



Electronic Money Association

Crescent House

5 The Crescent

Surbiton

Surrey

KT6 4BN

United Kingdom

Telephone: +44 (0) 20 8399 2066

Facsimile: +44 (0) 870 762 5063

www.e-ma.org

James Tallack

Financial Conduct Authority

25 The North Colonnade

London E14 5HS

UK

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Dear James

Re: EMA response to FCA CP 18/3 on SME Access to the Financial Ombudsman Service

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, including startups. The majority of EMA members are authorized in the UK, and operate across the EU, most frequently on a cross-border basis. A list of current EMA members is provided at the end of this document.

We write to express our concern about the FCA's proposals to expand the list of eligible complainants to the Financial Ombudsman Service to include SMEs and guarantors. This is a substantial departure from existing practice, and is likely to have a considerable impact, particularly on smaller financial service providers in the payment services sector, where disputes are likely to be complex, and where the financial services provider may themselves be an SME.

I would be grateful for your consideration of our concerns.

Yours faithfully

Dr Thaer Sabri

Chief Executive Officer

Electronic Money Association

EMA response to consultation

Q1: Do you agree with our proposed changes to the definition of an eligible complainant? Are the proposed size thresholds broadly correct or would different thresholds or criteria be more appropriate?

We do not agree with the proposed expansion of the definition of eligible complainants.

Freedom of contract is a long established principle in common law, in particular in its application to B2B contracts. This principle has only been varied to protect weaker parties where there is a gross power disparity e.g. individuals as consumers or employees. The businesses that are proposed to fall within the scope of the revised definition will have between 10 and 50 employees, and turnover and assets well in excess of the resources of ordinary individuals. The financial services industry should not have to provide a special redress channel merely to cover inadequate preparation when purchasing financial services. These businesses can avail themselves of the services of accountants, independent financial advisors and lawyers in a manner that ordinary individuals cannot.

We note that currently the legislative basis for the Financial Ombudsman Service (“**Ombudsman**”), as set out in section 225(1) FSMA, is “*a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person.*” The more complex and the higher the value of claim, the harder it is for the Ombudsman to meet these criteria.

We also note that the Ombudsman’s decisions are binding on the relevant financial service provider but not on the eligible complainant. As the cases increase in complexity (and the corresponding claim values increase), the new larger eligible complainants will be incentivized to present their case in the High Court with respect to matters that have not succeeded with the Ombudsman, using it as a means of testing and honing arguments in advance of the court hearing. This is a form of dispute arbitration. Unlike in the case of a complaint to the Ombudsman, commercial alternative dispute resolution (“**ADR**”) allows for a level playing field as outcomes are either not binding (e.g. negotiation or mediation) or they are binding on both parties (e.g. arbitration), which allows for certainty and prevents arbitration by the complainant. Therefore, in order to prevent such arbitration, we caution against the expansion of the definition of eligible complaints.

Regarding complexity, we note the Ombudsman’s £150,000 compensation limit already exceeds the qualifying threshold for the Multi Track of the High Court, which handles the most complex civil cases. While this is justifiable for consumers, micro-enterprises, small charities and small trusts, for the purposes of meeting the statutory objectives of section 225(1) FSMA, the expected

complexity of claims by larger complainants will require the Ombudsman to adopt procedures which incorporate the characteristics of Multi Track. This then defeats the statutory objective of the Ombudsman to resolve disputes quickly and with a minimum of formality.

Finally, the Ombudsman is unlikely to have the necessary resources or expertise to handle the type and number of potential cases that might arise with larger complainants, particularly in relation to payment services. If this issue is not addressed in advance, financial service providers are likely to reduce the types of services offered to such businesses, thereby reducing their access to financial services products.

Q2: Do you agree that all 3 tests (employees, turnover and balance sheet) would need to be met for the Ombudsman to consider an SME a small business?

While we disagree with the values set out in the 3 tests, and recommend that they be reduced, we are of the view that all 3 tests (with revised values) must be met for the Ombudsman to consider an SME a small business.

Q3: Do you agree with our proposal to make guarantors eligible complainants?

No, guarantors should not be eligible complainants as they have a secondary contingent liability; it is the principal that has the primary liability under a contract backed by a guarantee. The guarantors are not the recipients of the financial services. If a guarantor becomes liable under the guarantee because of the failure of the principal to meet its obligation to the beneficiary, the guarantor is entitled to have the courts assess the principal's primary liability to the beneficiary and raise the principal's defences against the beneficiary. These issues are best determined by the courts.

Q4: Do you agree that the changes introducing small businesses as eligible complainants should come into effect on 1 December 2018 and that they should apply only to complaints made to a firm regarding acts or omissions of the firm, which occur from 1 December 2018? If not, what transitional period do you consider appropriate?

We do not agree with the proposed changes to the definition to eligible complainant. However, if the changes were to take place, it would be appropriate for the changes to apply only to acts or omissions occurring on or after the date the new rules come into force in order to allow firms to adjust their product offerings and services if need be.

Q5: Do you agree that the changes introducing guarantors as eligible complainants should come into effect on 1 December 2018 and that they

should apply only to complaints made to a firm regarding guarantees or security given on or after 1 December 2018?

We do not agree with the proposed changes to the definition of eligible complainant. However, if the changes were to take place, it would be appropriate for the changes to apply only to guarantees made on or after the date the new rules come into force in order to allow firms to adjust their product offerings and services if need be.

Q6: Do you agree with our cost benefit analysis? Are there other costs or benefits we ought to have considered?

We do not agree with the cost benefit analysis and our initial view is that the costs to both SMEs and financial service providers are being underestimated, as the more complex cases that will arise will require more time and resources to process, both for financial service providers and for the Ombudsman. Furthermore, the benefits to SMEs and financial service providers have been overestimated. Financial service providers are likely to build into their fees the potential cost of Ombudsman hearings, which would include not just the fees to the Ombudsman, the levy, but also the cost of preparing a case for the Ombudsman.

The Ombudsman is unlikely to have the necessary resources or expertise to handle the type and number of potential cases that might arise with larger complainants. If this issue is not addressed in advance, financial service providers are likely to reduce the types of services offered to such businesses, thereby reduce their access to financial services products.

Any action should be taken only after consideration of the findings of UK Finance's review into the complaints and ADR landscape for the UK's SME market.

Q7: Do you have any views on how access to redress might be improved for SMEs without the need for changes to legislation, including but not limited to the areas where we have powers to make changes?

We suggest that an industry-led voluntary ADR system as proposed by UK Finance, and mentioned by the FCA in paragraph 4.8 would be an appropriate tool for this purpose.

Q8: Without legislative change, do you think the Ombudsman might be an appropriate body to consider a greater share of complex or higher value complaints from SMEs than is implied in our proposals for consultation in Chapter 3? What changes would be needed to make this effective? What risks might this introduce?

No, please see our response to Q1.

List of EMA members as of April 2018:

Advanced Payment Solutions Ltd	One Money Mail Ltd
Airbnb Inc	Optal
Allegro Group	Park Card Services Limited
American Express	Paybase Limited
Azimo Limited	Payoneer
Bitstamp	PayPal Europe Ltd
BlaBla Connect UK Ltd	PayPoint Plc
Blackhawk Network Ltd	Paysafe Group
Boku Inc	PPRO Financial Ltd
CashFlows	PrePay Solutions
Citadel Commerce UK Ltd	R. Raphael & Sons plc
Clearsettle	Remitly
Coinbase	SafeCharge UK Limited
Corner Banca SA	Securiclick Limited
Ebanx	Skrill Limited
eBay Europe Sarl	Starpay Global Ltd.
Euronet Worldwide Inc	Stripe
Facebook Payments International Ltd	Syspay Ltd
First Rate Exchange Services	Transact Payments Limited
Flex-e-card	Transact24 (UK) Ltd
Flywire	TransferWise Ltd
GoCardless Ltd	TrueLayer Limited
Google Payment Ltd	Uber BV
IDT Financial Services Limited	Valitor
Imagor SA	Vitesse PSP Ltd
Intuit Inc.	Viva Payments SA
Ixaris Systems Ltd	Wave Crest Holdings Ltd
Merpay Ltd.	Wirecard AG
MuchBetter	Wirex Limited
Nvayo Limited	Worldpay UK Limited