HM Treasury

Payments Regulation and the Systemic Perimeter:

Consultation and Call for Evidence

July 2022

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Executive Summary

In its response to the 'Payments Landscape Review' in October 2021, the government committed to consulting on bringing systemically important entities operating within payment chains into Bank of England regulation. This was in recognition of responses to the Review and detailed work by the Bank's Financial Policy Committee highlighting how innovation, the proliferation of new services, and greater interconnectivity within the payments sector, have transformed how risks are spread across payments networks.

Given the degree of market change, it is doubtful that the logic stemming from the Banking Act 2009 of focusing Bank of England ("Bank") supervision on the systemic risks posed by payment systems and associated service providers alone remains adequate. Where issues such as critical scale, a lack of effective substitutability, or material economic interdependence exist beyond the Bank's existing remit for regulating systemic payment systems, then risks to financial stability or to the economic interests of the UK may also arise.

This consultation explores reforms on this topic in-depth. It sets out here:

1. the rationale for expanding the Bank's supervision of systemic risk relating to payments beyond payment systems and associated service providers, as set out in Part 5 of the Banking Act today
2. the principles the government would apply to any reforms of the Bank's regulatory responsibility for systemic payments activities, namely that of 'same risk, same regulatory outcome'
3. what an amended regulatory perimeter would involve for regulating risk end-to-end throughout the payment chain; what criteria would apply to recognising new entities; and the continued role for the Treasury in determining which entities fall within the systemic regulatory regime
4. the changes that would be required to ensure the effective and proportionate deployment of the Bank's supervisory powers
5. how accountability could be enhanced in the event of any expansion of the Bank's regulatory remit, drawing on the 'Financial Services Future Regulatory Framework (FRF) Review'

Further to the recent introduction of the 'Financial Services and Markets Bill', this consultation also sets out the government's approach to applying the FRF Review to the payments regulatory landscape at large, in relation to the UK's regulatory authorities for payments. This covers:

1. the application of the FRF Review's proposed statutory objectives and accountability framework to the Financial Conduct Authority's (FCA) supervision of payment services and e-money
2. the application of the accountability framework to the Payment Systems Regulator's (PSR) supervision of payment systems, and in relation to its regulatory responsibilities governed by retained EU law
3. the application of the accountability framework to the Bank of England in its supervision of systemic payments activities, including introducing a secondary innovation objective. This is in line with proposals made in relation to other Bank-regulated financial market infrastructure (namely, central counterparties and central securities depositories)

Finally, the consultation explores potential reforms to clarify the Payment Systems Regulator's regulatory framework and explores the Senior Managers & Certification Regime's potential application to the sector.

The government will formally respond to this consultation in 2023, further to receiving and reflecting on stakeholder feedback.

Chapter 1

Responding to systemic risks within payment chains

The current scope of systemic payments supervision

1.1 Since 2009, through Part 5 of the Banking Act, the Bank of England has been responsible for supervising payment systems that are recognised as systemically important. Part 5 defines what a payment system is; the criteria that determines if a system poses or is likely to pose systemic risk to the financial system or wider economy; the process HM Treasury employs to formally recognise a system as systemic for supervision by the Bank; and the powers the Bank has in supervising those recognised systems.

1.2 The regime set out in Part 5 ensures that systems performing critical, concentrated and hard-to-substitute activities are supervised for the financial stability or economic risk associated with their potential disruption or failure of service. Deciding whether or not to recognise a system as systemic is judged by the present or prospective volume, value, nature of, concentration and substitutability of the activities a system performs within the payments landscape and its relationship with the rest of the financial system, or with the Bank of England.

1.3 For payment systems recognised as systemic under Part 5, the Bank is given broad supervisory powers. Within this toolkit, the Bank publishes principles guiding its supervisory approach, issues codes of practice, and makes directions over the systems it supervises.[1]

1.4 Part 5 also allows the Bank to request relevant fees, reports, and information from supervised systems for the purpose of effectively monitoring for risks in both a system's design, and for market-wide interdependencies. The Bank has the ability to appoint formally persons to inspect and report on a system's activities and processes and, where necessary, penalise and force closure of systems that repeatedly fail to comply with the principles, codes, and directions that it issues.

1.5 Under the Banking Act, the Bank is also able to supervise associated service providers that perform critical operations forming part of the arrangements of a recognised payment system. These entities are not necessarily payment systems themselves, and may not be systemic in their own right, but perform

[1] The Bank of England's approach to supervising financial market infrastructure, including recognised systemic payment systems, is set out publicly here.

or support key functions within a recognised system for which their own disruption would pose similar, associated risks to UK stability.

1.6 Since the Banking Act's enactment, and with regulators' advice, the Treasury has formally recognised 9 payment systems and 1 associated service provider for Bank supervision. These are Bacs, CLS, CREST, LCH Ltd, the Faster Payments Service, ICE Clear Europe, VISA Europe, LINK and Mastercard Europe. Vocalink is additionally supervised as a specified service provider for its services to Bacs, the Faster Payments Service, and LINK.

1.7 The government considers the Banking Act framework an extremely valuable one for supervising and responding to risks posed to UK financial stability. VISA Europe's outage in the UK and across Europe on 1 June 2018 is a useful example regarding the importance of regulating risks to UK financial and economic stability, and the repercussive impacts of a major firm's outage, its relationship to the wider payment chain, and to economic continuity. The outage of VISA Europe resulted in over 5.2 million UK card payments being declined within only a number of hours.[2]

Exploring evolutionary trends within payment chains

1.8 In October 2021, in its response to the 'Payments Landscape Review',[3] the government recognised that the payments sector has seen a significant transformation, facilitated in part by legislation designed to support competition, but also due to wider technological innovation and evolving user preferences. A large and growing number of payment services businesses have entered the market with new technologies, functionalities, and end-user facing services that enrich payment 'journeys', performing functions previously executed by other parts of the UK's payments network.

1.9 Market behaviour in how payments are made and received has, in turn, changed enormously. In 2009, when the Banking Act was first enacted, a majority of all transactions were still made using cash. Today, cash is estimated to make up only 17% of all payments made in the UK. Debit and credit card payments now represent a majority of payments transacted. Consumer purchasing habits have also become increasingly digital, especially during the Covid-19 pandemic, with the value of personal online spending increasing more than fivefold since 2010, to over £300bn in the UK in 2020. For in-person 'point of sale' transactions, both contactless payments and the use of mobile wallets, such as Apple Pay and Google Pay, have become increasingly common payment methods, with 83% of people in the UK now using contactless payments and a third registered for mobile payments.[4]

1.10 It is clear that a combination of changing habits and evolving technologies have already, and will continue to, radically transform how consumers and businesses transact payments for the foreseeable future. In this regard, the government's vision for the payments sector remains ensuring that new and

2 Letter from Visa regarding service disruption, UK Parliament, June 2018

3 Payments Landscape Review: Response to the Call for Evidence, HM Treasury, October 2021

4 Source: UK Payment Markets Report 2021, UK Finance, June 2021

existing firms are free to innovate, bringing forward new technologies, greater choice, and increased competition for end-users. However, as payment chains – the set of activities necessary to make and receive payments – unbundle and grow to include a greater number of these activities and services at the same time as dependence on cash has reduced, the government recognises that regulation needs to remain agile to ensure that risks are properly managed commensurate with the pace of change.

1.11 Given the level of change, both in behaviour and technology, the risk is that systemic actors are unlikely to be concentrated only within the payment systems themselves currently subject to Bank of England supervision. Unlike in 2009, there is now potential for a wider array of firms to perform critical activities within ever more complex payment chains, where their own disruption could pose material risks to the UK financial system or wider economy. There is a risk that systemic actors could thereby emerge elsewhere within the payment chain, outside the Bank's regulatory mandate yet posing commensurate risks to those entities that are Bank-supervised.

1.12 While the regulatory perimeter for payments has evolved since 2009 – via the Electronic Money Regulations 2011, Financial Services (Banking Reform) Act 2013, and Payment Services Regulations 2017[5] – the purpose of these regulatory regimes is not designed to deal with the mitigation of potential systemic risk specifically. There is no regulation that applies to all actors throughout the payment chain that pose systemic risks to the financial system at large or to the UK economy.

1.13 The risk is that other types of market actors may play a critical role in the payments landscape, and could similarly exhibit adverse economic effects, or risks to stability, in the event of disruption.

Principles to reform: 'same risk, same regulatory outcome'

1.14 In its December 2019 'Financial Stability Report',[6] the Bank's Financial Policy Committee set out publicly for the first time its considerations for more effectively assessing financial stability risk within payment chains. This included that:

a) regulation of payments should reflect the financial stability risk, rather than the legal or technological form, of payments activities

b) firms that are systemically important should be subject to proportionate standards of operational and financial resilience that reflect the risks they pose

5 Payment services and e-money are subject to conduct and prudential supervision by the FCA, and certain payment systems and related participants are subject to economic supervision under the PSR.

6 Financial Stability Report, Bank of England, December 2019

c) the systemic importance of any single firm should be informed by whether it is part of one or more systemic payment chains and whether its failure could disrupt the end-to-end chain

1.15 Together, this approach is a manifestation of the principle of 'same risk, same regulatory outcome' – namely, that in place of focusing on an entity's form, regulation should reflect the risk posed by an entity's activities and relationship to the wider market and economy.

1.16 In its response to the 'Payments Landscape Review', the government made clear its support for the principle of 'same risk, same regulatory outcome' in approaching future changes to payments regulation, which had been broadly welcomed by respondents. The government also committed publicly as part of its response to consulting on reforming the Bank's remit over systemic payments activities in order to respond to the evolution of the payments landscape. This consultation is therefore designed to examine if systemic payments supervision by the Bank of England should be expanded, in order for the Bank to be able to supervise any source of material risk to UK financial stability or the wider economy – consistent with its current supervision of systemic payment systems. The consultation sets out the government's proposed approach and seeks views on a number of key considerations within this.

1.17 In considering such an expansion and how it might be put into effect, the government considers that the essential design of Part 5 of the Banking Act is well-established, proportionate and appropriate. Moreover, the government is cognisant from feedback to initiatives such as the 'Payments Landscape Review' of the desire from industry for a period of regulatory continuity following considerable change in the development of the sector and its regulation in recent years. The government therefore considers that any reforms to the systemic regulatory perimeter for payments should be made via the Banking Act, rather than erecting a new regulatory regime in its place or as a supplement.

1.18 The government also considers that amending the scope of the Banking Act to be able to accommodate systemic market actors throughout payment chains:

a) would need to be designed in an agile way, capable of providing for recognition of entities with different business models over time

b) would therefore require the ability to recognise an entity offering systemic payment activities in its own right, in place of focusing only on payment systems and associated service providers to those systems (which is the case today)

c) should preserve the existing recognition process whereby the Treasury is responsible for recognising an entity as systemic. This is also in line with the broader approach the government intends to take to financial services in the FRF Review – a model through which the regulatory perimeter will be determined by Parliament and government, but the regulators then take responsibility for providing the detail of regulatory standards and supervision. A recognition-

based model also ensures proportionality and that only entities that are judged to be systemic or likely to become so, are brought within the Bank's regulatory remit, providing a tailored and firm-specific determination as to if regulation should be applied.

d) should maintain the 'high bar' for bringing a firm into Bank supervision, continuing to apply this only to entities where the Treasury is concerned that deficiencies in a firm's design or disruption to its operation would threaten the UK's financial stability or have wider economic consequences. As is the case today for payment systems, criteria including the nature, volume, and substitutability of services would help guide the Treasury's assessment.[7]

1.19 The government recognises that any expansion of the Bank's systemic regulatory remit to cover market actors within the payment chain at large raises a number of related policy questions. Chief of these is how to manage overlapping regulatory responsibility with the FCA, in a scenario where a payments entity subject to FCA supervision under the Payment Services Regulations 2017 or Electronic Money Regulations 2011 was also deemed systemic under an expanded scope of the Banking Act; this is dealt with in the following chapter. The government proposes to draw on the approach being taken in the recently introduced 'Financial Services and Markets Bill', in relation to the regulation of stablecoins used as a means of payment. In this, the government is already expanding the regulatory perimeter as a result of the emergence of new forms of digital money, including the types of entity that may be systemic and fall within the Bank's regulatory purview, alongside dealing with associated co-supervision.

1.20 In addition, the government recognises the importance of wider developments in the regulatory regime for financial services through the FRF Review. The FRF Review proposes changes to the regulators' statutory objectives, and enhanced mechanisms for accountability, scrutiny, and oversight of the regulators by Parliament, the Treasury, and stakeholders, commensurate with the significant new regulatory responsibilities that the authorities would be given. While the FRF Review was developed primarily as a response to managing the large body of retained EU law that the UK has inherited since leaving the European Union (EU), it will rapidly become a false distinction to differentiate between regulations that were once part of retained EU law and regulations that were not. This consultation therefore explores whether an increase in the Bank's regulatory remit under the Banking Act should be twinned with applying the objectives and accountability framework designed through the FRF Review, reflecting the increased supervisory responsibility that the Bank would have, assuming its systemic regulatory perimeter was expanded.

1.21 The remainder of this consultation paper comprises an examination of, and seeks views in respect of:

7 See section 185 of the Banking Act, which sets out the criteria for recognition and matters which the Treasury is obliged to consider.

a) the systemic regulatory perimeter for the Bank of England and if the scope of the Banking Act should be extended to cover systemic entities throughout payment chains

b) the Bank's regulatory powers under the Banking Act, and establishing co-supervisory responsibility between the regulatory authorities, in particular the Bank of England and FCA

c) the application of the FRF Review's proposals to the payments regulatory perimeter, for the Bank of England, FCA and PSR

d) the application of a Senior Managers & Certification Regime to the payments regulatory perimeter

e) the regulatory framework of the PSR

Question 1: Do you agree that in line with the principle of 'same risk, same regulatory outcome', the Bank of England should have responsibility for supervising systemic actors within payment chains?

Question 2: Do you agree with the government's approach that the existing architecture of Part 5 of the Banking Act 2009 should be reflected in any expansion in the scope of Bank supervision – with criteria to determine systemic importance, and recognition by the Treasury?

Chapter 2

The scope and regulatory framework of the Banking Act 2009

The effective systemic supervision of the payment chain

2.1 Today, the only entities in payment chains that are systemically regulated – for the potential impact they could have on the financial system or UK economy – are payment systems and associated service providers. The regulation of 'associated' service providers are covered by section 206(A) within Part 5 of the Banking Act. This enables the Treasury to recognise service providers that perform systemic operations constituting part of a payment system already recognised for Bank supervision.

2.2 Unlike for payment systems, determining if a service provider should be recognised for Bank supervision does not require the Treasury to apply a set of criteria to that entity to determine its importance to the financial system or economy. Instead, its recognition can be made automatically, as a result of its close relationship with a recognised payment system and if disruption to either the payment system or related service provider could have consequences for financial stability or economic continuity.

2.3 As of today, the only firm that has been recognised through section 206(A) is Vocalink, which provides key processing services and technical infrastructure that facilitates payments made through the Faster Payments Service; cash withdrawals through the ATM network LINK; and 90% of UK salaries, 70% of household bills, and over 95% of state benefits payments through Bacs.[1]

2.4 The government considers that the existing regulatory framework to recognise payment systems and associated service providers is broadly the right one.[2] The key feature of the existing regime is criteria for recognition of a payment system by the Treasury, with the recognition of a service provider requiring no further criteria but being brought into Bank of England

1 Source: Vocalink

2 In the context of the recently introduced stablecoins legislation, the government has, however, suggested that it may be beneficial to also include providers "connected with" a payment system as opposed to just the current formulation of "form[ing] part of the arrangements constituting the system", to reflect the different ways that stablecoins may work. This may also be valid as part of reforms to the wider approach for regulating systemic payments entities.

supervision where necessary, as a result of its relationship with a recognised payment system.

2.5 However, the government believes that the Banking Act could be widened to introduce an additional category of payments 'provider' – i.e. an entity or actor within the payment chain – that poses systemic risk in its own right to the financial system or UK economy, and which may or may not have a relationship with an already-supervised payment system. This is similar to the approach taken for certain digital wallets that provide access to stablecoins used as a means of payment, as proposed in the recent 'Financial Services and Markets Bill'. It would make it possible to recognise sources of systemic risk from other providers within the payment chain, in addition to the Bank's existing regulation of systemic payment systems and associated service providers thereto.

2.6 The distinguishing feature of this additional category is that the source of risk would be in relation to the provider itself, not its relationship with an already-recognised payment system. This would capture other actors that perform an essential role, where such a provider's disruption or outage would not necessarily affect the stability of a specific, already-supervised entity, but could itself have material adverse impacts on the financial system or economy through its relationship with multiple entities or otherwise.

2.7 Based on the current structure of the Banking Act, this additional provision could allow for the possibility to recognise critical associated service providers to such actors, just as the Banking Act makes it possible today to supervise systemic payment systems and associated service providers to those systems.

2.8 This would result in the following expanded scope for the systemic payments perimeter:

- systemic payment systems (already in scope), where these are judged to be likely to threaten the stability of, or confidence in, the UK financial system or have serious economic consequences for the UK
- associated service providers (already in scope) to the above
- providers in their own right, where these are judged to be likely to threaten the stability of, or confidence in, the UK financial system or have serious economic consequences for the UK
- associated service providers to the above

2.9 The benefit of widening the systemic regulatory perimeter in this way would be enabling the payments regulatory framework to remain up to date, with the ability to apply Bank supervision to any entity within the payment chain that poses risks to the UK's financial system or to wider economic continuity, as well as to entities providing critical services to them. Given the speed of innovation and degree of market change within even the last 5-10 years, it is entirely possible that a market actor or new business model could take a market leading position within payment chains, upon which consumers and/or businesses depend. Without adapting the UK's systemic regulatory framework for payments, that entity may well fall outside the regulatory

framework of the Bank given the limitation today to cover only recognised payment systems and directly associated service providers.

2.10 It is possible that any such future entities could fall within the supervisory remit of the FCA via the Payment Services or Electronic Money Regulations, and its scope for supervising an entity's prudential management and conduct. However, the FCA's mandate does not extend to considering the macro-stability risks posed by payments activities to the wider economy or UK financial system. Moreover, while the FCA's regulatory framework for payments is very broad across the range of payment services,[3] it is possible that a new business model could emerge and fall outside even the FCA's regulatory remit, which is based on the authorisation of particular types of institution, as opposed to a regime that may specify an individual entity based on its impact and relationship to financial stability or the UK economy.

2.11 A broadening of the systemic payments perimeter, as described above, to cover payment chains at large would require very clear recognition criteria to ensure that the expanded regime applies proportionately and only to entities that pose or are likely to pose material risk. The government therefore considers that recognition criteria would need to be created in order to judge if a payments provider – other than a payment system or associated service provider – is a source of material risk, and the government's starting point is that these criteria should closely follow the existing criteria provided under section 185 of the Banking Act[4]. This would ensure the principle of 'same risk, same regulatory outcome' is followed in determining which actors should fall within the scope of Bank supervision. It would also mean that recognition in all cases would only be possible where it is judged by the Treasury that the entity concerned poses potential risk to the stability of, or confidence in, the UK financial system, or where there would be serious economic consequences.[5] In addition, the Treasury would need to have regard to the nature, volume, and substitutability of the services provided by the entity concerned.

2.12 Furthermore, the Treasury would be obliged to consult the Bank of England and other relevant regulatory authorities, including the FCA, prior to recognition; notify the entity that it is being considered for recognition; and consider any representations made. The Treasury would also be able to rely on information provided to it by the Bank of England or the other regulatory authorities. This is in line with the current Banking Act process.

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3 Today, the FCA is able to make rules within the payments regulatory landscape covering authorised payment institutions, small payment institutions, registered account information service providers, and electronic money institutions.

4 The existing criteria in section 185 cannot apply directly as these specifically refer to payment systems. However, in the government's newly introduced stablecoins legislation, new recognition criteria would be established to capture providers who are systemic in their own right (in relation to 'digital settlement assets'), drawing heavily on section 185. The government considers a similar approach could be taken to a further widening of the Bank's systemic perimeter for regulating payments, as here proposed.

5 Under the Banking Act, the consequences described are those that would seriously affect "business or other interests throughout the United Kingdom."

Modification through section 206(A)

2.13 Although the government considers that the existing basis of the Banking Act (prior to the expansion proposed above) is broadly correct, it would like to take evidence about the extent to which modification of section 206(A) may be needed in order to manage the risk of overlapping regulation and to ensure greater clarity, consistency, and proportionality.

2.14 When the Banking Act was first enacted in 2009, the government intended to make it possible for supervision to apply to telecommunications and information technology providers; they are explicitly listed as examples of entities that may be brought within the scope of Part 5 supervision. To date, the Treasury has not recognised any telecoms or generic IT providers through section 206(A), and the Bank has never proposed such a candidate for consideration. In practice, both the Treasury and the Bank have focused only on there being a clear connection to the delivery of payments activities specifically and to a particular recognised firm, resulting in the designation of Vocalink alone for its operations on behalf of the Faster Payments Service, LINK, and Bacs.

2.15 In parallel, the government has recently proposed the creation of a critical third party regulatory framework for financial services, as part of the Financial Services and Markets Bill. This will enable the financial regulators to oversee the services provided by certain third party providers to the financial sector.[6] This initiative reflects work at both the domestic and international level, including by the Financial Stability Board, to assess the financial stability implications of financial institutions' growing dependencies on a small number of third parties, including cloud service providers and other so-called 'Big Tech' firms.[7] The critical third party regime draws heavily from Part 5 of the Banking Act in its proposed construction, including designation by the Treasury and in applying criteria to determine the systemic importance of a potential critical third party.

2.16 Under the government's proposals for a critical third party regime, the services provided to authorised persons or recognised financial market infrastructure by designated critical third parties would be overseen by the financial regulators. While firms themselves would remain primarily accountable for managing risks to their operational resilience, the regime would allow the financial authorities to monitor and manage potential systemic risks stemming from the concentration of the provision of material services to authorised persons or financial market infrastructure firms. In particular, the regulators, including the Bank of England, would be able to make rules, gather information, and take targeted enforcement action in respect of services that designated critical third parties provide to firms.

2.17 It is the government's view that the critical third party framework should be more appropriate than the Banking Act to oversee the material services provided by generalist technology firms, where these are provided to the

6 Critical third parties to the finance sector: policy statement, HM Treasury, June 2022

7 Regulatory and Supervisory Issues Relating to Outsourcing and Third-Party Relationships: Discussion paper, Financial Stability Board, November 2020; and, Outsourcing and third-party risk – Overview of responses to the public consultation, Financial Stability Board, June 2021

financial sector at large. The government is therefore considering if section 206(A) should be clarified to address the assumption that telecoms and IT providers would typically be within scope of Part 5 of the Banking Act. This would mean that supervision under Part 5 would apply to market actors where their role specifically in relation to payments was of supervisory importance to the Bank of England – be that payment systems, associated service providers to those systems such as Vocalink, or other actors of critical interest to the payment chain if the Banking Act was extended as described in this consultation. More general providers of systemic importance could instead be considered for designation under the critical third party regime (subject to meeting that regime's criteria), unless their importance was clearly in relation to the activity of payments specifically.[8]

Question 3: Do you agree with the government's approach to supervising different types of systemic service provider described above?

Question 4: Do you agree that general IT and technology firms should typically fall within the critical third party framework instead of the Banking Act, and do you have views on if the current reference to these entities in the Banking Act should be modified, and how?

Clarifying and enhancing the application of the Banking Act

Enhancing the Bank's ability to gather information when monitoring for systemic risks

2.18 Under section 204 of Part 5, the Bank has the ability to gather information relevant to it carrying out its functions. Currently, it has scope to do this in two ways: by requesting information from or in connection with already-recognised payment systems or associated service providers, or where it considers the information would help the Treasury in deciding whether to designate an entity.

2.19 The Bank's ability to gather and analyse information on those systems and service providers that it supervises, or in connection with a possible recognition order, is essential to understanding the nature of the risk posed by a given entity, and to help inform how the Bank should apply its supervisory powers under Part 5. The Bank may share the information that it gathers with the Treasury, other UK regulatory authorities, and the Bank of International Settlements, where it deems this relevant.

2.20 As payment chains have evolved to include new activities and market actors, it is reasonable to assume that information that would help the Bank monitor risk in the sector may be broader than the information gathering currently permitted under the Banking Act. For example, while information

8 For telecommunications specifically, the regulators published a joint paper in June 2022 about how the regulatory authorities would seek to apply the critical third-party regime. In the paper, they indicated that the intention would be to use the regime principally to oversee the operational resilience of systemically important third party service providers to the financial sector, including technology providers, as opposed to telecoms firms which are already regulated and supervised by Ofcom.

gathered may very likely inform an eventual recognition order, it may not always be known at the point of initiating an information request if a recognition order is likely to be needed, especially given the increasing complexity of the payments landscape. Moreover, the government considers that if the Bank is going to take on greater responsibility for supervising risk across the payment chain, there is a rationale to giving the Bank broader information-gathering powers in order for it to be able to assess market risk more holistically and evaluate the market for which it is responsible. This is also consistent with the considerations around information gathering for systemic payments chains as set out by the Bank's Financial Policy Committee in its December 2019 *Financial stability Report.* [9]

2.21 There is already existing precedent for this in the Financial Services (Banking Reform) Act 2013 (FSBRA), introduced some years after the Banking Act. Under FSBRA, the PSR has a specific function of 'keeping markets under review' and has information-gathering powers through which it is able to require any person to provide information or documents in connection with any of its functions (as well as to collect information in relation to recognising a payment system under its own supervision). The government considers that a similar function may be appropriate for the Bank, while ensuring that the discharge of an information-gathering request is proportionate and there is close cooperation between the regulatory authorities to avoid duplicative or overlapping requests. While giving the Bank a potential new function relating to market surveillance would mean it would be possible for the Bank to request information where needed from non-recognised entities, only those entities recognised as systemic would be in scope of Part 5 supervision itself.

2.22 The government believes that this approach would allow the Bank the capacity to survey the sector more effectively and respond to risks that it identifies with greater efficiency and proportionality.

Question 5: Do you agree with the government's view that the Bank should have the ability to gather information for the purposes of keeping markets under review from the perspective of understanding systemic risk, in the way proposed above? Are there any features that you consider would be important for this to be an effective and proportionate power?

Clarifying the application of the Bank's supervision to recognised entities' operations

2.23 As set out in chapter 1 of this consultation, the Bank already has broad powers under Part 5 of the Banking Act allowing it to publish regulatory principles and issue codes of practice, or directions, for those systemic payment systems and service providers that it supervises.

2.24 While the extent of the Bank's overall regulatory and enforcement powers is set out in some detail in sections 188-202(A) of the Banking Act, the Bank is

9 In the December 2019 *Financial Stability Report,* the FPC noted that "all firms above a certain threshold carrying out the activities that make up payment chains should provide sufficient information to support the identification of systemically important payments firms as they emerge", in order to ensure that there was sufficient information necessary for regulation and supervision to be effective.

given very broad discretion to exercise its mandate to 'oversee' recognised entities. The scope of the Bank's powers refers only to the 'operation' (undefined) of a recognised system or associated service provider, while clarifying that a reference to a recognised entity's operation extends to its management. As such, the Bank has a broad mandate under Part 5 to direct recognised entities as to how they should be organised, operationalised, and managed.

2.25 The Bank has over time used its powers in various ways to correspond to the differing structures of and activities performed by systemic entities brought into its supervision. While the Bank is able to provide further clarity about how it exercises its powers in order to oversee recognised entities through its issuance of codes of practice, principles, and specific directions, the government considers that it may be beneficial to give further clarity directly in legislation as to the nature of the Bank's powers. This would appear to be more consistent with the wider FRF Review, which seeks to establish the perimeter and overall framework of regulation by Parliament and government while then leaving the detail of setting firm-facing standards to the responsible regulator.

2.26 In considering how the Bank approaches its supervision of the operations of systemic payment systems and associated service providers today, the government believes that the list below non-exhaustively illustrates the types of areas where the Bank may exercise its powers:

- regarding an entity's legal and operational structure, including its establishment and relationship with the wider group
- its management, governance, risk management and operational processes
- in relation to prudential requirements, including capital and liquidity management, and limitations to business operations or activities where these are necessary

2.27 All of the characteristics described above are common to financial services regulation at large and may also be relevant to the 'operation' of any recognised payments entity, including its management. This includes powers to limit activity – as per the final bullet above – where, for example, the FCA has the ability to vary a firm's permissions should it have a particular concern as the supervising authority for a particular entity.

2.28 As the payments landscape continues to evolve at speed and become more complex, the government believes that there could be instances where the Bank may need to apply a limit on an activity of a recognised payments entity. These limits could be used in a number of ways, including in the form of upper or lower transaction or value limits upon a systemic entity's processing, in certain scenarios. This might occur in circumstances where either:

a) a newly recognised or existing Bank-supervised entity intends to perform new payment activities both at-scale and at-pace, and regulatory intervention is required in order that new activity scales safely, avoiding risk to the UK financial system or wider economy

b) an existing recognised entity processing systemic volumes or values of payments intends to cease part of its operations, where this would pose substitutability problems or network effects for payment chains or the wider economy

2.29 The setting of limits would allow the Bank to ensure the safe mobilisation and growth of a recognised entity to mitigate risks from disorderly failure as well as any risks the entity may pose to the wider financial system. The government recognises, however, that such a power would be exceptional, and in most circumstances will not be relevant, including in relation to systemic entities already operating resiliently at scale and providing critical and high-volume payment processing to the marketplace. The ability for limits to be imposed should also not act as an inhibitor to effective competition or the emergence of new and valuable innovation. The government therefore envisages that such a power, if clarified in legislation, should also set out the circumstances in which it would apply, to avoid confusion or uncertainty. The exercise of such powers would also benefit from the closer co-supervisory framework set out in the following chapter, so as to ensure sufficient consultation and coordination between the authorities.

2.30 The government welcomes views on this issue and on the approach proposed above, including the circumstances in which setting limits on a business activity is relevant for systemic payments regulation and appropriate to managing risk to the wider marketplace or economy. The government considers that such a power simply codifies the status quo today under the Banking Act, but that providing greater clarification may give more transparency as to when such a limit could be applied in order to manage financial stability or serious economic risk.

Question 6: Do you agree with the government's proposal to clarify the Bank's ability to apply limits where necessary for recognised entities within an expanded regulatory perimeter; to specify the circumstances in which they may be relevant; and views on what those circumstances might be?

2.31 Separate from the issue of limits, in its initial consultation on erecting a regulatory regime for stablecoins used as a means of payment,[10] the government sought views from stakeholders asking if location requirements should be clarified explicitly within the Banking Act.

2.32 The feedback from respondents was mixed, with some support for requiring firms to be authorised in the UK in order to actively market stablecoins used as a means of payment to UK consumers, while some observed the importance of ensuring UK supervisors had sufficient regulatory grip over this emerging asset class for reasons of UK financial stability. Others argued that the UK risked creating a more onerous regime than other jurisdictions and that the government should adopt an approach that was more strongly tilted at UK competitiveness.

10 UK regulatory approach to cryptoassets and stablecoins: consultation and call for evidence, HM Treasury, January 2021

2.33 The government decided not to pursue setting Banking Act location requirements for regulating stablecoins used as a means of payment in isolation. Instead, in the government's response to the stablecoins consultation,[11] it indicated it would return to the subject in this consultation, namely in the context of the review of the systemic regulatory perimeter at large.

2.34 The government is minded not to create an automatic or ex ante location requirement for an entity recognised under the Banking Act to be established in the UK, but to clarify in the legislation that the Bank has the ability to apply such a requirement where it deems this necessary as part of its role in overseeing the risk posed by a particular recognised entity's operations. The government considers this approach codifies the status quo today under the Banking Act, but that providing greater clarification may give more transparency to affected market actors as to the scope of the Bank's existing powers.

2.35 The logic for proposing this approach in place of a pre-existing requirement to establish in the UK is as follows:

- it is an established norm of financial services regulation that where services are provided directly to consumers, establishment within the local jurisdiction is typically required. Where market actors provide services directly to consumers, or 'store of value' functions, these should be established locally given the need to ensure consumer protection and that supervisors have sufficient ability to regulate a firm directly
- a degree of establishment requirements already exist in the UK in the field of payments regulation, under both the Payment Services and Electronic Money Regulations, where entities carry out or intend to carry out at least part of their payment services or e-money business in the UK. Should any such providers already be required to establish in the UK in a certain form, and then be recognised under the Banking Act in future under an expanded scope to Part 5, the requirements under the payment services and e-money regime would already be in place
- this leaves to the systemic perimeter alone – where there is no ex ante location requirement – the treatment of recognised payment systems, recognised associated service providers thereto, as well as any future recognised entity under an expanded scope of the Banking Act that did not fall within FCA supervision under the Payment Services and Electronic Money Regulations. It would also leave any remaining recognised payment services or e-money business that did not meet the threshold of carrying out at least part of its payment services or e-money business in the UK
- for recognised entities within the existing scope of the Banking Act, it may well be desirable or necessary to require location in the UK in a given case, given that the operation of payments is critical to UK households and businesses. Conversely, in cases where, for example, services are not

11 UK regulatory approach to cryptoassets, stablecoins and distributed ledger technologies in financial markets: Response to the consultation and call for evidence, HM Treasury, April 202

provided directly to consumers or the Bank is satisfied that the risks to the UK's market would not be mitigated by establishment, the government does not consider that such a requirement is necessary. The Bank may consider in a given case that there is adequate regulation and supervision by home supervisors, sufficient regulatory cooperation, and the nature of the activity is such that location requirements are unnecessary, and the Bank should be able and comfortable deferring to the supervision of another jurisdiction. That judgement may also change over time dependent on how the market or a particular business evolves, as well as the regulatory and supervisory approach of other jurisdictions.

- there may also be some benefit to this approach given that an expanded systemic perimeter would allow for the recognition of any entity posing risks within the payment chain. That could bring in different business models and activities over time, for which it is difficult to know that mandating a requirement to locate in the UK is necessary or desirable
- in sum, the government considers that putting the Bank in a position to exercise its judgement in individual cases is the most proportionate and effective approach, reflecting current practice and the Bank's powers today

2.36 If such an approach was adopted, the government considers that a degree of clarification as to how location requirements would apply would be likely to be beneficial. This would include in circumstances where the Bank requires a location requirement, but the FCA's regulation does not require establishment. The government could, for example, potentially task the Bank with setting out its approach in the future.

2.37 Clarification may also be useful to speak to the issue of 'deference' – the term used to describe when it is possible and beneficial to defer to the rules, supervision, and regulatory cooperation of other jurisdictions.

2.38 The government therefore considers that the best balance between being globally open and cognisant of market developments, while protecting UK consumers and UK stability, is likely to be served by clarifying in law the Bank's existing discretion to impose a location requirement and keeping in place the existing establishment requirements within the FCA's regulatory perimeter.

2.39 Notably, however, there are a few inconsistencies in the establishment requirements within the FCA's regulatory purview and, thereby, in the protection afforded to consumers. Although for the most part payment services and e-money institutions who carry out, or intend to carry out, part of their business in the UK must establish (i.e. have a head office) in the UK, this is not the case for, specifically, authorised electronic money institutions (EMIs) and regulated account information service providers (RAISPs) which may operate via only a branch presence in the UK.[12] In addition, the

12 In the case of authorised electronic money institutions (EMIs), this is especially pertinent given the development of the sector in recent years to in some cases comprise sizeable players within the consumer payments landscape, and that a condition of registration as a small EMI does require a UK head office, for a business carrying out or intending to carry out activity in the UK.

legislation does not specify what is meant by business being carried out in the UK.

2.40 The government therefore additionally welcomes evidence, beyond the Bank's regulatory remit, about the regulatory differences in the establishment requirements for different types of payment services and e-money firms, or if there are justifiable reasons for differentiating between these requirements. The government also welcome views on when establishment should be required and if a lack of specificity in the FCA's legislation relating to when business is conducted in the UK creates risks in terms of consumer protection.

Question 7: Do you consider that providing greater clarity as to the nature of the Bank's supervisory powers would provide greater transparency? If so, do you have views on how this should be provided, for example directly in the legislation, or as a supplementary annex, or in some other form?

Question 8: Do you agree with the government's proposed approach to requirements for establishment under the Banking Act and the rationale provided? What are your views on the adequacy of the existing requirements under the Payment Services and Electronic Money Regulations?

Managing co-supervisory responsibility

2.41 Today, the delineation of the regulatory perimeter for payments has meant that payment system operators remain outside the FCA's regulatory remit, and payment services and e-money institutions outside the Bank of England's purview. There is limited regulatory overlap between the authorities, although there is some between the FCA and PSR in regulating market participants to ensure adequate protection for consumers or service users. The Bank and the PSR also co-regulate 4 payment system operators; although they have different objectives (financial stability and competition respectively), coordination in supervising these systems is still required. Some of the feedback to the 'Payments Landscape Review' underscored the importance of ensuring that regulatory boundaries are well-articulated and that any overlapping regimes be structured to mitigate burden while avoiding regulatory arbitrage.[13]

2.42 If the scope of the Banking Act was altered so that the Bank was able to supervise systemic risk wherever it may emerge within the payment chain, this would mean that recognised entities could potentially be subject to co-competent supervision between the Bank and FCA. The future boundary of systemic supervision would change for the Bank, defined by the potential source of risk posed by the entity concerned, rather than being defined by the type of operator concerned.

2.43 Examples of co-supervision of this nature already exist in financial services regulation at large, notably between the FCA and Prudential Regulation Authority (PRA) for the supervision of investment firms. A similar model of co-supervision has also been included by the government in proposals to

13 Payments Landscape Review: Call for Evidence, HM Treasury, July 2020

bring the regulation of stablecoins used as a means of payment into Bank and FCA supervision,[14] where the Bank will be responsible for supervising recognised (systemic) stablecoin payment systems (including associated service providers), and recognised stablecoin service providers, in addition to the FCA.

2.44 Although the threshold for recognition under the Banking Act is necessarily high, as it applies only to entities that may pose serious risk to the system or broader economy, the government acknowledges the need to set out clearly how the FCA and Bank would co-supervise those within the widened regulatory perimeter. The model of regulation would need to consider the potential for co-supervision and ensure there was an appropriate framework to provide clarity and delineation between the authorities, avoid regulatory duplication, and ensure meaningful cooperation. Although there are some useful precedents in existing payments legislation designed to support regulatory cooperation, including within FSBRA, the government considers that these requirements ought to be more substantive, in a regulatory framework where greater co-supervision is foreseeable.

Extending the approach proposed for systemic stablecoins used as a means of payment

2.45 The government's 2021-22 consultation and subsequent legislative proposals to bring stablecoins used as a means of payment within the UK regulatory perimeter considered how to manage the potential for regulatory overlap. This in turn draws on the co-supervisory model that already exists for investment firms.

2.46 The government considers the model proposed for systemic stablecoins may provide a useful basis for managing co-supervision across the payments perimeter, if the Bank's mandate to supervise systemic risk throughout the payment chain was extended as proposed in this consultation. The arrangements proposed in relation to regulating stablecoin when used as a means of payment are therefore set out in more detail below.

2.47 As set out in its recent consultation response, the government plans to extend the existing payments and e-money regulatory frameworks to include stablecoins that are used as a means of payment. In a scenario where a stablecoin issuer or provider is classified as having systemic importance, the government expects that the Bank should also be able to supervise such an entity through Part 5 of the Banking Act, and act as the lead prudential regulator while it continues to also be FCA authorised.

2.48 As part of the 'Financial Services and Markets Bill' that was recently introduced to Parliament, the government proposes to establish a regime for stablecoins used as a means of payment that clearly identifies the applicable regulatory requirements in instances where a stablecoin issuer or provider is regulated by more than one regulator. For example, this could occur where

[14] The 'Financial Services and Markets Bill', and consultation response on erecting a regime for systemic stablecoins, uses the term 'digital settlement asset', which encompasses a wider class of payment cryptoasset to allow the regime to react to future developments. For ease of reading concerning this subject matter, this consultation refers to 'stablecoin' throughout.

an entity is authorised by the FCA under the Electronic Money Regulations 2011 as an electronic money institution, while also recognised as a systemic operator subject to Bank oversight. The regime will ensure that the regulators have the ability to set regulatory standards with regard to their objectives, subject to a duty to cooperate.

2.49 In designing this model, the government intends to give the Treasury a power to make regulations regarding entities within the perimeter (including a power to disapply existing FCA rules that are superseded by the Bank's prudential regime), with regard to systemic stablecoin issuers and systemic stablecoin service providers. When using this power, the Treasury would be required to consult both the FCA and the Bank, and other regulators such as the PSR, as relevant. It would also be possible for the Treasury's power to extend to the ability to enable transitional regulatory arrangements to apply, for example to support a firm's adjustment in a scenario whereby a major, scaling operator migrated from solo regulation by the FCA to co-supervision between the FCA and Bank.

2.50 Through the proposed powers being given to the Treasury in relation to the regulation of stablecoins used as a means of payment, the government would also be able to further specify the boundaries and clarify the responsibilities of the regulators. Equivalent to section 3G of the Financial Services and Markets Act 2000 (FSMA), the Treasury would be able to provide clarity regarding the regulators' respective responsibilities, for example specifying if one regulator or another should be primarily responsible for a particular activity, or to require that a particular regulator consults another in a given area. As above, the Treasury would similarly be required to consult both the FCA and the Bank, and other relevant regulators including the PSR.

2.51 The government also intends to establish mechanisms to further clarify how the relevant regulatory authorities will work together in the co-supervision of the regulatory framework for stablecoins, where used as a means of payment. Specifically, the government proposes that:

- the regulators be required to set out how they will work together through a memorandum of understanding to reflect their new supervisory responsibilities. These measures are consistent with those that exist for currently co-supervised investment firms, and existing requirements under FSBRA, while ensuring this is put in place specifically to address the matter of stablecoin-related supervision given the co-supervisory model of regulation that is being created
- a duty of cooperation is applied to the Bank, the FCA, the PRA, and the PSR when exercising their respective functions, improving upon the baseline provided under section 98 of FSBRA and ensuring that cooperation applies consistently across the payments regulatory perimeter, including to the FCA's responsibilities for payment services and e-money regulation
- where it does not impede the Bank acting in the interests of mitigating urgent financial stability risk, the Bank will be required to issue a high-level policy statement, following consultation with the FCA and the

Treasury, on its overarching approach to the regulation of systemic stablecoins and associated service providers. This will include an indication of the matters the Bank may consider when exercising its powers over stablecoin payment systems or service providers, and the procedures it intends to follow. This includes instances where the Bank would replace the FCA as the lead authority in setting certain rules and making directions for a specific firm, due to the primacy afforded to the Bank for prudential matters in relation to systemic entities. Precedent for this type of approach also exists in the co-supervisory model for investment firms

- the Bank will be given a power to prevent the FCA from taking specific action in relation to an entity recognised as systemic, akin to that of section 3I of FSMA, if it would give rise to financial stability concerns, following consultation with the FCA and Treasury. We expect that this power would be used in exceptional circumstances, as is the precedent for investment firm supervision, but its availability helps mitigate the risk of conflicting requirements applying to co-supervised persons

2.52 This model of co-supervision was designed borrowing from the legislative approach taken for co-supervising investment firms between the PRA and FCA today and is intended to apply in a similar way to that proposed for stablecoins used as a means of payment in the future.

2.53 It is the government's view that this co-supervisory model would be an appropriate framework to extend across payments supervision if the Bank's systemic regulatory perimeter was extended, as this consultation proposes. It would help ensure transparency, predictability, and more coordinated and delineated mandates between the regulatory authorities, significantly strengthening the existing regulatory cooperation provisions that already exist today in payments legislation.

Primacy of the FMI SAR in cases of insolvency

2.54 In instances where co-supervised systemic payments entities were to fail, this also raises questions about the authorities' framework for managing and mitigating the disruption associated with their failure.

2.55 Today, Special Administration Regimes (SARs) provide authorities with the means to effectively manage and mitigate risks associated with an entity's failure. The majority of firms within the FCA's supervisory scope are overseen by the Payments & Electronic Money SAR (PESAR), while the Bank's oversight of systemic payment systems and recognised service providers falls under the Financial Market Infrastructure SAR (FMI SAR).

2.56 These SARs contain differing requirements as to the process and priorities associated with managing the risks of an entity's failure. For instance, the PESAR prioritises the return of customer funds as it applies to firms that are often consumer-facing and largely non-systemic. The FMI SAR prioritises maintaining payment flows and mitigating the impact to wider financial market stability.

2.57 In those limited instances where a currently FCA-authorised payment service or e-money institution was to be co-supervised with the Bank for its financial stability risk, it is appropriate that the government make clear which SAR

takes precedence both to avoid regulatory ambiguity and to ensure the most suitable framework applies.

2.58 The government recently published a consultation setting out its intention to apply the FMI SAR, in amended form, to the operators of, and/or service providers to, systemic digital settlement asset-based payment systems.[15] In the case of stablecoins, this might include – but is not limited to – the issuer or operator of a stablecoin, a digital wallet, or an associated service provider. In particular, the consultation sets out the government's plans to enable the Bank to direct administrators to prioritise, if appropriate, the return or transfer of customer assets in the case of a systemic entity captured under the above definition failing. It also signals the government's intention to establish the primacy of the FMI SAR over such entities that are co-supervised by the Bank and FCA and impose a requirement on the Bank to consult the FCA before seeking a special administration order or directing administrators with regard to the regime's objectives.

2.59 As a matter of principle, the government considers that in instances where a systemic payments actor was co-supervised by the FCA and Bank, these entities should also be principally overseen by the Bank (meaning that the FMI SAR should take precedence). The government will continue to explore whether a bespoke framework beyond the current reforms to the FMI SAR would be required to better mitigate the associated financial stability risks in the event of failure, both for systemic stablecoins used as a means of payment and wider systemic payments entities, while continuing to ensure adequate consumer protection as established in the PESAR.

Question 9: Do you support the co-supervisory model proposed between the regulatory authorities, allowing the Bank of England to take primacy for systemic entities for reasons of financial stability? Do you support the principle of the primacy of the FMI SAR for systemic payments entities?

15 Managing the failure of systemic Digital Settlement Asset (including stablecoin) firms, HM Treasury, May 2022

Chapter 3

The 'Future Regulatory Framework Review': Considerations for the regulation of payments

3.1 The 'Future Regulatory Framework (FRF) Review' was announced by the then Chancellor of the Exchequer at Mansion House on 20 June 2019, with the objective of reviewing the UK's financial services regulatory framework to ensure it is fit for the future, following the UK's departure from the EU. The government has engaged extensively with stakeholders on the FRF Review, including through a call for evidence and two consultations since July 2019. The first consultation, published in October 2020, set out an overall approach to financial services regulation.[1] The second consultation, published in November 2021, set out detailed proposals for reform.[2] On 10 May 2022, it was announced in the Queen's Speech that the government would enhance the UK's position as a global leader in financial services, through the establishment of a coherent, agile and internationally respected approach to financial services regulation.[3] On 20 July 2022, the government introduced the 'Financial Services and Markets Bill' and published its response to the consultation.

3.2 The government has proposed through the FRF Review moving to a comprehensive 'FSMA model' of financial services regulation, based on the model of regulation established in the Financial Services and Markets Act 2000. Under this approach, the regulatory perimeter continues to be set by Parliament and the government, with the financial services regulators responsible for setting many of the direct regulatory requirements which apply to supervised entities. Delivering a comprehensive FSMA model of regulation requires the repeal of retained EU law relating to financial services.

3.3 Alongside the regulators' expanded responsibilities, the FRF Review has proposed changes to the FCA and the PRA's statutory objectives to include a new secondary objective to support the long-term growth and international competitiveness of the UK economy. In addition, the FRF Review proposed measures to increase the accountability of the regulators to Parliament, to

1 Future Regulatory Framework Review: Consultation, HM Treasury, October 2020

2 Future Regulatory Framework Review: Proposals to Reform, HM Treasury, November 2021

3 Queen's Speech 2022, Office of the Prime Minister, May 2022

strengthen their relationship to the Treasury, and to enhance engagement with stakeholders. The government's FRF Review proposals initially focussed predominantly on the FCA and PRA, with its response also setting out its relevance to the PSR.

3.4 Given that retained EU law also sets out requirements in relation to central counterparties (CCPs) and central securities depositories (CSDs), the government also consulted in January 2022 on how it would seek to apply a similar model to the Bank of England's regulation of these financial market infrastructures (FMI), tailoring its proposals to the specificities of these firms.[4]

3.5 The government will deliver these reforms through the current 'Financial Services and Markets Bill'.

The relationship of the FRF Review to payments

3.6 With respect to payments, there are several considerations as to how the regulatory framework fits with the outcomes of the FRF Review. The regulation of payments is the responsibility of three different regulatory authorities and does not form part of the FSMA framework. Moreover, the UK's regulatory regime for payments is itself a mixture of retained EU law – in particular for the FCA – and wholly domestic regulation with respect to the Bank of England's mandate for systemic supervision under the Banking Act.

3.7 The government is approaching the application of the outcomes of the FRF Review to the payments regulatory landscape as follows:

- the proposals the government has made in relation to the statutory objectives and accountability mechanisms of the FCA and PRA will largely apply to the FCA with respect to its regulation and supervision of payment services and e-money.[5] This is intended to ensure consistency and reflect the increased role that the FCA will have over this part of the market as a result of the FRF Review, given the intention to delegate the setting of technical regulatory requirements to the relevant regulatory authority
- the government proposes to extend the accountability mechanisms to the PSR but is not amending the regulatory objectives of the PSR. The government has considered the PSR's objectives, in particular given its role as an economic regulator responsible for overseeing payments systems, and considers that the PSR's current objectives are effective in supporting the government's policy aims. The PSR's existing innovation objective promotes the development of and innovation in payment systems – alongside competition and securing good outcomes for users of payment

4 Future Regulatory Framework Review: Central Counterparties and Central Securities Depositories, HM Treasury, January 2022

5 Although the accountability framework is designed to sit in FSMA, several of the clauses refer to the FCA acting under other legislative instruments. Where this is not the case, many of the provisions still apply to the FCA acting in relation to payment services and e-money, as significant parts of FSMA are incorporated by reference into PSR 2017 and EMR 2011, including the FCA deriving its rulemaking power for payment services and e-money from a modified form of section 137A of FSMA.

systems. The government has considered if it were to extend the new secondary international competitiveness and growth objective that it is introducing for the PRA and the FCA, that this would in practice be duplicative, given the overall mandate of the PSR to foster competition and support innovation to the benefit of the UK's marketplace. Moreover, the PSR is already required to consider the desirability of sustainable growth in the economy of the UK in the medium or long term when discharging its functions as part of its regulatory principles[6]

- the government has not extended the FRF Review accountability framework or changes in statutory objectives to the Bank of England for its payments supervision, in the current 'Financial Services and Markets Bill'. However, the government recognises that if the Bank's supervisory mandate is widened to accommodate other payments entities of systemic importance as proposed in Chapter 2, this represents a new and greater degree of responsibility for the Bank. The government therefore is seeking views through this consultation on whether the Bank's objectives and accountability framework for payment systems should also be amended in line with the outcomes of the FRF Review, were the Bank to assume any increased supervisory responsibility across the payment chain

- finally, in its November 2021 consultation on the FRF Review, the government identified that there are certain areas of financial services – including payments regulation – where existing regulatory powers are insufficient. Without remedy, it would not be possible to realise the objectives of the FRF Review and move to a comprehensive FSMA model of regulation. The nature of this gap in relation to the regulators' rulemaking powers is set out in more detail later in this chapter

Aligning the Bank's accountability mechanisms and objectives with the 'Future Regulatory Framework Review'

3.8 As above, as part of the FRF Review, the government has set out changes to the regulation of CCPs and CSDs by the Bank of England, including the accountability arrangements that should apply. The government considers these accountability arrangements to be the right starting point in assessing if such arrangements should also apply to the Bank in relation to payments supervision. Applying the same arrangements to payments and CCPs and CSDs would avoid operational complexity within the Bank, so that different parts of the Bank's directorate for financial market infrastructure are not dealing with slightly different sets of arrangements and objectives. It would also align with international standards, under which CCPs, CSDs (or securities settlement systems) and systemic payments systems are considered financial market infrastructure and subject to a common set of international principles.

[6] This principle will, however, be supplemented as part of the implementation of the FRF Review to additionally incorporate the government's climate commitments, in line with the new regulatory principle for the FCA and PRA to have regard to the UK net zero emissions target to achieve a net zero economy by 2050, as set out in the Climate Change Act 2008.

3.9 Specifically, in the context of the regulation of CCPs and CSDs, the government has proposed in the recently introduced 'Financial Services and Markets Bill':

- that the Bank should receive a general rulemaking power over CCPs and CSDs, without which it would not be possible for the Bank to assume responsibility for setting the detail of firm-facing rules
- that the Bank should have a secondary objective so that, as it advances its primary objective for financial stability it must, so far as is reasonably possible, facilitate innovation in the clearing and settlement services provided by the CCPs and CSDs regulated by the Bank (this is with a view to improving the quality, efficiency and economy of the services they provide, subject to conforming with relevant international standards)
- that the Bank's primary objective of ensuring UK financial stability be extended to also cover the financial stability impacts of UK CCPs and CSDs on other jurisdictions and ensuring non-discrimination on the basis of nationality or location
- that the existing regulatory principles in section 3B of FSMA should be extended to the supervision of CCPs and CSDs, including a proposed new principle on climate change and the government's commitment to a net zero economy, as well as a principle to facilitate fair, reasonable and equitable provision of services
- that the Treasury's new powers to require the PRA and the FCA to 'have regard' to specific considerations in their rulemaking, and a power to require a regulator to make rules for certain matters, would be extended to the Bank's supervision of CCPs and CSDs
- the creation of a new statutory committee to exercise the Bank's functions in relation to CCPs and CSDs
- to enhance the accountability mechanisms pertaining to the Bank in its relationship:
    - with the Treasury – through recommendation letters that the Treasury may write to the Bank, setting out aspects of the economic policy of the government to which the Bank should have regard and which the Bank is required to respond to on an annual basis; a power for the Treasury to direct the regulator to review its rules; and ensuring that the regulators' new responsibilities operate effectively alongside the Treasury's work on trade and deference
    - with Parliament – through new statutory requirements for the Bank to notify the relevant select committee when publishing a consultation, and to respond in writing to responses to statutory consultations from Parliamentary committees
    - with stakeholders – through a requirement for the Bank to publish a framework on how it will conduct cost-benefit analyses (CBA) and a

requirement to engage a CBA statutory panel to scrutinise and evaluate the approach taken to CBA.[7]

3.10 The government considers that if the proposed accountability arrangements for CCPs and CSDs were extended to the Bank in its supervision relating to payments, the existing proposals for CCPs and CSDs are appropriate. With respect to a secondary objective relating to innovation, the government considers this is also essential for the payments industry, and dovetails with the government's wider objectives with respect to supporting the UK's competitiveness and its long-term growth. As is the case for CCPs and CSDs, the government believes that a secondary innovation objective effectively balances supporting the development of new technologies and business models within the sector with the Bank's primary objective of protecting financial stability. The amendment to the Bank's primary objective to reflect the financial stability impacts on other jurisdictions is also relevant, given the UK's role as a major market for financial services and the presence of large international firms such as Mastercard Europe and VISA Europe within the Bank's regulatory purview.

3.11 The government welcomes views as to the relevance or not of applying the proposed additional regulatory principle of facilitating fair, reasonable and equitable provision of services for CCPs and CSDs, given the PSR's existing explicit mandate in ensuring fair and reasonable access to payment systems and the absence of a clearing obligation (which requires a firm to clear with CCPs in certain circumstances).

3.12 Unlike for CCPs and CSDs, there is not a problem with the ability of the Bank of England to set requirements that apply to payments entities within its regulatory purview. Although the Bank does not have a traditional rulemaking power like that in FSMA, its supervisory tools to publish codes of practice, directions, and principles occupy a similar terrain and are adequate. For this reason, the government does not intend to create an additional new rulemaking power for the Bank over systemic payments entities.

3.13 Correspondingly, where parts of the accountability framework apply to rulemaking, these will instead apply to where the Bank exercises its Banking Act powers for general (not firm-specific) application. This is also consistent with the way the government has proposed to apply the accountability framework to the PSR, which similarly adjusts the application to the PSR to reflect where the PSR is acting in relation to matters of general application – as the PSR similarly does not have a traditional rulemaking power.

Question 10: Do you consider that the government should apply the FRF accountability framework to the Bank of England in its supervision of a wider payments perimeter?

[7] The government did not propose that the Bank establish a stakeholder panel in respect of its CCPs and CCP regulation because there are only a very small number of these firms. Parallels can be drawn for payments, given that the Bank has a limited role confined only to supervising a small number of systemically important entities.

Regulatory rulemaking in the context of the FRF Review

3.14 To establish a comprehensive FSMA model, the regulators need to have the appropriate powers to make rules when retained EU law is repealed. In its November 2021 consultation on the FRF Review, the government committed to ensuring that the regulatory authorities had the necessary powers – including in relation to payments regulation – to replace direct regulatory requirements in retained EU law, if existing powers were insufficient.

3.15 The ability of the FCA and, to a lesser extent the PSR, to establish direct regulatory requirements in relation to retained EU payments law is currently restricted.

3.16 The FCA derives the majority of its competence for payment services and e-money through the Payment Services Regulations 2017 and Electronic Money Regulations 2011, both of which are retained EU law instruments. Persons regulated under these instruments are authorised or registered 'payment service providers' (PSPs), which includes payments institutions, small payment institutions, account information service providers, payment initiation service providers, credit institutions, authorised electronic money institutions and small electronic money institutions.

3.17 The FCA's payments legislation is itself very broad in terms of persons and scope, covering both the market for payments within the UK and in relation to the 'qualifying area' of the UK and EEA, supporting the UK's participation in the SEPA region and ensuring efficiencies in cross-border payments.

3.18 For payment services and electronic money, the FCA currently operates within a bespoke rulemaking regime based on FSMA, but that is narrower in scope. The FCA is currently only able to exercise its general rulemaking capability where it has or is doing the same thing for credit institutions – a limitation which does not exist in FSMA. This means that, in practice, the FCA is only able to write rules for the sector for some areas of conduct policy. Without remedy, it would not be possible to repeal parts of the Payment Services and Electronic Money Regulations, as the FCA would not have the power to replace, for example, the technical prudential and safeguarding requirements that apply to the sector in the existing legislation.

3.19 For the PSR, it operates chiefly under a domestic framework – Part 5 of FSBRA – but it has competence in some areas of retained EU law for payments policy, mainly in respect of interchange fees, as well as some parts of the Payment Services Regulations 2017 (for ATM operators and for access to and participation in payment systems). Similar to the FCA, the PSR has deficiencies in its ability to set standards for the sector, in areas which are currently covered by retained EU law.

3.20 Like the Bank, the PSR does not have a conventional rulemaking power, either under domestic law or in retained EU law. It instead establishes regulatory requirements of general application, mainly through powers of direction, or changes to rules and contracts. Although the PSR has powers of direction under its retained EU law, these are insufficient compared with its comparable power of direction under domestic law which is wider. In particular, under domestic law, a power of direction can be used to set standards which must be met, whereas the PSR's EU-derived powers relate

only to using directions as a means of enforcement, not to establish regulatory standards. Without remedy, therefore, it would not be possible to repeal the relevant retained EU law in a way that gave responsibility to the PSR in the areas for which it is competent, as it is unable to set standards in relation to areas which are currently covered by retained EU law.

3.21 Through the introduction of the 'Financial Services and Markets Bill', the government proposes to be able to modify and restate retained EU law in order to establish a comprehensive FSMA model. Through this, it will be possible for the Treasury to make regulations conferring powers on a regulator, including the ability to make rules or other instruments. The government therefore intends to ensure that the FCA has a general rulemaking power for payments and e-money, and that the PSR has an enhanced power of direction in their areas of retained EU law, better aligning the regulators' powers with those that exist in their domestic regulatory frameworks. This will create a comprehensive FSMA model in relation to payments legislation when retained EU law is repealed and ensure that there is coherence in regulatory powers between domestic and EU-derived statute.

3.22 The government therefore proposes to:

a) modify retained EU law to ensure that the FCA has a general rulemaking power appropriate for payments and e-money (reflecting sections 137A and 137B of FSMA). This will involve removing the existing constraint in payments legislation described in this chapter. It will ensure that the FCA has the ability to make firm-facing rules applying to the payments sector in transition and when retained EU law is repealed

b) make ancillary changes to the FCA's rulemaking powers, in line with its powers under FSMA

c) finally, modify the PSR's retained EU law to align the PSR's power to establish standards with its domestic statute, principally section 54 of FSBRA

Question 11: Do you have views on the government's proposed approach to aligning the FRF Review with the regulatory landscape for payments?

Chapter 4

Extending the Senior Managers & Certification Regime

4.1 From July to October 2021, the government consulted on the application of the Senior Managers & Certification Regime (SM&CR) to financial market infrastructure (FMI) supervised by the Bank of England.[1] Among the FMI considered in that consultation were payment systems recognised under the Banking Act and specified service providers to those recognised payment systems.

4.2 In May 2022, the government published its response to that consultation.[2] It committed to implementing the SM&CR for recognised payment systems and specified service providers, but to a longer timeframe than for the other categories of FMI included within that consultation. This was to account for any changes to the Bank of England's regulatory perimeter that may occur in connection with this review.

4.3 The government's response outlined how extending the SM&CR framework to the Bank's remit for systemic payments supervision should strengthen the individual accountability of senior managers within supervised entities, where a large amount of risk remains concentrated. A Senior Managers & Certification Regime would help ensure senior managers have the appropriate competence, expertise, and probity to carry out their roles, while providing a known, effective and proportionate means for achieving high standards of conduct among all staff. Based on prior experience of SM&CR regimes in other parts of the financial services sector, this ought to result in improved governance arrangements at these firms. When the SM&CR is applied to systemic payment systems and specified service providers, the Bank will have discretion in implementing the regime and would consult and engage with industry to ensure any rules are effective and proportionate.

4.4 If the Bank's systemic regulatory perimeter is expanded, as is proposed through this consultation, to accommodate sources of risk within the payment chain at large, the government considers that the same rationale for applying a SM&CR regime is likely to apply as for systemic payment systems and specified service providers. This is in line with the principle of 'same risk, same regulatory outcome' and adjusting the regulatory

1 Senior Managers & Certification Regime (SM&CR) for Financial Market Infrastructures (FMIs): consultation, HM Treasury, July 2021

2 Senior Managers & Certification Regime for Financial Market Infrastructures: Consultation Response, HM Treasury, June 2022

framework to reflect where risk is posed, rather than focusing on legal or technological form. The way in which a Senior Managers & Certification Regime was applied could again take into account the type of business, its size, and level of risk.

4.5 In addition, further to the government's review of the Senior Managers & Certification Regime for FMIs, the FCA published in October 2021 its annual perimeter report.[3] The FCA identified, in its view, the benefit of a Senior Managers & Certification Regime applying to the payment services and e-money sector, arguing that this would "enhance individual accountability and governance within firms and strengthen our ability to supervise such firms by giving us a wider range of tools to drive higher standards and mitigate risks of consumer harm".

4.6 The government recognises the very strong growth witnessed in the payment services and e-money sector in recent years and the importance of both supporting continued market development while ensuring the regulatory framework for financial services remains agile, consistent and effective, and protects consumers.

4.7 The government therefore welcomes any views from respondents on the potential applicability of a Senior Managers & Certification Regime more widely to the sector, including within the FCA's regulatory ambit, and if this should include potentially differentiated treatment for differently sized market actors, commensurate with their risk and reach (and in light of the existing differentiation of treatment based on size in the Payment Services and Electronic Money regimes).

Question 12: Do you think that the Senior Managers & Certification Regime should apply to recognised payments entities within the Bank of England's regulatory perimeter, including if this is expanded?

Question 13: Do you consider that a SM&CR regime would be beneficial within the FCA's sphere of supervision, and on what basis?

3 Perimeter Report 2020-21, Financial Conduct Authority

Chapter 5

Revisiting the Payment Systems Regulator's legislative framework

Designing the Financial Services (Banking Reform) Act 2013

5.1 In March 2013, through its 'Opening up UK Payments' consultation, the government proposed establishing a new, competition-focused, utility-style regulator to oversee retail payment systems in the UK.[1] This followed a report published in July 2011 by the Treasury Select Committee, as well as serious concern within government and the wider sector about the governance of payment systems in the UK.

5.2 The Payment Systems Regulator (PSR) was created through FSBRA and became fully operational in April 2015. The PSR assumed a mandate for the economic regulation of payment systems operating in the UK, with objectives to promote innovation and greater competition within and between UK payment systems, while ensuring the needs of consumers and businesses are fully considered in decisions regarding the operation and development of payment systems. The PSR also has certain powers in relation to participants in payment systems (defined in FSBRA as system operators, infrastructure providers, and payment service providers).

5.3 Since its creation, the PSR now regulates 7 payment systems: Bacs, CHAPS, Cheque & Credit, the Faster Payments Service, LINK, Mastercard Europe, and VISA Europe.

5.4 The PSR has since led significant changes to the governance, ownership, and regulation of payment systems in the UK. This includes, for example, tackling anti-competitive or 'cartel' behaviour within the prepaid cards market; setting clear minimum standards for fair and open access to payment systems; and overseeing the introduction of new innovations such as Confirmation of Payee for the Faster Payments Service and CHAPS payments.

5.5 The PSR's statutory mandate over payment systems is primarily governed by Part 5 of FSBRA. Similar to the Bank's recognition process under the Banking Act, the PSR's supervision applies to payment systems designated by the Treasury, which the government considers has benefits in helping ensure that regulation is targeted and proportionate, while remaining adaptable over time.

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1 Opening up UK payments, HM Treasury, March 2013

5.6 Unlike the Bank of England's systemic supervision of recognised payment systems, the threshold for designating a system for PSR supervision is lower, reflecting the economic role the PSR plays in ensuring effective competition, innovation, and that the needs of service users are met. Designation may occur where the Treasury is satisfied that any deficiencies in the design of the system, or any disruption of its operation, would be likely to have serious consequences for market users – although the Treasury non-exhaustively considers the volume, value, nature, and substitutability of payments made by a system, and its relationship with other payment systems.

5.7 FSBRA gives the PSR regulatory and competition powers to set standards through directions, impose requirements, require operators to provide access to systems, investigate behaviour inconsistent with fair outcomes, amend existing agreements, issue fees and charges, and take action against anti-competitive behaviour.

5.8 Since 2017, the PSR has also been given the role under the Payment Services Regulations to ensure proportionate, objective, and non-discriminatory access to payment systems, previously covered under FSBRA alone, as well as oversight of ATM operators' withdrawal charges. The PSR is also the lead responsible authority under the Interchange Fee Regulation 2015.

5.9 Nearly a decade after FSBRA was enacted, and given the pace of market change since, the government considers it is appropriate to review the functioning of the PSR's regulatory framework. This is as part of the government's assessment of the regulatory perimeter for payments and is intended to ensure the PSR has the capacity to carry out its functions effectively and efficiently.

The PSR's governing framework within FSBRA

Ensuring fair access to payment systems

5.10 Ensuring fair, open, and transparent access to designated payment systems in the UK is central to ensuring a competitive and innovative sector, where new entrants and business models can compete on fair and reasonable terms. It is one of the PSR's principal competences to oversee both 'direct and indirect' access to payment systems (which refers to direct participation in a system, or access to a system via a pre-existing participant).

5.11 As a result of its membership of the EU, the UK has two different and overlapping regimes for accessing payment systems:

- Part 5 of FSBRA, where the PSR's ability to safeguard direct and indirect access to payment systems is provided for principally under sections 56-57. Since its creation, the PSR has set out the requirements expected from FSBRA designated payment systems in granting fair access via its powers of direction (through its General Direction 2). FSBRA is the UK's domestic regulatory regime to protect access to payment systems
- Part 8 of the Payment Services Regulations 2017, which is retained EU law. This sets out direct and indirect requirements for access to payment

systems under Regulations 103-104. Access must be on a given on a proportionate, objective and non-discriminatory basis (referred to as the 'POND' criteria)

5.12 While the objectives of these provisions are similar, they are very different in design. The FSBRA regime reflects the UK's vision for a utility-style regulator with explicit powers to safeguard competition and intervene in market practice so as to achieve this aim. By contrast, the regime under the Payment Services Regulations is an enforcement regime for which the PSR has powers to ensure compliance but no additional powers of intervention. As such, the UK's domestic regime has a stronger and clearer focus to safeguard competition.

5.13 The current dual regime – where access requirements are set out in both domestic statute and in retained EU law – has resulted in anomalies as to which regime takes precedence in a given scenario. As a result of the primacy of EU law for members of the EU, the UK disapplied the FSBRA access regime (under its section 108) where the Payment Services regime applied. The scope of application of the Payment Services regime itself turns on whether or not a system is designated under the Settlement Finality Regulations 1999 (SFRs).

5.14 This complex, duplicative, and overlapping structure for regulating payment system access – the design of which reflects the primacy of EU law rather than regulatory rationale – can lead to perverse outcomes where similar market actors may be subject to different access provisions purely as a result of designation under the SFRs, risking an unlevel playing field as well as regulatory complexity.

5.15 Responses to the 'Payments Landscape Review' often highlighted the need for greater clarity over the PSR's duty in ensuring fair access. Firms are often expected to understand and navigate two competing regimes' requirements and to know which systems fall under which regime. Fintech and challenger payments firms in particular noted that being able to secure fair and reasonable access to systems was sometimes cumbersome, confusing, and may affect their ability to conduct business activity.

5.16 The government's view is that the FSBRA regime for market access is simpler and more effective and reflects the UK's original ambitions to safeguard competition. The government therefore believes the regime under the Payment Services Regulations would benefit from removal, leaving the FSBRA regime to apply in its place in all cases. In addition to being a more effective regime, having a single 'access regime' would ensure greater clarity and consistency for market actors and a level playing field.

5.17 The regime applies to payment systems as designated under FSBRA by the Treasury – whereas in principle the PSR is responsible for any payment system under the Payment Services Regulations. Applying the FSBRA regime would help ensure that the PSR targets its resources and regulatory interventions most effectively, focusing on the systems for which it is the designated regulator (which itself can evolve as needed through future designations), and in line with the PSR's statutory obligation to discharge its resources in the most efficient and economical way. Notably too, the PSR has

never exercised its powers in relation to accessing payment systems for a non-designated system.

5.18 The government welcomes views on this proposal – including if the POND criteria merit retention in the final FSBRA regime. The concept of "proportionate, objective and non-discriminatory" access has become a well-understood feature of the PSR's regulatory approach, both for persons defending their approach to allowing access and for those seeking access. It is language commonly used by the PSR in exercising its duties under both FSBRA and the Payment Services Regulations.

Question 14: Do you agree with the government's proposals to simplify the regulatory regime governing access to payment systems?

Improving the efficiency of sections 56-57

5.19 As explained above, sections 56 and 57 of FSBRA are fundamental to ensuring fair access to payment systems. Under these provisions:

- section 56 allows applicants to request that the PSR uses its regulatory powers to grant access to designated payment systems
- section 57 gives the PSR the power to vary the terms, fees or charges of commercial agreements, so as to ensure that commercial barriers are not erected that undermine fair and reasonable competition/access. This provision also operates on the basis of an applicant's request

5.20 Currently, the PSR has no discretion as to whether its powers under section 56 or 57 are most appropriate in a given case, as its ability to act and under which route is determined by the applicant. This can be inefficient if, in evaluating a given case, the PSR realises that a better solution would be delivered through its other powers. The government considers the binary nature of applying these powers and the inability of the PSR to apply which remedy is best in a given case, is inefficient.

5.21 In addition, the PSR currently has limited discretion not to consider an application made to it, even if it receives these from entities that might, for example, be subject to UK sanctions or from entities that are insolvent.

5.22 The government considers that remedying these issues would create more efficiencies both for the PSR and for applicants.

Removing 'primary purpose'

5.23 For a new payment system to be capable of designation, it must meet the definition of a payment system as set out in section 41 of FSBRA, where a system is defined as being 'for the purpose of enabling persons to make transfers of funds'.

5.24 Further to this, section 41(2) specifies what cannot be considered a system. Section 41(2)(e) states that an entity's 'primary' purpose must be enabling the transfer of funds.

5.25 The government is concerned that where this provision was a reasonable requirement in 2013, it does not reflect the changing nature of the

payments landscape. When this provision was first written, it was not envisaged that operators may enter the market whose primary commercial function was not that of being a system operator, but who would nonetheless perform important activities facilitating the transfer of funds. While the government considers that the approach to designation under FSBRA generally works well, and that the correct systems are currently within scope, it is concerned that over time the 'primary' purpose requirement may act as a constraint with no particular purpose. Notably, there is no such restriction under the Banking Act, even though the bar for recognition for being systemic is higher.

5.26 The government is therefore considering adjusting the 'primary purpose' provision set out in section 41(2)(e), as part of ensuring that the FSBRA framework remains agile and applicable over time.

The ability to vary and revoke existing directions

5.27 As explained earlier in this consultation paper, one of the chief regulatory tools of the PSR is its ability to issue directions to firms that it supervises, either of a general or firm-specific nature.

5.28 Currently, when the PSR wishes to vary or revoke an existing direction it must issue a full, new direction in its place. This is unlike the position for rulemaking within financial services where, for example, the FCA has the explicit means to vary or revoke a rule. Other competition regulators also have similar powers, such as those of the Competition & Markets Authority (CMA), under section 75 of the Enterprise Act 2002.

5.29 This creates inefficiencies for the PSR's internal resources and for the market. It means, for example, that even minor modifications have resulted in a full new public consultation. A new consultation concerns not just the modification itself, but the whole direction. This is even in cases when the policy itself has guided multiple general or specific directions in the past, and where there will be no change in policy given that the existing direction is already the result of previous consultation.

5.30 The government therefore considers that the PSR should be given the means to vary or revoke existing directions, consistent with the approach for other authorities. Moreover, the government is confident that effective consultation and stakeholder engagement will not be reduced, especially in view of the parallel provisions under the FRF Review which will strengthen engagement, consultation, and overall accountability.

Regulatory powers in relation to misleading information

5.31 Currently, the PSR can impose an administrative penalty on a supervised entity if it fails to comply with a 'supervisory action' (an action taken under section 54-56 of FSBRA), such as a direction. The PSR's ability to issue penalties is contained in section 73 of FSBRA.

5.32 While the PSR has the power under section 81 of FSBRA to request information from a person in connection with its functions, it does not have the power to issue fines where that person fails to comply or provides misleading or incomplete information. This contrasts with the position for

other authorities such as the FCA. The FCA's 'Principles for Businesses' constitute "relevant requirements" for the purposes of section 206 of FSMA, and therefore it is possible for the FCA to impose a penalty for breaches of Principle 11 ('Relations with the regulators'). It is also possible for the FCA to impose a penalty on an authorised firm under section 206 of FSMA for a breach of SUP 15.6, which relates to inaccurate, false, incomplete or misleading information.

5.33 The government is considering if a similar type of power should be given to the PSR and, if so, what the requisite standard should be for determining if a penalty is an appropriate and proportionate penalty in the event of a breach. This might, for example, be appropriate in cases where a person knowingly or recklessly provided the PSR with information that was false or misleading, such as in cases where a significant amount of information was inaccurate, or the person persistently failed to provide accurate information. The government would welcome views on if a commensurate power to other regulatory authorities should apply in this case and, if so, the 'bar' for such a fine being available. The government would also welcome views on what would be an appropriate avenue for appeal in such a case.

Question 15: Do you consider that there is merit in the PSR being able to impose a penalty on designated systems and their participants for 'misleading information', e.g. where a person knowingly or recklessly provides the PSR with false or misleading information? Do you have any views on what would be a fair and effective route of appeal?

Clarifying routes of appeal against PSR decisions

5.34 There are currently different routes to appealing decisions made by the PSR under FSBRA – to the CMA, Competition Appeal Tribunal (CAT), and judicial review.

5.35 In particular, for applications made to it under sections 56-57 of FSBRA:

a) in instances where the PSR exercises its powers, the PSR can be challenged by appeal to the CMA

b) where the PSR chooses not to exercise its powers, this is challengeable by judicial review

5.36 The rationale for having a set of otherwise CMA-appealable decisions be subject to Judicial Review where the PSR has not acted is unclear. The government is therefore minded that a decision by the PSR not to exercise its power would be similarly challengeable to the CMA as for a decision that it actively takes.

5.37 In addition, there is currently no time limit set in statute on appealing decisions; firms may bring appeals against the PSR at any time. This is unlike similar competition regulators such as the CMA which do have existing procedural rules that set limits for when and for how long a decision is appealable. The government is considering instigating a deadline of 2 months from the date on which the appellant was notified of the decision made by the PSR. This would bring the PSR in line with the current process

for appeals made against decisions that are sent to the CAT elsewhere in the FSBRA legislation.

A means of redress for service users

5.38 When the PSR takes enforcement action that leads to a financial penalty, surrendered monies are received by the Treasury.

5.39 There are currently no means for the PSR to separately compensate service users who may have been harmed. This contrasts with the position of the FCA. While the FCA also surrenders enforcement fines to the Treasury, it additionally has powers of restitution, both for payments services specifically (section 114 of Payment Services Regulations 2017) and under section 384 of FSMA. These powers allow the FCA to require supervised firms to pay specifically calculated amounts to particular victims by way of redress for their misconduct.

5.40 The FCA also has restitution powers which allows the regulator to apply to the court for a restitution order, in addition to its own administrative powers under section 384. It further has statutory powers to require authorised firms, payment service providers and/or electronic money issuers to carry out redress exercises, for the benefit of consumers of financial services.

5.41 The FCA has set out its policy on restitution in chapter 11 of its enforcement guide.

5.42 Powers of restitution do not apply instead of a financial penalty, but the payment of redress can be taken into consideration by the FCA when making a financial penalty calculation. This may lead, for example, to the FCA not including a disgorgement element within a financial penalty or reducing this sum. In imposing a financial penalty, the FCA may also take into account the behaviour of a firm where a redress exercise has been carried out, such as where terms were generous, or the exercise of redress undertaken especially promptly. The government is considering if a similar power of restitution should be available to the PSR.

Making arrangements for the investigation of complaints

5.43 Section 84 of the Financial Services Act 2012 requires the regulators to make arrangements for the investigation of complaints in relation to a complaint made against the exercise of, or failure to exercise, their relevant functions. This includes appointing an independent investigator responsible for the conduct of investigations, which in turn requires approval from the Treasury.

5.44 The PSR was established in 2013, and therefore after the enactment of the Financial Services Act 2012. Nonetheless, it has opted to be subject to these standards voluntarily since it established in 2015.

5.45 The government considers that for clarity and transparency, the system should be formalised and the PSR added to the list of regulators in scope of the requirements under section 84 of the Financial Services Act 2012.

Question 16: The government would welcome views on any of the issues identified above in relation to the operation of FSBRA.

Chapter 6

Responding to this consultation and next steps

This consultation will remain open for 12 weeks, and close at 23:59 on Tuesday 11 October 2022. We invite stakeholders to provide responses to the questions set out throughout the consultation using the template provided alongside this document; however, we also welcome wider commentary in whichever format best serves the stakeholder intending to respond, with means to guide policy considerations and further development of the topics covered in this consultation.

We welcome responses from all stakeholders, notably:

- payment institutions, including payment system operators, payment services providers, and electronic money institutions
- financial institutions, including financial technology firms
- businesses and consumer groups
- industry bodies and trade associations

Please submit responses electronically or via addressed mail to the following:

Payments Perimeter Consultation
Payments & Fintech
HM Treasury
1 Horse Guards Road
SW1A 2HQ
PaymentsPerimeterConsultation@hmtreasury.gov.uk

Confidentiality

'Payments Regulation and the Systemic Perimeter' – Processing of Personal Data

This notice sets out how HM Treasury will use your personal data for the purposes of this consultation and call for evidence and explains your rights under the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA).

Your data (Data Subject Categories)

The personal information relates to you as either a member of the public, parliamentarians, and representatives of organisations or companies.

The data we collect (Data Categories)

Information may include your name, address, email address, job title, and employer of the correspondent, as well as your opinions. It is possible that you will volunteer additional identifying information about themselves or third parties.

Legal basis of processing

The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in HM Treasury. For the purpose of this consultation the task is consulting on departmental policies or proposals or obtaining opinion data in order to develop good effective government policies.

Special categories data

Any of the categories of special category data may be processed if such data is volunteered by the respondent.

Legal basis for processing special category data

Where special category data is volunteered by you (the data subject), the legal basis relied upon for processing it is: the processing is necessary for reasons of substantial public interest for the exercise of a function of the Crown, a Minister of the Crown, or a government department.

This function is consulting on departmental policies or proposals, or obtaining opinion data, to develop good effective policies.

Purpose

The personal information is processed for the purpose of obtaining the opinions of members of the public and representatives of organisations and companies, about departmental policies, proposals, or generally to obtain public opinion data on an issue of public interest.

Who we share your responses with

Information provided in response to a consultation may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004 (EIR).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury.

Where someone submits special category personal data or personal data about third parties, we will endeavour to delete that data before publication takes place.

Where information about respondents is not published, it may be shared with officials within other public bodies involved in this consultation process to assist us in developing the policies to which it relates. This could include the Bank of England, the Financial Conduct Authority and the Payment Systems Regulator. Examples of other public bodies appear at: www.gov.uk/government/organisations.

As the personal information is stored on our IT infrastructure, it will be accessible to our IT contractor, NTT. NTT will only process this data for our purposes and in fulfilment with the contractual obligations they have with us.

How long we will hold your data (Retention)

Personal information in responses to consultations will generally be published and therefore retained indefinitely as a historic record under the Public Records Act 1958.

Personal information in responses that is not published will be retained for 3 calendar years after the consultation has concluded.

Your rights

1. You have the right to request information about how your personal data are processed and to request a copy of that personal data.
2. You have the right to request that any inaccuracies in your personal data are rectified without delay.
3. You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.
4. You have the right, in certain circumstances (for example, where accuracy is contested), to request that the processing of your personal data is restricted.
5. You have the right to object to the processing of your personal data where it is processed for direct marketing purposes.
6. You have the right to data portability, which allows your data to be copied or transferred from one IT environment to another.

How to submit a Data Subject Access Request (DSAR)

To request access to personal data that HM Treasury holds about you, contact:

HM Treasury Data Protection Unit
1 Horse Guards Road
London
SW1A 2HQ
dsar@hmtreasury.gov.uk

Complaints

If you have any concerns about the use of your personal data, please contact us via this mailbox: privacy@hmtreasury.gov.uk.

If we are unable to address your concerns to your satisfaction, you can make a complaint to the Information Commissioner, the UK's independent regulator for data protection. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
0303 123 1113
casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Annex A

List of questions

1 Do you agree that in line with the principle of 'same risk, same regulatory outcome', the Bank of England should have responsibility for supervising systemic actors within payment chains?

2 Do you agree with the government's approach that the existing architecture of Part 5 of the Banking Act 2009 should be reflected in any expansion in the scope of Bank supervision – with criteria to determine systemic importance, and recognition by the Treasury?

3 Do you agree with the government's approach to supervising different types of systemic service provider described above?

4 Do you agree that general IT and technology firms should typically fall within the critical third party framework instead of the Banking Act, and do you have views on if the current reference to these entities in the Banking Act should be modified, and how?

5 Do you agree with the government's view that the Bank should have the ability to gather information for the purposes of keeping markets under review from the perspective of understanding systemic risk, in the way proposed above? Are there any features that you consider would be important for this to be an effective and proportionate power?

6 Do you agree with the government's proposal to clarify the Bank's ability to apply limits where necessary for recognised entities within an expanded regulatory perimeter; to specify the circumstances in which they may be relevant; and views on what those circumstances might be?

7 Do you consider that providing greater clarity as to the nature of the Bank's supervisory powers would provide greater transparency? If so, do you have views on how this should be provided, for example directly in the legislation, or as a supplementary annex, or in some other form?

8 Do you agree with the government's proposed approach to requirements for establishment under the Banking Act and the rationale provided? What are your views on the adequacy of the existing requirements under the Payment Services and Electronic Money Regulations?

9 Do you support the co-supervisory model proposed between the regulatory authorities, allowing the Bank of England to take primacy for systemic entities for reasons of financial stability? Do you support the principle of the primacy of the FMI SAR for systemic payments entities?

10 Do you consider that the government should apply the FRF accountability framework to the Bank of England in its supervision of a wider payments perimeter?

11 Do you have views on the government's proposed approach to aligning the FRF Review with the regulatory landscape for payments?

12 Do you think that the Senior Managers & Certification Regime should apply to recognised payments entities within the Bank of England's regulatory perimeter, including if this is expanded?

13 Do you consider that a SM&CR regime would be beneficial within the FCA's sphere of supervision, and on what basis?

14 Do you agree with the government's proposals to simplify the regulatory regime governing access to payment systems?

15 Do you consider that there is merit in the PSR being able to impose a penalty on designated systems and their participants for 'misleading information', e.g. where a person knowingly or recklessly provides the PSR with false or misleading information? Do you have any views on what would be a fair and effective route of appeal?

16 The government would welcome views on any of the issues identified above in relation to the operation of FSBRA.

HM Treasury contacts

This document can be downloaded from www.gov.uk

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

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