

FINANCIAL SERVICES (BANKING REFORM) ACT 2013

EXPLANATORY NOTES

COMMENTARY

Part 5 – Regulation of Payment Systems

Overview

Section 39: Overview

229. *Section 39* introduces Part 5 of the Act, which establishes a regulatory regime for payment systems in the United Kingdom.

The Payment Systems Regulator

Section 40 and Schedule 4: The Payment Systems Regulator

230. *Section 40* requires the FCA to establish the Payment Systems Regulator and to take such steps as are necessary to ensure that the Payment Systems Regulator can exercise its functions. *Subsection (4)* allows the FCA to provide staff and services to the Payment Systems Regulator. *Schedule 4*, amongst other things, includes provision for the constitution of, appointment to and removal from the board of the Payment Systems Regulator; provides for how it is to be funded; and provides for arrangements for the delegation of its functions, including to the FCA.

“Payment system” etc

Section 41: Meaning of “payment system”

231. *Section 41* defines a payment system, and gives the Treasury power by order to add, vary or remove descriptions of arrangements which are excluded from the definition.

Section 42: Participants in payment systems etc

232. *Section 42* defines three classes of persons to be regarded as “participants” in a payment system: “operators”, “infrastructure providers” and “payment service providers”. *Subsection (6)* describes what it means for a payment service provider to have “direct access” to a payment system. *Subsection (7)* makes provision for what the term “participation” may include in relation to operators of, and payment service providers with direct access to, payment systems. *Subsection (8)* ensures that the Bank of England would not be regarded as any category of participant.

Designation as a regulated payment system

Sections 43 to 48: Designation orders

233. *Section 43* gives the Treasury a power to issue a “designation order” to designate a payment system, to bring that system into the scope of regulation by the Payment Systems Regulator. *Sections 44 to 48* set out the procedural requirements for making, amending and revoking such orders. Orders can only be made where the Treasury are satisfied that certain criteria are met in respect of the system, and the Treasury are required to take into account the matters set out in *subsection (2)* of *section 44* when assessing whether the criteria were met, and they must consult the Payment Systems Regulator and the operator before making, amending or revoking any designation order (see *sections 45, 46 and 47*). The Treasury have a duty to consider any request by the operator of a regulated payment system for the amendment or revocation of its designation order (*sections 46(3) and 47(4)*). The Treasury is also required to publish any designation order, any amended designation order and any revocation of a designation order (*section 48*).

General duties of Regulator

Sections 49 to 53: Duties of Regulator

234. *Section 49* establishes the general duties and objectives of the Payment Systems Regulator, which is required, so far as is reasonably possible, to act in a way that advances one or more of its “payment systems objectives”: the “competition objective”, the “innovation objective” and the “service-user objective”. *Subsection (3)* sets out the matters which the Payment Systems Regulator is required to take into account in discharging its “general functions”. *Sections 50, 51 and 52* provide definitions for the “competition objective”, the “innovation objective” and the “service-user objective”. *Section 53* sets out the regulatory principles to which the Payment Systems Regulator is required to have regard.

Regulatory and competition functions

Sections 54 to 58: Powers of Regulator

235. *Sections 54 to 58* set out the regulatory powers of the Payment Systems Regulator. The Payment Systems Regulator has the following powers: to give directions to participants in regulated payment systems (*section 54*); to impose certain requirements on the operator of a regulated payment system concerning the rules of the system (*section 55*); to order the provision of access to a regulated payment system (*section 56*); to vary the fees and charges payable under, and other terms and conditions of, an agreement concerning access to a regulated payment system (*section 57*); and to require the disposal of an interest in the operator of a regulated payment system (*section 58*). The powers to order the provision of access to a payment system and to vary agreements can only be exercised where an application has been received by the Payment Systems Regulator. The power to order the disposal of an interest in a regulated payment system can only be exercised if the Payment Systems Regulator is satisfied that, if the power were not exercised, it is likely that there would be a restriction or distortion of competition in the market for payment systems or for services they provide (*section 58(2)*). The exercise of this power is subject to the consent of the Treasury (*section 58(3)*).

Sections 59: The Regulator’s functions under Part 4 of the Enterprise Act 2002

236. *Section 59* confers on the Payment Systems Regulator certain of the competition functions of the CMA under Part 4 of EA02, so far as those functions relate to participation in payment systems. The Payment Systems Regulator will only have a market study function concurrently exercisable with the CMA (whose Board exercises

this function); the Payment Systems Regulator does not have the concurrent function of conducting market investigations, which remains solely that of the CMA (which convenes a group to conduct such investigations). The Payment Systems Regulator will be able to conduct a market study the purpose of which is, amongst other things, to consider the extent to which a matter in relation to participation in payment systems used to provide services in the United Kingdom has or may have effects adverse on the interests of consumers. Having conducted a market study, the Payment Systems Regulator can then refer the relevant market to the CMA which has the power to conduct a market investigation and, if necessary, use its powers in Part 4 of the EA02 to remedy any distortion or restriction of competition that it finds in the market. Certain functions of the CMA (relating to the maintenance of registers and publishing of guidance) contained in Part 4 of EA02 are excluded from those that the Payment Systems Regulator may exercise concurrently.

Section 60: Restrictions on exercise of functions under Part 4 of the Enterprise Act 2002

237. *Section 60* imposes a requirement on the CMA and the Payment Systems Regulator to consult each other before exercising any of their concurrently exercisable competition functions. *Subsection (2)* prevents one exercising functions in relation to a matter if the other had already exercised those functions in relation to that matter. *Subsections (4) and (5)* make similar provisions for co-ordination between the Payment Systems Regulator and the FCA, which also have concurrent competition functions under Part 4 of EA02 as a consequence of *sections 129 and Schedule 8* (which are explained separately below).

Section 61: The Regulator's functions under the Competition Act 1998

238. *Section 61* confers on the Payment Systems Regulator certain competition functions under Part 1 of CA98. Such functions are exercisable concurrently by the Payment Systems Regulator and the CMA. Those functions concern investigations of, and powers to address, restrictions and distortions of competition, so far as the agreements, decisions, concerted practices or conduct in question relate to participation in payment systems. *Subsection (3)*, in conjunction with *subsection (5)*, excludes certain functions of the CMA contained in Part 1 of CA98 from those that the Payment Systems Regulator can exercise concurrently.

Section 62: Duty to consider exercise of powers under Competition Act 1998

239. *Section 62* imposes a requirement on the Payment Systems Regulator, before exercising any of the powers mentioned in *subsection (2)*, to consider whether it would be more appropriate to take action under its new powers in CA98. *Subsection (3)* prohibits the Payment Systems Regulator from exercising a power mentioned in *subsection (2)* if it considers that it would be more appropriate to proceed under CA98.

Sections 63 to 67: The Regulator's competition powers

240. *Sections 63 to 67* make further provision concerning the Payment Systems Regulator's competition powers, including requiring it to provide relevant information and assistance to a CMA group carrying out a market investigation in response to a market investigation reference made by the Payment Systems Regulator. It is also required to keep under review the market for payment systems and the markets for services provided by payment systems. *Subsection (1)* of *section 67* gives the Payment Systems Regulator the power to apply to the court to make a disqualification order against a person who is a director of a company which has committed a breach of competition law. *Subsection (2)* has the effect of ensuring that the Payment Systems Regulator is a National Competition Authority for the purposes of EU competition law. *Subsection (3)* amends section 136 of EA02, to ensure that the Payment Systems Regulator would receive a copy of a CMA report where the CMA Board had made a market investigation

reference, for consideration by a CMA group, concerning participation in payment systems. *Subsection (4)* amends section 52 of the Enterprise and Regulatory Reform Act 2013 so that the power for the Secretary of State to remove from a regulator any of its concurrent competition functions would extend to the Payment Systems Regulator's concurrent competition functions. *Subsection (5)* ensures that the CMA is required to report on the exercise by the Payment Systems Regulator of its concurrent competition powers.

Complaints

Sections 68 to 70: Complaints

241. *Sections 68 to 70* make provision for complaints to be made to the Payment Systems Regulator by representative bodies designated by the Treasury, where it appears that a matter concerning payment systems is significantly damaging the interests of payments system service users.

Sections 71 to 79 and Schedule 5: Enforcement and appeals

242. *Sections 71 to 75* include provision for the enforcement of decisions made by the Payment Systems Regulator. The Payment Systems Regulator has the power to require a participant in a regulated payment system to pay a penalty in respect of a compliance failure (as defined in *section 71*) and can publish details of compliance failures and penalties it imposes. Before imposing a penalty or publishing details of a compliance failure, the Payment Systems Regulator must issue a warning notice to the person concerned, provide at least 21 days for representations to be made, consider any representations received and give notice in writing stating whether or not it intends to impose the sanction (*section 74*). The Payment Systems Regulator can apply to the court to issue injunctions to prevent the occurrence or continuation of a compliance failure or to order a participant who has committed a compliance failure to take steps to remedy it (*section 75*).
243. *Sections 76 to 79 and Schedule 5* make provision about appeals against decisions of the Payment Systems Regulator. *Section 76* provides that certain decisions are classed as "CAT-appealable decisions" and have to be appealed to the CAT along with appeals concerning penalties. Other decisions qualify as "CMA-appealable decisions" and have to be appealed to the CMA. Appeals to the CMA are only possible where the CMA has granted permission. *Section 77 and 78* make provision about the procedure for appeals to the CAT, and *Section 79 and Schedule 5* make provision about the procedure for appeals to the CMA, including the power of the CMA to suspend the decision in question pending the outcome of the appeal, and the CMA's powers to obtain information relevant to the determination of the appeal. Appeals of CAT-appealable decisions are heard to a judicial review standard. Appeals against a CMA-appealable decision can result, if the CMA decided to quash whole or part of a decision, in the CMA substituting its own decision for that of the Payment Systems Regulator.

Section 80: Enforcement of requirement to dispose of interest in payment system

244. *Section 80* provides for the enforcement of decisions of the Payment Systems Regulator to require a disposal of an interest in the operator of a payment system.

Sections 81 to 90: Information and investigation powers

245. *Sections 81 to 83* confer information and investigation powers. The Payment Systems Regulator has the power to require the provision of information or documents which it thinks would help the Treasury in determining whether to designate a payment system, or which the Payment Systems Regulator requires in performing its functions under Part 5 of the Act (*section 81*). The Payment Systems Regulator also has the power to require a participant in a regulated payment system to provide a report on any matter relating to

the person's participation in the system, or to appoint a person other than a participant to provide this report (*section 82*). The Payment Systems Regulator can appoint one or more competent persons to investigate any aspect of the business of any participant in a regulated payment system, if the Payment Systems Regulator thinks that it is desirable to do so to advance any of its payment systems objectives. The Payment Systems Regulator can also appoint one or more competent persons to investigate circumstances that suggest a compliance failure may have taken place (*section 83*).

246. *Sections 84 to 87* make general provision regarding notification requirements when a person is appointed to conduct an investigation, as well as provision conferring on investigators the power to require certain persons to give evidence, and provision concerning the admissibility as evidence of information provided pursuant to information requirements imposed by an investigator under the powers contained in *sections 85 and 86*.
247. *Sections 88 to 90* provide for the enforcement of requirements to provide information or documents to the Payment Systems Regulator or any investigator. Under these provisions, a justice of the peace, if satisfied that certain conditions are met, may issue a warrant to permit the entry onto premises of a person who has failed to provide information required by the Payment Systems Regulator or an investigator (*section 88*). *Section 88* sets out the powers of a constable under a warrant and provides that the warrant may authorise persons accompanying a constable to exercise these powers under the supervision of a constable. *Section 90* provides that the court may in certain circumstances treat failures to comply with information requirements as contempt of court. Certain activities are criminalised, including the intentional falsification, concealment or destruction of relevant information, the intentional provision of false or misleading information and the obstruction of a person acting under a warrant.

Sections 91 to 95: Disclosure of information

248. *Sections 91 to 95* make provision about the treatment of confidential information by the Payment Systems Regulator and others. *Section 91* imposes a restriction on the disclosure of confidential information without the consent of the person who provided it, or the person to whom it related, by the Payment Systems Regulator, the FCA, their employees and service providers and certain others (each a "primary recipient"), as well as any person who had obtained the confidential information directly or indirectly from a primary recipient. Provision is made for what is and is not to be considered "confidential information" and to ensure that the restriction does not apply to information received by a primary recipient in connection with the discharge of the Payment Systems Regulator's concurrent competition functions. Instead, the provisions contained in Part 9 of the Enterprise Act 2002, which deals with the disclosure of specified information, apply.
249. *Section 92* provides that disclosure of confidential information is permitted if it is for the purpose of facilitating the carrying out of a public function and is permitted by regulations made by the Treasury. A definition of "public functions" is included, and *subsections (3) to (4)* set out the matters for which Treasury regulations made under this power could make provision.
250. The restrictions on disclosing confidential information are enforced by making it a criminal offence by *section 93* to disclose confidential information in contravention of the restriction and, where information has been disclosed to a person in accordance with regulations made by the Treasury, for that person to use the information in contravention of any provision of those regulations.
251. *Section 94* restricts the disclosure by the Payment Systems Regulator or the the FCA to any person of "specially protected information" (defined in *subsection (3)*) received from the Bank of England. *Section 94* also sets out the circumstances in which disclosure of such information is not subject to the restriction.

252. *Section 95* amends section 246 of the Banking Act 2009 to allow the Bank of England to disclose restricted information to the Payment Systems Regulator.

Section 96: Guidance

253. *Section 96* enables the Payment Systems Regulator to issue guidance consisting of such information and advice as it considers appropriate with respect to the matters set out in the section.

Section 97: Reports

254. *Section 97* gives the Payment Systems Regulator the power to prepare and publish a report into any matter relevant to the exercise of its functions under Part 5 of the Act where it considers that it is desirable to do so in order to advance any of its payment systems objectives.

Sections 98 to 102: Relationships between the regulators

255. *Sections 98 to 102* make provision concerning the relationship between the Payment Systems Regulator and other regulators. Under *section 98* the Payment Systems Regulator, the Bank of England, the FCA and the PRA are required to co-ordinate the exercise of their relevant functions (as defined by *subsection (5)* of *section 98*). The duty to co-ordinate only applies to the extent that compliance is compatible with the advancement by each regulator of any of its objectives and does not impose a burden on the regulators that is disproportionate to the benefits of compliance. Under *section 99*, the Payment Systems Regulator, the Bank of England, the FCA and the PRA are obliged to draw up a memorandum of understanding which describes their respective roles and how they intend to comply with the duty to co-ordinate the exercise of their functions. The Bank, the FCA and the PRA each have a power (set out in *sections 100, 101 and 102* respectively), where certain conditions are satisfied, to give the Payment Systems Regulator a direction not to exercise a power or not to exercise it in a specified manner.

Sections 103 to 107: Consultation and accountability

256. *Sections 103 to 107* impose consultation obligations on the Payment Systems Regulator, as well as providing for its accountability and oversight of its activities. Under *section 103* the Payment Systems Regulator is required to make and maintain effective arrangements for consulting relevant persons (that is, participants in regulated payment systems and those who use or are likely to use services provided by those systems) about the extent to which the Payment Systems Regulator's general policies and practices are consistent with its general duties and how its payment systems objectives may be best achieved. Under *section 104*, where the Payment Systems Regulator is considering imposing a generally applicable requirement (that is, a general direction under *section 54* or a generally-imposed requirement under *section 55*) the Payment Systems Regulator is under a duty to consult the Bank of England, the FCA and the PRA. After doing so, the Payments Systems Regulator has to publish a draft of the proposed requirement, publish a cost-benefit analysis together with an explanation of the purpose of the proposed requirement, and have regard to any representations made. *Subsection (6)* provides for the steps the Payment Systems Regulator has to take if the direction or requirement it intends to impose differs significantly from the draft it published.
257. *Section 105* amends the Financial Services Act 2012 to establish a further set of circumstances in which the Treasury may arrange independent inquiries: to inquire into a failure in the system of regulation of payment systems by the Payment Systems Regulator. *Section 106* further amends that Act to impose a duty on the Payment Systems Regulator to investigate possible regulatory failures and report to the Treasury accordingly. It is also provided that the Payment Systems Regulator is required to

carry out such an investigation where it appears to the Treasury that the conditions for initiating an investigation are satisfied.

258. *Section 107* ensures that the CMA could advise the Payment Systems Regulator if the CMA is of the opinion that the Payment Systems Regulator's regulatory activities (or regulatory omissions) may cause or contribute to the prevention, restriction or distortion of competition in connection with the supply or acquisition of goods or services in the UK or in part of the UK.

Sections 108 to 110: Miscellaneous and supplemental

259. *Sections 108 to 110* contain miscellaneous and supplemental provision. The purpose of *section 108* is to ensure that the Payment Systems Regulator's powers could not be exercised incompatibly with EU law and to avoid the powers themselves consequently being held to be incompatible with EU law.
260. The Payment Services Regulations 2009 (the "2009 Regulations") implement Directive 2007/64/EC of the European Parliament and of the Council of 13th November 2007 on payment services in the internal market (the "Directive"). Under Article 28(1) of the Directive, Member States are required to ensure that "the rules on access of authorised or registered payment service providers to payment systems are objective, non-discriminatory and proportionate...". There is also a prohibition on payment systems imposing on payment service providers, on payment service users or on other payment systems certain restrictive rules governing access to and participation in payment systems. The references in Article 28(1) to "payment systems" do not, however, include all payment systems. For example, those systems designated under Directive 98/26/EC of the European Parliament and of the Council of 19th May 1998 on settlement finality in payment and securities settlement systems are excluded from the scope of Article 28(1).
261. Part 8 of the 2009 Regulations implements Article 28 of the Directive. Regulation 97 of the 2009 Regulations prohibits restrictive rules or conditions governing access to, or participation in, a payment system (other than those to which Article 28(1) does not apply) by "authorised payment institutions", "EEA authorised payment institutions" and "small payment institutions", as defined in the 2009 Regulations.
262. The Directive is a "maximum harmonisation" measure: Member States are not permitted under EU law to adopt any measures which go beyond the measures contained in the Directive. If the Payment Systems Regulator were able to exercise any power for the purposes of enabling a "relevant person" (that is, authorised payment institutions, EEA authorised payment institutions and small payment institutions) to obtain access to, or otherwise participate in, a payment system to which Part 8 of the 2009 Regulations does not apply, that would mean that the maximum harmonisation principle would be contravened. *Section 108* serves to prevent the possibility of such a contravention and therefore to ensure the powers themselves are compatible with the maximum harmonisation principle.
263. *Section 109* ensures that the provisions in Schedules 1ZA and 1ZB to FSMA which exempt from liability in damages the FCA, PRA and their employees for anything done or omitted in the discharge, or purported discharge, of the FCA's and the PRA's functions extend to the FCA's and PRA's functions under Part 5 of the Act.
264. *Section 110* contains the interpretative provisions for Part 5 of the Act.