

Application of the FCA's Principles for Business to Payment Firms

Summary of Requirements and Potential Issues

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Principle 1 (Integrity) A firm must conduct its business with integrity.

With respect to compliance with Principle 1, the FCA outlined its expectation in CP18/21 by referring to compliance with the fitness and propriety requirements under the PSRs/EMRs and with the relevant guidelines of the European Banking Authority (EBA) (e.g. EBA/GL/2015/18 on retail banking products).

However, given that the Principles also apply to “connected activities”, compliance with the requirements under the PSRs/EMRs and EBA Guidelines may not be sufficient.

Principle 2 (Skill, care and diligence) A firm must conduct its business with due skill, care and diligence.

See discussion above on Principle 1.

Principle 3 (Management and control) A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

With respect to compliance with Principle 3, the FCA outlined its expectation in CP18/21 by referring to compliance with specific requirements under PSRs regarding management of operational and security risks and with the relevant guidelines of the EBA (e.g. EBA/GL/2017/17 on operational and security risks and EBA/GL/2019/02 on outsourcing).

However, given the “connected activities” issue, compliance with the requirements under the PSRs/EMRs and EBA Guidelines may not be sufficient. Further, the application of this Principle 3 also takes into account any activity of other entities within the firm’s group.

Principle 4 (Financial prudence) A firm must maintain adequate financial resources.

The FCA in CP18/21 suggested that compliance with the capital requirements under the PSRs/EMRs should be sufficient for the purposes of Principle 4. However, this is not expressly set out in the new rules themselves.

One respondent specifically asked whether for purposes of complying with the Principles the FCA would expect firms only to comply with the relevant existing requirements under the PSRs/EMRs or whether the FCA would expect the Principles to go beyond those requirements. The FCA did

not specifically address that point.

Principle 5 (Market conduct) A firm must observe proper standards of market conduct.

With respect compliance with Principle 5, the FCA outlined its expectation in CP18/21 by referring to standards of conduct that “might” be developed by market participants or relevant market codes. However, it is not clear what such “codes” are.

Currently the UK payments industry is consulting on a voluntary code on contingency reimbursement model in relation to authorised push payment fraud; presumably such code would be relevant.

Principle 6 (Customers’ interests) A firm must pay due regard to the interests of its customers and treat them fairly.

This applies only with respect to customers who are consumers, micro-enterprises or small charities (the definitions of these terms are in line with those under the corporate carve-out provisions in the PSRs/EMRs).

Payment firms are subject to certain specified “conduct of business” requirements (e.g. pre-contractual disclosures) under the PSRs/EMRs. The new PRIN 3.1.8G states that there may be circumstances where Principle 6 may be “limited” by such conduct of business requirements. However, it is not clear what those circumstances would be and how Principle 6 would be so limited.

By contrast, the FCA in CP18/21 suggested that Principle 6 would go beyond such specific requirements and the relevant customers must be treated fairly “in general”. This seems potentially to contradict PRIN3.1.8G.

Principle 7 (Communications with clients) A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

This applies only with respect to customers who are consumers, micro-enterprises or small charities (the definitions of these terms are in line with those under the corporate carve-out provisions in the PSRs/EMRs).

The FCA in CP18/21 appeared to focus on certain advertising practices it considered to be misleading (e.g. payment account being advertised as bank accounts; and services being advertised as free when other intermediaries (not the firm itself) actually charge fees).

The FCA also suggested that compliance with the specific information requirements (as required by the PSRs) in itself might not be sufficient and that the key was to ensure information would be communicated clearly.

Principle 8 (Conflicts of interest) A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

This applies only with respect to customers who are consumers, micro-enterprises or small charities (the definitions of these terms are in line with those under the corporate carve-out provisions in the PSRs/EMRs).

The FCA in CP18/21 discussed Principle 8 in the context of payment firms that advise on payment services or e-money (e.g. offering recommendations of what account is best). This seems to suggest Principle 8 only applies where Principle 9 applies. But this is not expressly set out in the new rules themselves.

Principle 9 (Customers: relationship of trust) A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

This applies only with respect to customers who are consumers, micro-enterprises or small charities (the definitions of these terms are in line with those under the corporate carve-out provisions in the PSRs/EMRs).

While the FCA in CP18/21 briefly explained when a payment firm would be advising for these purposes (see comment on Principle 8), giving such advice is not a regulated activity and there is no specific guidance as to what would amount to such advice.

For example, would general advertising/marketing of one's own services or products amount to advising for these purposes?

Principle 10 (Clients' assets) A firm must arrange adequate protection for clients' assets when it is responsible for them.

Authorised PIs and EMIs are obliged to safeguard customers' funds under the PSRs/EMRs; small PIs and EMIs (with respect to unrelated payment services) are not.

The FCA in CP18/21 suggested that compliance with those safeguarding obligations should be sufficient for the purpose of Principle 10 and stated that this would not extend safeguarding obligations to small PIs/EMIs. However, such expectation is not expressly set out in the new rules.

Principle 11 (Relations with regulators) A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

The FCA suggested in CP18/21 that compliance with the various reporting/notification requirements under the PSRs and EMRs should be sufficient for these purposes.

This seems to mean that, unlike for FSMA firms (where Principle 11 covers additional notification requirements as set out in SUP15.3), there are no additional notification requirements for payment firms other than those in the PSRs/EMRs. However, this is not expressly set out in the new rules and the "connected activities" point may also add complexity in terms of comply with this Principle 11.

Further, the application of this Principle 11 also takes into account any activity of other entities within the firm's group (where it relates to disclosures made to the FCA).

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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