

3-5-2017

Dear Complainant,

**Complaint against the Financial Conduct Authority
Reference Number: FCA00238**

Thank you for your email of 23 January 2017. I have now reviewed the information sent to me by you and the Financial Conduct Authority (FCA), and am able to write to you.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

What we have done since receiving your complaint

I have reviewed all the papers you and the regulator have sent to my office and I have also asked additional questions of the FCA and considered their response. Both you and the FCA have had the opportunity to comment in response to my preliminary decision. I have carefully considered the points that you made and, although they have not altered my decision on your complaint, I have made further reference to them below.

Your complaint

On 27 June 2016 you wrote to the FCA to complain about the UK's implementation of the European Union Payment Services Directive 2007 (the PSD). You said that despite the PSD's intention to speed up processing of bank payments to "D+1", the bulk of payments in the UK still went under the BACS process which takes three days. You alleged that BACS is not compliant with the PSD because funds are not credited until Day 3 and that the FCA condones this situation.

On 19 September 2016 the FCA wrote to you setting out its understanding of your complaint and asked you to confirm how you were directly affected by this issue, to comply with paragraph 3.2 of the Complaints Scheme (the Scheme). You explained that you were affected as someone running a small business who wishes to make D+1 payments for wages and salary and direct debits. Your complaint was accepted for investigation under the Scheme. The FCA categorised your complaint as an allegation of mistake by the FCA in failing to correct the UK's apparent inability to process D+1 payments, thus breaching EU law.

On 20 January 2017 the FCA informed you that it had not upheld your complaint. Its decision said that the BACS system is compliant with the PSD, because a payment is both debited and credited on Entry Day (Day 3 in the BACS cycle). The FCA said that this is the 'point in time of receipt' for the purposes of the PSD, therefore it was not in breach of EU law.

You are dissatisfied with this response and have asked me to investigate. You have asked me to look at the following matters in particular:

- (a) There is no D+1 option for direct debits in the UK (and there never has been), despite direct debits being explicitly included under the D+1 rule in the PSD.
- (b) There is no D+1 option for UK employers to allow them to pay their staff the next day, due to the vital importance of the BACS RTI hash code, which provides essential benefits to employers and their employees – benefits which are not available if an alternative method of payment such as Faster Payments is used.
- (c) The meaning of “point in time of receipt”, which you argue “*has nothing to do with funds, when funds are debited, or credited, whether funds are earmarked as part of the process, or whether funds credit and debit simultaneously – it has nothing to do with funds at all. Instead, as very simply and clearly stated in the PSD, it is entirely to do with when the payment service user submits his payment instruction to his bank*”.

In support of your complaint, you have supplied me with an email from BACS, which says:

There is no means to pay D+1 via the BACS Service, if you wish to do this, it's advised you find alternative methods to make the payments, you can discuss this with your bank to find the right method that suits you and your business. If you are concerned about HMRC penalties, my advice is to contact them directly to discuss further in depth. To be clear, with regard to your question on the PSD or, more importantly in the UK, the Payment Services Regulations, we can confirm that BACS is fully compliant with the requirements.

You have subsequently sent in further representations giving examples from social media of consumers who are apparently unaware of their right to D+1 by default.

My position

Having reviewed the correspondence, I am not satisfied that the FCA's Stage 1 response to your complaint is sufficiently clear. At the very least you have received conflicting information in that BACS has told you that it does not offer a D+1 service whereas the FCA's response says that effectively it does because “*the 'point in time of receipt' is Entry Day, as is the day that the amount is credited to the payee's PSP's account*”. I therefore asked the FCA further questions to clarify its position.

Jurisdictional matters

As a preliminary point, the FCA now says that it considers that your complaint is outside the scope of the Scheme. It says that its Approach Document, which sets out its position on the PSD, is guidance given under regulation 93 of the Payment Services Regulations (PSR). Under article 2(b) of the Financial Services Act 2012 (Relevant Functions in Relation to Complaints Scheme) Order 2014, giving such guidance is not a relevant function for the purposes of the Scheme.

Under paragraph 3.4 (c) of the Scheme, complaints are excluded if they relate to the performance of the regulators' legislative functions as defined in the 2012 Act. I am satisfied that the Approach Document is guidance relating to legislative function and that the FCA could have chosen to exclude your complaint on this basis. I have considered whether I

should therefore decline to investigate your concerns. However, since the FCA chose to respond to your concerns (and, in my view, gave you an inadequate response) I consider it fair to give you a full response to your complaint.

Substantive Complaint

In response to my request for further clarification of its position on BACS and the PSD, the FCA has responded as follows:

Article 69 of the PSD sets out the rule that payments have to be credited to the payee's payment service provider's account by close of business on the business day following the day when the payment order was received or deemed to have been received. This is sometimes referred to as the D+1 requirement. Article 64 is linked to this as it permits contractual agreements to make future dated payments – for future payments the date of receipt of the payment order for the purposes of Article 69 is deemed to be the future date agreed. The Faster Payments System (FPS) was introduced in May 2008 – this enables payments to be made within the prescribed execution times and covers the vast majority of payments. (CHAPS also does so but a charge is involved.) The use of BACS is considered compliant on the basis that it is used for future dated payments: there needs to be contractual agreement of the payer and there must be no earmarking of the funds until payment date. The FCA's Guidance has flagged this.

The FCA's position on this matter is as set out in paragraphs 8.127 to 8.130 of its Approach Document - <https://www.fca.org.uk/publication/archive/payment-services-approach.pdf>. In particular, paragraphs 8.129b and 8.130 are relevant. The key point is that the FCA consider the execution of a BACS payment may in certain circumstances (where there is customer agreement and subject to its position on 'earmarking') be classed as a 'future dated payment', and so comply with the prescribed maximum execution times. The FCA recognise, however, that there may be exceptional circumstances where it is not possible for certain payments to be made in the specified time limit, and that firms may feel it necessary to refuse the payment order in these circumstances. An explanation of the time limits for payment transactions is set out in paragraphs 8.144 to 8.151 of the Approach Document.

For ease, I have added the full text of those paragraphs as an annex to this decision.

The FCA therefore considers firms' use of BACS to be compliant with the PSD in the circumstances set out in its Approach Document. The FCA has expressed its regret that this position was not fully reflected in its response letter to you. Where firms continue to use BACS, the FCA expects firms to clearly explain the position to their customers. As set out above, these payments would be classed as 'future dated payments' and the provisions of Article 64(2) of the PSD regarding customer agreement will apply. Firms should also take note of paragraph 8.127 of the Approach Document in respect of 'earmarking'. The FCA would be interested from a supervisory point of view if firms are not complying with these requirements.

I am grateful for this clarification of the FCA's position and I hope you will find it helpful, although I appreciate that from your perspective it leaves the substantive issue unresolved. I understand that you wish to make batch payments or arrange direct debits that are not future

dated and that neither CHAPS nor FPS offer this so that currently there is no alternative product and/or the alternatives are less convenient.

In response to my preliminary decision you have made several further points in support of your complaint. In summary, you say that:

- the FCA's Approach Document, which appears to supersede the PSD or the PSR, takes a different view of 'point in time of receipt' from either and is focussed on firms as payment services providers not on consumers or payment services users;
- the key point about Article 64(2) of the PSD is that it allows for forward-dating by exception and agreement but this does not explain or address why BACS payments are minimum D+2 when the rule is maximum D+1;
- as a result your original complaint still stands.

My understanding is that the FCA's Approach Document does not override the PSD but is commentary to show the FCA's supervisory approach. It is the PSR that implements the PSD into UK legislation and is the primary source of the rules and sets out the exceptions.

I do not find the FCA's position on this matter to be beyond doubt, and I have sympathy with your view that the current arrangements do not deliver all the benefits which the PSD appears to have envisaged. I also accept that it is arguable whether BACS payments are compliant with the PSD; however, that is not an argument I can settle. Ultimately, this is a matter of legal interpretation that would have to be resolved through the courts. This would involve detailed arguments about how EU law is incorporated into UK systems and it is not a matter that can be resolved under the Scheme.

Having said this, I have found the FCA's initial complaint response to you to be confusing, inadequate and inaccurate. I **recommend** that the FCA should offer you an apology for this and offer to pay you £100 for your time and trouble in pursuing this complaint to my Office.

Delay

As noted above, you first complained to the FCA in June 2016 but your complaint was not formally responded to until September. You contacted my office in October because you were concerned about the FCA's lack of substantive progress in responding to your concerns. We intervened to monitor the situation and advised you to wait for the outcome of the FCA's investigation. At your request we chased the FCA again in December 2016 and January 2017 and the complaint response was sent to you on 20 January.

I note that the FCA's complaint response to you apologises for the length of time taken to complete its investigation into your complaint. I have considered whether that is an acceptable response to its delays or whether it would be appropriate for me to recommend that a small payment is made to you. Overall, I have concluded that this would be appropriate, since in my view there was minor maladministration in handling your complaint at the outset, particularly between June and September 2016. It seems that there was some initial discussion about whether your complaint fell under the remit of the FCA or the Payment Services Regulator; however, that does not excuse the FCA's failure to keep you informed and updated, leaving you to chase progress. I **recommend** that the FCA offers to

pay you the sum of £50 in recognition of the distress and inconvenience that has been caused to you by its delays in handling your complaint.

Conclusion

In conclusion, for the reasons set out above, I have partly upheld your complaint. I recommend that:

- The FCA offers to pay you the sum of £100 for your time and trouble in pursuing your complaint to my Office and £50 for distress and inconvenience caused to you by its complaints handling delays, a total of £150.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner

Attachment follows – Relevant Extracts from the FCA’s Approach Document

RELEVANT EXTRACTS from FCA's Approach Document

8.127 The aim of the PSD provisions in respect of execution times is to mandate and harmonise the speeding up of payments, so the maximum time taken when neither the payer nor the payee has access to the funds should be one business day. This means, in our view, that in general where 'earmarking' of funds takes place, so that the funds remain in the customer's account for value-dating purposes but are unavailable to the customer to spend, the point in time of receipt for the purposes of calculating the execution time must be the point at which the funds become unavailable to the customer. For future dated payments such as standing orders and direct debits the point in time of receipt will be the date agreed for the payment.

8.128 In our view, an exception to this can be made where a promise or guarantee of payment has been given by the payer's payment service provider to the payee, such as in a preauthorised card transaction. In such cases it may be acceptable, on the basis of recital 37 to the Payment Services Directive, for the funds to be earmarked pending receipt of the actual payment order and it is reasonable for the payer to assume that the funds have been debited from their account at the point of authorisation of the payment. However, without such a promise or guarantee to the payee, for example in the case of a direct debit or standing order, we can see no justification for earmarking such funds and it is reasonable for the payer to assume they have access to their funds until the date they instructed the direct debit or standing order to be actioned (for example, the first of the month). Similarly, if when sending a BACS credit the bank earmarked the funds in the payer's account on the day the file was submitted but delayed the debit until the business day before the funds are credited to the payee's payment service provider's account, the execution time would be longer than 'next day' and therefore in breach of the requirements of regulation 70(1).

8.129 Where the payee's payment service provider is not reachable by a payment system which enables payments to be made within the prescribed maximum execution times (such as Faster Payments), the firm will need to make alternative arrangements, and clearly explain the position to their customers. Possible options include:

- a. making the payment through an alternative payment system (e.g. CHAPS) if available. This must be with the agreement of the customer, who must be advised of (and agree to) any additional charges involved; or
- b. continuing to use BACS, but delaying the debit to the customer's account until, at the earliest, the business day before the BACS settlement day. This would be classed as a 'future dated payment' and the provisions of regulation 65(4) regarding customer agreement will apply. Firms should also take note of paragraph 8.127 in respect of 'earmarking'.

8.130 In exceptional circumstances where, in spite of all efforts, it is not possible for the firm to make the payment within the specified time limit, firms may feel it necessary to refuse the payment order concerned. The requirements of regulation 66 (as set out below) would need to be met in this regard, and where a firm believes that such refusals may be necessary it will need to consider whether its framework contracts will need to be amended to allow refusal on these grounds. Such amendments, will, of course, require 2 months' notice to be provided. We would not expect that any such refusal, or notification of a refusal on these grounds, would attract a charge.

8.144 The default rule is that payments have to be credited to the payee's payment service provider's account (that is the payee's PSP's account with its own bank or settlement service provider) by close of business on the business day following the day when the payment order was received (or was deemed to have been received – see above under 'Receipt of payment orders'). 84 Financial Conduct Authority The FCA's role under the Payment Services Regulations 2009 June 2013

8.145 An extra day may be added to the above period when the payment order is initiated in paper, rather than electronic form.

8.146 For payment transactions in the currency of an EEA State where: • both the payer and the payee are within the EEA; and • the payment transaction is not a UK national sterling transaction; and • the payment transaction is not in euro, the maximum period that may be agreed between the payer's payment service provider and its customer is the end of the fourth business day following the day on which the payment order was received.

8.147 For merchant acquiring transactions we have included diagrams and an explanatory note setting out one model of how the time limit provisions might work for a four-party card scheme in Annex 5. While this model was discussed with the industry when the PSRs were implemented, it is recognised that an alternative model has since been put forward, and that the payment service providers involved intend to discuss this model with the European Commission in relation to how the Directive requirements for merchant acquiring apply. We also understand that the process within three-party card schemes may differ from the model set out in Annex 5, and we would be happy to discuss the application of the PSRs to such schemes on an individual basis.

8.148 The payee's payment service provider must value date and make available the credit to the payee's account following receipt of the funds in its own account in accordance with regulation 73. Therefore, as soon as the funds are received in the payee's payment service provider's account, it must make sure that the payee can get access to the funds and credit value date them no later than the business day on which the payment service provider's account was credited. In practice this means that payment service providers' systems must identify the funds immediately they are received in their own account with their settlement provider and credit them to the payee's account immediately. If the funds are received on a non-business day, the above requirements will apply at the start of the next business day. A diagram showing these time limits is included in Annex 6.

8.149 It is recognised that in practice some processing of the payment by the payee's payment service provider may be needed before the customer can access the funds. However, the requirement for 'immediate' availability means that the time taken for this processing must be kept to a minimum and we see no reason why, in normal circumstances, this should be longer than two hours. For the avoidance of doubt, unless the payment concerned is received out of business hours, 'immediate' can never mean the next business day. What constitute business hours will depend upon the circumstances; for example a customer with an internet based account where the customer can make payments at any time using Faster Payments, or can withdraw funds at any time using an ATM can reasonably expect his payment service provider to make the funds available to him whenever they are received, whereas a customer with an account which can only be accessed during branch opening hours would expect the funds to be available when the branch next opened.

8.150 Payment transactions where both the payer's and the payee's accounts are with the same payment service provider are within the scope of the PSRs, and as such the execution time provisions will apply. This includes transactions where the payer and the payee are the same person. Where an external clearing system is used to execute the transaction, our view is that the funds will be 'credited to that payment service provider's account' (regulation 73(2)) when Financial Conduct Authority 85 The FCA's role under the Payment Services Regulations 2009 June 2013 that clearing system settles, in the same way as payments received from another payment service provider through that clearing system.

8.151 Where a payment service provider is using its own internal processes to execute the transfer, we believe that the principles and aims underlying the execution time provisions in the PSD and PSRs must apply, that is, the avoidance of 'float' and the efficient processing of payment transactions. We would therefore expect that in such transactions value will be given to the payee on the same day as the payer's account is debited, and that the funds will be put at the disposal of the payee as quickly as possible.