findings. These include when the regulated person agrees to not receive our preliminary findings in advance of our referral, in the interests of expediting the consideration of the matter by the EDC.

6.199 We will consider any responses received within the period stated, but we are not obliged to consider any responses received after this time, when deciding whether the matter should be referred to the EDC. If a regulated person under investigation requires more time to make representations on our preliminary findings, it should provide us with that request before the expiry of the response period, supported by reasons.

6.200 We may also ask for a meeting with the regulated person if we think it will assist our understanding of the issues involved and inform our decision about the appropriateness of taking enforcement action. We will likewise consider requests for meetings with us on this basis.

6.201 If we send our preliminary findings to the regulated person subject to investigation and then decide not to take any action in relation to any compliance failure, we will let the person under investigation know this as soon as it is reasonable to do so.

Enforcement Decisions Committee

6.202 The EDC is a committee of the PSR Board established for the purpose of making decisions, on our behalf (when settlement is not appropriate or where a settlement has otherwise not been reached), as to whether a compliance failure has occurred and, if so, what sanction, if any, should be imposed. It is not a tribunal or judicial body. The EDC's findings constitute an administrative decision on behalf of the PSR.

6.203 The EDC is an internal decision-making committee, which is separate from the enforcement case team. Its members are appointed by the PSR Board based on their relevant experience. The EDC deals with matters referred to it by PSR staff. These matters are decided in decision-making meetings held in private (which may take the

form of a meeting with the regulated person if the subject of the investigation wishes to attend and make oral representations about the matter) and conducted by three person decision-making panels.

6.204 The EDC has a Chair and Deputy Chair, and has a pool of members from which it draws three-person panels. A list of current members of the EDC is on our website. Either the Chair or Deputy Chair acts as the 'Panel Chair' for every EDC decision-making panel. The Panel Chair chooses the other members of each panel.

6.205 If an EDC member has been appointed as a SDM in a particular matter, they are excluded from being a member of any EDC panel appointed to decide that matter following a subsequent referral by the enforcement case team.

6.206 The EDC has its own support staff who undertake corporate secretarial duties (the Secretariat). The Secretariat will inform the regulated person subject to potential enforcement action that a panel has been appointed and provide them with the names of the panellists. The Secretariat will also communicate with the regulated person regarding the administrative arrangements for holding any decision-making meeting, the final decision for which lies with the Panel Chair.

6.207 In dealing with matters referred to it, the EDC is responsible for deciding the following:

- Whether there has been a compliance failure.
- Whether to impose a sanction for a compliance failure, and, if so:
  - whether to impose a financial penalty for the compliance failure or to publish details of the compliance failure or both; and
  - where a decision is made to impose a financial penalty, the amount of the penalty

6.208 Where a regulated person disputes the entirety of our proposed enforcement action, the EDC will be responsible for making decisions in relation to each of these matters.

6.209 The process followed by the EDC involves it making two determinations:

- whether to give a Warning Notice to the regulated person concerned, in respect of any suspected compliance failure and proposed sanction
- after consideration of any representations from the regulated person in response to the Warning Notice, whether to issue a Decision Notice setting out its finding that there has been a compliance failure and the sanction imposed (if any)

6.210 In the event of a partial settlement agreement, in which a regulated person chooses to contest one or more, but not all, of the issues relevant to the proposed enforcement action, the EDC is responsible for deciding only issues which fall outside the partial settlement agreement. In that scenario, as explained above, we will usually tell the EDC that discussions have taken place (but not the content of these discussions) and that an agreement has been reached to settle other aspects of the case.

6.211 The EDC will not examine or depart from the matters agreed between the parties to a partial agreement, and the regulated person subject to enforcement action will not be permitted to adduce any evidence that seeks to undermine or attempts to re-open the settled matters.

6.212 Each member of the panel will have a vote in relation to the matters before it, including the Panel Chair. Panels will make decisions by way of a simple majority, but a decision will not indicate whether it was taken unanimously. In the event of a tie[35], the Panel

35. For example, where one panel member abstains or is incapacitated during the course of the hearing.

Chair shall have a casting vote. The panel will conduct itself in such a manner and may adopt such procedures as the Panel Chair considers suitable and appropriate to enable the EDC to make decisions fairly and expeditiously.

6.213 Any decision of the EDC will take into account all the relevant information available to it. This includes the views of the enforcement case team in relation to the evidence before the EDC as to the facts underlying the potential compliance failure; the case team's legal, economic and any other analysis of the issues under consideration; and the case team's recommendation on the appropriate penalty.

6.214 If the EDC panel thinks it appropriate, it may seek its own legal, technical, economic and/or other relevant expert advice from PSR staff unconnected to the enforcement case team. In exceptional cases where the necessary additional expertise cannot be provided by PSR staff unconnected to the enforcement case team, the Panel Chair may, with our agreement, seek expert advice from external sources.

6.215 It will not usually be appropriate to share with the regulated person that is the subject of EDC proceedings the correspondence and/or communications exchanged between the EDC and members of our staff and/or external persons acting as advisors to it. In particular, legal advice provided to the EDC will be subject to legal privilege. However, wherever legal or other technical analysis carried out by our staff forms part of the case against the recipient, then as much of the substance of that analysis as is necessary for the recipient to understand the case against it will be included within the submissions made by the enforcement case team to the EDC and any Warning or Decision Notice issued during the EDC process.

Making a recommendation to the EDC

6.216 As part of the recommendation to the EDC, we will submit a draft Warning Notice, along with our investigation report containing the enforcement case team's findings and any representations made by the regulated person in response to our preliminary findings. We will also provide the EDC with copies of the relevant evidence that we rely upon in support of our recommendations along with any evidence which we consider may undermine those recommendations, unless there is a good reason not to do so. A good reason might include, for example, where a person has admitted that there has been a compliance failure and does not wish to make representations on our recommendation as to the finding of a compliance failure and the sanction to be imposed (but where the case is unsuitable for settlement). In these circumstances, the EDC should have sufficient evidence before it to decide whether there has been a compliance failure, without needing to review the supporting evidence.

6.217 Where the case team recommends that the EDC should decide to publish details of a compliance failure, and any proposed financial penalty, the draft Warning Notice will set out the wording that the case team proposes should be published.

6.218 When we submit a recommendation to the EDC that there should be a finding of a compliance failure and, where appropriate, that a sanction should be imposed, we will inform the regulated person promptly after we submit our recommendation.

Issuing a Warning Notice

6.219 The first step of the EDC decision-making process is for an EDC panel to consider issuing a Warning Notice against the regulated person (Regulation 7 of the PCIFRs). The purpose of issuing a Warning Notice is to allow the regulated person to make representations on the enforcement action being proposed, before the EDC decides whether there has been a compliance failure and, if so, whether it is appropriate to impose any sanction in respect of that failure.

6.220 Under Regulation 9 of the PCIFRs, we (through the EDC) are required to issue a Warning Notice whenever we propose to impose a sanction on a regulated person. We are not required to issue a Warning Notice where we propose to make a finding that there has been a compliance failure but do not propose to impose a sanction in relation to it. Nonetheless, we will refer the matter to the EDC and recommend that it issues a Warning Notice in both sets of circumstances, allowing a regulated person under investigation an opportunity to make representations before any decision that there has been a compliance failure is made.

6.221 In deciding to issue a Warning Notice, the EDC will:

- settle the wording of the Warning Notice; and
- make any necessary decisions related to the conduct of the decision-making process following the issuing of the Warning Notice – for example, determining the exact period for the recipient of the notice to make representations on it

6.222 Prior to issuing the Warning Notice, the EDC may seek further information and/or clarification of the matters to which relates from the enforcement case team. Communications between the EDC and the enforcement case team exchanged prior to the issuing of the Warning Notice are not disclosable to the regulated person to whom the draft Warning Notice is addressed.

6.223 Any Warning Notice issued will set out the factors the EDC has taken into account when making its decision, and will include sufficient information to enable the regulated person to understand the PSR's case against it.

6.224 If the EDC decides to issue a Warning Notice, we will make arrangements for the notice to be provided to the regulated person(s) promptly and will communicate any other related decisions of the EDC to the person(s) at the same time. Along with the Warning Notice the regulated person(s) will, subject to considerations of confidentiality under section 91 of FSBRA, legal privilege and public interest, also be provided with copies of the relevant evidence submitted by the enforcement case team to the EDC and considered by the EDC when making its decision.

6.225 If the EDC decides not to issue a Warning Notice, on the grounds that the evidence does not support the recommendation as to enforcement action, then we will communicate this, in writing, to the regulated person. In these circumstances, we will consider whether the enforcement case should then be closed or whether the investigation should continue, taking into account the factors set out in our APF.

6.226 There is no statutory requirement under the PCIFRs to publish details of Warning Notices issued by the EDC and no statutory prohibition against doing so. We will consider whether to publish details of Warning Notices on a case-by-case basis, taking into account all of the relevant circumstances, and we may invite comments from the subject of the notice on both the fact of publication and the extent of the details to be published before deciding whether to do so.

6.227 Relevant circumstances would include whether any third party is identified within the notice who may be prejudiced by publication. In such circumstances, we will usually also send a copy, or the relevant part, of the notice to the third party for comments and consider all reasonable comments from them before making a final decision as to publication.

Making representations to the EDC

6.228 From the point at which the Warning Notice has been issued by the EDC the enforcement case team will not engage with the panel during the decision-making process, including at any meeting held with the regulated person, unless specifically asked to do so by the EDC.

6.229 Once the EDC has issued a Warning Notice it has discretion, subject to confidentiality considerations under section 91 of FSBRA, legal privilege and public interest, as to whether to share with the recipient(s) any communications it has with the enforcement case team about the progress of the case, in the interests of fairness.

6.230 Once a Warning Notice has been issued, the regulated person(s) to which it is addressed will have at least three weeks (Regulation 7 of the PCIFRs section 74 of FSBRA) to make representations to the EDC in writing. The Warning Notice will state the time within which representations are to be made and who those representations should be addressed to. The Warning Notice may also indicate the expected format and scope of any representations.

6.231 The content of any written 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 sanction is appropriate. The representations should clearly identify the reasons for contesting the proposed enforcement action, including the factual and legal grounds on which the recipient is relying, and should be as concise as possible. We would expect a regulated person's written submissions to be comprehensive such that it should not be necessary for that person to seek to introduce new material at the oral representations meeting without good reason for doing so.

6.232 The enforcement case team will be given an opportunity to respond to the written representations, and the time frame for providing this response will be determined by the Panel Chair.

6.233 In some circumstances, the Panel Chair may agree to an extension of the time within which the recipient(s) of a Warning Notice can make representations. The recipient(s) of a Warning Notice must apply to the EDC (via the Secretariat) in writing for such an extension, before the expiry of the time granted for making representations, stating why the extension is necessary and, in particular, why it is not possible to respond adequately in the period already provided.

6.234 The Panel Chair will decide whether to grant an application for an extension of time. In considering the application, the Panel Chair may seek the enforcement case team's views and will balance the interests of fairness to the applicant with those of procedural efficiency.

6.235 If the recipient of a Warning Notice does not make representations within the time frame stipulated, and does not seek an extension of time within which to do so, the EDC will proceed on the basis that the matters in the Warning Notice are not disputed and will proceed to consider whether to issue a Decision Notice. In such circumstances, the decision may be taken by the Panel Chair alone, without the need to convene or consult all members of the EDC panel, if the Panel Chair determines this to be appropriate in the circumstances.

6.236 If the recipient(s) of a Warning Notice requests to be able to make oral representations in addition to their written representations, they should inform the Secretariat of this within two weeks of receiving the Warning Notice.

6.237 If the regulated person does not wish to make oral representations, then the EDC panel will proceed to consider whether to issue a Decision Notice based on the Warning Notice issued, any written representations provided by the regulated person and any response provided by the enforcement case team. The panel may invite the enforcement case team to attend its decision-making meeting and may ask questions of, or for an oral response to the regulated person's representations from, the case team at that meeting. In those circumstances, we will usually provide a record of that meeting to the regulated person, and offer it the opportunity to comment on any additional matters (not included in the material submitted to the EDC in advance of the meeting) that may have been raised by the EDC during its course.

6.238 If the regulated person wishes to make oral representations, a date will be set for a meeting with the regulated person at which the relevant EDC panel will hear the oral representations. The regulated person may wish to be legally represented at the meeting (although this is not a requirement of the EDC).

6.239 The Panel Chair will specify the running order and timings of the meeting and will be responsible for ensuring that proceedings run to time. The Panel Chair may also intervene if oral representations do not meaningfully advance the panel's understanding of the written representations. Any panel member may pose questions to the regulated during the meeting – for example, in order to clarify the representations being made. The panel may also ask questions of and/or for an oral response to the regulated person's representations from the case team during the meeting.

6.240 During an oral representation meeting with the regulated person, the panel may invite the regulated person to provide evidence or representations in addition to those they have chosen to present. The panel may also invite other persons to attend and/or otherwise provide information to the EDC if the panel believes they would be able to provide information that it reasonably considers to be relevant to the matters to be decided. Persons invited to provide information to the EDC in this way may decline to do so. However, in line with General Direction 1, regulated persons will be under a duty to cooperate with enforcement proceedings and to be open and honest when dealing with the EDC.

6.241 The EDC may also choose to ask the enforcement case team to issue an IRN under section 81 of FSBRA where it considers that this would be the appropriate course of action to enable the EDC to perform its decision-making function.

6.242 In considering whether to issue a Decision Notice, either following consideration of a regulated person's written representations alone, or following a meeting where oral representations have also been provided by the regulated person, the panel may also ask the recipient and/or the enforcement case team to provide additional information and/or representations in writing after the meeting and stipulate the time frame for this. Where further information and representations are requested from and provided by one party, the panel will usually share these with the other party in the interests of fairness, subject to confidentiality considerations under section 91 of FSBRA, legal privilege and public interest.

Disclosure of underlying evidence

6.243 When the EDC issues a Warning Notice the regulated person will, subject to considerations of confidentiality under section 91 of FSBRA, legal privilege and public interest, be provided with the evidence submitted by the enforcement case team to the EDC and considered by the EDC when making its decision.

6.244 In addition, in each case we will consider whether fairness requires us to disclose any other relevant evidence provided to or obtained by the enforcement case team for the purposes of our investigation and the taking of enforcement action to the recipient(s), including any evidence that we consider may undermine our recommendations to the EDC.

6.245 When considering what to disclose and the manner of disclosure, we will give due consideration to what is required to achieve fairness for the regulated person, while also taking into account considerations of confidentiality, legal privilege and public interest.

6.246 We will keep the need to disclose further evidence under review throughout the EDC process, and will make further disclosure as and when we consider it necessary. For example, following any representations made by the regulated person.

6.247 The EDC may also consider disclosing other relevant evidence, provided to or obtained by the enforcement case team for the purposes of our investigation and the taking of enforcement action, during the course of exercising its decision-making functions. Where the EDC does this, it will consider whether access to the material is necessary for the recipient(s) to understand the case against it, whether it should be disclosed as a matter of fairness, and whether any claims of confidentiality, legal privilege or public interest are made in relation to the material.

The decision of the EDC

6.248 Where written, or oral and written, representations are made following the issuing of the Warning Notice, the EDC panel will take them into account when reaching its decision as to whether there has been a compliance failure and, if so, whether the proposed sanction should be imposed.

6.249 If no representations are made following the issuing of the Warning Notice, the EDC will generally regard the matters set out in the Warning Notice as undisputed.

6.250 Regulation 7 of the PCIFRs requires us (through the EDC) to issue a notice in writing, following the issuing of any Warning Notice and allowing an opportunity for representations to be made, whether the final decision is to impose a sanction or not. Therefore, following any decision by the EDC that there has been a compliance failure, we will make arrangements for a written notice ('the Decision Notice') to be promptly provided to the regulated person(s) to which it is addressed. The Decision Notice will state:

- the nature of the compliance failure; and
- whether a sanction will be imposed and, if so, the details of that sanction

6.251 Where the EDC decides that we should publish details of a compliance failure (including, if the EDC so decides, the details of any financial penalty imposed), the EDC will settle the wording to be used and the Decision Notice will set out the wording that we will publish. We will also inform the subject of the notice of the date on which we intend to publish the details of the compliance failure. When 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.

6.252 Where the EDC decides to impose a financial penalty for a compliance failure, the Decision Notice will state the amount of penalty that we will impose. We will also inform the subject of the notice of the date on which payment of the penalty is due. This will usually be 14 days following the issue of the Decision Notice.

6.253 Where the EDC finds non-compliance, whether or not it also imposes a sanction, we may decide to give a direction (general or specific) for the purpose of remedying the failure or preventing a failure to comply, or continued non-compliance with those requirements.

6.254 If the EDC decides not to issue a Decision Notice, on the grounds that the evidence does not support the proposed action, then we will communicate this to the regulated person. In these circumstances, we will consider whether the enforcement case should then be closed or whether the investigation should continue, taking into account the factors set out in our APF.

Appeals

6.255 Any person affected by a decision of the EDC to impose a sanction can appeal to the CAT (Regulation 9 of the PCIFRs).

6.256 In the case of an appeal of a decision to publish the details of a compliance failure, the CAT must apply the same principles as would be applied by a court on an application for Judicial Review and must either dismiss the appeal, or quash the whole, or part, of the

decision to which the appeal relates (Regulation 10 of the PCIFRs). If the CAT quashes the whole, or part, of a decision, it may refer the matter back to us with a direction to reconsider and make a new decision in accordance with its ruling. The CAT may not direct us to take any action which we would not otherwise have the power to take at the time of making the original decision.

6.257 In the case of an appeal of a decision to impose a financial penalty, the appeal may be made against the imposition of the penalty, the amount of the penalty, or any date by which the penalty, or any part of it, is required to be paid to us (Regulation 11(2) of the PCIFRs). The CAT may either uphold the penalty/date, or set aside the penalty/date, or substitute for the penalty/date a penalty of a different amount or an alternative date, decided by the CAT.

6.258 When the EDC decides to impose a financial penalty for a compliance failure, and an appeal against the decision is made to the CAT, we may not require payment of the penalty before the appeal has been determined (Regulation 11(6) of the PCIFRs).

6.259 When the EDC decides to issue a Decision Notice specifying that it has found a compliance failure to have occurred but has decided not to impose a sanction, then no appeal will lie to the CAT but the decision can be challenged by way of Judicial Review.

Injunctions

6.260 Another way in which we can enforce some of our regulatory decisions, including when the regulated person does not rectify its non-compliance voluntarily following an EDC decision, is by applying to the court for an injunction (Regulation 8 of the PCIFRs).

6.261 Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers of sanction.

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

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

- restraining the conduct, if it is satisfied that there is a reasonable likelihood of a compliance failure or, if a compliance failure has taken place that it is reasonably likely to continue or be repeated
- requiring the participant in a regulated payment system, and anyone else who appears to have been knowingly concerned in the compliance failure, to take steps to remedy it, if it is satisfied that there has been a compliance failure and that steps could be taken to remedy it, or
- restraining the participant in a regulated payment system or the person (as the case may be) from dealing with any assets which it is satisfied the participant or person is reasonably likely to deal with, if it is satisfied that there has been a compliance failure or that the person may have been knowingly concerned in a compliance failure[36]

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

36. The court may also make an order freezing assets under its inherent jurisdiction.

87 Statement of penalty principles

Introduction

Amended text

7.1 This chapter sets out our statement of penalty principles. It covers penalties for non-compliance with ~~Regulation (EU) 2015/571 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (the 'Interchange Fee Regulation' or 'IFR')~~the IFR and directions given by the PSR under the Payment Card Interchange Fee Regulations 2015 (PCIFRs). Under Regulation 6 of the PCIFRs, we may require a regulated person (that is, any person on whom an obligation or prohibition is imposed by any provision of the IFR) to pay a penalty in respect of a compliance failure.[37]

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

- an obligation or prohibition imposed by the IFR, or
- a direction given by the PSR under Regulation 4 of the PCIFRs

7.3 This document contains our statement of the principles which we will apply in determining (a) whether to impose a penalty; and (b) the amount of that penalty. We are required to prepare this statement of principles under Regulation 6(3) of the PCIFRs. Details of the procedures that we will generally apply in relation to our functions under the PCIFRs, including rights of appeal, are set out in the previous chapter.

7.4 We will have regard to this statement of principles:

- in respect of any compliance failure which occurred, or is continuing, on or after 9 December 2015
- in deciding whether to impose a penalty
- in determining the amount of any penalty

7.5 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.

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

Deciding whether to impose a penalty

7.7 We will consider the full circumstances of each individual case when determining whether or not to impose a financial penalty.

37. In this document, references to a 'regulated person' shall have the same meaning as defined in Regulation 2(1) of the PCIFRs.

7.8 Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive, and not all of these factors may be applicable in a particular case. There may also be other factors, not listed here, that are relevant in an individual case. The factors we may consider include:

- the nature, seriousness, duration, frequency and impact of the compliance failure
- the behaviour of the regulated person after the compliance failure has been identified
- the previous compliance history of the regulated person
- what we had said in any guidance or other materials published by us which were current at the time of the behaviour in question

Amended text

- action taken by us or another domestic or international ~~competent~~ authority under the IFR in previous similar cases
- action to be taken by another ~~competent~~ authority: where ~~a competent~~ an authority proposes to take action in respect of the same compliance failure which is under consideration by us, or one similar to it, we will consider whether the other ~~competent~~ authority's action would be adequate to address our concerns, or whether it would be appropriate for us to take our own action
- the extent to which there is uncertainty or complexity in the interpretation of an IFR prohibition or requirement, where the issue has not been the subject of previous guidance or statements by the PSR or another ~~competent~~ authority or by the courts

7.9 Where we impose a financial penalty, our normal practice will be to also publish details of the compliance failure.[38]

7.10 In deciding whether it is appropriate to publish details of a compliance failure (instead of imposing a financial penalty), we will consider all the relevant circumstances of the case. The key factor is the nature and seriousness of the compliance failure, but other considerations include the following non-exhaustive factors:

- whether or not deterrence may be effectively achieved by publishing details of the compliance failure
- if the regulated person has derived an economic benefit (including made a profit or avoided a loss) as a result of the compliance failure, this may be a factor in favour of a financial penalty, on the basis that a regulated person should not be permitted to retain any benefit from its compliance failure
- if the compliance failure is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the compliance failure; other things being equal, the more serious the failure, the more likely we are to impose a financial penalty
- if the regulated person has brought the compliance failure to our attention, this may be a factor in favour of only publishing details of the compliance failure
- if the regulated person has admitted the compliance failure and provided full and immediate cooperation to us, and has taken steps to put in place effective remedial action, this may be a factor in favour of only publishing details of the compliance failure, rather than also imposing a financial penalty
- if the regulated person has a poor compliance history, this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases

38. Under Regulation 5(a) of the PCIFRs, we may publish details of a compliance failure by a regulated person.

Amended text

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

7.11 Where we impose a financial penalty, our normal practice will be to also publish details of that financial penalty under Regulation 5(b) of the PCIFRs. We will only refrain from publishing details of a financial penalty in exceptional circumstances.

Determining the appropriate level of the financial penalty

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

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

7.13 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.

Amended text

- **First element**: The disgorgement of any economic benefits derived directly from the compliance failure (see paragraphs ~~8~~7.17 to ~~8~~7.19).
- **Second element**: The financial penalty, calculated as follows:
  - Step 1: In addition to any disgorgement (see first element), the determination of a figure which reflects the seriousness of the compliance failure and the size and financial position of the regulated person (see paragraphs ~~8~~7.20 to ~~8~~7.21).
  - Step 2: Where appropriate, an adjustment made to the Step 1 figure to take account of any aggravating or mitigating circumstances (see paragraphs ~~8~~7.22 to ~~8~~7.23).
  - Step 3: Where appropriate, an upwards adjustment made to the amount arrived at after Steps 1 and 2, to ensure that the penalty has an appropriate and effective deterrent effect (see paragraph ~~8~~7.24).
  - Step 4: If applicable, one or both of the following factors may be applied to the figure determined following Steps 1, 2 and 3:
    - a settlement discount (see paragraphs ~~8~~7.25 and ~~8~~7.34 to ~~8~~7.40)
    - an adjustment based on any serious financial hardship which the PSR considers payment of the penalty would cause the regulated person, or if the penalty could adversely impact the stability of or confidence in the UK financial system (see paragraphs ~~8~~7.26 and ~~8~~7.27 to ~~8~~7.33)

Amended text

7.14 For the avoidance of doubt, any settlement discount does not apply to disgorgement of any financial benefit derived directly from the compliance failure (under the first element of paragraph ~~8~~7.13).

7.15 We recognise that the overall penalty arrived at pursuant to our framework approach must be appropriate and proportionate to the relevant compliance failure. We may decrease the level of the penalty which would otherwise be determined following Steps 1 and 2 if we consider that it is disproportionately high, having regard to the seriousness, scale and effect of the compliance failure. In determining any deterrence uplift at Step 3, we will also ensure that the overall penalty is not disproportionate.

7.16 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

7.17 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.

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

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

Second element: the penalty

Step 1 – the seriousness of the compliance failure

Amended text

7.20 As noted in paragraphs ~~8~~7.13 to ~~8~~7.14, the penalty is calculated separately from, and in addition to, any disgorgement. We will determine a figure for the penalty that reflects the seriousness of the compliance failure. In many cases, the amount of revenue generated by a regulated person from a particular business activity is indicative of the harm or potential harm that its compliance failure may cause. In such cases the PSR will determine a figure which will be based on a percentage of the annual gross revenues derived by the regulated person from the business activity in the United Kingdom to

which the compliance failure relates.[39] 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.

7.21 The following factors may be relevant to determining the appropriate level of financial penalty:

- **Deterrence**: When determining the appropriate level of penalty, we will have regard to the principal purpose for which we impose sanctions, namely to promote high standards of regulatory behaviour by deterring regulated persons who have committed compliance failures from committing further compliance failures and helping to deter other regulated persons from committing similar compliance failures.
- **The nature of the compliance failure**: The following considerations may in particular be relevant:
  - the nature of the IFR obligation or prohibition imposed on, or the PSR direction given to, the regulated person which was not complied with
  - the duration and/or frequency and/or repetition of the compliance failure
  - the extent to which the regulated person's senior management were aware of the compliance failure, the nature and extent of their involvement in it, and the timing and adequacy of any steps taken to address it
- The impact or potential impact of the compliance failure on the aims of the IFR (taking into account the provisions of the IFR and its explanatory recitals).
- The extent to which the compliance failure was deliberate or reckless.

Step 2 – mitigating and aggravating factors

Amended text

7.22 We may increase or decrease the amount of the financial penalty arrived at after Step 1 (but not including any amount to be disgorged as set out in paragraphs ~~8~~7.17 to ~~8~~7.19) to take into account factors which aggravate or mitigate the compliance failure.

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

- the behaviour of the regulated person in bringing (or failing to bring) quickly, effectively and comprehensively the compliance failure to our attention (or the attention of other ~~competent~~ authorities, where appropriate)
- the degree of cooperation the regulated person showed during the investigation of the compliance failure by us, or any other ~~competent~~ authority working with us, and the impact of this on our ability to conclude our investigation into the compliance failure promptly and efficiently
- any remedial steps the regulated person has taken, or has committed to take, since the compliance failure was identified, how promptly they were or will be taken, and their effectiveness
- whether the regulated person has arranged its resources in such a way as to enable or avoid disgorgement and/or payment of a financial penalty
- whether the regulated person had previously been informed about our concerns in relation to the issue or behaviour in question

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

Amended text

- whether the regulated person had previously undertaken to us or another ~~competent~~ authority not to perform a particular act or not to engage in particular behaviour which relates to the compliance failure, or has undertaken to perform a particular act or to engage in particular behaviour which relates to the compliance failure
- the extent to which the regulated person concerned has complied with our directions or the requests or requirements of another ~~competent~~ authority relating to the issue
- the previous disciplinary record and general compliance history of the regulated person in relation to us or another ~~competent~~ authority
- action taken against the regulated person by another ~~competent~~ authority that is relevant to the compliance failure in question

- whether our guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials
- whether adequate steps have been taken by the regulated person to achieve a clear and unambiguous commitment to compliance with the IFR obligations or prohibitions imposed on it, and with the PSR's directions under the PCIFRs, throughout the organisation (from the top down) – together with appropriate steps relating to regulatory risk identification, risk assessment, risk mitigation and review activities[40]
- 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

7.24 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

Amended text

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

40. 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.

Step 4 – discounts

Amended text

7.25 The PSR and the regulated person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the PSR and the regulated person concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated under the first element, pursuant to paragraphs ~~8~~7.13 to ~~8~~7.14. Details of the PSR's policy on settlement discounts are provided in paragraphs ~~8~~7.34 to ~~8~~7.40.

7.26 Details of our policy on serious financial hardship are provided in paragraphs ~~8~~7.27 to ~~8~~7.33.

Serious financial hardship

7.27 Our starting point is that we consider that it is only in exceptional cases that we would grant a discount to a penalty based on a claim of serious financial hardship for the reasons set out in paragraphs ~~8~~7.28 to ~~8~~7.30.

7.28 We note that many Payment Service Providers (PSPs) authorised by the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) are subject to their own prudential requirements.

7.29 In the context of penalties imposed on a regulated person for a compliance failure, we expect in particular that businesses (such as card system operators) organised as not-for-profit entities should have in place effective arrangements with their owners, shareholders, guarantors or direct participants (as the case may be) to call upon such persons to contribute sufficient funds from time to time in order to enable the business to meet its current and future debts and liabilities as they fall due. This would cover a debt owed to us as a penalty for a compliance failure.

7.30 With respect to any claim that a decision to impose a penalty on a regulated person could adversely impact the stability of, or confidence in, the UK financial system, or where we consider that such a risk exists, we will liaise with the Bank of England before taking such a decision.

Amended text

7.31 Subject to paragraphs ~~8~~7.27 to ~~8~~7.30, our approach to determining penalties is intended to ensure that financial penalties are proportionate to the compliance failure. We recognise that penalties may affect regulated persons differently, and that we should consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of enforcement action serious financial hardship, and/or if this could adversely impact the stability of, or confidence in, the UK financial system. Where a regulated person claims that payment of the penalty proposed by us will cause it serious financial hardship, we will consider whether to reduce the proposed penalty (resulting from Steps 1, 2 and 3) only if:

- the regulated person provides verifiable evidence that payment of the penalty will cause them serious financial hardship and/or could adversely impact the stability of or confidence in the UK financial system
- the regulated person provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by us about its financial position

7.32 The onus is on the regulated person to satisfy us that payment of the penalty will cause it serious financial hardship and/or that this could adversely impact the stability of, or confidence in, the UK financial system.

7.33 There may be cases where, even though the regulated person has satisfied us that payment of the financial penalty would cause serious financial hardship, we consider the compliance failure to be so serious that it is not appropriate to reduce the penalty. We will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether (as applicable):

- an individual who has the ability to exercise control or material influence over the management or operation of the regulated person (Individual Controller):
  - directly derived a financial benefit from the compliance failure and, if so, the extent of that financial benefit
  - that individual acted fraudulently or dishonestly with a view to personal gain
- previous action by us in respect of similar compliance failures has failed to improve industry standards

Amended text

- 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

7.34 As set out in paragraph ~~8~~7.14 and for the avoidance of doubt, any settlement discount does not apply to disgorgement of any financial benefit derived directly from the compliance failure (under the first element of paragraph ~~8~~7.13).

7.35 Regulated persons subject to enforcement action may be prepared to agree the amount of any financial penalty and other conditions which we seek to impose by way of such action. We recognise the benefits of such agreements, in that they offer the potential for securing earlier protection for parties that the IFR is intended to benefit and the saving of costs to the regulated person concerned in contesting the financial penalty and to the PSR itself. The penalty that might otherwise be payable in respect of a compliance failure by the regulated person concerned will therefore be reduced to reflect the timing of any settlement agreement.

7.36 In appropriate cases our approach will be to discuss with the regulated person concerned to agree in principle the amount of a financial penalty having regard to our statement of principles as set out here. This starting figure (resulting from Steps 1, 2 and 3) will take no account of the existence of the settlement discount. Such amount (A) will then be reduced by a percentage of A, according to the stage in the process at which agreement is reached. The maximum percentage reduction shall be no more than 30% of A. The resulting figure (B) will be the amount actually payable by the regulated person concerned in respect of the compliance failure. However, where part of a proposed penalty specifically equates to the disgorgement of any profit accrued, or loss avoided, then the percentage reduction will not apply to that part of the penalty.

7.37 In certain circumstances, the regulated person concerned may consider that it would have been possible to reach a settlement at an earlier stage and argue that it should be entitled to a greater percentage reduction in penalty. It may be, for example, that we no longer wish to pursue enforcement action in respect of all of the acts or omissions previously alleged to give rise to the compliance failure. In such cases, the regulated

person concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from a greater discount. Equally, we may consider that greater openness from the regulated person concerned could have resulted in an earlier settlement.

7.38 Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.

7.39 However, in exceptional cases we may accept that there has been a substantial change in the nature or seriousness of the action being taken against the regulated person concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases, the PSR and the regulated person concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible.

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

Apportionment

7.41 In a case where we are proposing to impose a financial penalty on a regulated person for two or more separate and distinct compliance failures, we will consider whether it is appropriate to identify in the Warning Notice and final Decision Notice how the penalty is apportioned between those separate and distinct areas. Apportionment will not, however, generally be appropriate in other cases.

Payment of financial penalties

7.42 Financial penalties will be paid to the Treasury after deducting our enforcement costs as provided for in Regulation 15(3)(e) of the PCIFRs and Schedule 4, paragraph 10(1) of FSBRA.

Amended text

7.43 Financial penalties must be paid within the period (usually 14 calendar days) that is stated on the final decision notice. Our policy in relation to reducing a penalty because its payment may cause a participant serious financial hardship is set out in paragraphs ~~8~~7.27 to ~~8~~7.33.

7.44 We will consider agreeing to defer the due date for payment of a penalty or accepting payment by instalments where, for example, the regulated person requires a reasonable time to raise funds to enable the totality of the penalty to be paid within a sensible period. Each case will be treated on its facts and extra time will not be given where the regulated person could or should have organised its business affairs in order to allow it to pay within the specified time.

7.45 We will remain vigilant to any attempt by regulated persons to seek to avoid or pass on the financial consequences of any penalty to third parties in circumstances where it would be unlawful or inappropriate to do so.[41]

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

7.46 We have a mechanism under the Financial Services (Banking Reform Act) 2013 (FSBRA) which enables us to require participants in FSBRA regulated payment systems to justify their fees and charges. Section 57 FSBRA enables us to vary any of the terms or fees or charges payable under relevant agreements, including (but not limited to) agreements between a PSP with direct access to a regulated payment system and another person for the purposes of enabling that other person to obtain indirect access to the payment system. It would therefore be open to an Indirect PSP to apply to us under section 57 FSBRA should there be grounds for concern that the fees charged under their agreement with a Direct PSP to obtain indirect access to a payment system, represent an attempt to indemnify the Direct PSP from the financial consequences of penalties, or to otherwise pass on the effects of such penalties to Indirect PSPs.

7.47 In meeting their obligation to pay a penalty, regulated persons must satisfy themselves that their arrangements are consistent with public policy. For example, those regulated persons who are also subject to Chapter 6 of the General Provisions module of the FCA Handbook (GEN)[42] will be reminded that it contains rules prohibiting a firm or member from entering into, arranging, claiming on or making a payment under a contract of insurance that is intended to have, or has, the effect of indemnifying a relevant party against a financial penalty. We expect regulated persons who are subject to GEN to comply with those provisions as relevant for the purposes of financial penalties imposed under Regulation 6 of the PCIFRs. We would typically expect regulated persons who are not subject to GEN to comply with these general principles.

42. ~~See: http://fshandbook.info/FS/html/FCA/GEN/6/1~~ See: https://www.handbook.fca.org.uk/handbook

Appendix 1
The content of applications about disputes

Content of applications

1.1 This appendix sets out guidelines for applicants on the format and content of applications made by payees about disputes with their payment service providers (PSPs) arising under the IFR.

1.2 Applicants are reminded that failing to follow these guidelines may result in the application lacking sufficient information for the PSR to be able to consider it properly.

1.3 If an application does not contain all the necessary information, we will advise you on what else is needed before we will be able to consider the application and allocate an initial enquiry number to the dispute. (Please note that the allocation of an initial enquiry number does not mean that the PSR has decided to open a case or that it is appropriate for us handle the dispute.)

1.4 It would be helpful if applicants could, wherever possible, provide their application and any relevant supporting documents in Word format (ideally) or in searchable PDF format.

1.5 An application should contain the business name, address, telephone number and email address of the applicant, and the contact details of an individual who can discuss the details of the dispute.

1.6 An application should contain the following information:[43]

Section A: Overview of the application

- The nature of the applicant's business and its scale (local, national, international).[44]
- The broad facts of the dispute and its commercial context.
- The IFR prohibitions or obligations which are the subject of the dispute.
- The proposed remedy or remedies for resolution of the dispute.

Section B: Details of the dispute

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

43. Where the applicant considers that any information is not relevant, or believes that any information is not available, they should explain why this is the case.
44. Details of relevant turnover or volumes/values of relevant transactions would also be helpful.

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

Section C: History of commercial negotiations

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

Section D: Remedy sought

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

Section E: Supporting information and evidence

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

Confidentiality

1.7 When submitting an application, applicants should identify information which they consider to be confidential and which, if disclosed to the other party (or parties) to the dispute, or to third parties (as the case may be), would significantly harm the legitimate interests of the party to whom the information relates. Applicants should also explain why they consider the information to be confidential.

1.8 Applicants should provide us with a non-confidential version of their application and any supporting documents in which they redact the information they consider to be confidential.

Form of declaration by an officer of the company

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

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

Signed: [ ]

[ ] Date: [ ]

Appendix 2
Glossary

This table includes the glossary and abbreviations used for the purposes of this consultation paper. Where a term is defined in the IFR we record that definition here.

Term or acronym	Description
acquirer (IFR definition)	A payment service provider contracting with a payee to accept and process card-based payment transactions, which result in a transfer of funds to the payee.
EU IFR (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.
FCA	Financial Conduct Authority.
four-party payment card scheme (IFR definition)	A payment card scheme in which card-based payment transactions are made from the payment account of a payer to the payment account of a payee through the intermediation of the scheme, an issuer (on the payer's side) and an acquirer (on the payee's side).
FSBRA	Financial Services (Banking Reform) Act 2013.
IFR (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, as it applies in the UK, as amended by the Interchange Fee (Amendment) (EU Exit) Regulations 2019.
interchange fee (IFR definition)	A fee paid for each transaction directly or indirectly (i.e. through a third party) between the issuer and the acquirer involved in a card-based payment transaction. The net compensation or other agreed remuneration is considered to be part of the interchange fee.
issuer (IFR definition)	A payment service provider contracting to provide a payer with a payment instrument to initiate and process the payer's card-based payment transactions.
merchant	In a card payment system context, a merchant is the retailer or service provider that accepts card-based payments from cardholders through the services of an acquirer.
merchant service charge (MSC) (IFR definition)	A fee paid by the payee to the acquirer in relation to card-based payment transactions.
participant (in a payment system)	This includes payment system operators, payment service providers and infrastructure providers.

Term or acronym	Description
payment card (IFR definition)	A category of payment instrument that enables the payer to initiate a debit or credit card transaction.
Payment service provider (IFR definition)	'payment service provider' has the meaning given by regulation 2(1) of the Payment Services Regulations 2017. A payment service provider can be an issuer or an acquirer or both.
PCIFRs	The Payment Card Interchange Fee Regulations 2015 (SI 2015/1911), which support the implementation of the IFR in the UK, as amended from time to time.
processing entity (IFR definition)	Any natural or legal person providing payment transaction processing services.
PSR (Payment Systems Regulator)	The Payment Systems Regulator Limited, the body corporate established by the FCA under section 40(1) of FSBRA.
three-party payment card scheme (IFR definition)	A payment card scheme in which the scheme itself provides acquiring and issuing services and card-based payment transactions are made from the payment account of a payer to the payment account of a payee within the scheme. When a three-party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four-party payment card scheme.
the Treasury	Her Majesty's Treasury.

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