Payment Systems Regulator

Consultation paper

Proposed revised penalty statement

March 2023

CP23/2

We welcome your views on this consultation regarding proposed changes to our penalty statements. If you would like to provide comments, please send these to us by **5pm on 27 April 2023.**

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

Regulatory Enforcement Team
Payment Systems Regulator
12 Endeavour Square
London E20 1JN

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

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

We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. If you want to claim commercial confidentiality over specific items in your response, you must identify those specific items which you claim to be commercially confidential. We may nonetheless be required to disclose all responses which include information marked as confidential in order to meet legal obligations, in particular if we are asked to disclose a confidential response under the Freedom of Information Act 2000. We will endeavour to consult you if we receive such a request. Any decision we make not to disclose a response can be reviewed by the Information Commissioner and the Information Rights Tribunal.

You can download this consultation paper from our website:
www.psr.org.uk/cp23-2-penalty-statement-consultation/

We take our data protection responsibilities seriously and will process any personal data that you provide to us in accordance with the Data Protection Act 2018, the General Data Protection Regulation and our PSR Data Privacy Policy. For more information on how and why we process your personal data, and your rights in respect of the personal data that you provide to us, please see our website privacy policy, available here: www.psr.org.uk/privacy-notice

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1 Executive summary

Consultation on proposed changes to our penalty statements

1.1 We have three penalty statements that set out the principles we apply when determining penalties and exercising our associated powers of publication in different contexts.

1.2 Having reviewed these penalty statements and considered feedback from stakeholders, we propose to make the following changes:

a. Combine our three penalty statements into one.

b. Change the way in which we consider the duration of a compliance failure and how we take account of revenue when calculating penalties.

c. Clarify what we mean by 'senior management'.

d. Add further clarity to when we consider a compliance failure is deliberate or reckless.

e. Reinforce the principle that penalties should disincentivise compliance failures.

1.3 These proposed changes should help those who may be the subject of a PSR investigation understand how we determine whether to impose a penalty and its amount.

1.4 We welcome your views regarding our proposed changes to our penalty statements.

1.5 **Please provide any comments to us by 5pm on 27 April 2023.**

2 Introduction

This chapter sets out the background to our proposed changes as follows:

- The purpose of our current penalty statements and the scope of their application.
- Why we are reviewing our current penalty statements.
- The scope of our proposed revised penalty statement.
- The stakeholder engagement we have undertaken.

The purpose and scope of our penalty statements

2.1 We have the power to impose financial penalties on bodies[1] who fail to comply with obligations we enforce. We also have powers to publish details of failures to comply and the penalties we impose.

2.2 We are under a legal obligation to publish a statement of principles that we use when deciding whether to impose a financial penalty and determining its amount. Currently, we have three penalty statements that fulfil that purpose:

a. FSBRA Penalties Guidance

b. IFR Guidance

c. PSRs 2017 Guidance

2.3 These three penalty statements apply to our ability to impose financial penalties, and our associated powers of publication, in respect of failures to comply with the following:

a. A direction or requirement imposed under the Financial Services (Banking Reform) Act 2013 (FSBRA).

b. An obligation or prohibition imposed by Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions as retained EU Law (the IFR). [2]

c. A direction we give under Regulation 4 of the Payment Card Interchange Fees Regulations 2015 (PCIFRs).

1 We do not have the power to impose financial penalties on individuals.

2 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions was converted into UK law by the European Union (Withdrawal) Act 2018 (EUWA) and 'onshored' by a statutory instrument (the onshoring SI), which amended provisions to make them operate effectively after the UK's withdrawal from the EU. The IFR as it now applies in the UK came into effect at the end of the implementation period, on 31 December 2020.

d. A 'qualifying requirement' (an obligation, prohibition or restriction imposed under Regulation 61 or Part 8 of the Payment Services Regulations 2017 (PSRs 2017), with the exception of the obligation imposed on the Financial Conduct Authority by regulation 105(5) PSRs 2017)[3], and

e. a direction we give under Regulation 125 of the PSRs 2017.

Why we are reviewing our penalty statements

2.4 We must, from time to time, review our penalty statements and, if appropriate, revise them to ensure we have an appropriate framework for imposing penalties. Having reviewed our penalty statements over the last six months, we now propose to revise them as explained in Chapter 3 of this document.

2.5 A proposed revised penalty statement, which we intend to apply whenever we are considering imposing a financial penalty, is set out at Annex 1 of this document.

The scope of our proposed revised penalty statement

2.6 We intend to apply our proposed revised penalty statement when deciding whether to impose a penalty, the amount of any penalty and when deciding whether to exercise our associated powers of publication in respect of failures to comply with the EU law-based obligations that we currently enforce (the IFRs and PSRs 2017) or a direction or requirement imposed under FSBRA.

2.7 The Financial Services and Markets Bill is likely to shortly receive royal assent. When the Bill becomes law, it will facilitate the revocation and restatement of retained EU law (including provisions of the PSRs 2017 and the IFR). We will review the impact the Bill may have on our penalty statement in due course.

Stakeholder engagement

2.8 We value stakeholders' views and have sought their input on our emerging thinking. We held two roundtable discussions during November 2022 and bilateral discussions with some law firms who have relevant expertise and interest in our penalty statements. We summarise key elements of this valuable feedback and discuss its influence on our proposed changes in the following sections of this document.

3 Regulation 123 of the PSRs 2017.

3 Proposed changes to our penalty statements

In this chapter we set out the main changes we propose to make to our penalty statements, and the thinking behind them.

Change to how we consider the duration of a compliance failure in Step 1 of the penalty calculation

3.1 The current penalty statements set out a framework for calculating a penalty made up of two elements: an element of disgorgement (if applicable) and a penal element, calculated by a four-step process. Step 1 involves calculating a figure that reflects the seriousness of the compliance failure.

3.2 Where we use revenue as a starting point for a penalty calculation, the current penalty statements direct us to use revenue realised by the firm from the relevant business activity during the year prior to our decision notice, or the termination of the relevant compliance failure, whichever is earlier.

3.3 We then apply a percentage that reflects the seriousness of the compliance failure to give a figure for Step 1.

3.4 The current penalty statements do not provide a scale on which the chosen percentage will sit. We have, however, applied and published a percentage scale of 0-60% in our Decision Notice against NatWest. We subsequently applied the same scale in our Decision Notice against Barclays.

3.5 Feedback we received during our stakeholder engagement indicated broad support for incorporating a percentage scale into our penalty statement. Stakeholders said they would welcome the greater clarity.

3.6 We agree with the initial feedback that publishing a percentage scale in the penalty statement would provide us with a clearer basis for imposing a penalty, without unduly compromising the degree of flexibility needed to account for different circumstances. We therefore propose to incorporate a percentage scale in a revised penalty statement.

3.7 We do not propose to change the basic four-step process for calculating the penal element of a penalty.

3.8 We will use our proposed percentage scale if we choose revenue as a starting point for Step 1. If we do not choose revenue as a starting point, we may use a different percentage scale or a different methodology.

3.9 In most cases, we will use revenue as a starting metric for penalty calculations, as it will usually be an appropriate reflection of the harm, or potential harm, caused by a compliance failure.

3.10 Some stakeholders expressed the view that revenue may not be the most suitable metric to use as a starting point to calculate a penalty. We recognise that in some cases there may be more suitable metrics which more accurately reflect the harm or potential harm that the compliance failure caused. The proposed revised penalty statement retains an appropriate amount of flexibility to allow for this.

3.11 In situations where we use revenue as a starting metric, we propose to use a percentage scale of 0-20%, with three bands of seriousness: 0-6%, 7-13% and 14-20%, representing lesser, moderate and high seriousness respectively.

3.12 We considered other percentage scales with different ranges but believe a range of 0-20% should, in most scenarios, enable us to arrive at a sum after Step 1 that provides an appropriate foundation on which to base a penalty.

3.13 We also propose to use revenue realised during the entire period in which a compliance failure occurs. We consider this would be more reflective of the circumstances of the compliance failure.

3.14 Taken together, these two changes will remove the currently existing incentive to prolong compliance failures or be uncooperative in working with us in the hope of reducing the relevant revenue over the most recent 12-month period and thus supressing the size of a potential penalty. Our new proposed policy will ensure that a firm's incentive is always to address any compliance failures and cooperate towards resolving cases quickly.

3.15 This positive effect is achieved while maintaining the maximum penalty for what we would consider likely 'standard' cases (by which we mean compliance failures that last about three years and for which revenue over that period remains relatively constant) at a level similar to now (by applying up to 20% over three years in this example rather than applying 60% to a single year).

3.16 In applying this approach, we would consider how to take into account the duration of the compliance failure when calculating a penalty. For instance, if we used revenue as a basis for calculating a penalty for a continuous compliance failure lasting a number of years, it is unlikely that we would consider duration as a relevant factor when assessing its seriousness.

3.17 If, however, a metric other than revenue is used as a basis to calculate a penalty, we may consider the duration of the compliance failure as a relevant factor for assessing seriousness.

3.18 If we choose revenue as a starting point for Step 1 on a compliance failure which lasts less than a year, or is a one-off event, we propose to use revenue realised during the 12 months preceding the end of the compliance failure.

3.19 There may be circumstances in which the duration of a compliance failure spans a period of time during which both the current penalty statements and the new penalty statement are in place. Our likely starting point to calculating a penalty in such circumstances would be to apply the current penalty statements to the period they were in force and apply our new proposed penalty statement to the period that is in force.

Strengthening disincentives to compliance failures

3.20 It is very important that our penalty statement enables us to disincentivise organisations that are subject to obligations we enforce from failing to comply with their obligations. The penalty statement must give us the tools we need to remove any financial incentive firms may have not to comply with obligations we enforce. While we recognise this concept is already captured in the current penalty statements, we have proposed some minor amendments to emphasise that it is one of the key underlying objectives of the penalty statement.

Adding further clarity to when we consider a compliance failure is 'deliberate' or 'reckless'

3.21 The current penalty statements provide that the extent to which the compliance failure was deliberate or reckless may be a relevant factor in determining the appropriate level of financial penalty. However, the penalty statement does not distinguish between 'deliberate' and 'reckless.' Neither does it define deliberate or reckless, and no factors are identified that may point to a compliance failure being either deliberate or reckless.

3.22 We believe that clarifying what we mean by these terms will not only increase transparency, but should also assist stakeholders in understanding our penalty process. This should have the knock-on effect of making any settlement discussions easier and more streamlined.

3.23 We first propose to separate reckless and deliberate into two distinct factors to take into account at Step 1.

3.24 We then propose to introduce a non-exhaustive list of factors that may point to a compliance failure being reckless or deliberate. The list is not exhaustive: not all factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

3.25 The penalty statement is also currently silent as to which individuals' state of mind needs to be attributed to a firm to make the case that the firm itself acted in a deliberate or reckless manner. We consider this should be 'senior management or a responsible individual'.

3.26 We are also proposing to clarify 'senior management' awareness at paragraphs 3.36 to 3.43 below, which should be read alongside our proposed changes to reckless or deliberate.

3.27 Feedback received during our stakeholder engagement indicated broad support for providing more detail on factors that might indicate a compliance failure was deliberate or reckless. There was also general support for any such list of factors to be non-exhaustive.

3.28 One stakeholder said we should be able to take into account what the firm ought to have known, particularly when considering whether the firm was reckless, and should also be able to take into account wilful ignorance. We agree with this position.

3.29 Another stakeholder noted there are different meanings of recklessness – i.e., subjective and objective recklessness – and it might be helpful for the PSR to set out what we think might be reckless. We agree there is merit to this.

3.30 We also propose introducing an objective element to the assessment of whether a compliance failure was reckless, to capture what a firm ought to have known. This will ensure there is no incentive on senior management or responsible individuals within a firm to turn a blind eye to a potential compliance failure.

3.31 Finally, we propose to remove the reference to 'the extent to which' the compliance failure was deliberate or reckless and simply say 'whether' the compliance failure was deliberate or reckless. We think a compliance failure either is or is not reckless and the current wording obfuscates more than it illuminates.

3.32 We recognise that by including a reference to what an individual ought to have appreciated or ought to have been aware of, we are introducing an objective element to the assessment of whether a compliance failure is reckless. We consider there are cogent reasons for doing so.

3.33 Recklessness may consist of turning a blind eye to something that is, objectively speaking, obvious or ought to have given rise to reasonable suspicion. In determining whether behaviour is reckless, we consider that regard must be had to what would reasonably have been appreciated or understood by persons in the same position as the individual in question.

3.34 We believe there is merit in applying an objective standard that does not depend on the particular knowledge the individual may or may not have of the risk in question. In the regulatory context with which we are concerned, a reckless failure to consider whether something is a risk may be as equally reckless as disregarding a known risk.

3.35 We carefully considered whether or not to elaborate on what we mean by 'reckless' or 'deliberate'. We recognise there is an inherent risk in introducing a list of non-exhaustive factors, in that some stakeholders may nonetheless interpret the list as determinative. However, we think the benefits of greater clarity and transparency outweigh this risk. We will be clear that the factors we list are indicative only, and simply because a factor is not listed does not mean it is irrelevant.

Clarifying 'senior management'

3.36 The current penalty statements explain that, in determining the seriousness of a compliance failure and the appropriate level of any financial penalty, a relevant factor is the extent to which a firm's senior management were aware of the compliance failure, the nature and extent of their involvement in it, and the timing and adequacy of any steps they took to address it.

3.37 The penalty statements do not define the term 'senior management', nor is any guidance provided as to who should be regarded as holding a senior management position.

3.38 Feedback we received during stakeholder engagement indicated broad support for further detail on the meaning of senior management. Stakeholders confirmed that they would welcome the greater clarity.

3.39 Having considered the issue, we propose to amend our penalty statements to include a list of non-exhaustive factors which may indicate that a person holds a senior management position within a firm.

3.40 We agree it would be useful to provide greater clarity on what we mean by senior management. The proposed amendment will enable those who may be the subject of a PSR investigation to better understand how we calculate penalties.

3.41 We recognise there is a risk that some stakeholders may choose to interpret the factors set out in our proposed list as determinative. However, we will make clear that our proposed list is not exhaustive. Not all of the proposed factors may be applicable in a particular case, while other factors that are not listed may be relevant.

3.42 We considered whether, in deciding whether an individual holds a senior management position, we should evaluate the extent to which an individual performs a senior management function.[4]

3.43 We think that limiting our interpretation of senior management in this manner may be unduly restrictive. We recognise that there is, potentially, some scope for individuals who do not perform senior management functions to make decisions which we may view as relevant to a firm's compliance with the obligations we enforce. Equally, we recognise that there may be some situations where a firm that is subject to investigation by us may not be authorised by the Financial Conduct Authority and/or the Prudential Regulation Authority. Therefore, we do not consider it appropriate to limit our interpretation of senior management to those performing a senior management function under the Senior Managers Certification Regime.

Combining three penalty statements into one

3.44 As explained in paragraphs 2.2 to 2.3, we currently have three penalty statements that apply to our ability to impose penalties and exercise our related powers of publication in respect of compliance failures.

3.45 Some stakeholders felt it would be more convenient if these three penalty statements were combined into one document.

3.46 Having considered this feedback, we agree that a single document – one that sets out all the principles we will apply when determining penalties in any context – would be an improvement on the current three. We therefore propose to combine our current three penalty statements into one.

3.47 We are aware that two of our current penalty statements are embedded in other documents (our IFR Guidance and our PSRs 2017 Guidance). Our current FSBRA penalty statement is also referred to in our Powers and Procedures Guidance. If we adopt our proposed penalty statement, we will amend these documents to refer to our existing penalty statements and our revised penalty statement as appropriate. If we adopt and publish our proposed penalty statement, we will publish new updated versions of these documents.

4 FCA and/or PRA Senior Managers Certification Regime.

4 Other considerations

Diversity and equalities

4.1 We are required under the Equality Act 2010 to have due regard to the need to eliminate discrimination and to promote equality of opportunity in carrying out our policies, services and functions.

4.2 We believe that none of our proposals to change our penalty statements raise issues of equality and diversity. If you are aware of any equality and diversity implications, we would welcome your comments.

Annex 1
Proposed revised penalty statement

PSR Payment Systems Regulator

Proposed revised penalty statement

March 2023

Contents

1 Introduction

1.1 The Payment Systems Regulator (PSR) has the power to impose various sanctions in respect of a 'compliance failure': that is, a failure to comply with a regulation or a direction we enforce. We can:

a. publish details of a compliance failure

b. impose a financial penalty

c. publish details of a financial penalty

1.2 This document sets out the principles we will apply when deciding whether to exercise those powers, whether to impose a penalty, and when determining its amount.

1.3 We have the power to impose a penalty and powers of publication described above under the following legislation:

- Sections 72 and 73(1) Financial Services (Banking Reform) Act 2013 (FSBRA)
- Regulations 5 and 6 of the Payment Card Interchange Fees Regulations 2015 (PCIFRs)
- Regulations 126 and 127 of the Payment Systems Regulations 2017 (PSRs 2017)

1.4 FSBRA defines a compliance failure as a failure by a participant[1] in a regulated payment system[2] to comply with:

1. a direction given by us under section 54 FSBRA
2. a requirement imposed by us under section 55 or 56 FSBRA

1.5 The PCIFRs define a compliance failure as a failure by a regulated person[3] to comply with:

1. an obligation or prohibition imposed by the Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions as retained EU Law (IFR)[4]
2. a direction given by the PSR under Regulation 4 of the PCIFRs

1 A 'participant' is defined by section 42 FSBRA.

2 A 'regulated payment system' is a payment system that has been designated by order of HM Treasury under Section 43 FSBRA.

3 A 'regulated person' under the PCIFRs is a person on whom an obligation, prohibition or restriction is imposed by any provision of the IFR (regulation 2 PCIFRs).

4 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions was converted into UK law by the European Union (Withdrawal) Act 2018 (EUWA) and 'onshored' by a statutory instrument (the onshoring SI), which amended provisions to make them operate effectively after the UK's withdrawal from the EU. The IFR as it now applies in the UK came into effect at the end of the implementation period, on 31 December 2020. In this statement, we use the terms 'IFR' to the provisions that apply in the UK as a result of the onshoring amendments to the retained EU law.

1.6 The PSRs 2017 define a compliance failure as a failure by a regulated person[5] to comply with:

1. a 'qualifying requirement', that is: an obligation, prohibition or restriction imposed by regulation 61 of the PSRs 2017 (information on ATM withdrawal charges) or Part 8 of the PSRs 2017 (access to payment systems and bank accounts), with the exception of the obligation imposed on the FCA by regulation 105(5) PSRs 2017)[6]
2. a direction we give under Regulation 125 under the PSRs 2017

1.7 This statement of principles will apply to any compliance failure under FSBRA, the PCIFRs, or the PSRS 2017, which occurred or is continuing on or after the date of adoption of this penalty statement.

1.8 A reference to a compliance failure in this document means one of the different types of compliance failure described in paragraphs 1.4 to 1.6.

1.9 A reference to a subject means a 'participant' under FSBRA, a 'regulated person' under the PCIFRs or a 'regulated person' under the PSRs 2017.

1.10 We will apply this statement of principles when imposing a penalty for a compliance failure. This does not mean that we will always impose the same penalty for similar compliance failures. Our penalties may differ on a case-by-case basis.

1.11 We are required to prepare this statement of principles under section 73(3) FSBRA, Regulation 6(3) of the PCIFRs, and Regulation 127(3) of the PSRs 2017.

1.12 You can find further details of our procedures, including rights of appeal, in the following documents:

- Powers and Procedures Guidance
- Guidance on the PSR's approach to monitoring and enforcing compliance with the Interchange Fee Regulation
- The Payment Services Regulations 2017 – the PSR's approach to monitoring and enforcement

1.13 We will review this statement of principles from time to time and revise if necessary. Any revised statement will be issued for consultation and published.

5 A 'regulated person' under the PSRs 2017 is a person on whom a 'qualifying requirement' is imposed (regulation 123 PSRs 2017).

6 Regulation 123 of the PSRs 2017.

2 Deciding whether to impose a penalty

2.1 We will consider the full circumstances of each individual case when determining whether to impose a financial penalty.

2.2 Below is a list of factors that may be relevant for this purpose. The list is not exhaustive, and not all of these factors may be applicable in a particular case. There may also be other factors, not listed here, that are relevant in an individual case. The factors we may consider include:

1. The nature, seriousness, duration, frequency and impact of the compliance failure.
2. The subject's behaviour after the compliance failure has been identified.
3. The subject's previous disciplinary record and compliance history.
4. Our guidance and other published materials: generally, we will not take action against a subject for behaviour that we consider to be in line with guidance, or other materials published by us pursuant to our statutory functions and duties, and which were current at the time of the behaviour in question.
5. Action we or a relevant regulator have taken in previous similar cases.
6. Action another relevant regulator proposes to take on the same case.

   Where another regulator proposes to act on the compliance failure we are considering, we may decide that its action would be adequate to address our concerns. Sometimes, it may still be appropriate for us to take our own action.
7. Whether the compliance failure in question relates to a new issue, on which neither we nor another regulator has issued guidance or statements.

2.3 If we impose a financial penalty, we will normally also publish details of the compliance failure.[7]

2.4 We may decide to only publish details of a compliance failure, without imposing a penalty.

2.5 In deciding whether this is an appropriate approach, we will consider all the relevant circumstances of the case, including the nature and seriousness of the compliance failure and its impact on the aims of the relevant regulation or direction.

7 Under section 72(1) of FSBRA, we may publish details of a compliance failure and details of a penalty imposed under FSBRA. Under regulation 5 PCIFRs, we may publish details of a compliance failure under the PCIFRs. Regulation 5 PCIFRs also gives us the power to publish details of a penalty imposed under the PCIFRs. Regulation 126 PSRs 2017 gives us the power to publish details of a compliance failure under the PSRs 2017. Regulation 126 PSRs also gives us the power to publish details of a penalty imposed under the PSRs 2017.

2.6 We may also consider some or all of the following factors when deciding on whether to impose a penalty:

1. Whether publication of the compliance failure alone would **not** be enough to deter others from committing the same or similar compliance breach.
2. Whether the subject has derived an economic benefit (including made a profit or avoided a loss or cost) as a result of the compliance failure. If so, the subject should not retain it.
3. The seriousness of the breach (by nature or degree). The more serious the breach, the more likely we are to impose a penalty.
4. We are more likely to impose a penalty where a subject has a poor disciplinary history. This would include their history with the PSR, but we may consider the subject's disciplinary record with other regulators.
5. Whether the subject has brought the compliance failure to our attention. If so, we may be more likely to consider only publishing details of the compliance failure.
6. Whether the subject has cooperated with us: that is, immediately admitting the compliance failure and taking steps to put in place effective remedial action. If so, we may be more likely to consider only publishing details of the compliance failure.
7. Whether imposing a financial penalty would have a serious impact on the subject. This would only be a consideration that would cause us to waive a financial penalty in exceptional circumstances.
8. How to achieve consistency with other regulators and in our own approach. We may be influenced by our decisions in previous cases as to whether a penalty is appropriate.

2.7 Where we impose a financial penalty, we will usually also publish the details. We will only refrain from doing this in exceptional circumstances.

3 Determining the appropriate level of the financial penalty

3.1 We base our penalty-setting regime on the following general principles:

- **Disgorgement:** A subject should not benefit from any compliance failure.
- **Discipline:** A subject should be penalised for wrongdoing.
- **Deterrence:** Any penalty should deter the subject and others from committing further or similar compliance failures.
- **Disincentivising non-compliance:** a penalty should remove any financial incentive for a subject not to comply with its obligations. The cost of a compliance failure should significantly exceed any financial benefit the subject may have derived from it.

3.2 When we calculate a penalty, we consider two elements which make up the whole amount:

1. **First element:** disgorgement of any benefit the subject received as a result of its compliance failure (see paragraphs 3.7 to 3.9).
2. **Second element:** a financial penalty reflecting the seriousness of the compliance failure.

3.3 The second element, the financial penalty, is calculated as follows:

- **Step 1:** we determine a figure which reflects the seriousness of the compliance failure and the size and financial position of the subject (see paragraphs 3.10 to 3.18)
- **Step 2:** where appropriate, we adjust the Step 1 figure to take account of any aggravating or mitigating circumstances (see paragraphs 3.19 and 3.20)
- **Step 3:** where appropriate, we increase the amount arrived at after Steps 1 and 2, to ensure that the penalty is effective as a deterrent (see paragraph 3.21)
- **Step 4:** if applicable, we may apply one or both of the following factors to the figure we arrive at after following Steps 1, 2 and 3:
  - a settlement discount (see paragraphs 3.22 and 5.1 to 5.12)
  - an adjustment based on any serious financial hardship which we consider the penalty would cause the subject, or if the penalty could adversely impact the stability of, or confidence in, the UK financial system (see paragraphs 3.23 and 4.1 to 4.8).

3.4 A settlement discount is only ever applied to the financial penalty element, it is **not** applied to any disgorgement element.

3.5 When we use this statement of principles to determine a penalty, we recognise that the penalty must be proportionate to the compliance failure. We may decrease the penalty calculated after Steps 1 and 2 if we consider it disproportionately high given the seriousness, scale and effect of the compliance failure. In determining any deterrence uplift at Step 3, we will also ensure that the overall penalty is not disproportionate.

3.6 We list the factors and circumstances we will consider when determining the appropriate level of a penalty below. The list is **not** exhaustive. Not all these factors will apply to every case, while in some cases other factors, not listed here, may be relevant.

Our framework for determining the level of a penalty

First element: disgorgement

3.7 We will aim to deprive a subject of the financial benefit derived directly from, or attributable to, the compliance failure (which may include any profit made and loss or cost avoided) where it is practicable to quantify this. We may also charge interest on the disgorgement.

3.8 We will aim to deprive the subject of **all** the financial benefit derived from activities that relate to payment systems and services, where the subject's business model is dependent on a compliance failure, or where the compliance failure is central to the subject's business.

3.9 Where a subject agrees to carry out a remedial programme (which may include compensating those who have suffered a loss or not realised a profit as a result of the compliance failure), or where we decide to impose a redress programme, we will take this into consideration. In such cases, the final penalty might not include a disgorgement element, or the disgorgement element might be reduced.

Second element: the penalty

Step 1 – the seriousness of the compliance failure

3.10 We calculate a figure for a penalty that reflects the seriousness of the compliance failure. This penalty will be separate from, and in addition to, any disgorgement – see paragraphs 3.7 to 3.9.

3.11 A compliance failure may cause costs or harm to others, in addition to the financial benefit the subject derives. In many cases, the amount of revenue a subject generates from a particular business activity is indicative of the harm or potential harm caused by its compliance failure.

3.12 In such cases, we will determine a figure based on a percentage of relevant revenue. Where appropriate, we may consider a subject's 'billings' (that is, the revenues invoiced to third parties) on the relevant business activity – for example, where revenues information is not available or differs from billings.

3.13 Relevant revenue means the gross revenue the subject derived from the business activity in the United Kingdom to which the compliance failure relates. This will normally be the revenue gained during the entire duration of the compliance failure. If a compliance failure lasts less than a year, or is a one-off event, we will use revenue realised during the 12 months preceding the end of the compliance failure.

3.14 When we have determined the relevant revenue, we will then decide the percentage of that revenue which will form the basis of the penalty.

3.15 We will apply a percentage to the relevant revenue to determine the figure for Step 1 of the penalty calculation. The percentage chosen will reflect how serious the compliance failure is.

3.16 The percentage chosen will be on a sliding scale of 0-20%, expressing the following bands of seriousness:

Table 1: Calculating a figure for Step 1

Seriousness	Percentage of revenue applied
Lesser seriousness	0 – 6
Moderate seriousness	7 – 13
High seriousness	14 – 20

3.17 If we choose not to use revenue as a basis to calculate a penalty, we may apply a different percentage scale and/or a different methodology to determine an appropriate figure for Step 1.

3.18 The following factors may guide us in judging the seriousness of a compliance failure and determining the appropriate level of financial penalty:

1. **Deterrence:** when determining the appropriate level of penalty, we will keep in mind our main goal of promoting high standards of regulatory behaviour by deterring subjects and others from committing further or similar compliance failures.
2. **The nature of the compliance failure:** we consider the following factors may be relevant:
    - The nature of the obligation or requirement which was not complied with.
    - The length and/or frequency and/or repetition of the compliance failure.[8]

8 We will normally account for the duration of the breach by considering the revenue over the whole period of the compliance failure. There may be circumstances where we will also consider it as a seriousness factor. This will typically be where we consider an alternative metric which does not in itself account for the length of the compliance breach.

- The extent to which the subject's senior management were aware of the compliance failure, the nature and extent of their involvement in it, and the timing and adequacy of any steps taken to address it. Factors which may indicate that an individual holds a senior management position for these purposes include but are not limited to:
    - Whether the individual was tasked with making decisions which impact on the subject's ability to comply with the relevant obligation – for example, decisions relating to the development and/or implementation of policies and systems that enable the subject to comply with the relevant obligation.
    - Whether the individual was part of a group of individuals that was tasked with making decisions of the same nature as those outlined above.
    - If the individual was part of such a group of individuals, whether they were a key decision maker in that group.
    - The individual's role, including their relative level of seniority at the firm and what they had oversight of.
    - Whether, given the circumstances – including, for example, the nature of their role – the individual concerned ought to have been tasked with the decision-making responsibility referred to above, either individually or as part of a group of individuals.

3. **The impact or potential impact of the compliance failure** on the following may be relevant:
    - Competition in the market for payment systems or the markets for services provided by payment systems.
    - Innovation in the market for payment systems or the markets for services provided by payment systems, or the markets for infrastructure to be used for the purposes of operating payment systems.
    - The interests of those who use, or who are likely to use, services provided by regulated payment systems.
    - The aims of the IFR and the PSRs 2017.
4. **Whether the compliance failure was reckless:** factors which may indicate that a compliance failure was reckless include, but are not limited to:
    - The firm's senior management, or a responsible individual, appreciated or ought to have appreciated there was a risk that their actions or inaction could result in a compliance failure, and failed adequately to mitigate that risk.
    - The firm's senior management, or a responsible individual, were aware, or ought to have been aware, there was a risk that their actions or inaction could result in a compliance failure but failed to check if they were acting in accordance with the firm's internal procedures.
    - The firm's senior management, or a responsible individual, were aware, or ought to have been aware, of a risk that a result would occur and it was unreasonable for them to take that risk having regard to the circumstances as they knew/believed them to be, or ought to have known/believed them to be.

5. **Whether the compliance failure was deliberate.** Factors which may indicate a compliance failure was deliberate include, but are not limited to:
    - The compliance failure was intentional, in that the firm's senior management, or a responsible individual, intended or foresaw that the likely or actual consequences of their actions or inaction would result in a compliance failure.
    - The firm's senior management, or a responsible individual, knew that their actions were not in accordance with the firm's internal procedures.
    - The firm's senior management, or a responsible individual, sought to conceal their misconduct.
    - The firm's senior management, or a responsible individual, committed the compliance failure in such a way as to avoid or reduce the risk that the compliance failure would be discovered.
    - The compliance failure was repeated.

Step 2 – mitigating and aggravating factors

3.19 We may increase or decrease the amount of the financial penalty arrived at after Step 1 (but not including any amount to be disgorged) to take into account factors which aggravate or mitigate the compliance failure.

3.20 The following list of factors may have the effect of aggravating or mitigating the compliance failure:

1. Whether the subject notified us or other regulators of the compliance failure swiftly and comprehensively.
2. Whether the subject cooperated swiftly, effectively and comprehensively with us or any other relevant regulator during the investigation of the compliance failure, and the impact of this on our ability to conclude our investigation into the compliance failure promptly and efficiently.
3. Any remedial steps the subject has taken or committed to take since the compliance failure was identified, and how promptly and effectively these steps are carried out.
4. Whether the subject has arranged its resources in such a way as to enable or avoid disgorgement and/or payment of a financial penalty.
5. Whether the subject had previously been informed of our concerns about the issue or behaviour in question.
6. Whether the subject had previously assured us or another relevant regulator that it would perform a particular act or engage in particular behaviour relating to the compliance failure, or refrain from a particular act or behaviour.
7. The subject's previous disciplinary record and general compliance history with us or another relevant regulator/authority.
8. Action taken against the subject by another relevant regulator/authority that is relevant to the compliance failure in question.
9. Whether our guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials.

10. Whether the subject has taken adequate steps to achieve a clear and unambiguous commitment to compliance with our regulatory requirements and/or directions. We would expect to see this throughout the organisation (from the top down), and for the subject to have taken appropriate steps to identify and assess regulatory risk, mitigate those risks and review those activities.[9]
11. Whether the failure was due in whole or in part to the actions of a third party and whether the subject was or ought to have been aware of this, and whether it took or ought to have taken reasonable steps to avoid the compliance failure.
12. The subject's size, financial resources, and other circumstances.

Step 3 – adjustment for deterrence

3.21 We may increase the penalty if we consider that the figure arrived at after Step 2 would not be effective in deterring the subject, or others, from committing further or similar compliance failures. Circumstances where we may do this include but are not limited to the following circumstances:

- We think the value of the penalty is too small in relation to the compliance failure to meet our aim of credible and effective deterrence.
- Previous action by us or another relevant regulator/authority in respect of the same or similar issues has failed to improve the subject's behaviour and/or relevant industry behavioural standards.
- We think there is a risk that the subject or others will commit further compliance failures in the future unless we increase the penalty.

Step 4 – discounts

3.22 We and the subject may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, we will reduce the amount of the financial penalty we would otherwise have imposed. The reduction will reflect the stage at which the agreement was reached. The settlement discount does not apply to the disgorgement of any benefit calculated under the first element, see paragraphs 3.7 to 3.9. For further details of our policy on settlement discounts, see paragraphs 5.1 to 5.12.

3.23 For details of our policy on serious financial hardship, see paragraphs 4.1 to 4.8.

9 The mere existence of compliance activities will not be treated as a mitigating factor. The subject will need to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of regulatory risk. It will also need to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand. We will not, subject to some exceptions, ordinarily regard the existence of a compliance programme as a factor to warrant an increase in the amount of the penalty to be imposed against that subject for the compliance failure. The exceptions include situations where the purported compliance programme had been used to facilitate the compliance failure, to mislead us or another relevant regulator/authority as to the existence or nature of the compliance failure or had been used in an attempt to conceal the compliance failure.

4 Serious financial hardship

4.1 Only in exceptional cases would we grant a discount to a penalty based on a claim of serious financial hardship for the reasons set out in paragraphs 4.2 to 4.5.

4.2 We note that many payment service providers authorised by the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) are subject to their own prudential requirements.

4.3 We expect the organisations subject to obligations we enforce to have made effective arrangements to call on their owners, shareholders, guarantors or direct participants, etc., for sufficient funds to meet their debts and liabilities when necessary. This would cover a debt owed to us as a penalty for a compliance failure.

4.4 We aim to ensure that financial penalties are proportionate to the compliance failure. We recognise that penalties may affect subjects differently. Accordingly, we may consider a reduction if the proposed penalty would cause the subject serious financial hardship, and/or if it could adversely impact the stability of, or confidence in, the UK financial system.

4.5 We will liaise with the Bank of England before deciding on any claim that imposing a penalty on a participant could adversely impact the stability of, or confidence in, the UK financial system, or when we consider that such a risk exists.

4.6 Where a subject claims that paying the penalty imposed by us will cause it serious financial hardship and/or could adversely impact the stability of, or confidence in, the UK financial system, we will consider a reduction only if:

- the subject provides verifiable evidence to support their claim in a full, frank and timely manner
- the subject cooperates fully in answering any questions we ask about its financial position

4.7 The onus is on the subject to satisfy us that payment of the penalty will cause it serious financial hardship and/or that it could adversely impact the stability of, or confidence in, the UK financial system.

4.8 We may decide that a compliance failure is so serious it would **not** be appropriate to reduce the penalty, even where the subject can demonstrate that payment would cause it serious financial hardship. We will consider all the circumstances in determining whether this course of action is appropriate, including:

- Whether an individual who can control or has material influence over the subject's management or operation (an 'Individual Controller'):
  - directly derived a financial benefit from the compliance failure and, if so, its extent
  - acted fraudulently or dishonestly with a view to personal gain
- Whether previous action by us in respect of similar compliance failures has failed to improve industry standards.

- Whether a subject or Individual Controller has spent money, dissipated assets or otherwise used financial structures in anticipation of enforcement action by us or another relevant regulator/authority with the aim of frustrating or limiting the impact of enforcement action taken by us or other regulators/authorities.

5 Settlement discount

5.1 Any settlement discount does not apply to disgorgement of any financial benefit derived directly from the compliance failure (see paragraph 3.7 to 3.9).

5.2 Subjects may be prepared to agree the amount of any financial penalty and other conditions which we seek to impose by way of such action.

5.3 We recognise the benefits of such agreements, which can potentially secure earlier protection for the service-users[10] or parties that the PSRs 2017 and IFR are intended to benefit. They can also save both us and the subject the costs of contesting the financial penalty.

5.4 We may therefore reduce the penalty we might otherwise have imposed to reflect the timing of any settlement agreement.

5.5 Where we think it is appropriate to do so, we will discuss the amount of the penalty with the subject with the aim of reaching such an agreement. The penalty will be calculated using the principles set out above.

5.6 This starting figure (resulting from Steps 1, 2 and 3) will take no account of the existence of the settlement discount.

5.7 Where we decide to apply a settlement discount, the penalty will be calculated as follows:

1. **Starting figure:** the sum reached after following Steps 1, 2 and 3, excluding disgorgement
2. **Settlement discount**: a percentage reduction of the starting figure
3. **Penalty to pay**: the starting figure – penalty discount + disgorgement

5.8 The settlement discount cannot be more than 30%.

5.9 There may be occasions when the subject considers that it would have been possible to reach an earlier settlement, and accordingly the penalty should be reduced by a greater percentage. For example, we may decide not to pursue enforcement action in respect of all the acts or omissions which we previously alleged were part of the compliance failure. The subject could argue that if our action had begun on this basis, it would have agreed an appropriate penalty at an earlier stage and should therefore benefit from a greater discount. Equally, we may consider that greater openness from the subject could have resulted in an earlier settlement.

5.10 This type of argument may compromise the value of early settlement and incentivise subjects to raise disputes as to when an agreement might have been possible. Therefore, we will not normally reduce a penalty on the basis that settlement could have been achieved earlier.

10 Service users are defined by Section 52 FSBRA.

5.11 However, in exceptional cases we may accept that there has been a substantial change in the nature or seriousness of our action against the subject concerned. In this case, if we are satisfied that an earlier agreement would have been possible if we had commenced our action on a different basis, we may decide that the settlement discount should reflect an agreement at the earlier stage.

5.12 In cases where we apply a settlement discount to the penalty, we will set out the fact of settlement and the level of the discount in the final decision notice.

6 Apportionment

6.1 If we are proposing to impose a financial penalty on a subject for two or more separate compliance failures, we will consider whether it is appropriate to identify how the penalty is apportioned between them in our warning and final decision notices. Apportionment will not, however, generally be appropriate in other cases.

7 Payment of financial penalties

7.1 Financial penalties will be paid to the Treasury after deducting our enforcement costs.[11]

7.2 Financial penalties must be paid within the period (usually 14 calendar days) stated on the final decision notice.

7.3 Our policy on reducing a penalty to avoid causing a subject serious financial hardship is set out in paragraphs 4.1 to 4.8.

7.4 We will consider agreeing to defer the due date for payment of a penalty or accepting payment by instalments if, for example, the subject requires time to raise funds so it can pay the full penalty within a reasonable period. Each case will be treated on its facts, and we will not grant extra time where the subject could or should have organised its business affairs to allow it to pay on time.

7.5 We will remain vigilant to any attempt by subjects to avoid or pass on the financial consequences of any penalty to third parties in circumstances where it would be unlawful or inappropriate to do so.[12] In this context, it should be noted that the Bank of England is not a 'participant' within the meaning of section 42 FSBRA, so subjects should not attempt to pass on any liability for penalties to the Bank of England, whether directly or indirectly as a cost recoverable from the Bank.

7.6 Where appropriate, we will consider using our applicable powers to deprive a subject of the ability to pass on the financial burden of a penalty to a third party.

7.7 In meeting their obligation to pay a penalty, subjects must satisfy themselves that their arrangements are consistent with public policy.

7.8 For example, subjects who are also subject to Chapter 6 of the General Provisions module of the FCA Handbook (GEN)[13] must follow rules prohibiting them from entering into, arranging, claiming on or making a payment under a contract of insurance that is intended to have, or has, the effect of indemnifying a relevant party against a financial penalty.

7.9 We expect subjects who are subject to GEN to comply with those rules as relevant to the payment of penalties we impose. We would typically expect subjects who are not subject to GEN to comply with these general principles.

11 Payment of penalties to HM Treasury less enforcement costs is facilitated by Schedule 4 FSBRA, paragraph 10(1) Regulation 136(3)(d) of the PSRs 2017 and Regulation 15(3)(e) of the PCIFRs (as appropriate, depending on the type of compliance failure).

12 Including, for example, any attempt by a subject to avoid liability for a penalty by withdrawing from participation in a payment system or card payment system after a penalty is imposed or when a penalty appears reasonably likely.

13 See https://www.handbook.fca.org.uk/handbook/GEN/6/?view=chapter

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