

# Powers and Procedures Guidance (PPG)

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## Introduction

### 1 Scope of the Powers and Procedures Guidance (PPG)

- 1.1 The PPG principally relates to the processes and procedures that the PSR will generally apply in relation to its regulatory functions under the Financial Services (Banking Reform) Act 2013 (FSBRA).
- 1.2 The PPG does not attempt to describe in detail all the provisions of FSBRA and interested parties are advised to refer to the text of that legislation for a complete description of the PSR's statutory functions and powers.
- 1.3 References in the PPG to a 'section' or 'sections' are references to the relevant provisions of FSBRA.
- 1.4 The PPG has been developed prior to the operational launch of the PSR. It is not exhaustive. We will keep it under review and update it as appropriate. Where we become the competent authority for other national or EU legislation, we may revise the PPG or issue separate guidance as appropriate.

### 2 Our FSBRA powers

- 2.1 Under FSBRA, we have a range of powers over participants in regulated payment systems. These include among others:
  - powers to exercise particular regulatory functions (sections 54 to 58)
  - powers to enforce certain regulatory decisions where parties do not comply (sections 71 to 75), and
  - powers to gather information and to conduct investigations (sections 81 to 90).
- 2.2 The PPG sets out practical information on how we will exercise these powers, where we have determined that it is appropriate to do so.
- 2.3 Any project or programme of work by the PSR might lead us to consider that it is appropriate to exercise a particular regulatory function, based on the information we gather and our engagement with stakeholders. Where this is the case, we would expect to inform affected parties of our thinking on our possible course(s) of action and seek their views before proposing to exercise the relevant power(s).

## Giving directions and imposing requirements

### 3 Overview of the powers

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

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

- 4.1 Any project or programme of work by the PSR might lead us to consider that it is appropriate to give a specific direction or impose a specifically-imposed requirement, based on the information we gather and our engagement with stakeholders. Where this is the case, we would expect to inform prospective addressees and other affected parties and to seek their views before proposing to exercise the relevant power.
- 4.2 Before giving a specific direction or imposing a specifically-imposed requirement, we will normally send addressees a notice of a proposed direction or a proposed requirement. That notice will give our reasons for proposing the direction or requirement, as well as the next steps and the timescale for representations to be made. Where applicable, the notice will also set out the proposed implementation timescale (that is, the period between the issuing of the direction or requirement and its commencement). In urgent cases, we may give specific directions or impose specifically-imposed requirements without giving notice.
- 4.3 Where we give notice, we will normally allow 14 days for addressees to make representations in writing. We will take into account the circumstances of each case. In some situations, it might be appropriate to give more time for representations to be made. In urgent cases, the period in which representations can be made might be shortened. We will consider written representations received alongside any views expressed orally in any meeting(s) held between the addressees and the PSR case team or staff during the window for representations. If the PSR does not seek such a meeting itself, an addressee may request one. In doing so, the addressee should state why a meeting is necessary. We will consider such requests and we may decide to convene a meeting between the addressee and the PSR case team or staff.
- 4.4 Where a proposed specific direction or specifically-imposed requirement is likely to have wider implications or relevance beyond the specific addressees, we might decide to share the draft direction or requirement more widely and seek the views of other stakeholders. We will balance the interests of such wider consultation with fairness to the specific addressees of the proposed direction or requirement. In deciding whether to share the draft direction or requirement more widely, we may seek the views of the specific addressees.
- 4.5 We will take account of representations received in deciding whether to give a specific direction or impose a specifically-imposed requirement.

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<sup>1</sup> Section 54

<sup>2</sup> Section 55

- 4.6 When a decision is taken to give a specific direction or impose a specifically-imposed requirement, a final notice of a direction or a requirement will typically be addressed to the relevant participants. Alternatively, and where appropriate to do so (see paragraph 4.7 below), we may publish the direction or requirement on our website and bring it to the attention of the relevant participants. Either way, we will set out the reasons for the action taken. We will specify the commencement date of the direction or requirement.
- 4.7 We will decide whether to publish a specific direction or a specifically-imposed requirement based on the circumstances of each case. We will balance the interests of transparency in the exercise of our functions and wider awareness of our decisions with fairness to the specific addressees of the direction or requirement. In deciding whether to publish a direction or requirement, we may seek the views of the specific addressees.

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

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

## **6 Appeals**

- 6.1 FSBRA (section 76) provides that decisions to give specific directions or to impose specifically-imposed requirements are appealable to the Competition Appeal Tribunal (CAT) by any person who is affected by the decision.
- 6.2 Decisions to give general directions or to impose generally-imposed requirements are not appealable in the same manner as specific directions or specifically-imposed requirements (see section 76).
- 6.3 Our decisions on whether to give directions or impose requirements, like all administrative decisions, can be the subject of judicial review by the courts.

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

### 7 Overview of the powers

- 7.1 FSBRA provides a mechanism whereby a party ('the applicant') having a dispute with another party (or parties) can seek resolution of the dispute by the PSR.
- 7.2 In such cases, the applicant will make a formal section 56 or 57 application. Following such applications, we can require the granting of access to regulated payment systems or vary the fees, charges, terms or conditions of agreements relating to regulated payment systems. We understand that the timely resolution of disputes is important and we will try to reach a determination as soon as possible in the circumstances of each dispute that we decide to investigate.
- 7.3 In response to an application, we might decide to take informal action rather than to exercise our formal section 56 or 57 powers. We might take informal action before and/or after we decide to investigate a dispute.

### 8 Making an application

- 8.1 For us to properly consider disputes that are escalated under sections 56 and 57, we will need applications to contain detailed information on the nature of the dispute and the remedy that is sought. A common format for making such applications will also assist us in the task of processing and considering them.
- 8.2 Guidance on the format and content of applications is set out in Appendix 1 below. Parties making an application should ensure that the information provided is specific and relevant and does not go beyond what is needed to resolve the dispute. The submission of unnecessary or irrelevant information or evidence could delay our assessment of the application. In certain cases, particularly for smaller companies or individuals, we may consider relaxing some of these requirements.
- 8.3 We will expect that parties to a dispute will have first sought to resolve their disagreements through commercial negotiations and available alternative dispute resolution processes, which may include attempts at mediation. Where an applicant has not done (or attempted) this, we may decide that it is not appropriate to handle the application or to exercise any of our powers, at least until the applicant has demonstrated that they have reasonably pursued such alternative routes to resolve their dispute.
- 8.4 If you are a potential applicant and need any further guidance on how to make an application, please contact us by email at [PSRapplications@psr.org.uk](mailto:PSRapplications@psr.org.uk)
- 8.5 Applications under sections 56 or 57 should be made to:  
  
Post: Payment Systems Regulator, 25 The North Colonnade, Canary Wharf, London, E14 5HS  
  
Email: [PSRapplications@psr.org.uk](mailto:PSRapplications@psr.org.uk)
- 8.6 If an applicant considers that its application contains confidential information, it should provide a separate non-confidential version which can be copied to the other party (or parties) to the dispute, as well as explaining why it considers that the information is confidential.

## 9 Following receipt of an application

- 9.1 Where applications made under sections 56 or 57 are submitted by email, we will aim to acknowledge receipt within one working day.
- 9.2 Following receipt, we will review the application and assess whether it contains the requisite information and documentation. We will assess whether there is enough detail in the application to be able to consider it properly. We may need to revert to the applicant for further detail if this is lacking.
- 9.3 If we are satisfied that we have been provided with sufficient information by the applicant to consider the application, we will allocate an initial enquiry number to the dispute and open an initial enquiry. The initial enquiry phase involves the PSR considering whether or not it is appropriate for us to handle a dispute. We may decide that it is not appropriate for us to handle a dispute for various reasons, including that there are alternative means available for resolving the dispute or that our handling of it would not be an administrative priority (see our Administrative Priority Framework, available on our website: [www.psr.org.uk](http://www.psr.org.uk)).
- 9.4 Applications may require clarification on certain points and the PSR may need to raise these with the parties. We may also need to undertake some enquiries to assist us in understanding the dispute. The first step will usually be to send a non-confidential version of the application to the other party (or parties) to the dispute named in the application. However, where we consider it appropriate, and where it is permitted by legislation, we may also disclose confidential information. We expect to seek the views of the applicant before deciding to disclose any confidential information.
- 9.5 As part of the initial enquiry phase, we may convene meetings with parties to the dispute, separately or jointly.
- 9.6 As soon as practicable after we have decided whether or not it is appropriate for us to handle the dispute, we will inform the parties to the dispute of our decision and the reasons for it.

## 10 Where we decide to handle a dispute

- 10.1 If we have decided that it is appropriate for us to handle a dispute, we will open a case and allocate a case number. We may publish details of the dispute, including the business names of the applicant and the other parties, on our website.
- 10.2 We will proceed to gather information necessary for us to determine whether we should exercise our powers under sections 56 or 57. We might seek information from the other party or parties to the dispute, or third parties, through the exercise of our power to obtain information or documents (under section 81) or by obtaining a report from a participant or appointing a skilled person to provide a report (under section 82). We may convene meetings with the parties to the dispute, separately or jointly.
- 10.3 Deciding to handle a dispute and gather further information does not bind us to exercising our powers under sections 56 or 57. Our information gathering might reveal that there are no grounds for such action, or we may decide that exercising our powers is not justified or is not an administrative priority. Where we do decide to act, we may decide to exercise our powers to give directions or impose requirements under sections 54 or 55, rather than our powers under sections 56 or 57, depending on what we consider to be most appropriate in each case.



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

- 11.1 Following our investigation of a dispute, we might decide that it is appropriate to determine the dispute by requiring the granting of access or the variation of an agreement.
- 11.2 Before requiring the granting of access or the variation of an agreement, we will normally send all parties to the dispute a notice of a proposed requirement to grant access or a proposed variation of an agreement. That notice will set out our reasons for proposing the access requirement or the variation of the agreement, as well as the next steps and the timescale for representations to be made. In urgent cases, we may require the granting of access or the variation of an agreement without giving notice.
- 11.3 Where we give notice, we will normally allow 14 days for representations to be made in writing. We will take into account the circumstances of each case. In some situations it may be appropriate to give more time for representations to be made. In urgent cases, the period in which representations can be made might be shortened. We will consider written representations received alongside any views expressed orally in any meeting(s) held between the parties to the dispute and the PSR case team or staff during the window for representations. If the PSR does not seek such a meeting itself, a party to a dispute may request one. In doing so, the party should state why a meeting is necessary. We will consider such requests and we may decide to convene a meeting between the party and the PSR case team or staff.
- 11.4 Where a proposed requirement to grant access or a proposed variation of an agreement is likely to have wider implications or relevance beyond the parties to the dispute, we might decide to share the draft terms of the requirement or variation more widely and seek the views of other stakeholders. We will balance the interests of such wider consultation with fairness to the parties to the dispute. In deciding whether to publish the draft terms of a requirement or variation, we may seek the views of the parties to the dispute.
- 11.5 We will take account of representations received in deciding whether to require the granting of access or the variation of an agreement.
- 11.6 When a decision is taken to require the granting of access or the variation of an agreement, a final notice of a requirement to grant access or a variation of an agreement will be addressed to the parties to the dispute. The notice will set out the reasons for the action taken. When a decision is made not to require the granting of access or the variation of an agreement, the parties will receive a statement summarising our reasons for this decision.
- 11.7 We will decide whether to publish the terms of a requirement to grant access or the variation of an agreement based on the circumstances of each case. We will balance the interests of transparency in the exercise of our functions and wider awareness of our decisions with fairness to the parties to the dispute. In deciding whether to publish the terms of a requirement or variation, we may seek the views of the parties to the dispute.

## **12 Publication of updates and final determination**

- 12.1 We may publish updates on our website in connection with those disputes that we decide to handle. We may also indicate what final determination was made, such as whether we considered that there were no grounds for action, that action was not an administrative priority, that we would exercise our section 56 or 57 powers, or that alternative action was more appropriate. We will decide whether to publish updates or final determinations of disputes based on the circumstances of each case. In doing so, we will balance the interests of transparency and wider awareness of the PSR's work and decision-making process with fairness to parties to the dispute. In making these decisions, we may seek the views of the parties to the dispute on what we expect to publish. We will not include commercially confidential information in any published updates or final determinations.

- 12.2 When we exercise our powers to require the granting of access or to vary an agreement, we may publish a summary of the action we have taken.
- 12.3 When the final determination of an application is published, we may also publish the non-confidential version of the initial application.

### **13 Appeals**

- 13.1 FSBRA (section 76) provides that decisions to require the granting of access or the variation of an agreement are appealable to the CMA by any person who is affected by the decision.
- 13.2 Our decisions on whether to require the granting of access or the variation of an agreement, like all administrative decisions, can be the subject of judicial review by the courts.

### **14 Other disputes**

- 14.1 Disputes between participants, or between participants and service-users, over matters other than access to regulated payment systems, or the fees, charges, terms or conditions of agreements relating to participation in regulated payment systems or the use of services provided by regulated payment systems, can also be the subject of applications to us. Applicants should follow the same process as set out at paragraphs 8.1 to 8.6 above for applications made under sections 56 or 57.
- 14.2 Following receipt of an application that falls outside of sections 56 or 57, we will follow the same steps as set out in paragraphs 9.1 to 10.3 and 12.1 to 12.3 above for applications made under sections 56 or 57, where we consider that these steps are appropriate in the circumstances. However, where we decide to handle a dispute and ultimately decide that it is appropriate to take action, we will do so using our powers to give directions (under section 54) or impose requirements (under section 55).
- 14.3 If we consider that it is appropriate to give a specific direction or impose a specifically-imposed requirement, we will follow the process set out in paragraphs 4.1 to 4.7 above.
- 14.4 If we consider that it is more appropriate to give a general direction or impose a generally-imposed requirement, we will follow the process set out in paragraphs 5.1 to 5.7 above.

## Requirement to dispose of an interest in a payment system operator

### 15 Overview of the power

- 15.1 We have the power to require a person who has an interest in the operator of a regulated payment system to dispose of all or part of that interest.<sup>3</sup> 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. This power, like any other power we have, will only be used where it is appropriate and proportionate to do so.

### 16 Deciding whether to require the disposal of an interest

- 16.1 We may only exercise our power to require the disposal of an interest with the consent of the Treasury.
- 16.2 Where a project or programme of work by the PSR leads us to consider that it is appropriate to require the disposal of an interest, we will inform the operator, the person having an interest and other relevant parties and seek their views before proposing to exercise the relevant power.
- 16.3 Before requiring the disposal of an interest, we will send the operator and the person having an interest, a notice of a proposed disposal remedy. That notice will give our reasons for proposing the disposal, as well as the next steps and the timescale for representations to be made. We will normally allow at least 28 days for representations to be made to us. We expect that we would provide an opportunity for oral representations to be made by the operator and/or the person having an interest, where this is expressly requested and where good reasons are provided for why oral representations are necessary in addition to representations made in writing.
- 16.4 We will also normally publish a draft of the requirement on our website and invite representations on it from stakeholders other than the affected operator and the person having an interest. However, we are not required to publish a draft of the requirement and we will consider whether this is appropriate in all the circumstances of the case. The period allowed for written representations would not be longer, but might be the same, as the period allowed for representations by the operator and the person having an interest.
- 16.5 We will take account of representations received in deciding whether to require the disposal of an interest.
- 16.6 When a decision is made to require the disposal of an interest, a final notice of a disposal remedy will be addressed to the parties. The notice will set out the reasons for the action taken.
- 16.7 In those cases where we published a draft of the requirement, we will also normally publish an account, in general terms, of representations we received and our response to them.
- 16.8 Where we decide to require the disposal of an interest, we will publish our decision.

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<sup>3</sup> Section 58

## **17 Enforcement of the disposal requirement**

17.1 A requirement to dispose of an interest is enforceable by civil proceedings brought by us.<sup>4</sup>

## **18 Appeals**

18.1 FSBRA (section 76) provides that decisions to require the disposal of an interest are appealable to the CMA by any person who is affected by the decision.

18.2 Our decisions on whether to require the disposal of an interest, like all administrative decisions, can be the subject of judicial review by the courts.

## Enforcement action

### 19 Overview of the powers

- 19.1 A compliance failure is the failure of a participant in a regulated payment system to comply with:
- a direction (general or specific) given under section 54
  - a requirement imposed (generally or specifically) under section 55, or
  - a requirement to grant access to a payment system imposed under section 56.<sup>5</sup>
- 19.2 We have the power to take enforcement action in relation to these compliance failures. This includes the power to:
- publish details of the compliance failure (section 72(1))
  - impose a financial penalty for the compliance failure (section 73) and publish details of that penalty (section 72(2))
  - seek an injunction to bring the compliance failure to an end, remedy the compliance failure or restrain dealing with assets (section 75).
- 19.3 We may publish details of a compliance failure or impose a financial penalty in any situation when we have sufficient evidence that a participant in a regulated payment system has failed to comply with a direction or requirement that was addressed to it. For example, we might make this determination following:
- an investigation in response to a complaint made to us about non-compliance with a PSR direction or requirement
  - an investigation commenced at our own initiative into compliance with a PSR direction or requirement
  - a report of a skilled person which reveals a compliance failure.
- 19.4 A participant in a regulated payment system might also proactively approach us to disclose or declare a compliance failure. It might further undertake to change its practice, bring the compliance failure to an end and give assurances on how future compliance failures will be avoided. We reserve the option to publish details of a compliance failure or impose a financial penalty in such cases, if we are satisfied that a compliance failure occurred and that the sanction is appropriate.

### 20 Publication of compliance failures and imposition of financial penalties

- 20.1 We will consider each compliance failure on its merits and determine whether the publication of details relating to the compliance failure and/or relating to the imposition of a financial penalty is appropriate.

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<sup>5</sup> A failure to comply with a decision of the PSR to vary the fees, charges, terms or conditions of an agreement relating to a payment system (under section 57) does not constitute a compliance failure. The effect of the PSR's regulatory decision is to vary the agreement itself. Any subsequent breach of the agreement would be enforceable as a matter of private law by the parties to that agreement.

- 20.2 When we decide to publish details of a compliance failure, those details (including, if relevant, the details of any financial penalty imposed) will generally be published on our website. We might also issue a press release.
- 20.3 We are required to prepare a statement of the principles we will apply in determining whether to impose a financial penalty and the amount of any penalty.<sup>6</sup>This statement is contained in our Penalties Guidance, which is available on our website: [www.psr.org.uk](http://www.psr.org.uk)
- 20.4 In applying the statement of penalty principles, we must apply the version in force at the time of the compliance failure. We must also review the statement from time to time and revise it if necessary.

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

- 21.1 Decisions on whether to publish details of, or to impose a financial penalty for, a compliance failure will be taken by the PSR Enforcement Decisions Committee (EDC). The EDC will determine whether a compliance failure has been committed and whether publication of details of the compliance failure or the imposition of a financial penalty is appropriate.
- 21.2 The EDC is a sub-committee of the PSR Board. It is separate from those persons who may investigate or otherwise ascertain that a compliance failure had been committed and recommend (to the EDC) that enforcement action be taken. EDC members are independent of the PSR and are appointed by the PSR Board on the basis of their relevant experience. The EDC has its own legal advisers and support staff.

### *PSR recommendation to the EDC to issue a warning notice*

- 21.3 If our staff consider that it is appropriate to publish details of, or impose a financial penalty for, a compliance failure, they will recommend to the EDC that a warning notice should be issued. We may submit a draft warning notice to the EDC, along with our recommendation.
- 21.4 A recommendation to issue a warning notice may arise from a formal investigation involving appointed investigators (see paragraphs 32.1 to 41.3 below on the use of appointed investigators). In such cases, our recommendation to the EDC will usually be accompanied by the investigation report produced.
- 21.5 When we consider it appropriate, or the EDC requests it, relevant supporting documents or evidence will be provided to the EDC.

### *Deciding whether to issue a warning notice*

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

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<sup>6</sup> Section 73(3)

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

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

### ***Contents of the warning notice***

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

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

### ***Access to underlying material***

21.11 There is no statutory requirement to provide a recipient of a warning notice with any underlying material. However, the EDC will consider in each case whether it is appropriate to do so. In some cases, the EDC may consider it appropriate to provide the recipient with the written submissions and documents that the EDC considered when reaching the decision to issue a warning notice. The EDC will consider whether access to underlying material is likely to be necessary for the recipient of a warning notice to understand the case against it.

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

### ***Making representations to the EDC***

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

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

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

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

- 21.17 If the recipient of a warning notice indicates that they wish to make oral representations, the EDC staff, in conjunction with the Chairman or a Deputy Chairman of the EDC, will fix a date for a meeting (an oral hearing) at which the relevant EDC members will receive those representations.
- 21.18 The EDC Chairman will be the Chair of the oral hearing. The EDC Chairman will specify the running order and timings of the oral hearing, and will ensure that representations run to time during the hearing. They may also intervene if oral representations merely reiterate or restate representations previously made in writing, or do not meaningfully advance the EDC's understanding of those representations. Any member of the EDC may pose questions to the participant making the oral representations to clarify the representations being made.

### ***The final decision of the EDC***

- 21.19 If representations were made, the EDC will consider those representations when reaching its decision on whether it is appropriate to publish details of a compliance failure or impose a financial penalty.
- 21.20 If no representations were made, the EDC will generally regard as undisputed the matters set out in the warning notice. In such circumstances, the decision to publish details of the compliance failure or to impose a financial penalty can be taken by the EDC Chairman alone, without the need to convene or consult all members of the EDC, if the EDC Chairman so determines.
- 21.21 If the EDC decides to publish details of a compliance failure, it will settle the wording of those details to be published.
- 21.22 If the EDC decides to impose a financial penalty, it will determine the amount of any penalty. See our Penalties Guidance (available on our website: [www.psr.org.uk](http://www.psr.org.uk)), which contains our statement of the principles we will apply in determining whether to impose a penalty and the amount of that penalty.

### ***Communication of the EDC's decision***

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

## **22 Appeals**

- 22.1 FSBRA (section 76) provides that decisions to publish the details of a compliance failure or to impose a financial penalty in respect of a compliance failure are appealable to the CAT by any person who is affected by the decision.



- 22.2 When the EDC decides to publish details of a compliance failure, the details cannot be published until after the expiry of the period in which the decision can be appealed to the CAT or, if an appeal against the decision is made, following the determination of that appeal.
- 22.3 When the EDC decides to impose a financial penalty for a compliance failure, and an appeal against the decision is made to the CAT, the penalty is not required to be paid until after the appeal has been determined.
- 22.4 Our decisions on whether to publish the details of a compliance failure or to impose a financial penalty in respect of a compliance failure, like all administrative decisions, can be the subject of judicial review by the courts.

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

- 23.1 Settlement has many potential advantages, including the saving of our and industry resources and the prompt communication of compliance messages to the industry or to the markets for payment systems and payment services. As such, we consider that it is normally in the public interest for matters to be settled, and early, if possible.
- 23.2 Accordingly, a participant in a regulated payment system may settle with us by agreeing to the publication of details of and/or the imposition of a financial penalty for a compliance failure, rather than contesting our decision.
- 23.3 Settlements are still regulatory decisions. We would not normally agree to detailed settlement discussions until we have a sufficient understanding of the nature and gravity of the suspected compliance failure to make a reasonable assessment of the appropriate outcome. However, a participant in a regulated payment system may enter into settlement discussions with us at any time, if both the participant and we agree.
- 23.4 Settlement discussions between the participant in a regulated payment system and us are likely to revolve around the discussion of a draft warning notice based on evidence obtained by us, or on sufficient agreed facts to support a regulatory decision.
- 23.5 Settlement decisions must be taken jointly by two settlement decision makers (SDMs), who will be senior PSR/FCA staff (at least one of whom will be from the PSR). Neither of the SDMs will have been directly involved in establishing the evidence on which the settlement decision is based. The SDMs may, but need not, participate in settlement discussions between the participant in a regulated payment system and the PSR.
- 23.6 The SDMs may accept the proposed settlement by deciding to issue a warning notice. Alternatively, they may decline the proposed settlement, in which case settlement discussions might continue.
- 23.7 The warning notice will constitute our proposed decision about the compliance failure and will set out the details of the compliance failure that we propose to publish and/or the financial penalty that we propose to impose.
- 23.8 Once a warning notice has been issued and the participant in a regulated payment system has confirmed that it agrees with its contents, the SDMs will conclude the settlement by deciding to issue a final decision notice. The decision notice constitutes our regulatory decision about that compliance failure.

- 23.9 In recognition of the benefits and savings afforded by settlement, any financial penalty specified in the warning notice may be reduced to reflect the timing of the settlement (that is, the stage of the process when settlement is concluded).
- 23.10 The amount of the financial penalty specified in the warning notice will take into account all the factors in our statement of penalty principles (contained in our Penalties Guidance) apart from the existence of the settlement discount that will be applied if the settlement is concluded. If a settlement is concluded, the discount will be detailed in the decision notice.
- 23.11 Compliance failure proceedings may still be settled, if appropriate, where a warning notice has been issued by the EDC. In these circumstances, settlement discussions will still be undertaken by our staff and decisions made by the SDMs.
- 23.12 All settlement communications are made without prejudice. Consequently, if the settlement discussions break down and the matter proceeds through a contested administrative process through the EDC, the EDC will not be told about any admissions or concessions made during settlement discussions.

## 24 Injunctions

- 24.1 Applying to the court for injunctive relief is another way that we can enforce some of our regulatory decisions.<sup>7</sup> Our powers to seek injunctions apply in relation to the same compliance failures that give rise to our powers to publish details or impose a financial penalty.
- 24.2 In making a decision to apply to the court, we will consider whether the legal test that the court will apply is met, as well as the nature, impact and seriousness of the actual or potential compliance failure and whether injunctive relief is appropriate.
- 24.3 On our application, the court may make an order:
- restraining the conduct, if it is satisfied that there is a reasonable likelihood of a compliance failure or, if a compliance failure has taken place, that it is reasonably likely to continue or be repeated
  - requiring the participant in a regulated payment system, and anyone else who appears to have been knowingly concerned in the compliance failure, to take steps to remedy it, if it is satisfied that there has been a compliance failure and that steps could be taken to remedy it, or
  - restraining the participant in a regulated payment system or the person (as the case may be) from dealing with any assets which it is satisfied the participant or person is reasonably likely to deal with, if it is satisfied that there has been a compliance failure or that the person may have been knowingly concerned in a compliance failure.<sup>8</sup>
- 24.4 We may seek only one type of order or several, depending on the circumstances of each case.

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<sup>7</sup> Section 75

<sup>8</sup> The court may also make an order freezing assets under its inherent jurisdiction.

## Information gathering and investigation powers

### 25 Overview of our powers

- 25.1 We have various powers to gather information and to conduct investigations.<sup>9</sup> In any particular case, we will decide which powers, or combination of powers, are the most appropriate to use.

### 26 Power to obtain information or documents

- 26.1 We have the power to require a person to provide information and documents which we need to exercise our statutory functions under FSBRA.<sup>10</sup>
- 26.2 We expect to use this power for general information gathering purposes, including updating our knowledge on the state of the market for payment systems (or the markets for services provided by payment systems). We also expect to use this power in the context of our market reviews.<sup>11</sup>
- 26.3 We might also use this power to obtain information or documents to assist, for example, in determining whether there has been a compliance failure by a participant in a regulated payment system. However, where one or more investigators have been appointed to investigate a suspected compliance failure (see paragraphs 32.1 to 41.3 below on the use of appointed investigators), we generally expect to use the information gathering powers exercisable by those investigators (see paragraphs 28.1 to 28.8 below).
- 26.4 Requests for the provision of information and documents will be made through a formal written notice (known as an information request or a section 81 notice). The notice will set out the form or manner in which information or documents should be provided and will specify the deadline for responses.
- 26.5 We expect to give recipients of information requests advance notice so that they can manage their resources accordingly. Also, where it is practical and appropriate to do so, we will send the information request in draft and take account of comments on the scope of the request, the actions that will be required in responding, and the deadline by which information must be provided. In certain circumstances, it will not be appropriate to provide advance notice or to send information requests in draft (for example, if it would be inefficient because the request is for a small amount of information).

### 27 Reports by skilled persons

- 27.1 We have the power to require a participant in a regulated payment system to provide a report by a skilled person. We can also appoint a skilled person to provide a report.<sup>12</sup>

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<sup>9</sup> Sections 81 to 90

<sup>10</sup> Section 81

<sup>11</sup> We also have powers to obtain information or documents under the Enterprise Act 2002 (EA02), as amended, in connection with market studies. Detailed guidance on how we will exercise our EA02 powers will be published by the PSR as soon as possible after our 1 April 2015 operational launch. We consulted on this guidance in January 2015. See: <http://www.fca.org.uk/news/psr/psr-cp15-01-psr-competition-concurrency-guidance>

<sup>12</sup> Section 82

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

## 28 Powers exercisable by appointed investigators

- 28.1 We may appoint investigators to conduct an investigation (see paragraphs 32.1 to 41.3 below on the use of appointed investigators). If investigators are appointed, they will have powers (under section 85) to:
- require persons under investigation (and persons connected with them) to provide information and to attend and answer questions in interview, and
  - require any person to produce documents.

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<sup>13</sup> Following the appointment of the skilled person, we may also give specific directions to the participant about the procedures to be followed and their obligations under the notice to provide a skilled person's report.

- 28.2 The requirements described above may be imposed only so far as the investigator reasonably considers them to be relevant to the purposes of the investigation.
- 28.3 For investigations into suspected compliance failures, appointed investigators can also require the attendance or the provision of information by any persons who, in the investigator's opinion, are or may be able to give relevant information. Such persons may also be required to give the appointed investigators all assistance in connection with the investigation as they are reasonably able to give.
- 28.4 The appointed investigator(s) will exercise these powers by issuing formal notices in writing (known as investigatory requirement notices or section 85 notices). These notices will set out the requirements and the deadlines for compliance.
- 28.5 We expect to give recipients of investigatory requirement notices advance warning so that they can manage their resources accordingly. Also, when it is practical and appropriate to do so, we will send the investigatory requirement notice in draft and take account of comments on the scope of the requirements, the actions that will be required in complying with them, and the deadline for compliance. In certain circumstances, it will not be appropriate to provide advance warning or to send investigatory requirement notices in draft, for example if we think it would prejudice the investigation.
- 28.6 We do not expect to send draft investigatory requirement notices when the information or document requirements are straightforward and we consider that it is reasonable to expect the information or documents to be made available within our specified timeframe.
- 28.7 The timeframe for comments on a draft investigatory requirement notice would usually be no more than three working days. After considering any comments, we will then confirm or amend the investigatory requirement notice.
- 28.8 Once we have formally issued an investigatory requirement notice (whether or not it has been preceded by a draft), we will not usually agree to an extension of time for complying with the notice, unless compelling reasons are provided to support an extension request.

## 29 Search and seizure powers

- 29.1 We have the power to apply to a justice of the peace for a warrant to enter premises where documents or information are held.<sup>14</sup> The circumstances under which we may apply for a search warrant include:
- when a person has been issued with an information request or an investigatory requirement notice requiring the provision of information or documents and has failed (wholly or in part) to comply with the requirement, or
  - when there are reasonable grounds for believing that, if an information request or an investigatory requirement notice requiring the provision of information or documents were to be issued to a participant in a regulated payment system, the requirement would not be complied with or the information or documents would be removed, tampered with or destroyed.
- 29.2 A warrant obtained under section 88 authorises a police constable or a person in the company, and under the supervision of, a police constable, to do the following:
- enter and search the premises specified in the warrant
  - take possession of any information or documents appearing to be of a kind for which the warrant was issued, or

<sup>14</sup> Section 88  
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- take any other steps which may appear to be necessary to preserve or prevent interference with such information or documents.

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

29.4 During a search under warrant, we would expect to take copies of documents rather than to seize originals, when it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize original documents, we expect to return these to the participant in a regulated payment system as soon as reasonably practicable to do so. We will adopt the same approach with respect to electronic copies, in that we will endeavour to take copies of hard-drives where it is reasonably practicable to do so and not disproportionately time-consuming. When it is necessary to seize hard-drives, laptops, or other data-storage devices, we expect to return these to the participant in a regulated payment system as soon as reasonably practicable to do so.

### 30 Non-compliance

30.1 Our direction on relations with the PSR (Direction 1) specifies that:

*“A participant must deal with the PSR in an open and cooperative way, and must disclose to the PSR appropriately anything relating to the participant which could materially adversely impact advancement of the PSR’s statutory objectives and duties.”*

A breach of this direction could lead to compliance failure proceedings.

30.2 If a person does not comply with an information or investigatory requirement imposed under any of our statutory powers (sections 81 to 88), they can be dealt with by the courts as if they were in contempt of court (when penalties can be a fine, imprisonment or both). We may also choose to bring compliance failure proceedings for breach of Direction 1 by a participant in a regulated payment system, as this is a serious form of non-cooperation.

### 31 Voluntary provision of information

31.1 We may, where appropriate to do so, make use of voluntary information requests rather than formal requests under section 81. We understand that some parties may prefer to receive a voluntary information request while others may prefer to receive a formal information request. Where we have sought information voluntarily but the recipient of the request considers that it would be helpful for this to be formalised into a statutory request, they should discuss this with the PSR case team in the first instance.

31.2 Information may also be provided to us voluntarily, without us requesting it. For example, participants in a regulated payment system may commission an internal investigation or a report from an external law firm or other professional adviser and decide to pass a copy of this report to us. Such reports can be very helpful for us when an investigation (for example, into a suspected compliance failure) is anticipated or is underway.

31.3 Participants in a regulated payment system are not obliged to share the content of legally privileged reports they are given or advice they receive. It is for the participant to decide whether to provide such material to us. But a participant’s willingness to volunteer the results of its own investigation would be welcomed and is something that we may take into account when deciding what action to take, if any.

## The use of appointed investigators

### 32 Appointed investigators

- 32.1 We may appoint one or more investigators to conduct an investigation into the nature, conduct or state of the business of any participant in a regulated payment system if we consider it desirable to do so in order to advance any of our statutory objectives.<sup>15</sup> We may also appoint investigators to investigate a suspected compliance failure where it appears to us that there are circumstances suggesting that one may have occurred.<sup>16</sup>
- 32.2 An appointed investigator could be a member of the PSR's staff, a member of the FCA's staff or an external person. Appointed investigators are able to exercise certain investigatory powers not otherwise exercisable by the PSR (see paragraphs 28.1 to 28.8 above).
- 32.3 In some cases, we may consider it appropriate to appoint investigators for a general purpose and subsequently decide that it is appropriate to extend the investigation to cover a suspected compliance failure. In other cases, it may be appropriate to appoint investigators for both purposes at the outset.

### 33 Written notice of the appointment of investigators

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

### 34 Scoping discussions

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

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<sup>15</sup> Section 83(1)

<sup>16</sup> Section 83(2)

- how the process is likely to unfold, and
- the individuals and documents the team will need access to initially.

34.2 However, there is a limit as to how specific we can be about the nature of our concerns in the early stages of an investigation.

34.3 In addition to the initial scoping discussions, there will be an ongoing dialogue with the person under investigation throughout the investigative process.

### **35 Changes in the scope of an investigation**

35.1 If the nature of our concerns change significantly from those notified to the person under investigation and we are satisfied that it is appropriate to continue the investigation, we may change the scope accordingly.

35.2 If there is a change in the scope or conduct of the investigation we may give written notice of the change.

35.3 One situation (but not the only situation) in which we will give written notice of the change is where we think that the person under investigation is likely to be significantly prejudiced if they are not made aware of this. We cannot give a definitive list of all the circumstances in which a person under investigation is likely to be significantly prejudiced by not being made aware of a change in the scope or conduct of an investigation. However, it may include situations where there may be unnecessary costs from dealing with an aspect of an investigation which we no longer intend to pursue.

### **36 Appointment of additional investigators**

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

### **37 Notice of the termination of investigations**

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



## 38 Approach to information and document requirements

- 38.1 Appointed investigators will normally use the powers exercisable by them to require the provision of information or documents, rather than seeking information or documents on a voluntary basis. This is for reasons of fairness, transparency and efficiency. However, it might occasionally be appropriate to depart from this standard practice in limited circumstances, for example where the investigators are gathering information from third parties with no professional connection with the payments industry.
- 38.2 Appointed investigators will make it clear to the person concerned whether they are required to provide information or documents (through the use of an investigatory requirement notice) or whether information or documents are being sought on a voluntary basis.<sup>17</sup>
- 38.3 Investigatory requirement notices requiring the provision of information or documents are discussed at paragraphs 28.1 to 28.8 above.
- 38.4 As delays in the provision of information and/or documents can have a significant impact on the efficient progression of an investigation, we expect recipients to respond to investigatory requirement notices in a timely manner and within applicable deadlines.

## 39 Approach to interviews

- 39.1 Appointed investigators will normally use the powers exercisable by them to require the attendance and answering of questions at an interview, rather than seeking this on a voluntary basis. This is for reasons of fairness, transparency and efficiency. However, it might be appropriate to depart from this standard practice in limited circumstances, for example where the investigators are gathering information from third parties with no professional connection with the payments industry.
- 39.2 Appointed investigators will make it clear to the person concerned whether they are required to attend and answer questions at an interview (through the use of an investigatory requirement notice) or whether this is being sought on a voluntary basis.<sup>18</sup>
- 39.3 Investigatory requirement notices requiring the attendance and answering of questions at an interview are discussed at paragraphs 28.1 to 28.8 above.
- 39.4 When we interview a person, we will allow them to be accompanied by a legal adviser, if they wish. We will also, where appropriate, explain what use can be made of their answers in proceedings against them. If the interview is recorded, the person will be given a copy of the recording of the interview, along with a copy of any transcript.

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<sup>17</sup> We will not treat it as a compliance failure (for breach of PSR Direction 1) if, in the exceptional circumstances where it is appropriate to depart from the standard practice of appointed investigators using the powers exercisable by them, a participant in a regulated payment system declines to respond to an informal information or document request. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of that participant to provide information or documents voluntarily.

<sup>18</sup> We will not treat it as a compliance failure (for breach of PSR Direction 1) if, in the exceptional circumstances where it is appropriate to depart from the standard practice of appointed investigators using the powers exercisable by them, a participant in a regulated payment system declines to attend or answer questions at a voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of that participant to attend or answer questions voluntarily.

## **40 Preliminary findings letters and preliminary investigation reports (as regards compliance failures)**

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

## **41 Transparency in respect of appointed investigators**

- 41.1 We may wish to publicise information regarding the appointment and use of investigators. For example, we may wish to publish on our website a summary of the subject matter of the investigation and the identity of the person under investigation. We may also wish to publish details of what action, if any, we ultimately decide to take (such as the issuing of a warning notice or a decision notice).

- 41.2 We will consider the circumstances of each case and balance the interests of transparency (including enabling participants in payment systems, service-users and the wider public to understand the nature of our concerns and what we are doing to address them) and fairness to the person under investigation.
- 41.3 We may consult the person under investigation and take account of any evidence they provide which suggests that publication of information about the investigation would be unfair.

## Concurrent competition powers

### 42 CA98 and EA02 powers

- 42.1 We have the power to apply certain aspects of competition law alongside the Competition and Markets Authority (CMA), if an issue relates to participation in payment systems.
- 42.2 Under the Competition Act 1998 (CA98), we can conduct investigations in relation to anti-competitive agreements, decisions or concerted practices, or the abuse of a dominant position.
- 42.3 Our concurrent competition powers under the Enterprise Act 2002 (EA02) enable us, among other things, to make references to the CMA to carry out a market investigation. We can do this if we consider that there are reasonable grounds for suspecting that any feature, or combination of features, of a market or markets relating to participation in payment systems prevents, restricts or distorts competition.
- 42.4 Detailed guidance on how we will exercise our concurrent competition law functions will be published on our website ([www.psr.org.uk](http://www.psr.org.uk)) as soon as possible after our 1 April 2015 operational launch.<sup>19</sup>

### 43 Interplay between FSBRA and CA98 powers

- 43.1 We have a duty to consider whether it would be more appropriate to exercise our concurrent competition powers under CA98 before exercising certain of our FSBRA powers, as set out below.<sup>20</sup>
- 43.2 This duty does not arise in all circumstances. Rather, it takes account of the proper focus of CA98 action, which is designed to address either:
- agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition (the Chapter I prohibition), or
  - conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market (the Chapter II prohibition).
- 43.3 The Chapter I and Chapter II prohibitions are not intended to tackle more general concerns about the nature of competition in a market or set of markets.<sup>21</sup> Accordingly, when we intend to exercise our power to give a general direction<sup>22</sup> or to impose a generally-imposed requirement,<sup>23</sup> we are not obliged to consider whether it would be more appropriate to proceed under CA98.
- 43.4 However, if we intend to give a specific direction or impose a specific requirement (for example, a direction or a requirement addressed to an individual payment systems operator), we will consider our CA98 powers first. The duty to consider our CA98 powers also arises in connection with our

<sup>19</sup> We consulted on this guidance in January 2015. See: <http://www.fca.org.uk/news/psr/psr-cp15-01-psr-competition-concurrency-guidance>

<sup>20</sup> See section 62

<sup>21</sup> However, Part 4 of EA02, as amended, governs the UK 'markets regime', under which the CMA and the concurrent authorities can act to address any feature, or combination of features, of a market that prevents, restricts or distorts competition.

<sup>22</sup> Section 54

<sup>23</sup> Section 55

powers to:

- require the granting of access to a payment system<sup>24</sup>
- vary agreements relating to payment systems,<sup>25</sup> and
- require the disposal of an interest in the operator of a payment system.<sup>26</sup>

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

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<sup>24</sup> Section 56

<sup>25</sup> Section 57

<sup>26</sup> Section 58

## Other functions of the PSR

### 44 Keeping markets under review

- 44.1 We also have the function of keeping the market for payment systems and the markets for services provided by payment systems under review.<sup>27</sup>
- 44.2 We will, from time to time, initiate a market review or a call for information to gather information on a required (statutory) and/or voluntary basis.
- 44.3 When we seek the input of participants in payment systems, service-users and others, we will publicise specific contact details on our website. We may provide the contact details of core project team members) and/or a designated project email address.

### 45 Giving guidance

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

### 46 Consultation

- 46.1 We have a duty to consult on the extent to which our general policies and practices are consistent with our general duties and on how our objectives may be best advanced.
- 46.2 The most common forms of consultation will be where we consult on:
- draft general directions or generally-imposed requirements (see paragraphs 5.1 to 5.7 above)
  - draft general guidance (see paragraphs 45.1 to 45.2 above), and
  - our general policies and principles under which we will perform our particular functions.
- 46.3 When we consult in any of these ways, we expect that we will use a combination of our website, press releases and direct correspondence to draw attention to the consultation (and any drafts to which they relate).

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<sup>27</sup> Section 64

- 46.4 Our consultations are likely to pose a number of questions, some of which may not be of relevance to all stakeholders. Respondents should feel free to answer only those questions where they have strong opinions or relevant experience. In all cases, the consultation paper will set out detailed information on how to respond and the deadline for doing so.
- 46.5 Some of our consultations will be accompanied by an online response form on our website. When responding to our consultations by email we request that you provide your response in a Word document (rather than, or in addition to, providing your response as a PDF). You may also respond by post (although we request that respondents provide their responses electronically wherever possible).
- 46.6 We may, following certain consultations, make all non-confidential responses available for public inspection. The consultation paper will indicate whether we intend to do this. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. You should identify those specific items in your response which you claim to be commercially confidential. We may nonetheless be required to disclose responses which include information marked as confidential, in order to meet legal obligations, in particular if we are asked to disclose a confidential response under the Freedom of Information Act 2000. We will endeavour to consult you in handling such a request. Any decision we make not to disclose a response is reviewable by the Information Commissioner and the Information Rights Tribunal.

## Contacting us

### 47 Complaints (within the payments industry)

- 47.1 If you wish to make a complaint about a breach of regulatory directions or requirements (under FSBRA), a breach of competition law or a breach of other relevant legislation (including European payments legislation which the PSR is the competent authority for), you can contact us by post or by email to:  
**PSRcomplaints@psr.org.uk**

### 48 Super-complaints

- 48.1 If you are a designated representative body and wish to make a super-complaint (under section 68 FSBRA) to us, please see our Super-Complaints Guidance for details on how to do so. Our Super-Complaints Guidance is available on our website: [www.psr.org.uk](http://www.psr.org.uk)
- 48.2 Our mailbox address for super-complaints is: **PSRsuper-complaints@psr.org.uk**

### 49 Applications about disputes

- 49.1 If you are in a dispute with another party (or parties) and wish to apply to us for resolution of the dispute, please see paragraphs 8.1 to 8.6 above and Appendix 1 below for details on how to do so.
- 49.2 Our mailbox address for applications made under sections 56 or 57 and in connection with any other disputes is: **PSRapplications@psr.org.uk**

### 50 For general purposes

- 50.1 If you wish to contact us for general purposes (for example, to provide us with information which is likely to be of relevance to our work, or to request a meeting), you can contact us by post or by email to:  
**contactus@psr.org.uk**
- 50.2 We will endeavour to respond to all general queries or correspondence seeking a response within 12 working days of receipt.



## **51 Our postal address**

51.1 You can contact us by post at:

**Payment Systems Regulator  
25 The North Colonnade  
Canary Wharf  
London  
E14 5HS**

## Appendix 1:

### The content of applications about disputes

#### 1 Content of applications

- 1.1 This appendix sets out guidelines for applicants on the format and content of applications made under sections 56 or 57 and in connection with any other disputes.
- 1.2 Applicants are reminded that failing to follow these guidelines may result in the application lacking sufficient information for the PSR to be able to consider it properly.
- 1.3 If an application does not contain all the necessary information, we will advise you on what else is needed before we will be able to consider the application and allocate an initial enquiry number to the dispute. (Please note that the allocation of an initial enquiry number does not mean that the PSR has decided to open a case or that it is appropriate for us handle the dispute.)
- 1.4 It would be helpful if applicants could, wherever possible, provide their application and any relevant supporting documents in Word format (ideally) or in searchable PDF format.
- 1.5 An application should contain the business name, address, telephone number and email address of the applicant and the contact details of an individual who can discuss the details of the dispute.
- 1.6 An application should contain the following information:<sup>28</sup>

##### ***Section A: Overview of the application***

- The nature of the applicant's business and its scale (local, national, international).<sup>29</sup>
- The broad facts of the dispute and its commercial context.
- The legal basis according to which the application to the PSR is being made (e.g. section 56 or 57).
- The proposed remedy or remedies for resolution of the dispute.

##### ***Section B: Details of the dispute***

- The relevant payment system(s) and downstream products or services.
- The full facts of the dispute and its commercial context, including all relevant background and evidence.
- The full details of any justification given for the behaviour or action leading to the dispute.
- The reasons why an application has been made to the PSR.
- If the dispute relates to a request for access to a payment system: the business plans of any relevant product or service, including forecasts, demonstrating how and when it is intended to launch the products or services that would be provided in the event that access is granted.

<sup>28</sup> Where the applicant considers that any information is not relevant, or believes that any information is not available, they should explain why this is the case.

<sup>29</sup> Details of relevant turnover or volumes/values of relevant transactions would also be helpful.

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

### ***Section C: History of commercial negotiations***

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

### ***Section D: Remedy sought***

- The full details of the remedy sought by the applicant, with reasons and justifications.
- The legal basis for the remedy sought (e.g. section 56 or 57 FSBRA).
- The applicant's assessment of how the remedy sought would be consistent with the PSR's statutory duties, objectives and/or regulatory principles (as set out in sections 49 to 53 FSBRA).<sup>30</sup>

### ***Section E: Supporting information and evidence***

- If applicable, details about the provision of any relevant product or service which depends on access to the payment system which is the subject of the dispute, including business plans relating to the relevant product or service (see Section B).
- If applicable, copies of the relevant contract or terms which are the subject of the dispute (see Section B).
- If applicable, benchmarking data in relation to any fees or charges which are in dispute, or an explanation of why no such data is available (see Section B).
- Relevant documentary evidence of commercial negotiations between the applicant and the other party (or parties) to the dispute, and a chronology of events where appropriate (see Section C).
- Any other relevant supporting information or documentary evidence.

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<sup>30</sup> The applicant may also wish to give a view on how the subject matter of the dispute and the remedy sought relate to broader regulatory issues or policies (for example, where the matter in dispute is also subject to any investigation, review, consultation or other programme of work by the PSR or another regulator).

## 2 Confidentiality

- 2.1 When submitting an application, applicants should identify information which they consider to be confidential and which, if disclosed to the other party (or parties) to the dispute, or to third parties (as the case may be), would significantly harm the legitimate interests of the party to whom the information relates. Applicants should also explain why they consider the information to be confidential.
- 2.2 Applicants should provide us with a non-confidential version of their application and any supporting documents in which they redact the information they consider to be confidential.

## 3 Form of Declaration by an officer of the company

- 3.1 Applications made under sections 56 or 57 FSBRA and in connection with any other disputes should be accompanied by the following declaration by an officer of the company:

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

*Signed: [ ]*

*Position in the company: [ ]*

*Date: [ ]'*