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25 August 2023

**Re: PSR CP23/4 draft Directions Faster Payments APP scam reimbursement rules and operator monitoring**

Dear APP Scams Team,

The EMA is the EU trade body representing electronic money issuers and alternative payment service providers. Our members include leading payments and e-commerce businesses worldwide that provide online payments, card-based products, electronic vouchers and mobile payment instruments. They also include a large number of smaller Payment Service Providers. A list of current EMA members is provided at the end of this document.

We welcome the opportunity to respond to the PSR's Consultation on draft Directions for Faster Payments APP scam reimbursement rules and operator monitoring, as they will impact a large number of PSPs, including several EMA members.

I would be grateful for your consideration of our concerns.

Yours sincerely

Dr Thaer Sabri  
Chief Executive Officer  
Electronic Money Association

## Questions

**Question 1: Does our proposed package of the three legal instruments outlined above (and published in the annexes to this document) give full effect to the policy set out in our policy statement PS23/3? If not, why, and what changes are necessary in order for it to do so?**

On 12 July 2023, the Supreme Court handed down their judgment in *Philipp v Barclays Bank UK PLC*. The Supreme Court stated in the judgment:

*It is a basic duty of a bank under its contract with a customer who has a current account in credit to make payments from the account in compliance with the customer's instructions. This duty is strict. **Where the customer has authorised and instructed the bank to make a payment, the bank must carry out the instruction promptly. It is not for the bank to concern itself with the wisdom or risks of its customer's payment decisions.***

*It would be possible for a bank to agree as an express term of the contract that it will not comply with a payment instruction given by the customer if the bank believes, or if the bank has reasonable grounds for believing, that the customer has been tricked by a third party into authorising the payment [...] **In the absence of an express term, no obligation of this kind can be implied or said to be inherent in the relationship between a bank and its customer. To the contrary, such an obligation would be inconsistent with the normal contractual basis on which banking transactions are conducted.***

The PSR has referred to this case that was ongoing throughout 2022 and 2023 in several settings. Now that it has been ultimately decided by the Supreme Court, we would encourage the PSR to read the judgment and reflect the decisions of the judges in their future policies with respect to APP scams.

The PSR's reimbursement policy is inconsistent with general principles of English law, unreasonable and, generally speaking, not welcome by industry.

**Question 2: Do you agree with our proposed timeline for implementation and the feasibility of the 'go live' date of 2 April 2024? If not, why and what alternative would you propose?**

The "go live" date of 2 April 2024 introduces an unreasonably short timeframe. EMA members, generally speaking, are indirect participants of Faster Payments and are therefore subject to the general direction that has not yet been published for consultation.

Paragraph 1.3 provides: *We are publishing our general direction to payment service providers (PSPs) for visibility, but we intend to consult on it separately in October. This*

*will allow Pay.UK to draft the reimbursement rules beforehand, so that the consultation will be better informed on PSPs' obligations under the section 54 general direction.*

It is not reasonable to publish a direction in October and move from consultation phase to full implementation and rules in effect phase by April the following year.

The PSR is only now consulting on key details that will inform PSPs' reimbursement policy. On 15 August 2023, the PSR published two consultations CP 23/6 on excess and maximum reimbursement and CP 23/7 on the consumer standard of caution. Stakeholders are given a truncated timeline to respond in less than a month by 12 September 2023.

That outcome of that consultation will inform what internal measures etc. a PSP would have to put in place in order to implement the reimbursement requirement. The PSP will have to recalibrate various systems, put in place new policies and procedures, deploy training etc. in order to implement the PSR's new rules.

As stated in all of our previous responses, the PSR have not considered how their policies will affect smaller PSPs. Whilst the larger UK PSPs be ready for an earlier "go live" date, this is because those banks have significant resources that allowed them to join the LSB Contingent Reimbursement Model Code ("CRM Code") and already have policies and procedures in place to reimburse customers, identify vulnerable customers, manage split liability cases etc. This is not the case with smaller PSPs. It is not commercially feasible for a smaller PSP to join the CRM Code; that is why no smaller PSPs have signed up to the CRM Code and do not have existing policies and procedures in place to reimburse customers.

We would like to remind the PSR that the CRM code was developed over a period of over 12 months before launching in May 2019; those banks that were not part of the original signatories then joined over the course of the following 4 years, so the implementation timelines for these entities were at least 12 months if not longer.

It is not feasible for a PSP to implement these rules within the business when the PSR will only be publishing key details of those rules in late 2023. For example, PSPs will now need to deploy additional engineering efforts to send 'tailored and specific warnings' to a customer.<sup>1</sup> A PSP will now have to put in place policies and procedures to investigate and establish whether a claimant *promptly* reported a fraud<sup>2</sup> or where the customer has otherwise acted with gross negligence.

It is not feasible to do this or otherwise reasonable to expect PSPs to do this in the period of time between the final rules being published (later 2023) and 2 April 2024.

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<sup>1</sup> CP 23/7: APP fraud: The consumer standard of caution; paragraph 3.6

<sup>2</sup> CP 23/7: APP fraud: The consumer standard of caution; paragraph 3.10

The “go live” date should therefore be no earlier than 12 months from the date all of the relevant PSR policy decisions are finalised, in order to allow sufficient time to implement these complex and subjective rules within their businesses.

**Question 3: Do you have any comments on the frequency of reporting to Pay.UK? Would a different reporting frequency strike a balance between the cost and burden of reporting and sufficient data coverage?**

The “frequency of reporting” was not set out in the consultation so it is not possible to provide comments. We would therefore expect that the PSR will publish a further consultation on frequency of reporting in order to discharge their statutory duty to consult pursuant to section 103 of the Financial Services (Banking Reform) Act 2013.

**Question 4: Do you have any comments on what data Pay.UK should gather?**

We understand from sessions with Pay.UK on the data gathering process that Pay.UK intends to require PSPs to report the “Transaction method” as a single data point within an overall report regarding an instance of a customer being scammed. We further understand that the possible values for this data point “Transaction method” are intended to be:

- International (SWIFT)
- BACS Standing order
- Faster payment
- Intra Bank Transfer
- BACS
- CHAPS

Please note Section 72 of the Financial Services and Markets Act 2023 provides:

**Liability of payment service providers for fraudulent transactions**

(1)The Payment Systems Regulator must prepare and publish a draft of a relevant requirement for reimbursement in such **qualifying cases of payment orders** as the Regulator considers should be eligible for reimbursement.

(2) A case is a “**qualifying case**” for the purposes of this section if—

- (a) the case relates to a payment order **executed over the Faster Payments Scheme**, and
- (b) the payment order was executed subsequent to fraud or dishonesty.<sup>3</sup>

The PSR is empowered to hand down a reimbursement requirement with respect to “qualifying cases”. As set out above, a “qualifying case” is a payment order executed over Faster Payments.

Accordingly, PSPs are not required to report instances of APP fraud in general to Pay.UK. PSPs are therefore not required to report any instances of APP fraud other than those that

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<sup>3</sup> Section 72, Financial Services and Markets Act 2023

relate to a payment order executed over Faster Payments. This data point “Transaction method” therefore needs to be removed or the expectation levied that only those cases relating to payment orders executed over Faster Payments will be reported to Pay.UK.

**Question 5: Do you have any comments on the approach and principles for Pay.UK monitoring compliance?**

**Question 6: Do you have any other comments on the section 55 specific requirement on Pay.UK?**

**Question 7: Do you have any other comments on the section 54 specific direction on Pay.UK?**

**Question 8: Do you have any other comments on the section 54 general direction on PSPs?**

We will provide comments on the section 54 general direction when the PSR publishes this document for consultation in October 2023. Please note that merely publishing the draft section 54 general direction as part of this consultation does not discharge the PSR’s duty to consult as set out in sections 103 and 104 of the Financial Services (Banking Reform) Act 2013.

**Question 9: Do you agree that it is right to follow a similar approach to imposing a reimbursement requirement within the CHAPS payment system?**

As we do not support the PSR’s reimbursement policies for Faster Payments, for the reasons we have set out in our previous responses to PSR consultations on this subject, we do not support extending the reimbursement requirement to another payment system such as CHAPs.

**Question 10: Do you have any comments on the most effective way to do this?**

See response to question 9.

**Question 11: Do you have any other comments on this consultation?**

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