

Speech

Carole Begent at the BLP and BIICL Competition in Financial Services Conference

Speech by Carole Begent, Head of Legal, at the Berwin Leighton Paisner and British Institute of International and Comparative Law 'Competition in Financial Services' Conference on 28 February 2018.

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Thank you for inviting me to join a panel today and to participate in this interesting afternoon discussion. The subject of compliance has many aspects. Today I would like to cover two broad topics:

- The relevance of compliance to the PSR's goal.
- The PSR's enforcement work – present and future.



Carole Begent

Compliance is not an isolated subject. It needs to be seen in the context of its surroundings - that could be public policy and primary legislation. When there is a sector regulator, it includes regulatory policy and the measures set by a regulator for the purpose of achieving the regulator's statutory objectives. I want to give you an insight into the PSR's approach to achieving its objectives.

The PSR was fully established under the Financial Services (Banking Reform) Act (or 'FSBRA') in April 2015. We are an economic regulator. The PSR's three statutory objectives further explain the PSR's role:

- to promote competition in the markets for payment systems and services (between operators, payment service providers (or 'PSPs') and infrastructure providers)
- to promote innovation in payment systems, and
- to ensure payment systems are developed in a way that considers and promotes users' interests (businesses and consumers)

We want to bring change to the payments industry, injecting competition and innovation where it is needed most and putting the interests of the people and businesses that use payment systems front and centre.

The PSR also has concurrent competition powers (as applies to many economic regulators) and enforcement functions under the Interchange Fee Regulation, the revised Payment Services Directive (PSD2)¹ and the Payment Accounts Directive.² These all have the purpose of enhancing competition and so fit well with the PSR's goal.

I will talk about our enforcement activity shortly.

FSBRA provided a designation scheme and set out the PSR's regulatory powers, but did not itself put in place any additional measures for systems and firms to comply with.

In a regulated sector such as this, it may surprise you that compliance isn't a word that has featured in the day to day vocabulary of many in our organisation. That isn't because we don't care about compliance, but it is a reflection of what the main focus of the PSR's activities to date has been and how we have sought to achieve what we were set up to do.

A lot has happened in less than three years since the PSR was established, including:

- The Payments Strategy Forum was set up and published its Strategy.
- Following its market review of the supply of infrastructure services competitive procurement exercises are progressing in relation to three schemes.
- The number of businesses with direct access and providing indirect access has increased.

The New Payment System Operator (or 'NPSO') has been established and will shortly take over operation of BACS, Faster Payments and the new image clearing system for cheques. The NPSO is also responsible for taking forward aspects of the PSF's strategy and blueprint. This includes development and delivery of the New Payments Architecture.

The PSR is engaged with the work of LINK regarding the ATM network and of course, following the PSR's response to the Which? super-complaint work, to tackle payment scams continues with high expectations that there will be improvements for users.

There have already been significant changes in the payments sector.

In 2015 the PSR forecasted much of the work leading to these developments and it placed emphasis on the importance of a good working relationship with the industry. The achievements to date show how well the industry has responded. Much has been achieved without the PSR resorting to using its formal powers, instead using 'soft powers', if you will.

That is not to say we've shied away from use of the powers we were given. The PSR gave the signal in 2015 that if the work it was doing to advance its objectives was insufficient then it would consider further action, including using its powers.

1 Implemented in the UK by the Payment Services Regulations 2017

2 Implemented in the UK by the Payment Account Regulations 2015

And the PSR has used its powers when it has believed it was appropriate to do so.

The PSR has issued directions. By its launch date in 2015 the PSR had made 6 general directions focused mainly on access and governance and one specific direction also focused on access.

Since then we have issued one further specific direction relating to Direct Debit Facilities Management, requiring the operator of BACS to ensure that commercial Facilities Management service providers that wish to do so, can use the BACS bulk change process to help clients switch to/from another provider; and submit for approval a plan and timetable to achieve that outcome.

The PSR has also issued five further specific directions: Following the infrastructure market review, three operators (BACS, FPS and LINK) are subject to a competitive procurement obligation in relation to their central infrastructure. In addition, BACS and FPS are subject to a specific direction requiring the operator to prepare and make available documentation to facilitate conversion between existing messaging standards and ISO 20022.

So that brings the tally of directions to six general and seven specific. It's not a high tally. The change to the industry and achievement of the PSR's objectives is much greater in comparison.

The dialogue between the regulator and industry remains constructive. This is all to the good. However, the PSR remains prepared to exercise its powers and to take enforcement action, if it is appropriate to do so, with its focus on those statutory objectives.

To date the PSR has taken enforcement action in respect of one of the 2015 directions. It involved general direction 6 concerning the timing of publication of Board minutes.

The PSR is presently reviewing the 2015 directions and proposes to commence a consultation on what changes, if any, are appropriate. Changes will be driven by both legal and commercial changes in the market since these directions were first introduced, as well as whether the existing regulatory package can be enhanced further to promote our statutory objectives. We want to ensure that our measures are clear and understood, proportionate, effective both in the sense of furthering our objectives and being capable of being enforced by us.

So much for the PSR generated measures.

I will now talk about the other legislation which imposes obligations on business so that the use of 'compliance' is highly relevant.

The PSR has enforcement functions in relation to:

- the Interchange Fee Regulation³ (or 'IFR'), where it is the lead monitor and enforcer in the UK
- the access provisions in PSD2⁴
- the Competition Act 1998

3 Regulation (EU) 2015/751. See also Payment Card Interchange Fee Regulations 2015 (SI 2015/1911)

4 Payment Services Directive (EU) 2015/2366. See also Payment Services Regulations 2017 (SI 2017/752)

In relation to the interchange fee, initial work was focused on preparing for this role - by preparing guidance relating to the interchange fee cap and then the second tranche of the regulation imposing the business rules. Subsequent and ongoing work has been associated with monitoring and assessing compliance and considering next steps. There has also been significant stakeholder engagement, both with those subject to obligations under the IFR and those affected by it. This will continue to be an area where the PSR will be engaged both as an enforcer of the IFR and as it develops its understanding of the cards market generally.

This January, we became the competent authority to monitor and enforce certain provisions of PSD2, principally focused on access. The work complements the PSR's determinative role in relation to access under FSBRA (and in some instances replaces that role). However, the dynamic of enforcer is slightly different and it will be interesting to see how this evolves. To date the PSR has published guidance in relation to this new role. We anticipate that access work will be an area of activity for the PSR over the year.

And so on to the PSR's competition powers. The PSR was given concurrent powers under the Competition Act 1998 and its EU equivalent⁵ and the Enterprise Act 2002.

As many of you may know the Competition Act prohibits anticompetitive agreements and abuse of dominance. The PSR's jurisdiction under the Competition Act is in relation to participation in any payment system (designated under FSBRA or not).⁶ These powers complement the PSR's statutory duty to promote competition.

Perhaps less well appreciated is that alongside the ability to take enforcement action under the Competition Act, the PSR also has the power to apply to the Court for a disqualification order made against a director of a company which has breached the competition law and where his conduct as a director makes him unfit to be concerned in the management of a company.

Like many regulators we anticipate that there will be a variety of sources of information that may result in our taking action under the Competition Act. These include our own observations and market intelligence, complaints, and requests for leniency. Please do talk to us. If you are a leniency applicant, we, along with all concurrent regulators, have arranged for the CMA to be a single port of call. There is information about leniency on our website, together with leniency telephone number.

Indeed, it is under the Competition Act that we have recently opened a case. At this stage in the investigation I am limited in how much I can say about the case. I can tell you that it involved visits at a significant number of sites around the UK, having successfully obtained warrants from the Court. Investigations such as these are significant operations, particularly for small and fairly new regulators such as the PSR. The work has involved close collaboration with the CMA in particular.

⁵ Treaty on the Functioning of the European Union, Articles 101 and 102.

⁶ 'Participation' is defined in FSBRA (section 42) to refer to operators, infrastructure providers and any payment service providers. That is, 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.

To sum up the PSR's approach:

- the PSR wants to make a difference and achieve its objectives
- how we do this depends on the issue and circumstances
- a lot has been achieved without the use of formal powers
- we continue to place emphasis on the importance of a good working relationship with the sector including users
- the PSR remains prepared to impose regulatory measures when it needs to
- it is prepared to enforce against breaches of legislation or regulatory measures when appropriate

Thank you.

