

The application of the Interchange Fee Regulation in the UK: Phase 1



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1. The Interchange Fee Regulation (IFR) in the UK

- We are the main competent authority for monitoring and enforcing the IFR in the UK. The Treasury has also assigned roles to other bodies, including the FCA.
- In December 2015 we published a consultation paper and draft guidance to explain how we will monitor compliance with caps on interchange fees or equivalent issuer compensation (Articles 3, 4 and 5), and business rules provisions (Articles 6, 11 and 12) that entered into force on 9 December 2015.
- We received responses to our consultation from 27 stakeholders. We summarise the main points raised, and our responses, in this document.
- The final guidance for our approach to monitoring compliance with the IFR provisions that were in force by 9 December 2015 is published alongside this document.

Background

- 1.1** On 29 April 2015, the European Parliament and the Council of the European Union adopted the Interchange Fee Regulation (IFR), which was published in the Official Journal of the European Union on 19 May 2015.¹
- 1.2** The IFR will bring major changes to the way card payment systems operate in Europe. It introduces caps on the interchange fees on debit and credit card transactions where both the issuer and acquirer are located in the European Economic Area (EEA). It also sets out a number of business rule provisions that will require affected parties to amend their business practices (unless their current practice already complies with the provisions).
- 1.3** The IFR requires each Member State to appoint one or more competent authorities that will be empowered to enforce the Regulation. HM Treasury ('the Treasury') has decided that the PSR will be the main competent authority in the UK.²
- 1.4** In our consultation paper CP15/3, published on 2 December 2015, we asked for stakeholders' views on our approach to monitoring compliance with the IFR provisions that were in force by 9 December 2015. Our approach was set out in draft guidance, which we published alongside the consultation paper.
- 1.5** We anticipate consulting later this year on our approach to the remaining IFR provisions, which come into effect on 9 June 2016.

¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.123.01.0001.01.ENG

² The Statutory Instrument that will give the PSR its powers was published on 17 November 2015. www.legislation.gov.uk/uksi/2015/1911/contents/mades

Responses to our consultation

- 1.6** Twenty-seven stakeholders responded to the consultation. Respondents were generally supportive of our guidance while seeking additional clarity on some points, including:
- the methodology for calculating market shares
 - the definition of commercial cards
 - the definition of cross-border and domestic transactions
 - the definition of the Merchant Service Charge (MSC)
 - detail on our approach to monitoring compliance with the interchange fee caps/ anti-circumvention provisions
- 1.7** Some respondents argued that our approach was, in a number of respects, wrong in law (because we had misapplied the IFR or misstated its provisions in our draft guidance). In the remainder of this document, we explain whether our guidance has been revised in the light of these comments, or whether it remains the same. Where comments related to our monitoring and enforcement approach, or suggested other amendments to the guidance, we have set out our responses below.

Classification of payment card schemes subject to the IFR

- 1.8** In our draft guidance we explained that under the IFR, a three-party scheme must carry out both issuing and acquiring activity itself. This also applies to a three-party scheme that operates with licensees, or issues cards with a co-branding partner or through an agent. We applied the IFR definitions of three- and four-party schemes to each of the six schemes that currently operate in the UK and set out each scheme's classification.
- 1.9** While the majority of schemes were content with their classification, two of them queried their classification as four-party schemes.
- 1.10** In addition, two schemes took different positions on the types of transaction that are subject to the interchange fee caps for three-party schemes operating with licensees (or issuing cards with a co-branding partner or through an agent). One argued that all transactions under such schemes are subject to the caps, while another argued that transactions where the scheme is both the sole issuer and the acquirer are not subject to the caps.

Our response

We have retained the same classifications of the six schemes that currently operate in the UK. A three-party scheme is one which issues cards and acquires transactions itself. There is currently only one scheme that both issues cards and acquires its own transactions: American Express. Based on the information we have about the schemes' arrangements to date, no other scheme operating in the UK can be classified either as a three-party scheme, or a three-party scheme that operates with licensees or issues card-based payment instruments with a co-branding partner or through an agent.

The interchange fee caps apply only to transactions where the acquirer is a different entity to the issuer, co-branding partner or agent. Where the issuer and the acquirer are the same entity, there is no interchange fee. This means that pure three-party transactions (for example, where American Express issues the card and acquires the transaction) are not caught by the interchange fee caps. This is clear from Article 1(3)(c) of the IFR.

Charges to guidance

We have clarified the scope of the interchange fee caps for transactions made under three-party schemes that operate with licensees (or issue cards with a co-branding partner or through an agent).

We have made other minor amendments to clarify the guidance.

The definition of cross-border and domestic transactions

- 1.11** Under the IFR, interchange fees on cross-border transactions are capped at 0.2% of transaction value for debit cards and 0.3% of transaction value for credit cards. Member State governments have the option of setting lower caps for domestic transactions, and a variety of additional options for domestic debit card transactions. In the UK, the Treasury has set the credit card interchange fee cap at 0.3% and has decided to permit a weighted-average approach for the debit card cap. This means that individual interchange fees may be above 0.2% of transaction value as long as the weighted-average interchange fee is below 0.2%.
- 1.12** Article 2(8) of the IFR states that "cross-border payment transaction" means a card-based payment transaction where the issuer and the acquirer are located in different Member States or where the card-based payment instrument is issued by an issuer located in a Member State different from that of the point of sale'.
- 1.13** In recent years, an increasing volume of transactions have been acquired on a cross-border basis (for example, a transaction made using a card issued in the UK at a UK point of sale may be acquired in the Netherlands). Cross-border acquiring allows merchants to benefit from lower interchange fees on certain transactions by virtue of binding commitments that Visa Europe gave to the European Commission.

- 1.14** Some consultation respondents stated that cross-border-acquired transactions should be treated as domestic transactions under the IFR. One respondent stated that the inclusion of the issuer's location in the definition of a domestic transaction is a departure from the current industry approach (though others stated that the current industry approach considers the location of the issuer and point of sale). Some respondents referred to inconsistency between our draft guidance and the messages being communicated within the industry about cross-border-acquired transactions.
- 1.15** One respondent asked us to clarify the status of transactions where the point of sale was outside the UK.

Our response

The definitions of 'cross-border' and 'domestic' transactions in Article 2 of the IFR are clear. A domestic transaction is one where the issuer, acquirer and point of sale are all in the same Member State. Treating cross-border-acquired transactions as domestic transactions would be inconsistent with the provisions of the IFR.

We are aware of Visa Europe's previous commitments to the European Commission in respect of cross-border-acquired domestic transactions. These have no bearing on the interpretation of the IFR. From 9 December 2015, all cross-border-acquired transactions (made under any scheme, not just Visa Europe) have been treated as cross-border transactions under the IFR.

Transactions where the point of sale is located outside of the UK are not UK domestic transactions, although they might be domestic transactions of another Member State.

Changes to guidance

We have clarified the status of transactions where the point of sale is outside of the UK, and made other minor improvements for clarity.

The definition of commercial cards

- 1.16** The interchange fee caps do not apply to transactions made with commercial cards. Whether a card is classed as 'commercial' under the IFR therefore has a significant impact on issuers' revenues and on the costs borne by the acquiring and merchant side of the market.
- 1.17** For a card to be considered 'commercial', Article 2(6) of the IFR states that it must be 'limited in use for business expenses where the payments made with such cards are charged directly to the account of the undertaking or public sector entity or self-employed natural person'.
- 1.18** Our draft guidance stated that commercial cards under the IFR are those for which repayments are taken from the bank account of the employer. We stated that cards for which repayments are taken from the bank account of the employee would be subject to the interchange fee caps.
- 1.19** Some respondents to our consultation agreed with this statement while others argued that we had misapplied the IFR. There were two main points raised by those that contested the draft guidance on this point:

- 'Charged directly to the account' refers to the recording of a payment transaction on the credit card account (and the associated reduction in available credit) rather than the settlement of the credit card balance from the current account.
- The definition of a commercial card should be based on which party has liability for the commercial card account, not on the settlement of that account. This is on the basis that the liability will remain a fixed factor while the account from which the settlement is taken may change.

Our response

We have maintained our approach that the words 'charged directly' in Article 2(6) of the IFR refer to the settlement of a card transaction and the connection with the payment account from which such settlement occurs.

We have reached this conclusion after a thorough consideration of the legislative intent behind the IFR wording and the history of the text as it progressed through the legislative stages in the European Council and Parliament.

Changes to guidance

We have clarified the wording explaining the definition of a commercial card, and have removed references to industry terminology which may have been unhelpful or confusing.

Direct and indirect interchange fees

- 1.20** The interchange fee caps cover both direct and indirect payments between acquirers and issuers. If the IFR only applied to direct payments from acquirers to issuers, the interchange fee caps could be circumvented by alternative flows of fees to issuers. For example, an acquirer might pay fees to the scheme, and the scheme might pass them on to issuers.
- 1.21** Our draft guidance explained that indirect payments from acquirers to issuers, via the scheme or any other intermediary that may sit between them, would be classed as an indirect interchange fee. We also set out the responsibilities of the issuer and the acquirer to adhere to the interchange fee caps.
- 1.22** Some respondents to our consultation welcomed our attempt to clarify the position around Article 5 of the IFR (the anti-circumvention provisions), and how the interchange fee caps apply to indirect flows of money. However, many respondents considered that the guidance could go further, include more illustrative examples and clarify the kinds of flows of money that would or would not be treated as equivalent to interchange fees. A small number of respondents commented that our draft guidance was, at points, out of step with the language of the IFR and may go too far. For example, the draft guidance should reflect the language of 'equivalent object or effect of the interchange fee' when talking about indirect flows of money, and should recognise that issuer remuneration is to be looked at on a net compensation basis.
- 1.23** Some respondents queried our approach to acquirer's responsibilities under the IFR, noting that acquirers may only have visibility of the direct interchange fees they pay to issuers and not of the fees flowing between the scheme (or other intermediaries) and the issuer. Some respondents also asked us to clarify the meaning of 'intermediary'.

Our response

We welcome the consultation respondents' constructive comments, and agree that some additional clarity is needed here.

However, we do not consider that we can (or should attempt to) provide comprehensive and exhaustive guidance on the types of fees or flows of funds that would circumvent the interchange fee caps. There can be many different business models and arrangements between parties and it would be impossible to cover them all. We also consider that parties should not look to the competent authority for a 'blacklist' of practices that we would consider to be circumventions. We will assess whether there has been circumvention in each case; it is each party's own responsibility to ensure that its practices comply with the law.

We will keep our guidance under review and may revise it in due course to reflect practical experience of enforcing the IFR (and Article 5 in particular) over time.

Changes to guidance

We have developed the guidance in light of various related points raised in consultation responses and have included some additional explanatory text and examples.

We have also modified our description of the responsibilities of acquirers in complying with the interchange fee caps.

The methodology for calculating market shares

- 1.24** The Treasury has decided to grant a time-limited exemption from domestic interchange fee caps to three-party schemes which operate with licensee issuers and/or acquirers, or issue cards with a co-branding partner or through an agent.
- 1.25** To qualify for the exemption, the value of a scheme's annual transactions must be less than 3% of all card-based transactions made in the UK. The Treasury gave us the task of calculating relevant market share, so we needed to specify the numerator and denominator of the calculation.
- 1.26** The methodology outlined in our draft guidance explained that the numerator and denominator of the market share calculation includes transactions completed on cards issued both by third parties and the scheme itself as well as transactions on both consumer and commercial cards. However, ATM cash withdrawals are not included in either the numerator or denominator.
- 1.27** Some respondents argued that we had misapplied the IFR and contested this methodology. The main arguments were:
- The numerator should only include the value of those transactions where the three-party scheme is not itself both the sole issuer and acquirer.
 - The denominator as described in the draft guidance erroneously equates the meaning of 'all card-based payment transactions made in [the UK]' with the meaning of 'domestic payment transactions' (as defined in the IFR). Respondents who raised this point argued that the location of the acquirer should be irrelevant to whether a transaction is 'made in the UK'.

- Transactions on commercial cards should be excluded from the calculation because they are not subject to the interchange fee caps.

Our response

We have retained the same methodology for calculating market shares. We consider that this methodology is in line with the legislative intention behind the IFR and the language of the text.

The relevant market share is the percentage of all the scheme's transactions, and not a subset of transactions made under that scheme. The IFR does not exclude from the calculation those purchase transactions that are not covered by the interchange fee caps (such as those on commercial cards and those on cards issued and acquired by a three-party scheme).

Transactions are 'made in the UK' where all parties to that transaction are in the UK. A transaction might be initiated in the UK whenever the point of sale is in the UK but, unless the issuer and the acquirer are also in the UK, those transactions are not made in the UK. In other words, transactions made in the UK are equivalent to UK domestic transactions.

Changes to guidance

As noted above in respect of the classification of payment card schemes, we have clarified the scope of the interchange fee caps for transactions made under three-party schemes that operate with licensees (or issue cards with a co-branding partner or through an agent). Even where one of these schemes is not exempt from the interchange fee caps, not all of the transactions made under the scheme will be affected by the interchange fee caps. The interchange fee caps will not apply to transactions acquired by the scheme which are made on cards issued by the scheme.

We have made other minor improvements to the text for clarity.

Business rule provisions (Articles 6, 11 and 12)

- 1.28** In relation to our draft guidance on Article 6, one respondent stated that the reference to 'issuing cards with a co-branding partner or through an agent' does not make sense in this context because if a three-party scheme only has co-brands and/or agents and no licensees, then there is no licence arrangement to which the pan-European licensing requirement in Article 6 IFR can apply.
- 1.29** In relation to our draft guidance on Article 11, one respondent stated that the IFR and the revised EU Payment Services Directive (PSD2) are interrelated pieces of legislation. It noted that PSD2 will affect the law on surcharging, and that PSD2 would be transposed by Member States at a later date. The respondent suggested that we should remove references to PSD2 provisions in the guidance to avoid confusion, and to ensure that the guidance is future-proof. Other respondents said that the description of the law on surcharging was confusing.
- 1.30** The most common point raised by respondents on the draft guidance on business rules concerned how we apply the term 'merchant service charge' (MSC) in our draft guidance on Article 12.

- 1.31** Our draft guidance stated that, traditionally, ‘MSC’ has been used to denote the payment that a merchant must make to its acquirer for each card-based payment transaction, which includes the interchange fee.
- 1.32** Article 12 of the IFR requires acquirers to provide information to their merchants about the charges associated with each transaction, in which interchange fees should be listed separately from MSCs.
- 1.33** The word ‘separately’, together with the fact that the MSC is itself a defined term in the IFR, led us to state in our draft guidance that the total charge for the transaction should be given, with both the interchange fee and the non-interchange fee elements of the total charge indicated separately (i.e. a three-column approach). In this approach, the MSC would be the non-interchange fee elements of the total charge.
- 1.34** The vast majority of acquirers who responded to our consultation said that we had misapplied the IFR and suggested that the better view of the IFR text is that the total charge for the transaction is the MSC (which includes both interchange fee and non-interchange fee elements). They said that this MSC is to be provided and that the interchange fee is to be indicated separately (i.e. a two-column approach). Stakeholders further argued that this approach would avoid unintended consequences such as the confusion that would be created amongst the merchant community if the MSC were to be redefined.
- 1.35** One respondent stated that our description of the need for ‘prior and explicit consent’ by the merchant before information could be provided in aggregated form was incorrect.

Our response

We consider that our guidance on Article 6 should reflect the text of the IFR, which clearly refers to issuing cards with a co-branding partner or through an agent.

On Article 11, we acknowledge that PSD2 has not yet been implemented in UK law. We agree that it is not sensible to discuss the impact of PSD2 on surcharging in our guidance at this point.

On Article 12, we acknowledge that the interpretation of the MSC suggested by respondents is an equally plausible reading of the IFR and that adopting it would avoid adverse unintended consequences. We recognise that the term MSC is widely understood by acquirers and merchants to mean all elements of the per-transaction fee paid by a merchant to the acquirer, including the interchange fee. We have liaised with the FCA, and the final guidance in respect of Articles 11 and 12 reflects the common view of both authorities.

Changes to guidance

We have revised our draft guidance to reflect that the MSC includes the interchange fee. In other respects, we have not changed our guidance on Article 12.

We have revised the description of the impact of PSD2 on the law on surcharging. We now simply note that changes are afoot.

We have made other minor improvements to the text for clarity.

Monitoring and enforcement of the IFR

- 1.36** The draft guidance explained that we intend to use different monitoring approaches for different provisions of the IFR.
- 1.37** Where the IFR requires ongoing monitoring of firms' fee arrangements (Articles 3, 4 and 5) we stated that we would require schemes, issuers and acquirers to submit information demonstrating their compliance on a regular basis (at least once per year). We stated that this information should be certified by an independent auditor.
- 1.38** In respect of the IFR business rules in Articles 6, 11 and 12 we said that we would require parties to submit an initial compliance report and would subsequently follow a mainly complaints-led approach.

Articles 3, 4 and 5

- 1.39** Several respondents stated that we should focus our information-gathering efforts for Articles 3, 4 and 5 on card schemes, as they are the parties with greatest access to data to confirm compliance with the interchange fee caps. However, respondents also noted that we may want to cross-check that information with data provided by issuers and acquirers.
- 1.40** Some respondents requested greater clarity on the requirement for compliance reports to be certified by an independent auditor (including the definition of 'independent'). One stakeholder questioned whether this requirement is proportionate for firms that are subject to prudential regulation.
- 1.41** Finally, some respondents requested that we provide more detail in the guidance about the specific data items that we intend to request, our approach to monitoring compliance with cross-border transactions, and specific details about the 'relevant parties' we would request information from.

Articles 6, 11 and 12

- 1.42** In respect of our approach to monitoring compliance with the business rule provisions of Articles 6, 11 and 12, several respondents stated that they would welcome more information on the expected format, content and timing of the initial compliance reports and the potential subsequent discussions. Only one respondent expressed reservations about the complaints-led approach, suggesting that we adopt a proactive approach as well as receiving complaints. It also suggested that we clarify that complaints may be received from any party.

Our response

To allow a flexible approach according to the nature of the IFR prohibition or requirement, and the nature of the regulated person:

- in respect of Articles 3, 4 and 5, we will discuss the information and data requirements, and any applicable auditor certification requirement, separately with schemes, issuers and acquirers
- in respect of Articles 6, 11 and 12, we will discuss the content, timing and arrangements for submitting initial compliance reports separately with schemes and acquirers (as applicable)

In terms of auditor certification, we consider that firms may use their normal statutory auditor if we ask them to carry out an independent audit. We also recognise that recital 24 of the IFR anticipates that it is the information provided by payment card schemes (and not those payment service providers who are subject to prudential regulation) that may require independent auditor certification. Again, we will discuss these points directly with the relevant parties.

The phrase 'relevant parties' is used in the context of Articles 3, 4 and 5 and means the schemes, issuers and/or acquirers (as applicable) providing the information.

We consider that the proposed mainly complaints-led approach is appropriate in respect of Articles 6, 11 and 12. Complaints may be made by any party.

Changes to guidance

We have revised the guidance to reflect that we will engage separately with schemes, issuers and acquirers as appropriate.

We have made it clearer that any party that wants to complain about a breach of Articles 6, 11 or 12 should contact the PSR.

We have made other minor improvements to the text for clarity.

Our powers and procedures under the IFR

- 1.43** There were relatively few consultation responses which raised points on our draft procedural guidance. Some respondents acknowledged that the guidance built on existing guidance we have developed in connection with our functions under the Financial Services (Banking Reform) Act 2013 (FSBRA), which we have already consulted on.
- 1.44** One respondent raised a query about our dispute handling procedures and how they relate to the jurisdiction of the Financial Ombudsman Service (FOS). Another respondent asked us to reconsider our position on parties attempting to resolve their disputes directly before making a dispute application to us. The same respondent invited us to adopt an objective approach to determine the types of complaint we will handle.
- 1.45** One respondent asked us to clarify what protections apply against the disclosure of information or documents that a party is required to provide to an appointed investigator or skilled person.

- 1.46** One respondent asked us to justify why our guidance does not state, like our FSBRA Powers and Procedures Guidance, that where we decide to publish the details of a compliance failure, we cannot do so until the deadline for appealing to the Competition Appeal Tribunal (CAT) has passed, or, if an appeal against the decision is made, until the determination of the appeal. Another respondent asked for more detail on the factors that the Enforcement Decisions Committee (EDC) would take into account in deciding to publish details of a compliance failure.
- 1.47** Two respondents thought we should be obliged to give written notice of the appointment of investigators to the person under investigation.
- 1.48** One respondent raised a number of related points about procedural safeguards and, in particular, thought that we should allow more time for representations to be made on:
- draft specific directions
 - preliminary findings letters following investigations by appointed investigators
 - warning notices in compliance failure proceedings
- 1.49** One respondent asked us to confirm that we would not make a negative inference if a party does not volunteer to share the content of legally privileged material.
- 1.50** One respondent said that the guidance should be clarified to state the standard of review that applies in appeals to the CAT in respect of penalties for compliance failures.

Our response

Dispute applications

We have been given the role of monitoring and enforcing compliance with the rules set out in the IFR, not the FOS. The Payment Card Interchange Fee Regulations (PCIFRs) provide for a mechanism whereby a merchant that is in a dispute with its payment service provider (PSP) arising under the IFR can apply to us for resolution of that dispute. There is no requirement for a merchant that is in a dispute with its PSP about compliance with the IFR to have made a complaint to the FOS before they can make an application to us. 'Micro-enterprises' can still make complaints to the FOS about merchant acquiring and the FOS may be able to assist in some cases. For example, the FOS has previously handled complaints about disputed transactions and chargebacks. More information is available on the FOS website (financial-ombudsman.org.uk) and its August 2015 review of complaints relating to micro-enterprises and financial services: financial-ombudsman.org.uk/publications/pdf/Micro-enterprise-complaints-Aug-2015.pdf. In all cases, if a merchant is considering making a dispute application to us, or is in any doubt about whether to apply to us or complain to the FOS, they may contact us to discuss the process using the details set out in the guidance. See Annex 1 of our guidance for more information on the content of dispute applications.

Our procedures following the receipt of an application are set out in the guidance. We already have a published Administrative Priority Framework, which we will apply when considering whether to handle a dispute and what action we might take to resolve it.: psr.org.uk/administrative-priority-framework

Disclosure of information

Confidential information received by an investigator or skilled person we have appointed is subject to the same restrictions on disclosure as information we receive directly (see sections 91 to 93 of FSBRA). A skilled person appointed by the regulated person will be subject to whatever restrictions are provided for in the terms of engagement between the regulated person and the skilled person.

Publication of details of a compliance failure

The PCIFRs do not restrict us from publishing details of a compliance failure until the end of the period in which the decision to publish can be appealed to the CAT or until the determination of any such appeal. Our guidance reflects the legal position under the PCIFRs.

The EDC will take account of our recommendation to publish details of a compliance failure, any relevant supporting evidence or documents, and any representations made by the recipient of the warning notice. Paragraph 8.10 of our guidance sets out some of the relevant considerations in deciding whether it is appropriate to publish details of a compliance failure (instead of imposing a financial penalty).

Written notice of the appointment of investigators

The appointment of an investigator in the context of the PCIFRs can only be for the purposes of investigating a suspected compliance failure. There is no equivalent of the section 83(1) FSBRA power to appoint an investigator to conduct an investigation into the nature, conduct or state of the business of a participant in a regulated payment system. Accordingly, the exclusion in section 84(3)(b) of FSBRA – which means that we are not required to give written notice of the appointment of an investigator – applies to all potential investigations involving appointed investigators in the context of the PCIFRs. Our guidance nevertheless makes it clear that we may give written notice where it is appropriate to do so.

Timescales for representations

We have decided to retain the various timescales for representations in respect of draft specific directions, preliminary findings letters following investigations by appointed investigators, and warning notices in compliance failure proceedings. The timescales in our guidance are in line with the timescales relating to equivalent FSBRA powers and procedures.

We note in our guidance that we will normally allow 14 days for representations in respect of draft specific directions and preliminary findings letters, although we will take into account the circumstances of each case.

The period of at least 21 days for recipients of a warning notice to make representations on a warning notice is in line with Regulation 7 of the PCIFRs. The precise timescale for representations will be determined in each case. In some circumstances, the EDC may agree to an extension of time where the recipient requests this and explains why it is needed. These points are reflected in the guidance.

Voluntary provision of information

We do not consider that our guidance creates any undue pressure on regulated persons to disclose privileged legal advice. We make it clear in our guidance that it is for regulated persons to decide whether to provide such material to us voluntarily. We believe that it is important to signal in the guidance that regulated persons are welcome to provide us with material (such as the results of an internal investigation or a report prepared by an external law firm) on their own initiative.

Appeal against penalties

We agree that the guidance can be clarified to explain that appeals against financial penalties can result in the CAT upholding, setting aside or substituting its own penalty

for the penalty imposed by the PSR. The CAT can also vary the date for payment of the penalty.

In other respects, we have maintained the procedural guidance as it was consulted upon, bearing in mind equivalent procedural guidance already developed in connection with our FSBRA functions.

Changes to guidance

We have clarified the position around appeals against financial penalties.

We have made one other correction in paragraph 7.142 regarding interviews conducted by appointed investigators.

Statement of penalty principles

- 1.51** A few consultation responses raised points on our draft statement of penalty principles. This statement, like our procedural guidance, built on our existing statement issued under FSBRA.
- 1.52** One respondent said that only the 'relevant' compliance history of regulated persons should be taken into account.
- 1.53** One respondent raised concerns about the appropriateness of profit disgorgement as an element of the penalty calculation. It was felt that this would lead to greater cost, complexity and duration of enforcement proceedings. Profit disgorgement was also felt to be inappropriate where a regulated person offers voluntary redress.
- 1.54** Two respondents suggested that penalties should not exceed 10% of annual revenue or billings.
- 1.55** One respondent said that 14 calendar days was too short a time for the payment of penalties.

Our response

Compliance history

The compliance history that will be taken into account will be that which is relevant to the matter in hand (i.e. the appropriate level of penalty for the compliance failure identified). What is relevant or irrelevant will be for the EDC to determine in a given case. We do not believe this requires an amendment to the guidance.

Disgorgement

We have maintained disgorgement as the first element of our penalty framework. It is the first element also of our equivalent FSBRA penalty framework. Chapter II of the IFR contains regulated price caps. Therefore, a penalty approach that allows for disgorgement of interchange fees that exceed the regulated caps is compatible with the IFR.

Our guidance already acknowledges that we will take account of remedial programmes or redress in deciding whether our penalty will include a disgorgement element.

Upper limit

We have decided not to adopt either an upper or lower limit on penalties. We have adopted a principles-based approach to penalty calculation. The absence of an upper limit is also consistent with the PCIFRs (which do not set a statutory limit on the penalties that we may impose) and our approach to penalties under FSBRA.

Payment of penalties

We have maintained the typical 14 calendar day timescale for penalties to be paid. Our guidance recognises that we would consider extending the deadline or accept payment in instalments if, for example, a regulated person (as defined in the PCIFRs) could show that it needed further time to raise funds to pay.

Changes to guidance

No changes to guidance.

Annex 1

Consultation respondents

Air Plus International
Al Rayan Bank
American Express
Bank of America Merrill Lynch
Barclays
BASF
British Retail Consortium
Citi
CMS Payments Intelligence
Diners Club International
First Data
Global Payments
HSBC
JCB International Europe
JP Morgan Commerce Solutions
Lloyds Bank Cardnet
Lloyds Banking Group
MasterCard
MBNA
Nokia
TSB
UK Acquirer Forum
UK Cards Association
Visa Europe
Volkswagen
Walmart/ASDA
Worldpay

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