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25 November 2022

Dear Ben, Saima and Claire

Re: PSR CP21/10 Authorised Push Payment (APP) Scams Consultation Paper

The EMA is the UK trade body representing electronic money issuers and payment service providers. Our members include leading payments and e-commerce businesses worldwide, providing online payments, card-based products, electronic vouchers, and mobile payment instruments. A list of current EMA members is provided at the end of this document for reference.

We welcome the opportunity to comment on the PSR's proposals for reimbursement of APP scams. We consider that the impact of these proposals may be significant, with a particularly acute impact on smaller and payment-specialist PSPs, so we very much hope the PSR will be able to take our views into consideration.

Yours sincerely,

Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA response:

Overarching comments

We welcome the opportunity to respond to the PSR CP 22/4 on APP Scams and the proposals to require PSPs to reimburse victims of APP scams. We are supportive of the PSR's objective to ensure a consistent approach to reimbursement and ensure that firms are doing everything they reasonably can to prevent customers from falling victim to APP scams. The prevention of APP scams and protection of customers are key priorities for all segments of the payments industry.

Our response addresses the questions in the consultation below. However before addressing the detailed questions, we wish to re-state our view on the overarching principle and impact of mandatory reimbursement, and concern about the impact of these proposals. Placing full liability on PSPs for losses incurred by victims of APPs is inappropriate for the following reasons:

- (i) it incentivises fraud by providing easily accessible compensation and encourages criminals from elsewhere to target the UK;
- (ii) it is contrary to principles of English law and to the expectations of natural justice, where compensation would be expected to flow from fault and where liability is generally incurred through fault;
- (iii) it will be detrimental to the operating of the Faster Payments Scheme (FPS); and
- (iv) it creates a disincentive for third party actors who have the ability to reduce such risk – such as the accountants or dating website providers, to act to reduce the risk; and
- (v) it leaves the underlying fraud problem, a law enforcement and government policy matter, unaddressed.

Applying mandatory reimbursement through the FPS rules removes the ability to set a standard of care for consumers, and moves more directly towards a complete underwriting of fraud by the PSP industry. It is also not in the interests of users, whether consumers or businesses, to address fraud risk through underwriting; it simply shifts the cost of the fraud back to users who will have to pay through higher fees, and fails to address the vulnerabilities in the ecosystem that give rise to the fraud in the first place.

The EMA previously recommended that the PSR take a number of steps prior to implementing any measures: (1) carry out a consultation on the underlying assumptions behind mandatory reimbursement, and (2) conduct a proper impact assessment on the effects of mandatory reimbursement. The measures proposed may have detrimental consequences (both economic and competition consequences) on the payments market.

As the PSR's objectives are to promote the interests of all the businesses that use the payment systems, as well as ensure effective competition in the markets for payment systems and services, and to promote the development of and innovation in payment systems, we consider it to be the role of the PSR to ensure their policies will not damage the market for which they are responsible.

The EMA recommended that such a consultation explore the desirability of requiring PSPs and specialist PSPs in particular, to underwrite wider community fraud where PSPs have met their duty of care, and the impact on incentives for PSPs and other stakeholders to reduce the incidence of such APP scams. The consultation should consider the merits of penalising PSPs that have met their standard of care, the distinctions and relative contributions of direct and indirect participants, and the disproportionate impact that FPS rules may have on new specialist and innovative PSPs.

We note that, to date, neither of these actions seem to have been conducted, or even considered.

We strongly support the House of Lord's Fraud Act 2006 and Digital Fraud Committee's recommendations¹ that the PSR and Government further explore the long, and short term, risks of a blanket reimbursement policy and pursue a solution that achieves a level playing field for all customers and PSPs. As the report concludes "***the last link in the fraud chain ...cannot be expected to foot the fraud bill alone***".

Consultation questions

1. Do you have views on the impact of our proposals on consumers?

Yes, the PSR's proposals will change consumers' behaviour.

As set out in the [EMA response to PSR CP 21/10 on APP scams](#), we consider that the proposals will lead to consumers taking less care when authorising a payment.

We believe that reimbursement is only one dimension of consumer protection and that a wholesale mandatory reimbursement policy may introduce risks that consumers lack the incentive to guard against the possibility of fraud, and may even lead to new opportunities for reimbursement fraud emerging. We note that the Financial Secretary to the Treasury when giving evidence to the Treasury Committee in October 2022, told MPs that the PSR should "*come forward and engage with industry because there is a moral*

¹ <https://publications.parliament.uk/pa/ld5803/ldselect/ldfraudact/87/87.pdf>

*hazard piece and we have to get that right balance*², and further that the recent House of Lord's report¹ endorses this point and recommends that these risks are fully explored before finalising the reimbursement policy.

However so far, the Payment Systems Regulator has provided **no evidence** that the reimbursement requirement will not result in customers taking less care, and there does not appear to be any evidence that the UK will not be viewed as an easy target for further fraudulent activity. The Payment Systems Regulator's recent consultation CP 21/10 states: *We have seen no compelling evidence that mandatory reimbursement will cause customers to be careless with their payments. In fact, PSPs that have introduced blanket victim reimbursement policies have told us that this did not result in any increase in claims* [paragraph 3.45; CP21.10]

Since then, it does not appear that the PSR has conducted any research in this area. As a competition regulator, such research should have been done as a matter of course, and would provide a much stronger basis on which the PSR might substantiate such a significant change in the law.

Instead, reliance has been placed on anecdotal evidence - "Payment Service Providers (PSPs) have told us". The assertion that reimbursement will not inform the customer's behaviour has only been assessed with respect to customers of PSPs who have a blanket reimbursement policy. There is no evidence that this behaviour is representative of customers in general, or in circumstances where it is widely publicised at national level that all scam payments will be refunded. The customers of the PSP that had the blanket reimbursement policy may not have even known about the policy – the blanket reimbursement policy likely did not inform their behaviour whatsoever.

The reimbursement requirement will likely increase the (already disproportionately high) numbers of fraudsters specifically targeting the UK over other countries for easy money. EMA members operating at a global level have provided evidence that this trend is already occurring. Despite repeated recommendations to investigate these concerns, the PSR has not provided any evidence that this will not happen.

We strongly urge the PSR to gather sufficient evidence on the likely impact of blanket reimbursement on consumer behaviour so that proportionate and balanced measures for reimbursement can be devised.

2. Do you have views on the impact of our proposals on PSPs?

Yes, we are concerned with the impact of mandatory reimbursement on smaller and non-bank PSPs' commercial viability.

Cost of reimbursement:

² [Oral evidence taken before the Treasury Committee on 11 October 2022 \(Session 2022–23\) – Andrew Griffin \(Q75\)](#)

The PSR state: *We have not considered the direct costs of PSPs increasing their rates of reimbursement as being a relevant cost for this cost benefit analysis. We have not taken the approach of directly balancing the costs of increased reimbursement that PSPs will face against the benefits of increased reimbursement that victims will receive. That approach would simply find a large cost on one side cancelled out by the same scale of benefit on the other.* [2.40]

We recognize that mandatory reimbursement measures are intended to incentivize PSPs to have stronger anti-fraud measures in place. However, Members of the EMA are principally specialist payment providers who are proscribed from lending the funds of users, and therefore are restricted in the revenue that they generate to transaction-related income streams. The impact of any increase in cost is felt much more by these PSPs (i.e. non-bank PSPs), as they do not benefit from the cross-subsidisation afforded by banks. Whilst they may be able to put in place technical and operational measures that reduce the risk that their customers might suffer from APP scams, it is much harder for them to absorb the cost of an APP scam, or the cost increase of FPS scheme fees.

As an example, if the total revenue generated by a PSP was in the region of 1% of the value of a transaction (which is generally at the high end), from which its cost of doing business must be extracted. Hence it would have to process at least 100 equivalent size transaction to recover the loss on a single claim of fraud. Once the costs of doing business are taken into account, this is likely to increase to perhaps 1000 transactions.

The PSR have further said: *Respondents to our November consultation highlighted the potential cost implications of our reimbursement proposals for small PSPs and for certain business models. If reimbursement costs were large enough for some small PSPs, this could, in principle, have prudential implications – for instance, where firms face the cost of reimbursement and may not have the capacity to invest in fraud detection and prevention to combat the problem effectively. As set out in chapter 3, we continue to work with the FCA and the Prudential Regulation Authority (PRA) on how risks to individual small PSPs would be monitored and managed.* [2.65]

We strongly urge the PSR to reconsider the assessment of direct PSP costs of implementing the reimbursement proposals in light of the potential impact on indirect FPS participants, and small and non-bank PSPs.

Increased costs for use of the Faster Payments Scheme: Under the PSR's proposals Pay.UK will be directed to facilitate reimbursement. They will be required to put in place a cost allocation mechanism, a dispute resolution mechanism and a real time transaction monitoring mechanism. Putting in place all of these mechanisms and systems will require significant initial and on-going investment by Pay.UK.

Pay.UK will have to seek to recover these costs from Scheme participants. Accordingly, it is likely that all PSPs will pay more for participating in the Faster Payments Scheme (directly, or indirectly) and making Faster Payments.

The PSR has said: *Our proposed policy is likely to lead to PSPs incurring additional costs that they do not face at present, although we have not been able to quantify these.* [2.52]

We are concerned that if the increase in Faster Payment cost is not adequately quantified it may create a net negative effect where competition is stifled as only the largest providers in the UK will be able to participate in the Scheme.

We **urge the PSR to fully quantify the cost** to Pay.UK of managing the reimbursement scheme **before publishing the draft Direction** in order to measure the impact on the cost of Faster Payments scheme and the wider impact this may have.

Increased costs for use of the Faster Payments Scheme may result in scheme participants (i.e. generally banks) increasing the costs of banking services overall which will affect consumers and businesses alike.

Many EMA members are customers of banks; payments and e-money businesses rely on banking partners to provide safeguarding accounts, which are a regulatory requirement. These firms will face an increase in the cost of doing business. EMIs are already subject to de-risking, and banking services are at a premium – we are concerned that the PSR’s proposals are going to exacerbate this situation.

Impact on Payment initiation service providers (“PISPs”) will be disproportionate:

We note that the PSR’s analysis has not considered the downstream impact of the reimbursement measures on providers within the payment chain; most notably payment initiation providers (PISPs).

PSPs may have an incentive to become more risk averse to PISP initiated transactions (open banking payments) because they may have to reimburse a fraud without any recourse to the PISP who initiated the transaction. Unlike other PSPs, there is no feasible way to flow down liability to the PISP for reimbursement because there may not be a contract in place, and/or the PISP may not be in the flow of funds (and therefore have limited capacity to offset increased fraud liabilities that may occur). The Payment Services Regulations 2017 do not require the PISP to have a contract in place, nor for the PISP to be in the flow of funds.

Fraud controls designed to safeguard Faster Payments transactions against APP fraud, such as transaction limits, are already impacting the success of PIS because the controls applied do not reflect the risk profile of open banking payments i.e. usually to a known payee who is under contract with the FCA-authorized PISP. As we discuss in our response to Q9, the uncapped liability that the PSR propose for PSPs may exacerbate this issue even further, as PSPs may be even less willing to extend transactions limits for Faster Payment transactions.

We cannot reconcile the likely effect of the reimbursement proposals on the commercial viability of the PISP business model, with the PSR’s wider objective that account payments should become a viable alternative to card payments in the UK market. PISPs are at the heart of the PSR’s intention to drive competition in the payments market, yet the increased cost of Faster Payments, coupled with the cost of reimbursement, is likely to undermine the whole sector. We have set out our views in more detail in our earlier response to the PSR CP

As a result, we urge the PSR to fully consider the effect of mandatory reimbursement on the nascent open banking PISP market, and the wider competitive objectives of the UK payments strategy, before finalizing the proposals.

3. Do you have views on the scope we propose for our requirements on reimbursement?

Payers

Yes, reimbursement requirements should extend to customers that are consumers only. Micro-enterprises and charities should not be within scope of the reimbursement requirements.

The PSR has included micro-enterprises and charities within scope of the proposed reimbursement requirements because the PSR is applying the same scope as Part 6 and 7 of the Payment Services Regulations; however, this is unsubstantiated. The reimbursement requirements have little to do with payments regulation; they are, instead, a consumer protection measure and, other than requiring payment service providers to underwrite fraud, have little to do with payments at all.

To explain, the fraud takes place on a separate platform, for example, a dating website. Correspondence is exchanged between the fraudster and the victim on that separate platform; this could be over a long time. Payment service providers are only involved at the very last stage of the fraud when the victim uses their payment account to transfer funds to the fraudster. If the fraudster did not demand money but, instead, demanded the victim sign over the deeds to their house, it would not follow that a reimbursement requirement in this case would be classed as real estate / real property regulation. Accordingly it is unclear on what basis the scope of core payments regulation should be applied to the reimbursement requirements.

An additional unintended consequence of extending the scope to include micro-enterprises and small charities is that their ability to obtain payment services or specific products would decrease. Some PSP business models are primarily developed for, and utilised by, corporate customers, including micro businesses, which benefit from access to such services. However, under these proposals microbusinesses will only remain a relatively small part of overall revenue, whilst representing an increased risk and cost profile to the payments firm, increasing the risk that they will be excluded from such product offerings.

To summarise, the scope should be limited to consumers only.

Indirect participants

Indirect participants have no control over scheme rules and otherwise have no influence over them; indirect participants are merely bound by the contract they have in place with the direct participant. Accordingly, the governance of Pay.UK would have to change in order to allow for indirect participants to have a say in terms of scheme rules.

APP scams in scope

We note that the definition of APP fraud is ambiguous in the consultation.

The APP scams in scope should include only those scams that involve social engineering. Scams that involve family members defrauding one another or other situations where the fraudster is otherwise known to the victim should not be included within scope. Otherwise the risk is that PSPs become involved in family disputes etc. which are squarely a civil matter and not related to the PSR's objectives.

In multi-generational scams, where the fraudster convinces the victim to move the funds more than once, the final payment to the fraudster must be the only payment that qualifies for reimbursement, and not any interim payments between the victim's own accounts, or accounts over which they hold control.

4. Do you have comments on our proposals:

- **that there should be a consumer caution exception to mandatory reimbursement**

Yes, this is essential.

- **to use gross negligence as the consumer caution exception**

Gross negligence is too low a standard; it is considerably below the standard that persons are required to conduct themselves in the course of everyday life. In the course of everyday life in order to avoid being held liable for loss sustained by another, a person must, generally speaking, conduct themselves to the standard of a reasonably prudent person acting in similar circumstances.

Regulation 77(3) of the Payment Services Regulations 2017

We have established in the response to question three that the reimbursement requirement proposed by the PSR is not a payments requirement – it is a consumer protection measure that requires entities that provide payment services to underwrite fraud. Accordingly, references to the Payment Services Regulations 2017 are not persuasive and should not be used as a justification for using gross negligence as a standard.

CRM Code

Whilst the CRM Code is a comparable mechanism to the reimbursement requirements proposed by the PSR, the CRM Code also includes several other exceptions to reimbursement, which are not present here. For example, the customer ignored effective warnings. Accordingly, referencing the CRM Code as using gross negligence as a standard is only justified if the PSR were to include all of the other exceptions to reimbursement that are present in the CRM Code.

Impact on PSP incentives

We understand that the PSR's objective in placing liability on PSPs is the hope that this may increase the incentive on PSPs to reduce the instance of APP scams. However, if the only consumer exception is an undefined threshold of gross negligence, the proposed approach will penalise PSPs that have met their standard of care. If PSPs are unable to take any actions to reduce their liability in individual cases, their incentive – or even ability - to address such fraud - apart from refusing to process transactions over a certain value or to certain jurisdictions – is not apparent.

- **not to provide additional guidance on gross negligence?**

This will lead to not only uncertainty but disputes over the standard of conduct.

5. Do you have comments on our proposal to require reimbursement of vulnerable consumers even if they acted with gross negligence?

Even for vulnerable customers the standard of gross negligence is too low. As stated in our response to question 4, it departs too far from the standard of conduct a person is required to hold themselves to in everyday life (i.e. the reasonable person standard). The next standard below gross negligence is criminal.

Accordingly, the exception of gross negligence must apply to all customers including vulnerable customers.

6. Do you have comments on our proposal to use the FCA's definition of a vulnerable customer?

The FCA's definition of vulnerable customer (as set out in paragraph 2.5 of FG21-1) is too broad to apply to rules relating to APP-scam reimbursement. It is too broad in general; however, it is certainly too broad for rules as onerous as those proposed by the PSR in this consultation.

Paragraph 2.19 of FG21-1 sets out some examples of harm and disadvantage that firms should be alert to:

- heightened stress levels due to difficult, or different, personal circumstances
- increasing time pressures due to additional responsibilities
- increasing pre-occupation ('brain is elsewhere') limiting their ability to manage
- lack of perspective especially when experiencing something for the first time, not fully understanding the broader implications; being unable to make comparisons, or see the 'bigger picture'
- changing attitudes towards taking risks; people often become more 'reckless' and/or careless when under stress.

Under the vulnerable customer guidance [FG21-1], these examples of harm and disadvantage mean that the customer should be subject to the heightened standard of care as set out in the vulnerable customer guidance.

Under the PSR's proposed APP-scam reimbursement rules, these examples of harm and disadvantage operate as justifications for a customer acting grossly negligent.

The vulnerable customer guidance and APP-scam reimbursement rules are completely different contexts; accordingly, the PSR should define vulnerability in objective terms leaving no room for dispute.

7. Do you have comments on our proposals that:

- **sending PSPs should be allowed to apply a modest fixed 'excess' to reimbursement**

Yes, firms should be permitted to apply an excess.

- **any 'excess' should be set at no more than £35**

We disagree with GBP 35 excess. The excess should be at least GBP 100. The alignment with the unauthorised transactions rules in the Payment Services Regulations 2017 is not relevant; in our response to Q3, we have established that the PSR's proposed reimbursement rules are not payment rules – they are instead a consumer protection measure and, other than requiring payment service providers to underwrite fraud, have little to do with payments at all. It is unclear why an alignment with the Payment Services Regulations 2017 is necessary. Instead, comparisons should be made with home or motor insurance policies (as the PSR proposals are closer in nature to an insurance policy against social engineering fraud), which usually carry a minimum excess of over £100, and in many cases several £100s.

Finally, we would also question whether, even with a raised excess limit, consumers will be genuinely incentivised to exercise greater caution when initiating payments in many APP scam scenarios. As noted in our response to Q1, the PSR has limited evidence on the impact of mandatory reimbursement on consumer behaviour. We again urge the PSR to gather and assess robust evidence of the impact of reimbursement on consumer behaviour.

- **PSPs should be able to exempt vulnerable consumers from any 'excess' they apply?**

No, on the basis that PSPs still incur costs when providing services to customers even where the customer is considered vulnerable. The PSR has stated above that the excess will be "modest" in any case.

8. Do you have comments on our proposals that:

- **sending PSPs should be allowed to set a minimum claim threshold**

Yes, this is essential.

- **any threshold should be set at no more than £100**

No, the minimum threshold should be raised to between GBP 500 and GBP 1000.

We understand the PSR's rationale for including a minimum threshold is to account for the basic operational costs a PSP will incur when facilitating reimbursement. We consider that the basic operational costs that a PSP incurs from reimbursing a customer will exceed GBP 100. In order to facilitate reimbursement, PSPs will have to, for example, deploy a global training programme in order to train staff on the PSR's new measures. This training will not be limited to the staff members handling the claim but will also include, for example, training for customer support representatives. We therefore consider the minimum threshold should be raised to between GBP 500 and GBP 1000 to account for such costs.

• PSPs should be able to exempt vulnerable consumers from any threshold they set?

No, on the basis that PSPs still incur costs when providing services to customers even where the customer is considered vulnerable.

9. Do you have comments on our proposal not to have a maximum threshold?

We believe this is unreasonable and not commercially viable. No business can accept uncapped liability; especially when the standard of conduct is so uncertain.

The PSR state: *We would expect PSPs typically to have the strongest safeguards in place for the largest payments. Given this, if a PSP allowed a very large payment to proceed, it should be liable if the payment is an APP scam (subject to exceptions for first party fraud and gross negligence) [4.47]*

Please note that a maximum threshold may not be engaged if the customer were to make "a very large payment" – it may be engaged when the customer makes many payments of small amounts over time.

The PSR further note: *In practice most PSPs' Faster Payments transactions limits are very well below £1 million. [4.47].* Therefore, a liability cap of "very well below GBP 1 million" should be reasonable.

The maximum threshold should align with section 75 of the Consumer Credit Act 1975 (i.e. GBP 30,000). As the PSR have already established parallels with Section 75, there is precedent for capped liability at this level – unlimited liability is unsubstantiated.

Our proposed GBP 30,000 cap aligning with section 75 rights under the Consumer Credit Act 1975 should be the cap applied to the entire claim and not merely one payment. This is because fraudsters will become aware of any per transaction cap and tailor their practises to convince the customer to make several payments below the threshold rather than one large payment that will exceed it. The PSR should therefore apply an overall cap to an entire claim to ensure the PSR's proposals do not further enhance fraud.

10. Do you have comments on our proposals that:

- **sending PSPs should be allowed to set a time-limit for claims for mandatory reimbursement**

Sending PSPs should definitely be allowed to set a time limit for claims of reimbursement. This should be a basic tenet for any prudent business.

- **any time-limit should be set at no less than 13 months?**

Time limit is too long

The time limit should be lessened to six months. The 13-month time limit in the PSR for the customer to notify the PSP of an unauthorised transaction is so long because the customer is not involved in the unauthorised transaction and may therefore not know about it.

An APP scam is completely different in nature to an unauthorised transaction in that it directly involves the customer. The customer is aware the transaction has taken place; they gave their authorisation for the payment order to be executed.

Whilst both types of fraud, unauthorised transactions are not comparable to APP scams (i.e. authorised payments). Accordingly, there is no basis to use the same lengthy time period.

In any case, consumers usually report a scam or fraud within days if not hours of becoming a victim.

How the time period is defined is incorrect

The PSR has proposed “*a time-limit of no less than 13 months from the final payment involved in the APP scam*”; however, this means that numerous payments could take place over the course of years and the customer notifies the PSP that they have in fact been scammed within 13 months of making the final (of many) payments.

All of the payments that the PSR expects the PSP to reimburse must take place within the time limit. PSPs do not agree to underwriting fraud that may have been perpetuated over a series of years. Even the crime of the fraud itself is subject to a statute of limitations.

11. Do you have comments on our proposals that:

- **the sending PSP is responsible for reimbursing the consumer**

No specific comments.

- **reimbursement should be as soon possible, and no later than 48 hours after a claim is made, unless the PSP can evidence suspicions of first party fraud or gross negligence?**

We do not agree with the “no later than 48 hours after a claim is made” timeline. This is far too short a time for a PSP to properly investigate the matter. A fraudster may have spent months or even years perpetrating the fraud. For the most sophisticated of scams, the fraudster may have spent a considerable amount of time laying the foundation in

order to socially engineer the victim; it may not be a simple matter that can be dealt with in 48 hours.

Further, 48 hours is two working days which is seven hours times two – this is not sufficient time to fully investigate a claim.

The timeframe also needs take into account the customer's willingness to cooperate. In other words, the clock must not start ticking until the customer has provided every piece of information that PSP has requested in order to investigate the claim.

Permitting a PSP was given all relevant information by the customer in order for the PSP to thoroughly investigate, and, depending on the sophistication of the fraud at hand, a realistic timeframe to investigate the claim and be in a position to make an informed decision as to whether it is a valid claim is no less than one week. 48 hours will put pressure on staff to rush investigations and decisions which will lead to inaccuracy. In particular this will affect smaller PSPs that are unable to provide staffing to cover such activity over the weekend.

We propose the PSR extend the time limit to reimburse to five working days. Please note that the time limit must be expressed in 'working days' as to not necessitate smaller PSPs allocating resource during the course of a weekend, as discussed above.

Please further note that the time limit should be expressed in a 'stop / start' clock. To demonstrate, when the customer formally submits a claim, the clock starts. The clock then stops until the customer provides all information requested by the PSP; the customer must not be able to 'buy time' or wait out the five-day time limit by not cooperating or otherwise not providing information.

12. What standard of evidence for gross negligence or first party fraud would be sufficient to enable a PSP to take more time to investigate, and how long should the PSP have to investigate in those circumstances?

We suggest a standard of "reasonable suspicion based on articulatable facts".

Please note that whether it is considered evidence of gross negligence or fraud (or not), PSPs must be permitted to extend the time for investigation indefinitely in cases where the customer (i) refuses to provide the PSP with any information requested by the PSP relating to the claim, (ii) tries to mislead the PSP, or (iii) does not otherwise fully cooperate with the PSP following a claim.

13. Do you have comments on our proposal for a 50:50 default allocation of reimbursement costs between sending and receiving PSPs?

We understand the rationale behind the 50:50 default allocation of reimbursement costs, as a relatively simple way to attribute liability between PSPs. However we are aware of at least one alternative being proposed, and would invite the PSR to consider such alternatives before adopting the 50:50 liability option.

For example one approach that would allow PSPs to reduce their fraud liability and better manage their risk would be to automatically allocate liability based on historical APP scam related data. The APP scam data that PSPs will be required to report to the PSR under Measure 1 could be used to score PSPs for fraud, and the liability ratio between sending and receiving PSP be applied in line with their relative APP scam risk score. This would provide a clear liability allocation, and incentivise PSPs to reduce their risk score.

14. Do you have views on our proposal that PSPs are able to choose to depart from the 50:50 default allocation by negotiation, mediation or dispute resolution based on a designated set of more tailored allocation criteria?

The allocation criteria must take into account the relative bargaining power of the PSPs. Large banks have significant resources – they will always be in a position to challenge the default 50/50 position and force smaller PSPs to dispute resolution. Smaller PSPs will not have the resources to continuously keep defending these challenges.

In addition, smaller PSPs may be relying on the larger bank or PSPs for other services (banking services, safeguarding, payment processing, etc) with whom they are disputing a reimbursement allocation. The effect on the commercial relationship could be affected and result in unintended consequences for the smaller PSP, such as being de-risked.

Accordingly, the PSR must direct Pay.UK to take into account the relative size and bargaining power of the PSPs in the allocation criteria.

Further, the allocation criteria should empower the receiving PSPs to challenge a classification of a given transaction as fraudulent - prior to the repayment to the victim – and to allow the receiving PSP to provide evidence to the sending PSP that the payment was legitimate. The sending PSP has no insight into the fraudster's use of payment services and should therefore not be permitted to unilaterally classify a transaction as fraudulent (thereby levying 50% of the liability on the receiving PSP).

15. Do you have views on how scheme rules could implement our proposed 50:50 default allocation to multi-generational scams?

The final payment to the fraudster must be the only payment that qualifies for reimbursement.

The PSR states:

The 'end to end' journey of some APP scams involves more than one payment. In one example, the fraudster may 'socially engineer' the consumer to transfer money from their bank account to an account they hold at a different PSP (or perhaps persuade them to open a new account in their own name). The fraudster then persuades the consumer to transfer the money from that account into the account under the fraudster's control. [5.10]

In some cases that second payment may be a transfer using Faster Payments to an account held at a PSP. In other cases, the second payment may be to a different type of

account, such as a crypto wallet, which does not happen over Faster Payments, but uses another, for example, a card or a crypto-based, payment system. [5.11]

In the example given by the PSR, the first payment from one account held by the customer to another account (not yet to the fraudster but to another account held by the customer) must not qualify for reimbursement. The customer, by transferring funds to themselves, has not sustained any loss at this stage and therefore the PSP cannot incur liability.

Using the same example given by the PSR, the customer then makes a second payment to a crypto wallet. The PSR expressly states this transaction does not take place over Faster Payments.

Accordingly, this second transaction should not be within scope of the reimbursement rules proposed by the PSR. The scope of these proposed rules is confined to Faster Payments.

16. Do you have comments on our proposal for a 50:50 default allocation of repatriated funds between sending and receiving PSPs?

The PSPs must be made whole for the loss they have suffered from reimbursing the customer.

The PSR state: *We propose that, as a default, repatriated funds should be shared 50:50 between the sending and receiving PSPs to defray their costs of liability for reimbursement. [5.16]*

This makes sense to the extent that liability was apportioned 50/50 in the first instance.

The PSR further note: *Any repatriated funds remaining after the PSPs have fully defrayed their reimbursement costs would go to the victim. [5.16]*

Please note that even if repatriated funds do exceed reimbursement costs (although it is unclear how this could be the case), the customer must not be able to profit from the scam. The funds paid to the customer by the PSP must be no more than the loss the customer sustained as a result of the scam.

17. Do you have views on the scope we propose for rules on allocating the costs of mandatory reimbursement?

The PSR intends to levy reimbursement costs on both direct and indirect participants. However, indirect participants do not have any control over scheme rules, they are subject to the terms of the contract they have in place with the direct participant.

If the PSR intend indirect participants bear the same liability as direct participants, indirect participants must be given the same rights as direct participants in terms of influence scheme rules that relate to APP scams. Anything less than complete equality between direct participants and indirect participants in terms of their ability to influence scheme rules would be unfair as direct participants and indirect participants bear the same liability under the rules.

18. Do you have views on our long-term vision, and our rationale for the PSO being the rule-setter responsible for mitigating fraud?

As we have discussed above, the PSR must establish the cost of the reimbursement proposals before embarking on it.

If Pay.UK are going to be directed to facilitate reimbursement. They are going to be required to put in place a cost allocation mechanism, a dispute resolution mechanism and a real time transaction monitoring mechanism.

Putting in place all of these mechanisms and systems is going to cost Pay.UK significantly and these costs will be passed on to PSPs.

19. Do you have comments on the minimum initial set of Faster Payments scheme rules needed to implement our mandatory reimbursement proposals?

The rules are not appropriate generally, and, as a result, the minimum initial set of rules are not appropriate. The rules are uncertain and ambiguous on important points. For example, the standard of conduct required by both the customer and the PSP, in different circumstances, is not settled (for example, gross negligence, or the standard of evidence a PSP must produce to be permitted to take extra time to investigate). The scheme cannot implement rules based on PSR requirements that need to be clarified.

20. Do you have views on how we should exercise our powers under FSBRA to implement our requirements?

No specific comments.

21. Do you have views on how we propose that allocation criteria and dispute resolution arrangements are developed and implemented?

There is not enough detail in the consultation to answer this question. The dispute resolution process appears to be cumbersome and onerous. Would disputing a 50/50 allocation under the proposed dispute resolution arrangements incur a fee? If so, what is it? Are there options for a PSP to reimburse the customer unilaterally and not engage in dispute resolution?

In relation to the “set of standards for preventing and detecting APP scams” and that the PSR expects “future arrangements to build on the achievements of the CRM Code”, we consider that if PSPs are liable for reimbursement, then PSPs should be free to determine their own standard of conduct in terms of detecting and preventing APP scams. The PSP is the party bearing all risk of loss; it should be able to mitigate this risk on its own terms.

22. Do you have comments on our preferred short-term implementation approach of requiring Pay.UK to implement an effective compliance monitoring regime, including a reporting requirement on PSPs?

Reporting seems unnecessarily onerous. If PSPs were not complying with scheme rules and not reimbursing customers, would this not elicit complaints to higher authorities such as the FOS or a court (e.g. Philips v Barclays)?

23. Do you have views on the costs and benefits of Pay.UK implementing a real time compliance monitoring system and when it could be introduced?

The PSR must establish how much this monitoring system will cost Pay.UK as this cost will be passed on to PSPs. In particular it is likely to have a disproportionate impact on payments-specialist PSPs and smaller PSPs.

The PSR have said: *Respondents to our November consultation highlighted the potential cost implications of our reimbursement proposals for small PSPs and for certain business models. If reimbursement costs were large enough for some small PSPs, this could, in principle, have prudential implications – for instance, where firms face the cost of reimbursement and may not have the capacity to invest in fraud detection and prevention to combat the problem effectively. As set out in chapter 3, we continue to work with the FCA and the Prudential Regulation Authority (PRA) on how **risks to individual small PSPs** would be monitored and managed. [2.65]*

As discussed in our response to Q2, it is imperative that the PSR conduct a full cost analysis of Pay.UK implementing the reimbursement measures.

24. Do you have views on the best option for short-term enforcement arrangements?

The EMA considers Option A - with short-term enforcement managed by Pay.UK, and avoiding the PSR's intervention - is the correct approach for short-term enforcement.

25. Do you have views on the best way to apply the rules on reimbursement to indirect participants?

Indirect participants have no control over scheme rules and otherwise have no influence over them; indirect participants are merely bound by the contract they have in place with the direct participant.

Accordingly, the governance of Pay.UK would have to change in order to allow for indirect participants to have a say in terms of scheme rules.

26. If it was necessary for us to give a direction, what are your views on whether we should direct indirect PSPs or IAPs?

If it were necessary for the PSR to give such a directive, a direction on indirect participants rather than indirect access providers would be more appropriate in the circumstances.

27. Do you have comments on our cost benefit analysis at Annex 2 or any additional evidence relevant to the analysis?

We consider that the cost benefit analysis is unsubstantiated as it does not contain analysis of any costs (as discussed above).

Section 104(3) of FSBRA requires the PSR to provide a “cost benefit analysis” with draft proposed requirements.

Section 104(7) provides:

(7) For the purposes of this section a “cost benefit analysis” is—

(a) an analysis of the costs together with an analysis of the benefits that will arise—

(i) if the proposed requirement is imposed, or

(ii) if subsection (6) applies, from the requirement imposed, and

(b) subject to subsection (8), an estimate of those costs and of those benefits.

The PSR have not provided what is described in section 104(7) as a “cost benefit analysis” because there are no costs set out in Annex 2. There are some examples figures which do not appear to reach the threshold.

Section 104 (8) of FSBRA provides:

(8) If, in the opinion of the Payment Systems Regulator—

(a) the costs or benefits referred to in subsection (7) cannot reasonably be estimated, or

(b) it is not reasonably practicable to produce an estimate, the cost benefit analysis need not estimate them, but must include a statement of the Payment Systems Regulator’s opinion and an explanation of it.

We consider that the cost to Pay.UK of facilitating the reimbursement rules (which will then be passed on to PSPs) can reasonably be estimated; however, the PSR have said in Annex 2:

- *We cannot quantify the likely scale of the costs to PSPs [2.49]*
- *Our proposed policy is likely to lead to PSPs incurring additional costs that they do not face at present, although we have not been able to quantify these; and [2.52]*
- *We have not sought to quantify the potential costs, if any, of any such migration [2.64]*

However the CBA does not appear to provide a rationale for why the quantification of these costs has not been sought.

We consider that the document published at Annex 2 is lacking in detail such that it does not discharge the PSR's obligation in section 104(3) of FSBRA to provide a cost analysis.

28. Do you have any other comments on the proposals in this consultation?

We urge the PSR to not only quantify the costs of their proposals as set out above in the response to question 27, but to also analyse in more detail the cost to the faster payment system and the potential for delayed and rejected payments due to the need to investigate potential scam payments. We do not consider the effect of delayed and / or rejected payments on both PSPs and consumers has been sufficiently analysed in the consultation; we therefore that the PSR provide this analysis.

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