Electronic Money Association
bringing together Europe's innovative payment service providers

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By email: Kate.Fitzgerald@psr.org.uk, Benjamin.Woodside@psr.org.uk, Saima.Hansraj@psr.org.uk, Chris.Hemsley@psr.org.uk, Chris.McGrath2@fca.org.uk, Laurens.vanHeck@fca.org.uk,

Dear Kate

Re: APP scam liability for PSPs – GBP 415,000

We refer to our telephone conversation on Wednesday 6 December 2023 where you asked us to attend in order to discuss the extent of liability levied on PSPs for loss arising from an APP scam. To reiterate – the extent of liability currently proposed by the PSR in recent consultations published in September 2023 is GBP 415,000.

The EMA has responded to all PSR consultations on APP scams and otherwise engaged with the PSR on this matter since 2017. In all of those instances of engagement, whether consultation response or otherwise, we have put forward principled arguments, reasoning and evidence against levying excessive liability on PSPs for loss arising from APP scams.

To date, the PSR has not been able to refute our arguments nor have they substantively addressed our concerns.

Presumably unpersuaded by any other arguments previously provided by industry, we have been requested – days before the publication of the final policy statement – for

data relating to the competition impact of the APP scam proposals on the market for payment services.

The PSR is the competition regulator for the market for payment services. The PSR has enforcement powers under Part 1 of the Competition Act 1998 and market study and market investigation reference powers under Part 4 of the Enterprise Act 2002, as far as these powers relate to participation in payment systems (sections 59 to 67, Banking Reform Act).

We therefore wonder why the PSR, as the competition regulator, has not carried out any market research or obtained independent data on how their policies will affect competition in the payments sector.

The PSR runs a risk of firms bringing judicial review against them for policies taken by the PSR, particularly where concerns have been raised consistently throughout the process, but remain unaddressed.

1. Larger businesses can sustain greater liabilities; smaller businesses cannot

We do not consider this statement to be controversial and it is unclear what data the PSR expects us to furnish in order to prove it.

This proposed liability is so extensive such that one claim, which these firms have extremely limited ability to prevent, could send a small payment service provider into insolvency. A large UK retail bank could withstand a loss of £415,000; however, a smaller payment service provider likely could not. A high-value reimbursement claim is likely to put a smaller payment service provider into insolvency.

UK retail banks are required to hold large amounts of capital, which can exceed millions of pounds[1]; whereas, smaller payment service providers (such as electronic money institutions and payment institutions) are required, by law, to hold only between £125,000 and €350,000 initial capital. This demonstrates the different nature and risks associated with a large UK retail bank's business compared with that of a small payment service provider.

A reimbursement liability of greater than a small payment service provider's capital requirement could send that business into insolvency; whereas a UK bank worth millions of pounds could easily withstand such a liability.

This is further exacerbated in the payments industry. PSPs who are members of the EMA are principally specialist payment providers who are proscribed from lending the funds of users, and therefore are restricted in the income 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.

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, it would have to process at least 100 equivalent size

[1] Pursuant to the UK Capital Requirements Regulation (575/2013)

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.

2. Smaller PSPs will react defensively in order to protect their own balance sheet; large UK banks need not

Smaller payment service providers who cannot afford to take on a liability as extensive as that currently proposed by the PSR will react by, in the first instance, protecting themselves. This will mean smaller payment service providers simply stop or delay transactions in order to assess whether the transaction is possible fraudulent. This will result in the Faster Payments Scheme becoming the opposite of what it is intended to be i.e. fast and be, generally speaking, a poor customer outcome from a Consumer Duty perspective. It should be remembered that instant payments, and the Faster Payments Scheme in particular, gives the UK a significant competitive advantage, and has been one of the main driving forces behind the explosion in the establishment and growth of UK Fintech firms over the last 10 years. Smaller payment service providers will act defensively, stopping more payments to investigate because the alternative (paying out a large reimbursement claim) is not feasible for that business. Large UK banks, on the other hand, have significant resources and revenue and can absorb large losses. Large UK banks need not stop transactions to check if the transaction is fraudulent; they can simply run the risk that it is fraud and pay out if that eventuates.

Customers of smaller payment service providers will clearly become frustrated with payments being consistently stopped or otherwise delayed and will switch to a large UK bank. In addition, a £415,000 reimbursement scheme could act as a barrier to entry for new fintechs looking to start up in the UK.

Similarly, smaller payment service providers who cannot afford to take on a liability as extensive as that currently proposed by the PSR will react defensively by imposing monetary limits on transactions in order to reduce their potential liability in the event a transaction does indeed turn out to be fraudulent requiring reimbursement.

Again, imposing transaction limits and otherwise restricting the customer's use of the payment service will have the effect of frustrating the customer and they will switch to a large UK bank that does not need to impose such restrictions on their service offering in order to protect themselves from liability. Transaction limits are also not guaranteed to resolve the problem, as scammers will instead do smaller multi-payment scams to bypass transaction limits. Under the PSR proposals, these will be treated as one claim, and numerous such payments can go back over a 13-month period. Instead, customers wishing to make larger payments will be limited to a smaller number of PSPs, and/or forced to pay the high CHAPs scheme fees.

Payments industry representatives from small payment service provider firms expressly conveyed this information to PSR representatives at the PSR Stakeholder Session held Friday 7 July 2023 at 10am GMT. Beyond payments industry representatives' confirmation that small payment service providers will react in this manner, it is unclear what data the PSR expects the industry to provide.

3. High risk will deter direct investment in the UK payments sector

The PSR's proposal for a maximum threshold of £415,000 is a concern for investors, as one or two high value claims could bankrupt smaller firms and wipe out investments. This significantly increases the risk profile of investing into smaller fintechs.

The UK fintech sector has significantly improved customer outcomes over the last decade, yet the current scope of this regime proposes that customers do not have to take any meaningful steps to verify payments or act responsibly. PSPs can only use blunt instruments to protect customers, and without any targeted action to tackle fraud at source, this could lead to scammers targeting the UK even more - creating an environment conducive to organised crime.

The EU's current approach - that PSPs should be liable only where they have some resource to prevent fraud from happening on their platforms. We believe that this more proportionate approach could lead to fintech entrepreneurs choosing the EU over the UK to launch their business.

4. Insurance providers will increase premiums

PSPs have a number of insurance policies in place to manage their risk. This can include professional indemnity insurance and safeguarding insurance. Following dialogue with insurance providers in this market, they have indicated that premiums will likely increase as a result of the changes coming in next year. Premium increases will be based on the following factors:

- **Increase in Frequency of Claims being made** – the increased ease with which customers can make claims against their PSP will have a knock-on effect on PSPs making claims to their insurers.
- **Potential increase in quantums being stolen**. As scammers have become more sophisticated, they are working out how PSPs trade and are able to comb off funds over longer periods of time by infiltrating their systems.
- Insurers will be aware that **more firms are likely to lean on their insurance** as a consequence of these measures and in order to brace themselves, the underlying rate of this coverage is likely to increase.
- Most importantly, **the number of insurers who can consider covering Payment Services Providers is already limited in the London market.** PSPs are newer/faster growing businesses than traditional financial institutions who have more insurance options than PSPs. The existing apprehension around insuring PSPs may be exacerbated by these reforms, and would be another reason why new insurers would be wary of entering the Fintech insurance market.

5. Competition objective

Small payment service providers provide a wide range of mainstream and niche products that benefit consumers, SMEs and corporates alike. They represent a remarkable example of innovation, efficiency and consumer-centric progress in the UK, and are fundamental to the UK's global position at the forefront of Fintech development and innovation. Competition in the market has been encouraged over the years, which has driven down costs and improved the quality of services for consumer and business customers alike.

The PSR has the following statutory objectives to facilitate competition in the market for payment services:

- to promote effective competition[2]
- to promote the development of, and innovation in, payment systems in the interests of those who use, or are likely to use, services provided by payment systems, with a view to improving the quality, efficiency and economy of payment systems[3]
- to ensure that payment systems are operated and developed in a way that takes account of, and promotes, the interests of those who use, or are likely to use, services provided by payment systems.[4]

The PSR's measures starting 7 October 2024 are wholly inconsistent with these statutory objectives. The PSR's measures will function to:

- levy excessive liability on small payment service providers putting them at risk of insolvency
- force small payment service providers to delay payments and impose transaction limits
- force small payment service providers to curtail their service provision driving customers to switch to large banks
- make small payment service providers less appealing to venture capitalists who wish to bring direct investment to the UK
- increase small payment service providers' insurance premiums for essential services (e.g. safeguarding of customer funds which is required by regulation).

Whilst we still consider it excessive, the non-bank payments sector has stated to the PSR on a number of occasions (consultation responses, engagements, stakeholder sessions, conference calls etc.) that we are willing to live with a liability cap of GBP 30,000 with respect to liability arising from APP scams.

6. Lack of rationale for such a high liability cap

There is no sound basis for the PSR to propose such extensive liability. The PSR have proposed £415,000 on the basis that this is the upper limit of what the Financial Ombudsman can award to a complainant. This is not a sound basis because the Financial Ombudsman ("**FOS**") serves a different purpose to that of the PSR's reimbursement rules, and is not bound to decide complaints in accordance with PSR directions. The purpose of the FOS is to provide redress to customers when firms have done something really wrong or egregious, such as serious regulatory non-compliance that results in loss to the customer. The PSR reimbursement rules, on the other hand, make payment service providers the insurers of last resort for APP scams (i.e. liable in cases where they have not done anything non-compliant or otherwise wrong, just like an insurance company pays out a policy). Where the customer is receiving reimbursement for an APP scam due to no fault on the part of the firm (and the firm's role is confined to the insurer of last resort), the extent of liability should be much lower. In the (extremely rare) cases where a customer

[2] Section 50, Banking Reform Act

[3] Section 51, Banking Reform Act

[4] Section 52, Banking Reform Act

suffers loss higher than £30,000, they can have recourse to the FOS, which has the right to award in the customers' favour up to the £415,000.

The proposed cap of £415,000 is designed to cover 99.98% of all claims and 95% of all losses; however, 95% of APP scam claims are lower than £10,000[5], thus the vast majority of claims would still be reimbursed if liability was limited to £30,000. There does not appear to be any rationale to substantiate levying such a significant liability for the sake of outlying cases, especially given the potential impact on smaller PSPs.

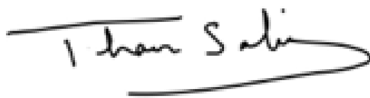
For the sake of an outlying 5% of claims, the PSR are running the risk of sinking a small payment service provider. This would have wider ramifications. Indeed, an individual customer who fell victim to a large scam would be reimbursed, as the customer standard of caution is so low that firms will have little ability to refuse to pay (even where the customer lies or does not act in good faith themselves); however, a small business could enter insolvency and numerous individuals would lose their jobs. In the current cost of living crisis, why would an individual customer's reimbursement take precedence over people's jobs?

Instead we support setting a liability limit of £30,000. This is the same as the liability cap for credit card fraud set down by Section 75 of the Consumer Credit Act 1974. It makes sense that the extent of reimbursement liability is consistent across all types of payment fraud.

A liability cap of £30,000 ensures that a significant majority of APP fraud cases are reimbursed (i.e. 95%), whilst protecting small payment service providers from outlying cases of hundreds of thousands of pounds that would sink them.

We hope you will be able to take our concerns into account as you make your final policy decisions this week, and remain available for further discussion.

Yours sincerely



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

[5] UK Finance Annual Fraud report (2022 data)

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Annex I: List of EMA members as of December 2023

AAVE LIMITED
Airbnb Inc
Airwallex (UK) Limited
Allegro Group
Amazon
American Express
ArcaPay UAB
Banked
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network EMEA Limited
Boku Inc
Booking Holdings Financial Services International Limited
BVNK
CashFlows
Circle
Citadel Commerce UK Ltd
Contis
Corner Banca SA
Crypto.com
eBay Sarl
ECOMMPAY Limited
Em@ney Plc
emerchantpay Group Ltd
eToro Money
Etsy Ireland UC
Euronet Worldwide Inc
Facebook Payments International Ltd
Financial House Limited
First Rate Exchange Services
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Gemini
Globepay Limited
GoCardless Ltd
Google Payment Ltd
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MONAVATE
MONETLEY LTD
Moneyhub Financial Technology Ltd
Moorwand
MuchBetter
myPOS Payments Ltd
Nuvei Financial Services Ltd
OFX
OKG Payment Services Ltd
OKTO
One Money Mail Ltd
OpenPayd
Own.Solutions
Park Card Services Limited
Paymentsense Limited
Paynt
Payoneer Europe Limited
PayPal Europe Ltd
Paysafe Group
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Plaid
PPRO Financial Ltd
PPS
Ramp Swaps Ltd
Remitly
Revolut
Ripple
Securiclick Limited
Segpay
Skrill Limited
Soldo Financial Services Ireland DAC
Square
Stripe
SumUp Limited
Swile Payment
Syspay Ltd
Transact Payments Limited
TransferMate Global Payments
TrueLayer Limited
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