

~~TERMS OF REFERENCE AND PROCEDURES OF
THE ENFORCEMENT DECISIONS COMMITTEE
OF THE PAYMENT SYSTEMS REGULATOR~~

1 Terms of reference of the Enforcement Decisions Committee

Background and purpose

~~1. The Board of the Payment Systems Regulator (PSR) has authorised a pool of persons (EDC members) to be appointed to the Enforcement Decisions Committee (EDC) to act as decision-makers in cases where:~~

~~a. the Case Sponsor in an enforcement case considers is a committee of the PSR Board that a compliance failure has occurred, as defined by section 71 of the Financial Services (Banking Reform) Act 2013 (FSBRA), and that the matter is suitable for enforcement action~~

~~b.1.1 the PSR and the party/parties under investigation have not agreed to settle the matter in full, i.e. all or part of the Case Sponsor's recommendation to the EDC is contested authorised to decide whether to issue warning notices and decision notices imposing sanctions in respect of compliance failure.~~

~~2. When referring a matter to the EDC the Case Sponsor may recommend that, as a consequence of the compliance failure, one or more of the following sanctions should be imposed:~~

~~1.2 publication of the details of a compliance failure A compliance failure may be:~~

~~• by a participant in a regulated payment system (to comply with one or more PSR directions (general or specific) given under section 54 of the Financial Services (Banking Reform) Act 2013 (FSBRA)).~~

~~a. • by a participant in a regulated payment system to comply with one or more PSR requirements imposed by the PSR under section 72(4)55 FSBRA).~~

~~b. requiring by a participant in a regulated payment system to comply with one or more PSR requirements to grant access to pay a penalty in respect of a compliance failure (under section 73 FSBRA)~~

~~c. • publication of the details of any penalty a regulated payment system imposed under section 7356 FSBRA (under section 72(3) FSBRA).~~

~~3. The Board of the PSR has also authorised the EDC members to act as decision makers in respect of compliance failures relating to payments legislation under which the PSR has enforcement powers and functions. Information on the sanctions available for these types of compliance failures in the legislation concerned is set out at Annex A.~~

~~4. Individual EDC Panels are to decide, in individual cases submitted to the EDC:~~

~~a. Whether to give a Warning Notice to the party/parties under investigation in respect of a compliance failure and any proposed sanction. In making this decision, the EDC panel will first need to be satisfied that a compliance failure has occurred.~~

~~b. Whether to issue a Decision Notice in respect of the compliance failure and any proposed sanction.~~

~~5. An EDC Panel comprised of three EDC members will be appointed to be the decision-makers in any enforcement case referred to the EDC. EDC Panels are appointed by the Chair of the EDC (or, in his/her absence, by the Deputy Chair). Where appropriate, in light of the specific nature of the case, the Chair will ensure that the EDC Panel includes a lawyer and an economist, when available.~~

- ~~• by a regulated person to comply with an obligation or prohibition imposed by Regulation (EU) 2015/751 of the European Parliament and the Council of 29 April 2015 on interchange fees for card-based payment transactions (the 'Interchange Fee Regulation').~~
- ~~• by a regulated person to comply with a direction given by the PSR under Regulation 4 of the Payment Card Interchange Fee Regulations 2015 (the 'PCIFRs').~~
- ~~• by the operator of a switching service which has been designated as an alternative arrangement to comply with a PSR direction given under Schedule 4, paragraph 8 of the Payment Accounts Regulations 2015 (the 'PARs').~~
- ~~• by the operator of a switching service which has been designated as an alternative arrangement to comply with a PSR notice to provide information given under Schedule 4, paragraph 7 of the PARs, or~~
- ~~• by a regulated person to comply with a qualifying requirement or a PSR direction given under Regulation 125(1) of the Payment Systems Regulations 2017 (the 'PSRs 2017').~~

6.1.3 ~~The purpose of the EDC is to ensure advance the fairness of the PSR's enforcement process operates fairly, so that~~by ensuring, in certain contested cases, separation between those who monitor, and then investigate compliance failures in any individual contested case, are separate from conduct investigations and those who decide whether a compliance failure has occurred and, if so, what sanction, if any, should be imposed. ~~-To this end:~~

~~7. The EDC exercises administrative~~ decision-making powers on behalf of the PSR Board. The EDC is accountable to the Board in respect of its procedures and general arrangements, but this does not affect its independence in relation to its decisions.

~~8. The EDC members and EDC Panels are separate from the PSR's executive management structure. All EDC members, including the Chair and Deputy Chair~~Chairs, are appointed for fixed periods by the Board. The Board may remove an

EDC member only in the event of that member's misconduct or incapacity, or with the member's agreement.

- An EDC Panel will be appointed to be the decision-makers each time the PSR considers that there is a compliance failure and that the compliance failure should be sanctioned. This means that there may be more than one EDC Panel in place at any one time.
- 9. The Decision-Making Committees Secretariat (“the Secretariat”) in the FCA’s Corporate Governance Division shall provide administrative services to the EDC, EDC members and EDC Panels [in accordance with the Protocol¹].
- The EDC Panels will usually receive legal, technical, economic and/or other relevant expert advice from PSR staff unconnected to the enforcement case team. In exceptionalis not involved in deciding which cases to investigate and only becomes involved in a case where the necessary additional expertise cannot be provided relevant division of the PSR considers that a compliance failure has occurred and recommends imposing a sanction.

Functions of the EDC Panels

1.4 The functions of individual EDC Panels are:

- to consider whether the material on which a recommendation is based is adequate to support it and whether the action recommended is appropriate in all circumstances
- to consider representations made (whether written, oral or both) and any comments made by PSR staff, FCA staff unconnected to the enforcement (where appropriate) or others in respect of those representations
- to decide whether to give warning notices setting out the suspected compliance failure and, where a sanction is proposed, the nature of the proposed sanction, which can consist of a financial penalty in respect of the suspected compliance failure, publication of the details of the suspected compliance failure or both
- to decide whether to issue decision notices finding a compliance failure and, where a sanction is imposed, the nature of the sanction, which can consist of a financial penalty in respect of the compliance failure, publication of the details of the compliance failure or both
- where a financial penalty is imposed, to decide on the appropriate amount of any penalty, having regard to the applicable penalty principles in force at the time when the compliance failure occurred
- to take decisions associated with the matters which are within its scope

1.5 EDC Panels do not take any of the following decisions:

- closing a case team, on grounds of administrative priority

¹ Protocol for the Secretariat's provision of services to the Payment Systems Regulator's Enforcement Decisions Committee.

- settling a case²
- applying to court for an injunction in accordance with section 75 of FSBRA

Operation of the EDC

1.6 The EDC will operate in accordance with the PSR's published guidance documents in particular, as applicable:

- the PSR's Objectives Guidance,
- the PSR's Powers and Procedures Guidance (Chapter 5),
- the Guidance on the PSR's approach to monitoring and enforcing compliance with the Interchange Fee Regulation (Chapter 6),
- the Guidance on the PSR's approach as a competent authority for designation of alternative switching schemes under the Payment Account Regulations 2015 (Chapter 7),
- the PSR's approach to monitoring and enforcing the revised Payment Services Directive (PSD2) (Annex 1),
- the Revised Penalty Statement, and/or
- any other relevant published guidance (together the 'PSR Published Guidance').

1.7 The PSR Published Guidance provides details in respect of the following matters:

- Appointment of EDC panels, EDC meetings and composition of panels
- the EDC's general procedure
- the EDC's procedure in relation to warning notices
- the EDC's procedure in relation to representations
- the EDC's procedure in relation to decision notices.

~~10-1.8~~ Where they are not specified in published guidance, the EDC will conduct itself in the manner and may adopt such procedures as the Panel Chair may, with the PSR's agreement, seek expert advice from external sources considers suitable and appropriate to enable the EDC to determine fairly and expeditiously any matters which EDC Panels are considering.

Duties of the EDC members

² Settlement is the process whereby we reach an agreement with a regulated party on the issues in an enforcement case, specifically that there has been one or more compliance failures and the appropriate sanction, if any. An EDC member may act as a settlement decision where they do, they will not be involved in any aspect of the case considered at a later stage by an EDC panel. The process is set out in the PSR's Powers and Procedures Guidance, the Guidance on the PSR's approach to monitoring and enforcing compliance with the Interchange Fee Regulation, the Guidance on the PSR's approach as a competent authority for designation of alternative switching schemes under the Payment Account Regulations 2015 and Annex 1 to the PSR's approach to monitoring and enforcing the revised Payment Services Directive (PSD2).

~~11.~~1.9 Each EDC member ~~has agreed to shall~~ comply with the FCA and PSR Code of Conduct for Decision-Making Committee Members Code of Conduct members ("the Code of Conduct"), including its confidentiality obligations and conflicts of interest principles and process. The Secretariat will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

~~12.~~1.10 Each EDC member must make ~~themselves~~him or herself reasonably available to attend training relevant to their role as an EDC member regardless of whether they are currently sitting on an EDC Panel.

~~13.~~1.11 EDC members can be a member of more than one EDC Panel at any one time.

~~14.~~ EDC Panels do not have a role in enforcement cases before the Case Sponsor makes a referral to the EDC. However, an EDC member may be appointed to act as a Settlement Decision Maker (SDM) in an enforcement case where the Case Sponsor has determined that settlement may be an appropriate way of reaching an enforcement decision.

~~15.~~ 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 of the case to the EDC by the Case Sponsor (should full settlement not be achieved).

~~16.~~ The Chair, supported by the Secretariat, will act as the main liaison point for the Case Sponsor and the enforcement case team throughout the decision-making process, or he/she may designate another member of the EDC Panel in any particular case to act as the main liaison point for the case team.

1.12 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 case team. In cases where the necessary additional expertise cannot be provided by PSR staff unconnected to the case team, the Panel Chair may, with the agreement of the PSR, seek expert advice from external sources.

1.13 Each member of the EDC Panel will have a vote in relation to the matters before it, including the Panel Chair. EDC Panels will make decisions by simple majority, but a decision need not indicate whether it was taken unanimously. In the event of a tie, the Chair shall have a casting vote.

Notice of meetings

1.14 The Secretariat will make the arrangements for each EDC and EDC Panel meeting, including confirming the availability of each EDC member.

Minutes of meetings

~~17.~~ The EDC is a committee of the Board and, in discharging their functions, EDC members must have regard to:

- a. ~~The PSR's statutory general duties, including its statutory payment system objectives Secretariat will make and regulatory principles³ (where the matter before the EDC concerns a compliance failure relating to FSBRA and the PSR's regulatory requirements made thereunder).~~
- b. ~~The PSR's functions or duties in connection with or arising under EU payments legislation as transposed, implemented or otherwise enacted in the UK (where the matter before the EDC concerns a compliance failure relating to such EU payments legislation)⁴.~~
- c. ~~As retain appropriate the PSR's published guidance documents, including in particular (in connection with FSBRA) the Powers & Procedures Guidance (PPG), the Penalties Guidance, the Objectives Guidance, and/or any other relevant published guidance, including guidance on the PSR's functions in relation to EU payments legislation (as appropriate).~~
- d. ~~As appropriate, the PSR's published Policy Statements; any general or specific directions issued under section 54 FSBRA; any generally applicable or specific requirements issued under section 55 FSBRA; any orders issued requiring the granting of new access under section 56 FSBRA; any variations of existing access agreements, fees or charges required under section 57 FSBRA; any disposal(s) of interests in payment systems operators and/or infrastructure providers required under section 58 FSBRA; the text of any payments legislation under which the PSR has enforcement powers and functions (see further Annex A).~~
- e. ~~Any prior compliance failures relating to FSBRA which have been sanctioned through the imposition of a penalty under section 73 FSBRA and/or through the publication of details of the compliance failure and/or penalty imposed under section 72(1) and/or (2) FSBRA; and/or any prior compliance failures relating to payments legislation under which the PSR has enforcement powers and functions, which have been sanctioned through the imposition of sanctions under the relevant legislation assigning those sanctioning powers to the PSR (see further Annex A).~~

Conflicts of interest

- 18. ~~On appointment records of the meetings held by the Board as an EDC member, EDC members must disclose to the Secretariat and the Chair any information (including interests and/or relationships) in relation to conflicts of interest and keep the Secretariat and the Chair informed of any relevant developments (including further interests they acquire) after their appointment as an EDC member.~~
- 19. ~~If an EDC member has a potential conflict of interest in any matter in which she/he is asked to participate as part of an EDC Panel, she/he must disclose the conflict to the Secretariat and the Chair (including interests and/or relationships). The Chair will decide whether it is appropriate for that EDC member to act on the EDC Panel for the matter in question.~~

³ Sections 49-53 FSBRA

⁴ See further Annex A of these Terms of Reference.

~~20. Each member of the EDC shall comply with the rules and procedures laid down in the Code of Conduct in relation to conflicts of interest.~~

~~21. The Secretariat will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.~~

Functions and Operation of the EDC Panels

~~22.1.15~~ In dealing with matters referred to them, and of the decisions taken by EDC Panels are responsible for deciding the following.

~~a. Where a regulated party disputes the entirety of the proposed enforcement action:~~

- ~~• whether there has been a compliance failure~~
- ~~• whether to impose a sanction for any compliance failure and, if so, what sanction should be imposed~~

~~b. In the event of a partial settlement agreement being reached, in which a regulated party 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.~~

~~23. Decisions in relation to the issuing of a warning notice and/or of a decision notice require at least two members of an EDC Panel to be in agreement.~~

~~24. The EDC Panels will operate in accordance with chapter 5 of the PPG or the equivalent chapter in the PSR's other published guidance on the PSR's functions in relation to UK payments legislation, as appropriate. Otherwise the EDC will conduct itself in the manner and may adopt such procedures as the Chair considers suitable and appropriate to enable the EDC to determine fairly and expeditiously any matters which EDC Panels are considering.~~

~~25. An EDC Panel meeting can be held in person or by teleconference, videoconference or other similar facility which provides the necessary level of privacy. Decisions in relation to the issuing of a Warning Notice and/or a Decision Notice may also be taken in writing including by email or other electronic means.~~

Timescales

~~26. The EDC's target timeframe for issuing a Decision Notice from the point of receiving a referral from the PSR enforcement case team is six months. Where a case is specifically complex or involves issues that mean that a six month timeframe is likely to be insufficient then the EDC and the PSR's Head of Supervision and Compliance Monitoring will agree that an extended timeframe should be set. The extent to which the timeframe is extended will depend on the specific circumstances of the case.~~

~~27. Within the overall 26 weeks' timeframe, the EDC will adopt the following interim target dates:~~

~~a. The time between referral and holding a Warning Notice meeting will typically be three weeks.~~

- ~~b. The time between holding a Warning Notice meeting and issuing the Warning Notice will typically be within five weeks.~~
 - ~~c. Where the EDC Panel decides not to issue a Warning Notice, the reasons for that decision (recorded by the EDC in an internal Record of Decision) will typically be provided to the PSR enforcement case team within five weeks of the Warning Notice meeting.~~
 - ~~d. The time between issuing a Warning Notice and provision of written representations by the party subject to the Warning Notice will be three weeks unless an extension is granted by the EDC Chair.~~
 - ~~e. [The time between the EDC and the PSR enforcement team receiving the representations and the case team responding will typically be two weeks unless the EDC Chair sets a different timeframe.] The time between issuing the Warning Notice and holding a decision meeting (whether involving oral representations or not) will typically be no more than 12 weeks. The time between the Decision Notice meeting and issuing a Decision Notice will typically be within six weeks. Where the EDC Panel decides not to issue a Decision Notice, the reasons for that decision (recorded by the EDC in an internal Record of Decision) will typically be provided to the PSR enforcement case team within six weeks of the decision meeting.~~
- ~~28. A Feedback Meeting will be held between the EDC Panel and the PSR enforcement case team typically within four weeks of either a Decision Notice being given, or a Record of Decision being provided.~~

Resources

- ~~29.1.16~~ The EDC shall have access to sufficient resources in order to carry out its duties including, in particular, the Secretariat.

Reporting

- ~~30. The Chair of the EDC will report on an annual basis to the PSR Board.~~

ANNEX A: Payments legislation for which the PSR is a competent authority

The Board of the PSR has authorised EDC members appointed to the EDC to act as decision-makers in any case of compliance failures arising in relation to the following EU payments legislation for which the PSR is a competent authority and where the following sanctions are available to the PSR.

Legislative instrument(s)	Nature of the compliance failure(s) relevant to the EDC	Nature of the sanction(s) available to the PSR where the EDC acts as decision-maker
The Payment Card Interchange Fee Regulations 2015 (the ' PCIFRs '), which designate the PSR as the competent authority for Regulation (EU) 2015/751 of the European Parliament and the Council of 29 April 2015 on interchange fees for card-based payment transactions (the ' Interchange Fee Regulation ' or ' IFR ')	Where a regulated person (that is, any persons on whom an obligation or prohibition is imposed by any provision of the IFR): <ul style="list-style-type: none"> • fails to comply with an obligation or prohibition imposed by the IFR; or • fails to comply with a direction given by the PSR under Regulation 4 of the PCIFRs. 	<ul style="list-style-type: none"> • The publication of details of the compliance failure (under Regulation 5 of the PCIFRs); • the imposition of a financial penalty for the compliance failure (under Regulation 6 of the PCIFRs); and • the publication of details of any financial penalty (under Regulation 5(b) of the PCIFRs).
Part 3 and Schedule 4 of the Payment Account Regulations 2015 (the ' PARs '), which designate the PSR as the competent authority for the designation of payment account switching services as 'alternative arrangements', further to Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (the ' Payment Accounts Directive ' or ' PAD ')	Where the operator of a switching service which has been designated as an alternative arrangement: <ul style="list-style-type: none"> • fails to comply with a PSR direction given under Schedule 4, paragraph 8 of the PARs for the purpose of ensuring that the switching service continues to meet the requirements of Regulation 15(2) of the PARs; or • fails to comply with a PSR notice to provide information given under Schedule 4, paragraph 7 of the PARs. 	<ul style="list-style-type: none"> • The imposition of financial penalties under schedule 4, paragraph 9 of the PARs.
Part 10 of the Payment Services Regulations 2017 (the ' PSRs 2017 '), designates the PSR as the competent authority in relation to the provision of	Where the regulated person fails to: <ul style="list-style-type: none"> • Comply with the requirements of regulations 61, 103, 104 	<ul style="list-style-type: none"> • The publication of details of the compliance failure (under Regulation 126(a) of the PSRs 2017);

information on ATM withdrawals (Regulation 61); direct access to payment systems (Regulation 103); indirect access to payment systems (Regulation 104) and access to bank accounts (Regulation 105 ⁵), further to Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (the 'revised Payment Services Directive' or 'PSD2')	and/or 105 of the PSRs 2017; or • Comply with a direction given under Regulation 125 of the PSRs 2017	<ul style="list-style-type: none"> • the imposition of a financial penalty for the compliance failure (under Regulation 127 of the PSRs 2017); and • the publication of details of the financial penalty (under Regulation 126(b) of the PSRs 2017).
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⁵ Both the PSR and the FCA have been appointed as competent authorities for monitoring and enforcing compliance with Regulation 105 (Access to bank accounts)