

Regulatory tools



This Supporting Paper supports the PSR's Consultation Paper '*A new regulatory framework for payment systems in the UK*'. It specifically outlines our approach to the regulatory tools and framework we are proposing that form part of our broader overall framework for the regulation of UK payment systems.

As with all of our proposals in this consultation, they have been designed to further our objectives of promoting competition, innovation and the interests of service-users. This Supporting Paper is designed for those stakeholders who want a more detailed understanding of our proposed approach.

We are asking for comments on this Consultation Paper by 5pm, Monday, 12 January 2015.

You can send your comments and responses to our consultation questions by email to PSRconsultations@psr.org.uk.

You can also respond in writing to the address below (although we ask all respondents to also provide electronic Word and PDF versions of their response).

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Consultation response team
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London E14 5HS

We will publish all non-confidential responses to our Consultation Paper along with our final Policy Statement.

We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. Stakeholders who wish to claim commercial confidentiality over specific items in their response should make sure to fill in the cover sheet accordingly, and to identify those specific items which they claim to be commercially confidential by **highlighting them in yellow**.

We may nonetheless be required to disclose all responses which include information marked as confidential, in order to meet legal obligations, in particular if we are asked to disclose a confidential response under the Freedom of Information Act 2000. We will endeavour to consult you in handling such a request. Any decision we make not to disclose a response is reviewable by the Information Commissioner and the Information Rights Tribunal.

You can download this Consultation Paper from our website: www.psr.org.uk

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A.

Introduction

- 6.1 This Supporting Paper provides a high-level description of our regulatory tools.
- 6.2 This Supporting Paper also sets out our proposed Principles, which underpin our package of regulatory measures, and which set some high-level behavioural standards for industry participants.
- 6.3 Our regulatory tools support our package of policy proposals in relation to payments industry strategy, governance and control of payment systems, and access to payment systems. As set out in *Supporting Paper 1: The PSR and UK payments industry*, our statutory powers are the tools we can use to advance our objectives and ensure the organisations we regulate do what we expect them to do. We have developed processes which set out how we will exercise our powers and how industry participants and service-users can interact with us. We are also providing guidance on some topics.
- 6.4 We will take action, among others, if we see that:
- the solutions proposed by industry do not take into account the criteria or measures we have set, or do not satisfactorily address our concerns
 - industry or individual participants are not implementing directions effectively or on time, or are acting in a way which could pre-empt or run counter to our directions
 - progress against the priorities we have set or expect from industry is too slow
 - the outcomes we expect are not being delivered
- 6.5 This Supporting Paper is divided into ten parts and five Annexes:
- **Part A:** this introduction
 - **Part B:** the PSR Principles
 - **Part C:** our Objectives Guidance
 - **Part D:** our Administrative Priority Framework
 - **Part E:** our Powers & Procedures Guide
 - **Part F:** our dispute resolution and applications procedures
 - **Part G:** our Super-Complaints Guidance
 - **Part H:** our Penalties Guidance

- **Part I:** our market reviews
- **Part J:** our concurrent competition powers

and

- **Annex 1:** Draft Objectives Guidance
- **Annex 2:** Draft Administrative Priority Framework
- **Annex 3:** Draft Powers & Procedures Guide
- **Annex 4:** Draft Super-Complaints Guidance
- **Annex 5:** Draft Penalties Guidance

6.6 Expressions and acronyms we use are defined as appropriate in this Supporting Paper and in our *Glossary*. Where expressions are capitalised in the text (e.g. 'Operator'), a more detailed definition is included in our *Glossary*, which is included as *Annex 1* to our Consultation Paper.

B.

The PSR Principles

The rationale for our approach to PSR Principles

- 6.7 We propose to issue a number of general, legally-binding Principles to apply to participants in designated payment systems. Our aim is to formulate succinct high-level principles stating the fundamental obligations of these participants, which are part of our overall package of regulatory measures (and which underpin our other proposals on access and governance).
- 6.8 Our intention is to set out in the PSR Principles some behavioural standards to which we expect participants to adhere. Breaching a Principle will constitute a regulatory compliance failure (see **Part E** below and *Annex 3: Draft Powers & Procedures Guide* to this Supporting Paper). In determining whether a Principle has been breached, we will look at what is the appropriate conduct expected under the Principle in question.
- 6.9 The main considerations that have guided us in formulating the draft Principles are as follows:
- **Our statutory objectives:** the content of the draft Principles reflects our statutory objectives of promoting competition, innovation and the interests of service-users, under the Financial Services (Banking Reform) Act 2013 (FSBRA). We have also had regard to the importance of maintaining the stability of, and confidence in, the UK financial system, and the importance of payment systems in relation to the performance of functions by the Bank of England (the Bank), as well as our regulatory principles under FSBRA.
 - **Practical experience:** we have used the existing *Principles for Financial Market Infrastructures*, issued by CPSS-IOSCO (CPSS-IOSCO Principles), the ECB's '*Oversight Framework for Card Payment Schemes*' and the Financial Conduct Authority's (FCA) Principles as inspiration, and have crafted our own Principles which we believe suitably reflect the characteristics of the payment systems industry and its participants, taking into account what is appropriate and proportionate for our specific industry circumstances.
 - **Durability and flexibility:** we believe that the Principles should be formulated at a level of generality which will enable them to be durable without amendment (unless there is a major change in the legislative or industry environment), so they are written in a way which should allow them to take changing circumstances and practices into account.
 - **International models:** we have also aimed to ensure that the Principles are in harmony with relevant international standards – in particular those of the ECB and the CPSS-IOSCO Principles.
- 6.10 Two of our proposed Principles will apply to all participants, while the third one will apply to certain categories of participants (Operators and Central Infrastructure Providers), to reflect what we consider is appropriate and proportionate. Operator refers to the Operators of the

payment systems designated by Treasury.¹ Central Infrastructure Provider refers to a provider of a package of systems and services, comprising hardware and software, provided under contract to an Operator for the purpose of operating the relevant payment system, including the processing of payment transactions and funds transfers.

- 6.11 In all cases, the practical implications of the Principles for participants' conduct, organisation and resources will depend on the size of the participant and the business it undertakes. The Principles are deliberately drafted in such a way as to enable each participant to comply with them by taking into account its particular circumstances. We expect that many participants will already be organising and conducting themselves in ways which are compliant with our Principles.
- 6.12 Although the Principles will be binding on participants in their own right, they will also need to be viewed in the wider context of other directions, requirements and guidance we issue. We do not expect the Principles to function in a vacuum, but in harmony with the remainder of the regulatory framework within which participants must operate, and to underpin our package of proposals, including the other directions and requirements we may impose.

Our proposed Principles

- 6.13 These Principles will apply to participants' organisation, conduct and activities in relation to UK payment systems and services provided by payment systems.
- 6.14 Our proposed Principles are as follows.
- 6.15 **Principle 1: Relations with regulators:** *'A participant must deal with its regulators in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant of which the PSR would reasonably expect notice.'*
- 6.16 The Rationale for our proposed Principle 1 is as follows:
- We consider that all participants in payment systems should deal with their regulators in an open and cooperative way. To do otherwise will damage their credibility in our eyes, and may lead us to take more prescriptive action. We also want to ensure that a participant does not 'forum shop' among its regulators, and acts in an open and cooperative way with all of its regulators, not just some of them.
 - We expect a 'no surprises' culture, which means we expect industry participants to engage meaningfully with us, and to proactively keep us informed of anticipated developments before they are implemented – instead of us having to impose prescriptive reporting requirements from the outset.
 - The requirement to be cooperative (in dealing with regulators) includes expecting industry participants to cooperate with us by responding fully, accurately and promptly to any information requests we issue.
- 6.17 **Principle 2: Compliance:** *'A participant must observe proper standards of conduct and must refrain from activity which that participant should reasonably have expected to restrict or prevent another participant from complying with its regulatory obligations in relation to payment systems and services provided by payment systems.'*
- 6.18 The Rationale for our proposed Principle 2 is as follows:

¹ The Treasury's consultation on designation is ongoing and currently includes Bacs, C&CC, CHAPS, FPS, LINK, NICC, MasterCard and Visa.

- We expect industry participants to behave appropriately, and to be responsible for their own behaviour. Observing proper standards of conduct, in this context, includes at a minimum complying in a prompt and fulsome manner with any directions or requirements we issue, and engaging constructively with us. Conduct which would not meet the 'proper standard' would include, for example, unjustified delays in compliance, or attempts to pre-empt or otherwise take action which would run counter to the letter or spirit and intention of our directions.
- Given the significant links and relationships that exist both horizontally and vertically within the payments industry, we recognise that there is the potential for the conduct of one participant to interfere in the affairs of another participant, and we consider that such interference would also fail to meet proper standards of conduct.
- We consider that it is appropriate to require participants to refrain from activity which they should reasonably have expected to restrict or prevent another participant from complying with its regulatory obligations. This could happen, for example, if one participant has an interest or shareholding in another participant, and uses it to influence the behaviour of that participant in such a way that it cannot comply with its regulatory obligations.
- The Principle does not focus on conduct that might have an unforeseeable effect on another person, rather, it focuses on conduct where a participant knew, should have known, or is otherwise legally attributed with the knowledge, that that conduct would likely have a prohibited effect.

6.19 **Principle 3: Financial prudence:** *'An Operator or Infrastructure Provider must ensure it has, or has access to, adequate financial resources to ensure that it is able to carry out its functions and activities in relation to the regulated payment system it operates in the case of an Operator, or the regulated payment system or systems whose central infrastructure it provides or controls in the case of an Infrastructure Provider, including resources to:*

- *cover potential general business losses and debts as they fall due*
- *continue operations and services as a going concern if those losses or debts materialise, and*
- *comply with its regulatory obligations in relation to payment systems and services provided by payment systems.'*

6.20 The Rationale for our proposed Principle 3 is as follows:

- Given the large number of PSPs and service-users who depend on how infrastructure is provided, controlled, developed and operated, and the significance of Operators and Central Infrastructure Providers in ensuring the stability of, and confidence in, the UK financial system, we consider that it is critical that Operators and Central Infrastructure Providers properly identify, monitor and manage business risk.
- We consider that this includes ensuring that Operators and Central Infrastructure Providers manage business risks appropriately, including financial risk, to ensure that they are able to carry out their functions and activities. Managing financial risk includes being able to pay penalties, should we impose any against an Operator or Central Infrastructure Provider as a result of a compliance failure. Among others, we do not want a situation where an Operator or Central Infrastructure Provider manages its business poorly and then uses its poor management, and the resulting precarious financial situation it is in, as an excuse for not being able to comply with our regulatory requirements.

Our proposed Principles are consistent with our objectives and duties

- 6.21 We anticipate that our proposed Principles will advance our objectives by setting succinct high-level principles stating the fundamental behavioural obligations of participants. Our proposed Principles will also underpin and support our specific policy proposals on access and governance. In particular:
- Our proposed Principle 1 on Relations with regulators sets the whole tone for our relationship with our regulated entities and vice-versa, and underpins our ‘no surprises’ culture. Having a principles-based approach is appropriate and proportionate, and avoids the risk of us being overly prescriptive.
 - Our proposed Principle 2 on Compliance focuses on each participant being responsible for its own behaviour and refraining from interfering with the ability of another participant to comply with its regulatory obligations.
 - Our proposed Principle 3 on Financial prudence focuses more specifically on the significance of Operators and Central Infrastructure Providers in relation to the stability of, and confidence in, the UK financial system, and the reliance that a large number of PSPs and service-users place on them and on their ability to properly identify, monitor and manage risk.
- 6.22 We consider that these Principles support our competition, innovation and service-user objectives. Payment systems form a vital part of the UK’s financial systems supporting the broader UK economy and service-users. Our vision is to have world class payment systems. To achieve this, we need, among other things, financially sound payment systems, which are used and operated by compliant participants, who interact in an open and cooperative way with their regulators. If industry participants do not adhere to the behavioural standards we are setting, our ability to advance one or more of our objectives may be jeopardised. In particular, our proposed Principles will ensure that industry participants are accountable to us and, indirectly, to their service-users, for their behaviour.
- 6.23 With regard to Principle 1 on Relations with regulators, we want participants to engage with us in an open and cooperative way. We do not expect participants to notify us of the minutiae of running their business, we rely on them to exercise sound judgement in determining what are the developments or changes that we would reasonably expect notice of given our objectives and the concerns we are looking to address (as set out in the Consultation Paper and Supporting Papers).²
- 6.24 With regards to Principle 2 on Compliance, we note that many participants are already subject to similar rules.
- Certain PSPs are already subject to a rule on observing proper standards of market conduct under the FCA (and the Prudential Regulation Authority (PRA)) Principles,³ and Payment Institutions (PIs) are subject to similar expectations under Regulation 6 PSRs 2009.
 - The Bank already expects compliance with legal requirements of Bacs, CHAPS and FPS under the CPSS-IOSCO Principles.
 - Card payment systems are already subject to a general compliance requirement under the ECB’s ‘*Oversight Framework for Card Payment Schemes*’, (for example the guidance under Standard 1). Consumer card instruments are also subject to the Consumer Credit regime of the FCA, where compliance with a range of legal requirements requires Card Operators

² If in doubt, participants can contact us and ask us for guidance on what we would typically expect to be given notice of.

³ A similar principle is adopted by the FCA and PRA (Principle 11: “A firm must deal with its regulators in an open and cooperative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.”). See <http://fshandbook.info/FS/html/FCA/PRIN/2/1> and PRA Handbook, APER 2.1B The Statements of Principle <http://fshandbook.info/FS/html/PRA/APER/2/1B>

to reflect legislative changes in their rules in order to facilitate legal compliance of their Affiliates.

6.25 With respect to Principle 3 on Financial prudence, we note that many Operators are already subject to similar rules.

- The CPSS-IOSCO Principles contain similar recommendations. Bacs, CHAPS and FPS must already have regard to these, and C&CC have told us that they also take these into account. In particular, our proposed Principle aligns with CPSS-IOSCO Principle 15 on General Business Risk, which requires a financial market infrastructure to *'identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialise. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services'*.
- Card payment systems are similarly already subject to requirements to manage business and financial risks and have effective governance arrangements under the ECB's *'Oversight Framework for Card Payment Schemes'*, under Standards 3, 4 and 5.
- Central Infrastructure Providers are not currently subject to such clear requirements on managing business and financial risk, but given how critical they are in terms of underpinning the UK's payment systems, we consider that our Principle on Financial prudence should apply to them too.

6.26 We have had regard to our regulatory principles when considering and developing our proposed Principles. In particular:

- We consider that it is appropriate, economic and efficient for us to set high-level behavioural standards for participants, rather than issuing prescriptive rules. We believe that this approach represents an efficient allocation of our resources. We consider that it is for industry participants to be responsible for their own behaviour and to manage risk appropriately, as they are best placed to ensure that they have open and cooperative Relations with regulators, are compliant, and manage their risks appropriately.
- We consider that our proposed Principles are consistent with the principle of proportionality. We consider that the proposed Principles are the least onerous approach to ensuring appropriate behavioural standards are adhered to, as compared with us issuing prescriptive rules. We consider that the costs of compliance with our proposed Principles are not disproportionate to the benefits in general terms which can be expected to result from our proposed Principles, especially as we expect that many participants will already be organising and conducting themselves in ways which are compliant with our Principles.
- We consider that our proposed Principles are consistent with the general principle that those who use services provided by payment systems should take responsibility for their decisions, and that the senior management of regulated participants are responsible for ensuring compliance with the requirements we set. This is particularly the case for our Principles on Compliance and Relations with regulators, but also our Principle on Financial prudence.
- As noted earlier, we consider that Operators and Central Infrastructure Providers play a significant and critical role in ensuring the stability of, and confidence in, the UK financial system, given the reliance that a large number of PSPs and service-users place on them. We therefore consider that our Principle on Financial prudence, which requires Operators and Central Infrastructure Providers to manage business and financial risk, will support sustainable growth in the UK economy in the medium and long term.
- We recognise that the businesses we regulate differ in nature and in their objectives, which should, where appropriate, be reflected in how we exercise our functions. That is why we

consider that our Principles are an appropriate approach, as they enable each participant to comply with them by taking into account its particular circumstances, including its size and the business it undertakes.

- By setting out the behavioural standards we expect industry participants to adhere to through our proposed Principles, we are exercising our functions in a transparent way. We consider that our proposed Principles are clear, understandable to, and accessible by, all existing and prospective industry participants and other service-users.

6.27 As we develop our proposed directions, we have had, and will continue to have, regard to how our proposals could impact on the Bank's functions⁴ and objectives, and the stability of, or confidence in, the UK financial system. We will continue to work closely with the Bank to assess these impacts and ensure there are no adverse impacts. We have discussed our proposed Principles with the Bank (as well as with the PRA and FCA).

6.28 A copy of our proposed direction is set out in *Annex 2* to the Consultation Paper.

SP6-Q1: Do you agree with our three proposed high-level PSR Principles on Relations with regulators, Compliance and Financial prudence? If you disagree with our proposed approach, please give your reasons.

SP6-Q2: Do you agree with our proposed approach that our PSR Principles on Relations with regulators and on Compliance should apply to all participants? If you disagree with our proposed approach, please give your reasons for disagreeing, and explain which categories of participants you consider they should apply to and why.

SP6-Q3: Do you agree with our proposed approach that our PSR Principle on Financial prudence should apply to Operators and Central Infrastructure Providers? If you disagree with our proposed approach, please give your reasons for disagreeing, and explain which categories of participants you consider it should apply to and why.

Possible additional PSR Principles

6.29 We have also considered possible additional PSR Principles, which are more closely aligned to some of the FCA Principles. These are set out below.

6.30 We would welcome stakeholder feedback on whether we should consider adopting some or all of these possible PSR Principles in addition to the main three PSR Principles proposed above.

⁴ In its capacity as a monetary authority, including the Bank's other relevant functions such as settlement service provider, provider of infrastructure, security trustee, Direct PSP for some payment systems, and resolution authority.

Possible additional PSR Principles	
<p>Integrity (our version of FCA Principle 1)</p>	<p>A Direct PSP, Operator or Central Infrastructure Provider must conduct its business with integrity.</p>
<p>Skill, care & diligence (our version of FCA Principle 2)</p>	<p>A Direct PSP, Operator or Central Infrastructure Provider must conduct its business with due skill, care and diligence.</p>
<p>Management & control (our version of FCA Principle 3 & CPSS-IOSCO Principle 2)</p>	<p>An Operator or Central Infrastructure Provider must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.</p>
<p>Governance (based on CPSS-IOSCO Principle 2)</p>	<p>An Operator or Central Infrastructure Provider must have governance arrangements that are effective, clear and transparent.</p>
<p>Service-users' interests (our version of FCA Principle 6 & CPSS-IOSCO Principle 2, including Key Consideration 7)</p>	<p>An Operator or Central Infrastructure Provider must pay due regard to the interests of its service-users and treat them fairly.</p>
<p>Conflicts of interest (our version of FCA Principle 8 & CPSS-IOSCO Principle 23 at paragraph 3.23.3)</p>	<p>An Operator or Central Infrastructure Provider must manage conflicts of interest fairly.</p>

SP6-Q4: Do you think that we should also adopt some or all of the additional proposed Principles relating to Integrity, Skill care & diligence, Management & control, Governance, Service-users' interests, and/or Conflicts of interest? If you think we should adopt some or all of the additional proposed Principles, do you agree with the proposed participants to which each Principle would apply? Please give reasons for your response. If you disagree with the proposal to adopt some or all of the additional Principles, please give reasons for your response.

What are the intended benefits of our proposals and related anticipated costs for industry?

6.31 As set out below, we expect our proposed direction to set high-level Principles to have notable benefits for those who use, or are likely to use, the services provided by payment systems. In our opinion, it is not reasonably practicable to produce a quantitative estimate of the benefits given the nature of the benefits described below, such as ensuring that there are effective relationships between the PSR and those we regulate. Neither is it reasonably practicable to produce a quantitative estimate of the costs given the nature of the costs and that different participants will take into account their particular circumstances when complying with our proposed Principles.

Anticipated benefits

6.32 We consider that the regulatory framework formed by our proposed high-level Principles has the benefit of setting out our clear expectations for how we expect industry participants to behave, without being overly prescriptive. This also enables each participant to comply with the Principles by taking into account its particular circumstances.

6.33 With respect to Principle 1 on Relations with regulators, we note that by cooperating proactively with regulators, a participant may have an early warning of any problems/issues arising from its conduct with the obvious benefit that it will be able to agree and implement remedial actions at an early stage. Early and proactive cooperation may lead to savings for participants in terms of reputational damage, fines and management costs compared to the situation where a compliance failure has only been discovered following a complaint and/or an investigation.

6.34 Principles 1 (on Relations with regulators) and 2 (Compliance) should help to bring benefits by ensuring that participants deal with the regulator and respond to our directions in appropriate ways. This should help to make more effective use of the PSR's resources by giving greater confidence that participants are transparent in their dealings with us. It should bring benefits to regulatory effectiveness by reducing wasted time for the PSR in dealing with misleading information or in identifying compliance failures. The Bank already requires Bacs, CHAPS and FPS to have regard to the CPSS-IOSCO principle which is equivalent to our Principle 1 and therefore the benefits of our Principle in addition to the Bank's requirement will be minimal. We do however consider that there is benefit in elevating the relevant CPSS-IOSCO Principles and the ECB's *'Oversight Framework for Card Payments Schemes'* to a substantive regulatory requirement which must be complied with.

6.35 With respect to Principle 3 (on Financial prudence), we consider that it is important for all industry participants and service-users that we have financially sound payment systems. The Operators and the Central Infrastructure Providers that support them are crucial to well-functioning payment systems in the UK. Financial failure of any of these entities could bring detrimental consequences to the UK's payment systems which could be disruptive to the UK economy and in turn adversely impact service-users.

6.36 The Bank already requires Bacs, CHAPS and FPS to have regard to the CPSS-IOSCO principle which is equivalent to our Principle 3 and therefore the benefits of our Principle in addition to the Bank's requirement may be minimal. Similarly, Card Operators are subject to ECB requirements (and other similar regulatory requirements depending on their legal status) which are similar to our Principle 3, so the additional benefits may also be modest. However, benefits are expected to arise in respect of the other Operators and Central Infrastructure Providers by reducing the likelihood of financial failure, and by having a consistent regulatory requirement across all Operators and Central Infrastructure Providers.

6.37 A regulated environment in which the relevant participants are required to comply with our different Principles may help to raise the degree of confidence which participants have when dealing with other participants in the payments industry. For example, PSPs that are confident that their payment systems are operated and managed in a compliant and financially sound

way may be more likely to be willing to make investments in their own payments-related infrastructure and in new and innovative service propositions, which will benefit service-users.

Anticipated costs

- 6.38 We anticipate that the costs of complying with these Principles should not be significant. Many PSPs are already subject to the FCA's (and PRA's) Principles, which are similar to our proposed Principles. Several Interbank Operators must already have regard to the CPSS-IOSCO Principles which set out requirements which are similar to our proposed Principles, and likewise the Card Operators are already subject to the ECB's *'Oversight Framework for Card Payment Schemes'* which sets out requirements which are similar to several of our proposed Principles. We expect that the additional costs of complying with our Principles for those PSPs and Operators should therefore be small.
- 6.39 For other participants who are not currently subject to the FCA's Principles, regulation by the Bank (with respect to the CPSS-IOSCO Principles), or the ECB's *'Oversight Framework for Card Payment Schemes'*, there may be incremental costs of complying with our Principles. However, by setting out a principles-based framework rather than prescriptive rules, each participant will be able to comply with the Principles by taking into account its particular circumstances. This should help to minimise the costs associated with complying with the Principles. Further, many of these costs are those that would generally be faced by well-run organisations following best practice.
- 6.40 Some of the costs of complying with our Principles should be insignificant, and will be influenced by how a participant chooses to organise itself to comply with our Principles, taking into account its specific circumstances, organisation and objectives.
- 6.41 For example, with respect to Principle 1 on Relations with regulators, we consider that the incremental cost for a participant of dealing with its regulators in an open and cooperative way, as compared to dealing with its regulators in a non-transparent, misleading or uncooperative way is minimal, if there is in fact any incremental cost. Also with respect to Principle 1 on Relations with regulators, we consider that it is likely to be more efficient and cost-effective for a participant to pro-actively disclose to the PSR relevant important information, as compared to complying with more prescriptive reporting requirements, which would be an alternative we could have opted for instead of a general Principle on Relations with regulators.
- 6.42 With respect to Principle 2 on Compliance, we consider that our Principle sets a clear standard that participants should comply with their regulatory obligations, and creates an appropriate, compliance-focused regulatory framework for the payment systems industry. For each direction that we have proposed in this Consultation Paper and its Supporting Papers, we have assessed the anticipated costs and benefits, and we consider that each proposed direction is appropriate in its own right (and this will also be the case for any future directions or requirements we impose). It is also important to note that other than our Principles 1 (on Relations with regulators) and 2 (on Compliance) which are aimed at all participants in regulated payment systems, all of our other directions are aimed at narrower categories of participants, such as Operators, Central Infrastructure Providers and Sponsor Banks. Operators are also under specific reporting requirements with respect to their compliance with relevant directions. Accordingly, we consider that there should not be any significant additional cost incurred in complying with our Principle on Compliance (as compared to any costs they may already incur in complying with other directions).
- 6.43 With respect to Principle 3 on Financial prudence, many Interbank Operators and all Card Operators are already subject to similar requirements under the CPSS-IOSCO Principles or the ECB's *'Oversight Framework for Card Payment Schemes'*, so any additional costs in complying with our Principle should be modest.
- 6.44 We consider that overall, the additional costs of complying with our Principles should be minimal. We consider that these costs should be outweighed by the benefits associated with a

well-functioning payment systems industry, in which we have set clear standards of behaviour for participants.

SP6-Q5: Do you agree with the anticipated costs and benefits identified for our three proposed high-level Principles? Can you provide any data that might further inform our analysis of the likely impact of our proposed directions?

C. Our Objectives Guidance

- 6.45 Our responsibilities are primarily set out in FSBRA. We are an economic regulator and we share competition powers with other UK and EU competition authorities.
- 6.46 We are required to give guidance on how we intend to advance our objectives in discharging our functions in relation to different categories of payment systems in the UK or participants in payment systems.⁵ Our objectives inform the activities we undertake and how we prioritise our work. Our primary focus is on making payment systems work better for service-users.
- 6.47 Our objectives are discussed in more detail in **Part C** on '**Our Objectives**' in *Supporting Paper 1: The PSR and UK payments industry*. As noted, all of our policy-making, directions and guidance will take into account and advance one or more of our objectives.
- 6.48 *Annex 1* to this Supporting Paper contains our draft **Objectives Guidance**. This covers:
- how we define service-users
 - our competition objective
 - our innovation objective
 - our service-user objective
 - our regulatory powers
 - our competition powers
 - how we will interact with other authorities

SP6-Q6: Do you agree with our proposed approach for our Objectives Guidance? If you disagree with our proposed approach, please give your reasons.

⁵ Section 96 FSBRA.

D.

Our Administrative Priority Framework

- 6.49 In discharging our general functions, we must have regard to the need to use our resources in the most efficient and effective way to further our objectives, in accordance with s.53(a) FSBRA. Because our resources are limited we need to consider this when we make decisions regarding, for example, which investigations we open and continue, and how we respond to applications and complaints we receive (subject to any specific legal duties we might have, such as the requirement to respond within 90 calendar days upon receipt of a super-complaint – see below under **Part G** and *Annex 4* to this Supporting Paper).
- 6.50 When we are making such decisions, we will also initially consider the degree to which taking action provides us with an opportunity to advance one or more of our objectives. We are unlikely to pursue an action which does not clearly advance one or more of our objectives. We will then weigh up the impact and strategic significance of taking action in light of our objectives, against the associated risk and resource implications. In other words, we will decide whether taking action would be consistent with our administrative priorities.
- 6.51 We have developed an Administrative Priority Framework to assist us in making these decisions, based on the type of issues we will consider and questions we will ask ourselves in order to help us when making these decisions.
- 6.52 Our draft Administrative Priority Framework therefore sets out the broad parameters that we will take into account when deciding whether to conduct (or continue) an investigation, and how to handle an application or complaint. It draws upon similar administrative priority frameworks used by the Competition and Markets Authority (CMA), European Commission, the Office of Communications (Ofcom), the Office of Rail Regulation (ORR), Ofwat (the Water Services Regulation Authority) and the CAA (Civil Aviation Authority).
- 6.53 The parameters we have identified relate to:
- the impact of the conduct/issue raised on the advancement of our objectives
 - the strategic importance of the conduct/issue raised (including with respect to our statutory objectives and our Annual Plan)
 - the risk (to the advancement of our objectives) involved in progressing or not progressing an analysis of the conduct/issue raised, including the likelihood of action being successful or not
 - the impact on resources of progressing such an analysis – this includes us considering whether, instead of the PSR taking action, there are alternative approaches that are likely to achieve the same ends, or that deal with the same issues, for example: private enforcement, planned market reviews, other ongoing or contemplated proceedings, action by other regulators, anticipated UK or EU legislative developments.

- 6.54 In discharging our regulatory functions we will always have regard to our regulatory principles under s.53 FSBA. The Administrative Priority Framework governs whether we will take up or continue a case, whereas the regulatory principles govern our determination of how we will exercise our functions (i.e. as to the type of action we will take).
- 6.55 Our draft Administrative Priority Framework is set out in *Annex 2* to this Supporting Paper.

SP6-Q7: Do you agree with our proposed approach for our Administrative Priority Framework, or are there any additional points that you think we ought to cover? If you disagree with our proposed approach, please give your reasons.

E.

Our Powers & Procedures Guide

- 6.56 Our approach to enforcement is intended to hold industry to account. We will closely monitor industry progress and ensure that our measures remain fit-for-purpose in light of changes in the market, law and regulation. We will take action using our regulatory and competition powers as appropriate where needed to pursue our objectives, including where we find examples of behaviour or encounter actions that may prevent or slow down the advancement of our objectives. This includes stepping in where we see decisions being made, for example by Operators, which we consider run counter to our directions or our objectives.
- 6.57 We will require participants to report on their compliance with our directions in relation to access and governance, and to 'self-certify' this compliance annually (see *Supporting Paper 3: Ownership, governance and control of payment systems* and *Supporting Paper 4: Access to payment systems*). We will assess whether the measures implemented are compliant. This will include testing with service-users what their views are on participants' compliance with our directions.
- 6.58 We will issue information requests as appropriate to any party we consider may have information or insight that would help us assess the state of compliance.
- 6.59 We also have a range of enforcement, information gathering and investigation powers to help us further our objectives and monitor progress. In particular, we can:
- require information or documents to be provided to us
 - appoint a skilled person to provide a report on any matter
 - investigate a compliance failure or the nature, conduct or state of the business of an Operator, Infrastructure Provider or PSP, or appoint someone else to do so
 - require someone who has relevant information to attend an interview as part of an investigation, or to produce information or documents.
- 6.60 We will take action if we see that:
- the solutions proposed by industry do not take into account the criteria or measures we have set, or do not satisfactorily address our concerns
 - industry or individual participants are not implementing directions effectively or on time, or are acting in a way which could pre-empt or run counter to our directions
 - progress against the priorities we have set for, or expect from, industry is too slow
 - the outcomes we expect are not being delivered

- 6.61 We have a range of ‘tools’ and powers at our disposal if we consider that we need to take action. We will determine in each case what action is the best suited to achieve the results we want, and what is most appropriate and proportionate in light of the specific circumstances.
- 6.62 The action we might take in these circumstances could include:
- using our concurrent competition powers (see **Part J** below)
 - carrying out reviews of relevant markets or keeping those markets under review (see **Part I** below)
 - launching own-initiative investigations where we have concerns, or in response to complaints
 - using our powers to gather further information
 - imposing general or specific directions and issuing guidance to ensure our outcomes are delivered and concerns are addressed
 - considering applications in relation to disputes (see **Part F** below)
 - imposing sanctions for non-compliance with our regulatory requirements (see **Part H** below and *Annex 5* to this Supporting Paper).
- 6.63 This range of powers and tools means that we can hold industry to account, and we can follow up and take action where appropriate and necessary.
- 6.64 In discharging our general functions, we must have regard to the principle that we should exercise our functions as transparently as possible (s.53(h) FSBRA).
- 6.65 With that in mind, we have developed a draft Powers & Procedures Guide, which sets out the following:
- what our different regulatory powers are
 - what a compliance failure is
 - for each power, what the procedure is that we will follow, and what the appeal route is (see also **Part F** below on ‘**our dispute resolution and applications procedures**’)
 - settlement decisions and the procedure related to them
 - injunctions
 - our powers to gather information and conduct investigations
 - our concurrent competition powers
 - our other functions
- 6.66 These processes are largely consistent with the FCA’s Decision Procedure and Penalties Manual (DEPP) and Enforcement Guide (EG),⁶ which will be familiar to entities regulated by the FCA, but these processes have been adapted to the payment systems industry and the FSBRA legislative framework.⁷

⁶ <http://fshandbook.info/FS/html/handbook/DEPP> and <http://fshandbook.info/FS/html/handbook/EG>

⁷ We also expect to be the competent authority with respect to enforcement of Part 8 of the Payment Services Regulations 2009 and, in due course, the Interchange Fee Regulation (see *Supporting Paper 5: Interchange fees*).

- 6.67 We will consult on our detailed procedures for our concurrent competition powers in due course (and separately from this Consultation Paper) (see **Part J** below).
- 6.68 Our draft Powers & Procedures Guide is set out in *Annex 3* to this Supporting Paper.

SP6-Q8: Do you agree with our proposed approach for our Powers & Procedures Guide? If you disagree with our proposed approach, please give your reasons.

F.

Our dispute resolution and applications procedures

- 6.69 Our dispute resolution and applications procedures are part of our overall Powers & Procedures Guide (PPG) described above, in particular at paragraphs 7-14 and 49 of the PPG and Appendix 1 to the PPG (see *Annex 3* to this Supporting Paper).
- 6.70 Our dispute resolution and applications procedures may be used in relation to what can broadly be described as ‘commercial disputes’, namely disagreements between different industry participants, or between an industry participant and a service-user (as opposed to disagreements between a regulated entity and its regulator). We consider that it is helpful for stakeholders to understand what our approach to commercial disputes will be.
- 6.71 Our expectation is that when parties refer commercial disputes to us, this will typically be through complaints or through applications submitted to us by PSPs either seeking new Direct Access or Indirect Access to a payment system, or by a service-user (including an Indirect PSP) seeking to modify the terms of existing Direct Access or Indirect Access to a payment system, or by a PSP or service-user seeking to modify the fees or charges payable in connection with participating in a regulated payment system or the use of services provided by a regulated payment system.⁸ We would expect other commercial disputes (for example related to infrastructure contracts) to be raised with us through the same process.
- 6.72 We will expect that parties to disputes will have first sought to resolve their disagreements through commercial negotiations. We expect that parties will only apply to us after having exhausted the available commercial and alternative dispute resolution (ADR) processes available to them, which may include attempts at mediation.
- 6.73 Our approach and procedures are drawn from those used by other regulators, but adapted to our specific context. We will be transparent throughout, and will explain to the involved parties what phase of the procedure they are in, what the next steps are and, if we decide to dismiss an application, why we are doing so.
- 6.74 Applicants will be expected to submit a reasoned case setting out what the commercial issue is, what negotiations or discussions have taken place with the access provider, what remedy is being sought, and to have the application signed by an officer of the applicant (or by the applicant if it is an individual).
- 6.75 We will apply our Administrative Priority Framework when deciding how to handle the application and whether to progress to the next phase (the Information Gathering Phase). If we decide to dismiss an application without further investigation, we will explain why to the applicant (who will have the possibility of seeking to have the decision judicially reviewed).

⁸ Such applications will be made under ss.56 or 57 FSBRA.

- 6.76 In the Information Gathering Phase, we will seek representations from the other parties involved. If we consider it appropriate and helpful, we will hold face-to-face meetings with all parties to try to resolve the commercial dispute. We may also suggest to parties that they consider mediation/ADR if we consider that they would be preferable approaches in light of the specific circumstances of the case.
- 6.77 Our Information Gathering Phase might reveal that there are no grounds for taking action, or we may consider that, on the basis of the information gathered, exercising our powers is not an administrative priority. In these circumstances, we will explain the basis for our conclusion to the applicant (who will have the possibility of seeking to have the decision judicially reviewed).
- 6.78 If we are minded to decide to grant access, or to modify the terms of existing access (including in relation to fees and charges), the PSR Managing Director will issue a Notice of a Proposed Requirement to Grant Access or a Notice of a Proposed Variation of an Agreement to all parties we consider to have a legitimate interest in the dispute, and will set a deadline for final representations. A Final Notice will be issued once representations have been considered. Such a Notice can be challenged by any interested party before the CMA.
- 6.79 Enablement of direct access to LINK, Visa and MasterCard is subject to a specific access rule under the European Payment Services Directive (2007/64/EC) (PSD). Article 28 PSD has been implemented into UK law by Part 8 of the Payment Services Regulations 2009 (SI 2009/209) (PSRs 2009). The PSRs 2009 lay down an outline procedure for decision-making which is analogous to that set out above for s.56-57 FSBRA. We therefore propose to use the procedural framework we are establishing to handle access applications under s.56-57 FSBRA in relation to Bacs, C&CC, CHAPS, FPS and NICC, and also for complaints regarding direct access to LINK, Visa and MasterCard.⁹
- 6.80 We will also use this procedural framework more generally for all complaints relating to commercial disputes, whether they relate to access or not.
- 6.81 Finally, whenever an application or complaint is submitted to us in relation to a specific commercial dispute, we will reserve the right to decide to open a broader investigation and, ultimately, to issue general directions or generally applicable requirements, begin competition or regulatory investigations, or launch a market review if proportionate and appropriate.
- 6.82 Our draft dispute resolution and applications procedures are included in our Powers & Procedures Guide, which is set out in *Annex 3* to this Supporting Paper.

SP6-Q9: Do you agree with our proposed approach for our dispute resolution and applications procedures? If you disagree with our proposed approach, please give your reasons.

⁹ Our proposed approach takes into account the modification to s.108 FSBRA which the Treasury has laid before Parliament, and which we expect to take effect before 1 April 2015.

G.

Our Super-Complaints Guidance

- 6.83 Section 68 FSBRA provides that certain representative bodies may complain to us about ‘a feature or a combination of features of a market for services provided by payment systems in the UK that are or may be significantly damaging the interests of service-users’.
- 6.84 We must respond to such a complaint from a representative body, known as a ‘super-complaint’, within 90 calendar days. This process is intended to provide representative bodies with a mechanism to raise issues with us about features of the market that may be affecting the interests of service-users.
- 6.85 This procedure has been modelled on the ‘super-complaint’ mechanism applicable to the CMA and provided for in s.11 of the Enterprise Act 2002.
- 6.86 Section 70 FSBRA requires us to issue guidance about the presentation of a reasoned case for a complaint under s.68 FSBRA. Our guidance is intended to help designated representative bodies make comprehensive and robust complaints so that we can respond in a manner that addresses a complainant’s concerns most appropriately.
- 6.87 Our draft guidance sets out:
- who can bring a super-complaint
 - what matters should be addressed in a super-complaint, including
 - what are the features of the UK market in the specific case
 - what are the interests of service-users in the specific case
 - how super-complaints will be handled
 - what action will result from a super-complaint
 - public disclosure of super-complaints
- 6.88 Our draft Super-Complaints Guidance is set out in *Annex 4* to this Supporting Paper.

SP6-Q10: Do you agree with our proposed approach for our Super-complaints Guidance? If you disagree with our proposed approach, please give your reasons.

H.

Our Penalties Guidance

- 6.89 Under s.73(1) FSBRA we may require a participant in a regulated payment system to pay a penalty in respect of a compliance failure.
- 6.90 A 'compliance failure' means a failure by a participant in a regulated payment system:
- to comply with a direction given by us under section 54 FSBRA or
 - to comply with a requirement imposed by us under sections 55 or 56 FSBRA.
- 6.91 A copy of our Penalties Guidance is set out in *Annex 5* to this Supporting Paper. 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 a penalty. We are required to prepare this under s.73(3) FSBRA.

Features of payment systems which may affect penalties

- 6.92 The specific characteristics of the payments industry mean that the calculation and recovery of penalties is not straightforward:
- Owing to the range of participants in payment systems – whose corporate and governance structures can be very different from each other – the revenues derived from or funds transferred within systems to which the compliance failure relates may not always be an accurate measure of the economic significance of the entity that is subject to the relevant obligation, or the impact of the relevant compliance failure. This is particularly the case in relation to those Operators who are not-for-profit organisations.
 - Direct PSPs, who are the direct participants in payment systems and typically the owners of Operators,¹⁰ may in some cases benefit from a breach by an Operator. It is therefore important that there are adequate incentives on Direct PSPs to support compliance on the part of Operators.
 - An Operator may have insufficient immediate funds at its disposal to pay a penalty at a level that would be consistent with deterrence.
 - Direct PSPs could seek to pass on the financial consequences of a penalty to Indirect PSPs in the form of increased fees under their Sponsor Agreements yet Indirect PSPs may not be responsible for the breach.

¹⁰ For more information see *Supporting Paper 1: The PSR and UK payment systems on ownership of payment systems*, and *Supporting Paper 3: Ownership, governance and control of payment systems on governance and control*.

Our approach to setting penalties

- 6.93 We will adopt a principles-based approach where the level of penalty would be based initially on the seriousness of the compliance failure. The penalty could be increased or decreased based on certain aggravating or mitigating factors.

Methodology and level of penalty

- 6.94 Most established regulatory regimes use the revenues or turnover of the infringing entity as the basic metric for the calculation of penalties. We have considered a number of potential alternative methodologies for setting penalties to take account of the different business models of participants and features of the payments industry. Options include calculating penalties based on:

- a percentage of **revenues** derived from the activity or system to which the compliance failure relates

or

- a percentage of the **value of funds transferred** through the relevant system to which the compliance failure relates.

We have not reached a firm view on whether we should use only revenues as a metric when calculating the level of penalties, or whether we should also, in certain cases, take other metrics into account. See our question SP6-Q12 on this point.

- 6.95 In terms of a starting point and an upper limit, our proposed approach to setting penalties is as follows:

- **Starting point:** we do not propose at this time to have a 'base line' or floor for the level of penalties (whether in absolute terms or as a percentage of revenues or another metric) given that potential compliance failures could vary in terms of seriousness, and we want to ensure that we have suitable discretion to set a penalty at a low level if that is what is appropriate and proportionate in the specific circumstances of an individual compliance failure.
- **Upper limit:** we propose to set an upper limit on the level of penalty whereby the maximum level of penalty would be **10 per cent of the annual revenues derived or billings made by the participant from the business activity in the United Kingdom to which the compliance failure relates.**¹¹

SP6-Q11: Do you agree with our proposed approach to setting penalties? If you disagree with our proposed approach, please give your reasons.

SP6-Q12: Do you think that we should also take into account metrics other than revenues when setting penalties, in particular when considering participants organised as not-for-profit entities (e.g. should we take into account the value of funds transferred through the relevant system and relating to that participant in such a case)?

¹¹ In the year prior to our final decision notice or termination of the relevant compliance failure, whichever is earlier.

SP6-Q13: What should be the upper limit (if any) on penalties (e.g. 10% of annual revenues derived or billings made by the participant from the business activity in the United Kingdom to which the compliance failure relates), and should this upper limit differ according to the category of participant?

Effectiveness of compliance and penalties regime

Compliance with our Principles

- 6.96 Our compliance regime is supported by our high-level, legally binding **Principles**. These are set out and described in more detail in **Part B** of this Supporting Paper.
- 6.97 The following Principles are particularly relevant to our regulatory compliance and penalties regime.
- 6.98 According to **Principle 2: Compliance:**
- 'A participant must observe proper standards of conduct and must refrain from activity which that participant should reasonably have expected to restrict or prevent another participant from complying with its regulatory obligations in relation to payment systems and services provided by payment systems.'*
- 6.99 This Principle focuses on each participant controlling its own behaviour (by observing proper standards of conduct, including complying with regulatory obligations) and refraining from interfering with the ability of another participant to comply with its regulatory obligations.
- 6.100 According to **Principle 3: Financial prudence:**
- 'An Operator or Infrastructure Provider must ensure it has, or has access to, adequate financial resources to ensure that it is able to carry out its functions and activities in relation to the regulated payment system it operates in the case of an Operator, or the regulated payment system or systems whose central infrastructure it provides or controls in the case of an Infrastructure Provider, including resources to*
- *cover potential general business losses and debts as they fall due*
 - *continue operations and services as a going concern if those losses or debts materialise and*
 - *comply with its regulatory obligations in relation to payment systems and services provided by payment systems.'*
- 6.101 In the context of penalties, we interpret this Principle to mean in particular that Operators and Central Infrastructure Providers have in place effective funding arrangements (including, as the case may be, with their owners, shareholders and guarantors, to enable them to call upon such persons to contribute sufficient funds from time to time) in order to enable the Operator (or Central Infrastructure Provider) to meet its current and future debts and liabilities as they fall due. This would include a debt owed to us as a penalty for a compliance failure.
- 6.102 We note that most of the Interbank Operators already have a mechanism to call for funds from Direct PSPs to meet the liabilities of the Operator. In such a case, we note that our Access Rule would also require that Operators set their criteria for Direct Access based on objective and risk-based considerations. This does not imply a 'one size fits all', and would therefore require Operators to look to the individual circumstances of the Direct PSP when seeking financial contributions from them to address debts resulting from penalties for compliance failures.
- Variation of agreements relating to payment systems***
- 6.103 We will remain vigilant to any attempt by a Sponsor Bank to seek to inappropriately pass on the financial consequences of any penalty to an Indirect PSP with whom it has a Sponsor

Agreement. We will consider whether any such action is inappropriate given all the relevant circumstances.

- 6.104 Our dispute resolution process under s.57 FSBRA allows us, on application, to require Direct PSPs to justify their fees and charges (see **Part F** above). Section 57 FSBRA enables us to vary any of the terms or fees or charges payable under relevant agreements including agreements for Indirect Access. It would therefore be open to an Indirect PSP to apply to us under s.57 should there be grounds for concern that the fees charged under a Sponsor Agreement represented an inappropriate attempt to indemnify the Sponsor Bank from the financial consequences of penalties or to otherwise pass-on the effects of such penalties to Indirect PSPs.

SP6-Q14: Do you agree with our proposed approach with respect to the enforcement and enforceability of penalties? If you disagree with our proposed approach, please give your reasons.

I.

Our market reviews

- 6.105 We have statutory objectives to promote effective competition, innovation and the interests of service-users. We may consider conducting market reviews as a tool to examine issues relating to the advancement of our objectives in the markets for payment systems, and the markets for the services provided by payment systems.
- 6.106 We may use our general FSBRA powers or we may launch a market study under the procedures set out in the Enterprise Act. For the purposes of this Supporting Paper, where we announce a market review, we expect to use our general FSBRA powers.
- 6.107 We would typically expect to have six key phases when conducting a market review: Pre-launch, Launch, Research, Analysis and Interim Report, Report, and Remedies, with each phase having specific high-level objectives, as set out in the table below.
- 6.108 Before launching a market review, we will assess internally what it should cover and the possible concerns we will consider. Where helpful, we may engage external parties on particular aspects of the market review (for example, the scope of the market review). We will also consider how, if necessary, we will request additional information from stakeholders once the market review is launched (e.g. by asking stakeholders to respond to a Request for Information or questionnaire).
- 6.109 Following the pre-launch scoping phase of work, we expect a market review to typically report on its findings within approximately 12 months from the date of its formal launch to releasing the Report, depending on the scope and complexity of the market review.
- 6.110 The Report may be followed by a further phase of work to assess possible remedies to address the Report's findings. This additional phase may include consultation on proposed remedies.

Table SP6-1: PSR market review phases

Phase	Detail	Timing
Pre-launch	<ul style="list-style-type: none"> • Largely internal stage to review information to explore and scope the areas of concern • Desk-based research using information already available to us • Establish planning and resource needs • Informal consultation with a limited number of external parties and representative bodies to assist in scoping the market review 	Typically 3-6 months depending on the scope of the review

Phase	Detail	Timing
Launch	<ul style="list-style-type: none"> • Announce publicly the intentions of the market review and the areas of concern • Indicate the scope of the matters on which views and evidence are sought • Engage with relevant stakeholders, including, as appropriate, Operators, PSPs, trade bodies, service-users, consumer bodies, government departments and other regulators 	Approx. 12 months (may be longer in very complex or multi-issue market reviews)
Research	<ul style="list-style-type: none"> • Fully define data requirements for the market review • Collect and request additional data and information • Carry out market research, business model analysis, interviews, roundtables and other research as appropriate 	
Analysis and Interim Report	<ul style="list-style-type: none"> • Assess evidence of issues/market failures • Assess extent of any consumer detriment • Publish interim report outlining draft analysis and preliminary conclusions, and where practicable and appropriate, proposed solutions for addressing any concerns identified 	
Report	<ul style="list-style-type: none"> • Publish final report including analysis, conclusions and, where appropriate, proposals and further regulatory requirements 	
Remedies	<ul style="list-style-type: none"> • Use existing powers and legal processes to develop proposals (including, for example, making directions, publishing guidance and making proposals for enhanced industry action) • If required, conduct formal consultation on proposed remedy 	Typically 4-6 months depending on the need and extent of any consultation

J.

Our concurrent competition powers

- 6.111 We have the power to concurrently apply certain aspects of competition law alongside the CMA where the issue relates to participation in payment systems.
- 6.112 In due course, we will consult on separate guidance on the exercise of our concurrent competition law functions. We expect to adopt a similar approach to that of the FCA in relation to its concurrent competition functions.

**Annex 1:
Draft Objectives Guidance**

Draft Objectives Guidance

Our objectives underpin everything we do, driving the activities we undertake and how we prioritise our work. We will use our regulatory powers to advance our statutory objectives.

1. Purpose

- 1.1 Our responsibilities are primarily set out in the Financial Services (Banking Reform) Act 2013 (FSBRA). We are an economic regulator, and share competition powers with the competition authorities.¹ We are required to give guidance on how we intend to advance our objectives in discharging our functions for different categories of payment system or participants² in payment systems.³ Our primary focus is on making payment systems work well for service-users.
- 1.2 We will keep this guidance under review and update it as appropriate.

2. Overview

- 2.1 Everything we do when discharging our general functions must, so far as reasonably possible, advance one or more of our objectives. These are:⁴
 - the competition objective
 - the innovation objective, and
 - the service-user objective.
- 2.2 In addition, when carrying out our functions we must have regard to the importance of maintaining the stability of, and confidence in, the UK financial system. We must have regard to the importance of payment systems in relation to the performance of the Bank of England's (the Bank) functions. We must also have regard to certain regulatory principles in FSBRA;⁵ these are set out in Appendix 2 of this document.
- 2.3 You will find three main sections in this document, each of which deals with one of our statutory objectives.

¹ See Section 8 below concerning our competition law powers and Section 9 concerning how we will work with other authorities.

² Participants in regulated payment systems are Operators of payment systems, Infrastructure Providers and Payment Service Providers (PSPs), see s.42(3)-(5) FSBRA.

³ Section 96 FSBRA.

⁴ See ss.50 – 52 FSBRA, see also Appendix 1.

⁵ See s.53 FSBRA, see also Appendix 2.

- 2.4 There is no hierarchy in our objectives – each is as important as the others. For the most part they are mutually supportive. For example, competition will tend to drive innovation in infrastructure, and service-users should benefit from greater innovation in payment systems. If tension arises between our objectives, we will take the course of action that aligns with our strategic priorities and that is in the best interests of service-users.
- 2.5 We will be open about the role our objectives play in our decisions. We will communicate the actions we are taking by engaging with stakeholders, through our website, and through publications such as reports, studies, decisions and our Annual Report.

3. How we define service-users

- 3.1 Service-users are those who use, or are likely to use, services provided by payment systems.⁶ This is a wide definition, which includes, but is not limited to:
- Payment service providers (PSPs⁷) including direct and indirect participants in payment systems such as banks, building societies, credit unions, ATM operators, authorised and small e-money institutions,⁸ and authorised and small payment institutions.⁹
 - Customers of direct and indirect participants of payment systems, including government departments, large corporations, SMEs, retailers, utilities, charities and individual consumers.

4. Our competition objective

- 4.1 This objective is to promote effective competition in the markets for payment systems and for services provided by payment systems in the interests of service-users. Our work will focus on promoting and protecting the process of competition in the interests of service-users, rather than promoting or protecting specific competitors.
- 4.2 The legislation stipulates that promoting effective competition includes promoting effective competition between different:
- operators of payment systems (Operators)¹⁰
 - PSPs
 - infrastructure providers (Infrastructure Providers)¹¹
- 4.3 We will promote effective competition where it is in the interests of service-users.
- 4.4 As set out in FSBRA, we may have regard to the following when assessing how effective competition is:

6 See s.52 FSBRA.

7 PSP, according to s.42(5) FSBRA, in relation to a payment system, means any person who provides services to persons who are not participants in the system for the purposes of enabling the transfer of funds using the payment system.

8 A person that has been granted authorisation under a national legislation implementing title II of the Electronic Money Directive (2009/11/EC) including, for the avoidance of doubt, a person who has been granted a waiver from full authorisation and been registered in accordance with Article 9 Electronic Money Directive (a 'small EMI').

9 A person that has been granted authorisation under a national legislation implementing the PSD or been granted a waiver from full authorisation and been registered in accordance with Article 26 PSD (a 'small PI').

10 Operator, according to s.42(3) FSBRA, in relation to a payment system, means any person with responsibility under the system for managing or operating it; and any reference to the operation of a payment system includes a reference to its management.

11 Infrastructure Provider, according to s.42(4) FSBRA, in relation to a payment system, means any person who provides or controls any part of the infrastructure used for the purposes of operating the payment system.

- existing and potential **service-users** – their needs, how easy it is for them to use the services provided by payment systems and how easy it is for them to switch suppliers
 - existing and potential **PSPs** – their needs, how easy it is for them to provide services using payment systems and to switch providers
 - existing and potential **Infrastructure Providers** – their needs and how easy it is to provide infrastructure for operating payment systems
 - **Operators** – their needs and how easy it is for them to change the infrastructure used to operate their payment systems
 - **new entrants** – how easy it is for them to enter the market
 - how far competition is contributing to the development of efficient and effective **infrastructure** for operating payment systems
 - how far competition is encouraging **innovation**, and
 - the level and structure of **fees**, charges or other costs associated with participation in payment systems¹²
- 4.5 While competition generally brings better outcomes for service-users, collaboration between participants in payment systems may sometimes be appropriate and ultimately in the interests of service-users. For example, collaboration within payment systems can enable smaller PSPs to have access to payment systems and, therefore, increase competition between PSPs at the retail level.
- 4.6 We will consider market features that could indicate that there are competition issues, including, for example:
- levels of market concentration
 - barriers to entry or expansion
 - common ownership of competing facilities
 - market power of buyers or suppliers
 - laws and regulations
 - information asymmetries¹³ between competitors or between those already in the market and new entrants
 - transparency and the flow of information between participants
 - degree of vertical integration
 - service-user behaviour, and
 - ease of switching
- 4.7 For example, we may seek to promote competition by ensuring that barriers to entry are reduced or removed, where appropriate. Facilitating new entry may drive competition and innovation. This in turn, can lead to more cost-effective, efficient and improved quality services being available to service-users.

¹² Section 50(3) FSBRA, see also Appendix 1.

¹³ Information asymmetry refers to circumstances in which one party has access to greater or better information than the other.

- 4.8 We will use our regulatory powers where this will foster greater competition in the interests of service-users. Except where we are considering making general directions or requirements, we must consider first whether it is more appropriate to use our competition powers, rather than our regulatory powers.¹⁴

5. Our innovation objective

- 5.1 Our innovation objective is to promote the development of, and innovation in, payment systems and infrastructure to be used to operate payment systems in the interests of service-users. The purpose of this objective is to improve the quality, efficiency and economy of payment systems. This means services that are more responsive to service-users' needs and better systems that are accessible, easy to use, and cost-effective to operate and use.
- 5.2 Our role is not to innovate, but to encourage and support industry, and to help create the conditions in which innovation can flourish. We will only seek to promote innovation that is in the interests of service-users.
- 5.3 We will work with industry to ensure there are adequate opportunities and the right incentives for firms to innovate. This will involve assessing, among other things:
- barriers to innovation including laws and regulations
 - standards and interoperability
 - apportionment of risk
 - access to payment systems
 - costs of investment
 - technological requirements (e.g. the need for both the payer and the payee to have the right technology)
 - the need for scale of take-up in order for an innovation to be successful (network effects)
- 5.4 In most cases, competitive markets drive innovation. We appreciate, however, that, given the existence of network effects, participants may sometimes need to collaborate to develop innovations, for example the collaboration that was needed to develop Paym.
- 5.5 Innovations in payment systems may come from firms outside the financial services sector, such as technology and hardware providers. We want to facilitate such innovation where we can, where it brings greater competition and benefits to service-users.

6. Our service-user objective

- 6.1 Improving how payment systems are operated for service-users is at the heart of everything we do and is central to our competition and innovation objectives. We understand this to mean that payment systems should be operated and developed to take account of, and promote, the interests of service-users. This means we expect existing services to be improved and new, better services to be developed.
- 6.2 We expect payment systems to offer service-users choice, to be responsive in meeting their diverse needs, and to create opportunities for PSPs to bring innovative services to market. They

¹⁴ Section 62 FSBRA.

should be high quality, good value, efficient and cost-effective, while offering a reliable, secure and stable service.

- 6.3 We will assess how well payment systems and services provided by payment systems are working for service-users by seeking their views and expect industry participants to raise issues and concerns with us. In addition, we are setting up a panel which will have representation from service-users.

7. Our regulatory powers

- 7.1 We have a range of powers over participants in regulated payment systems to support our functions. We can:

- require or prohibit a specific action or set standards¹⁵
- require Operators to establish or change rules of payment systems, require them to notify us of changes, or require that they get our approval before making rule changes¹⁶
- on application, require the Operator of a regulated payment system or a PSP with Direct Access to it, to grant access to that system¹⁷
- change the fees, charges, terms and conditions, or terms of access that Operators or PSPs impose on their customers¹⁸
- require the disposal of an interest in the Operator of a regulated payment system¹⁹
- provide guidance²⁰
- conduct market reviews
- consider applications and complaints²¹

- 7.2 We have a range of enforcement, information gathering and investigation powers. We can:

- require information or documents to be provided to us²²
- require an Operator, Infrastructure Provider or PSP, or appoint a skilled person, to provide a report on any matter relating to their participation in a regulated payment system²³
- investigate a potential compliance failure or the nature, conduct or state of the business of an Operator, Infrastructure Provider or PSP of a regulated payment system, or appoint someone else to do so²⁴
- appoint an investigator, who can require someone who has relevant information to attend an interview, or produce information or documents²⁵

15 Section 54 FSBRA.

16 Section 55 FSBRA.

17 Section 56 FSBRA.

18 Section 57 FSBRA.

19 Section 58 FSBRA.

20 Section 96 FSBRA.

21 Sections 56, 57 and 68 FSBRA.

22 Section 81 FSBRA.

23 Section 82 FSBRA.

24 Sections 83 and 84 FSBRA.

25 Section 85 FSBRA.

- 7.3 A compliance failure²⁶ occurs when a participant in a regulated payment system does not comply with any of the following:
- one of our directions under s.54 FSBRA
 - one of our requirements regarding systems rules under s.55 FSBRA
 - one of our requirements granting direct or indirect access to a relevant payment system under s.56 FSBRA
- 7.4 We can use our enforcement processes to investigate a compliance failure, to publish a finding that there has been a compliance failure, to impose a penalty and to seek a court injunction, where appropriate.
- 7.5 We can also issue directions to order specific remedial action to be taken.

8. Our competition powers

- 8.1 We also have the power to investigate and enforce infringements of UK and EU competition law²⁷ and we can carry out market reviews.
- 8.2 Where we conclude that a market is not working well, we have the option of using our competition powers to refer this market to the Competition and Markets Authority (CMA) for more detailed investigation (a market investigation reference).

9. How we will interact with other authorities

- 9.1 We will work with other authorities to ensure that our activities are consistent with, and do not duplicate, those of others. This will involve working closely with authorities involved in UK financial regulation and the enforcement of competition law.

Financial authorities

- 9.2 We will work with the Bank, the Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA) and the European Commission. The FCA and European Commission also enforce competition law (see paragraphs 9.7 and 9.8 below).
- 9.3 Some of the payment systems that we expect to be designated for regulation by us are also overseen by the Bank, which:
- Oversees payment systems that have been 'recognised' by the Treasury under the Banking Act 2009 to protect and enhance financial stability. The systems we expect to regulate and that have been recognised are the following interbank payment systems: Bacs, CHAPS and FPS.
 - Determines whether to approve applications for a payment system to be 'designated' under the European Directive on Settlement Finality in Payment and Securities Settlement Systems (Directive 98/26/EC) (SFD). The systems we expect to regulate and that are designated under SFD are the following interbank payment systems: Bacs, C&CC, CHAPS and FPS. Designated systems benefit from certain protections from the normal operation of insolvency law.²⁸

²⁶ Section 71 FSBRA.

²⁷ Chapters I and II of the UK Competition Act 1998, and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

²⁸ For more information on the Bank's supervisory work, please refer to its website: http://www.bankofengland.co.uk/financialstability/Pages/fmis/supervisory_app/supervisoryapproach.aspx.

- 9.4 The FCA and the PRA are collectively responsible for the prudential supervision of financial services firms. The firms that are regulated by the FCA or the PRA from a prudential perspective are also subject to conduct regulation by the FCA. Some of the firms the FCA and PRA regulate will be participants²⁹ in regulated payment systems and will therefore also be regulated by us.
- 9.5 We will enter into a Memorandum of Understanding with the FCA, the Bank and the PRA, which will set out how we intend to work together.
- 9.6 Concerns about financial services firms that do not relate to payment systems or services provided by payment systems will usually be handled by the FCA and/or the PRA, as appropriate.

Competition authorities

- 9.7 On competition matters, we will work with the CMA, the European Commission and other competition authorities (particularly the FCA) to promote competition in the market for payment systems and the markets for services provided by payment systems. We will also participate in forums such as the UK Competition Network, the UK Regulators Network, the EU Competition Network and the International Competition Network.
- 9.8 We will enter into a Memorandum of Understanding with the CMA, which will set out how we intend to work together. We will also issue guidance on how we intend to use our concurrent competition law powers.

²⁹ Financial services firms that use regulated payment systems to carry out payment services will come within the definition of participants since they will be PSPs.

Appendix 1 – FSBRA provisions concerning objectives

Financial Services (Banking Reform) Act 2013

49 *Regulator's general duties in relation to payment systems*

- (1) In discharging its general functions relating to payment systems the Payment Systems Regulator must, so far as is reasonably possible, act in a way which advances one or more of its payment systems objectives.
- (2) The payment systems objectives of the Payment Systems Regulator are—
 - (a) the competition objective (see section 50),
 - (b) the innovation objective (see section 51), and
 - (c) the service-user objective (see section 52).
- (3) In discharging its general functions relating to payment systems the Payment Systems Regulator must have regard to—
 - (a) the importance of maintaining the stability of, and confidence in, the UK financial system,
 - (b) the importance of payment systems in relation to the performance of functions by the Bank of England in its capacity as a monetary authority, and
 - (c) the regulatory principles in section 53.
- (4) The general functions of the Payment Systems Regulator relating to payment systems are—
 - (a) its function of giving general directions under section 54 (considered as a whole),
 - (b) its functions in relation to the giving of general guidance under section 96 (considered as a whole), and
 - (c) its function of determining the general policy and principles by reference to which it performs particular functions.

50 *The competition objective*

- (1) The competition objective is to promote effective competition in—
 - (a) the market for payment systems, and
 - (b) the markets for services provided by payment systems, in the interests of those who use, or are likely to use, services provided by payment systems.
- (2) The reference in subsection (1) to promoting effective competition includes, in particular, promoting effective competition—
 - (a) between different operators of payment systems,
 - (b) between different payment service providers, and
 - (c) between different infrastructure providers.
- (3) The matters to which the Payment Systems Regulator may have regard in considering the effectiveness of competition in a market mentioned in subsection (1) include—

- (a) the needs of different persons who use, or may use, services provided by payment systems;
- (b) the ease with which persons who may wish to use those services can do so;
- (c) the ease with which persons who obtain those services can change the person from whom they obtain them;
- (d) the needs of different payment service providers or persons who wish to become payment service providers;
- (e) the ease with which payment service providers, or persons who wish to become payment service providers, can provide services using payment systems;
- (f) the ease with which payment service providers can change the payment system they use to provide their services;
- (g) the needs of different infrastructure providers or persons who wish to become infrastructure providers;
- (h) the ease with which infrastructure providers, or persons who wish to become infrastructure providers, can provide infrastructure for the purposes of operating payment systems;
- (i) the needs of different operators of payment systems;
- (j) the ease with which operators of payment systems can change the infrastructure used to operate the payment systems;
- (k) the level and structure of fees, charges or other costs associated with participation in payment systems;
- (l) the ease with which new entrants can enter the market;
- (m) how far competition is contributing to the development of efficient and effective infrastructure for the purposes of operating payment systems;
- (n) how far competition is encouraging innovation.

51 The innovation objective

- (1) The innovation objective is to promote the development of, and innovation in, payment systems in the interests of those who use, or are likely to use, services provided by payment systems, with a view to improving the quality, efficiency and economy of payment systems.
- (2) The reference in subsection (1) to promoting the development of, and innovation in, payment systems includes, in particular, a reference to promoting the development of, and innovation in, infrastructure to be used for the purposes of operating payment systems.

52 The service-user objective

The service-user objective is to ensure that payment systems are operated and developed in a way that takes account of, and promotes, the interests of those who use, or are likely to use, services provided by payment systems.

Appendix 2 – FSBRA provisions concerning regulatory principles

Regulatory principles

Section 53 FSBRA sets out the following regulatory principles to which we must have regard in discharging our general functions relating to payment systems:

- (a) the need to use the resources of the Payment Systems Regulator in the most efficient and economic way;
- (b) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;
- (c) the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term;
- (d) the general principle that those who use services provided by payment systems should take responsibility for their decisions;
- (e) the responsibilities of the senior management of persons subject to requirements imposed by or under this Part, including those affecting persons who use services provided by payment systems, in relation to compliance with those requirements;
- (f) the desirability where appropriate of the Payment Systems Regulator exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons subject to requirements imposed by or under this Part;
- (g) the desirability in appropriate cases of the Payment Systems Regulator publishing information relating to persons on whom requirements are imposed by or under this Part, or requiring such persons to publish information, as a means of contributing to the advancement by the Payment Systems Regulator of its payment systems objectives;
- (h) the principle that the Payment Systems Regulator should exercise its functions as transparently as possible.

**Annex 2:
Our Draft Administrative Priority Framework
regarding our Regulatory Powers**

Our Draft Administrative Priority Framework regarding our Regulatory Powers

We need to use our resources in the most efficient and effective way to further our objectives, in accordance with s.53(a) FSBRA. This means that we need to make decisions regarding, for example, which investigations we open and continue, and how we respond to applications and complaints, subject to any specific legal duties we might have.¹

In making these decisions, we will initially consider the degree to which taking action provides us with an opportunity to advance one or more of our objectives, as we are unlikely to pursue an action which does not clearly do this.

We will then weigh up the impact and strategic significance of taking action with respect to the advancement of our objectives, against the associated risks and resource implications (as set out below). In other words, we will decide whether taking action would be consistent with our administrative priorities. We have adopted this Administrative Priority Framework based on the types of issue we will consider and questions we will ask ourselves in order to help make these decisions.

We will make decisions on a case-by-case basis. We will consider only factors which we consider to be relevant to each specific case, and we may therefore not consider all of the factors listed below in reaching our decision. Our Administrative Priority Framework is illustrative, rather than exhaustive, and we will consider other factors where and as appropriate.

The factors we may consider are grouped in four main themes, which are listed below in alphabetical order, without ranking them with particular weighting (the relative importance and weighting of individual factors will vary from case to case).

1. Impact (with respect to the advancement of our objectives)

- a. The risk that the conduct or issue presents to service-users, including consumers and participants in payment systems – this includes us considering whether that risk is immediate or not, whether the impact is direct or indirect, and what the scale and magnitude of the impact would be if the risk or issue was not addressed by us at this time.
- b. The likely short-run and long-run impacts that our action is likely to have – this includes the direct as well as the indirect impact (for example deterrence and awareness effects).
- c. The severity of the conduct or issue and whether it is ongoing.

¹ For example, we are required to respond within 90 days upon the receipt of a complaint from a representative body in accordance with ss.68 and 69 FSBRA.

- d. Whether the conduct or issue is repeated, intentional or a particularly flagrant contravention or infringement.
- e. Whether, if the conduct or issue directly relates to a particular organisation, they have a history of similar contraventions or infringements or applications, or a demonstrated record of poor compliance.

2. Resources (implications for the PSR)

- a. The resource implications for us of taking action, given:
 - i. the need to act fairly in the interests of all parties likely to be affected (for example: service-users; the complainant or applicant; the target of the investigation; the party in relation to which the application is directed; third-parties)
 - ii. the extent to which the resource requirements are proportionate to the anticipated benefits of action
 - iii. the timing and resource requirements of other existing or anticipated work
 - iv. the need for, and availability of, specific policy or specialist skills in order to take action
- b. Whether there are alternatives to us taking action (by considering an application or investigation, or continuing an investigation, or progressing to the next phase in treating an application) that are likely to achieve the same ends, or deal with the same issues on a sufficiently timely basis (for example: dispute resolution; private enforcement; planned market reviews or studies; other proceedings we are undertaking; the use of alternative powers; action by other authorities; market developments; anticipated UK or EU legislative developments or self-regulation).

3. Risk (relating to the likelihood of success of any action by us)

- a. The likelihood of our action resulting in a successful outcome.
- b. The existence of a relevant decision by us or other authorities establishing the existence (or not) of an infringement or position of significant market power in a market which appears relevant to the complaint or application, and how this interacts with the issue before us.
- c. The strength and quality of the evidence presented and available on which to base any action we might take.

4. Strategic importance (with respect to the advancement of our objectives)

- a. Whether the issue that has been identified relates to our broader strategic goals or priorities (including those within our Annual Plan) and portfolio of work in support of our objectives.
- b. The strategic and economic significance of the issues raised.

- c. Whether other agencies might be better placed to undertake the work, including for example other UK regulators, law enforcement bodies or the European Commission.
- d. Whether there is a point of public policy or law of wider application such that action by us would help to clarify our approach for our stakeholders.
- e. The extent to which knowledge that would be gained in us taking action would progress our responsibilities and/or fulfil our monitoring role under any relevant UK or EU-driven legislation.

Annex 3:
Draft Powers and Procedures Guide (PPG)

Draft Powers and Procedures Guide (PPG)

Important notes

Status of this guidance

This guidance has been developed prior to the operational launch of the Payment Systems Regulator (PSR). It is not exhaustive and will be subject to review and revision as our procedures and decisional practice develop.

We expect that we will review and, if necessary, reissue this guidance within 18 months of the PSR's operational launch in April 2015.

Supplementary guidance

This guidance (and its future revisions) may be supplemented by such other guidance documents as the PSR considers necessary or appropriate. For example, we expect to issue additional guidance on the PSR's concurrent competition powers.

In addition, where we become the competent authority for other national or EU legislation (specifically, Part 8 of the Payment Services Regulations 2009 and the proposed EU Regulation on interchange fees in card payment systems) we may revise this guidance, or issue separate guidance, once we have formally assumed these additional responsibilities.

Information absent from this guidance

Given that the PSR is prior to its operational launch, some contact details and other operational information has been omitted from this document. This information will be inserted when this guidance is formally issued. These omissions are clearly marked: *'[to be inserted in final guidance document]'*.

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Introduction

1 Scope of the Powers and Procedures Guide (PPG)

- 1.1 The PPG principally relates to the processes and procedures that the PSR will generally apply in relation to its regulatory functions under the Financial Services (Banking Reform) Act 2013 (FSBRA).
- 1.2 The PPG does not attempt to describe in detail all the provisions of FSBRA and interested parties are advised to refer to the text of that legislation for a complete description of the PSR's statutory functions and powers.
- 1.3 References in the PPG to a 'section(s)' are references to the relevant provisions of FSBRA.

2 The powers covered by the PPG

- 2.1 Under FSBRA, we have a range of powers over participants in regulated payment systems. These include among others:
 - powers to exercise particular regulatory functions (sections 54 to 58)
 - powers to enforce certain regulatory decisions where parties do not comply (sections 71 to 75), and
 - powers to gather information and to conduct investigations (sections 81 to 90).
- 2.2 The PPG sets out practical information on how we will exercise these powers, where we have determined that it is appropriate to do so based on the information in our possession.

Giving directions and imposing requirements

3 Overview of the powers

- 3.1 We can, by giving a direction to a participant in a regulated payment system, require or prohibit the taking of a specified action in relation to the system.¹ Further, we can require the operator of a regulated payment system to establish or change rules for the operation of the system, to notify us of rule changes or to seek our approval before making rule changes.² We refer to these powers as ‘giving directions’ and ‘imposing requirements’.
- 3.2 Directions and requirements can be ‘specific’ or ‘general’, depending on whether they are addressed only at certain participants in regulated payment systems (for example, a named operator of a payment system) or whole classes of participants (for example, all operators of payment systems).

4 Deciding whether to give a specific direction or impose a specifically-imposed requirement

- 4.1 Before giving a specific direction or imposing a specifically-imposed requirement, we will normally have engaged in some information gathering. This could, for example, be through a programme of work led by us or another relevant regulator, through a market review or as a result of a complaint which has been submitted to us. Therefore, we would expect to have previously engaged with prospective addressees on the subject matter of the specific direction or specifically-imposed requirement before we decide to give or impose it.
- 4.2 Before giving a specific direction or imposing a specifically-imposed requirement, we will normally send addressees a notice of a proposed direction or a proposed requirement. That notice will give our reasons for proposing the direction or requirement, as well as the next steps and the timescale for representations to be made. We will normally allow 14 days for representations to be made in writing.
- 4.3 In urgent cases, we may give specific directions or impose specifically-imposed requirements without giving notice or seeking written representations. Alternatively, the period in which representations can be made might be shortened.
- 4.4 We will take account of written representations received in deciding whether to give a specific direction or impose a specifically-imposed requirement.
- 4.5 When a decision is taken to give a specific direction or impose a specifically-imposed requirement, a final notice of a direction or a requirement will be addressed to the relevant participants. That notice will set out the reasons for the action taken.

1 Section 54

2 Section 55

5 Deciding whether to give a general direction or impose a generally-imposed requirement

- 5.1 Before giving a general direction or imposing a generally-imposed requirement, we will normally consult publicly by publishing a draft of the direction or requirement on our website and inviting representations on it. We might also issue a press release drawing attention to the draft, write directly to participants in regulated payment systems or take such other steps as we see fit to draw attention to the proposal.
- 5.2 However, we are not required to publish a draft direction or requirement if we consider that the delay involved would be prejudicial to the interests of service-users.
- 5.3 When we publish a draft direction or requirement, it will be accompanied by a cost-benefit analysis, an explanation of its purpose, our reasons for proposing it and a notice that representations may be made to us within a specified time. However, we will not publish a cost-benefit analysis where we do not consider that the proposal will lead to any significant increase in costs. Where the costs or benefits cannot reasonably be estimated, or where it is not reasonably practicable to produce an estimate, we will give our opinion and an explanation of it.
- 5.4 In responding to consultations on proposed general directions or generally-imposed requirements, respondents are urged to pay attention to the instructions and the timescale for responses in the consultation notice accompanying the draft direction or requirement. We will normally allow 4 to 12 weeks for representations to be made in writing.
- 5.5 We will take account of consultation responses received in deciding whether to give a general direction or impose a generally-imposed requirement.
- 5.6 When a decision is taken to give a general direction or impose a generally-imposed requirement, a final notice of a direction or a requirement will be addressed to the relevant participants. That notice will set out the reasons for the action taken.
- 5.7 We will publish an account, in general terms, of representations made during the consultation and our response to them.

6 Appeals

- 6.1 Decisions to give specific directions or to impose specifically-imposed requirements are appealable to the Competition Appeal Tribunal (CAT) by any person who is affected by the decision.
- 6.2 Decisions to give general directions or to impose generally-imposed requirements are not appealable in the same manner as specific directions or specifically-imposed requirements. However, our decisions, like all administrative decisions, can be the subject of judicial review by the courts.

Disputes over access to a payment system and fees, charges, terms or conditions

7 Overview of the powers

- 7.1 FSBRA provides a mechanism whereby a party ('the applicant') having a commercial dispute with another party (or parties) can seek resolution of the dispute by the PSR.
- 7.2 In such cases, the applicant escalates its dispute to us by way of a formal section 56 or 57 application. Following such applications, we can require the granting of access to payment systems or vary the fees, charges, terms or conditions of agreements relating to payment systems.

8 Making an application

- 8.1 For us to properly consider disputes that are escalated under sections 56 and 57, we will need applications to contain detailed information on the nature of the dispute and the remedy that is sought. A common format for making such applications will also assist us in the task of processing and considering them.
- 8.2 Guidance on the format and content of applications is set out in Appendix 1 below. Parties making an application should ensure that the information provided is specific and relevant and does not go beyond what is needed to resolve the dispute. The submission of unnecessary or irrelevant information or evidence could delay the opening of any information gathering phase. In certain cases, particularly for smaller companies or individuals, we may consider relaxing some of these requirements.
- 8.3 If you are a potential applicant and need any further guidance on how to make an application, please contact *[to be inserted in final guidance document]*.
- 8.4 Applications under sections 56 or 57 should be made to:

Post: *[to be inserted in final guidance document]*

Email: *[to be inserted in final guidance document]*
- 8.5 If an applicant considers that its application contains confidential information, it should provide a separate non-confidential version which can be copied to the other party (or parties) to the dispute, as well as explaining why it considers that the information is confidential.

9 Following receipt of an application

- 9.1 Where applications made under sections 56 or 57 are submitted by email, we will aim to acknowledge receipt within one working day.
- 9.2 Following receipt, we will review the application under our administrative priority framework (see [PSR website url – *to be inserted in final guidance*]) – provided as *Annex 2 to Supporting Paper 6: Regulatory tools*). We will assess whether there is enough detail in the application to be able to consider it properly and to decide whether or not to proceed to the information gathering phase. We may need to revert to the applicant for further detail if this is lacking.
- 9.3 If we consider that it would not be appropriate for us to further investigate the dispute, we will inform the applicant without commencing the information gathering phase. We may also decide not to proceed to the information gathering phase if we consider that doing so is not an administrative priority.

10 Information gathering phase

- 10.1 We will usually initiate the information gathering phase by sending a non-confidential version of the application to the other party (or parties) to the dispute named in the application. However, where we consider it appropriate, and where it is permitted by legislation, we may also disclose confidential information. We expect to seek the views of the applicant before deciding to disclose any confidential information.
- 10.2 We may also publish details of the dispute, including the business names of the applicant and the other parties, on our website.
- 10.3 The purpose of the information gathering phase is to gather all information necessary for us to determine whether we should exercise our powers under sections 56 or 57. We might seek information from the other party or parties to the dispute, or third parties, through the exercise of our power to obtain information or documents (under section 81) or by obtaining a report from a participant or appointing a skilled person to provide a report (under section 82).
- 10.4 The information gathering phase does not bind us to exercising our powers under sections 56 or 57. Our information gathering might reveal that there are no grounds for such action. During or after the information gathering phase, we may consider that exercising our powers is not justified or is not an administrative priority. Where we do decide to act, we may decide to exercise our powers to give directions or impose requirements (under sections 54 or 55), rather than our powers under sections 56 or 57, depending on what we consider to be most appropriate in each case.

11 Deciding whether to require access or the variation of an agreement

- 11.1 Before requiring the granting of access or the variation of an agreement, we will normally send all parties to the dispute a notice of a proposed requirement to grant access or a proposed variation of an agreement. That notice will set out our reasons for proposing the access requirement or the variation of the agreement, as well as the next steps and the timescale for representations to be made. We will normally allow 14 days for representations to be made in writing.
- 11.2 In urgent cases, we may require the granting of access or the variation of an agreement without giving notice and seeking written representations. Alternatively, the period in which representations can be made might be shortened.

- 11.3 We will take account of written representations received in deciding whether to require the granting of access or the variation of an agreement.
- 11.4 When a decision is taken to require the granting of access or the variation of an agreement, a final notice of a requirement to grant access or a variation of an agreement will be addressed to the parties to the dispute. That notice will set out the reasons for the action taken. When a decision is made not to require the granting of access or the variation of an agreement, the parties will receive a statement summarising our reasons for this decision.

12 Publication of updates and final determination

- 12.1 We may publish updates on our website in connection with those disputes which progressed to the information gathering phase. We may indicate what final determination was made, such as whether we considered that there were no grounds for action, that action was not an administrative priority, that we will exercise our section 56 or 57 powers, or that alternative action was more appropriate.
- 12.2 When we exercise our powers to require the granting of access or to vary an agreement, we may publish a summary of the action we have taken.
- 12.3 When the final determination of an application is published, we may also publish the non-confidential version of the initial application.

13 Appeals

- 13.1 Decisions to require the granting of access or the variation of an agreement are appealable to the CMA by any person who is affected by the decision.

14 Other commercial disputes

- 14.1 Commercial disputes between participants, or between participants and service-users, over matters other than access to payment systems, or the fees, charges, terms or conditions of agreements relating to participation in regulated payment systems or the use of services provided by regulated payment systems, may also be escalated to us.
- 14.2 In such cases, we will normally follow the same procedure as set out in paragraphs 8.1 to 12.3 above for applications made under sections 56 or 57. However, where we decide to take action, we will make use of our direction and requirement powers (under sections 54 and 55).
- 14.3 If we consider that it is appropriate to give a specific direction or impose a specifically-imposed requirement, we will follow the process set out in paragraphs 4.1 to 4.5 above.
- 14.4 If we consider that it is more appropriate to give a general direction or impose a generally-imposed requirement, we will follow the process set out in paragraphs 5.1 to 5.7 above.

Requirement to dispose of an interest in a payment system operator

15 Overview of the power

- 15.1 We have the power to require a person who has an interest in the operator of a regulated payment system to dispose of all or part of that interest.³ We may only exercise this power if we consider that, if the power is not exercised, there is likely to be a restriction or distortion of competition in the market for payment systems, or a market for services provided by payment systems.

16 Deciding whether to require the disposal of an interest

- 16.1 We may only exercise our power to require the disposal of an interest with the consent of the Treasury.
- 16.2 Before requiring the disposal of an interest, we will normally have engaged in some information gathering. This could, for example, be through a programme of work led by us or another relevant regulator, through a market review or as a result of a complaint which has been submitted to us. Therefore, we would expect to have previously engaged with relevant parties before we decide to require the disposal.
- 16.3 Before exercise of this power, we will normally send the operator and the person having an interest a notice of a proposed disposal remedy. That notice will give our reasons for proposing the disposal, as well as the next steps and the timescale for representations to be made. We will normally allow 28 days for representations to be made in writing.
- 16.4 We will take account of written representations received in deciding whether to require the disposal of an interest.
- 16.5 When a decision is made to require the disposal of an interest, a final notice of a disposal remedy will be addressed to the parties. That notice will set out the reasons for the action taken.

17 Enforcement of the disposal requirement

- 17.1 A requirement to dispose of an interest is enforceable by civil proceedings brought by us.⁴

³ Section 58

⁴ Section 80

18 Appeals

- 18.1 Decisions to require the disposal of an interest are appealable to the CMA by any person who is affected by the decision.⁵

⁵ Section 79

Enforcement action

19 Overview of the powers

- 19.1 A compliance failure is the failure of a participant in a regulated payment system to comply with:
- a direction (general or specific) given under section 54
 - a requirement imposed (generally or specifically) under section 55, or
 - a requirement to grant access to a payment system imposed under section 56.⁶
- 19.2 We have the power to take enforcement action in relation to these compliance failures. This includes the power to:
- publish details of the compliance failure (section 72(1))
 - impose a financial penalty for the compliance failure (section 73) and publish details of that penalty (section 72(2))
 - seek an injunction to bring the compliance failure to an end, remedy the compliance failure or restrain dealing with assets (section 75).
- 19.3 We may publish details of a compliance failure or impose a financial penalty in any situation when we have sufficient evidence that a participant in a regulated payment system has failed to comply with a direction or requirement that was addressed to it. For example, we might make this determination following:
- an investigation in response to a complaint made to us about non-compliance with a PSR direction or requirement
 - an investigation commenced at our own initiative into compliance with a PSR direction or requirement
 - a report of a skilled person which reveals a compliance failure.
- 19.4 A participant in a regulated payment system might also proactively approach us to disclose or declare a compliance failure. It might further undertake to change its practice, bring the compliance failure to an end and give assurances on how future compliance failures will be avoided. We reserve the right to publish details of a compliance failure or impose a financial

⁶ A failure to comply with a decision of the PSR to vary the fees, charges, terms or conditions of an agreement relating to a payment system (under section 57) does not constitute a compliance failure. The effect of the PSR's regulatory decision is to vary the agreement itself. Any subsequent breach of the agreement would be enforceable as a matter of private law by the parties to that agreement.

penalty in such cases, if we are satisfied that a compliance failure occurred and that the sanction is appropriate.

20 Publication of compliance failures and imposition of financial penalties

- 20.1 We will consider each compliance failure on its merits and determine whether the publication of details relating to the compliance failure and/or relating to the imposition of a financial penalty is appropriate.
- 20.2 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. We might also issue a press release.
- 20.3 We are required to prepare a statement of the principles we will apply in determining whether to impose a financial penalty and the amount of any penalty.⁷ This statement is set out at [PSR website url] (provided as Annex 5 to Supporting Paper 6: Regulatory tools).
- 20.4 In applying the statement of penalty principles, we must apply the version in force at the time of the compliance failure. We must also review the statement from time to time and revise it if necessary.

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

- 21.1 Decisions on whether to publish details of, or to impose a financial penalty for, a compliance failure will be taken by the PSR Enforcement Decisions Committee (EDC). The EDC will determine whether a compliance failure has been committed and whether publication of details of the compliance failure or the imposition of a financial penalty is appropriate.
- 21.2 The EDC is separate from the PSR investigators or other PSR case team members who may investigate or otherwise ascertain that a compliance failure had been committed and recommend (to the EDC) that enforcement action be taken. The EDC has its own legal advisers and support staff.

PSR recommendation to the EDC to issue a warning notice

- 21.3 If our staff consider that it is appropriate to publish details of, or impose a financial penalty for, a compliance failure, they will recommend to the EDC that a warning notice should be issued. We may submit a draft warning notice to the EDC, along with our recommendation.
- 21.4 A recommendation to issue a warning notice may arise from a formal investigation involving appointed investigators, in which case our recommendation to the EDC will usually be accompanied by the investigation report produced.
- 21.5 When we consider it appropriate, or the EDC requests it, relevant supporting documents or evidence will be provided to the EDC.

Deciding whether to issue a warning notice

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

- settle the wording of the warning notice, and

⁷ Section 73(3)

- make any relevant decisions associated with the issue of the warning notice (for example, the relevant period for the recipient of the notice to make representations and whether the recipient should be provided with any material relevant to the issue of the notice).

21.8 If the EDC decides to issue a warning notice, we will make appropriate arrangements for the notice to be given.

Contents of the warning notice

21.9 The warning notice will set out details of the compliance failure it relates to and the EDC's proposal to publish details of the compliance failure and/or to impose a financial penalty. The warning notice will state the factual and legal basis for the proposed action and the EDC's reasons for proposing it.

21.10 When the EDC proposes to publish details of a compliance failure, the warning notice will set out the wording that it intends to publish. If the EDC proposes to publish details of any proposed financial penalty, this will be included in the wording set out in the warning notice.

Access to underlying material

21.11 There is no statutory requirement to provide a recipient of a warning notice with any underlying material. However, we will consider whether it is appropriate to do so. In some cases, we may consider it appropriate to provide the recipient with the written submissions and documents that the EDC considered when reaching the decision to issue a warning notice.

21.12 If documents or submissions are covered by our confidentiality obligations, such material will only be provided to the recipient of the warning notice where there is lawful authority to do so. For example, if an exception applies under the Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 (SI 2014/882) or with the consent of the person from whom that information was received and (if different) to whom the information relates.

Making representations to the EDC

21.13 Once a warning notice has been issued, the recipient will have at least 21 days to make representations to the EDC. The EDC will, when issuing a warning notice, state the time in which representations are to be made and to whom those representations should be addressed.

21.14 The format and content of any representations is a matter for the recipient of the warning notice. However, the representations should be confined to the material necessary for the EDC's determination of whether the factual and legal basis for the proposed action is correct and whether the proposed action is appropriate. Representations should identify clearly what facts, legal grounds or reasons for the proposed action the recipient of the warning notice is contesting. Representations should be as concise as possible. The EDC may also signal, when the warning notice is issued, the expected format, content and length of representations that can be made to it.

21.15 In some circumstances, the EDC may agree to an extension of the time in which the recipient of a warning notice can make representations. A recipient of a warning notice must apply to the EDC for such an extension and must state why the extension is necessary and, in particular, why it is not possible to respond adequately in the period already provided.

21.16 A single member of the EDC will decide whether to grant an application for an extension. In considering the application, they will balance the interests of fairness to the applicant and those of procedural efficiency.

21.17 Save for exceptional circumstances, the EDC will only consider written representations. A recipient of a warning notice may apply to the EDC for permission to make oral representations but they must state why an oral hearing is necessary and, in particular, why it is not possible to adequately respond to the warning notice and state their case in writing.

- 21.18 The EDC Chairman will consider applications for an oral hearing. In considering the application, they will balance the interests of fairness to the applicant and those of procedural efficiency.
- 21.19 If the EDC Chairman agrees to an oral hearing, they will also be the Chair of an oral hearing at a date and time to be notified to the recipient of the warning notice. The EDC Chairman will specify the running order and timings of the oral hearing, and will ensure that submissions run to time during the hearing. They may also intervene if oral submissions merely reiterate or restate submissions previously made in writing, or do not meaningfully advance the EDC's understanding of those submissions. Any member of the EDC may pose questions to the participant making the oral submissions to clarify the submissions being made.

The final decision of the EDC

- 21.20 If representations were made, the EDC will consider those representations when reaching its decision on whether it is appropriate to publish details of a compliance failure or impose a financial penalty.
- 21.21 If no representations were made, the EDC will generally regard as undisputed the matters set out in the warning notice. In such circumstances, the decision to publish details of the compliance failure or to impose a financial penalty can be taken by the EDC Chairman alone, without the need to convene or consult all members of the EDC, if the EDC Chairman so determines.
- 21.22 If the EDC decides to publish details of a compliance failure, it will settle the wording of those details to be published.
- 21.23 If the EDC decides to impose a financial penalty, it will determine the amount of any penalty. See the PSR's statement of penalty principles at [PSR website url – to be inserted in final guidance] (provided as Annex 5 to Supporting Paper 6: Regulatory tools).

Communication of the EDC's decision

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

22 Appeals

- 22.1 Decisions of the EDC to publish the details of a compliance failure or to impose a financial penalty in respect of a compliance failure are appealable to the CAT by any person who is affected by the decision.
- 22.2 When the EDC decides to publish details of a compliance failure, the details cannot be published until after the expiry of the period in which the decision can be appealed to the CAT or, if an appeal against the decision is made, following the determination of that appeal.

- 22.3 When the EDC decides to impose a financial penalty for a compliance failure, and an appeal against the decision is made to the CAT, the penalty is not required to be paid until after the appeal has been determined.

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

- 23.1 Settlement has many potential advantages, including the saving of our and industry resources and the prompt communication of compliance messages to the industry or to the markets for payment systems and payment services. As such, we consider that it is normally in the public interest for matters to be settled, and early, if possible.
- 23.2 Accordingly, a participant in a regulated payment system may settle with us by agreeing to the publication of details of and/or the imposition of a financial penalty for a compliance failure, rather than contesting our investigation.
- 23.3 Settlements are still regulatory decisions. We would not normally agree to detailed settlement discussions until we have a sufficient understanding of the nature and gravity of the suspected compliance failure to make a reasonable assessment of the appropriate outcome. However, a participant in a regulated payment system may enter into settlement discussions with us at any time, if both the participant and we agree.
- 23.4 Settlement discussions between the participant in a regulated payment system and us are likely to revolve around the discussion of a draft warning notice based on evidence obtained by us, or on sufficient agreed facts to support a regulatory decision.
- 23.5 Settlement decisions must be taken jointly by two settlement decision makers (SDMs). Neither of the SDMs will have been directly involved in establishing the evidence on which the settlement decision is based. The SDMs may, but need not, participate in settlement discussions between the participant in a regulated payment system and the PSR.
- 23.6 The SDMs may accept the proposed settlement by deciding to issue a warning notice. Alternatively, they may decline the proposed settlement, in which case settlement discussions might continue.
- 23.7 The warning notice will constitute our proposed decision about the compliance failure and will set out the details of the compliance failure that we propose to publish and/or the financial penalty that we propose to impose.
- 23.8 Once a warning notice has been issued and the participant in a regulated payment system has confirmed that it agrees with its contents, the SDMs will conclude the settlement by deciding to issue a final decision notice. The decision notice constitutes our regulatory decision about that compliance failure.
- 23.9 In recognition of the benefits and savings afforded by settlement, any financial penalty specified in the warning notice may be reduced to reflect the timing of the settlement (that is, the stage of the process when settlement is concluded).
- 23.10 The amount of the financial penalty specified in the warning notice will take into account all the factors in our statement of penalty principles (see [PSR website url – insert in final guidance] – provided as Annex 5 to Supporting Paper 6: Regulatory tools) apart from the existence of the settlement discount that will be applied if the settlement is concluded. If a settlement is concluded, the discount will be detailed in the decision notice.

- 23.11 An investigation may still be settled, if appropriate, where a warning notice has been issued by the EDC. In these circumstances, settlement discussions will still be undertaken by our staff and decisions made by the SDMs.
- 23.12 All settlement communications are made without prejudice. Consequently, if the settlement discussions break down and the matter proceeds through a contested administrative process through the EDC, the EDC will not be told about any admissions or concessions made during settlement discussions.

24 Injunctions

- 24.1 Applying to the court for injunctive relief is another way that we can enforce some of our regulatory decisions.⁸ Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers to publish details or impose a financial penalty.
- 24.2 In making a decision to apply to the court, we will consider whether the legal test that the court will apply is met, as well as the nature, impact and seriousness of the actual or potential compliance failure and whether injunctive relief is appropriate.
- 24.3 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.⁹
- 24.4 We may seek only one type of order or several, depending on the circumstances of each case.

⁸ Section 75

⁹ The court may also make an order freezing assets under its inherent jurisdiction.

Information gathering and investigations

25 Overview of our powers

- 25.1 We have various powers to gather information and to conduct investigations.¹⁰ In any particular case, we will decide which powers, or combination of powers, are the most appropriate to use.

26 Power to obtain information or documents

- 26.1 We have the power to require a person to provide information and documents which we need to exercise our statutory functions under FSBRA.¹¹
- 26.2 We expect to use this power for general information gathering purposes, including updating our knowledge on the state of the market for payment systems (or the markets for services provided by payment systems). We also expect to use this power in the context of our market reviews.¹²
- 26.3 We might also use this power to obtain information or documents to assist, for example, in determining whether there has been a compliance failure by a participant in a regulated payment system. However, where a formal investigation into a suspected compliance failure has been commenced (with the appointment of one or more investigators), we generally expect to use the information gathering powers exercisable by those investigators.
- 26.4 Requests for the provision of information and documents will be made through a formal written notice (known as an information request or a section 81 notice). The notice will set out the form or manner in which information or documents should be provided and will specify the deadline for responses.
- 26.5 We expect to give recipients of information requests some advance notice so that they can manage their resources accordingly. Also, where it is practical and appropriate to do so, we will send the information request in draft and take account of comments on the scope of the request, the actions that will be required to respond, and the deadline by which information must be received. In certain circumstances, it will not be appropriate to provide advance notice or to send information requests in draft (for example, if it would be inefficient because the request is for a small amount of information).

¹⁰ Sections 81 to 90

¹¹ Section 81

¹² We also have powers to obtain information or documents under the Enterprise Act 2002 (EA02), as amended, in connection with market studies. Detailed guidance on how we will exercise our EA02 powers can be found in *[to be inserted in final guidance document]*.

27 Reports by skilled persons

- 27.1 We have the power to require a participant in a regulated payment system to provide a report by a skilled person. We can also appoint a skilled person to provide a report ourselves.¹³
- 27.2 We expect to use these powers where we need to better understand any matter relating to participation in a regulated payment system and where particular skills or specialist knowledge are required to produce a report. We will make clear, to the participant in the regulated payment system and to the skilled person, the nature of the matters that led us to decide that a skilled person's report was necessary and the possible uses of the results of that report.
- 27.3 A possible use of a skilled person's report is to assist us in determining whether there has been a compliance failure or if it is appropriate to conduct an investigation into a suspected compliance failure.
- 27.4 Where we require a participant in a regulated payment system to provide us with a skilled person's report, we will issue a notice in writing (known as a notice to provide a skilled person's report). This notice will specify such things as:
- the procedure by which the skilled person is to be nominated or approved by us
 - the terms of the appointment of the skilled person
 - the procedures to be followed and the obligations of the participant in the production of the skilled person's report
 - practical matters, such as arrangements for interaction between the skilled person and us
 - the subject matter which the report must cover and the form the report should take, and
 - the deadline for the submission of the report.¹⁴
- 27.5 We expect to give advance notice before we require the provision of a skilled person's report, so that the participant can manage its resources accordingly. Also, where it is practical and appropriate to do so, we will send the notice to provide a skilled person's report in draft and take account of comments on the scope and contents of the report, the work that the skilled person will be required to undertake (or the assistance they will require) and the deadline by which the report must be provided. We will assess each case on its facts to determine whether it would be appropriate to provide such advance notice and an opportunity to comment before formally requiring a report to be provided.
- 27.6 When we require a participant in a regulated payment system to provide a report by a skilled person, that participant will pay for the services of the skilled person. When we appoint a skilled person to produce a report, we may direct the participant who is the subject of the report to pay any expenses we incur. In both situations, we will consider the cost implications of skilled persons' reports and the facts and circumstances of each case, including the availability of alternative options for gathering information on the matter concerned.

28 Powers exercisable in the context of formal investigations

- 28.1 We may appoint investigators to conduct an investigation on our behalf (see paragraphs 31.1 to 32.3 below). If investigators are appointed, they will have powers (under section 85) to:

¹³ Section 82

¹⁴ Following the appointment of the skilled person, we may also give specific directions to the participant about the procedures to be followed and their obligations under the notice to provide a skilled person's report.

- require persons under investigation (and persons connected with them) to provide information and to attend and answer questions in interview, and
 - require any person to produce documents.
- 28.2 The requirements described above may be imposed only so far as the investigator reasonably considers them to be relevant to the purposes of the investigation.
- 28.3 For investigations into suspected compliance failures, investigators can also require the attendance or the provision of information by any persons who, in the investigator's opinion, are or may be able to give relevant information. Such persons may also be required to give the investigators all assistance in connection with the investigation as they are reasonably able to give.
- 28.4 The investigator(s) will exercise these powers by issuing formal notices in writing (known as investigatory requirement notices or section 85 notices). These notices will set out the requirements and the deadlines for compliance.
- 28.5 As with our information gathering powers in non-investigatory contexts, we expect to give recipients of investigatory requirement notices advance warning so that they can manage their resources accordingly. Also, when it is practical and appropriate to do so, we will send the investigatory requirement notice in draft and take account of comments on the scope of the requirements, the actions that will be required to comply, and the deadline for compliance. In certain circumstances, it will not be appropriate to provide advance notice or to send investigatory requirement notices in draft, for example if we think it would prejudice the investigation.

29 Search and seizure powers

- 29.1 We have the power to apply to a justice of the peace for a warrant to enter premises where documents or information are held.¹⁵ The circumstances under which we may apply for a search warrant include:
- when a person has been issued with an information request or an investigatory requirement notice requiring the provision of information or documents and has failed (wholly or in part) to comply with the requirement, or
 - when there are reasonable grounds for believing that, if an information request or an investigatory requirement notice requiring the provision of information or documents were to be issued to a participant in a regulated payment system, the requirement would not be complied with or the information or documents would be removed, tampered with or destroyed.
- 29.2 A warrant obtained under section 88 authorises a police constable or a PSR investigator in the company, and under the supervision of, a police constable, to do the following:
- enter and search the premises specified in the warrant
 - take possession of any information or documents appearing to be of a kind for which the warrant was issued, or
 - take any other steps which may appear to be necessary to preserve or prevent interference with such information or documents.

¹⁵ Section 88

- 29.3 PSR staff attending the search may require any person on the premises to provide an explanation of relevant information or documents, or to state where such information or documents can be found.
- 29.4 During a search under warrant, we would expect to take copies of documents rather than to seize originals, when it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize original documents, we expect to return these to the participant in a regulated payment system as soon as reasonably practicable to do so. We will adopt the same approach with respect to electronic copies, in that we will endeavour to take copies of hard-drives where it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize hard-drives, laptops, or other data-storage devices, we expect to return these to the participant in a regulated payment system as soon as reasonably practicable to do so.

30 Voluntary provision of information

- 30.1 Information may also be provided to us voluntarily. For example, participants in a regulated payment system may commission an internal investigation or a report from an external law firm or other professional adviser and decide to pass a copy of this report to us. Such reports can be very helpful for us when an investigation (for example, into a suspected compliance failure) is anticipated or is underway.
- 30.2 Participants in a regulated payment system are not obliged to share the content of legally privileged reports they are given or advice they receive. It is for the participant to decide whether to provide such material to us. But a participant's willingness to volunteer the results of its own investigation would be welcomed and is something that we may take into account when deciding what action to take, if any.

How investigations will be conducted

31 The purpose of investigations

- 31.1 We may appoint one or more investigators to conduct an investigation into the nature, conduct or state of the business of any participant in a regulated payment system.¹⁶ We may also appoint investigators to investigate a suspected compliance failure.
- 31.2 In some cases, we may consider it appropriate to appoint investigators for a general purpose and subsequently decide that it is appropriate to extend the investigation to cover a suspected compliance failure. In other cases, it may be appropriate to appoint investigators for both purposes at the outset.

32 Written notice of the appointment of investigators

- 32.1 We will give written notice of the appointment of investigators to the person under investigation, except when this would be likely to result in the investigation being frustrated or when investigators have been appointed to investigate a suspected compliance failure. We will assess each case on its facts to determine whether it would be appropriate to provide written notice.
- 32.2 When a notice of the appointment of investigator(s) is issued, it will specify the provision under which the investigator(s) were appointed and the reasons for their appointment.
- 32.3 If a notice of the appointment of investigator(s) is not issued at the time investigator(s) are appointed, we will normally issue the notice at the time we exercise our statutory powers to require information from the person under investigation, provided that such notification will not prejudice our ability to conduct the investigation effectively.

33 Scoping discussions

- 33.1 If notice is given at the outset of an investigation (when investigators are appointed), we will generally hold scoping discussions with the person under investigation close to the start of the investigation. The purpose of these discussions is to give the parties an indication of:
- why we have appointed investigators (including the nature of and reasons for our investigation)
 - the scope of the investigation

¹⁶ Section 83

- how the process is likely to unfold, and
 - the individuals and documents the team will need access to initially.
- 33.2 However, there is a limit as to how specific we can be about the nature of our concerns in the early stages of an investigation.
- 33.3 In addition to the initial scoping discussions, there will be an ongoing dialogue with the person under investigation throughout the investigative process.

34 Changes in the scope of an investigation

- 34.1 When the nature of our concerns change significantly from those notified to the person under investigation and we are satisfied that it is appropriate to continue the investigation, we may change the scope accordingly.
- 34.2 If there is a change in the scope or conduct of the investigation and we think that the person under investigation is likely to be significantly prejudiced if they are not made aware of this, we will give written notice of the change.
- 34.3 We cannot give a definitive list of all the circumstances in which a person under investigation is likely to be significantly prejudiced by not being made aware of a change in the scope or conduct of an investigation. However, it may include situations where there may be unnecessary costs from dealing with an aspect of an investigation which we no longer intend to pursue.

35 Appointment of additional investigators

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

36 Notice of termination of investigations

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

37 Use of our investigatory powers

- 37.1 During an investigation, we will use the statutory powers exercisable by appointed investigators to require the production of documents, the provision of information or the answering of questions in interview. This is for reasons of fairness, transparency and efficiency. However, it will sometimes be appropriate to depart from this standard practice. For example, for third parties with no professional connection with the payments industry, we may seek information voluntarily.

- 37.2 We will make it clear to the person concerned whether we require them to produce information or answer questions under our formal investigatory powers or whether the provision of information or answers is purely voluntary.
- 37.3 One of our legally binding Principles of participation in regulated payment systems (Principle 1) specifies that:
- “A participant must deal with its regulators in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant of which the PSR would reasonably expect notice.”*
- A breach of this Principle could lead to compliance failure proceedings.
- 37.4 If a participant in a regulated payment system does not attend or answer questions at a voluntary interview, or declines to respond to an informal request for information, we will not treat this as a compliance failure. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of that person to attend or provide information voluntarily.
- 37.5 If a person does not comply with a requirement imposed by the exercise of statutory powers, they can be dealt with by the court as if they were in contempt of court (when penalties can be a fine, imprisonment or both). We may also choose to bring compliance failure proceedings for breach of Principle 1 by a participant in a regulated payment system, as this is a serious form of non-cooperation.

38 Approach to information and document requirements

- 38.1 Investigatory requirement notices requiring the production of information or documents are discussed at paragraphs 28.1 to 28.5 above.
- 38.2 As delays in the provision of information and/or documents can have a significant impact on the efficient progression of an investigation, we expect recipients to respond to investigatory requirement notices in a timely manner and within applicable deadlines.
- 38.3 We expect to give recipients of investigatory requirement notices advance warning, so that they can manage their resources accordingly. Also, when it is practical and appropriate to do so, we will send the investigatory requirement notice in draft and take account of comments on the scope of the requirements, the actions required to comply, and the deadline for compliance. In certain circumstances, it will not be appropriate to provide advance notice or to send investigatory requirement notices in draft, for example if we think it would prejudice the investigation.
- 38.4 We do not expect to send draft investigatory requirement notices when the information or document requirements are straightforward and we consider that it is reasonable to expect the information or documents to be made available within our specified timeframe.
- 38.5 The timeframe for comments on a draft investigatory requirement notice would usually be no more than three working days. After considering any comments, we will then confirm or amend the investigatory requirement notice.
- 38.6 Once we have formally issued an investigatory requirement notice (whether or not it has been preceded by a draft), we will not usually agree to an extension of time for complying with the notice, unless compelling reasons are provided to support an extension request.

39 Approach to interviews and interview procedures

- 39.1 Whether an interview is conducted on a voluntary or on a required (statutory) basis is a decision for us. A person required to attend an interview by the use of statutory powers has no entitlement to insist that the interview takes place voluntarily. If someone does not attend a required interview, then they can be dealt with by the court as if they were in contempt (when the penalties can be a fine, imprisonment or both).
- 39.2 Similarly, a person asked to attend an interview on a purely voluntary basis is not entitled to insist that they be served with a requirement. A person is not obliged to attend a voluntary interview or to answer questions put to them at that time. But they should be aware that an adverse inference may be drawn from the failure to attend a voluntary interview or a refusal to answer any questions at such an interview.
- 39.3 When we interview a person, we will allow them to be accompanied by a legal adviser, if they wish. We will also, where appropriate, explain what use can be made of the answers in proceedings against them. If the interview is recorded, the person will be given a copy of the recording of the interview, along with a copy of any transcript.

40 Preliminary findings letters and preliminary investigation reports

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

- 40.6 If we send a preliminary findings letter and then decide not to take any further action, we will communicate this decision promptly to the person under investigation.
- 40.7 When we submit an investigation report to the EDC, with a recommendation that details of a compliance failure be published or that a financial penalty be imposed, we will inform the person under investigation promptly after the submission of that report.

41 Transparency in respect of investigations

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

Concurrent competition powers

42 CA98 and EA02 powers

- 42.1 We have the power to apply certain aspects of competition law alongside the CMA, if an issue relates to participation in payment systems.
- 42.2 Under the Competition Act 1998 (CA98), we can conduct investigations in relation to anti-competitive agreements, decisions or concerted practices, or the abuse of a dominant position.
- 42.3 Our concurrent competition powers under the Enterprise Act 2002 (EA02) enable us, among other things, to make references to the CMA to carry out a market investigation. We can do this if we consider that there are reasonable grounds for suspecting that any feature, or combination of features, of a market or markets relating to participation in payment systems prevents, restricts or distorts competition.
- 42.4 Detailed guidance on how we will exercise our concurrent competition law functions can be found in *[to be inserted in final guidance document – PSR website url]*.

43 Interplay between FSBRA and CA98 powers

- 43.1 We have a duty to consider whether it would be more appropriate to exercise our concurrent competition powers under the CA98 before exercising certain of our FSBRA powers, as set out below.¹⁷
- 43.2 This duty does not arise in all circumstances. Rather, it takes account of the proper focus of CA98 action, which is designed to address either:
- agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition (the Chapter I prohibition), or
 - conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market (the Chapter II prohibition).
- 43.3 The Chapter I and Chapter II prohibitions are not intended to tackle more general concerns about the nature of competition in a market or set of markets.¹⁸ Accordingly, when we intend to

¹⁷ See section 62

¹⁸ However, Part 4 of EA02, as amended, governs the UK 'markets regime', under which the CMA and the concurrent authorities can act to address any feature, or combination of features, of a market that prevents, restricts or distorts competition.

exercise our power to give a general direction¹⁹ or to impose a generally-imposed requirement,²⁰ we are not obliged to consider whether it would be more appropriate to proceed under CA98.

43.4 However, if we intend to give a specific direction or impose a specific requirement (for example, a direction or a requirement addressed to an individual payment systems operator), we will consider our CA98 powers first. The duty to consider our CA98 powers also arises in connection with our powers to:

- require the granting of access to a payment system²¹
- vary agreements relating to payment systems,²² and
- require the disposal of an interest in the operator of a payment system.²³

43.5 When we decide that it is more appropriate to use our FSBRA regulatory powers, in preference to our CA98 powers, we will state our reasons. In doing so, we expect to make reference to the quality of the evidence or information in our possession and to our Administrative Priority Framework.

19 Section 54

20 Section 55

21 Section 56

22 Section 57

23 Section 58

Other functions of the PSR

44 Keeping markets under review

- 44.1 We also have the function of keeping the market for payment systems and the markets for services provided by payment systems under review.²⁴
- 44.2 We will, from time to time, initiate a market review or a call for information to gather information on a required (statutory) and/or voluntary basis.
- 44.3 When we seek the input of participants in payment systems, service-users and others, we will publicise specific contact details on our website. We are likely to provide the contact details of core project team members (for example, *[to be inserted in final guidance document]*) and a designated project email address.

45 Giving guidance

- 45.1 We will, from time to time, issue general guidance consisting of such information and advice as we consider appropriate.
- 45.2 This document is an example of the type of general guidance that we will issue on procedural matters and the operation of the provisions of FSBRA. However, we will also, from time to time, issue general guidance on any substantive or operational matters about which we consider it desirable to give information or advice (including on how we intend to advance our objectives).

46 Consultation

- 46.1 We have a duty to consult on the extent to which our general policies and practices are consistent with our general duties and on how our objectives may be best advanced.
- 46.2 The most common forms of consultation will be where we consult on:
- draft general directions or generally-imposed requirements (see paragraphs 5.1 to 5.7 above)
 - draft general guidance (see paragraph 45.1 to 45.2 above), and
 - our general policies and principles under which we will perform our particular functions.

²⁴ Section 64

- 46.3 When we consult in any of these ways, we expect that we will use a combination of our website, press releases and direct correspondence to draw attention to the consultation (and any drafts to which they relate).
- 46.4 Our consultations are likely to pose a number of questions, some of which may not be of relevance to all stakeholders. Respondents should feel free to answer only those questions where they have strong opinions or relevant experience. In all cases, the consultation paper will set out detailed information on how to respond and the deadline for doing so.

Contacting us

47 For general purposes

- 47.1 If you wish to contact us for general purposes (for example, to provide us with information which is likely to be of relevance to our work, or to request a meeting), you can use the following means:
- 47.2 By post: *[to be inserted in final guidance document]*
- 47.3 By email: *[to be inserted in final guidance document]*
- 47.4 By telephone: Our Contact Centre telephone number for all general enquiries is *[to be inserted in final guidance document]*
- 47.5 We will endeavour to respond to all general queries or correspondence seeking a response within 12 working days of receipt.

48 Super-complaints

- 48.1 If you are a designated representative body and wish to make a super-complaint (under section 68 FSBRA) to us, please see the detailed guidance on how to do so set out in *[PSR website url – to be inserted in final guidance]* (provided as Annex 4 to Supporting Paper 6: Regulatory tools).
- 48.2 Our mailbox address for super-complaints is: *[to be inserted in final guidance document]*.

49 Applications about disputes

- 49.1 If you are in a commercial dispute with another party (or parties) and wish to apply to us for resolution of the dispute, please see paragraphs 8.1 to 8.5 above and Appendix 1 below for details on how to do so.
- 49.2 Our mailbox address for applications made under sections 56 or 57 and in connection with any other commercial disputes is: *[to be inserted in final guidance document]*.

Appendix 1:

The content of applications about disputes

50 Content of applications

- 50.1 This appendix sets out guidelines for applicants on the format and content of applications made under sections 56 or 57 and in connection with any other commercial disputes.
- 50.2 Applicants are reminded that failing to follow these guidelines could delay the opening of any information gathering phase.
- 50.3 If an application does not contain all the necessary information, we will advise you on what else is needed before we will consider the application to be complete.
- 50.4 An application should contain the following information:²⁵

Section A: Overview of the application

- The business name, address, telephone number and email address of the applicant and the contact details of an individual who can discuss the detail of the dispute.
- The nature of the applicant's business and its scale (local, national, international).²⁶
- The broad facts of the dispute and its commercial context.
- The legal basis according to which the application to the PSR is being made (e.g. section 56 or 57).
- The proposed remedy or remedies for resolution of the dispute.

Section B: Details of the dispute

- The relevant payment system(s) and downstream products or services.
- 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 conduct or action leading to the dispute.
- The reasons why an application has been made to the PSR.
- If the dispute relates to a request for access to a payment system: the business plans of any relevant product or service, including forecasts, demonstrating how and when it is

²⁵ 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.

²⁶ Details of relevant turnover or volumes/values of relevant transactions would also be helpful.

intended to launch the products or services that would be provided in the event that access is granted.

- If the dispute relates to fees, charges, terms or conditions of an agreement relating to a payment system: a copy of the relevant version of the agreement or contract, clearly identifying the clauses that are at issue.
- If the dispute relates to fees or charges: benchmarking data in relation to those fees or charges or an explanation of why no such data is available.
- If the commercial dispute relates to another matter: sufficient information and supporting evidence to enable us to understand the context and subject matter of the dispute.
- If there are any ex ante regulatory conditions applying to any party to the dispute: the full details of those conditions and whether (and, if so, why) the applicant considers that a relevant obligation is not being met by the other party.

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: the 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.²⁷

Section D: Remedy sought

- The full details of the remedy sought by the applicant, with reasons and justifications.
- The legal basis for the remedy sought (e.g. section 56 or 57 FSBR).
- The applicant's assessment of how the remedy sought would be consistent with the PSR's statutory duties, objectives and/or regulatory principles (as set out in sections 49 to 53 FSBR).²⁸

Section E: Supporting information and evidence

- Details about the provision of any relevant product or service which depends on access to the payment system which is the subject of the dispute, including business plans relating to the relevant product or service (see Section B).
- Copies of the relevant contract or terms which are the subject of the dispute (see Section B).
- If applicable, benchmarking data in relation to any fees or charges which are in dispute, or an explanation of why no such data is available (see Section B).
- 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.

²⁷ We are aware that, in negotiations, parties may make without prejudice offers in an attempt to settle disputes. We do not wish to dissuade parties from actively seeking to resolve disputes in this way. While we will wish to see details of such offers where this is relevant to determining whether meaningful negotiations have taken place, the existence or content of such offers will not determine our resolution of a dispute.

²⁸ The applicant may also wish to give a view on how the subject matter of the dispute and the remedy sought relate to broader regulatory issues or policies (for example, where the matter in dispute is also subject to any ongoing investigation, review, consultation or other programme of work by the PSR or another regulator.)

51 Confidentiality

- 51.1 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.
- 51.2 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.

52 Form of Declaration by an officer of the company

- 52.1 Applications made under sections 56 or 57 FSBRA (or other commercial disputes escalated to us) 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. All information and evidence provided in making this application to the PSR is, to the best of my knowledge and belief, true and accurate.

Signed: []

Position in the company: []

Date: []'

**Annex 4:
Draft Guidance for designated representative
bodies on making a super-complaint under s.68
FSBRA**

Draft Guidance for designated representative bodies on making a super-complaint under s.68 FSBRA

1. Purpose

- 1.1 The Financial Services (Banking Reform) Act 2013 (FSBRA) provides that certain representative bodies may complain to the Payment Systems Regulator (PSR). These complaints should be about a feature, or combination of features, of a market for services provided by payment systems in the UK that is, or appears to be, significantly damaging the interests of service-users. We must respond within 90 calendar days.
- 1.2 This process is intended to provide representative bodies with a mechanism to raise issues with us about features of the market that may be affecting service-user interests. A service-user is any person that uses, or is likely to use services provided by payment systems. While this may include service-users who do not reside in the UK, there may be a more limited range of actions that we can take for complaints about damage to the interests of those service-users.
- 1.3 Our super-complaint process has been modelled on the 'super-complaint' mechanism applicable to the Competition and Markets Authority (CMA) provided for in s.11 of the Enterprise Act 2002. Under s.70 FSBRA, we are required to provide guidance on the presentation of a reasoned case for a complaint under s.68 FSBRA. This guidance is intended to fulfil that requirement. It also aims to help designated representative bodies make comprehensive and robust super-complaints so that we can respond in a manner that addresses a super-complainant's concerns most appropriately.

2. Who can bring a super-complaint?

- 2.1 The Treasury decides which representative bodies should be able to make super-complaints. The Treasury can make any organisation a designated representative body provided it "represents the interests of service-users of any description".¹ The Treasury [*has published – to be inserted in final document*] criteria to be applied by it in determining whether to make or revoke a designation. It is expected that those designated bodies will be informed bodies that are in a strong position to represent the interests of service-users, and are able to provide clear reasoning and evidence in support of any super-complaint they make.
- 2.2 Representative bodies that want to apply for designated status should contact the Treasury for further information or can find information [*here – to be inserted in final document*].

¹ Section 68(3)(a) FSBRA

- 2.3 In this guidance we refer to designated representative bodies that are making a super-complaint as “super-complainants”.

3. How to process a super-complaint

- 3.1 When making a super-complaint, the super-complainant should write to us setting out the reasons why, in its view, a UK market for services provided by payment systems has a feature, or a combination of features, that is, or appears to be, significantly harming the interests of service-users and should therefore be investigated. The super-complaint should be clearly identified as such.
- 3.2 Super-complainants are encouraged to discuss their complaints with us before submitting a formal super-complaint. This may allow us to suggest an alternative course of action to the super-complainant, or inform them of other work we are doing that is likely to address the issues it has raised.
- 3.3 If the complaint is suitable for the super-complaints process, early discussion of it will also enable us to highlight any gaps in the information or analysis the super-complainant is proposing to provide. If we have information that may be relevant to the super-complaint, an early discussion may also help us do some preliminary investigative work before formally receiving the complaint. Where relevant, a designated representative body that is also designated to make super-complaints to the CMA or Financial Conduct Authority (FCA) may want to discuss their super-complaint with those authorities before deciding where best to submit their complaint.
- 3.4 Super-complaints should be submitted electronically to PSRSuper-Complaints@psr.org.uk or in hard copy to:
- The Payment Systems Regulator Limited
25 The North Colonnade
Canary Wharf
London E14 5HS
- 3.5 We will aim to acknowledge a super-complaint within one working day of receipt if submitted electronically. Acknowledgement of receipt of a super-complaint does not signify that we consider it to have merit, be complete or indicate that we intend to investigate it. We may need to ask for more information in order to evaluate the super-complaint and decide whether to investigate further.

4. Features of the UK market

- 4.1 The super-complainant should highlight the features of the relevant market for services provided by payment systems that may be significantly damaging the interests of service-users. FSBRA² provides that a feature of a market in the UK for services provided by payment systems is to be read as a reference to:
- the structure of the market concerned or any aspect of that structure
 - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires services in the market concerned, or
 - any conduct relating to the market concerned of customers of any person who supplies or acquires services.

² Section 68(4) FSBRA

- 4.2 This may cover, for instance, super-complaints about issues arising from the characteristics of a payment system or services provided by or to such a system, or from the conduct of any participant or participants³ in payment systems, whether or not the system has been designated for the purposes of FSBRA. “Conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.⁴
- 4.3 While we may consider super-complaints about any feature of a market for services provided by payment systems, we may have limited authority to take action in certain circumstances. This may especially be the case where another regulator is already dealing with the matter or may be better placed to address the concerns raised. In these circumstances we will work, where appropriate, with other authorities to establish which one is best placed to deal with the complaint.
- 4.4 For the purposes of making a complaint, a market must be in the UK and includes:
- any market which operates in the UK (or part of the UK) and in another country or territory (or in a part thereof), and
 - any market that operates only in a part of the UK.
- 4.5 We expect that a cross-border issue that may affect service-users in the UK or that involves participants in UK payment systems is likely to satisfy this requirement.
- 4.6 We will not consider an issue that solely affects service-users, participants in payment systems or markets in overseas jurisdictions.

5. The interests of service-users

- 5.1 The super-complainant should set out why it considers that a feature of the relevant market for services provided by payment systems is, or may be, significantly damaging the interests of service-users, including, where applicable:
- the features of the relevant market, including any details about market practice, features and/or pricing in relation to the relevant service
 - details of the conduct of the relevant participants in payment systems identified as significantly damaging the interests of service-users
 - details of any relevant PSR principles, directions, requirements, guidance or other relevant legislation, guidance, or policies (for instance, EU rules) that the relevant participants in payment systems may be failing to comply with or that may otherwise be relevant to protecting the interests of service-users
 - whether harm falls disproportionately on a certain class or classes of service-users
 - how the relevant feature of the market is or may be causing damage to the interests of the relevant class or classes of service-user, including the impact and extent of the damage or potential damage and an explanation of how this has been assessed or estimated, and
 - an indication of what outcome(s) the super-complainant is seeking in order to address the damage to service-users that has been identified.
- 5.2 It is not necessary for a super-complaint to demonstrate that the interests of service-users have actually been damaged. Where a super-complaint does not demonstrate that service-users are

³ Participants in payment systems are Operators, Infrastructure Providers and Payment Service Providers as defined under s.42 FSBRA

⁴ Section 68(4) FSBRA

actually suffering harm, super-complainants should provide us with clear information about why they consider that service-user interests are at risk of being damaged.

- 5.3 Super-complaints should relate to the interests of service-users generally or to those of a specific class or classes of service-user identified in the complaint. Complaints about damage to the interests of individual service-users should be addressed in writing to us.⁵
- 5.4 Where possible, all matters raised in the super-complaint should be supported by documented facts and evidence. While we do not expect super-complainants to provide the level of evidence necessary for us to take formal action, the information provided by the super-complainant should be sufficient to enable us to determine whether we need to carry out further investigation.
- 5.5 Where relevant and feasible, the super-complainant should try to provide us with evidence about:
 - details of the market (including details about the nature of the service concerned) to which the super-complaint relates, and whether there are particular aspects of the service causing actual or potential problems for service-users
 - whether the super-complaint relates to the market as a whole or only to certain participants in payment systems or parts of the market
 - details of service-user needs, how easy it is for them to use the services provided by payment systems and the general quality of the services they receive
 - whether particular aspects of the services provided by payment systems, the way in which they are sold or provided, lack of transparency or difficulties in properly assessing cost, risks and benefits of different systems, present particular problems for service-users
 - the terms on which the services provided by payment systems are supplied, including the level and structure of fees, charges or other costs associated with the services
 - any costs incurred or practical difficulties experienced by service-users as a direct result of switching to alternative suppliers or of seeking to exit or terminate a service
 - practices by payment systems participants in the relevant sector that may be restricting or distorting competition, or preventing innovation
 - whether the relevant service is only supplied together with other services rather than separately
 - whether service-users or specific classes of service-users are facing barriers to accessing relevant services
 - the steps the super-complainant has already taken or attempted to take in relation to the issue (or the steps the service-users which the super-complainant represents have already taken or attempted to take in relation to the issue)
 - details of any industry codes of practice or guidance that apply to the service, and
 - any other matter that may be relevant to assessing whether a feature or combination of features of the relevant market is or may be significantly damaging the interests of service-users.

⁵ [PSR website url Link to Powers & Procedures Guidance – see Annex 3 to Supporting Paper 6: Regulatory tools]

6. How will super-complaints be handled?

- 6.1 We will examine the contents of the super-complaint in more detail to determine if it meets the criteria set out above, that is:
- the super-complainant is a designated representative body
 - the super-complaint is about a feature, or the combination of features, of a market in the UK for services provided by payment systems, and
 - there is a reasoned case showing that the feature, or combination of features, complained of is, or appears to be, significantly damaging the interests of service-users.
- 6.2 All the criteria must be satisfied for the complaint to receive super-complaint status.
- 6.3 If the complaint satisfies these criteria, we will assess the quality of information and evidence supplied. We will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. Where we find that a reasoned case for complaint has not been made or that it requires clarification, we will contact the designated body as soon as possible requesting further information or clarification. Where a request for clarification or further information is made, the super-complainant will be given a set time period within which to respond. If it fails to do so, we may consider making a formal response that no action will be taken regarding the complaint. We may choose to meet with the designated body making the complaint to raise any immediate questions about the evidence submitted and to offer a broad indication of our lines of enquiry.
- 6.4 We may then carry out wider enquiries, with a view to testing the evidence provided and obtaining any further information we consider necessary to form a reasoned view on whether the complaint justifies further action. Exactly how we do this will be determined on a case-by-case basis, but may involve:
- internal research
 - public requests for information
 - carrying out a review of the relevant participants in payment systems
 - approaching relevant businesses or trade associations for information
 - publishing information that we already hold
 - approaching consumer organisations, trading standards departments, government departments and/or other public bodies for information
 - initiating other work such as a market study or research or commissioning a report
 - consultation with the Bank of England, the FCA, the Prudential Regulation Authority, the PSR Panel or any other relevant body, or
 - any other action we deem necessary.
- 6.5 We will keep the super-complainant informed of material developments in the progress of the case and super-complainants can contact us to clarify issues or for further information as appropriate. Any discussions held with the super-complainant will be subject to the general restrictions on us relating to the disclosure of confidential information in s.91 FSBA.
- 6.6 If a super-complainant considers that its super-complaint contains commercially confidential information, it must explain why this information is commercially confidential, and it must

provide a separate non-confidential version of the complaint. Super-complainants should avoid making claims of confidentiality over entire documents unless there are good grounds for doing so.

7. What action will result from a super-complaint?

- 7.1 We are required under s.69 FSBRA to publish a response to the super-complaint within 90 calendar days setting out how we propose to deal with the complaint, explaining in particular whether we have decided to take any action and, if so, what action, and the reasons for our decision. Any action we take will be subject to the usual procedures and controls that may be relevant to that action. For example, if we propose to make general directions or requirements as a response to a super-complaint, we will follow our general consultation process⁶ for making general directions. The possible outcomes of a super-complaint include, but are not limited to:
- regulatory action by us (including, but not limited to, taking enforcement action against a participant or participants in a regulated payment system)
 - using our competition law powers (including launching an investigation into anti-competitive conduct of a participant or launching a market study)
 - initiating a review of our relevant directions, requirements or guidance
 - referring the complaint to another authority or regulatory agency that may be better able to address the complaint
 - initiating further assessment of the matters raised in the complaint
 - deciding that no action should be taken, or
 - dismissing the super-complaint as unfounded, frivolous or unnecessary.
- 7.2 It is possible that following the submission of a super-complaint, a super-complainant may be able to achieve a resolution of the matters raised with the subject of the super-complaint directly. We will consider such developments when determining whether to take action and the nature of such action. The fact that a super-complainant has been able to achieve a resolution of the matters in the super-complaint to its own satisfaction does not of itself prevent us from taking further action where we deem this to be appropriate.

8. Publicity for super-complaints

- 8.1 It is for a super-complainant to decide whether or not to issue a press notice recording its super-complaint. However, super-complainants should consult with us to avoid jeopardising investigations that could be hampered by prior disclosure of the complaint. In such circumstances, the agreement of the super-complainant may be sought to keep the existence of the super-complaint confidential for a period.
- 8.2 It should be noted, however, that we are required to publish our response to the super-complaint. As a minimum, this publication will include a non-confidential version of the complaint and our reasons for our proposals on our website. If it is appropriate, a press notice may also accompany the response.
- 8.3 In some circumstances we may decide that it would also be appropriate to issue a press notice ourselves when we receive a super-complaint, for example if the announcement of the

⁶ Section 104 FSBRA

complaint was to be combined with a public request for information. This will be decided on a case-by-case basis. Super-complainants may be encouraged to create a public summary of their complaint, where not already in the public domain, to encourage interested parties to submit relevant information to the PSR.

**Annex 5:
The Payment Systems Regulator's Draft
Penalties Guidance**

The Payment Systems Regulator's Draft Penalties Guidance

1. Introduction

- 1.1 Under section 73(1) Financial Services (Banking Reform) Act 2013 (FSBRA) we may require a participant in a regulated payment system to pay a penalty in respect of a compliance failure.¹
- 1.2 A 'compliance failure' means a failure by a participant in a regulated payment system to comply with:
- a direction given by us under section 54 FSBRA; or
 - a requirement imposed by us under section 55 or 56 FSBRA.
- 1.3 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 a penalty. We are required to prepare this statement of principles under section 73(3) FSBRA.
- 1.4 We will have regard to this statement of principles:
- in respect of any compliance failure which occurred, or is continuing, on or after 1 April 2015
 - in deciding whether to impose a penalty
 - in determining the amount of any penalty.
- 1.5 We will apply this statement of principles in respect of all participants. This does not imply that the same compliance failure would necessarily result in the same financial penalty across and within the different categories of participant.
- 1.6 We may, from time to time, revise this statement of principles. Any revised statement will be issued for consultation and published.²

2. Deciding whether to impose a penalty

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

¹ In this document references to a 'participant' shall have the same meaning as defined in section 42 FSBRA.

² Except insofar as the context requires, words or expressions will have the meaning assigned to them in the PSR's relevant directions and requirements, and otherwise any word or expression will have the same meaning as it has in the Act.

- 2.2 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 conduct of the participant after the compliance failure has been identified.
 - The previous disciplinary record and compliance history of the participant.
 - Our guidance and other published materials: we will not generally take action against a participant for behaviour that we consider to be in line with guidance, our regulatory principles or other materials published by us pursuant to our statutory functions and duties, and which were current at the time of the behaviour in question.
 - Action taken by us or a relevant regulator (another relevant domestic or international regulatory authority or their predecessor) in previous similar cases.
 - Action taken by a relevant regulator: where a regulator proposes to take action in respect of the compliance failure which is under consideration by us, or one similar to it, we will consider whether the other regulator's action would be adequate to address our concerns, or whether it would be appropriate for us to take our own action.
- 2.3 Where we impose a financial penalty, our normal practice will be to also publish details of the compliance failure.³
- 2.4 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 participant 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 participant 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 participant has brought the compliance failure to our attention, this may be a factor in favour of publishing details only
 - if the participant has admitted the compliance failure and provides 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 publishing details only, rather than also imposing a financial penalty
 - if the participant has a poor disciplinary record or 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

³ Under section 72(1) FSBRA we may publish details of a compliance failure by a participant in a regulated payment system.

- the approach of the PSR or other relevant regulator in similar previous cases (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) and
- the impact on the participant concerned, although it would only be in an exceptional case that we would be prepared to agree to publish details only, and not impose a financial penalty, if a penalty would otherwise be the appropriate sanction.

3. Determining the appropriate level of financial penalty

- 3.1 Our penalty-setting regime is based on the following general principles:
- *disgorgement* – a participant should not benefit from any compliance failure
 - *discipline* – a participant should be penalised for wrongdoing; and
 - *deterrence* – any penalty imposed should deter the participant who committed the compliance failure, and others, from committing further or similar compliance failures.
- 3.2 The total amount payable by a participant subject to enforcement action may be made up of two elements: (i) disgorgement of the benefit received as a result of the compliance failure; and (ii) a financial penalty reflecting the seriousness of the compliance failure. These elements are incorporated in the following framework.
- **First element:** the disgorgement of any economic benefits derived directly from the compliance failure (see paragraphs 3.7-3.9).
 - **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 participant (see paragraph 3.10)
 - *Step 2:* where appropriate, an adjustment made to the Step 1 figure to take account of any aggravating or mitigating circumstances (see paragraphs 3.11-3.12)
 - *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 3.13); and
 - *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 3.14 and 5.1-5.7)
 - an adjustment based on any serious financial hardship which the PSR considers payment of the penalty would cause the participant, or if the penalty could adversely impact the stability of or confidence in the UK financial system (see paragraphs 3.15 and 4.1-4.8).
- 3.3 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 3.2).

- 3.4 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.
- 3.5 The penalty resulting from Steps 1-4 may not exceed 10% of the annual revenues or billings derived by the participant from the business activity in the United Kingdom to which the compliance failure relates.⁴
- 3.6 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**

- 3.7 We will seek to deprive a participant 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.
- 3.8 Where the success of a participant's business model is dependent on failing to comply with regulatory obligations related to payment systems and services provided over payment systems, and the compliance failure is at the core of the participant's activities related to payment systems and services provided over payment systems, we will seek to deprive the participant of all the financial benefit derived from such activities.
- 3.9 Where a participant agrees to carry out a remedial programme (which may include redress to compensate those who have suffered a loss 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

- 3.10 As noted in paragraphs 3.2-3.3, the penalty is calculated separately from, and in addition to, any disgorgement. We will determine a figure that reflects the seriousness of the compliance failure. 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 conduct by deterring participants who have committed compliance failures from committing further compliance failures and helping to deter other participants from committing similar compliance failures.
 - *The nature of the compliance failure*: the following considerations may in particular be relevant:
 - the nature of the requirement imposed on, or the direction given to, the participant which was not complied with
 - the duration and/or frequency of the compliance failure

⁴ Annual revenues realised in the year prior to the PSR's final decision notice or termination of the relevant compliance failure, whichever is earlier.

- the extent to which the participant’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 following may in particular be relevant:
 - competitiveness of and competition in the market for payment systems or the markets for services provided by payment systems
 - innovation in the market for payment systems or the markets for services provided by payment systems
 - the interests of those who use, or who are likely to use, services provided by regulated payment systems.
- The extent to which the compliance failure was deliberate or reckless.

Step 2 – mitigating and aggravating factors

- 3.11 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 3.7-3.9) to take into account factors which aggravate or mitigate the compliance failure.
- 3.12 The following list of factors may have the effect of aggravating or mitigating the compliance failure:
- the conduct of the participant in bringing (or failing to bring) quickly, effectively and comprehensively the compliance failure to our attention (or the attention of other relevant regulators, where appropriate)
 - the degree of cooperation the participant showed during the investigation of the compliance failure by us, or any other relevant regulator 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 participant 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 participant has arranged its resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty
 - whether the participant had previously been informed about our concerns in relation to the issue
 - whether the participant had previously undertaken to us or another relevant regulator not to perform a particular act or engage in particular behaviour which relates to the compliance failure
 - the extent to which the participant concerned has complied with our requests or requirements or those of another relevant regulator relating to the issue
 - the previous disciplinary record and general compliance history of the participant in relation to the PSR or another relevant regulator
 - action taken against the participant by another relevant regulator 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

- the size, financial resources and other circumstances of the participant on whom the penalty is to be imposed.

Step 3 – adjustment for deterrence

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

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

Step 4 – discounts

3.14 The PSR and the participant 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 participant concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated under the first element, pursuant to paragraphs 3.2-3.3. Details of the PSR's policy on settlement discounts are provided at paragraphs 5.1-5.7.

3.15 Details of the PSR's policy on serious financial hardship are provided at paragraphs 4.1-4.8.

4. Serious financial hardship

- 4.1 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 4.2-4.4.
- 4.2 We note that many PSPs authorised by the Financial Conduct Authority or the Prudential Regulation Authority are subject to their own prudential requirements.
- 4.3 With respect to Operators and Infrastructure Providers, under our Principle on Financial prudence:

'An Operator or Infrastructure Provider must ensure it has, or has access to, adequate financial resources to ensure that it is able to carry out its functions and activities in relation to the regulated payment system it operates in the case of an Operator, or the regulated payment system or systems whose central infrastructure it provides or controls in the case of an Infrastructure Provider, including resources to

- *cover potential general business losses and debts as they fall due*
- *continue operations and services as a going concern if those losses or debts materialise and*
- *comply with its regulatory obligations in relation to payment systems and services provided by payment systems.'*

- 4.4 In the context of penalties, we interpret this Principle on Financial prudence to mean in particular that participants that are 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 allow the Operator or Central Infrastructure Provider to meet its current and future debts and liabilities as they fall due. This would cover a debt owed to the PSR as a penalty for a compliance failure.
- 4.5 With respect to any claim that a decision to impose a penalty on a participant 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.
- 4.6 Subject to paragraphs 4.1-4.5, our approach to determining penalties is intended to ensure that financial penalties are proportionate to the compliance failure. We recognise that penalties may affect participants 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 participant 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 participant 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; and
 - the participant provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by us about its financial position.
- 4.7 The onus is on the participant 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.
- 4.8 There may be cases where, even though the participant 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 participant (Individual Controller):
 - directly derived a financial benefit from the compliance failure and, if so, the extent of that financial benefit
 - the individual acted fraudulently or dishonestly with a view to personal gain
 - previous PSR action in respect of similar compliance failures has failed to improve industry standards
 - a participant or Individual Controller has spent money or dissipated assets or otherwise used financial structures in anticipation of enforcement action by us or another relevant regulator with a view to frustrating or limiting the impact of action taken by us or other regulators.

5. Settlement discount

- 5.1 As set out in paragraph 3.3 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 3.2).
- 5.2 Participants 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 service-users and the saving of costs to the participant 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 participant concerned will therefore be reduced to reflect the timing of any settlement agreement.
- 5.3 In appropriate cases our approach will be to discuss with the participant 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 participant 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.
- 5.4 In certain circumstances, the participant 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 participant 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 participant concerned could have resulted in an earlier settlement.
- 5.5 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.
- 5.6 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 participant 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 participant concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible.
- 5.7 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.

6. Apportionment

- 6.1 In a case where we are proposing to impose a financial penalty on a participant 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.

7. Payment of financial penalties

- 7.1 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 4.1-4.8.
- 7.2 We will consider agreeing to defer the due date for payment of a penalty or accepting payment by instalments where, for example, the participant requires a reasonable time to raise funds to enable the totality of the penalty to be paid within a reasonable period.
- 7.3 We will remain vigilant to any attempt by participants to seek to pass on the financial consequences of any penalty to third parties in circumstances where it would be inappropriate to do so.
- 7.4 We have a mechanism which will allow us to require participants to justify their fees and charges. Section 57 FSBRA allows us to vary any of the terms or fees or charges payable under relevant agreements, including agreements between a payment service provider 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 participant to apply to us under section 57, should there be grounds for concern that the fees charged under their agreement with a direct participant to obtain indirect access to a payment system represent an attempt to indemnify the direct participant from the financial consequences of penalties, or to otherwise pass on the effects of such penalties to indirect participants.
- 7.5 In meeting their obligation to pay a penalty, participants must satisfy themselves that their arrangements are consistent with public policy. For example, those who are subject to Chapter 6 of the General Provisions module of the FCA Handbook (GEN)⁵ 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. The PSR expects participants in a regulated payment system who are subject to GEN to comply with those provisions as relevant for the purposes of financial penalties imposed under FSBRA. The PSR would typically expect participants in a regulated payment system who are not subject to GEN to comply with these general principles.

⁵ See <http://fshandbook.info/FS/html/FCA/GEN/6/1>

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