

Response paper

Revision of our Powers and Procedures Guidance

Response to consultation
on revisions to our PPG

September 2024

Contents

1	Executive summary	3
2	Consultees' changes, our reply and the changes made to the PPG	4

1 Executive summary

We have issued a new version of our Powers and Procedures Guidance (the PPG). This document explains the changes we made to the PPG following a consultation on our proposed revisions.

Background

- 1.1** Our original PPG outlined the procedures and processes that apply in relation to our regulatory and enforcement powers and functions under the Financial Services (Banking Reform) Act 2013 (FSBRA). The PPG was published in March 2015, before the operational launch of the Payment Systems Regulator (PSR). When it was published, we said we would keep its contents under review and update it when necessary.
- 1.2** Between July and October 2019, we consulted on a number of proposed revisions, which we published in CP19/7, [Consultation on proposed revisions to our Powers and Procedures Guidance](#) (July 2019).
- 1.3** In October 2023, we consulted on a revised version of this document¹ because we felt it may need updating for two main reasons. First because it did not accurately reflect our current management structure and its practices, which have changed since the latest version of our PPG. Secondly, because it restricted how we can deploy staff across our enforcement and monitoring functions.
- 1.4** We consulted on our proposals for three weeks.

Consultation responses, our reply and the changes made to the PPG

- 1.5** We received three consultation responses. All made substantive and valuable comments.
- 1.6** After we considered all the comments we received, we reviewed the text further and made additional amendments.
- 1.7** We are grateful to all the respondents who engaged constructively with the consultation.
- 1.8** The revised PPG will be published on **20 September 2024** and will replace the existing version from that date.
- 1.9** It is important that stakeholders read the final, revised PPG so that they are aware of and understand all the further explanatory text in relation to this publication.

1 [CP23/9, Consultation on proposed revisions to our Powers and Procedures Guidance](#) October 2023

2 Consultees' changes, our reply and the changes made to the PPG

We received three written responses to the new proposals in the PPG consultation. Two came from regulated firms and one came from a law firm.

In this chapter, we summarise the issues raised by respondents and how we took their comments into account in the changes we have made to the PPG. The final version of the guidance is available on our website.

Paragraph 5.7 - process for opening an investigation

Existing Paragraph 5.7

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

Proposed Paragraph 5.7

The decision to open an enforcement case and investigate a compliance failure will be made by two 'case openers'. These may be any of the following: the Managing Director of the PSR and all Heads of Divisions of the PSR. Alternatively, at the Managing Director's discretion, the decision may be delegated further to an individual of at least Senior Manager level to form one of the two case openers or committee as set out in the Corporate Governance Resolution (CGR) provided the requirements for appropriate decision-making procedures and accountability set out in the CGR are met.

Background

- 2.1** Paragraph 5.7 explains our process for deciding whether to open an enforcement case and investigate a compliance failure. It provides a clearer, fuller narrative of who the decision-makers are to reflect recent changes to our management structure and practices (including the creation of our new Supervision and Compliance Monitoring Division) and to give us greater flexibility in who we can appoint for the purpose of opening an enforcement case.

Comments received and our response and position in July 2024

- 2.2** Respondents raised several issues in relation to paragraph 5.7. The first and second related to the way decision-making would be delegated by the Managing Director. The third related to the application of the Corporate Governance Resolution. One further matter that drew comment was the seniority and expertise of individuals to whom the Managing Director delegates decision-making.
- 2.3** The issues raised and our replies are summarised in the following table and explained in more detail below.

Allow the Managing Director to delegate the decision to open an enforcement case and investigate a compliance failure to “an individual or committee”

Stakeholder comment	Our reply	Rationale
Request for further clarity around how and why the decision to delegate would be taken to ensure consistency of application.	We decided not to change our substantive proposals.	We considered whether we needed to clarify the decision to delegate. Although we recognise the concerns raised, we have taken the view that the Corporate Governance Resolution clearly sets out the PSR’s internal requirements for decision-making and accountability, and which the Managing Director is required to apply when making such decisions. Consequently, we do not consider it necessary to clarify the decision to delegate.
Concern that the revision to the guidance potentially allows for the Managing Director to delegate the decision for one individual to open a case, potentially reducing the opportunities for oversight to validate the decision.	We decided to clarify that the reference to “an individual” in the proposed text indicates a further individual who will form one of the two required to open a case.	We considered whether the proposed revision to the guidance could be interpreted in a way that potentially allows the Managing Director to delegate the decision on opening a case to one individual. We recognise that there is scope for the proposed guidance to be interpreted in this way and so made it clear that reference to “an individual” in the proposed text indicates a further individual who will form one of the two case openers required to open a case, thereby dispelling any concerns about delegation to one individual.

Stakeholder comment	Our reply	Rationale
Questions as to how the Corporate Governance Resolution will be applied and who will assess how the Corporate Governance Resolution (CGR) requirements have been met.	We decided not to change the substantive proposals.	We considered whether we could further clarify how the CGR will be applied and who will assess how its requirements have been met. We reviewed the issues carefully and we understand the concerns raised by respondents. However, we consider that it is neither necessary nor appropriate for the PPG to explain the basis on which the Managing Director may delegate his authority to an individual or committee. We set that out properly in the CGR, where we detail the PSR's internal requirements for internal decision-making and accountability, which the Managing Director is required to apply when making such decisions. To include further detail seeking to fetter the MD's authority in the PPG, creates a risk of conflict between the two documents.

Concern that individuals to whom the Managing Director delegates have the right judgement and expertise required and are appropriately senior within the PSR.	We decided not to change our substantive proposals. However, minor clarification has been added to reflect that such individuals will be either senior managers or above.	We understand the issues raised by respondents and we considered whether changes could be made to alleviate this concern. However, we consider that the Managing Director has an obligation under the CGR to ensure that anyone he delegates to has sufficient judgment, expertise and seniority. So we have decided not to make a change to our substantive proposal but clarify the level of seniority that the Managing Director delegates to.
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The decision to open an enforcement case and investigate a compliance failure may be made by two 'case openers' which may be the Managing Director of the PSR, the Head of Policy, the Head of Strategy and Intelligence and the Head of Supervision and Compliance Monitoring

Comment	Our position
We received no comments	In order to give us greater flexibility in who we can appoint for the purpose of opening an enforcement case, we have made changes to clarify that all the PSR's Heads of Divisions may be appointed as case openers.

Paragraph 5.12 – Flexibility for staff deployed on monitoring or enforcement to work across functions

Existing Paragraph 5.12

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

Proposed paragraph 5.12

The case team may include staff who have been directly involved in monitoring any conduct relating to a suspected compliance failure by the regulated party under investigation.

Background

- 2.4** Paragraph 5.12 sets out which staff we may appoint to become part of the enforcement team allocated to a case.
- 2.5** Paragraph 5.12 provides that, where an enforcement case is opened, staff that have been involved in monitoring conduct relating to a particular suspected compliance failure may be appointed to become part of the enforcement team allocated to a case.

Comments received and our response and position in September 2024

- 2.6** There were a number of issues raised by respondents in relation to paragraph 5.12. The first was whether having a member of the monitoring team included in the enforcement team risked confirmation bias. One consultee referred to the distinction the Prudential Regulation Authority (“PRA”) and the Financial Conduct Authority (“FCA”) make in having separate teams and internal processes so that matters can be referred from one team to the other, and consequently the need for the PSR to maintain a similar distinction between Supervision, Compliance and Monitoring on the one hand and Enforcement on the other.
- 2.7** One further comment expressed concern about adding Supervision staff to an enforcement investigation. Supervision, Compliance Monitoring and Enforcement are different regulatory processes that involve different statutory powers, and when interacting with the PSR those subject to investigations need to know what procedure the PSR is following and what powers it is exercising.
- 2.8** One consultee said there was potential for a conflict of interest to arise in EDC proceedings. One comment expressed concerns over differences in background and that Compliance and Monitoring staff may have different skillsets to Enforcement staff.
- 2.9** The issues and our replies are summarised in the following table and explained in more detail below.

Stakeholder comment	Our reply	Rationale
<p>Concern that the revision could give rise to a possible risk of confirmation bias, insofar as monitoring staff are included as part of the enforcement team.</p>	<p>We decided not to change our revisions to the PPG in light of this comment.</p>	<p>We carefully considered this comment but have decided not to change our revisions to the PPG in response. We clarify here that, as stated in the existing PPG, we will always give due consideration to what is required to achieve fairness for the party subject to enforcement action. To that extent, we recognise that there are potential risks in how the additional flexibility is used in practice, but that we would appropriately manage any risk of confirmation bias.</p> <p>The change allows us to decide case-by-case which staff should be involved and the extent of their involvement. We recognise that if a staff member is heavily involved at the compliance stage, there's a risk of confirmation bias if they're also involved in a relevant investigation (particularly if in a senior or influential role). However, our internal scrutiny and supervision will ensure that their involvement will not compromise the case.</p> <p>The existing PPG has safeguards that mitigate the risk of confirmation bias. Two are as follows:</p> <ul style="list-style-type: none"> • If a case follows the settlement route, decisions are taken by independent Settlement Decision Makers who have had no prior involvement in the case. Settlement involves an admission of liability by the subject of an investigation, so they will scrutinise the case team's conclusions regarding liability and appropriate sanction as part of their role. • If a case is contested, an independent decision-making panel known as the Enforcement Decisions Committee (not the investigation team) makes a finding that a compliance failure has occurred and/or that a sanction is appropriate on behalf of the PSR. Prior to a contested case even reaching the committee, the case team's preliminary findings, including those regarding liability, are scrutinised by the case sponsor. The committee will hear evidence from both the case team and the subject of an investigation before reaching a decision regarding liability and sanction (if any).

Stakeholder comment	Our reply	Rationale
<p>Concern that the PSR should maintain a distinction between Supervision, Compliance and Monitoring (on the one hand) and Enforcement (on the other), given the PRA's and FCA's approach of maintaining the broad distinction in having separate teams and internal processes for referring matters from one team to the other.</p>	<p>We decided not to change our revisions to the PPG in light of this comment.</p>	<p>We have carefully assessed the advantages and disadvantages of maintaining such a distinction. We compared our own proposed approach with those of other financial services regulators. We note that the FCA and the PRA are large organisations with statutory monitoring functions distinct from their enforcement functions. The PSR is a much smaller organisation, committed to managing our resources in a proportionate and cost-effective manner and deploy them flexibly wherever possible. The Supervision, Compliance Monitoring and Enforcement division comprises three teams: the Compliance Monitoring team may, through its monitoring of compliance with Specific or General Directions and requirements, identify cases for referral to enforcement. Supervision performs a different role that is removed from enforcement and monitoring. They are two connected stages, in that our monitoring activity considers regulated parties' performance with our directions or requirements and selects cases for enforcement.</p> <p>We have measures in place to mitigate against the risk of confirmation bias arising in our enforcement case handling. Consequently, we consider that the need to maintain such a distinction does not arise.</p>
<p>Concerns about adding Supervision staff to an enforcement investigation, given that Supervision, Compliance Monitoring and Enforcement are different regulatory processes that involve the exercise of different statutory powers, and when interacting with the PSR those subject to investigations need to know what procedure the PSR is following and what powers it is exercising.</p>	<p>We decided not to change our revisions to the PPG in light of this comment.</p>	<p>The PSR's Supervision team builds and maintains relationships with regulated bodies. Given the responsibilities of those in supervision and the skills and competencies involved, we do not intend to add members of the Supervision team to an enforcement case team as a matter of routine team composition. The PSR notifies PSPs what powers it is exercising as a matter of standard procedure.</p>

Stakeholder comment	Our reply	Rationale
<p>“It is possible that in some types of dispute, the PSR's previous SC&M activity in a matter could be relevant to the Enforcement investigation and any subsequent dispute. For example, past policy work by the PSR, or past discussions between a firm and a member of the PSR's SC&M team about the approach to a statutory or PSR policy requirement, could not only form part of the factual matrix of the Enforcement case, but also part of a firm's defence to the PSR's allegations of a breach. Such an individual might be called upon to give evidence to the EDC in a particular case whilst also being a member of the team responsible for prosecuting it. This could present an untenable conflict for the member of PSR SC&M staff concerned, which would be avoided by maintaining the current distinction”.</p>	<p>We decided not to change our revisions to the PPG in light of this comment.</p>	<p>In our view, it is highly unlikely a conflict of interest of the nature outlined would arise. However, if it did, it would be managed by the checks and balances we have explained above. By way of example, we may decide to exclude someone from being part of the enforcement case team if they were a witness of a factual matter that was so pivotal to liability or penalty that they would reasonably be considered conflicted.</p>
<p>Concerns over differences in background and the fact that Compliance and Monitoring staff may have different skill sets to Enforcement staff.</p>	<p>We decided not to change our revisions to the PPG in light of this comment.</p>	<p>We consider that skills and competences are a matter for the PSR to determine at the time. The PSR is small so we create efficiency within the SCM division by allocating resource across teams (and recruit people with the right skills and competences to be able to do so). Although the skills may be differently applied in monitoring cases to those in enforcement cases, the people fulfilling those roles have the underlying skills and competence to be able to do both types.</p>

- 2.10** We consider therefore that the proposed changes would have the potential to save significant amounts of time and resource, would make our enforcement and monitoring processes more efficient and effective and would make the best use of the resource available in the two teams.

Next Steps

- 2.11** The final version of the PPG applies from 20 September and the previous version will cease to apply.
- 2.12** We are reviewing other PSR guidance, to check if any consequential updates need to be made to reflect the new PPG and whether to consult on any of them.

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