STATUTORY INSTRUMENTS

2017 No. 752

The Payment Services Regulations 2017

PART 9

The Financial Conduct Authority

Functions of the FCA

106.—(1) The FCA is designated as the competent authority for the purposes of the payment services directive, except as set out in paragraph (2), and has the functions and powers conferred on it by these Regulations.

(2) The FCA is not designated as the competent authority for the purposes of the following provisions of the payment services directive—

(a) the condition in Article 3(o) (transposed in regulation 61) (information on ATM withdrawal charges);

(b) Article 35 (transposed in regulations 102 to 104) (access to payment systems);

(c) in Article 62, paragraph 4 and the second sentence of paragraph 3 (restrictions on payee charging for use of certain payment instruments).

(3) In determining the general policy and principles by reference to which it performs particular functions under these Regulations, and to the extent appropriate taking into account the FCA's designation under paragraph (1), the FCA must have regard to—

(a) the need to use its resources in the most efficient and economic way;

(b) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(c) the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term;

(d) the general principle that consumers should take responsibility for their own decisions;

(e) the responsibilities of those who manage the affairs of persons subject to requirements imposed by or under these Regulations, including those affecting consumers, in relation to compliance with those requirements;

(f) the desirability where appropriate of the FCA exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons subject to requirements imposed by or under these Regulations;

(g) the desirability in appropriate cases of the FCA publishing information in relation to persons on whom requirements are imposed by or under these Regulations;

(h) the principle that the FCA should exercise its functions as transparently as possible.

Application of this Part to requirements of directly applicable EU regulations and FCA rules

107. For the purposes of this Part, including the legislation applied by regulation 122 and Schedule 6, but with the exception of regulation 119 and Schedule 5 (credit agreements)—

(a) the requirements imposed on payment service providers by Articles 8(2), 9(2) and 12 of the interchange fee regulation are to be treated as if they were included in Part 5 of these Regulations (requirements for providers of certain services which are not payment services);

(b) the requirements imposed on payment service providers by Articles 8(5) and (6), 9(1), 10(1) and (5) and 11 of the interchange fee regulation are to be treated as if they were included in Part 6 of these Regulations (information requirements for payment services); and

(c) requirements imposed on payment service providers by or under directly applicable EU regulations adopted under the payment services directive, or by rules made by the FCA pursuant to paragraph 3 of Schedule 7, are to be treated as if they were imposed by or under Part 7 of these Regulations (rights and obligations in relation to the provision of payment services).

Supervision and enforcement

Monitoring and enforcement

108.—(1) The FCA must maintain arrangements designed to enable it to determine whether—

(a) persons on whom requirements are imposed by or under Parts 2 to 7 or regulation 105 (access to bank accounts) are complying with them;

(b) there has been any contravention of regulation 138(1) (prohibition on provision of payment services by persons other than payment service providers), 139(1) (false claims to be a payment service provider or exempt) or 142(1)(a) or (2) (misleading a regulator).

(2) The arrangements referred to in paragraph (1) may provide for functions to be performed on behalf of the FCA by any body or person who is, in its opinion, competent to perform them.

(3) The FCA must also maintain arrangements for enforcing the provisions of these Regulations.

(4) Paragraph (2) does not affect the FCA's duty under paragraph (1).

Reporting requirements

109.—(1) A person must give the FCA such information as the FCA may direct in respect of its provision of payment services or its compliance with requirements imposed by or under Parts 2 to 7 or regulation 105 (access to bank accounts).

(2) Information required under this regulation must be given at such times and in such form, and verified in such manner, as the FCA may direct.

(3) A direction under paragraph (2) must specify the purpose for which the information is required, as appropriate, and the time within which the information is to be given.

(4) Each authorised payment institution, small payment institution and registered account information service provider, and each credit institution and electronic money institution which is authorised in the United Kingdom and provides payment services, must provide to the FCA statistical data on fraud relating to different means of payment.

(5) Such data must be provided at least once per year, and must be provided in such form as the FCA may direct.

(6) The FCA must provide such data in an aggregated form to the European Banking Authority and the European Central Bank.

Public censure

110. If the FCA considers that a person has contravened a requirement imposed on them by or under these Regulations, the FCA may publish a statement to that effect.

Financial penalties

111.—(1) The FCA may impose a penalty of such amount as it considers appropriate on—

(a) a payment service provider who has contravened a requirement imposed on them by or under these Regulations; or

(b) a person who has contravened regulation 138(1) (prohibition on provision of payment services by persons other than payment service providers), 139(1) (false claims to be a payment service provider or exempt) or 142(1)(a) or (2) (misleading a regulator).

(2) The FCA may not in respect of any contravention both require a person to pay a penalty under this regulation and cancel their authorisation as a payment institution or their registration as a small payment institution or account information service provider (as the case may be).

(3) A penalty under this regulation is a debt due from that person to the FCA, and is recoverable accordingly.

Proposal to take disciplinary measures

112.—(1) Where the FCA proposes to publish a statement under regulation 110 or to impose a penalty under regulation 111, it must give the person concerned a warning notice.

(2) The warning notice must set out the terms of the proposed statement or state the amount of the proposed penalty.

(3) If, having considered any representations made in response to the warning notice, the FCA decides to publish a statement under regulation 110 or to impose a penalty under regulation 111, it must without delay give the person concerned a decision notice.

(4) The decision notice must set out the terms of the statement or state the amount of the penalty.

(5) If the FCA decides to publish a statement under regulation 110 or impose a penalty on a person under regulation 111, the person concerned may refer the matter to the Upper Tribunal.

(6) Sections 210 (statements of policy) and 211 (statements of policy: procedure) of the 2000 Act apply in respect of the imposition of penalties under regulation 111 and the amount of such penalties as they apply in respect of the imposition of penalties under Part 14 of the 2000 Act (disciplinary measures) and the amount of penalties under that Part of that Act.

(7) After a statement under regulation 110 is published, the FCA must send a copy of it to the person concerned and to any person to whom a copy of the decision notice was given under section 393(4) of the 2000 Act (third party rights) (as applied by paragraph 10 of Schedule 6 to these Regulations).

Injunctions

113.—(1) If, on the application of the FCA, the court is satisfied—

(a) that there is a reasonable likelihood that any person will contravene a requirement imposed by or under these Regulations; or

(b) that any person has contravened such a requirement and that there is a reasonable likelihood that the contravention will continue or be repeated,

the court may make an order restraining (or in Scotland an interdict prohibiting) the contravention.

(2) If, on the application of the FCA, the court is satisfied—

(a) that any person has contravened a requirement imposed by or under these Regulations; and

(b) that there are steps which could be taken for remedying the contravention,

the court may make an order requiring that person, and any other person who appears to have been knowingly concerned in the contravention, to take such steps as the court may direct to remedy it.

(3) If, on the application of the FCA, the court is satisfied that any person may have—

(a) contravened a requirement imposed by or under these Regulations; or

(b) been knowingly concerned in the contravention of such a requirement,

it may make an order restraining (or in Scotland an interdict prohibiting) them from disposing of, or otherwise dealing with, any assets of theirs which it is satisfied they are reasonably likely to dispose of or otherwise deal with.

(4) The jurisdiction conferred by this regulation is exercisable by the High Court and the Court of Session.

(5) In paragraph (2), references to remedying a contravention include references to mitigating its effect.

Power of FCA to require restitution

114.—(1) The FCA may exercise the power in paragraph (2) if it is satisfied that a payment service provider (referred to in this regulation and regulation 115 as "the person concerned") has contravened a requirement imposed by or under these Regulations, or been knowingly concerned in the contravention of such a requirement, and that—

(a) profits have accrued to the person concerned as a result of the contravention; or

(b) one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.

(2) The power referred to in paragraph (1) is a power to require the person concerned, in accordance with such arrangements as the FCA considers appropriate, to pay to the appropriate person or distribute among the appropriate persons such amount as appears to the FCA to be just having regard—

(a) in a case within sub-paragraph (a) of paragraph (1), to the profits appearing to the FCA to have accrued;

(b) in a case within sub-paragraph (b) of that paragraph, to the extent of the loss or other adverse effect;

(c) in a case within both of those paragraphs, to the profits appearing to the FCA to have accrued and to the extent of the loss or other adverse effect.

(3) In paragraph (2) "appropriate person" means a person appearing to the FCA to be someone—

(a) to whom the profits mentioned in paragraph (1)(a) are attributable; or

(b) who has suffered the loss or adverse effect mentioned in paragraph (1)(b).

Proposal to require restitution

115.—(1) If the FCA proposes to exercise the power under regulation 114(2), it must give the person concerned a warning notice.

(2) The warning notice must state the amount which the FCA propose to require the person concerned to pay or distribute as mentioned in regulation 114(2).

(3) If, having considered any representations made in response to the warning notice, the FCA decides to exercise the power under regulation 114(2), it must without delay give the person concerned a decision notice.

(4) The decision notice must—

(a) state the amount that the person concerned is to pay or distribute;

(b) identify the person or persons to whom that amount is to be paid or among whom that amount is to be distributed; and

(c) state the arrangements in accordance with which the payment or distribution is to be made.

(5) If the FCA decides to exercise the power under regulation 114(2), the person concerned may refer the matter to the Upper Tribunal.

Restitution orders

116.—(1) The court may, on the application of the FCA, make an order under paragraph (2) if it is satisfied that a person has contravened a requirement imposed by or under these Regulations, or been knowingly concerned in the contravention of such a requirement, and that—

(a) profits have accrued to them as a result of the contravention; or

(b) one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.

(2) The court may order the person concerned to pay to the FCA such sum as appears to the court to be just having regard—

(a) in a case within sub-paragraph (a) of paragraph (1), to the profits appearing to the court to have accrued;

(b) in a case within sub-paragraph (b) of that paragraph, to the extent of the loss or other adverse effect;

(c) in a case within both of those sub-paragraphs, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect.

(3) Any amount paid to the FCA in pursuance of an order under paragraph (2) must be paid by it to such qualifying person or distributed by it among such qualifying persons as the court may direct.

(4) In paragraph (3), "qualifying person" means a person appearing to the court to be someone—

(a) to whom the profits mentioned in paragraph (1)(a) are attributable; or

(b) who has suffered the loss or adverse effect mentioned in paragraph (1)(b).

(5) On an application under paragraph (1) the court may require the person concerned to supply it with such accounts or other information as it may require for any one or more of the following purposes—

(a) establishing whether any and, if so, what profits have accrued to them as mentioned in sub-paragraph (a) of that paragraph;

(b) establishing whether any person or persons have suffered any loss or adverse effect as mentioned in sub-paragraph (b) of that paragraph; and

(c) determining how any amounts are to be paid or distributed under paragraph (3).

(6) The court may require any accounts or other information supplied under paragraph (5) to be verified in such manner as it may direct.

(7) The jurisdiction conferred by this regulation is exercisable by the High Court and the Court of Session.

(8) Nothing in this regulation affects the right of any person other than the FCA to bring proceedings in respect of the matters to which this regulation applies.

Complaints

117.—(1) The FCA must maintain arrangements designed to enable payment service users and other interested parties to submit complaints to it that a requirement imposed by or under Parts 2 to 7 of these Regulations has been breached by a payment service provider.

(2) Where it considers it appropriate, the FCA must include in any reply to a complaint under paragraph (1) details of the ombudsman scheme established under Part 16 of the 2000 Act (the ombudsman scheme).

Miscellaneous

Costs of supervision

118.—(1) The functions of the FCA under these Regulations are to be treated for the purposes of paragraph 23 of Schedule 1ZA (fees) to the 2000 Act(**1**) as functions conferred on the FCA under that Act, with the following modifications—

(a) section 1B(5)(a) of the 2000 Act (FCA's general duties)(**2**) does not apply to the making of rules under paragraph 23 by virtue of this regulation;

(b) rules made under paragraph 23 by virtue of this regulation are not to be treated as regulating provisions for the purposes of section 140A(1) of the 2000 Act (competition scrutiny)(**3**);

(c) paragraph 23(7) does not apply.

(2) The FCA must in respect of each of its financial years pay to the Treasury any amounts received by it during the year by way of penalties imposed under regulation 111.

(3) The Treasury may give directions to the FCA as to how the FCA is to comply with its duty under paragraph (2).

(4) The directions may in particular—

(a) specify the time when any payment is required to be made to the Treasury, and

(b) require the FCA to provide the Treasury at specified times with information relating to penalties that the FCA has imposed under regulation 111.

(5) The Treasury must pay into the Consolidated Fund any sums received by them under this regulation.

Credit agreements

119. Schedule 5, which contains provisions concerning credit agreements, has effect.

(**1**) 2000 c. 8. Schedule 1ZA was substituted by Schedule 3 to the Financial Services Act 2012 (c. 21). Paragraph 23 was amended by paragraph 7 of Schedule 8 to the Financial Services (Banking Reform) Act 2013 (c. 33), paragraph 16 of Schedule 3 to the Pension Schemes Act 2015 (c.8) and section 29 of the Bank of England and Financial Services Act 2016 (c. 14), and by S.I. 2013/1773.

(**2**) Section 1B was substituted by section 6 of the Financial Services Act 2012 and amended by paragraph 3 of Schedule 3 to the Pension Schemes Act 2015.

(**3**) Section 140A was substituted by section 24 of the Financial Services Act 2012 and amended by paragraph 10 of Schedule 3 to the Financial Services (Banking Reform) Act 2013 and paragraph 10 of Schedule 3 to the Pension Schemes Act 2015, and by S.I. 2014/892 and 2016/680.

Guidance

120.—(1) The FCA may give guidance consisting of such information and advice as it considers appropriate with respect to—

(a) the operation of these Regulations;

(b) any matters relating to the functions of the FCA under these Regulations;

(c) any other matters about which it appears to the FCA to be desirable to give information or advice in connection with these Regulations.

(2) The FCA may—

(a) publish its guidance;

(b) offer copies of its published guidance for sale at a reasonable price;

(c) if it gives guidance in response to a request made by any person, make a reasonable charge for that guidance.

FCA's exemption from liability in damages

121. The functions of the FCA under these Regulations are to be treated for the purposes of paragraph 25 (exemption from liability in damages) of Part 4 of Schedule 1ZA to the 2000 Act(**4**) as functions conferred on the FCA under that Act.

Application and modification of primary and secondary legislation

122. The provisions of primary and secondary legislation set out in Schedule 6 apply for the purposes of these Regulations with the modifications set out in that Schedule.

(**4**) Paragraph 25 was amended by section 109 of the Financial Services (Banking Reform) Act 2013.