Payment Systems Regulator

CP19/7

Consultation Paper

Powers and Procedures Guidance

Consultation on proposed revisions to our Powers and Procedures Guidance

July 2019

We welcome your views on our proposed revisions to our Powers and Procedures Guidance. If you would like to provide comments, please send these to us by 5pm on 17 October 2019.

You can email your comments to PPGReview@psr.org.uk or write to us at:

PPG Review
Payment Systems Regulator
12 Endeavour Square
London E20 1JN

We will consider your comments when preparing our response to this consultation.

We will make all non-confidential responses to this consultation available for public inspection.

We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. If you want to claim commercial confidentiality over specific items in your response, you must identify those specific items which you claim to be commercially confidential. 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 if we receive such a request. Any decision we make not to disclose a response can be reviewed by the Information Commissioner and the Information Rights Tribunal.

You can download this consultation paper from our website:
psr.org.uk/powers-and-procedures-guidance

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1 Executive summary

In this consultation paper, we revisit our Powers and Procedures Guidance on our regulatory and enforcement powers and procedures under the Financial Services (Banking Reform) Act 2013, which was first published in March 2015 prior to our operational launch.

We present for consultation an updated and refreshed version of our guidance. We are also consulting on amendments that we would need to make to a part of our guidance on the Interchange Fee Regulation that currently reflects some of the content of our Powers and Procedures Guidance.

Introduction

1.1 We are consulting on a revised version of our existing Powers and Procedures Guidance (PPG) published in March 2015, as reflected in the draft guidance in Annex 1. It is proposed that the revised version will replace the existing PPG. The changes we have made add to the content of, update and otherwise improve our PPG.

1.2 We are also consulting on an updated version of the part of our guidance[1] on the Interchange Fee Regulation 2015 (IFR) that describes our powers and procedures to monitor compliance with, and enforce some of, the obligations under the IFR. For the most part our powers in respect of the IFR mirror our FSBRA powers. Therefore, as there are advantages in applying the same procedures to the use of our FSBRA power in different contexts (as far as it is appropriate and practical to do so), our IFR guidance also mirrors parts of the PPG. Consequently, in the interests of consistency any revisions made to the PPG will need to be reflected in the relevant part of our IFR guidance.

1.3 A revised version of the relevant part (Chapter 7) of our IFR guidance, reflecting the proposed changes to the PPG, is in Annex 2.

1.4 This document is intended to give a high-level overview of, and context to, the changes we propose to make to our PPG and the relevant part of our IFR guidance. It is important that stakeholders read the revised PPG and revised section of our IFR guidance so that they are aware, and understand all, of the potential changes to these publications.

1.5 All references made in this document to revisions to our PPG should be read as also referring to the equivalent revisions to our IFR guidance.

1 'Guidance on the PSR's approach as a competent authority for the EU Interchange Fee Regulation', October 2016.

Background

1.6 The PPG outlined the procedures and processes that we would generally apply in relation to our functions under FSBRA. It was published in March 2015, before the operational launch of the PSR.

1.7 We acknowledged at the time of publication the need to keep its contents under review and to update it when necessary.

What we are consulting on

1.8 In Chapter 3 we summarise the reasons for revising the PPG and give examples of the changes we are proposing to make to it. As we explain in greater detail in this document, the revisions are intended to provide more information to stakeholders about our role and our procedures as well as to provide up-to-date information about our processes.

1.9 Overall, the revised guidance should make it easier for regulated parties[2] to understand our approach to using our powers and how we work in practice. We are consulting on the proposed revised draft in Annex 1.

1.10 In this consultation we also propose consequential revisions to our IFR guidance. A revised version of the relevant section is in Annex 2.

1.11 Some of our other existing guidance is likely to require expansion and/or amendment if we adopt particular revisions to the PPG, following consultation. Where this is the case we propose to carry out a separate review of that guidance, with consultation where appropriate.

1.12 For example, we intend to consult on proposed amendments to our guidance on our powers and procedures in relation to our role under the second EU Payment Services Directive 2015 (PSDII) and access to payment systems, including changes which reflect those suggested for the PPG, later this year.

1.13 Another of our publications that we consider will need to be updated, once the wording of the revised PPG is settled, is our Penalties Guidance.[3]

2 For the purposes of the PPG a 'regulated party' is any entity that may be the subject of regulatory or enforcement action by us.

3 'Penalties Guidance', March 2015.

Reasons for and aims of revising the PPG

1.14 We are revising the PPG for two main reasons. Firstly, because the powers we can use and the functions we can perform have increased significantly since it was published. Secondly, we have significantly developed our procedures and processes since then, to reflect the first-hand experience that we have gained of using our powers and carrying out our functions.

1.15 For the most part, our procedures are not changed but our proposed guidance provides more information about them. However, in some places we consider that there are ways in which our procedures can be improved and we highlight these in Chapter 3.

1.16 Our overall aim is to make our guidance as clear and accessible to users as possible.

Next steps

1.17 This consultation will close on 17 October 2019. We welcome comments from all stakeholders and interested parties, not only entities that we regulate.

1.18 During our consultation we intend to engage with stakeholders to obtain as wide a variety of views as possible on our revised guidance. This consultation is likely to be of interest to regulated parties and other persons who may be subject to the use of our regulatory, enforcement and information and investigative powers and to individuals, firms and other organisations who have an interest in when and how we use them.

1.19 We expect to make final decisions on the content of the PPG, following our assessment of the responses to the consultation, in the autumn and we aim to publish our finalised, updated PPG before the end of the year.

1.20 At the same time, we will update our IFR guidance where the text refers to and mirrors the parts of the PPG being revised and publish a refreshed version of that document.

1.21 Once the wording of the revised PPG is settled we will review and amend other PSR guidance, with a view to further consultation where appropriate, where changes to the PPG make it necessary to expand on or make amendments to its content.

Consultation questions

Question 1 Do you have any comments on the revised version of the PPG in Annex 1?

Question 2 Do you have any comments on the revised version of current Chapter 7 of the IFR Guidance in Annex 2?

Question 3 Other than our Penalties Guidance, do you consider that the proposed revisions to the PPG will require us to amend any other of our published guidance?

2 Introduction

This introduction sets out the background to the publication of our PPG, gives an overview of how the draft in Annex 1 has been revised and explains the need to amend one part of our related IFR guidance (revised version in Annex 2) as a result of revising the PPG.

2.1 The PSR is the economic regulator for the payment systems industry in the UK. We were established under the Financial Services (Banking Reform) Act 2013 (FSBRA) and launched in April 2015, with statutory objectives (the 'payment system objectives') that require us to:

- ensure that payment systems are operated and developed in a way that considers and promotes the interests of service-users (the businesses and consumers that use services provided by payment systems)
- promote effective competition in the markets for payment systems and services in the interest of service-users – in particular, between payment system operators, payment service providers and payment system infrastructure providers
- promote the development of and innovation in payment systems, particularly the infrastructure used to operate those systems, in the interest of service-users[4]

2.2 In our policy statement PSR 15/1: A *new regulatory framework for payment systems in the UK*[5], we explained how we would regulate the payment systems industry from our inception. This followed publication of Consultation Paper 14/1 on our proposed approach to regulation.[6]

2.3 Part of that consultation concerned our proposed PPG, outlining the procedures and processes that we would generally apply when exercising our regulatory and enforcement powers under FSBRA. The PPG was one of the regulatory tools that we proposed should support our policy proposals relating to payments industry strategy and governance, control and access to payment systems.

2.4 We published the PPG alongside PSR 15/1 in March 2015, before our operational launch in April 2015.

4 S50, s51 and s52 FSBRA.

5 March 2015.

6 'A new regulatory framework for payment systems in the UK', November 2014.

2.5 The PPG was heavily focused on our FSBRA powers and we sought to give practical information on how we would exercise the following such powers, once we had decided it was appropriate to do so. The power to:

- take regulatory action, by way of:
  - making a general or specific direction (section 54 FSBRA)
  - imposing a rule requirement (section 55 FSBRA)
  - imposing a requirement to grant access to a payment system (section 56 FSBRA)
  - imposing a requirement to vary an agreement relating to payment systems (section 57 FSBRA)
  - imposing a requirement to dispose of an interest in a payment system (section 58 FSBRA)
- take enforcement action, under sections 72 to 75 FSBRA, in relation to failures to comply with a direction, rule requirement or requirement to grant access, imposed under either section 54, 55 or 56 FSBRA
- gather information and conduct investigations, under sections 81 to 90 FSBRA

2.6 The PPG also sets out: the appeal routes from our decisions; our concurrent competition powers; and our other FSBRA functions

Overview of the proposed revisions to the PPG

2.7 We think that the PPG now requires updating, in order to enable both our internal and external stakeholders to better understand our role, how we work in practice, how we work with other regulators and how we decide when and how we will perform our statutory functions and use our statutory powers. Mostly, the improvements made to the PPG do not represent any changes to our existing procedures. However, in some areas we consider that there are ways in which our procedures can be changed for the better and this is also reflected in the revised PPG.

2.8 The revisions that we propose to make to the PPG are relatively extensive and, where they relate to our general approach to using our powers, cut across all sections of the original guidance. The changes also involve moving sections of the existing PPG to restructure it.

2.9 In Chapter 3 we explain the reasons behind revising the guidance and we highlight key changes made, distinguishing amendments that reflect changes to our procedures from overall improvements to the guidance.

Consequential amendments to other PSR guidance

2.10 If we adopt any of the proposed revisions to the PPG we will need to update Chapter 7 of our guidance on the IFR.[7] Our IFR monitoring and enforcement powers, as set out in the Payment Card Interchange Fee Regulations 2015 (PCIFRs)[8], replicate some provisions of FSBRA for IFR purposes. They also apply (or apply with modification) other provisions of FSBRA to our IFR function. This effectively allows us to use a number of our FSBRA powers in relation to any person on whom an obligation or prohibition is imposed by any provision of the IFR ('regulated persons').

2.11 As a result, Chapter 7 of our IFR guidance mostly mirrors the existing PPG. There are advantages in applying the same procedures to the use of our FSBRA power in different contexts (as far as it is appropriate and practical to do so).

2.12 In the interests of consistency, we therefore intend to reflect, where appropriate and as far as practical, the proposed changes to the PPG in a refreshed Chapter 7 of the IFR guidance. We highlight in Chapter 3 some specific areas where the IFR guidance has been amended to align it with the PPG.

2.13 A revised version of the IFR guidance that reflects the proposed changes to the PPG is in Annex 2.

2.14 We will reflect on all the comments received in relation to either of the draft documents in Annex 1 and Annex 2 when finalising both the PPG and the IFR guidance. There are significant advantages in continuing to apply the same procedures to the use of our FSBRA powers in different contexts, as far as it is appropriate and practical to do so.

2.15 If we adopt some or all of the recommended revisions to the PPG following consultation, we may also need to expand or amend some of our other published guidance. For example, we anticipate that many of the changes we propose to make to the PPG will also need to be reflected in our guidance on our access powers and functions under sections 56 and 57 FSBRA and under PSDII.[9] We intend to consult on our proposed amendments to this guidance later in the year as part of our proposal to publish single guidance on both our monitoring and enforcement role under PSDII and our administrative decision-making role under section 56 and 57 FSBRA.

2.16 We propose to conduct a review of any other guidance affected by revisions made to the PPG once the wording of the PPG is settled. We anticipate consequential amendments will need to be made to our Penalties Guidance, which refers to some of the processes (such as settlement discounts) that we are proposing to change.

7 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card based payment transactions (the 'Interchange Fee Regulation' or 'IFR').

8 SI 2015/1911

9 'PSR CP 16/4, Draft guidance on our approach to handling applications' under sections 56 and 57 FSBRA, July 2016 and 'The PSR's approach to monitoring and enforcing the revised Payment Services Directive (PSDII)', September 2017.

Structure of this consultation paper

2.17 The structure of this consultation paper is as follows:

- Chapter 1 – Executive summary
- Chapter 2 – Introduction
- Chapter 3 – Reasons for and aims of revising the PPG
- Chapter 4 – Next Steps
- Annex 1 – The draft, revised PPG
- Annex 2 – The draft, revised IFR guidance

3 Reasons for and aims of revising the PPG

This chapter explains our aims when revising, and the reasons behind the proposed changes to, our PPG and highlights key changes made.

3.1 We have carried out an extensive review of our PPG and have concluded that it is now appropriate to revise parts of its content, to provide more information to stakeholders about our role and our procedures as well as to provide up-to-date information about our processes.

3.2 There are two main reasons for this. Firstly, our functions have increased significantly since the PPG was originally published, prior to our operational launch. Both our jurisdiction and the scope of our work has changed substantially and this should be reflected in a revised PPG.

3.3 Secondly, we have significantly developed our procedures and processes since then, to reflect the first-hand experience that we have gained of using our powers and carrying out our functions. In some areas of our work we have been able to publish separate guidance describing these procedures and how they work in practice. In other areas we think we should now give more detail of our procedures in a revised PPG. In addition, we believe that the PPG would be improved by including, where appropriate, an explanation of some of our supplementary processes and practices which do not directly concern, but are relevant to the use of, our FSBRA powers and functions.

3.4 Although most of the revisions made do not represent changes to our current procedures, in some areas we consider that there are ways in which our procedures can be changed for the better, and this is reflected in the draft revised PPG.

3.5 We explain these reasons further below and highlight key changes to the content of the revised PPG in Annex 1 and also to the revised IFR guidance in Annex 2, distinguishing amendments that reflect changes to our procedures from overall improvements to the guidance.

3.6 Our overall aim is to make our guidance as clear and accessible to users as possible.

Our increased functions

3.7 In the last four years our jurisdiction and the scope of our work have both changed, alongside the expanding legislative and regulatory framework that governs us.

Expansion of jurisdiction

3.8 FSBRA gave us certain powers in relation to regulated payment systems. FSBRA also made us a concurrent competition authority able to exercise powers under the Competion Act 1998 (CA98) and the Enterprise Act 2002 (EA 2002).

3.9 However, our role and remit now extends beyond the FSBRA and competition jurisdictions. Since 2015 we have been given the following additional functions.

- We are responsible for monitoring and enforcing compliance with the IFR, in accordance with the PCIFRs.
- We are responsible for monitoring and enforcing compliance with some provisions of PSDII in accordance with the Payment Services Regulations 2017.
- We are the UK's competent authority to designate alternative switching schemes, under the EU Payment Accounts Directive 2014, and ensure such schemes continue to meet the criteria set out under the Payment Account Regulations 2015.

3.10 Therefore, we have updated the draft PPG in Annex 1 (paragraphs 2.6 and 2.11) to acknowledge these additional functions.

3.11 The revised PPG also explains more comprehensively our role in the regulatory landscape, as well as how we work with concurrent regulators and authorities (paragraphs 2.13 to 2.16, 2.21, 3.7 to 3.14), and how we deal with different types of information that we receive as a result of all of our functions (paragraphs 2.17 to 2.37).

The scope of our work and our priorities

3.12 Our increased jurisdiction has brought with it a need to proactively scope and prioritise our work. Our annual work programme, as contained in our Annual Plan[10], reflects this.

3.13 Since our inception we have developed our approach to using our FSBRA powers in a way that reflects our organisational and administrative priorities, while also meeting our statutory duty to promote our statutory objectives, and in line with the regulatory principles in FSBRA.[11]

3.14 Following our original consultation on the existing PPG (CP 14/1), we concluded that it did not need to describe explicitly how we reach decisions about taking action, only how we would take action once we had decided it was appropriate to do so. This was because information on how we take decisions is covered in other publications such as PSR 15/1, our Administrative Priority Framework (APF) and our Objectives Guidance.[12] However, we also stated that we would 'commit to keeping our guidance under review to reflect our experience of reaching regulatory decisions'.[13]

10 'Payment Systems Regulator Annual Plan and Budget 2019/20', March 2019.
11 S53 FSBRA.
12 'Objectives Guidance', March 2015.
13 CP14/1 paragraph 9.12.

3.15 At the moment, answers to questions about when we may consider using our FSBRA powers and how we decide this are in one or more separate documents. However, we think that we should make it easier for regulated parties and interested stakeholders to access information on all aspects of our approach to using our FSBRA powers, by including it within the revised PPG.

3.16 We also think that including this information within the PPG will clarify a number of matters for regulated parties.

- Firstly, that we will not always take formal action when we identify a matter of regulatory concern, but we will consider all available, appropriate options and continue to keep the question of what is the most appropriate outcome under review.
- Secondly, that we will consider taking either regulatory or enforcement action in circumstances where both possibilities are available, regardless of whether a decision was initially taken to open an enforcement case or look into the matter in some other way.
- Thirdly, we will look at using the full ambit of our information gathering and enforcement powers to gather evidence, whether we have opened an enforcement case or the matter is being looked into in some other way.
- Finally, that, with the exception of decisions taken by the Enforcement Decisions Committee, we will always take decisions with reference to our APF.

3.17 The revised PPG in Annex 1, therefore now does the following.

- It explains that we are under a statutory duty to ensure that we exercise any of our general functions in line with our statutory objectives and the regulatory principles. Even in the absence of a legal duty to have regard to these matters when exercising our other functions, we will still aim to act in a manner that does not run contrary to them (paragraph 3.6).
- It clarifies that it will not be appropriate for us to take formal action in every matter referred to us. We will only act where we have decided that it is appropriate to do so, based on the information we have, and we will consider all of the available, relevant evidence together with any other criteria we adopt to help us make decisions (for example, paragraphs 2.28, 4.1 and 5.3). We will also continue to keep the question of what is the most appropriate outcome under review as a matter progresses (paragraph 5.9).
- It makes more frequent and clearer references to the use of our APF, which helps us decide when and where it is appropriate to use our formal powers and how to do so in a targeted way (paragraphs 2.23, 2.24, 2.28, 3.13, 4.2, 4.42, 5.3, 5.54, 5.8, 5.9 and 5.83).

- It explains that we have a variety of options available outside of our formal FSBRA powers. For example, we may have both informal and formal interactions with external stakeholders when asking for information, considering whether to give a direction or impose a rule requirement and investigating a suspected compliance failure. This also includes the possibility of taking no action (for example, paragraphs 2.29 to 2.31 and 5.53).
- It gives more even-handed treatment to our use of our direction, requirement and enforcement powers. It makes it clear that we will review all of the available options before deciding on the most appropriate steps to take (for example, paragraphs 2.31, 4.1 and 5.3) and will keep that under review, regardless of whether we initially decided to open an enforcement case or look into the matter in some other way.
- It clarifies that we will look at using the full ambit of our information gathering and enforcement powers to gather evidence, whether we have opened an enforcement case or the matter is being looked into in some other way (paragraphs 2.42 to 2.47).

Our developed procedures, processes and practices

3.18 Since our launch we have significantly developed the procedures that we use when exercising our FSBRA powers, and we better understand how we can and should exercise those powers. In particular, we have:

- developed further, based on experience, the procedures and processes we use in relation to our direction, requirement and enforcement powers under FSBRA
- developed further our supplemental processes and practices that help us perform our statutory functions effectively and efficiently (for example, in relation to complaints and working with the Enforcement Decisions Committee (EDC))

3.19 Therefore, we can now include further information in our guidance about our procedures and processes.

3.20 In addition, because we have also developed specific guidance on the procedures and processes to be followed when we exercise our access and market review functions under FSBRA, we can mostly remove content from the existing PPG that covers these areas.

Procedures and processes used in relation to our direction, requirement and enforcement powers under FSBRA

3.21 We propose to add information in relation to our powers and procedures in several respects.

3.22 For example, we explain in more detail how we may take urgent action in response to potentially harmful behaviour. In this context, we may give a direction or impose a rule requirement with little or no notice and/or apply for a court injunction under section 75 of FSBRA. The draft revised PPG in Annex 1 contains our proposed text on this (paragraphs 4.40 to 4.41 and 5.16).

3.23 The draft PPG also provides additional information in relation to our process for assessing whether to open an enforcement case to investigate a potential compliance failure and how such a case would proceed, both before and after it is referred to the EDC.

3.24 We give more detail around numerous matters, for example:

- the criteria we apply when deciding to open an enforcement case (including reference to our APF) (paragraph 5.8)
- who the decision-makers and other staff members are (by reference to role and title) who will be involved in an enforcement case as it progresses through its various stages (paragraph 5.12 to 5.14)
- when and how we will update a party under investigation as to the scope and progress of that investigation (paragraphs 5.22 to 5.31)
- the composition of EDC panels and when decisions can be made by a panel Chair alone, rather than the full panel (for example, paragraphs 5.64, 5.66, 5,90, 5.92 and 5.93)
- how an EDC member's additional role as a potential Settlement Decision Maker (SDM) is managed (an EDC member who is appointed as a SDM would not then, if the matter did not settle and proceeded to the EDC, go on to participate as an EDC panel member in relation to that matter) (paragraphs 5.43 and 5.65)
- the procedures to be used if the EDC process results in something other than issuing a warning or a final decision notice (for example, the matter being discontinued) (paragraphs 5.83 and 5.112)
- the lifecycle of an enforcement case, in the form of a diagram (Annex C to the revised PPG)

Our supplementary processes and practices

3.25 Since we published the PPG we have developed further our supplemental processes and practices that help us perform our statutory functions effectively and efficiently. For stakeholders to be able to fully understand the context of our work and what to expect when engaging with us, the revised PPG should include some explanation of these.

3.26 We have added more information about how we handle intelligence or complaints from firms and individuals about industry behaviours and/or suspected compliance failures and how we treat confidential material received in such circumstances. We explain what will happen when they give, or are the subject of, such intelligence or a complaint and how we may treat the information given to us differently depending on its source, its nature, which of our powers and functions it may relate to and our administrative priorities.

3.27 The draft PPG in Annex 1 includes a new section dealing with these issues (paragraphs 2.17 to 2.37).

3.28 We have also added more information regarding how we work with the EDC. This reflects our developed thinking on our processes and governance arrangements. First, in relation to the exact position the EDC holds within our governance structure and, second, in relation to who might provide legal, economic or other technical advice to the EDC during enforcement proceedings.

3.29 In relation to the first issue, although we are not legally obliged to, the PSR has chosen to establish the EDC and appoint independent panel members to it as part of its internal governance arrangements for administrative, enforcement decision-making. FSBRA does not impose requirements on us around the independence of decision-makers (in contrast to the requirements placed on the FCA and The Prudential Regulation Authority (PRA),[14] and therefore the governance arrangements for the EDC and the ways in which cases are conducted before it differ from those used by the FCA (and the PRA) for its decision-making bodies.

3.30 The obligations upon us are to make administrative decisions that are transparent, robust and fair, in line with public law and good regulatory practice. The EDC is the way we choose to do this.

3.31 We propose revisions to the PPG to explain more clearly that the EDC operates not as a tribunal or court, but as an internal body tasked with making administrative decisions.[15] The draft PPG in Annex 1 therefore explains the position of the EDC in those terms.

3.32 In relation to the second issue, we consider that the people who advise the EDC should be those who are best placed to do so, in light of the complex and technical nature of many of the subject matters that it makes decisions on. This gives the EDC the best support and allows us to reach the best regulatory outcomes. As our staff have substantial expertise in both the legal and other technical subjects that will arise before the EDC, we consider that our staff are usually best placed to provide advice to our own internal decision-making body.

3.33 This approach is already explained in our published guidance on our approach to monitoring and enforcing the IFR. In that document we make it clear that, in the IFR context, the EDC's advisers may include members of our staff.

3.34 The revised PPG (paragraph 5.73) also now explains who amongst our staff may advise the EDC in the context of enforcement action taken under FSBRA, if and when required. It explains that the reference to 'staff unconnected to the case' means that members of the enforcement case team cannot give advice to the EDC, apart from any analysis and submissions made when presenting our case to the EDC. Staff unconnected to the case may however include, for example, members of the team who work on the policy for, and monitoring of, the regulation that is the subject-matter of the case. In practice, as we will have a very small pool of staff working in any single area, this may also mean that the person best placed to give advice may have been working on the subject right up until we opened the enforcement case.

14 S395(2) Financial Services and Markets Act 2000.

15 Other financial regulators already do this, for example the FCA – FCA, 'Decision, Procedure and Penalties Manual', June 2019 paragraphs 3.1 and 3.2.

3.35 Other regulators take a similar approach to providing internal advisors to decision-making bodies, including the Bank of England (in relation to prudential regulation and other enforcement cases).[16] Our practice here is also aligned to the approach that we and other competition authorities (including the Competition and Markets Authority whose processes we use as a model) adopt in relation to our competition decision-making function. When our Competition Decisions Committee (the CDC) considers a matter referred to it, it will receive both legal and other advice from our staff throughout that process. The CDC will only ask for external advice in exceptional circumstances.

3.36 When receiving advice from our staff, and throughout the decision-making process, EDC members will be fully responsible for making decisions on the matters referred to them, in respect of both non-compliance and sanction, considering all relevant factors.

3.37 In addition, we have also added to content of the PPG to explain how, in practice, we will manage the process of working with the EDC.

3.38 For example, we have explained when internal communications between our staff and the EDC might be disclosed to a regulated party that is the subject of enforcement action. The revised PPG now explains that:

- Prior to the issuing of a warning notice the EDC may choose to communicate with the enforcement case team about the draft warning notice submitted to it for the purpose of seeking further information and/or clarification of the matters to which it relates. Such communications about the draft warning notice are not disclosable to the party to whom the draft warning notice is addressed. However, any warning notice issued will set out the factors the EDC has taken into account when deciding to issue the warning notice and will include sufficient information to enable the regulated party to understand the PSR's case against it (paragraph 5.81). The regulated party will, subject to considerations of confidentiality under section 91 FSBRA (paragraph 2.48), legal privilege and Public Interest Immunity (PII), also be provided with copies of any evidence submitted by the enforcement case team and considered by the EDC when making its decision (see paragraph 5.82).
- Once the EDC has issued a warning notice it has discretion, subject to considerations of confidentiality, legal privilege and PII, as to whether to share with the recipient any communications it has with the enforcement case team about the progress of the case (paragraph 5.87).
- It will not usually be appropriate to share with the regulated party who is the subject of EDC proceedings the correspondence and/or communications exchanged between the EDC and members of our staff (unconnected to the enforcement case team) acting as advisors to it. In particular, any legal advice provided will be subject to legal privilege (paragraph 5.74). Wherever legal or other technical analysis carried out by our staff forms part of the case against the recipient then as much of the substance of that analysis as is necessary for the recipient to understand the case against it will be included within the submissions made by the enforcement case team to the EDC and any warning or decision notice issued during the EDC process. This is unless disclosure is restricted by section 91 FSBRA, legal privilege or PII.

16 'Bank of England, Procedures – The Enforcement Decisions Committee', August 2018 paragraph 3.5.

Other guidance on the procedures and processes to follow when exercising some of our FSBRA functions

3.39 We have published separate, standalone guidance explaining our role and functions in respect of:

- applications for access to payment systems using our powers under section 56 FSBRA and our powers to vary agreements relating to payment systems under section 57 of FSBRA
- our approach to monitoring and enforcing obligations under PSDII
- the carrying out of a market review under section 64 FSBRA[17]

3.40 The existing PPG provided some information about these functions but the separate guidance gives now gives much more detail. Therefore, the revised PPG in Annex 1 no longer covers our procedures where they only relate to these specific functions and refers the reader instead to the standalone guidance for more information.

3.41 We highlight here that we intend to consult later this year on our proposal to publish single guidance on both our enforcement role under the PSDII and our administrative decision-making role under section 56 and 57 FSBRA. Currently, administrative decisions under each of these regimes are made by separate decision makers within the PSR (the EDC in relation to compliance failures under PSDII and a senior member of staff in relation decisions under section 56 and 57 FSBRA). We will be proposing that, in future, the decision maker for the two regimes should be the same.

3.42 We envisage that that new guidance will also need to reflect any changes made to the PPG as a result of this consultation and will draw upon the explanations of information gathering, investigation, enforcement case opening and decision-making by the EDC that is in the revised PPG. This is because it is desirable that our processes for gathering information, investigating and taking enforcement decisions, using powers under different regimes, are aligned as far as is appropriate, taking into account any adjustments that need to be made to reflect the different functions being performed.

3.43 We will therefore also take responses to this consultation, on the content of the revised PPG, into account when finalising the relevant part of our proposed guidance on PSDII and sections 56 and 57 FSBRA.

17 'Markets Guidance', 2015.

Changing our processes

3.44 Our work so far has contributed greatly to our practical knowledge base and to our understanding of how and when we should use our formal powers, if at all. It has allowed us to develop our own good practice, which also reflects that used by regulators and authorities performing functions similar to ours.

3.45 It has also shown us that, because of the nature and size of our organisation and the scale, form and technicality of our work we need to adapt for the future some of the procedures set out in the existing PPG and this needs to be reflected in any revised version.

3.46 We believe these changes to our procedures will make our work more effective and efficient. They include amendments to:

- aspects of our process for consulting with stakeholders when we propose to exercise our direction, rule requirement and enforcement powers under FSBRA
- our settlement decision-making procedures
- our explanation of how our General Direction 1 (on how regulated parties interact with the PSR as regulator) works when we use our FSBRA powers, including any enforcement action that we choose to take
- the process for disclosing underlying material in relation to an enforcement matter that we are referring to the EDC

Our consultation processes

3.47 The existing PPG explains, in separate sections, how we will consult on using our different directions and requirement powers under FSBRA, namely deciding whether to:

- give a specific direction or impose a specifically-imposed requirement
- give a general direction or impose a generally-imposed requirement
- impose a disposal requirement

3.48 It also explains how we will consult with any regulated party that is subject to proposed enforcement action, before we refer the matter to the EDC to make any decision about the party's non-compliance.

3.49 The PPG then provides more detail on the procedures to be followed when consulting in each of these contexts. In light of our experience gained we believe that some of these should be amended to reflect what we have found, in practice, to be a better approach to consultation.

3.50 For example, for a specific direction, the existing PPG says we will usually consult with the parties to which the proposed direction will be addressed and we may consult more widely if the underlying issues may have wider implication or relevance beyond the addressees of the direction. It also explains that we may choose to publish any final specific direction on our website. However, in practice, in all but one of our special directions issued to date (Special Direction 7)[18], we have consulted publicly on both our proposed course of action and the wording of our draft direction and also published the final direction on our website. Therefore, we propose to reflect this as our usual practice in the revised PPG while retaining the discretion to vary our practice when we consider it appropriate in the circumstances.

3.51 We have adopted this approach to consultation, partly, because there is a risk that, unless we consult more widely, we may not know that our work will affect an industry sector, one or more firms or a category of individuals

3.52 The revised PPG in Annex 1 explains that for special directions, (where unlike general directions) there is no statutory obligation to do this under FSBRA)[19], before beginning any wider consultation process we will take account of any representations the relevant parties make to us, if they think that all or part of the direction should not be published (paragraphs 4.45 to 4.47).

3.53 The revised PPG explains that it is also our usual practice to publish the final versions of all of our directions on our website, together with a statement explaining, in general terms, the responses we received and how we have taken these and other, relevant, factors into account when determining whether to make the direction. Before doing so we will consider any representations made to us by a regulated party who thinks that all or part of the direction should not be published (paragraphs 4.52 to 4.53, Annex 1).

3.54 This now reflects the approach of the existing PPG when describing how we consult on imposing a disposal requirement (under section 58 FSBRA), where our power is likewise directed at a narrow pool of addressees but may be relevant to a much wider group.

3.55 Another area where we believe we can improve the PPG, to better explain how our consultation processes work in practice, is in relation to when we will consider receiving oral as well as written representations from parties (other than in the context of EDC proceedings) who are the subject of proposed action, whether regulatory or enforcement.

18 In this case we consulted on the type of action we proposed to take but only consulted with the addressee of the direction (BACS) on the exact wording of the proposed direction.

19 S104 FSBRA requires us to publicly consult on both the fact and the text of proposed general directions, unless the consequent delay would be prejudicial to service users.

3.56 The refreshed PPG in Annex 1 now explains that we will, in the context of both regulatory and enforcement action (paragraphs 4.49, 4.61, 4.71 and 5.57):

- always require representations to be made to us in writing, in the first place, where we are asking for comments on our proposed action
- request that the relevant party attends a face to face meeting with us if we consider it would help us understand the issues involved and decide whether to take action
- consider granting requests from a party for a face to face meeting with us on the same basis

3.57 In our view, this revision will make it easier for regulated parties to understand what they need to do when we propose to use our FSBRA powers, namely, always set out representations in writing in the first place, and what they need to do if they want a face to face meeting with us. Having submissions in writing should reduce the chance of us misunderstanding or misinterpreting the comments and provide us with a clear basis on which to assess whether there is a need for further consideration and/or evidence gathering before we make our final decision.

3.58 This revision also reflects our need for flexibility as to how we work. We are a small organisation and we are under a statutory duty to use our resources efficiently, in a timely and targeted way. In general we find it helpful to receive submissions in writing. We will, however, hold a meeting where we think this will additionally aid our understanding of the matter under consideration.

3.59 Any exercise of our discretion that results in us declining to hear oral representations is not intended to, and cannot, override any other entitlement to an oral hearing in another context. For example, in relation to enforcement action where a case has been referred to and is being considered by the EDC.

Settlement

3.60 In our initial Policy Statement (PSR 15/1) we recognised that our future experience of settlement proceedings would shape the development of our processes in this area.[20]

3.61 Now that we have taken an enforcement case through settlement, we believe that there is room for improvement in our processes as they are described in the existing PPG. We consider that our revisions in this area could save significant amounts of our time and resources and make our enforcement processes more efficient and effective.

3.62 Firstly, we think there is an advantage in encouraging regulated parties who are under investigation for a suspected compliance failure to consider settlement as early in the process as possible. Settlement saves resources for both us and regulated parties and it can also encourage a culture of increased openness and cooperation between the regulator and the regulated community.[21]

20 PSR 15/1 paragraph 9.48.

21 In its recent consultation paper 'Enforcement: changes to the PRA's settlement policy', April 2017, the PRA recognises the need to encourage parties to settle early by suggesting discounts on any financial penalty made following non-compliance.

3.63 To encourage parties under investigation to consider early settlement opportunities we propose:

- A regulated party can raise the possibility of settlement at any time during the lifecycle of an enforcement case (paragraph 5.35).
- The stage at which we will generally enter into settlement discussions, where appropriate, is when we consider that we have sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome (paragraph 5.35).
- Whether to enter into settlement discussions is a matter for our discretion (paragraph 5.37).
- There will be an 'early settlement window' process, offering the largest possible discount only in that 'window', replacing the process described in the current PPG (and our current Penalties Guidance) whereby there is no clear cut-off period for claiming the maximum discount following settlement (paragraph 5.37).
- A significantly lesser discount will be available upon settlement after the settlement window has closed and the exact amount of the discount will depend on our assessment of the stage the case has reached, in terms of preparation for EDC proceedings, and the level of co-operation received from the parties (paragraph 5.38).[22]

3.64 Secondly, we think that there may be further advantages in using partial settlement agreements to narrow the issues the EDC has to decide.[23]

3.65 Under a full settlement agreement, a regulated party may accept that there has been a compliance failure and agree to a financial penalty and/or publication of the failure instead of contesting the enforcement action. Under a partial settlement agreement the party can continue to contest part of the proposed action, including, but not limited to:

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

3.66 Where a party has reached a partial agreement with us, the EDC will decide the remaining contested matters. The EDC will not examine or depart from the matters agreed and the party subject to enforcement action will not be permitted to adduce any evidence that aims to undermine or attempt to re-open the settled matters.

3.67 The maximum available settlement discount is the same for both full and partial settlement agreements where an agreement is reached during the early settlement window and, in the case of a partial agreement, where it covers all factual issues and issues relating to non-compliance.

22 This approach differs from that currently adopted by the FCA and that proposed by the PRA in their consultation paper, both of which only allow for settlement discounts within the early settlement window.

23 The FCA has only recently adopted the process of 'focused resolution', but it has already used it in one concluded case - Linear Investments Ltd v FCA [2019] UKUT 0115.

3.68 The revised PPG in Annex 1 reflects our proposal to introduce this additional element into our settlement processes, to save both time and resources for both our staff and the EDC (paragraph 5.40).

Taking into account our general directions

3.69 We have recently consulted on improvements to our original 'day one' general directions.[24] We will need to ensure that the final revised version of the PPG reflects any changes to the directions, once the wording of the directions is settled.

3.70 General Direction 1 is particularly relevant to any description of our powers and procedures, both under FSBRA and more widely. This direction governs the relationship that regulated parties have with us. It currently requires parties to, appropriately, inform us about matters relating to them that could materially, adversely impact on the advancement of our statutory objectives and explains that parties have a duty to act in an open and co-operative way in all of their dealings with us. As a result of our recent general directions review we have since decided to amend General Direction 1 to clarify that regulated parties should inform us of anything relating to them, that we would reasonably expect to be told about.[25]

3.71 General Direction 1 is relevant to the PPG for two reasons. Firstly, because it is one way that information about a matter of potential regulatory concern may come to our attention, something that is explained in the revised guidance (paragraphs 2.38 to 2.41).

3.72 Secondly, because if a regulated party does not cooperate with us when we are gathering information about an issue we are considering or investigating, it may be liable to a finding of non-compliance in respect of its obligations under General Direction 1. The obligation under General Direction 1, applies irrespective of whether or not formal requests for information are made.

3.73 We could bring enforcement action for non-compliance with General Direction 1 either in parallel with or instead of the use of our powers to sanction the non-compliance through the courts (under section 90 FSBRA). If the party does not cooperate with an informal request we can only take General Direction 1.

24 'Review of the PSR Direction made in 2015', March 2018, 'Decision on the review into our 'day one' Directions', March 2019, and 'Consultation of proposed Directions', March 2019 (CP18/3).

25 'Decision on the review into our 'day one' Directions', March 2019.

3.74 In the revised PPG we explain the full effect of General Direction 1 by way of making two further amendments, namely:

- We have made it clear that the requirements of General Direction 1 apply whenever we request information from a regulated party, whether we make that request using our formal powers or not (paragraphs 2.38 to 2.41).
- We have removed the suggestion that we will not consider exercising our power to take enforcement action under FSBRA for non-compliance with General Direction 1 if a party fails to respond to an information request in circumstances where we have appointed investigators but have not followed the usual course of requesting information via an Information Requirement Notice (under section 85 FSBRA) (paragraph 4.37). The PPG currently says that in these circumstances we will instead consider holding an adverse inference against the party in respect of the matter they are being investigated for.

3.75 In relation to the second amendment we consider that the reference to drawing adverse inferences from a failure to give information to investigators voluntarily is not strictly appropriate, particularly because this approach is not consistent with what happens when we do not appoint investigators and we request information on a voluntary basis. In that situation, a failure to cooperate with our request could result in enforcement action for non-compliance with General Direction 1, not in an adverse inference being considered. We do not think that there are good reasons for having different approaches in these two scenarios.

Disclosure

3.76 One further area where we consider we should amend the processes as described in the existing PPG is in relation to the material that we disclose to regulated parties that are the subject of enforcement proceedings being referred to the EDC, and to the EDC itself.

3.77 The existing PPG describes how we will prepare an investigation report in each enforcement case and that this will form the basis of our preliminary findings in the case. Usually these preliminary findings will then be shared with the party under investigation and comments will be invited on those findings, before the final decision is made to refer, or not, the matter to the EDC.

3.78 In addition, the PPG explains that the EDC will likewise usually be provided with the investigation report, along with any draft warning notice that they are asked to issue.

3.79 In relation to 'underlying material' (evidential material which either supports or undermines the case against the regulated party as set out in our preliminary findings and, later, in any warning notice issued by the EDC) the existing PPG states that:

- as there is no statutory requirement to give a recipient of a warning notice any underlying material, it is for the EDC to decide whether it is appropriate in each case for the subject of the enforcement action to have access to any underlying material, bearing in mind our duties to protect confidential information under FSBRA
- where we consider it appropriate or, where the EDC requests it, we will provide EDC members with relevant supporting documents or evidence

3.80 As part of our work reviewing the PPG we have looked at how other financial regulators (usually subject to a statutory disclosure regime) approach the issue of disclosing underlying material to parties' subject to enforcement action and to their decision-making committees. Other regulators usually provide, to both a regulated party and the appointed decision-makers, any evidential documents relied upon in support of their case and then assess whether additional, underlying material is disclosable or not. In general terms considerations of fairness are usually weighed in the balance with restrictions arising from issues of confidentiality, legal privilege and public interest. We now consider that we should amend the approach to disclosure described in the current PPG to be more in line with that of other regulators.

3.81 The refreshed PPG in Annex 1 explains that we will, in every case referred to the EDC, provide panel members with any investigation report prepared by the enforcement case team and any response to the preliminary findings letter. We will also provide the EDC with the relevant evidence that we rely upon in support of our recommendations along with any evidence which we consider may undermine those recommendations, unless there is a good reason not to do so (paragraph 5.75). A good reason would include, for example, where a party has admitted that there has been a compliance failure and does not wish to make representations as to our recommendation as to the sanction to be opposed (but where the case is unsuitable for settlement). In such circumstances, the EDC would have sufficient evidence before it to decide whether there had been a compliance failure, without needing to review the supporting evidence.

3.82 The revised PPG also explains that, in each case, when the EDC issues a warning notice the regulated party will, subject to considerations of confidentiality under section 91 FSBRA, legal privilege and PII, be provided with copies of the evidence submitted by the enforcement case team to the EDC and considered by the EDC when making its decision (paragraph 5.82 and 5.101).

3.83 The revised PPG also states (paragraph 5.102) that we will, we will consider whether fairness requires us to disclose any other relevant evidence to the recipient(s) including any evidence that we consider may undermine the enforcement case team's recommendations to the EDC.

3.84 In addition, we will keep the need to disclose further evidence under review throughout the enforcement process (for example, following the receipt of the party's submissions to the EDC) and we will make further disclosure as and when necessary (paragraph 5.105).

3.85 In addition, we make it clear that the EDC can consider granting access to other evidence when appropriate. Where the EDC does this it will consider whether access to the material is necessary for the recipient(s) to understand the case against it and whether any claims of confidentiality, privilege or PII are made in relation to the material (paragraph 5.106).

3.86 Amending our approach to disclosure will have several advantages, namely:

- It may help parties under investigation to better understand the case against them and whether there is any material that undermines it, so that they can appropriately exercise their rights of defence.
- It will help parties to assess whether to enter into settlement discussions or otherwise help us narrow the issues before the EDC.
- The EDC will spend less time hearing applications for the disclosure of underlying material.

Clarity and accessibility

3.87 In addition to the revisions already discussed above we have also improved the PPG to make it as clear and accessible as possible.

3.88 We have done this in two ways. The first is by giving clearer explanations of some of our processes, with diagrams where appropriate. One example of this is the flow chart we have included in Annex C of the refreshed PPG, which sets out the lifecycle of an enforcement case. Another example is the diagram we provide that sets out, more clearly, the appeal routes from our decisions, which is in Annex D of the refreshed PPG.

3.89 Secondly, the revised PPG has a new structure as outlined below.

- Chapter 1 – Introduction and scope of the PPG
- Chapter 2 – The role of the PSR and our ways of working
- Chapter 3 – The FSBRA regulatory framework
- Chapter 4 – Taking regulatory action using our FSBRA powers
- Chapter 5 – Taking enforcement action using our FSBRA powers

3.90 Chapter 2 contains a number of new sections outlining: the PSR's role with reference to the different legislative regimes we work under (e.g. FSBRA, IFR, PSDII and the Current Account Switching Service); who we regulate; how we work with other regulators and authorities; how potential regulatory concerns are brought to us (including complaints); how we otherwise gather information before deciding whether to take action; publication of our work; and information handling and confidentiality.

3.91 Chapter 3 is a standalone section summarising our FSBRA powers that are relevant to this PPG, whilst Chapters 4 and 5 explain how we will exercise those powers, including, for example, setting out the lifespan of an enforcement case.

3.92 Chapters 4 and 5 are based on the current chapters of the existing PPG that cover regulatory and enforcement action, but are adapted to reflect all of the revisions outlined within this consultation paper.

Amendments to our IFR guidance

3.93 As explained in Chapter 2, we intend for the majority of the revisions made to the PPG to be reflected in a refreshed version of Chapter 7 of our IFR guidance.

3.94 Our powers under the PCIFRs differ from our FSBRA powers in two respects. Firstly, the criteria for appointing investigators are narrower under the PCIFRs than under section 83 FSBRA (only when there are circumstances to suggest that there may have been a compliance failure). Secondly, Article 7 of the IFR gives us an additional power to obtain an independent report in respect of breaches of that article.

3.95 Other than these differences, the powers we have in relation to monitoring and taking enforcement action against non-compliance with the IFR replicate the powers we have under FSBRA. Therefore, to ensure consistency in the application of our FSBRA powers in different contexts, the revised IFR guidance in Annex 2 almost entirely replicates the revised PPG.

3.96 One key change that has resulted, where the content of the revised IFR guidance is now different from that of the existing IFR guidance, is in relation to our description of how we treat complaints and communications received from persons about non-compliance with the IFR.

3.97 In the existing IFR guidance we described how we would address both complaints and 'disputes' about the IFR, referring specifically to the use of an application process to resolve the latter. This is because Article 15 of the IFR refers to a requirement on member states to provide either 'adequate and effective out of court complaint and redress procedures or take equivalent measures for the settlement of disputes'.

3.98 However, in practice, because of the nature of our role in respect of the IFR, we would never receive an application to resolve a dispute about the obligations under the IFR that did not also amount to a complaint about potential non-compliance with it.

3.99 Therefore, while in the existing IFR guidance we imply that there may be separate processes for dealing with 'complaints' and disputes, in practice we will deal with all communications received about non-compliance with the IFR in the same way, as complaints.

3.100 The revised IFR in Annex 2 therefore now removes references to IFR applications and disputes and reflects instead the parts of the revised PPG that describe our complaint handling processes.

Conclusion

3.101 We consider that the proposed revisions to the PPG will be of significant benefit to regulated parties, any other person who may be affected by our work and other external stakeholders. Clear, robust guidance about how we use our powers will increase transparency and give more clarity and certainty to those who may be affected when we use them.

3.102 The revisions will also be reflected in an updated version of our IFR guidance, to ensure that we adopt a consistent approach, as far is appropriate, when using our FSBRA powers in a different context.

3.103 The revisions we propose will add to, update and improve the PPG and are reflected in the new, draft guidance in Annex 1 and Annex 2. It is important that stakeholders read both the draft, revised PPG and the draft, revised section of our IFR guidance to fully understand the changes we propose.

4 Next steps and consultation questions

This section sets out the next steps for our review of the PPG.

4.1 We are now consulting on the proposed content of the revised PPG in Annex 1. We are asking for comments on this consultation paper by 17 October 2019.

4.2 You can send your comments and responses to our consultation questions by emailing us at PPGReview@psr.org.uk. We would be grateful if you could provide your response in a Word document (rather than, or as well as, a PDF).

4.3 We welcome comments from all stakeholders and interested parties, not only entities that we regulate. During our consultation we will engage with stakeholders to obtain as wide a variety of views as possible on our revised guidance.

4.4 Following consultation and our assessment of the responses received, we expect to make final decisions on the content of the PPG in the autumn, and aim to publish our finalised, updated, version before the end of the year.

4.5 At the same time, we will update our other published guidance on the IFR, where it is affected by the PPG revisions, and will publish a refreshed version of that document.

4.6 We propose to conduct a separate review of any guidance that we consider may also need updating to reflect any changes made to the PPG and, where appropriate, we will further consult on proposed changes to that guidance.

4.7 We will make all non-confidential responses to this consultation available for public inspection.

Consultation Questions

Question 1 Do you have any comments on the revised version of the PPG in Annex 1?

Question 2 Do you have any comments on the revised version of the current Chapter 7 of the IFR Guidance in Annex 2?

Question 3 Other than our Penalties Guidance, do you consider that the proposed revisions to the PPG will require us to amend any other of our published guidance?

Annex 1

DRAFT Revised Powers and Procedures Guidance

Contents

1 Introduction

This chapter provides an overview of our Powers and Procedures Guidance (PPG) and explains its scope.

Overview

1.1 The Payment Systems Regulator Limited (PSR) is the economic regulator for the payment systems industry in the UK. We were established under the Financial Services (Banking Reform) Act 2013 (FSBRA) as a subsidiary of, but independent from, the Financial Conduct Authority (FCA).

1.2 This publication is the PSR's Powers and Procedures Guidance (PPG). It is general guidance made under section 96 FSBRA, after having regard to our general duties and regulatory principles.[26]

1.3 This guidance explains:

- our role and our ways of working (Chapter 2)
- the FSBRA legal and regulatory framework under which we operate (Chapter 3)
- our powers to take regulatory action under FSBRA, how we will decide what, if any, action to take, what processes and procedures we will follow and how a party can appeal against regulatory action (Chapter 4)
- our powers to take enforcement action under FSBRA where we consider that a compliance failure has occurred, how we will decide what, if any, enforcement action to take, what processes and procedures we will follow, and how a party can appeal against a decision to impose a penalty or publish details of any compliance failure (Chapter 5)

Scope of the PPG

1.4 This guidance sets out our role as the regulator for payment systems and the powers we have under FSBRA to:

- take regulatory action by way of making directions and imposing requirements (under sections 54, 55 and 58 of FSBRA)
- to take enforcement action for non-compliance (under sections 71 to 80 of FSBRA)

1.5 This guidance also explains the procedures that will apply when we consider using, and do use, these powers.

26 General duties: see s49 FSBRA. Regulatory principles: see s53 FSBRA.

1.6 For the purposes of this guidance we use the term 'regulated party' to refer to any entity that may be the subject of regulatory or enforcement action taken by us under FSBRA.

1.7 We may from time to time prepare separate guidance explaining our processes and procedures in relation to specific functions we perform under other provisions of FSBRA and/or other legislation. For example, we have published guidance explaining our role and functions in respect of:

- considering applications for access to payment systems using our powers under sections 56 and 57 of FSBRA and our approach to monitoring and enforcing the access provisions of the second Payment Services Directive[27]
- monitoring and enforcing the main requirements of the Interchange Fee Regulation 2015[28]
- our competition law powers under the Competition Act 1998 and Enterprise Act 2002[29]
- These documents each contain standalone guidance explaining our processes and procedures in these areas.

1.8 We have also published separate guidance on our approach to assessing the appropriate penalties to be imposed when we find a compliance failure.

1.9 For a full, current list of guidance and publications relating to our powers at the time of publication, please see Annex A. The most up-to-date list of our guidance and other publications is on our website: www.psr.org.uk.

1.10 This guidance represents our approach and procedures at the date of publication. It replaces the PPG published in March 2015.

1.11 We may revise our approach and procedures from time to time to reflect changes in best practice or the law and our developing experience in performing our functions under FSBRA.

1.12 We will apply this guidance flexibly. This means that we will have regard to this guidance when we perform our functions but may adopt a different approach when we think it is appropriate having considered all the relevant circumstances.

1.13 This guidance does not attempt to describe all the provisions of FSBRA in detail. Interested parties are advised to refer to the text of that legislation for a complete description of our statutory functions and powers. In the event of any inconsistency between FSBRA and any part of this guidance, FSBRA takes precedence.

27 Directive 2015/2366/EU.

28 Regulation (EU) 2015/751.

29 Given to us by s59-63 FSBRA.

2 The role of the PSR and our ways of working

This chapter explains our role, who we regulate and how we work with others. It also explains how we gather and receive information that may lead to us using our powers and how we handle this, sometimes confidential, information. Finally, it sets out when we will consider using our FSBRA powers to take either regulatory or enforcement action.

The role of the PSR

2.1 The PSR is the economic regulator for the payment systems in the UK. We regulate the market for payment systems and payment services in a way that ensures that payment systems are accessible, reliable, secure and value for money for everyone that uses them.

2.2 The PSR was launched on 1 April 2015. We were established under FSBRA with the statutory objectives (the 'payment system objectives') of:

- ensuring that payment systems are operated and developed in a way that considers and promotes the interests of service-users (the businesses and consumers that use, or are likely to use, services provided by payment systems)
- promoting effective competition in the markets for payment systems and services provided by payment systems in the interest of service-users – in particular, between payment system operators, payment service providers and payment system infrastructure providers
- promoting the development of and innovation in payment systems, particularly the infrastructure used to operate those systems, in the interest of service-users[30]

2.3 We must advance one or more of these objectives when performing our general functions under FSBRA.[31]

2.4 FSBRA gives us certain powers in relation to regulated payment systems. Her Majesty's Treasury (the Treasury) has the power to designate any payment system as a 'regulated' payment system.[32] To date the Treasury has designated eight payment systems as regulated payment systems. Our FSBRA powers apply in relation to all participants within these regulated systems (paragraphs 2.8 to 2.9 below).

30 S50, s51 and s52 FSBRA.

31 S49 FSBRA.

32 S43 FSBRA.

2.5 Our role and remit is wider than the FSBRA jurisdiction. We are also a competition authority with powers under the Competition Act 1998 (CA98) and the Enterprise Act 2002 (EA02), concurrent with those of the Competition and Markets Authority (CMA), the FCA and several other sector regulators. As a competition authority we are able to exercise powers in relation to infringements of competition law so far as they relate to participation in payment systems.

2.6 Since 2015 we have been allocated additional functions.[33]

- We are responsible for monitoring and enforcing compliance with the EU Interchange Fee Regulation (IFR) 2015, in accordance with the Payment Card Interchange Fee Regulations 2015 (PCIFRs).[34]
- We are responsible for monitoring and enforcing compliance with some provisions of the second EU Payment Services Directive 2015 (PSDII), as transposed into UK law in the Payment Services Regulations 2017 (PSRs).[35]
- We are the UK's competent authority to designate alternative switching schemes, under the EU Payment Accounts Directive 2014 (PAD), and ensure such schemes continue to meet the criteria set out under the Payment Account Regulations 2015 (PARs).[36]

2.7 We have published separate guidance in relation to our powers and functions in each of these areas (Annex A).

Who we regulate

2.8 Under FSBRA, we have regulatory and enforcement powers in relation to participants in any of the following regulated payment systems:

- BACS
- Cheque and Credit
- CHAPS[37]
- Faster Payments Scheme
- LINK
- Northern Ireland Cheque Clearing
- Mastercard
- VISA Europe

33 For more information about these roles please see the guidance listed in Annex A.

34 Regulation (EU) 2015/751, SI 2015/1911. Note that in the event of EU withdrawal without an agreement, the IFR will be replaced by an onshored version of the IFR (The Interchange Fee (Amendment) (EU Exit) Regulations 2018). The PSR will retain its responsibility for monitoring and enforcing compliance with the onshored IFR.

35 Directive 2015/2366/EU, SI 2017/752.

36 Directive 2014/92/EU, SI 2015/2038. Currently only the Current Account Switching Service (CASS) has been designated as an alternative switching scheme by the PSR.

37 Since 2017 CHAPS has been operated by the Bank of England and, under s42 FSBRA, the Bank of England is not regarded as a participant in a regulated payment system. However, CHAPS remains a designated payment system.

2.9 Section 42 FSBRA defines the following persons as 'participants' in a payment system:

- the operator of the payment system, which, 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
- any infrastructure provider, which, 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
- any payment service provider, which, 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

2.10 However, our information gathering and investigative powers under FSBRA extend to persons outside this definition (see Chapters 4 and 5).

2.11 We may also take action against any firm subject to any obligations under the PCIFRs, PSRs and the PARs.

2.12 Our concurrent competition functions apply in relation to participation in any payment system active in the UK (whether or not designated by the Treasury under FSBRA).

Working with others

2.13 There are several other financial services regulators with which we are required, under FSBRA, to coordinate the exercise of our regulatory functions, namely: the Bank of England (BoE), the FCA and the Prudential Regulation Authority (PRA).[38] We have entered into a Memorandum of Understanding with these regulators, which describes:

- the role of each regulator in relation to the exercise of relevant functions that relate to matters of common regulatory interest
- how we intend to comply with our duty to coordinate the exercise of our functions with theirs[39]

2.14 We have additional duties to exercise our competition law functions in coordination and consultation with the CMA.[40] These are set out in a separate memorandum of understanding.

2.15 We are also a member of the United Kingdom Regulators Network (UKRN), the United Kingdom Competition Network (UKCN) and the European Competition Network (ECN).[41]

2.16 Links to the memorandums of understanding referred to in this section are on our website.

38 S98 FSBRA.

39 S99(2) FSBRA.

40 The Competition Act 1998 (Concurrency) Regulations 2014 SI 2014/536.

41 In the event of EU withdrawal without an agreement the PSR will no longer be a member of the ECN.

Receiving and gathering information

2.17 There are many ways in which information which may lead to us considering whether to take regulatory or enforcement action under FSBRA comes to our attention. For example: by regulated parties self-reporting to us; by intelligence and complaints received from other regulators, firms, other organisations and individuals, including consumers and whistleblowers; and through our own proactive, information gathering, including monitoring of compliance with directions or statutory requirements.

2.18 In the case of our own information gathering, we may have sought the information to ascertain whether there are any issues of concern. Alternatively, the issue may arise while making enquiries for another purpose.

2.19 When a matter of regulatory concern is brought to our attention (i.e., we did not seek the information), we will consider the issues raised and which, if any, of our powers they may relate to.

2.20 If the matter appears to fall outside of our jurisdiction then we will consider whether another regulator may have jurisdiction and we will let the source of the information know. We do not generally forward complaints and intelligence received to another regulator or organisation.

2.21 Where the issues are within both our jurisdiction and that of another regulator or competition authority (for example, the FCA and the BoE), we will typically discuss the matter with the appropriate team within that organisation. Each organisation will consider its own priorities to decide which, if any, takes further action.

2.22 Where the issue appears to relate to our role and functions, we will assess the issue, based on information available to us and including consideration of what, if anything, we could do about it. Each year we publish our annual plan of proposed work. If information is received which relates to ongoing work, it will be forwarded to the team leading on that work.

2.23 If the information relates to a matter not within the current workplan, we will allocate staff to consider what, if anything, we might do. We make our assessment having regard to the factors set out in our Administrative Priority Framework (APF).[42]

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

- impact (with respect to the advancement of our statutory objectives, functions and duties)
- resources (implications for us)
- risk (relating to the likelihood of success of any action by us)
- strategic importance (with respect to the advancement of our statutory objectives, functions and duties)

42 'Administrative Priority Framework' (see Annex A).

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

2.26 Once we have identified the legislative regime(s) (FSBRA, IFR, PSDII, CA98 etc.) that the issue raised falls within, we will apply processes that are appropriate for handling complaints and intelligence involving those regimes. Please see our separate guidance on our powers and functions under the IFR, PSDII and CA98 for full details of our processes in those areas (Annex A).

2.27 To be able to regulate the market effectively we may use a combination of our powers and functions under FSBRA (sometimes alongside the powers and functions we have under other legislation). For example, we may address a widespread apparent non-compliance issue by publishing guidance for industry in combination with making one or more directions or requirements and taking enforcement action against individual parties.

2.28 However, we will not use our formal FSBRA powers every time a matter of regulatory concern is brought to our attention. As explained, we will assess whether we should use our formal powers after considering the circumstances of the matter involved and the factors set out in our APF. We will decide whether to take any action and, if so the type of action that is appropriate, on a case by case basis.

2.29 In addition to using our formal powers we can use other methods to try to secure good regulatory outcomes which will advance our statutory objectives. For example, we will engage with industry to help participants in payment systems and other stakeholders to find solutions to issues arising in the market or to encourage further innovation in the provision of payment services, as our work which led to the publication of the industry code on authorised push payment (APP) scams and the Payment Strategy Forum demonstrates.

2.30 We may also decide to take informal action, such as to engage with the firm(s) involved to effect change, remedy the underlying issue, and/or prevent such issues arising again. We may, for example, write privately to the regulated party regarding the subject matter of the complaint to express our views and to ask it to change its behaviour. If we first decide to take informal (rather than formal) action regarding a particular issue this does not preclude us from using our formal powers later.

2.31 In cases involving our FSBRA jurisdiction there are several possible next steps that could be taken by us and different outcomes that may result, including:

- taking no further action
- contacting the person raising the issue or complaint and seeking further information from them
- making further enquiries in the marketplace to understand better the issue
- recording the issue raised for the purposes of future/periodic review of issues raised with us
- formulating a project for inclusion in either our current or future programmes of policy work and considering whether to take regulatory action
- considering whether it raises non-compliance issues and, if so, whether to open an enforcement case

Information about possible non-compliance

2.32 In this section we explain how we handle complaints (other than complaints about us)[43] and intelligence that we receive, which might lead to us taking some form of action to address the behaviours of individual firms or that of wider industry.

2.33 We handle whistleblowing complaints in accordance with our whistleblowing policy.[44] Anyone wishing to blow the whistle on malpractice in relation to payment systems (or the services they provide) can contact us via the FCA's Intelligence Department.

2.34 If we receive a complaint relating to non-compliance with our directions or requirements made using our FSBRA powers, we will acknowledge the complaint received promptly. We will then, as described in paragraphs 2.19 to 2.26 above, consider the issue involved and which, if any, of our powers it relates to.

2.35 Complaints and information relating to possible non-compliance should be sent to PSRcomplaints@psr.org.uk or to the PSRcomplaints team at our registered address. If the sender is aware of a member of our staff or team within the PSR who is already working on the issue in question, or something close to it, then if they choose to bring the matter to the attention of that individual or team directly, they should also send a copy of that correspondence to the PSRcomplaints inbox or the PSRcomplaints team.

2.36 Following the acknowledgment of an issue that has been brought to our attention in this way, the information provided will be allocated to an appropriate member of PSR staff to consider.

43 Details of how to complain about us and which types of complaint are subject to review by the Independent Complaints Commisioner, if you are unsatisfied with our response to your complaint, are available on our website https://www.psr.org.uk/complaints-against-psr

44 https://www.psr.org.uk/psr-approach-whistleblowing

2.37 In cases of potential non-compliance we will not usually not give the provider of the information an explanation of whether, or how, we will take a matter forward. Our reasons for not informing the complainant will depend on the type of, and circumstances surrounding, the issue raised but usually this would be because of legal restrictions, market sensitivity, confidentiality considerations or because of our general approach to announcements in relation to our different types of work (see paragraphs 2.49 to 2.54).

General Direction 1

2.38 General Direction 1 currently covers all participants in the payment systems we regulate under FSBRA. It requires them, whenever they interact with us, to deal with us in an open and cooperative way and to disclose relevant information to us.

2.39 Regulated parties should tell us when they are providing information under General Direction 1 (for example, if they bring a matter to our attention which they believe we are not actively considering). Information volunteered should be accurate and, where applicable, evidence in support should be provided.

2.40 In line with General Direction 1 we expect regulated parties to tell us about any issues which could materially, adversely impact on the advancement of the payment system objectives and the performance of our statutory functions. This would include the disclosure or declaration of any potential or actual compliance failures that they are aware of.

2.41 Regulated parties may wish to consider providing information where they are in any doubt as to whether an issue could materially, adversely impact on the advancement of our objectives and the fulfilment of our duties. Whether something does materially, adversely impact on the advancement of the payment system objectives and the fulfilment of our duties is a matter for our assessment, when considering compliance under General Direction 1.

Information gathering

2.42 We gather information in a number of other ways, all of which can broadly be categorised as either informal or formal (see paragraphs 2.45 and 2.46 below) information gathering.

2.43 We may seek information from regulated parties or other individuals or firms for:

- exploratory purposes (for example, gathering information about industry practices and payment system developments to inform our policy development work)
- review purposes (for example, in the context of a market review or study[45])
- monitoring purposes (in respect of compliance with our directions or requirements and any other legal obligations we have responsibility for)
- enforcement purposes (when carrying out an investigation into potential non-compliance)

45 We have powers under s64 FSBRA to review the market and under the EA02 to conduct market studies. More information on these functions is contained within our 'Markets Guidance' (see Annex A).

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

2.45 Informal information gathering would not involve the use of our FSBRA information gathering or investigative powers. It may, for example, involve: desktop research into a particular issue; contacting the original source of a complaint/report for further detail and/or clarification of the matter raised; and/or asking individual regulated parties or sectors of industry to voluntarily answer questions about how they operate. Where we use these methods, regulated parties will be under an obligation to cooperate with our requests and to do so in an open and honest manner under General Direction 1.

2.46 Formal information gathering would, in contrast, involve the use of our FSBRA powers under sections 81 to 90. Formal information powers can apply to anyone, not just regulated parties. For further information about these powers and our powers to enforce compliance with them see paragraphs 3.25 to 3.38.

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

- the need to preserve and protect relevant information
- the need to receive the information in a timely manner
- whether we are making similar requests of multiple persons
- the purpose of gathering the information and the use it is intended for
- whether we may need to gather the information in a particular format in order to be able to rely upon it in the course of our work

Information handling and confidentiality

2.48 Often the information we receive is commercially sensitive or otherwise confidential. We have a duty to protect confidential information, as defined by section 91 of FSBRA, and will only disclose information in our possession if we consider it appropriate and are able to do so lawfully.[46]

2.49 There are also general statutory considerations that govern or restrict the way in which we deal with certain types of information. For example, any personal data must be collected and processed in accordance with the Data Protection Act 2018, the General Data Protection Regulation 2016[47] and our data privacy notice.

46 S91 FSBRA defines what is confidential information and imposes restrictions on its disclosure to protect confidentiality so far as possible, whilst ensuring that we are able to exercise our functions. The FSBRA (Disclosure of Confidential Information) Regulations 2014 2014/882 ('the Disclosure Regulations') provide a number of gateways, through which we may share confidential information.

47 SI 2016/679.

2.50 Even when information is sensitive and protected there may be occasions when disclosure is appropriate. One such case is where it will advance or help us to perform our functions.[48] For example, we may need to share information with a wider pool of stakeholders and seek their views on it to better understand a matter of regulatory concern and assess what, if any, action we need to take.

2.51 In addition, if our decisions may affect other parties we may need to consider whether we should disclose information in the interests of fairness. Relevant parties need to have sufficient information to understand our decisions, the basis for them and the supporting evidence. When considering if such disclosure is appropriate, we will have regard to the sensitivity of the information and how best to fulfil our obligations to act fairly.

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

2.53 Generally, when we make either informal or formal information requests we will ask any party which has provided us with commercially sensitive or confidential material to also provide a version of the material that can be shared with another relevant party. In other circumstances, including when we receive unsolicited information, we will ask the sender to inform us in writing if any of the information provided is sensitive and explain why. This includes information we receive orally (telephone or face to face). If we do not receive such an explanation, we will not regard the information as sensitive.

2.54 In some circumstances, we may want to publicise the fact that we are using, or considering using, powers and functions, including those we have under FSBRA. This is distinct from when enforcement action results in a sanction being imposed (see paragraph 5.5).

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

- where we receive information that an incident has occurred that has had a significant impact on the provision of payment systems and/or services
- where we become aware of a matter that has the potential to significantly affect service-users of payment systems, including consumers
- where we open an enforcement investigation into a matter of significant strategic importance to us and/or to industry (subject to our usual approach not to publish information about the opening of an enforcement case, see paragraph 5.6)

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

48 Regulation 3 of the Disclosure Regulations.

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

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

3 The FSBRA framework

This chapter summarises the FSBRA legal and regulatory framework under which we operate and our statutory powers.

It is structured as follows:

- Our FSBRA functions and regulatory principles
- Concurrent competition powers and the primacy obligation
- Taking regulatory action using our direction and requirement powers
- Taking enforcement action
- Information gathering and investigatory powers
- Power of the Bank of England, the FCA and the PRA to direct the PSR

Our FSBRA functions and regulatory principles

3.1 Under FSBRA we have several general functions along with a number of additional, particular ones. The performance of all of these functions enables us to properly regulate the payment systems industry.

3.2 Our general functions are:[49]

- to give general directions under section 54 FSBRA (see paragraphs 4.56 to 4.64 below) – a function that can only be performed by the PSR Board
- to give general guidance (under section 96 FSBRA) – a function that can be performed by the PSR Board or a committee or sub-committee of the Board
- to determine the general policy and principles by reference to which we perform our particular functions – a function that can be performed by the PSR Board, a committee or sub-committee of the Board, or a PSR officer or member of staff[50]

3.3 When performing any of our general functions, we must, as far as is reasonably possible, act in a way which advances one or more of the payment system objectives: the competition objective, the innovation objective and the service-user objective.

3.4 In addition, when performing our general functions, we must have 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 the Bank of England's functions.[51]

49 S49(4) FSBRA.

50 Schedule 4 paragraph 5 of FSBRA.

51 S49(3)(a) and (b) FSBRA. In some circumstances the Bank of England, the FCA and the PRA have the power of veto over exercising our functions, see paragraph 3.39 to 3.41 below.

3.5 We must also, when performing our general functions, have regard to the eight regulatory principles in section 53 of FSBRA (set out in Annex B to this guidance).[52] When using our FSBRA powers we will do so in a way that uses our resources most efficiently and economically, takes account of the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term, and is transparent, accountable, proportionate, consistent, and targeted only at cases where action is needed.

3.6 When performing any other functions (i.e., not our general functions) under FSBRA, we will also have regard to our statutory objectives, the importance of financial stability and of payment systems and the regulatory principles (although FSBRA does not require this), and aim to act in a manner that does not run contrary to any of those objectives and principles.

Concurrent competition powers and the primacy duty

3.7 Before exercising some of our FSBRA powers we have a statutory duty to consider if it would be more appropriate for the PSR to exercise its powers under CA98, in relation to infringements of competition law relating to participation in payment systems.[53] This is known as 'the primacy duty'. If we consider that it would be more appropriate to proceed under CA98, we must do so rather than exercise another power.

3.8 Our relevant FSBRA powers are:[54]

- to give a specific direction (section 54) or impose a specific requirement (section 55)
- to require granting of access (section 56) or vary agreements (section 57)
- to require the disposal of interest in an operator of a regulated payment system (section 58)

3.9 The primacy duty does not arise in all circumstances, as 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)[55], 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)[56]

3.10 There will be cases where there is no indication that CA98 could potentially apply. For example, if the behaviour does not appear likely to affect competition. Proceeding under CA98 will only be appropriate if the issue is within the scope of the prohibition provisions.

52 S49(3)(c) FSBRA.

53 S61 FSBRA.

54 S62 FSBRA.

55 S2(1) CA98.

56 S18(1) CA98.

3.11 If the issue relates to the general conditions of one or more markets, we might decide it is more appropriate to use our power to issue a general direction or to impose a general requirement (see Chapter 4 below). The use of these general regulatory powers under FSBRA does not trigger the primacy obligation.

3.12 If the issue relates to a failure to comply with one of our directions or requirements, or obligations imposed by the IFR, the PSRs or the PARs, we will consider taking enforcement action. Again, the primacy duty will not apply.

3.13 We will decide if it is more appropriate to take action under CA98 on a case by case basis, taking into account the factors in our APF. We will look at the potential harm to competition, whether there are reasonable grounds for suspecting an infringement of competition law, the resource and timing implications of the alternative actions available to us, and the different potential outcomes and deterrent effect of those actions.

3.14 Where it appears that it may be appropriate to take action under CA98 we have a duty, under the concurrency regime, to liaise with the other concurrent competition authorities to decide which of us the matters should be allocated to. The Competition Act (Concurrency) Regulations 2014[57] set out the process for determining which authority is best placed to act in any particular case and the CMA's guidance on the concurrency regime explains how it works in practice.[58]

Taking regulatory action using our direction and requirement powers

3.15 FSBRA gives us powers to:

- give directions to participants in regulated payment systems (section 54)
- impose requirements on the operator of a regulated payment system concerning the rules of the system (section 55)
- require the disposal of an interest in the operator of a regulated payment system, or in an infrastructure provider in relation to such a system (section 58)

3.16 For the purposes of this guidance, we broadly term the powers described above as 'direction and requirement powers'.

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

57 SI 2014/536.

58 'CMA, Regulated Industries: Guidance on concurrent application of competition law to regulated industries', published March 2014.

3.18 We also have the power to require, with the consent of the Treasury[59], a person who has an interest in the operator of a regulated payment system or in an infrastructure provider in relation to such a system, to dispose of all or part of that interest. 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. We can enforce a disposal requirement by bringing civil proceedings for an injunction or (in Scotland) interdict.

3.19 We explain how we use our direction and requirement powers in Chapter 4.

3.20 In addition to the above powers, we also have powers under sections 56 and 57 of FSBRA to grant access to, and vary agreements regarding, payment systems. We will consider whether to exercise these powers if we receive an application to the PSR for the remedy sought.[60]

Taking enforcement action

3.21 Compliance failures, as defined under section 71 of FSBRA, may arise from the failure of a participant in a regulated payment system to comply with:

- a general or specific direction
- a general or specific requirement
- an order requiring the grant of access to a payment system [61]

3.22 In connection with enforcement action, FSBRA also gives us the power to:

- require a participant in a regulated payment system to pay a penalty in respect of a compliance failure (section 73)
- publish details of any compliance failures and penalties that we have imposed (section 72)

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

a. restrain conduct where there is a reasonable likelihood that there will be a compliance failure or there has been a compliance failure and there is a reasonable likelihood that it will continue or be repeated (section 75(1))

a. remedy a compliance failure or restrain asset-dealing (sections 75(2) and 75(3))

3.24 We explain how we use our powers to take enforcement action in Chapter 5.[62]

59 S58(3) FSBRA.

60 Please see our access guidance (see Annex A).

61 How we take enforcement action in relation to the last of these is likewise set out in our access guidance (see Annex A).

62 The use of enforcement action in respect of failures to comply with a grant of access is explained in our access guidance (see Annex A).

Information gathering and investigatory powers

3.25 We have powers to gather information and conduct formal investigations under FSBRA. Each of our information gathering and investigatory powers can be used when we are:

- considering whether to take regulatory action using our direction and requirement powers
- considering whether to take enforcement action (whether or not we have formally opened an enforcement 'case')

Information requirements

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

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

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

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

Skilled person reports

3.29 We have the power, under section 82 FSBRA, to require a regulated party to provide a report by a skilled person. We ourselves can also appoint a skilled person to provide a report. When a regulated party receives notice that we intend to either require a report from a skilled person or appoint such a person to provide a report, both the regulated party and any person who is providing (or who has at any time provided) services to it, in relation to the matter being reported upon, will be under a duty to give the appointed skilled person all such assistance as the skilled person may reasonably require.[63]

Appointment of investigators

3.30 We have the power under FSBRA to appoint persons (the 'investigators') to conduct an investigation on our behalf:

- into the conduct or state of the business of any participant in a regulated payment system where it is desirable to do so in order to advance any of the payment systems objectives (section 83(1))
- where there are circumstances suggesting that there may have been a compliance failure (section 83(2))

63 S82(6) FSBRA.

3.31 In either context, appointed investigators can, under section 85 FSBRA, require persons to:

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

where the investigators reasonably consider the answer, information or document to be provided to be relevant to the purposes of the investigation.

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

- the party who is the subject of the investigation
- any person connected with the party under investigation
- in an investigation into whether there has been a compliance failure, any person who in the investigator's opinion is or may be able to give information which is or may be relevant to the investigation[64]

Search under warrant

3.33 We have the power to apply to a justice of the peace for a warrant to enter premises. The circumstances under which we may apply for a search warrant are as follows:

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

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

- enter and search the premises specified in the warrant
- take possession, or copies of, of any information or documents appearing to be of a kind for which the warrant was issued ('the relevant kind')[65]
- take any other steps which may appear to be necessary to preserve or prevent interference with such information or documents[66]

3.35 During the search, any person on the premises may be required to provide an explanation of relevant information or documents, or to state where such information or documents may be found.

64 S85(2) FSBRA.

65 The power to seize documents relevant to an investigation, granted under FSBRA, is extended by s50 Criminal Justice and Police Act 2001 to allow us to also seize mixed material that contains both relevant and irrelevant documents which can be sorted and sifted off-site at a later time.

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

Non-compliance with our information gathering and investigative powers

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

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

3.38 A person who obstructs the execution of a warrant or, either knowingly or recklessly, provides false or misleading information in response to an information requirement imposed by us[67], may be guilty of a criminal offence. In addition, where a person who knows that we are conducting an investigation either:

- falsifies, conceals, destroys or otherwise disposes of a document which the person knows or suspects would be relevant to such an investigation, or
- causes or permits the falsification, concealment, destruction or disposal of such a document

that person commits a criminal offence unless they can show that they had no intention of concealing facts disclosed by the documents from the investigator.[68]

67 S90(6) and (8) FSBRA.

68 S90(4) FSBRA.

Power of the Bank of England, FCA and PRA to direct the PSR

3.39 Under section 100 of FSBRA, where we are proposing to exercise any of our FSBRA powers in relation to a participant in a regulated payment system, the BoE may direct us not to exercise the power in question or not to exercise it in the specified manner, where the direction is necessary to avoid one of the possible consequences set out in section 100(3) of FSBRA. The possible consequences are that the exercise of the power in the manner proposed would:

- threaten the stability of the UK financial system
- have serious consequences for business or other interests in the United Kingdom
- have an adverse effect on the Bank's ability to act in its capacity as a monetary authority

3.40 Under section 101 of FSBRA the FCA may also direct us not to exercise any of our FSBRA powers in relation to a participant in a regulated payment system, or not to exercise it in a specified manner, if the FCA is of the opinion that it may have an adverse effect on the ability of the FCA to comply with its general duties (under section 1B(1) of Financial Services and Markets Act 2000 (FSMA)) and the FCA considers it necessary to issue a direction to prevent this.

3.41 Under section 102 of FSBRA the PRA may direct us not to exercise any of our FSBRA powers, where we are proposing to exercise them in relation to either:

- a class of PRA-authorised persons, or
- a particular PRA-authorised person

The PRA may do this where it considers it necessary to issue a direction to prevent one of the following possible consequences. Namely, that the exercise of the power in the manner proposed may:

- threaten the stability of the UK financial system
- result in the failure of a PRA-authorised person in a way that would have an adverse effect on the stability of the UK financial system
- threaten the continuity of core services provided in the United Kingdom
- have an adverse effect on the ability of the PRA to comply with its general objective (under section 2B(1) of Financial Services and Markets Act 2000 (FSMA))

4 Taking regulatory action using our FSBRA powers

As explained in Chapter 3, we have the power, under FSBRA, to give directions and impose requirements on participants in payment systems. In using these powers we take regulatory, as opposed to enforcement, action.

This chapter explains how we:

- consider whether it is appropriate to use our direction and requirement powers
- give specific directions and impose specific rule requirements
- give general directions and impose general rule requirements
- impose requirements for disposal of an interest in the operator of a regulated payment system

Considering whether it is appropriate to use our direction and requirement powers

4.1 When considering how to respond to a matter of regulatory concern we will consider using our direction and requirement powers if we become aware of matters which may run counter to the advancement of the payment systems objectives and performance of our statutory functions. As explained in Chapter 3, we will not use our formal powers in relation to every regulatory concern that we become aware of. We will also consider other available options.

4.2 We will give directions or impose requirements if we think it is appropriate to take formal action to regularise industry behaviours, in line with our payment system objectives, based on the evidence available to us and having had regard to our APF factors and all the relevant circumstances.

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

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

Information requirements

4.5 We use our powers to require information or documents under sections 81 and 85 of FSBRA to help us decide whether it would be appropriate to give a direction or impose either a rule or disposal requirement. We also use our powers to gather information for the purposes of our industry and compliance monitoring functions, including in the context of our market reviews.[69]

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

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

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

4.9 The timeframe for comments on a draft IRN may be short, depending upon the urgency of the circumstances we are working under. After considering any reasonable comments, we will confirm or amend the IRN.

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

4.11 When finalising the period for response to an IRN we will consider the availability, nature, complexity and volume of the information sought together with the circumstances within which we are imposing the requirement and any representations we receive relating to any advance notice given of the intended requirement. The time allowed to respond may be short, depending on the circumstances.

69 S64 FSBRA. We also have powers to obtain information or documents under EA02, as amended, in connection with market studies. http://www.fca.org.uk/news/psr/psr-cp15-01-psr-competition-concurrency-guidance. See our 'Markets Guidance' (Annex A).

4.12 We will generally:

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

4.13 As delays in providing information and/or documents can have a significant impact on the efficient progress of our work, recipients should comply with IRNs in a timely manner and in accordance with deadlines or interview dates. If a recipient thinks they cannot comply with a deadline to respond, they should raise this with us at the earliest possible opportunity, fully explaining the circumstances. We will only grant applications to extend a deadline if we are satisfied that there are good reasons for doing so. We are aware that a recipient of an IRN could be responding to several requests (from us or other authorities) concurrently. Generally, this will not of itself be an acceptable reason for delay.

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

4.15 Regulated parties are not obliged to share with us those parts of required documents, including reports of any internal investigations, over which they wish to assert legal privilege. It is for regulated parties to decide whether to provide privileged material to us, but if they redact or omit material from any documents provided on the grounds of legal privilege, they should also provide us with a description of that material and an explanation of why they say it is privileged. Otherwise regulated parties should volunteer the results of their own investigations in line with General Direction 1 (see paragraph 2.38 above).

Skilled person reports

4.16 We can use our powers under section 82 FSBRA to require a regulated party to provide a report by a skilled person, or to appoint a skilled person ourselves to provide a report. We will do this if we need to understand better any matter relating to participation in a regulated payment system and where particular skills or specialist knowledge about the subject matter under consideration are required.

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

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

- the procedure by which the skilled person is to be nominated or approved by us
- the terms of the appointment of the skilled person
- the procedures to be followed and the obligations of the regulated party in the production of the skilled person's report
- practical matters, such as arrangements for interaction between the skilled person and the PSR
- the subject matter of the report and the form the report should take
- the deadline for submission of the report

4.19 We will also explain to the regulated party and to the skilled person the nature of the matters that led us to decide that a skilled person's report was appropriate.

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

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

4.22 When we appoint a skilled person to produce a report, we will generally direct the regulated party who is the subject of the report to pay any expenses we incur.

Appointing investigators

4.23 We may use our power to appoint investigators if we are considering whether to take regulatory action. An appointed investigator can be any member of PSR staff or an external person.[70]

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

70 S84(5) FSBRA.

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

4.26 In some cases, we may appoint investigators in connection with taking regulatory action and subsequently decide to extend their remit to cover a suspected compliance failure and potential enforcement action. For example, if information about a potential compliance failure only comes to light after we have appointed investigators in respect of a different type of regulatory concern. When we do this, we will generally issue a new MOA, unless to do so would be likely to frustrate our work.

4.27 In other cases, where circumstances suggesting a potential compliance failure arise early in the process, we may appoint investigators for both purposes at the outset, using the same MOA.

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

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

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

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

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

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

Search under warrant

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

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

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

Non-compliance with our information gathering and investigative powers

4.37 If a regulated party fails to comply with any of our information gathering and investigative powers, we may either take enforcement action for failing to comply with General Direction 1 or take informal action in relation to that compliance failure.

4.38 We can also use our powers under FSBRA to:

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

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

Taking interim or urgent action

4.40 We may use our FSBRA powers to take urgent action, including the use of interim measures, where appropriate, either to: prevent the risk of a negative impact occurring, as a result of the behaviour of regulated parties, or address a negative impact that has already occurred. For example, we may consider giving a specific direction (see paragraphs 4.43 to 4.53) with short or no notice to prevent or address that behaviour.

4.41 As set out in the next section, before we give a direction or impose a rule requirement, we will normally give the parties notice of the proposed direction or rule requirement, with our reasons for proposing it, setting out the next steps and the deadline for representations. However, in urgent cases, we may give directions or specific rule requirements without giving notice if we believe that a delay may result in a detriment to others, or (in the case of specific directions and requirements) would otherwise be inappropriate. Alternatively, where the issues require urgent consideration and resolution, we may shorten the period set for submitting representations, so that we can reach a conclusion as soon as possible.

Closing a matter under consideration

4.42 If we decide to discontinue our consideration of a matter that could lead to using our direction and requirement powers, and we have previously informed regulated parties that we were considering whether to take action, as explained above we may, or may not, confirm this to the relevant parties. We may decide to close a matter under consideration without taking any action for a variety of reasons. For example, if we think there is insufficient evidence to support taking action or we conclude that the matter is no longer an administrative priority considering our APF criteria.

Deciding whether to give a specific direction or impose a specific rule requirement

4.43 It may be appropriate for us to give a specific direction to or to impose a specific rule requirement on one or more regulated party in relation to a matter that comes to our attention.

4.44 Specific directions and rule requirements are addressed only to certain participants in regulated payment systems (for example, a named operator of a payment system).

4.45 Before giving a specific direction or imposing a specific rule requirement on a regulated party, we will usually give the party notice and send them a draft of the proposed specific direction or requirement, accompanied by an explanation of why we believe it is appropriate to take this course of action. The draft will specify the proposed implementation date for the specific direction or requirement.

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

4.47 In deciding whether, and how, to carry out such a consultation we will take into account any issues in relation to the confidentiality of the information underlying our consideration of the direction or requirement. We may also seek the views of the recipient(s) of the proposed direction and take these into account.

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

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

4.50 We will take any responses we receive to the consultation into account when deciding whether to give a specific direction or impose a specific rule requirement.

4.51 When a decision is taken to give a specific direction or to impose a specific rule requirement, we will give a final notice of that decision directly to the recipient(s) of the draft notice. That notice will set out the reasons for the action and state the commencement date of the direction or requirement.

4.52 It is also our usual practice to publish the specific direction or rule requirement on our website Where we have carried out a wider consultation we will usually also publish a statement explaining, in general terms, the responses we received and how we have taken the responses and other, relevant factors into account when determining whether to make the direction.

4.53 In deciding whether to publish a specific direction or rule requirement, we may first seek the views of the recipient(s). Recipient(s) should make representations to us in writing if they think that there should be no publication of all or part of the direction and give reasons for this. We will take such representations into account when balancing our duty to act transparently when performing our functions and the public interest in promoting wider awareness of our decisions with our obligations to act fairly.

Appeals

4.54 Any persons affected by our decisions to give specific directions or impose specific rule requirements can appeal to the Competition Appeal Tribunal (CAT).[71]

4.55 In determining an appeal, the CAT must apply the same principles as would be applied by a court on an application for judicial review. It must either dismiss the appeal or quash the whole, or part, of the decision to which the appeal relates. If the CAT quashes the whole, or part, of a decision, it may also refer the matter back to us with a direction to reconsider the matter and make a new decision in accordance with its ruling. The CAT may not direct us to take any action which we would not otherwise have had the power to take when making our original decision.[72]

Deciding whether to give a general direction or impose a general rule requirement

4.56 Before giving a general direction or imposing a general rule requirement, we are required to consult the Bank of England, the FCA and the PRA as to the need for, and potential impact of, the proposed regulatory action.[73]

4.57 We will also generally engage in public consultation by publishing a draft of the proposed general direction or rule requirement on our website, along with an explanation of its purpose, our reasons for proposing it (taking into account the matters we must have regard to when performing our functions under FSBRA)[74], and a time frame for interested parties to respond. We will also take such other steps as we see fit to draw attention to the proposal.[75]

4.58 We are not required to publish a draft direction or rule requirement for consultation if we consider that the delay involved would be prejudicial to the interests of service-users.[76]

4.59 We will also, usually, publish a cost benefit analysis of the impact of the proposed general direction or rule requirement, including an estimate of the costs and benefits, where we consider that the proposal would lead to a significant increase in costs.[77] However, where it appears to us that the costs or benefits cannot reasonably be estimated, or where it is not reasonably practicable to produce an estimate, we will not include an estimate within our analysis but will give our opinion and an explanation of it instead.[78]

71 S76 FSBRA.

72 S77 FSBRA.

73 S104(2) FSBRA.

74 Paras 3.3-3.5 above.

75 S104(2) FSBRA.

76 S104(1) FSBRA.

77 104(3) and (11) FSBRA.

78 S04(8) FSBRA

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

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

4.62 We will take any consultation responses received into account when deciding whether to impose the general direction or rule requirement.[79]

4.63 When a decision is taken to give a general direction or to impose a general rule requirement, we will give a final notice of that decision directly to the recipient(s) of the draft notice. That notice will set out the reasons for the action and state the commencement date of the direction or requirement.

4.64 We will also publish the general direction or rule requirement on our website. This will usually be together with a statement explaining, in general terms, the responses we received and our response to them together with details of any significant differences between the draft and final general direction and an updated cost benefit analysis (if applicable).[80]

Appeals

4.65 Like all administrative decisions, our decisions to give general directions or to impose general rule requirements may be judicially reviewed by the courts.

Deciding whether to require the disposal of an interest

4.66 Under section 58(3) FSBRA we may only exercise our power to require the disposal of an interest with the consent of the Treasury.

4.67 If we consider that it is appropriate to use this power, before using it we will first inform the affected operator, the person holding an interest and any other affected parties, and seek their views.

4.68 We will send both the affected operator and the person holding the interest a draft of the proposed requirement, together with an explanation of why we believe it is appropriate to take the course of action proposed.

79 S104(4) FSBRA.

80 See s104(5) and 104(56) FSBRA.

4.69 We may also publish a draft of the disposal requirement on our website and invite responses from interested parties other than the affected operator and the person having an interest. In deciding whether, and how, to carry out such a consultation we will take into account any issues in relation to the confidentiality of the information underlying our consideration of the requirement. We may first seek the views of the recipient(s) of the notice and take these into account.

4.70 We will usually allow a minimum of four weeks for subject(s) of the requirement and any other person to make representations to us. The precise duration of the consultation will depend on the complexity of the proposed action and the circumstances surrounding it including, for example, how much meaningful engagement we have already had with stakeholders on the particular issues.

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

4.72 We will take account of all representations we receive when deciding whether to require the disposal of an interest.

4.73 When a decision is taken to require the disposal of an interest, we will give a final notice of that decision directly to the recipient of the draft notice. That notice will set out the reasons for the action taken.

4.74 It is also our usual practice to publish the requirement on our website. Where we have carried out a wider consultation, we will usually also publish a statement explaining, in general terms, the responses we received and how we have taken the responses and other, relevant factors into account when determining whether to make the direction.

4.75 In deciding whether to publish a disposal requirement, we may first seek the views of the recipients. Recipients should make representations to us in writing if they think that there should be no publication of all or part of the direction and give reasons for this. We will take such representations into account when balancing our duty to act transparently when performing our functions and the public interest in promoting wider awareness of our decisions with our obligations to act fairly.

Appeals

4.76 Any person affected by our decisions to require the disposal of an interest can appeal to the CMA, with its permission.[81]

4.77 The CMA must grant permission for the bringing of an appeal before it. It can only refuse permission to appeal if the appeal is made for reasons that are trivial or vexatious, or the appeal has no reasonable prospect of success.

81 S76 and Schedule 5 to FSBRA.

4.78 In determining an appeal, the CMA[82]:

- must have regard, to the same extent as is required of us, to the matters to which we must have regard in performing our functions under FSBRA
- may also have regard to any matter that we were not able to have regard to at the time of the decision
- must not have regard to any matter that we would not have been entitled to have regard to

4.79 The CMA must either dismiss the appeal or quash the whole, or part, of the decision to which the appeal relates. The CMA may only quash the whole, or part, of the decision to which the appeal relates where it is satisfied that the decision is wrong on one or more of the following grounds:

- The PSR failed properly to have regard to any matter to which it must have regard in performing its functions under FSBRA.
- The PSR failed to give the appropriate weight to any matter to which it must have regard in performing its functions under FSBRA.
- The decision was based, wholly or partly, on an error of fact.
- The decision was wrong in law.

4.80 If the CMA quashes the whole, or part, of a decision, it may either: refer the matter back to us with a direction to reconsider and make a new decision in accordance with its ruling; or substitute its own decision for ours. The CMA may not direct us to take any action that we would not otherwise have had the power to take when making our original decision.

82 S79 FSBRA.

5 Taking enforcement action using our FSBRA powers

Under the Financial Services (Banking Reform) Act 2013 (FSBRA) we have the power to take enforcement action in relation to the failure to comply with:

- a direction (general or specific) given under section 54 FSBRA
- a rule requirement (general or specific) imposed under section 55 FSBRA
- a requirement to grant access to a payment system under section 56 FSBRA

This chapter explains how we:

- investigate whether it is appropriate to take enforcement action
- engage with regulated parties subject to potential enforcement action
- make decisions to take enforcement action

Investigating whether it is appropriate to take enforcement action

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

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

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

5.3 When we have information about a possible compliance failure we will consider the appropriate course of action to take, if any. For example, we may seek additional information before deciding whether to: open an enforcement case; take no further action; take informal action; or take other, regulatory action. When deciding what action to take we will have regard to a number of different factors, depending on the nature and facts of the specific case. These include the primacy duty and the factors set out in the Administrative Priority Framework (APF).

5.4 When considering what sanction, if any, is appropriate to impose and when calculating any financial penalty, we will follow our Penalties Guidance. This contains a statement of the principles which we will apply in determining whether to impose a penalty and the amount of any penalty.[83] In applying our Penalties Guidance, we will apply the version in force at the time of the compliance failure.[84]

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

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

Opening an enforcement case

5.7 The decision to open an enforcement case and investigate a compliance failure is made by two 'case openers'.[85] These may be either the Managing Director of the PSR, the Head of Policy, the Head of Regulatory and Competition Enforcement or a member of staff of at least manager or technical specialist level.

5.8 The case openers will have regard to several different factors, depending on the nature and facts of the specific case. For example, the primacy duty, and the factors set out in the APF.

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

5.10 When we decide to open an enforcement case we will usually inform the party under investigation of the fact and subject matter of the investigation as soon as it is practicable to do so, unless we consider that informing them at that stage would frustrate the investigation. We will usually also appoint Investigators to investigate the matter formally, under section 83 FSBRA. The procedure for appointing Investigators is the same in the context of both considering whether to take regulatory action and enforcement cases (see paragraphs 4.23 to 4.33 above).

83 The PSR is required to publish such a statement by s73(3) FSBRA.

84 S73(4) FSBRA.

85 Case openers are appointed by our Managing Director.

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

5.12 The case team will be comprised of staff who have not been directly involved in monitoring any conduct relating to a suspected compliance failure by the regulated party under investigation. However, staff who have previously been involved in our other monitoring, and policy, work that relates to the subject matter of an open enforcement case (for example, the Interchange Fee Regulation (IFR)) may support and provide technical advice to the enforcement case team.

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

5.14 Each case team will have an allocated case owner, a senior member of staff, who will have oversight of the running of the case, keep the need for continued investigation under review and make day-to-day decisions about case progression and the use of our investigatory powers. Each case will also have a case sponsor, who will have been one of the case openers and will take milestone decisions (see Annex C for a flow chart setting out the milestones in the life of an enforcement case) about the progress, or otherwise, of the case, up until the point that it is referred to our Enforcement Decisions Committee (EDC) (see paragraphs 5.62 to 5.74). This will usually be our Head of Regulatory and Competition Enforcement.

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

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

5.17 One option available to us is to apply to the court for an injunction, under section 75 of FSBRA, to either prevent a compliance failure from occurring or recurring or to remedy an existing compliance failure (see paragraphs 5.118 to 5.121). Alternatively, we may consider using our powers to make a direction or impose a requirement to address the issues giving rise to the compliance failure whilst an enforcement investigation is pending or during its course.

Information requirements

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

5.19 Once Investigators are appointed they will usually use the additional information gathering powers available to them under section 85 of FSBRA to issue Information Requirement Notices (IRNs).

5.20 The powers used and procedures we follow for issuing IRNs in the context of an enforcement case under FSBRA are the same as when we are ascertaining the appropriateness of taking regulatory action by way of exercising our direction or requirement powers (see paragraphs 4.5 to 4.15 above).

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

Scoping the investigation

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

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

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

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

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

5.26 If, at any time, the nature of our concerns changes significantly from those notified to the person under investigation, and we are satisfied that it is appropriate to expand or narrow the investigation in response to that change, we may change the scope accordingly.[86]

Ongoing contact during Investigations

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

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

5.29 We will usually invite a party under investigation to attend at least one update meeting before we reach the stage of producing an investigation report containing our preliminary findings (see paragraphs 5.52 to 5.61). This will generally be once we have reviewed all of the information gathered during our investigation and have sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome. During this meeting, we will explain in more detail the nature and scope of the investigation and update the party as to the stage that the investigation has reached, the next steps and the likely timing of these.

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

5.31 As our investigation evolves we will also consider whether we need to inform the regulated party that the scope of our investigation has changed. We will generally do this when the changes are material, and, where we have appointed Investigators, we will inform the party under investigation of a change in the scope of the investigation, where it is likely to be significantly prejudiced if it is not made aware of the change.[87] However, the timing of our informing the party will depend upon whether we believe that providing the party with such information would be likely to result in the investigation being frustrated.

86 S84(7) FSBRA

87 S84(9) FSBRA.

Settlement

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

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

5.34 Parties should approach settlement discussions with us in an open and co-operative manner, in line with the obligations imposed by General Direction 1. A party's cooperation is one factor that we will take into account when calculating the appropriate financial penalty to impose for compliance failure (see our Penalties Guidance).

5.35 We are receptive to any regulated party informing us of its interest in entering into settlement discussions from an early stage of an investigation. Alternatively, if we consider that a case is suitable for settlement we may invite the party to engage in settlement discussions with us. We are unlikely to make such a proposal or commence such discussions until we have a sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome. In particular, we would wish to ascertain whether non-compliance is ongoing. Usually this will be once we have held the update meeting described in paragraph 5.29 above.

5.36 The decision to engage in settlement discussions and to settle is at our discretion. We will consider a number of factors when making such decisions, including:

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

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

5.38 Once the early settlement window closes the maximum discount will no longer be available. Between the closure of the window and the issuing of a warning notice (see paragraphs 5.78 to 5.85 below) by the EDC a lesser discount may be available. The exact amount of the available discount will depend on the stage that the case has reached in terms of our preparation for EDC proceedings and the level of co-operation received from the parties. See our Penalties Guidance for further information.

5.39 Where appropriate, matters may be settled at a later stage of the enforcement process, including where the EDC has already issued a warning notice up (until the point where it issues a decision notice). In those cases, the procedures outlined above will continue to apply, although the reduction in penalty for settlement will not be available.

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

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

5.41 Following the commencement of settlement discussions, we will consider on a case by case basis whether it is appropriate to enter into a proposed, focused agreement or whether the matter is unsuitable for settlement. When considering whether to enter into a focused settlement agreement we will consider various factors, including:

- the extent to which the party/parties under investigation have been open and cooperative with us
- the extent to which the matters accepted by the regulated party will save our time and resources

5.42 The maximum available settlement discount for a focused settlement agreement is 30% where that agreement is reached during the early settlement window and where all of the relevant facts are accepted and it is accepted that the relevant facts amount to a compliance failure .i.e. the only remaining issue to be decided is whether a sanction should be imposed and, if so, what it should be. Where a focused settlement agreement is reached on the same basis, outside of the early settlement window, or where a focused settlement agreement is reached on a different basis (i.e. some of the issues that remain concern contested questions of fact or of non-compliance) then a lesser discount may be available. The exact amount of the available discount will depend on the stage that the case has reached in terms of our preparation for EDC proceedings and the level of co-operation received from the parties. See our Penalties Guidance for further information.

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

5.44 The settlement discussions will involve consideration of the facts which are available to us to support a decision to take enforcement action and will culminate in the production of a draft warning notice that will set out the terms upon which it is proposed that the case be settled – .i.e. details of the relevant compliance failure(s) and the sanction that we propose to impose.

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

5.46 All settlement communications are without prejudice. Consequently, if settlement discussions break down and a matter is dealt with by way of a contested process (see paragraphs 5.75 to 5.112) through the EDC, the EDC will not consider any admissions or concessions made by any of the parties during settlement discussions.

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

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

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

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

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

5.50 In the case of full settlement, once the settlement agreement has been signed by all parties to the agreement, a warning notice will be issued by the SDMs in parallel with a decision notice.

5.51 In the case of a focused agreement, a warning notice setting out the agreed and remaining contested matters will be issued by the SDMs and the EDC will issue the decision notice after receiving representations from the regulated party on the contested matters.

Preliminary findings

5.52 An enforcement investigation will result in the preparation of a report setting out the preliminary findings of the enforcement case team. Where Investigators have been appointed this report will be prepared by them.[88]

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

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

5.54 If the investigation leads to a preliminary finding that there has been a compliance failure by the regulated party, we will consider the appropriate action to take on a case by case basis, considering our APF criteria. We may decide to take either informal or regulatory action (using our direction and requirement powers) to rectify the failure and/or its underlying cause. Alternatively, or in addition, we may recommend to the EDC that (if the EDC makes a decision in accordance with the case team's preliminary finding that a compliance failure has occurred) enforcement action be taken by way of imposing, where appropriate, one or both of the available sanctions – a financial penalty and/or publication of the details of a compliance failure and/or that penalty.

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

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

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

88 S84(6) FSBRA

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

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

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

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

Enforcement Decisions Committee

5.62 The EDC is a sub-committee of the PSR Board established for the purpose of making decisions, on our behalf, as to whether a compliance failure has occurred and, if so, what sanction, if any, should be imposed. It is not a tribunal or judicial body. The EDC's findings constitute an administrative decision on behalf of the PSR.

5.63 The EDC is an internal decision-making committee, which is separate from the enforcement case team. Its members are appointed by the PSR Board based on their relevant experience. The EDC deals with matters referred to it by PSR staff. These matters are decided in decision-making meetings (which may take the form of meeting with the party if the subject of the investigation wishes to attend and make oral representations about the matter) conducted by three-person decision-making panels, and held in private.

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

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

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

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

- whether there has been a compliance failure
- whether to impose a sanction for a compliance failure, and, if so:
  - whether to impose a financial penalty for the compliance failure or to publish details of the compliance failure, or both
  - where a decision is made to impose a financial penalty, the amount of the financial penalty to be imposed.
- whether to give a warning notice to the party concerned, in respect of any suspected compliance failure and proposed sanction
- after consideration of any representations from the party in response to the warning notice, whether to issue a decision notice setting out its finding that there has been a compliance failure and the sanction imposed (if any).

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

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

5.70 The EDC will not examine or depart from the matters agreed between the parties to a focused dispute resolution agreement and the party subject to enforcement action will not be permitted to adduce any evidence that seeks to undermine or attempts to re-open the settled matters.

5.71 Each member of the panel will have a vote in relation to the matters before it, including the Panel Chair. Panels will make decisions by way of a simple majority. The panel will conduct itself in such a manner and may adopt such procedures as the Panel Chair considers suitable and appropriate to enable the EDC to make decisions fairly and expeditiously.

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

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

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

Making a recommendation to the EDC

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

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

5.77 When we submit a recommendation to the EDC that there has been a compliance failure and, where appropriate, that a sanction should be imposed, we will inform the regulated party promptly after we submit our recommendation.

Issuing a warning notice

5.78 The first step of the EDC decision-making process is for an EDC panel to consider issuing a warning notice against the regulated party (section 74 FSBRA). The purpose of issuing a warning notice is to allow the regulated party to make representations on the enforcement action being proposed, before the EDC decides whether there has been a compliance failure and, if so, whether it is appropriate to impose any sanction in respect of that failure.

5.79 In deciding to issue a warning notice, the EDC will:

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

5.80 Prior to issuing the warning notice, the EDC may seek further information and/or clarification of the matters to which it relates from the enforcement case team. Communications between the EDC and the enforcement case team exchanged prior to the issuing of the warning notice are not disclosable to the party to whom the draft warning notice is addressed (the recipient(s)).

5.81 Any warning notice issued will set out the factors the EDC has taken into account when making its decision and will include sufficient information to enable the regulated party to understand the PSR's case against it.

5.82 If the EDC decides to issue a warning notice, the Secretariat will make arrangements for the notice to be provided to the recipient(s) promptly and will communicate any other related decisions of the EDC to the party/parties at the same time. Along with the warning notice the regulated party will, subject to considerations of confidentiality under section 91 FSBRA,[89] legal privilege and Public Interest Immunity (PII) also be provided with copies of the relevant evidence submitted by the enforcement case team to the EDC in support of the draft warning notice and considered by the EDC when making its decision.

5.83 If the EDC decides not to issue a warning notice, on the grounds that there is insufficient evidence to do so, then we will communicate this to the party/parties. In these circumstances, we will consider whether the enforcement case should then be closed or whether the investigation should continue, taking into account the factors set out in our APF.

89 See paragraph 2.48.

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

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

Making representations to the EDC

5.86 From the point at which the warning notice has been issued by the EDC the enforcement case team will not engage with the panel during the decision-making process, including at any meeting held with the party, unless specifically asked to do so by the EDC.

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

5.88 Once a warning notice has been issued, the regulated party/parties to which it is addressed will have at least three weeks (section 74 FSBRA) to make representations to the EDC in writing. The warning notice will state the time within which representations are to be made and who those representations should be addressed to. The warning notice may also indicate the expected format and scope of any representations.

5.89 The content of any written representations is a matter for the recipient(s) of the warning notice. However, the representations should be confined to the material necessary for the EDC's determination of whether the factual and legal basis for the proposed action is correct and whether the proposed sanction is appropriate. The representations should clearly identify the reasons for contesting the proposed enforcement action, including the factual and legal grounds on which the recipient is relying, and should be as concise as possible. We would expect a regulated party's written submissions to be comprehensive such that it should not be necessary for that party to seek to introduce new material at the oral representations meeting without very good reason for doing so.

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

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

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

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

5.94 If the recipient(s) of a warning notice requests to be able to make oral representations alongside their written representations, they should inform the Secretariat of this within two weeks of receiving the warning notice.

5.95 If the recipient does not wish to make oral representations then the EDC panel will proceed to consider whether to issue a Decision Notice based on the Warning Notice issued, the written representations provided by the recipient and any response provided by the enforcement case team.

5.96 If the recipient wishes make oral representations then a date will then be set for a meeting with the party, at which the relevant EDC panel will hear the oral representations. The recipient of a warning notice may wish to be legally represented at the meeting (although this is not a requirement of the EDC). The Panel Chair will specify the running order and timings of the meeting, and will be responsible for ensuring that proceedings run to time. The Panel Chair may also intervene if oral representations do not meaningfully advance the panel's understanding of the written representations. Any panel member may pose questions to the subject of the warning notice during the meeting to clarify the representations being made.

5.97 The panel may ask for an oral response to the recipient's representations from the case team during any meeting with the party.

5.98 During a meeting with the party/parties the panel may invite the recipients of a warning notice to provide evidence or representations in addition to what they have chosen to present. The panel may also invite other persons to attend and/or otherwise provide information to the EDC if the panel believes they would be able to provide information that it reasonably considers to be relevant to the matters to be decided. Persons invited to provide information to the EDC in this way may decline to do so. However, in line with General Direction 1, regulated parties will be under a duty to co-operate with enforcement proceedings and to be open and honest when dealing with the EDC.

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

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

Disclosure of underlying material

5.101 When the EDC issues a warning notice the regulated party will, subject to considerations of confidentiality under section 91 FSBRA, legal privilege and PII, be provided with the evidence as submitted by the enforcement case team to the EDC and considered by the EDC when making its decision.

5.102 In addition, in each case we will consider whether fairness requires us to disclose any other relevant evidence to the recipient(s) including any evidence that we consider may undermine our recommendations to the EDC.

5.103 When considering what to disclose and the manner of disclosure we take into account considerations of confidentiality, legal privilege and PII.

5.104 When we are assessing whether to disclose relevant evidence the question of fairness to the party subject to EDC proceedings will be treated as paramount.

5.105 We will keep the need to disclose further evidence under review throughout the EDC process and will make further disclosure as and when necessary. For example, following any representations made by the party/parties.

5.106 The EDC may also consider disclosing other relevant evidence during the course of exercising its decision-making functions. Where the EDC does this it will consider whether access to the material is necessary for the recipient(s) to understand the case against it, whether it should be disclosed as a matter of fairness and whether any claims of confidentiality, legal privilege or PII are made in relation to the material.

The decision of the EDC

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

5.108 If no representations are made following the issuing of the warning notice, the EDC will generally regard the matters set out in the warning notice as undisputed.

5.109 Following the EDC's decision, we will make arrangements for a written notice ('the decision notice') to be promptly provided to the regulated party/parties to which it is addressed. Where the EDC finds that a compliance failure has occurred, the decision notice will state:

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

5.110 Where the EDC decides that we should publish details of a compliance failure (including, if the EDC so decides, the details of any financial penalty imposed), the EDC will settle the wording to be used and the decision notice will set out the wording that we will publish. We will also inform the subject of the notice of the date on which we intend to publish the details of the compliance failure. When we decide to publish details of a compliance failure, those details (including, if relevant, the details of any financial penalty imposed) will generally be published on our website.

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

5.112 If the EDC decides not to issue a decision notice, on the grounds that there is insufficient evidence to do so, then we will communicate this to the party/parties. In these circumstances, we will consider whether the enforcement case should then be closed or whether the investigation should continue, taking into account the factors set out in our APF.

Appeals

5.113 Any person affected by a decision of the EDC in respect of a compliance failure can appeal to the Competition Appeal Tribunal (CAT).[90]

5.114 In the case of an appeal of a decision to publish the details of a compliance failure, the CAT must apply the same principles as would be applied by a court on an application for judicial review and must either dismiss the appeal, or quash the whole, or part, of the decision to which the appeal relates.[91] If the CAT quashes the whole, or part, of a decision, it may refer the matter back to us with a direction to reconsider and make a new decision in accordance with its ruling. The CAT may not direct us to take any action which we would not otherwise have the power to take at the time of making the original decision.

5.115 If the EDC decides to publish details of a compliance failure, the details cannot be published until after the expiry of the period within which the decision can be appealed to the CAT or, if an appeal against the decision is made, pending the determination of that appeal.[92]

5.116 In the case of an appeal of a decision to impose a financial penalty, the appeal may be made against the imposition of the penalty, the amount of the penalty, or any date by which the penalty, or any part of it, is required to be paid to us.[93] The CAT may either uphold the penalty, or set aside the penalty, or substitute for the penalty a penalty of an amount decided by the CAT.

5.117 When the EDC decides to impose a financial penalty for a compliance failure, and an appeal against the decision is made to the CAT, we may not require payment of the penalty before the appeal has been determined.[94]

Injunctions

5.118 Another way in which we can enforce some of our regulatory decisions is by applying to the court for an injunction.[95] Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers of sanction. However, we may also apply for an injunction to prevent a compliance failure from occurring.

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

90 S76 FSBRA.

91 S77 FSBRA

92 S77(8) FSBRA.

93 S78 FSBRA

94 S77(9) FSBRA

95 S75 FSBRA

5.120 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[96]

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

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

Annex A

Other PSR guidance

Administrative Priority Framework March 2015

A New Regulatory Framework for Payment Systems in the UK March 2015

Objectives Guidance March 2015

Penalties Guidance March 2015

Powers and Procedures Guidance March 2015

Competition Act 1998 (CA98) Guidance August 2015

Markets Guidance August 2015

Super Complaints Guidance March 2016

PS 16/2: The application of the Payment Accounts Regulations in the UK May 2016

Draft access guidance – draft guidance on applications under section 56 and 57 FSBRA July 2016

Guidance on the PSR's approach as a competent authority for the EU Interchange Fee Regulation October 2016

PSD2 guidance September 2017

Annex B

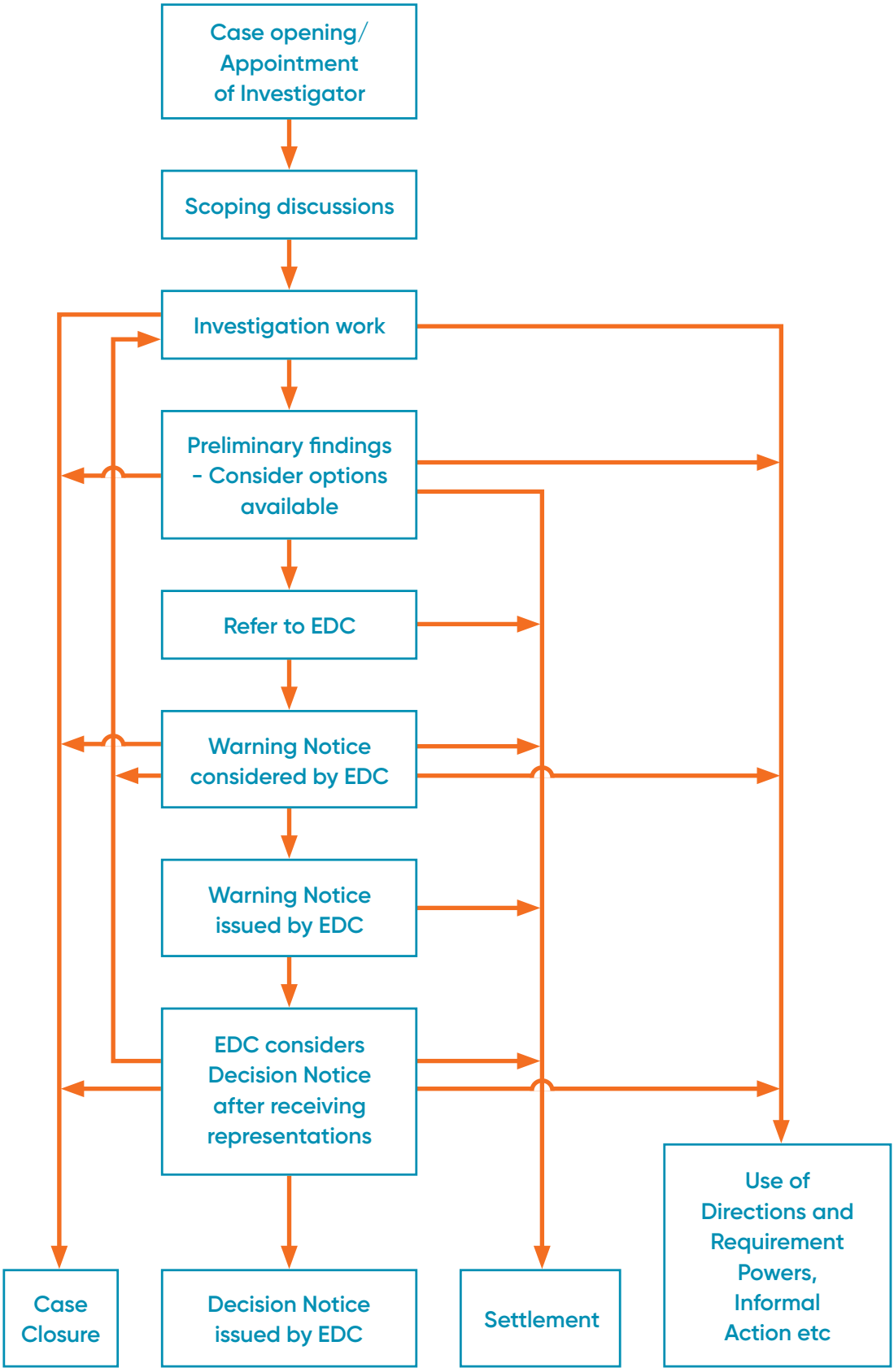
Our regulatory principles

Our regulatory principles, which are found in section 53 of FSBRA, are:

- The need to use the resources of the Payment Systems Regulator in the most efficient and economic way.
- 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.
- The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term.
- The general principle that those who use services provided by payment systems should take responsibility for their decisions.
- The responsibilities of the senior management of persons subject to requirements imposed by or under Part 5 of FSBRA, including those affecting persons who use services provided by payment systems, in relation to compliance with those requirements.
- 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 Part 5 of FSBRA.
- 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.
- The principle that the Payment Systems Regulator should exercise its functions as transparently as possible.

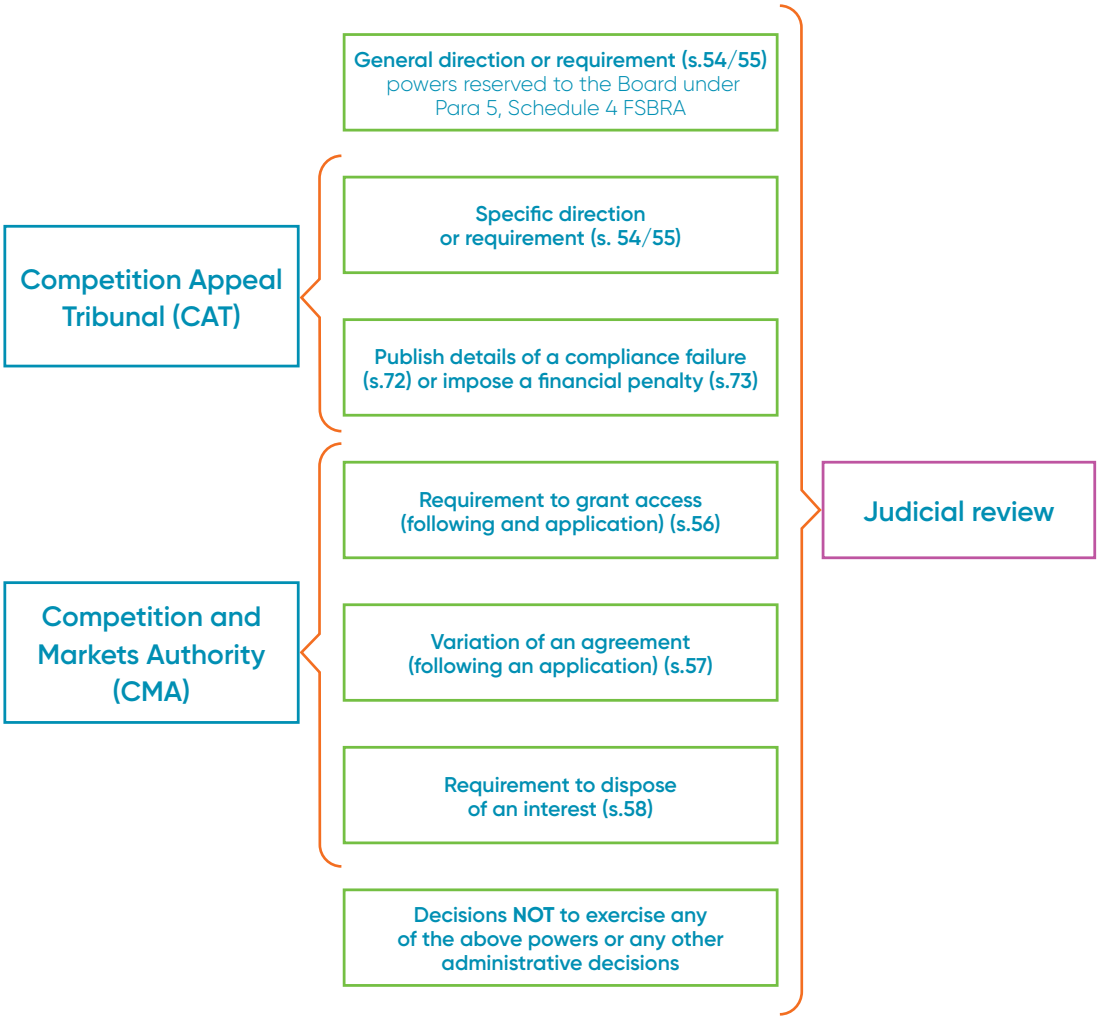
Annex C

Chart showing the lifecycle of an enforcement case



Annex D

Chart showing the routes to appeal from the PSR's decisions



Annex 2

DRAFT Revised IFR Powers and Procedures Guidance

This annex contains our proposed text to replace Chapter 7 of our existing IFR guidance:

https://www.psr.org.uk/psr-publications/policy-statements/final-guidance-IFR-Phase-2

7 Our powers and procedures under the PCIFRs

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

Introduction

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

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

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

7.3 This chapter explains:

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

7.4 Stakeholders may also be interested in our 'Powers and Procedures Guidance', which describes generally the role of the PSR and our ways of working as well as how we use our FSBRA powers outside of the context of the IFR.[97]

97 [URL for updated version to be inserted]

Receiving and handling information

7.5 There are many ways in which information that may lead to us considering whether to take action under the PCIFRs comes to our attention, in addition to the performance of our IFR monitoring function (see previous chapters). For example: by regulated persons self-reporting to us; by intelligence and complaints received from other regulators, firms, other organisations and individuals, including consumers and whistleblowers; and through our own proactive, information gathering for purposes other than monitoring the IFR.

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

7.7 If the matter appears to fall outside of our jurisdiction then we will consider whether another regulator may have jurisdiction and we will let the source of the information know. We do not generally forward on complaints and intelligence received to another regulator or organisation.

7.8 Where the issues are within both our jurisdiction and that of another competent UK authority and/or Member State we will cooperate with them as appropriate. This will include close cooperation with the FCA, which is a competent authority with respect to Articles 8(2), (5) and (6), 9, 10(1) and (5), 11 and 12 in the UK.

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

7.10 If the information relates to a matter not within the current workplan, we will allocate staff to consider what, if anything, we might do. We make our assessment having regard to the factors set out in our Administrative Priority Framework (APF).[98]

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

- impact (with respect to the advancement of our statutory objectives, functions and duties)
- resources (implications for us)
- risk (relating to the likelihood of success of any action by us)
- strategic importance (with respect to the advancement of our statutory objectives, functions and duties)

98 'Administrative Priority Framework', March 2015.

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

7.13 To be able to regulate the market effectively we may use a combination of our powers and functions under the PCIFRs (sometimes alongside the powers and functions we have under other legislation). For example, we may address a wide-spread apparent non-compliance issue by giving one or more directions or taking enforcement action against individual parties.

7.14 However, we will not use our formal powers every time a matter of regulatory concern is brought to our attention. We will assess whether we should use our formal powers after considering the circumstances of the matter concerned and the factors set out in our APF. We will decide whether to take any action and, if so, the type of action that is appropriate, on a case by case basis.

7.15 In addition to using our formal powers we can use other methods to try and secure good regulatory outcomes which will advance our statutory objectives. For example, we will engage with industry to help participants in payment systems and other stakeholders to find solutions to issues arising in the market or to encourage competition within the provision of payment services.

7.16 We may also decide to take informal action, such as to engage with the firm(s) involved to effect change, remedy the underlying issue, and/or prevent such issues arising again. We may, for example, write privately to the regulated person regarding the subject matter of the complaint to express our views and to ask it to change its behaviour. If we first decide to take informal (rather than formal) action regarding a particular issue this does not preclude us from using our formal powers later.

7.17 In cases involving our IFR jurisdiction there are a number of possible next steps that could be taken by us and different outcomes that may result, including:

- taking no further action
- contacting the person raising the issue or complaint and seeking further information from them
- making further enquiries in the market place to understand better the issue
- recording the issue raised for the purposes of future/periodic review of issues raised with us
- formulating a project for inclusion in either our current or future programmes of policy work
- considering whether to give a direction and whether to open an enforcement case

Receiving and gathering information

7.18 In this section, we explain how we handle complaints and intelligence that we receive in relation to firms' compliance with the IFR, and how we gather information ourselves for purposes of the IFR.

Complaints

7.19 We handle whistle-blowing complaints in accordance with our whistle-blowing policy.[99] Anyone wishing to blow the whistle on malpractice in relation to payment systems (or the services they provide) can contact us via the FCA's Intelligence Department.

7.20 If we receive a complaint relating to non-compliance with the IFR, we will acknowledge the complaint received promptly. We will then, as described in paragraphs 7.6 to 7.10 above, consider the issue involved and which, if any, of our powers it relates to.

7.21 Complaints and information relating to possible non-compliance with the IFR should be sent to IFRcompliance@psr.org.uk or to the PSR complaints team at our registered address. If the sender is aware of a member of our staff or team within the PSR who is already working on the issue in question, or something close to it, and they chose to bring the matter to the attention of that individual or team directly, they should also send a copy of that correspondence to the IFRcompliance inbox or the IFRcompliance team.

7.22 Following the acknowledgment of an issue that has been brought to our attention in this way, the information provided will then be allocated to an appropriate member of PSR staff to consider.

7.23 In cases of potential non-compliance we will usually not give the provider of the information an explanation of whether, or how, we will take a matter forward. Our reasons for not informing the complainant will depend on the type of issue raised, and the circumstances surrounding it, but usually this would be because of legal restrictions, market sensitivity, confidentiality considerations or because of our general approach to announcements in relation to our different types of work (see paragraphs 7.38 to 7.41).

General Direction 1

7.24 General Direction 1 currently covers all participants in the payment systems we regulate under FSBRA. It requires them, whenever they interact with us, to deal with us in an open and cooperative way and to disclose relevant information to us.

7.25 Regulated persons should tell us when they are providing information under General Direction 1 (for example, if they bring a matter to our attention which they believe we are not actively considering). Information volunteered should be accurate and, where applicable, evidence in support should be provided.

99 https://www.psr.org.uk/psr-approach-whistleblowing

7.26 In line with General Direction 1 we expect regulated persons to tell us about any issues which could materially adversely impact on the advancement of the payment system objectives and the performance of our statutory functions. This would include the disclosure or declaration of any potential or actual compliance failures that they are aware of.

7.27 Regulated persons may wish to consider providing information where they are in any doubt as to whether an issue could materially adversely impact on the advancement of our objectives and the fulfilment of our duties. Whether something does materially adversely impact on the advancement of the payment system objectives and the fulfilment of our duties is a matter for our assessment, when considering compliance under General Direction 1.

Informal and formal information gathering

7.28 We gather information in a number of other ways, all of which can broadly be categorised as either informal or formal information gathering (see paragraphs 7.29 to 7.30 below).

7.29 Informal information gathering would not involve the use of our formal information gathering or investigative powers. It may, for example, involve: desktop research into a particular issue; contacting the original source of a complaint/report for further detail and/or clarification of the matter raised; and/or asking individual regulated persons or sectors of industry to voluntarily answer questions about how they operate. Where we use these methods, regulated persons will be under an obligation to cooperate with our requests and to do so in an open and honest manner under General Direction 1.

7.30 Formal information gathering would, in contrast, involve the use of our formal powers. Formal information powers can apply to anyone, not just regulated persons. For further information about these powers and our powers to enforce compliance with them see paragraphs 7.44 to 7.89.

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

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

Information handling and confidentiality

7.32 Often the information we receive is commercially sensitive or otherwise confidential. We have a duty to protect confidential information, as defined by section 91 of FSBRA, and will only disclose information in our possession if we consider it appropriate and are able to do so lawfully.[100]

7.33 There are also general statutory considerations that govern or restrict the way in which we deal with certain types of information. For example, any personal data must be collected and processed in accordance with the Data Protection Act 2018, the General Data Protection Regulation[101] and our data privacy notice.

7.34 Even when information is sensitive and protected there may be occasions when disclosure is appropriate. One such case is where it will advance or help us to perform our functions.[102] For example, we may need to share information with a wider pool of stakeholders and seek their views on it to better understand a matter of regulatory concern and assess what, if any, action we need to take.

7.35 In addition, if our decisions may affect other parties we may need to consider whether we should disclose information in the interests of fairness. Relevant parties need to have sufficient information to understand our decisions, the basis for them and the supporting evidence. When considering if such disclosure is appropriate, we will have regard to the sensitivity of the information and how best to fulfil our obligations to act fairly.

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

7.37 Generally, when we make either informal or formal information requests we will ask any party which has provided us with commercially sensitive or confidential material to also provide a version of the material that can be shared with another relevant party. In other circumstances, including when we receive unsolicited information, we will ask the sender to inform us in writing if any of the information provided is sensitive and explain why. This includes information we receive orally (telephone or face to face). If we do not receive such an explanation, we will not regard the information as sensitive.

100 S91 FSBRA defines what is confidential information and imposes restrictions on its disclosure to protect confidentiality so far as possible, whilst ensuring that we are able to exercise our functions. The FSBRA (Disclosure of Confidential Information) Regulations 2014 2014/882 ('the Disclosure Regulations') provide a number of gateways through which we may share confidential information.

101 SI 2016/679.

102 Regulation 3 of the Disclosure Regulations.

Transparency of decision-making

7.38 In some circumstances, we may want to publicise the fact that we are using, or considering using, powers and functions, including those we have pursuant to the PCIFRs. This is distinct from when enforcement action results in a sanction being imposed (see paragraph 7.125).

7.39 For example, we may want to publicise the fact that we are taking, or considering whether to take, action where we want to give a direction or to open an enforcement investigation into a matter of significant strategic importance to us and/or to industry (subject to our usual approach not to publish information about the opening of an enforcement case, see paragraph 7.126).

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

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

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

Information gathering and investigatory powers

7.42 We have powers to gather information and conduct formal investigations under FSBRA which, by virtue of Regulation 14 of the PCIFRs, also apply for the purposes of monitoring compliance with, and taking enforcement action in respect of, the obligations, prohibitions and restrictions under the IFR.[103]

7.43 Our information gathering and investigatory powers can be used when we are:

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

Information requirements

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

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

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

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

7.47 We use our powers to require information or documents under section 81 and 85 of FSBRA to help us decide whether it would be appropriate to give a direction or take enforcement action. We also use our powers to gather information for the purposes of our compliance monitoring function.

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

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

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

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

7.51 The timeframe for comments on a draft IRN may be short, depending upon the urgency of the circumstances we are working under. After considering any reasonable comments, we will confirm or amend the IRN.

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

7.53 When finalising the period for response we will consider the availability, nature, complexity and volume of the information sought together with the circumstances within which we are imposing the requirement and any representations we receive relating to any advance notice given of the intended requirement. The time allowed to respond may be short, depending on the circumstances.

7.54 We will generally:

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

7.55 As delays in providing information and/or documents can have a significant impact on the efficient progress of our work, recipients should comply with IRNs in a timely manner and in accordance with deadlines or interview dates. If a recipient thinks they cannot comply with a deadline to respond, they should raise this with us at the earliest possible opportunity, fully explaining the circumstances. We will only grant applications to extend a deadline if we are satisfied that there are good reasons for doing so. We are aware that a recipient of an IRN could be responding to several requests (from us or other authorities) concurrently. Generally, this will not of itself be an acceptable reason for delay.

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

7.57 No one to whom an information requirement is addressed is obliged to share with us those parts of requested documents, including reports of any internal investigations, over which they wish to assert legal privilege. It is for regulated persons to decide whether to provide privileged material to us, but if they redact or omit material from any documents provided on the grounds of legal privilege, they should also provide us with a description of that material and an explanation of why they say it is privileged. Otherwise regulated persons should volunteer the results of their own investigations in line with General Direction 1 (see paragraph 7.24 to 7.27).

Skilled person reports

7.58 We have the power, under section 82 FSBRA, to require a regulated person to provide a report by a skilled person. We ourselves can also appoint a skilled person to provide a report. When a regulated person receives notice that we intend to either require a report from a skilled person or appoint such a person to provide a report, both the regulated person and any person who is providing (or who has at any time provided) services to it, in relation to the matter being reported upon, will be under a duty to give the appointed skilled person all such assistance as the skilled person may reasonably require.[104]

7.59 We can use our powers under section 82 FSBRA to require a regulated person to provide a report by a skilled person, or to appoint a skilled person ourselves to provide a report. We will do this if we need to understand better any matter relating to compliance with the IFR and where particular skills or specialist knowledge about the subject matter under consideration are required.

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

104 S82(6) FSBRA.

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

- the procedure by which the skilled person is to be nominated or approved by us
- the terms of the appointment of the skilled person
- the procedures to be followed and the obligations of the regulated person in the production of the skilled person's report
- practical matters, such as arrangements for interaction between the skilled person and the PSR
- the subject matter of the report and the form the report should take
- the deadline for submission of the report.

7.62 We will also explain, to the regulated person and to the skilled person, the nature of the matters that led us to decide that a skilled person's report was appropriate.

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

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

7.65 When we appoint a skilled person to produce a report, we will generally direct the regulated person who is the subject of the report to pay any expenses we incur.

Appointment of investigators

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

7.67 Appointed Investigators can, under section 85 FSBRA, require persons to:

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

where the Investigators reasonably consider the answer, information or document to be provided to be relevant to the purposes of the Investigation.

7.68 The Investigators may exercise the above powers in relation to:

- the party that is the subject of the investigation
- any person connected with the party under investigation
- in an investigation into whether there has been a compliance failure, any person who in the investigator's opinion is or may be able to give information which is or may be relevant to the investigation[105]

7.69 We may use our power to appoint Investigators if we are considering whether to take action in relation to a potential compliance failure. An appointed Investigator can be any member of PSR staff or an external person.[106]

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

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

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

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

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

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

105 S85(2) FSBRA.

106 S84(5) FSBRA.

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

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

Search under warrant

7.78 We have the power to apply to a justice of the peace for a warrant to enter premises. The circumstances under which we may apply for a search warrant are as follows:

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

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

- enter and search the premises specified in the warrant
- take possession, or copies, of any information or documents appearing to be of a kind for which the warrant was issued ('the relevant kind')[107]
- take any other steps which may appear to be necessary to preserve or prevent interference with such information or documents[108]

7.80 During the search, any person on the premises may be required to provide an explanation of relevant information or documents, or to state where such information or documents may be found.

107 The power to seize documents relevant to an investigation, granted under FSBRA, is extended by s50 Criminal Justice and Police Act 2001 to allow us to also seize mixed material that contains both relevant and irrelevant documents which can be sorted and sifted off-site at a later time.

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

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

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

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

Non-compliance with our information gathering and investigative powers

7.84 Where a regulated person fails to comply with our information gathering and/or investigative powers, they will also fail to comply with General Direction 1. The purpose of General Direction 1 is to help drive a 'no surprises' culture and to foster cooperation between us and the regulated community.[109] The timely provision of complete and accurate information, whether following a request or voluntarily, helps us to carry out our functions and achieve our objectives.

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

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

- falsifies, conceals, destroys or otherwise disposes of a document which the person knows or suspects is or would be relevant to such an Investigation, or
- causes or permits the falsification, concealment, destruction or disposal of such a document

that person commits a criminal offence unless they can show that they had no intention of concealing facts disclosed by the documents from the Investigator.[110]

109 S90(6) and (8) FSBRA.

110 S90(4) FSBRA.

7.87 If a regulated person fails to comply with any of our information gathering and investigative powers, we may, if General Direction 1 applies, either take enforcement action for failing to comply with that Direction or take informal action in relation to that compliance failure.

7.88 We can also use our powers under FSBRA to:

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

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

Taking interim or urgent action

7.90 We may use our powers to take urgent action, including the use of interim measures, where appropriate, either to: prevent the risk of a negative impact occurring, as a result of the behaviour of regulated persons or address a negative impact that has already occurred. For example, we may consider giving a specific direction (see paragraphs 7.103 to 7.112) with short or no notice to prevent or address that behaviour.

7.91 As set out in the next section, before we give a direction, we will normally give the parties notice of the proposed direction or rule requirement, with our reasons for proposing it, setting out the next steps and the deadline for representations. However, in urgent cases, we may give directions without giving notice if we believe that a delay may result in a detriment to others, or (in the case of specific directions) would otherwise be inappropriate. Alternatively, where the issues require urgent consideration and resolution, we may shorten the period set for submitting representations, so that we can reach a conclusion as soon as possible.

Giving directions

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

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

Considering whether it is appropriate to use our direction giving power

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

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

7.96 If we decide to discontinue our consideration of a matter that could lead to using our direction and/or enforcement powers, and we have previously informed regulated persons that we were considering whether to take action, as explained above we may, or may not, confirm this to the relevant parties.

7.97 We may decide to close a matter under consideration without taking any action for a variety of reasons. For example, if we think there is insufficient evidence to support taking action or we conclude that the matter is no longer an administrative priority considering our APF criteria.

Deciding whether to give a specific direction

7.98 It may be appropriate for us to give a specific direction to or to impose a specific rule requirement on one or more regulated person in relation to a matter that comes to our attention in relation to compliance with the IFR.

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

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

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

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

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

7.104 We will take any responses we receive to the consultation into account when deciding whether to give a specific direction.

7.105 When a decision is taken to give a specific direction, we will give a final notice of that decision directly to the recipient(s) of the draft notice. That notice will set out the reasons for the action and state the commencement date of the direction.

7.106 It is also our usual practice to publish the specific direction on our website. Where we have carried out a wider consultation we will usually also publish a statement explaining, in general terms, the responses we received and how we have taken the responses and other relevant factors into account when determining whether to make the direction.

7.107 In deciding whether to publish a specific direction, we may first seek the views of the recipient(s). Recipient(s) should make representations to us in writing if they think that there should be no publication of all or part of the Direction and give reasons for this. We will take such representations into account when balancing our duty to act transparently when performing our functions and the public interest in promoting wider awareness of our decisions with our obligations to act fairly.

Appeals

7.108 Any persons affected by our decisions to give specific directions or impose specific rule requirements can appeal to the Competition Appeal Tribunal (CAT) (Regulation 9).

7.109 In determining an appeal, the CAT must apply the same principles as would be applied by a court on an application for judicial review. It must either dismiss the appeal or quash the whole, or part, of the decision to which the appeal relates. If the CAT quashes the whole, or part, of a decision, it may also refer the matter back to us with a direction to reconsider the matter and make a new decision in accordance with its ruling. The CAT may not direct us to take any action which we would not otherwise have had the power to take when making our original decision.[111]

111 S77 FSBRA.

Deciding whether to give a general direction

7.110 Before giving a general direction or imposing a general rule requirement, we are required to consult the Bank of England, the FCA and the PRA as to the need for, and potential impact of, the proposed regulatory action.[112]

7.111 We will also generally engage in public consultation by publishing a draft of the proposed general direction or rule requirement on our website, along with an explanation of its purpose, our reasons for proposing it (taking into account the matters we must have regard to when performing our functions under FSBRA),[113] and a time frame for interested parties to respond. We will also take such other steps as we see fit to draw attention to the proposal.[114]

7.112 We are not required to publish a draft direction if we consider that the delay involved would be prejudicial to the interests of service users.[115]

7.113 We will also, usually, publish a cost benefit analysis of the impact of the proposed general direction, including an estimate of the costs and benefits, where we consider that the proposal would lead to a significant increase in costs.[116] However, where it appears to us that the costs or benefits cannot reasonably be estimated, or where it is not reasonably practicable to produce an estimate, we will not include an estimate within our analysis but will give our opinion and an explanation of it instead.[117]

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

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

7.116 We will take any consultation responses received into account when deciding whether to impose the general direction.[118]

112 S104(2) FSBRA.

113 S49 FSBRA.

114 S104 FSBRA.

115 S104 FSBRA.

116 S104 FSBRA.

117 S104 FSBRA.

118 S104 FSBRA

7.117 When a decision is taken to give a general direction we will give a final notice of that decision directly to the recipient(s) of the draft notice. That notice will set out the reasons for the action and state the commencement date of the direction.

7.118 We will also publish the general direction on our website. This will usually be together with a statement explaining, in general terms, the responses we received and our response to them together with details of any significant differences between the draft and final general direction and an updated cost benefit analysis (if applicable).[119]

Appeals

7.119 Like all administrative decisions, our decisions to give general directions or to impose general rule requirements may be judicially reviewed by the courts.

Taking enforcement action

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

a. an obligation, prohibition or restriction imposed by the IFR, or

b. a direction given by the PSR under Regulation 4 of the PCIFRs

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

a. require a regulated person to pay a penalty in respect of a compliance failure (Regulation 6)

b. publish details of any compliance failures and penalties that we have imposed (Regulation 5)

7.122 We may also seek a court injunction (or interdict, in Scotland) to:

a. restrain conduct where there is a reasonable likelihood that there will be a compliance failure or there has been a compliance failure and there is a reasonable likelihood that it will continue or be repeated (Regulation 8(1))

b. remedy a compliance failure or restrain asset-dealing (Regulation 8(2) and 8(3))

Investigating whether it is appropriate to take enforcement action

7.123 When we have information about a possible compliance failure we will consider the appropriate course of action to take, if any. For example, we may seek additional information before deciding whether to: open an enforcement case; take no further action; take informal action; or make a direction. When deciding what action to take we will have regard to a number of different factors, depending on the nature and facts of the specific case. These include the factors set out in the APF.

119 S104 FSBRA.

7.124 When considering what sanction, if any, is appropriate to impose and when calculating any financial penalty, we will follow our Penalties Guidance. This contains a statement of the principles which we will apply in determining whether to impose a penalty and the amount of any penalty.[120] In applying our Penalties Guidance, we will apply the version in force at the time of the compliance failure.[121]

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

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

Opening an enforcement case

7.127 The decision to open an enforcement case and investigate a compliance failure is made by two 'case openers'.[122] These may be either the Managing Director of the PSR, the Head of Policy, the Head of Regulatory and Competition Enforcement or a member of staff of at least manager or technical specialist level.

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

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

7.130 When we decide to open an enforcement case we will usually inform the party under investigation of the fact and subject matter of the investigation as soon as it is practicable to do so, unless we consider that informing them at that stage would frustrate the investigation. We will usually also appoint Investigators to investigate the matter formally, under section 83 FSBRA.

120 The PSR is required to publish such a statement by Regulation 6(3) PCIFRs.

121 'Penalties Guidance', March 2015.

122 Case openers are appointed by our Managing Director.

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

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

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

7.134 Each case team will have an allocated case owner, a senior member of staff, who will have oversight of the running of the case, keep the need for continued investigation under review and make day-to-day decisions about case progression and the use of our investigatory powers. Each case will also have a case sponsor, who will have been one of the case openers and will take milestone decisions about the progress, or otherwise of the case, up until the point that it is referred to our Enforcement Decisions Committee (EDC) (see paragraphs 7.181 to 7.193). This will usually be our Head of Regulatory and Competition Enforcement.

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

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

7.137 One option available to us is to apply to the court for an injunction, under Regulation 8 PCIFRs, to either prevent a compliance failure from occurring or recurring or to remedy an existing compliance failure (see paragraphs 7.235 to 7.238). Alternatively, we may consider using our powers to make a direction or impose a requirement to address the issues giving rise to the compliance failure whilst an enforcement investigation is pending or during its course.

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

Scoping the investigation

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

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

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

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

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

7.143 If, at any time, the nature of our concerns changes significantly from those notified to the person under investigation, and we are satisfied that it is appropriate to expand or narrow the investigation in response to that change, we may change the scope accordingly.[123]

123 S84 FSBRA.

Ongoing contact during investigations

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

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

7.146 We will usually invite a party under investigation to attend at least one update meeting before we reach the stage of producing an investigation report containing our preliminary findings (see paragraphs 7.169 to 7.178). This will generally be once we have reviewed all of the information gathered during our investigation and have sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome. During this meeting, we will explain in more detail the nature and scope of the investigation and update the party as to the stage that the investigation has reached, the next steps and the likely timing of these.

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

7.148 As our investigation evolves we will also consider whether we need to inform the regulated person that the scope of our investigation has changed. We will generally do this when the changes are material, and where we have appointed Investigators we will inform the party under investigation of a change in the scope of the investigation, where it is likely to be significantly prejudiced if it is not made aware of the change.[124] However, the timing of our informing the party will depend upon whether we believe that providing the party with such information would be likely to result in the investigation being frustrated.

124 S84(9) FSBRA.

Settlement

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

7.150 Settlement has many potential advantages, including saving PSR and industry resources and aiding in the prompt communication of compliance messages to industry and/or the markets for payment systems and payment services. As such, we recognise that settlement may be appropriate in certain circumstances and that the advantages of settlement should be reflected by way of a discount against any financial penalty that is imposed. Further details of our approach towards settlement discounts are set out in the PSR's Penalties Guidance.[125]

7.151 Parties should approach settlement discussions with us in an open and co-operative manner, in line with the obligations imposed by General Direction 1. A party's cooperation is one factor that we will take into account when calculating the appropriate financial penalty to impose for compliance failure (see our Penalties Guidance).

7.152 We are receptive to any regulated person informing us of its interest in entering into settlement discussions from an early stage of an investigation. Alternatively, if we consider that a case is suitable for settlement we may invite the party to engage in settlement discussions with us. We are unlikely to make such a proposal or commence such discussions until we have a sufficient understanding of the nature, extent, duration and gravity of the suspected compliance failure(s) to enable us to make a reasonable assessment of the appropriate outcome. In particular, we would wish to ascertain whether non-compliance is ongoing. Usually this will be once we have held the update meeting described in paragraph 7.146 above.

7.153 The decision to engage in settlement discussions and to settle is at our discretion. We will consider a number of factors when making such decisions, including:

- the likely savings to our time and resources
- the prospect of reaching settlement within a reasonable time
- the number of parties in a case
- whether all, or only some, of the parties show interest in engaging in settlement discussions.

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

125 'Penalties Guidance', March 2015.

7.155 Once the early settlement window closes the maximum discount will no longer be available. Between the closure of the window and the issuing of a warning notice (see paragraphs 7.195 above) by the EDC a lesser discount may be available. The exact amount of the available discount will depend on the stage that the case has reached in terms of our preparation for EDC proceedings and the level of cooperation received from the parties. See our Penalties Guidance for further information.

7.156 Where appropriate, matters may be settled at a later stage of the enforcement process, including where the EDC has already issued a warning notice up (until the point where it issues a decision notice). In those cases, the procedures outlined above will continue to apply, although the reduction in penalty for settlement will not be available.

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

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

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

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

7.159 The maximum available settlement discount for a focused settlement agreement is 30% where that agreement is reached during the early settlement window and where all of the relevant facts are accepted and it is accepted that the relevant facts amount to a compliance failure – i.e. the only remaining issue to be decided is whether a sanction should be imposed and, if so, what it should be. Where a focused settlement agreement is reached on the same basis, outside of the early settlement window, or where a focused settlement agreement is reached on a different basis (i.e. some of the issues that remain concern contested questions of fact or of non-compliance) then a lesser discount may be available. The exact amount of the available discount will depend on the stage that the case has reached in terms of our preparation for EDC proceedings and the level of co-operation received from the parties. See our Penalties Guidance for further information.

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

7.161 The settlement discussions will involve consideration of the facts which are available to us to support a decision to take enforcement action and will culminate in the production of a draft warning notice that will set out the terms upon which it is proposed that the case be settled – i.e. details of the relevant compliance failure(s) and the sanction that we propose to impose.

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

7.163 All settlement communications are without prejudice. Consequently, if settlement discussions break down and a matter is dealt with by way of a contested process (see the section beginning at paragraph 7.179 below) through the EDC, the EDC will not consider any admissions or concessions made by any of the parties during settlement discussions.

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

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

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

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

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

7.167 In the case of full settlement, once the settlement agreement has been signed by all parties to the agreement, a warning notice (see paragraph 7.195) will be issued by the SDMs in parallel with a decision notice (see paragraph 7.226 below).

7.168 In the case of a focused agreement, a warning notice setting out the agreed and remaining contested matters will be issued by the SDMs and the EDC will issue the decision notice after receiving representations from the regulated person on the contested matters.

Preliminary findings

7.169 An enforcement investigation will result in the preparation of a report setting out the preliminary findings of the enforcement case team. Where Investigators have been appointed this report will be prepared by them.[126]

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

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

7.171 If the investigation leads to a preliminary finding that there has been a compliance failure by the regulated person, we will consider the appropriate action to take on a case by case basis, considering our APF criteria. We may decide to make a direction to rectify the failure and/or its underlying cause. Alternatively, or in addition, we may recommend to the EDC that (if the EDC decidesn in accordance with the case team's preliminary finding that a compliance failure has occurred) enforcement action be taken by way of imposing, where appropriate, one or both of the available sanctions – a financial penalty and/or publication of the details of a compliance failure and/or that penalty.

7.172 If we propose to submit a recommendation to the EDC, we will normally send our preliminary findings to the regulated person first. These will be based on the investigation report prepared by the case team, which we will usually disclose in full at this stage (subject to confidentiality considerations under section 91 FSBRA applied to our IFR functions by Regulation 14 of the PCIFRs).

7.173 7.173 We will inform the party of: our preliminary conclusion on whether there has been a compliance failure; whether we intend to recommend that the EDC determine that one or more of our powers of sanction should be used in the event of the EDC finding that there has been a compliance failure; and the facts which we consider relevant to these issues.

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

126 S84(6) FSBRA

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

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

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

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

Enforcement Decisions Committee

7.179 The EDC is a sub-committee of the PSR Board established for the purpose of making decisions, on our behalf, as to whether a compliance failure has occurred and, if so, what sanction, if any, should be imposed. It is not a Tribunal or judicial body. The EDC's findings constitute an administrative decision on behalf of the PSR.

7.180 The EDC is an internal decision-making committee, which is separate from the enforcement case team. Its members are appointed by the PSR Board on the basis of their relevant experience. The EDC deals with matters referred to it by PSR staff. These matters are decided in decision-making meetings (which may take the form of a meeting with the party if the subject of the investigation wishes to attend and make oral representations about the matter) conducted by three-person decision-making panels, and held in private.

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

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

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

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

- whether there has been a compliance failure
- whether to issue impose a sanction for a compliance failure, and, if so:
  - whether to impose a financial penalty for the compliance failure or to publish details of the compliance failure, or both
  - where a decision is made to impose a financial penalty, the amount of the financial penalty to be imposed
- whether to give a warning notice to the party concerned, in respect of any suspected compliance failure and proposed sanction
- after consideration of any representations from the party in response to the warning notice, whether to issue a decision notice setting out its finding that there has been a compliance failure and the sanction imposed (if any).

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

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

7.187 The EDC will not examine or depart from the matters agreed between the parties to a focused dispute resolution agreement and the party subject to enforcement action will not be permitted to adduce any evidence that seeks to undermine or attempts to re-open the settled matters.

7.188 Each member of the panel will have a vote in relation to the matters before it, including the Panel Chair. Panels will make decisions by way of a simple majority. The panel will conduct itself in such a manner and may adopt such procedures as the Panel Chair considers suitable and appropriate to enable the EDC to make decisions fairly and expeditiously.

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

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

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

Making a recommendation to the EDC

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

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

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

Issuing a warning notice

7.195 The first step of the EDC decision-making process is for an EDC panel to consider issuing a warning notice against the regulated person (section 74 FSBRA). The purpose of issuing a warning notice is to allow the regulated person to make representations on the enforcement action being proposed, before the EDC decides whether there has been a compliance failure and, if so, whether it is appropriate to impose any sanction in respect of that failure.

7.196 In deciding to issue a warning notice, the EDC will:

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

7.197 Prior to issuing the warning notice, the EDC may seek further information and/or clarification of the matters to which it relates from the enforcement case team. Communications between the EDC and the enforcement case team exchanged prior to the issuing of the warning notice are not disclosable to the party to whom the draft warning notice is addressed (the recipient(s)).

7.198 Any warning notice issued will set out the factors the EDC has taken into account when making its decision and will include sufficient information to enable the regulated party to understand the PSR's case against it.

7.199 If the EDC decides to issue a warning notice, the Secretariat will make arrangements for the notice to be provided to the regulated person/persons to which it is addressed promptly and will communicate any other related decisions of the EDC to the person/persons at the same time. Along with the warning notice the regulated party will, subject to considerations of confidentiality under section 91 FSBRA,[127] legal privilege and Public Interest Immunity (PII), also be provided with copies of the relevant evidence submitted by the enforcement case team to the EDC in support of the draft warning notice and considered by the EDC when making its decision.

7.200 If the EDC decides not to issue a warning notice, on the grounds that there is insufficient evidence to do so, then we will communicate this to the regulated person. In these circumstances, we will consider whether the enforcement case should then be closed or whether the investigation should continue, taking into account the factors set out in our APF.

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

127 See paragraph 2.48.

7.202 Relevant circumstances would include whether any third party is identified within the notice who may be prejudiced by publication, and in such circumstances we will usually also send a copy of the notice to the third party for comments and take all reasonable comments from them into account before making a final decision as to publication.

Making representations to the EDC

7.203 From the point at which the warning notice has been issued by the EDC the enforcement case team will not engage with the panel during the decision-making process, including at any meeting held with the party, unless specifically asked to do so by the EDC.

7.204 Once the EDC has issued a warning notice it has discretion, subject to confidentiality considerations under section 91 FSBRA, legal privilege and PII, whether to share with the recipient(s) any communications it has with the enforcement case team about the progress of the case, in the interests of fairness.

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

7.206 The content of any written representations is a matter for the recipient(s) of the warning notice. However, the representations should be confined to the material necessary for the EDC's determination of whether the factual and legal basis for the proposed action is correct and whether the proposed sanction is appropriate. The representations should clearly identify the reasons for contesting the proposed enforcement action, including the factual and legal grounds on which the recipient is relying, and should be as concise as possible. We would expect a regulated party's written submissions to be comprehensive such that it should not be necessary for that party to seek to introduce new material at the oral representations meeting without very good reason for doing so.

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

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

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

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

7.211 If the recipient(s) of a warning notice requests to be able to make oral representations alongside their written representations, they should inform the Secretariat of this within two weeks of receiving the warning notice.

7.212 If the recipient does not wish to make oral representations then the EDC panel will proceed to consider whether to issue a Decision Notice based on the Warning Notice issued, the written representations provided by the recipient and any response provided by the enforcement case team.

7.213 If the recipient wishes to make oral representations then a date will then be set for a meeting with the party, at which the relevant EDC panel will hear the oral representations. The recipient of a warning notice may wish to be legally represented at the meeting (although this is not a requirement of the EDC). The Panel Chair will specify the running order and timings of the meeting, and will be responsible for ensuring that proceedings run to time. The Panel Chair may also intervene if oral representations do not meaningfully advance the panel's understanding of the written representations. Any panel member may pose questions to the subject of the warning notice during the meeting to clarify the representations being made.

7.214 The panel may ask for an oral response to the recipient's representations from the case team during any meeting with the party.

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

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

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

Disclosure of underlying material

7.218 When the EDC issues a warning notice the regulated party will, subject to considerations of confidentiality under section 91 FSBRA, legal privilege and PII, be provided with the evidence as submitted by the enforcement case team to the EDC and considered by the EDC when making its decision.

7.219 In addition, in each case we will consider whether fairness requires us to disclose any other relevant evidence to the recipient(s) including any evidence that we consider may undermine our recommendations to the EDC.

7.220 When considering what to disclose and the manner of disclosure we take into account considerations of confidentiality, legal privilege and PII.

7.221 When we are assessing whether to disclose relevant evidence the question of fairness to the party subject to EDC proceedings will be treated as paramount.

7.222 We will keep the need to disclose further evidence under review throughout the EDC process and will make further disclosure as and when necessary. For example, following any representations made by the party/parties.

7.223 The EDC may also consider disclosing other relevant evidence during the course of exercising its decision-making functions. Where the EDC does this it will consider whether access to the material is necessary for the recipient(s) to understand the case against it, whether it should be disclosed as a matter of fairness and whether a ny claims of confidentiality, legal privilege or PII are made in relation to the material.

The decision of the EDC

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

7.225 If no representations are made following the issuing of the warning notice, the EDC will generally regard the matters set out in the warning notice as undisputed.

7.226 Following the EDC's decision, we will make arrangements for a written notice ('the decision notice') to be promptly provided to the regulated person/parties to which it is addressed. Where the EDC finds that a compliance failure has occurred, the decision notice will state:

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

7.227 Where the EDC decides that we should publish details of a compliance failure (including, if the EDC so decides, the details of any financial penalty imposed), the EDC will settle the wording to be used and the decision notice will set out the wording that we will publish. We will also inform the subject of the notice of the date on which we intend to publish the details of the compliance failure. When we decide to publish details of a compliance failure, those details (including, if relevant, the details of any financial penalty imposed) will generally be published on our website.

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

7.229 If the EDC decides not to issue a decision notice, on the grounds that there is insufficient evidence to do so, then we will communicate this to the parties. In these circumstances, we will consider whether the enforcement case willshould then be closed or whether the investigation should continue, taking into account the factors set out in our APF.

Appeals

7.230 Any person affected by a decision of the EDC in respect of a compliance failure can appeal to the CAT (Regulation 9).

7.231 In the case of an appeal of a decision to publish the details of a compliance failure, the CAT must apply the same principles as would be applied by a court on an application for judicial review and must either dismiss the appeal, or quash the whole, or part, of the decision to which the appeal relates (Regulation 10). If the CAT quashes the whole, or part, of a decision, it may refer the matter back to us with a direction to reconsider and make a new decision in accordance with its ruling. The CAT may not direct us to take any action which we would not otherwise have the power to take at the time of making the original decision.

7.232 If the EDC decides to publish details of a compliance failure, the details cannot be published until after the expiry of the period within which the decision can be appealed to the CAT or, if an appeal against the decision is made, pending the determination of that appeal.

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

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

Injunctions

7.235 Another way in which we can enforce some of our regulatory decisions is by applying to the court for an injunction (Regulation 8). Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers of sanction. However, we may also apply for an injunction to prevent a compliance failure from occurring.

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

7.237 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[128]

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

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

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