
STATUTORY INSTRUMENTS

2009 No. 209

The Payment Services Regulations 2009

PART 8

ACCESS TO PAYMENT SYSTEMS

General

Application of Part 8

96.—(1) This Part does not apply to the following kinds of payment systems—

- (a) a designated system;
- (b) a payment system consisting solely of payment service providers belonging to the same group where one of the payment service providers enjoys effective control over the others;
- (c) a payment system where the sole payment service provider (whether as a single entity or a group)—
 - (i) acts or is able to act as the payment service provider for both the payer and the payee and is solely responsible for the management of the system; and
 - (ii) licenses other payment service providers to participate in the system subject to their having no right to negotiate fees in respect of the system between or amongst themselves (although they may establish their own pricing in relation to payers and payees).

(2) In paragraph (1)(a), “designated system” means a system which is declared by a designation order for the time being in force under regulation 4 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(1) to be a designated system for the purposes of those Regulations.

Prohibition on restrictive rules on access to payment systems

97.—(1) Rules or conditions governing access to, or participation in, a payment system by authorised payment institutions, EEA authorised payment institutions and small payment institutions must—

- (a) be objective, proportionate and non-discriminatory; and
- (b) not prevent, restrict or inhibit access or participation more than is necessary to—
 - (i) safeguard against specific risks such as settlement risk, operational risk or business risk; or
 - (ii) protect the financial and operational stability of the payment system.

(2) Paragraph (1) applies only to such small payment institutions as are legal persons.

(3) Rules or conditions governing access to, or participation in, a payment system which, in respect of payment service providers, payment service users or other payment systems—

- (a) restrict effective participation in other payment systems;
- (b) discriminate (whether directly or indirectly) between—
 - (i) different authorised payment institutions, or
 - (ii) different small payment institutions,
 in relation to the rights, obligations or entitlements of participants in the payment system; or
- (c) impose any restrictions on the basis that a person is not of a particular institutional status, are prohibited.

Supervision and enforcement

Power of OFT to investigate

98.—(1) The OFT may conduct an investigation where there are reasonable grounds for suspecting that any rule or condition governing access to, or participation in, a payment system contravenes regulation 97(1) or (3).

(2) Where the investigation relates to a possible breach of regulation 97(1)(b)(ii), the OFT must consult the Bank of England and the Authority.

OFT power to require information

99.—(1) For the purposes of an investigation under regulation 98 the OFT may require any person—

- (a) to produce to it or to a person appointed by it, at a specified time and place, any specified document, or
- (b) to provide to it or to a person appointed by it, at a specified time and place, any specified information,

which the OFT considers relates to any matter relevant to the investigation.

(2) The power conferred by paragraph (1) is to be exercised by a notice indicating the subject matter and purpose of the investigation.

(3) Information required to be provided under paragraph (1) must be provided in the specified manner and form, or, if that is not possible, in the nearest equivalent manner and form.

(4) The power conferred by paragraph (1) to require a person to produce a document includes power—

- (a) to require them to provide an explanation of the document, or
- (b) if the document is not produced, to require them to state, to the best of their knowledge and belief, where it is.

(5) In this regulation—

“document” includes information recorded in any form;

“information” includes estimates and forecasts;

“specified” means—

- (a) specified, or described, in the notice referred to in paragraph (2), or
- (b) falling within a category which is specified, or described, in such notice.

Failure to comply with information requirement

100.—(1) If, on an application made by the OFT, it appears to the court that a person (the “information defaulter”) has failed to do something that they were required to do under regulation 99, the court may make an order under this regulation.

- (2) An order under this regulation may require the information defaulter—
 - (a) to do the thing that they failed to do within such period as may be specified in the order;
 - (b) otherwise to take such steps to remedy the consequence of the failure as may be so specified.
- (3) In this regulation, “the court” means—
 - (a) in England and Wales and Northern Ireland, the High Court or the county court;
 - (b) in Scotland, the Court of Session or the sheriff court.

Privileged communications

101.—(1) A person is not required under regulation 99 to produce or disclose a privileged communication.

- (2) In paragraph (1) “privileged communication” means a communication—
 - (a) between a professional legal adviser and their client, or
 - (b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,

which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege.

- (3) In the application of this regulation to Scotland the reference in paragraph (2) to—
 - (a) proceedings in the High Court is to be read as a reference to legal proceedings generally; and
 - (b) an entitlement on grounds of legal professional privilege is to be read as a reference to an entitlement on the grounds of confidentiality of communications.

Notice of OFT decision

102. Before the OFT, as the result of an investigation under regulation 98, makes a decision that any rules or conditions governing access to, or participation in, a payment system contravene regulation 97(1) or (3), the OFT must—

- (a) give notice to the person (or persons) who the OFT considers are responsible for the contravention, and
- (b) give that person (or those persons) an opportunity to make representations.

Publication of OFT decision

103. Where the OFT makes a decision after an investigation under regulation 98, the OFT must publish its decision, together with its reasons for making it.

Enforcement of decisions

104.—(1) If the OFT makes a decision that any rules or conditions governing access to, or participation in, a payment system contravene regulation 97(1) or (3), the OFT may give such directions as the OFT considers appropriate to such person or persons as it considers appropriate.

- (2) A direction under paragraph (1) may (in particular)—

- (a) require the person concerned to change any rule or condition so that it no longer contravenes regulation 97(1) or (3); and
 - (b) relate to the conduct of the person in implementing any rule or condition.
- (3) A direction under paragraph (1) must be given in writing.
- (4) If a person fails, without reasonable excuse, to comply with a direction under paragraph (1), the OFT may apply to the High Court (or, in Scotland, the Court of Session) for an order requiring that person to comply with the direction within a time specified in the order.
- (5) An order under paragraph (4) may provide for all of the costs of, or incidental to, the application for the order to be borne by the person in default.

Power of OFT to impose financial penalties

- 105.**—(1) Where the OFT is satisfied that any rules or conditions governing access to, or participation in, a payment system contravene regulation 97(1) or (3), the OFT may impose a penalty of such amount as it considers appropriate on such persons as it considers appropriate.
- (2) The OFT may impose a penalty on a person under paragraph (1) only if the OFT is satisfied that the infringement has been committed intentionally or negligently by that person.
- (3) Notice of a penalty under this regulation must—
- (a) be in writing; and
 - (b) specify the date before which the penalty is required to be paid.
- (4) The date specified must not be earlier than the end of the period within which an appeal against the notice may be brought under regulation 106.
- (5) Any sums received by the OFT under this regulation are to be paid into the Consolidated Fund.

Miscellaneous

Appeal to the Competition Appeal Tribunal

- 106.**—(1) A person may appeal to the Competition Appeal Tribunal (2) from a decision by the OFT to give a direction under regulation 104(1) to that person or to impose a penalty under regulation 105 on that person.
- (2) In determining an appeal under paragraph (1) the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
- (3) Sections 14 (constitution of tribunal) and 15 (tribunal rules) of the Enterprise Act 2002 apply in respect of appeals to the Competition Appeal Tribunal under paragraph (1) as they apply in respect of appeals to the Competition Appeal Tribunal under that Act.

Disclosure of information by OFT

- 107.** Subject to regulation 119(2) and (3), Part 9 of the Enterprise Act 2002 (information) applies in respect of information which comes to the OFT by virtue of these Regulations as it applies in respect of information which is specified information for the purposes of Part 9.

Defamation

- 108.** For the purposes of the law relating to defamation, absolute privilege attaches to any decision made or notice given by the OFT in the exercise of any of its functions under this Part.

(2) Established under section 12 of the Enterprise Act 2002 (c.40).

Guidance

109.—(1) The OFT may give guidance consisting of such information and advice as it considers appropriate with respect to the exercise of its functions under this Part.

(2) The OFT may—

- (a) publish its guidance;
- (b) if it gives guidance in response to a request made by any person, make a reasonable charge for that guidance.