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Racquel Thomas-Smith
Strategy and Competition Division
Financial Conduct Authority
12 Endeavour Square
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3 October 2018

Dear Racquel

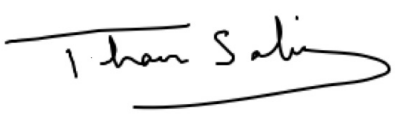
Re: EMA response to FCA CP 18/16 on extending the jurisdiction of the FOS to include recipient PSPs in cases of APP scams

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 views on the FCA's proposals to require PSPs to handle complaints regarding alleged fraud related to funds received as a result of APPs and the scope to allow eligible complainants to refer these complaints to the Financial Ombudsman Service. We support the proposal set out in the CP and believe they will help prevent APP scams and reduce their impact by increasing the incentives on PSPs to communicate with each other when an APP scam is notified. However, we note that PSPs are already subject to strict AML obligations in relation to the onboarding of customers and we would not support any additional implied obligations.

I would be grateful for your consideration of our concerns.

Yours sincerely



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA response to consultation

Q1: Do you agree with the Glossary definition for APP fraud? Please explain why.

The proposed Glossary definition for APP fraud – "a transfer of funds…." is very broad, and would encompass fraud using other payment methods such as card-based fraud, or pull payments, which have existing consumer protections already built in.

We propose the use of the definition set out in the scope of the Terms of Reference for the Industry Code for a Contingent Reimbursement Model (CRM) i.e. push payments made by consumers through the interbank payment systems:

• push payments executed across CHAPS, Faster Payments

• 'on-us' book transfers where both the sending and receiving accounts are held with the same

PSP, and the payment would otherwise have been executed across CHAPS or Faster Payments.

Both pull payments and other payment types, such as card payments, have existing consumer protection systems for authorised fraud, which are already in operation and work well for consumers and PSPs. Furthermore, the code was developed specifically with these payment types in mind and the group's deliberations did not consider other payment types.

Q2: Do you agree with our proposal to apply our complaints handling rules to complaints by payers against receiving PSPs about a failure to prevent alleged APP fraud, and bring these complaints into the Financial Ombudsman Service's CJ and VJ? Please explain why.

The EMA agrees to the FCA proposal of applying complaints handling rules in cases where the complainant believes the recipient PSP has failed to prevent alleged APP fraud. Rapid identification of fraud, communication between parties, and action to freeze, close or investigate accounts in the event of an APP scam should be reasonably expected. The FCA's proposed approach will increase the incentives on both parties to take action to reduce and react immediately to APP scams.

However, in relation to the responsibilities of recipient PSPs, it must be noted that a zero-failure regime in relation to the opening of payment accounts is not possible. A PSP that permits the opening of an account that is later used to receive APP scam funds must not be considered to have failed in its duty to prevent fraud. Nor should a complicit customer, who is tempted through

financial incentives to allow their account to be abused in this manner, cause the financial institution to be regarded as facilitating the fraud.

It is very difficult to identify when a seemingly legitimate account holder plans to use their account maliciously, particularly if they have presented genuine documentation. The most effective method of identifying a money mule or fraudster's account is through transaction monitoring. However the conversion from an account processing regular transactions to a money mule account is swift, making it problematic for PSPs as funds are usually withdrawn immediately. Therefore, despite a PSP's best efforts, identifying a money mule account at an early stage, for example at account opening, may not be possible.

Q3: Do you support a wider voluntary scheme, run by the Financial Ombudsman Service, to cover complaints which are not covered by our proposals? If yes, what do you suggest such a scheme should cover?

We do not believe the FOS is an appropriate forum for addressing the risk of fraud in the financial services industry. The actors and actions that result in fraud are frequently outside of the control of the regulated firm, and it is not equitable to seek redress from firms for actions that are outside of their control. There is already a basis for seeking redress where a firm has failed to meet its regulatory expectations, which include the prevention and deterrence of crime. There is no basis for widening the scope of the CJ to incidents for which the firms is not responsible.

Q4: Do you agree with our proposal to give effect to the requirement to bring these complaints (about a payee's PSP's cooperation with the payer's PSP to recover funds involved in a payment transaction where incorrect details have been provided) into the Financial Ombudsman Service's CJ and VJ? Please explain why.

We agree with the proposal to bring these complaints into the Financial Ombudsman Service's CJ and VJ.

EMA members have noted previous difficulties communicating with larger banks and obtaining relevant information, including in the case of APP Fraud. Firms report receiving little to no response, and often are unable to identify an appropriate point of contact. Bringing recipient PSPs within the jurisdiction of the FOS will provide an incentive for improved communication between PSPs. UK Finance's Best Practice Standards for the Repatriation of Funds following an APP Fraud are a helpful step towards alleviating these issues.

Whilst the EMA consider the free flow of information between appropriate parties a vital measure in reducing APP fraud, anti money laundering "tipping off" obligations may prevent PSPs from disclosing information to the FOS or complainants.

In rare cases, the complainant might submit their grievance against their PSP and the recipient PSP to the FOS resulting in duplicate complaints. This may delay the outcome for the complainant.

Q5: Do you agree with the costs, benefits and transfers we have identified? If not, please explain why.

We have the following comments on the costs and benefits identified.

Costs.

As mentioned above, it is often difficult for PSPs to identify an account that will be used for fraudulent purposes. In the event a complaint is brought against the recipient PSP, a fee is payable, and this is accepted. However, if the complaint is without grounds, where it does not meet the criteria for reimbursement such as the respondent PSP having met its duty of care or the complainant having been negligent, we suggest the fee should not be applied. If not, this could create a de facto threshold of £550, below which it would be uneconomical for PSPs to refuse claims, even if they are unfounded.

An alternative could be an initial high level review of the facts of each case - which would not accrue a fee, which would help resolve much of this difficulty. The FOS adjudicator or official can then take a view of whether an investigation was warranted, on the facts presented.

This would help to weed out unwarranted and fraudulent claims, without creating an opportunity for further fraud.

Point 12 of the CP states, *'In addition to the costs described above, we expect there to be unintended costs that we are unable to quantify. This includes the possibility that our proposals could result in PSPs applying more stringent checks when opening and operating accounts. This could potentially make it more difficult for some consumers and micro-enterprises and other eligible complainants to access banking and payments services.*' This potential outcome is not an issue to be taken lightly, as access to banking services is an ongoing – and increasing – problem for many customers in the UK. We agree that this is likely to be a result of the proposals, and therefore suggest that the FCA undertake mitigating measures to address this risk.

Another concern is an increase in the risk of customers claiming vulnerability, fraudulently. The FCA handbook states *all regulated firms must suspend the pursuit of recovery of a debt from a customer when:*

(1) the firm has been notified that the customer might not have the mental capacity to make relevant financial decisions about the management of the customer's debt and/or to engage in the debt recovery process at the time; or
(2) the firm understands or ought reasonably to be aware that the customer lacks mental capacity to make relevant financial decisions about the management of the customer's debt and/or to engage in the debt recovery process at the time.

In these instances, a customer/family member could claim the account holder did not have the necessary mental capacity to make relevant financial decisions, requiring the PSP to recover and refund the consumer. It would be helpful if some form of safeguard could be introduced to mitigate this risk, such as requiring nominal medical evidence.

Benefits.
EMA members believe the FCA's proposals will increase incentives on recipient PSPs to act quickly in the event of an APP Scam, which will in turn increase the likelihood of being able to recover funds and increase consumer trust and confidence in the financial system.

List of EMA members as of September 2018:

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