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PSR response to the BEIS consultation on Reforming Competition and Consumer Policy

I'm writing on behalf of the Payment Systems Regulator to respond to proposals and questions set out in the BEIS consultation on Reforming Competition and Consumer Policy.

The PSR welcomes the opportunity afforded by the consultation to ensure that the UK frameworks for competition and consumer policy are updated to reflect current and future policy objectives. By making the regime fit for the future, the right changes will assist the PSR carrying out its role of delivering the right outcomes through its regulation of the payment systems landscape. As economic regulator of payment networks, we have the statutory objectives of promoting competition, innovation, and the interests of service-users in the markets for payment systems and services. We also have concurrent Competition Act powers, alongside the CMA and other concurrent regulators and the power to conduct market studies and make market investigation references.

With these roles and these powers in mind, we have set out in the attached response how the proposals would affect our work, in particular where the proposals would help us to fulfil our statutory objectives of promoting competition, innovation, and the interests of service-users in payments systems, and where, in our view, they could be improved.

Please note that we are happy for our response attached to be made public. We would be available to engage in further discussions on the proposed reforms. In particular, we would be willing to elaborate on why we ask that the PSR should retain (and have enhanced) market study/market investigation powers.

Yours sincerely

[redacted]

PSR Response to BEIS consultation on Reforming Competition and Consumer Policy

Introduction

1. This document contains the Payment Systems Regulator's (PSR) response to the BEIS consultation on Reforming Competition and Consumer Policy which was published in July 2021.

2. The PSR welcomes the opportunity to comment on the BEIS proposals.

3. The PSR is established under the Financial Services (Banking Reform) Act 2013 (FSBRA) as the economic regulator of payment networks (including both the operator of regulated system and the payment service providers utilising such a system). We have the statutory objectives of

    a. promoting effective competition in the markets for payment systems and services ('payment systems markets');

    b. promoting innovation in payment systems; and

    c. ensuring payment systems are operated and developed in a way that considers and promotes the interests of service users (i.e. those who use, or are likely to use, services provided by payment systems).

4. Additionally, the PSR has concurrent Competition Act 1998 powers in relation participation in payment systems (irrespective of whether the payment system is regulated by us under FSBRA). The PSR has powers also to conduct market studies and to make market investigation references in relation to participation in payment systems,

5. With these roles and these powers in mind, we have set out in the below how the proposals would affect our work, in particular where the proposals would help us to fulfil our objectives and where, in our view, they could still be improved.

6. Following the structure of the BEIS consultation document, we will first comment on the competition policy reform proposals before we turn to the consumer policy proposals.

Competition policy reform proposals

7. We comment on a limited number of specific proposals in more detail where we consider them of particular relevance to our work and our ability as economic regulator with concurrent competition law powers to address associated harms in the markets.

Markets regime

Response to Q4 and Q5 (design of the markets regime)

8. Questions 4 and 5 seek comment on a set of proposals that are aimed at improving the effectiveness of the 'markets' regime. They suggest significant changes to the way the regime is currently designed, namely that:

   a. either new remedy powers are granted at the end of the market study phase[1], or

   b. alternatively, the present two-stage process of market study and market investigation would be abolished in favour of a single 'market inquiry' stage.

9. While the wording of the proposals does not make this explicit, we understand from discussions with BEIS that a reform of the markets regime towards a single market inquiry phase would mean that the PSR (alongside other concurrent regulators) would lose its powers to undertake market studies under the Enterprise Act 2002 (EA02). Under the alternative proposal, we would not lose these powers, but we would equally not be afforded new remedy powers at the end of a market study phase (which would exclusively be granted to the Competition and Markets Authority (CMA)). Under both proposals, we would retain our ability to make market investigation references to the CMA.

10. We suggest that the present two stage process of market study and market investigation should be retained, but updated to provide for a more efficient, flexible and proportionate regime. In particular, we are supportive of the proposal that the CMA should be granted additional remedy powers at the end of a market study, and we consider these powers should also be granted to all economic regulators (including the PSR), for the reasons set out below.

How the PSR applies the current markets regime

11. By way of background, currently we have powers to conduct market studies under the EA02 and we also have powers to conduct market reviews using our general powers under Part 5 of the Financial Services (Banking Reform) Act 2013 (FSBRA). Market reviews and market studies are the principal ways in which we investigate payment systems markets, to see how well they are working for service users. They are in line with our competition, innovation and

[1] Save for structural remedies which would still require a market investigation.

service user objectives. If we find that the markets we review or study could be made to work better, we have a range of powers to take appropriate action under FSBRA.[2]

12. In situations where we consider undertaking an investigation into a market, we decide on a case-by-case basis whether to pursue a FSBRA market review or an EA02 market study. Our choice of tool is influenced by a variety of considerations such as the aim(s) of the review/study, the different procedural requirements and timetables of each tool, and the different sets of powers (e.g. to gather information) that each tool gives us.[3]

13. So far, we have conducted three market reviews (i.e. using our FSBRA powers) of which two have been completed and one is presently ongoing.[4]

The issue with the current proposals

14. While all these reviews were made under our FSBRA powers, we can envisage situations in which utilising the FSBRA powers would be less appropriate - principally because of the restrictions in our toolkit that would arise at the remedy stage.

15. The key issue is that our FSBRA powers at the remedy stage only apply in relation to payment systems designated to be regulated by HM Treasury. At present, these are Bacs, CHAPS, Cheque & Credit, Faster Payments, LINK, (formerly) Northern Ireland Cheque Clearing[5], MasterCard and Visa Europe (Visa).[6]

16. However, the market for payment systems is rapidly changing. As it evolves, there is increased opportunity for competition issues to arise in areas which do not fit well into the FSBRA regulatory framework, but which are highly relevant. For example, there are payment systems which are not presently designated (e.g. PayPal). The growth of digital markets and the emergence of new business models is changing the payment system landscape significantly. For example, in a relatively short timeframe, new types of payment systems are emerging (such as crypto-asset based systems) and are likely to continue to do so. Presently, as explained in our introductory remarks, the concurrent powers (including the market study and investigation reference provisions) provide a valuable safeguard ensuring that regulatory action could be taken, even if the new emerging model does not fit well into the FSBRA regulatory framework. In this context, it should be noted that our regulatory framework does not include an authorisation regime, unlike many other UK economic regulators. This means, our approval is not required before a new payment system can offer its services in the UK. This increases the importance of having an effective set of review and remedy powers.

17. In a situation where the PSR did not have market study powers under the EA02, we think the consequences could be contrary to the policy intention. Were issues regarding non-designated payment systems to arise, the PSR would have no choice but to refer the matter to the CMA. In

[2] Further details on our regulatory powers is set out in our Powers and Procedures Guidance at https://www.psr.org.uk/media/znwkejgy/psr_powers_and_procedures_guidance_updated_june_2020.pdf.
[3] Further details on how we choose between market studies and market reviews and how we apply these powers is set out in our Markets Guidance (PSR PS 15/2.2) available at https://www.psr.org.uk/media/mvedfu0f/psr_ps15_2-2_markets_guidance.pdf.
[4] These are our current market review into the supply of card-acquiring services, and our past market reviews into the supply of indirect access to payment systems and into the ownership and competitiveness of infrastructure provision. Further information on these can be found on our homepage at https://www.psr.org.uk/our-work/market-reviews/.
[5] NICC has been included in what is now the UK Cheque and Credit Clearing system. See https://www.chequeandcredit.co.uk/.
[6] Further details on the designated payment networks we regulate can be found on our homepage at https://www.psr.org.uk/payment-systems/who-we-regulate/.

that instance, the CMA would have no ability to decline to take such a market reference. In contrast, giving the full set of powers to the PSR would allow us to prioritise matters within our remit, taking account of the overall impact judged against our statutory duties.

18. Furthermore, market investigations involve significant investment of resources on the part of the CMA. If the PSR were required to rely on the CMA to investigate markets (and, where necessary, to impose remedies "for us"), this would potentially (and perhaps even likely) affect the CMA's ability to focus on other priorities. For conducting such market investigations, the CMA would also likely require specialist know-how and market insight which the PSR has already at its disposal (and for reasons of which we would otherwise be considered 'best placed' under the concurrency regime). This lack of know-how may slow down the investigation process considerably (despite us seeking to facilitate). Finally, any remedy by the CMA would also need to be aligned with aspects of payment systems regulation for which the PSR would remain responsible. Again, while we would seek to facilitate this, there will be situations where the process would be more convoluted and costly than if we could act ourselves.

19. More generally, putting the CMA in a position where they become the "backstop" to fill regulatory gaps "for us" may in practice also lead to an increased fragmentation of the regulatory landscape for payment systems. In our view, there would be a clear risk that, in payments systems, relevant businesses could over time become subject to oversight (long term, if remedies were needed) from two regulators (the CMA and PSR) which both would set regulatory standards. Again, this may lead to inefficiencies, regulatory complexities and ultimately more red tape for businesses.

20. The considerations above do not apply to the PSR alone. It is likely that other economic regulators will similarly need to rely on the CMA to investigate markets (and impose remedies) for them. Many of them will be in a similar situation to the PSR, where market developments may give rise to competition issues in the markets they regulate but which will be difficult to tackle with their existing regulatory toolkit (if they were to lose market study powers).

How the proposals could be improved

21. We have set out above why the present proposals, in our view, will likely lead to unintended consequences, namely by reducing the overall ability of both the PSR and CMA to improve outcomes, and resulting in inefficiencies. This may even effectively undermine the goals Government is seeking to achieve with the proposals.

22. However, if economic regulators were empowered to effectively address issues through a market study, with decisions being taken by the regulator with the relevant industry knowledge, this would likely lead to a more efficient, flexible, and proportionate markets regime which the Government is seeking, whilst also being in line with the principle of concurrency.

23. For this reason, the PSR suggests that it (and other economic regulators) should retain their ability to conduct market studies under the EA02, and that it (and other economic regulators) should obtain powers to impose remedies at the end of the market study phase, as is presently considered for the CMA.

24. It is the ongoing relationship of the PSR with the industry as well as the principle of concurrency that influences our suggestion not only that the market study option should be retained, but that the PSR should have similar remedy powers as are being considered for the CMA. The Open Banking experience demonstrates that an improved and more efficient system

would contemplate the economic regulator being able to pick up the post report/remedies activity. To do so would leave the CMA to better prioritise on addressing new issues/other markets and leave the regulator with the ongoing relationship with the industry, which is entirely complementary to the regulator's role.

25. Finally, our suggestion would also keep relevant legislation under the EA02 simpler and clearer, and thus avoid regulatory complexity.

26. For these reasons:

a. In response to question 4, the PSR supports the proposal that the CMA should be empowered to impose remedies at the end of a market study process. We would further suggest that these additional remedy powers should also be granted to the PSR, and other economic regulators.

b. In response to question 5, the PSR does not support the proposal to replace the existing regime with a single stage market inquiry tool.

Responses to Q6 – Q9 (other features of the markets regime)

27. Questions 6 to 8 seek comment on a number of proposals that would update the markets regime further, namely enabling the CMA to:

a. impose interim measures in market studies and market investigations;

b. accept binding commitments at any stage of the 'market inquiry' process;

c. require businesses to participate in implementation trials that would allow the CMA to test and trial how best to implement its remedies; and

d. more effectively and flexibly review and vary remedies it imposes (including the possibility to expand or supplement remedies later on where required).

28. We welcome and support these reform proposals. We would suggest, in line with our previous response to questions 4 and 5, that any changes made to the markets regime to the benefit of the CMA should also be made – to the extent applicable – with regard to the PSR and other economic regulators (who, if the PSR's suggestions are followed, will retain their existing powers to conduct EA02 market studies and also will be able to impose new remedies at the end of a market study).

29. Question 9 asks what other reforms would help deliver more efficient, flexible and proportionate 'market inquires'. We have alluded to this already above, and we think that, particularly but not exclusively in a scenario where the Government were to go ahead and 'centralise' market inquiry powers with the CMA (against the suggestion of the PSR as set out above) and also afford the CMA the power to periodically review, and if necessary, vary, the remedies it imposes, that these powers of review and variation could be handed back to the economic regulators to the extent markets are affected that fall within their respective remits. This would avoid having two regulators effectively imposing regulatory requirements on

relevant businesses on an ongoing basis[7], and may also lead to efficiencies (which is demonstrated by the recent experience in Open Banking).

Merger Control

Response to Q10 (jurisdictional thresholds)

30. Question 10 seeks comment on the proposed update to the jurisdictional thresholds for merger control.

31. The PSR welcomes the proposals. In particular, the introduction of an additional share of supply test (pursuant to which a merger would be captured if "*any party to the merger has at least 25% share of supply of particular goods or services in the UK, or a substantial part of the UK, and has UK turnover of more than £100 million*") can be expected to remedy certain limitations in the existing thresholds which in the past may have allowed large firms to extend their market power.[8]

32. In this regard, we cannot rule out that updating the thresholds may also become important with regard to mergers in payment systems in the future, and in particular in a situation where the proposed new digital regime were not to apply to payment systems firms (meaning that potential transactions of concern could not be captured by that regime).[9]

Antitrust

Response to considerations on a statutory duty of expedition and Q24 (appropriate level of judicial scrutiny for CA98 infringement decisions)

33. Paragraphs 1.142-1.145 of the consultation document concern the introduction of a new statutory duty for expedition and set out why government does not plan to propose one. Question 24 seeks comment on what the appropriate level of judicial scrutiny for antitrust decisions. The PSR considers that these points are related.

34. The PSR agrees that the duration of both antitrust investigations and the appeals process before the courts could be improved. In this context, we consider that, falling short of amending the standard of review upon appeal, an explicit statutory duty of expedition, if also designed to influence the courts' approach on procedural matters, may be helpful to recalibrate the system towards a faster resolution of investigations and appeals without unduly compromising the quality of decision making and undermining businesses' rights of defence. In this regard, we suggest that (if BEIS were to reconsider this issue) any explicit statutory duty of expedition

[7] Notwithstanding the Government's consideration that the power to review and vary remedies should not lead a situation of perpetual review, firms would potentially be subject to regulatory rule making by two regulators for significant periods of time.
[8] In this regard, we agree with the view expressed in the BEIS consultation paper "A new pro-competition regime for digital markets", July 2021, at paragraph 171.
[9] We are referring to the separate proposals in the BEIS consultation paper "A new pro-competition regime for digital markets", July 2021, which suggest that a mandatory merger control regime with a transaction value threshold should be implemented that would capture transactions that previously weren't caught but might have been of concern (see paragraph 174 of the proposal). Although at present this is unclear, there is a question whether the new digital regime may theoretically also apply to payment system firms provided they meet the SMS test and become designated firms under the regime. Conversely, if payment system firms were not to fall under this regime, the proposed new share of supply threshold would achieve that any transactions of concern could still routinely be captured.

should be tied to matters of procedure, not substance. Otherwise, there may be a risk that an explicit statutory duty of expedition might lead to unintended consequences in that antitrust authorities would be disincentivised to go after difficult cases and scope investigations accordingly (which may mean harm remains unchecked).

35. Considering the issues outlined above in the round, we therefore suggest that an explicit statutory duty of expedition (similar to what is already in place for merger control and tied to procedural matters only)[10] would be preferable over indicative timescales.

Response to Q14 (territorial scope)

36. Question 14 concerns the proposal to amend the CA98 for the purpose of capturing anticompetitive agreements/conduct that has effects in the UK.

37. The proposal is welcome, if only because UK enforcement of antitrust law should depend on the question whether the conduct in question harms UK consumers or businesses, irrespective of where the conduct is implemented.

38. We would like to make two comments though.

39. First, the proposed wording of the legislative draft could be streamlined and simplified. We propose that the legal test should simply require that a conduct "has, or is likely to have, effects in the UK". In this regard, adding further qualifications in primary legislation (for example, that the effects need to be "direct", "substantial" and/or "foreseeable") seems in our view unnecessary and might even be potentially counterproductive if this were to lead to uncertainty as to what the precise geographic scope of UK competition law is (including associated practical difficulties for competition authorities to establish whether the test is met in individual cases).[11]

40. Second, to allow UK competition authorities to enforce against conduct effectively, the scope of information-gathering and remedy powers needs to be further updated, and beyond what is currently being proposed. For example, information-gathering powers will need to be updated to keep pace with the way information is obtained, used and stored by firms as a result of digitalisation (e.g. the fact that firms often store data in the cloud, including on servers outside the UK). Equally, further consideration should be given whether the existing powers are sufficiently effective to investigate companies located outside the UK.[12]

Consumer policy reform proposals

41. Like the Government's proposals to reform competition policy, the PSR broadly supports many of the reforms proposed to consumer policy, consumer rights and consumer enforcement. However, it does so while noting that although the PSR's remit is inevitably focused on bringing benefits to users of payment systems, it does not have specific consumer statutory powers,

[10] See paragraph 103 of the EA02.
[11] We note in this regard that the wording appears to reflect the jurisdictional test as set out in the US (see Foreign Trade Antitrust Improvement Act, 15 U.S. Code, title 15, chapter 1, §6a) and arguably the test also echoes in substance the "qualified effects test" set out by the Court of Justice of the European Union (see C-413/14 P, *Intel,* judgement *of* 6 September 2017*)*. However, the precise interpretation would still be open to UK case law.
[12] This issue was already pointed out by Lord Tyrie in its letter to BEIS of 21 February 2019 at page 33.

and hence direct experience of utilising the powers that the CMA and concurrent regulators have. We therefore complete this response with a small number of high-level comments.

42. Consumer law, like competition law enforcement, is undertaken by a range of regulatory agencies and the PSR considers that just as concurrency arrangements make sense in the enforcement of competition law so too it makes sense to ensure that such concurrency also operates well between the CMA and regulators that have duties to protect consumers.

43. We consider that having and maintaining consistency of application of the proposed reforms between the CMA and sector regulators would enhance the Government's aims for the specific outcomes of maintaining strong consumer rights, modernising consumer rights and strengthening enforcement.

44. We would like to note that consumer protection is often juxtaposed with regulations imposed on businesses to enable that protection. It is worth noting that many sole-traders and small businesses require as much protection as individual domestic consumers, and that many of the remedies might be relevant to both sets of buyers of goods and services. This is particularly true in the context of payments, where the needs of a sole trader/small business and an individual consumer are likely similar. With this in mind, Government should consider whether the consumer protections could be extended to also cover sole traders/small businesses in appropriate circumstances.

Response to Q41. (Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?)

45. Given that most business operate online whether to provide physical goods or services or digital content, we believe that it would be unhelpful for the Government to draw any distinction between the two and it would simplify, and make the application of rules easier, if no distinction was drawn between digital and non-digital products and services in terms of the level of rights consumers could expect to enjoy.

Response to Q46 (Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing?)

46. Our view is that consumer awareness of businesses using behavioural techniques to influence choice that affect their purchasing varies, and Government policy should with respect to consumer rights not be developed based on the assumption that consumers have a broad understanding of such techniques.

Response to Q49 (Are there perverse incentives or unintended consequences from our existing consumer law?)

47. Minimal fines for breaches, unlike under current competition law, could be seen by some larger traders as simply a cost of doing business to be absorbed within their operations. Minimal fines may also unintendedly incentivise traders not to comply with the law, particularly where they face little in the way of reputational costs as consequence of their non-compliance.

Response to Q61 (Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits,

costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?)

48. We consider there is a direct read-across between these proposals and the proposals on competition policy, where Government suggests updating existing civil fines (which at present are capped at £30,000 or a daily rate of £15,000, respectively) with new turnover-based penalties for non-compliance with information gathering powers (see paragraphs 1.218 – 1.223 of the consultation document).

49. With this in mind, we are supportive of the proposals to update the present consumer enforcement regime whereby at authorities currently need to seek a court order to force businesses to comply with information gathering measures (a potentially costly and lengthy process) with a regime where authorities can impose civil fines themselves. Further, we consider turnover-based fines are an appropriate tool for this purpose, as linking the size of the fine to the size of the business allows for sufficient deterrence of larger businesses.