bba
The voice of banking

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23rd December 2016

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BBA Response to Retail Banking Market Investigation, Draft Order - Consultation

The BBA is the leading trade association for the UK banking sector with 200 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Eighty per cent of global systemically important banks are members of the BBA. As the representative of the world's largest international banking cluster the BBA is the voice of UK banking.

The BBA welcomes the opportunity to provide feedback into the Retail Banking Investigation.

Responses are provided to the relevant Parts of the Order where feedback is considered appropriate. Our response has highlighted some technical and practical issues with the proposed Order and includes recommendations that supports the implementation of an effective environment to achieve the desired objectives. The BBA would welcome continued close dialogue and engagement with the CMA on the Order.

PART 1 – General

Article 5 - Exceptions to the application of the Order

- Based upon the Draft Explanatory Note, we understand that the CMA's policy objective is to implement a private banking and wealth management (PBWM) exemption as set out in the final report by putting in place:
  1. An exemption from the Order for firms / divisions that have as customers only 'Specified Individuals' (plus family members and employees) – provided for under Article 5.1.
  2. A power for the CMA to make a determination that a firm / division is exempt from the order in respect of its PCA customers to address situations where, PBWM firms serve a mix of Specified Individuals and a small volume of 'other customers' – provided for under Articles 5.2 and 5.4.
  3. A customer number limit, for exemptions made by determination – provided for under Article 5.3.

- We agree that a PBWM exemption is appropriate, as these customers were not the focus of the CMA review and have very different needs to retail customers. We also broadly agree with the framework for the exemption as set out above, but suggest that drafting amendments are needed to ensure the provisions work effectively.

The core exemption: Article 5.1

- Article 5.1 is intended to exempt firms / divisions that serve only Specified Individuals (plus their family members and firm employees) by exempting *PCA products* that are made available exclusively to these customers. This is a sensible exemption. However, in practice some PBWM divisions in a group provide to their customers (all Specified Individuals) PCA products which are also made available by other divisions within the group to retail customers. These PCAs have additional services such as enhanced relationship management attached to them for PBWM clients, but are fundamentally the same product. These added services and features do not change the underlying terms and conditions, meaning that it is not a separate *PCA product* to the one provided to mass market retail customers.

- We understand that the CMA is considering whether features such as the MMC and alerts required under the Order would only be applied to retail products, making it clear which products are genuine retail products, and which are PBWM products subject to Article 5.1. However, this assessment of which customers / products are in scope must be made before the CMA's remedies are applied, i.e.: before the MMC and other CMA-imposed features are attached to products. As such, attempting to use these features to distinguish between PCA products covered by Article 5.1 and those that are not covered cannot resolve the issue, at best giving rise to circular reasoning.

- Given the above, the exemption as drafted in Article 5.1 may not work for some divisions / brands operating in a group. The Article should therefore have an additional provision added to exempt divisions that cater solely to Specified Individuals, even though some of the PCA products provided may also be provided to retail customers by other divisions in the group.

Recommendation - We recommend adding additional provisions as follows:

"5.1A Subject to Article 5.1A1, this Order does not apply to providers of PCAs, or divisions within PCA providers, where its provision of PCAs is available exclusively to some or all of the following:

5.1.1 individuals holding assets to the value of not less than £250,000 calculated in accordance with Paragraphs 2 and 3 of Regulation 10 of The Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order ('Specified Individuals');

5.1.2 family members or dependents of Specified Individuals; and

5.1.3 employees of the PCA provider.

5.1A1 The exemption in Article 5.1A applies only in respect of that provider or division's provision of PCAs."

The backup exemption: Articles 5.2

- Providing the firm / division-based exemption above will help ensure that few firms will need to rely on the CMA's power to grant an exemption by determination. However, there is still a risk of gaps, so Article 5.2 remains important. Article 5.2 usefully provides a flexible mechanism for accommodating firms that are not covered by Article 5.1 (and proposed 5.1A), but this should be unduly narrow in its scope.

- Specifically, Article 5.2 can currently only be applied by the CMA when the division or Brand provides PCAs to individuals who are not Specified Individuals. If Article 5.1 is not successful in excluding all firms / divisions that have only Specified Individuals as customers, these firms should be able to apply for a determination.

Recommendation - We therefore recommend that Article 5.2 be revised as follows:

> "5.2 Where a PCA provider, or a division or Brand of a PCA provider, provides PCAs alongside specialist or private banking services (e.g. wealth management or investment services) ~~to individuals who are not Specified Individuals~~, such PCA provider may apply to the CMA for it to make a determination that the provision of PCAs to such individuals, together with any provision of PCAs to Specified Individuals, is operated independently from the provision of PCAs to other customers. "

- Making this change will be particularly important if our submission above to add a firm-based exemption is rejected. This change will not weaken Article 5.2, as the CMA retains final control over which firms benefit from a determination

Size limit of the exemption

- Furthermore, the PBWM exemption should be applied on the basis of the principle that PBWM services are not the target of the CMA review and remedies. As such, these services should be excluded from the Order, irrespective of the size of the firm and the number of customers.

Recommendation - As such, we recommend amending Article 5.3 as follows:

> "5.3 Where the CMA has made the determination required by Article 5.2, the Order shall not apply to the PCA customers of that division or Brand ~~if it has fewer than 150,000 active PCAs in GB and NI combined~~."

- We understand that the CMA may have concern that this could be inappropriately open to a large scale provider of products and services that are in a 'grey area' between retail and full PBWM. This could be addressed by adding to the list of factors under Article 5.4 consideration of the number of customers of the division or Brand that are not Specified Individuals.

Timeframes where a determination is not made

- Finally, we note that if the CMA receives many requests for a determination, it could be challenging to make a decision on them all in a timely manner. This would place applicant firms in a position of considerable uncertainty, with a risk that they will have very little time to implement the requirements. Firms and divisions that unsuccessfully seek a determination under Article 5.2 will need adequate time after the CMA's decision to implement the requirements of the Order.

Recommendation - We therefore recommend that the CMA provide itself with discretion under the Order to extend implementation deadlines where a firm or division has made an unsuccessful request for a determination.

Private Banking Clients with BCA's

- In the Final report on the Retail Banking Investigation, the scope of the remedies to apply to Private Banking clients was discussed. Paragraph 12.14 of the report highlights that it was "…concluded that it would be disproportionate for our remedies to apply to private banks where they operate independently from other parts of the business..."

- The Draft Order includes the intention to exclude PCAs used by Private Banking Clients from the Order.

- Private Banking clients will typically conduct their financial affairs through the same division / brand of a firm. The clients banking arrangements might include a BCA, although the incidence of this is likely to be low.

- For large Banking groups, the BCA de minimis threshold will not apply, and there could be an inadvertent consequence that a small number of BCAs managed within a Private Banking environment would be caught within scope of the Order. Elements of The Order will apply to all BCA providers irrespective of any threshold limit. We do not believe that this is a proportionate approach.

- The Retail Banking investigation was focussed upon retail customers operating PCAs and BCAs. The initial report recognised the difference of Private Banks and we therefore recommend that the Order retains an ability for the CMA to determine that BCAs may be excluded from the Order in situations that they decide are appropriate.

- **Recommendation** – An addition is made within Article 5 to make provision for the CMA to determine that, where PCAs have been exempted from the Order, providers can apply to the CMA for BCAs to be exempted as long as the BCA de minimis threshold is not exceeded at a brand or division level.

- The addition would be included within Articles 5.1, 5.1A.1 and 5.2

  > "Where The Order does not apply to a PCA product or a division or brand of a PCA provider, such PCA provider can make an application to the CMA for it to make a determination that the Order will not apply to BCAs, subject to the BCA de minimis exemption thresholds not being exceeded at a Brand/ Division level."

PART 2 - Open API standards and data sharing

Inclusion of Commercial credit cards

- Commercial credit cards have been included in the draft order under Article 12.4.3, but were not a part of the scope of the CMA review. As such, the CMA will not have received evidence in respect of these products during its investigations.

- Widening the scope of the remedy is not without risks. In particular, it creates an additional challenge for the delivery of the wider open banking framework. Although there might be some benefit in adding commercial credit cards in order to better align with PSD2, this change could be made later by the Implementation Trustee. However, it should not be a core requirement of the Order.

Recommendation - Commercial credit cards should be removed from the scope set out under Article 12.4.3.

Write access timing challenges

- The inclusion of write access in the CMA timetable, ahead of the Regulatory Technical Standards for PSD2, creates considerable risks for minimal benefits. The Order should permit a realistic timescale for open data "write access", and should not accelerate implementation unnecessarily.

- Open Data is transformative, and the BBA supports this initiative. However, the CMA's central comparison use-cases are supported by "read access" – which will effectively and proportionately address the identified AECs. "Read access" enhances competition based on products that exist in the market today.

- In contrast, the benefits from "write access" are not at the core of the CMA's remedies, and they pose additional risks. In particular, the Regulatory Technical Standards underpinning PSD2 security will only come into effect 18 months after their approval by the European Commission – likely to be Q3/4 2018.

- Furthermore, these services do not currently exist in the market.

<u>Risks of accelerating write access implementation</u>

- Misalignment between the implementation of the CMA's Order and the PSD2 RTS risks delivering "write access" without the underlying technical standards on which it depends, such as "strong authentication" could mean:
  - Customers will not be able to use write access because no payment initiation provider will as yet be in a position to provide services.
  - Worse, payment initiation services may be developed without the protection of strong authentication.
  - Separate technical standards will need to be developed and delivered to meet the requirements of the Order, which could result in duplication of regulatory standards.

- Inclusion of "write access" as part of the CMA's remedies and to the CMA's timetable will mean the Implementation Trustee is responsible for it. The entire Open Banking ecosystem is sensitive to customer perceptions, with payment-initiation arguably the most sensitive element. It is appropriate to be risk-averse as we consider the potential erosion of trust in open banking (beyond PCAs, BCAs, and payment initiation).

- Furthermore, there is a knock-on risk of jeopardising timely delivery of read-access, which is more central to the CMA's remedies and objectives.

<u>Limited benefits to acceleration</u>

- As noted above, the core benefits sought by this set of CMA remedies are addressed through read access. The benefits of write access are less central and depend entirely on the delivery of new products and propositions that are not available today. Indeed, it is unlikely to be available before the RTS come into force in Q3/4 2018.

Recommendation - The January 2018 implementation date for write access should be removed from the CMA Order. Instead the Implementation Trustee should be allowed to develop the timetable for delivery in the Agreed Timetable and Project Plan, which would then be subject to approval by the CMA.

PART 3 - Service quality indicators

9.1 'PCA' means a personal current account. That is an account marketed to individuals rather than businesses, which provides the facility to place funds, withdraw cash, hold deposits and to execute payment transaction to and from third parties but does not include any of the following types of accounts:

(a) an account in which money is held on deposit in a currency other than sterling;

(b) an account in which credit funds are held and offset against mortgage debt or a loan other than an overdraft facility, i.e. a current account mortgage;

(c) provided that the account is not used for day-to-day payment transactions:

(i) savings accounts (including instant access savings accounts);

(ii) credit card accounts where funds are usually paid in for the sole purpose of repaying a credit card debt; and

(iii) e-money accounts.

- The Order appears to define "PCA" using the definition of "payment account" from PAD/Payment Accounts Regulations. This could be very problematic because the PAD definition will capture some savings accounts that have similar functionality to PCAs.

Recommendation - we would suggest the CMA applies the definition of 'current account' adopted for the purposes of the Immigration Act 2014, which was discussed by the House of Commons' Fifth Delegated Legislation Committee on 5 November 2014. The Committee proposed that 'current account' should encompass only those accounts that are used principally for day-to-day banking – savings accounts were expressly excluded as their principal purpose is different. We believe such a definition will more appropriately reflect the CMA's intentions and avoid unintended adverse consequences.

- The Order appears to be silent as to the turnover threshold for SMEs for whom service quality information should be collected. The CMA has proposed that Parts 2, 4, 5 and 11 will only apply to SMEs with turnover below £6.5 million. It would therefore be logical for the Order to explicitly align the requirements of Part 3 so that they are consistent with the majority of the other remedies that apply to SME banking. We would also argue that service needs and expectations are very different for small businesses compared with those of medium or large size, especially for Online and Branch services.

Recommendation – A consistent definition of an SME to whom the Order will apply should be adopted

15. Requirement to publish service quality indicators

9.1 'Active PCA' means a PCA that has had at least one customer-generated payment or transfer (including standing orders and direct debits, but excluding charges and interest on the account) coming into, or leaving, the account in the previous 12 months.

15.1 Providers shall publish, in relation to each of their Brands to which this Part 3 applies, service quality indicators showing the willingness of their customers holding a PCA who have used the account or a relevant service in a defined period prior to the survey taking place

- Regarding defining what is an active account, this is a matter that we will cover when proposing an approach for the CMA's consideration in advance of 1 May 2017. However we would like to suggest that activity in the previous 3 months would retain enough recency for the account holder to retain an accurate view of their engagement, but retain enough coverage to ensure that smaller providers' pool of potential respondents is not significantly reduced by a more restrictive definition. The definition of a 'defined period' as shown in Article 15.1 would be aligned to this proposal.

- When considering the definition of an 'active account', the type of transactions that are being processed through the account will need to be understood when designing the survey methodology.

Active account Exclusions

Residency

- We would assume that those not resident in the region (NI or GB) that the survey relates to would be excluded from participating, including customers not resident in the UK.

Closed Accounts

- We would assume anyone who has closed their account would not be considered as 'active' and therefore will be excluded from participating in the survey.

Contact Frequency

- Firms seek to avoid over-researching their customers, so once a customer has taken part in research they commonly exclude them from other research for the next 6 months. Also, some customers tell firms that they want to be excluded from all research. We believe that customers who have self-selected not to take part in any market research should be able to ensure that remains the case under this process. The Industry working group will consider this as part of the survey methodology.

15.4 The first set of service quality indicators shall be published by all Providers on 1 August 2018 falling four weeks after all the data (incorporating results from 1 July 2017 to 30 June 2018) is collected. The service quality indicators shall thereafter be updated on the first Working Day after 31 January and 31 July each year based on data collected on a rolling basis over the 12 months from the beginning of January to the end of December of the previous calendar year and from the beginning of July to the end of June respectively incorporating six months of results from the previous calendar year and six months from the prevailing calendar year.

- Our principle concern is timing. If the agency chosen for this work is one with which any firm does not have an appropriate data-sharing contract, it could take at least 6-8 weeks, and in some cases up to six months for a firm to on-board them as a new supplier. This timescale is required to enable firms to undertake due diligence on the service provider, to ensure the security and integrity of their customers' data, and to satisfy security and IT safeguards. We would ask the CMA to reflect this in the deadline and give industry discretion to deliver as soon as possible within Q3 (instead of at start of Q3 2017). The published survey data could be a time series of data of up to 12 months. Additional accounts could be sampled to boost the overall survey volumes and balance any delay in the start of the survey and any loss of fieldwork period.

Recommendation - Rather than setting fixed dates, an option might be for providers to include a timetable for publication in the proposals to be submitted to CMA by 1st May 2017. This approach would be consistent with provisions in 16.1 which are similarly dependent on working arrangements still be agreed between providers and research agencies. Suggested redrafting for 15.4 could be:

> *The first set of service quality indicators shall be published by all Providers at a date to be agreed in Quarter 3 2018 to show results for the period ~~1 August 2018 falling four weeks after all the data (incorporating results~~ from 1 July 2017 to 30 June 2018~~) is collected~~. The service quality indicators shall thereafter be updated in Quarter 1 and Quarter 3 ~~on the first Working Day after 31 January and 31 July~~ each year based on data collected on a rolling basis over the 12 months from the beginning of January to the end of December of the previous calendar year and from the beginning of July to the end of June respectively incorporating six months results from the previous calendar year and six months from the prevailing calendar year. The precise*

timetable for publication will be based on a proposal to be submitted to the CMA by Providers by 1st May 2017.

- The recommended turnaround time from the survey fieldwork ending to publication of the results is currently very challenging. A workable solution of at least 4 weeks post receiving the verified results from the survey company is required to enable the production and distribution of material to enable accurate and prominent display in branches. Therefore the ability of firms to undertake such an exercise would rely on an analysis and delivery by the agency within a very short timescale (potentially just a few days, and the ability of the survey provider to achieve this is as yet unconfirmed) which may pose some risk

- There should be provision within the publication timescale to enable sufficient time for both the research agency to undertake quality checks before releasing the results, and for account providers to prepare any publications.

- The dates specified for publication of survey results will reflect the data from surveys conducted in December and June (for publication on 1st February and 1st August). There are concerns that the already tight timescales might be further impacted by seasonality at year end. As the survey methodology is developed, and should this identify risks to the timely publishing of the data, we would wish to revisit the publishing dates and timescales. The potential risks of the timely delivery of results will become clearer as the survey methodology progresses.

16. Collection of service quality information

16.1 The service quality indicators required to be published pursuant to Article 15 shall be wholly based on survey responses collected:

16.1.3 over a 12 month period on a rolling basis with data collection undertaken each month.

- The Draft Explanatory note indicates that face-to-face or telephone surveys are preferable, and that there are significant concerns about the use of online only surveys. We agree that a mixed methodology is likely to be appropriate and that online should not be ruled out completely, with face-to-face or telephone being used where email addresses are not available – online is a less intrusive option for consumers and allows them to answer openly without the influence of a telephone or face-to-face interviewer. We would certainly like to retain this option until the procurement phase has been completed.

- We are concerned that a sample provided study as opposed to free find will mean that a true and fair comparison among participants will be extremely challenging. However a data-sourced sample by the sharing of a list is likely to be required, at least for the smaller banks in NI close to the threshold. We are also conscious of the potential for an intended or unintended bias for any provided sample. Asking participants to provide a sufficiently large sample to the agency to select a small proportion randomly would mean one 3rd party holding potentially millions of bank customer details at any given time from either some or all participants. This is felt to be an unacceptable level of risk for data privacy and potential for hacking and fraud, particularly given the extremely testing timeline current required by CMA, and the lack of time for detailed security testing between an agency and a large number of banks within a very constrained period (see also our comments regarding timeline and the proposal to extend this, above). To avoid this, it may be that a free find approach is used for all but the smallest players where it would not be realistic to achieve the specified samples due to low incidence; however this will have knock-on effects in terms of the comparability of results.

16.2 Providers shall ensure that GB and NI are each surveyed separately (although potentially by a single independent survey agency) and in accordance with Article 16.1. In each case, the survey may be undertaken by either:

> *16.2.1 a single independent survey agency for both PCA and BCA customers; or*
>
> *16.2.2 two separate independent survey agencies one for PCA customers and one for BCA customers.*

- Representativeness of the survey: Clarification is required from the CMA on the degree of representativeness required, with regard to: Geographic; Demographic (age, gender, social class), and Product mix (how many other products they hold with a brand and/or different types of current accounts). If there is a need for the survey to be representative of all of these segments simultaneously it will introduce significant levels of complexity.

- With the SME survey, the representativeness of the survey could be supplemented by an understanding of the size of the business that is responding. As the methodology is developed, this could identify a need for different methodologies for PCAs and BCAs.

- Under the Market Research Society code of conduct, doing research with under 16's requires parental consent. Our preference is for account holders aged 18+ to be within scope.

- The survey methodology will need to consider the extent to which people who have been Overdrawn (e.g. they have used an overdraft whether authorised or unauthorised) or people who have an arranged overdraft, even if they haven't used it, are represented within the sample. Our preference is for confirmation that the survey question is aimed at those customers who had arranged and used an overdraft. We believe that this is what should be tested and would give a more balanced response. If the survey included customers who had an unarranged overdraft, their response is either going to be ambivalent ('I used it and it worked!') or negative ('I used it and the Bank wrote a letter to me!').

- For customers who are in severe financial difficulty, there are concerns that the responses to the survey might be influenced by actions that are taken on their account. We would therefore request confirmation that customers in severe financial difficulty are to be excluded.

16.3 Providers shall ensure that any survey commissioned pursuant to Article 16.2 grants permission, without restriction, to those providers subject to Part 2 to publish all anonymised underlying data on each Provider in accordance with the Read-only Data Standard.

- Our preference is for free-find, wherever that will be practicable. The revised Order makes clear that providers are not compelled to share customer data for the survey unless absolutely necessary and otherwise potential to game the sample exists. We believe that the only exception may be for some of the very smallest brands for whom a carefully designed process may be needed.

17. Specification of publication

17.1 Providers shall, pursuant to Article 15.4 and in accordance with Articles 17.2, 17.3 and 17.4, publish:

- With regard to where the indicators are published, CMA will be aware of the rapidly reducing usage of retail branches by consumers. In this context, CMA's proposals to require providers to publish service quality indicators, and update them six-monthly, in branch posters and literature seems disproportionate and costly. It also potentially delays the overall publication

of data due to printing and delivery lead times. We would ask CMA to reconsider this requirement.

Recommendation - We recommend that the CMA does not hard code the presentation format in the Order at this stage. We are more than 18 months from first proposed publication date, and there is considerable merit in allowing a period for piloting and testing different approaches with consumers. The format could be finalised, say, by Q1 2018, six months in advance of first publication date in Q3.

17.1.3 on the Brand's website (including where it has been optimised for mobile use) and mobile banking app (if any):

(a) the service quality indicator set out in Article 15.1.1 on the main personal banking page of the Brand's website such page shall be no more than one click away from the Brand's GB or NI website home page;

- In Article 17.1.3, it is proposed that providers publish the indicators 'no more than one click away' from a firm's main home page. This could mislead consumers into thinking the indicators have a much broader meaning and purpose.

Recommendation - As the indicators relate to PCA and BCAs only, we ask CMA to amend the requirement so that the indicators are found by a link from providers' personal current account page(s) instead. We would assume that the existence of an embedded document that is no more than one click way meets the requirements of the Order.

17.1.3. (e) *the service quality indicator set out in Article 15.1 within two steps of the Brand's primary mobile banking app screen.*

- Article 17.1.3 (e) refers to the 'service quality indicator set out in Article 15.1' – this article has four indicators (15.1.1, 15.1.2, 15.1.3 & 15.1.4). Clarity is required on whether the intention is for one indicator to be published (15.1.1) or all four

17.1.4 in information leaflets (or inserts inside such leaflets) likely to be seen by prospective PCA or BCA customers, such as those setting out the features and benefits of the PCAs or BCAs the Provider is offering, at least the service quality indicators set out in either Article 15.1.1 or Article 15.2.1 as relevant. For the avoidance of doubt this requirement does not impose an obligation on any Provider to publish such leaflets.

- Article 17.1.4 states that 'For the avoidance of doubt this requirement does not impose an obligation on any Provider to publish such leaflets' – further clarification is required on the meaning of this statement.

- To publish the service quality indicators in leaflets – even if it's via an insert – is disproportionate from a cost-benefit perspective. It should be at the providers' discretion. Some providers will only make limited use of leaflets; with customers often preferring to do their product research on websites instead.

17.2 The service quality indicators to be published in accordance with Article 17.1 shall include the following information:

- We are concerned that the proposed format for publication, as set out in Article 17.2 and Schedule 2 of the Explanatory Notes, could be unhelpful and potentially misleading for consumers. Differences between the percentage scores achieved by different brands may be marginal and not necessarily statistically significant. Yet the proposed ranking will appear to

imply a material difference between providers which could be fictitious. It is also unclear that consumers will find percentage figures as easy to comprehend as alternatives such as a star-based system; e.g. where providers are allocated star ratings (from one to five stars) based on their score, which would create meaningful groupings that consumers could readily relate to. We would welcome the CMA allowing for further discussion on the presentation format, as per our comments above.

Poster:

- No regional considerations are stated regarding the publication of the Top 5 brands. For example, would it be appropriate to publish a bank that is only present in SE England on posters in Scotland where the brand has no brand presence? We would welcome further discussion with CMA on the issue of regional differences and whether they can/should be represented?
- There should be an acknowledgement of statistical significance in the publication of results. (i.e. If no statistically significant difference between scores then should be shown as a joint rank)

PART 5 - Transaction History

Opt in versus opt out

- We understand that the CMA considered an ‘opt in’ approach to the provision of transaction histories but decided against it. However, it is not clear to us why this decision was reached.

- In paragraphs 14.94-96 of the final Report, the CMA explains that the objective of this remedy is to address the AEC by providing assurance to customers that they will not lose access to their transaction history and thus remove a barrier to switching.

- To achieve this objective it is clear that:
  a. Customers must have an easy way to access their transaction history after they have closed their account; and
  b. Customers need to be aware that this is available to them.

- It is not clear, however, why defaulting customers into receiving their history when they have closed their account will be more effective than just making clear to customers that the history will be available to them on request. While an ‘opt out’ approach will certainly mean that more customers *receive* their transaction history, this will only come after they have closed their accounts and therefore will not provide any additional *reassurance* that switching will not cause them to lose their records.

- By making customers aware early on that five years of account history continues to be accessible after closure, they will be in a good position to make an informed decision as to whether to close their account. This would be more effective than defaulting customers into receiving their history.

- Furthermore, providing a transaction history creates data security risks. Transaction histories contain information about the customer that is potentially valuable to fraudsters. This risk exists whether the transaction history is provided:
  - via a paper mail out, where it can in some instances be difficult to ensure the letter is received securely,
  - via an email, which could be intercepted or stored insecurely by the customer, or

  - via an online portal, which could be susceptible to hacking.

- Not all banks have the technological capability to deliver transaction history for closed accounts in electronic format, without a significant investment in their IT infrastructure. Of those who do, they might not always hold electronic contact details such as email for all customers. This means that in many cases where the customer hasn't opted-out of receiving their history, banks would have to default to sending the transaction history by post. Although this is not a CMA requirement, this would be very costly for banks, and inconvenient and unsafe for most customers. Changing the approach to 'opt-in' would allow the customer to both consider if they really need the transaction history, but also the format in which they prefer to receive it (if their bank provides a choice).

Recommendation - The CMA should amend Article 20.1 to adopt an 'opt in' approach, which would reduce risks to customers and would achieve the regulatory objective effectively.

Clarifying the exemption in Article 20.3.1

- If the CMA does finally conclude that the framework should operate on an 'opt out' basis, it is important to clarify the scope of Article 20.3.1.

- Article 20.3.1 states that there is an exemption from the requirement to provide a transaction history where the customer:

  "retains access to the information otherwise required to be provided under this Article 20 on an ongoing basis after the relevant account is closed;"

- However, it is not clear how far this should be interpreted. Article 21 requires banks to continue to make transaction histories available to customers after they close an account; in theory, this could be interpreted as satisfying Article 20.3.1. We understand that this is not intended, but this should be made clearer.

- This is explained to an extent in the explanatory note, which sets out in paragraph 53:

  "Where a customer has moved from one account to another with the same Provider, Article 20 will not apply so long as customers retain access to the Payment Transaction History from their old account."

- This provides an example of where Article 20.3.1 would apply, but it is not clear how exhaustive this is.

- **Recommendation** - We understand that the intention is for Article 20.3.1 to apply in situations where the customer does not need to make a new request for access. This could be made clearer by amending paragraph 53 of the explanatory note as follows:

  "Article 20 will not apply where the customer retains ongoing access to his or her transaction history without needing to specially request this access be given or set up. For example, where a customer has moved from one account to another with the same Provider Article 20 will not apply so long as customers retain access to the Payment Transaction History from their old account."

Alignment with evolving data protection rules

Repetitious or excessive requests

- Under the Data Protection Act 1998 (DPA), once a firm has provided information under a subject access request it is not required to comply with an identical or similar request from that data subject again until a reasonable interval has elapsed since the first request (DPA, section 8(3)).

- Although it may not arise frequently, this is a useful protection for firms to avoid vexatious use of data subject rights. We recommend that this be incorporated into the Order.

- This provision will, however, be replaced once the General Data Protection Regulation (GDPR) comes into effect in May 2018. The corresponding provision in the GDPR will allow firms to refuse a subject access request where the request is 'unfounded or excessive, in particular because of their repetitive character' (Article 12(5)). This change also needs to be accommodated.

- **Recommendation** - We therefore recommend that a new provision be included in Article 21 to the effect of:

  "Providers are not required to provide a Payment Transaction History to a customer where one has already been provided to that customer, and where the Provider would not be required to comply with a repeated subject access request under Section 8(3) of the Data Protection Act 1998, or any successor legislation."

Charging a fee

- The GDPR will also change the approach to charging a fee for subject access requests. Firms will not be able to charge a fee for subject access requests, except where the requests are 'unfounded or excessive, in particular because of their repetitive character'. This is as an alternative to refusing the request (see above).

- **Recommendation** - This change should be accommodated in the order, for example by amended Article 21.3 as follows:

  "Providers are not required to provide a Payment Transaction History unless they have requested and received a fee no greater than would be payable for a subject access request made under section 7 of the Data Protection Act, or any successor legislation. "

PART 6 - Automatic enrolment into a programme of alerts

- Banks are fully supportive of a principle that customers are provided with timely and relevant information to help them make informed decisions to manage their finances. The provision of alerts can help customers to take action to ensure that they have funds available to meet items presented for payment, and to minimise any costs of unauthorised borrowing.

- Customer engagement can be difficult to achieve, and smart communications are needed to get the correct message delivered at the correct time.

- The provision of alerts at inappropriate times could lead to unintended consequences and customer disengagement – either not responding to the messages or opting-out of alerts. The Research with the FCA will help to identify what works well.

Article 23 Automatic Enrolment

- The principle of sending an alert is to inform the customer and give them an opportunity to take action to avoid incurring unauthorised costs.

- Where a PCA product will incur no charge or any other costs, the Order confirms that there is no need to send an alert (Article 23.2.1).

- Some PCA products have a fee free 'buffer zone' within which no fees are incurred, however fees are incurred if the balance exceeds the fee free 'buffer zone'.

- The Order as written requires customers entering into such a fee free 'buffer zone' to be sent an alert even though no charges will be incurred. This would require an alert to be sent if a customer goes 1p overdrawn where they have no agreed overdraft limit.

- The fee free buffer zone is typically a low value (£10-£20) which embeds an element of proportionality, and ensures that customers are not charged for minor transgressions.

- A fee free buffer zone that applies to unauthorised overdrafts should be differentiated from a fee free agreed overdraft limit. Where an account has a fee free agreed overdraft limit, alerts would not need to be sent until the customer exceeds or attempts to exceed the agreed (but fee free) overdraft limit.

- Requiring alerts to be sent for low balances within a fee free buffer zone could have unintended consequences that could drive customer disengagement or opting-out from alert messages. Whilst recognising that Draft Explanatory Note 66 advises that the principle should be that customers are advised as they start to use a penalty free buffer, we do not believe that the sending of an alert in these circumstances is appropriate.

- **Recommendation** - Article 24.2.1 is amended to limit the alert trigger to accounts where the customer has exceeded a 'Pre-agreed credit limit' and will incur a charge.

  "24.2.1; knows that the relevant PCA has, at a specific point in time, moved into a position where the customer has exceeded a Pre-agreed credit limit and will incur a charge**;"**

Article 24 Timing of Alerts

Articles 24.3.4 / 24.7.4 Near Limit alert

- An alert trigger is the point at which a customer has exceeded, attempted to exceed or reasonably expected to exceed a pre-agreed credit limit (Article 24.2)

- A 'near limit alert' could be set by the customer or a feature of the PCA product and sent when a customer has moved into a position where the balance is below a defined threshold, but still within their overdraft limit or in credit. Such 'near limit alerts' are helpful for customers as they provide a greater window for customers to take action.

- A 'near limit alert' does not need to contain the content of alerts (Article 25) unless it also meets the requirement of an alert trigger under Article 24.2

- Where a 'near limit alert' has been sent, the requirements under Article 24.3.4 are ambiguous. Clarification is sought as to whether a customer should be sent a further alert when they are at

risk of incurring charges and fees for the unauthorised overdraft (unless exclusions in 24.3.1/2/3 apply).

- **Recommendation -** CMA are requested to clarify their intentions and the requirements under Article 24.3.4.

Article 24.5 – Minimum 10am notification of an alert trigger

- There could be exceptional situations of system outages whereby firms are unable to identify 'scheduled payments' that might generate an alert trigger, and consequently impact the ability to send the alert before 10am.

- In such situations firms will need to have contingency arrangements and where possible extend the deadline for customers to take action to avoid or reduce charges. It should be acknowledged however that the payment decisions on items presented for payment cannot be delayed. Draft Explanatory Note 70 acknowledges that the time communicated to customers could be very limited.

- Article 50.3.3(c) - obligation to submit compliance reports - requires lenders to report "where possible, the number and timing of successful and failed deliveries". This reporting can be used to monitor the operational delays in sending payments.

- **Recommendation -** Article 24.5 is amended to cover situations where there are exceptional operational issues.

  "24.5; Notwithstanding Article 24.4, where the alert trigger is brought about by a Scheduled payment the sending of the Alert must be initiated where operationally possible by, at a minimum, 10am on the day of the Alert Trigger."

Article 24.7.2 – Future dated payments

- Future dated payments included as part of 'Scheduled Payments' are not defined within the Order

- Given the need to provide alerts for 'Scheduled Payments' before 10am, it is envisaged that future dated payments relate to entries being applied to an account that are being processed through an overnight automated process (such as cheque clearing, online payments scheduled, etc.).

- The Bank would know details of the automated entries that are to be applied to customers account early in the morning and understand if they will create an alert trigger.

- It should be noted that Banks will typically process entries to a personal account on a real time basis. On receipt of a Scheduled Payments, Banks would make a pay / no pay decision immediately. The alert would therefore be more likely to advise of an action that has been taken and potential future charges.

- **Recommendation** - CMA should clarify their definition or principle for 'future dated payments' within Article 24.7.2, which, if it generates an alert trigger, would require the alert to be processed before 10am if operationally possible

Article 25 Content of Alerts

- The contents of the alert require the communication of a period of time during which the customer has an opportunity to take action to avoid or reduce charges (Article 25.1.2). For

customers moving into a fee free ‘buffer zone’ there are no immediate charges to be avoided and therefore a time limit would not be appropriate.

- **Recommendation** - If accounts entering an unauthorised fee free buffer zone are not excluded from the Order (Article 23.2) as recommended above, Article 25.1.2 should be amended to require the advice of a period of time ‘where appropriate’.

  “25.1.2; in relations to the transactions specified in Article 25.2, the customer has a period of time during which they have an opportunity to take action to avoid or reduce charges where appropriate, in which case the alert must inform the customer of the time by which they should take such action.”

PART 7 - Monthly Maximum Charge

- The Order is introducing a requirement for firms to publish a Monthly Maximum Charge (MMC) for customers exceeding or attempting to exceed a Pre-agreed credit limit.

- It will be important that communications are clear to consumers that the maximum applies to the charges in relation to exceeding or attempting to exceed a pre-agreed credit limit, and does not include authorised overdraft charges or is a total maximum charge for the product.

- Communications should also be clear that the Monthly Maximum Charge applies at an individual product level and not at a customer level.

- Schedule 2 sets out the communication of the MMC. Whilst the format of Schedule 2 is different to Article 28.5.2, we understand that the principle is contained within Article 28.5.2 and that Relevant Charge includes all charges that could accrue to an account as a result of exceeding or attempting to exceed a pre-agreed credit limit.

- The implementation of the MMC will require technical and system changes to be implemented within firms.

- Changes could be needed in relation to both the identification/ tracking of the constituent costs covered by the MMC, as well as charging frequency (for PCA’s where charges are applied quarterly rather than monthly). This may require changes to the account terms and conditions and therefore a period of pre-notification for those changes to take effect. Where significant system changes and/or notification of changes to product terms and conditions are required

- The time period for the implementation and application of the MMC is challenging. There are additional aspects of regulatory change that Banks will need to manage at the same time that also impact PCAs, and we think that there is merit in combining the introduction of this remedy with the delivery of:

  - The Payments Account Directive (PAD) – This will deliver new transparency requirements which are closely aligned to the objectives of this Order. The PAD requirements are due to be delivered nine months from when the EBA’s Regulatory and Implementing Technical Standards come into force.

  - Payments Service Directive 2 (PSD2) – Implementation on 13th January 2018

- The changes to be implemented through the Order and the regulatory Directives identified above, will require changes to similar systems that affect PCAs. It would be most efficient if the

implementation is aligned to minimise duplication of effort with system changes and an efficient use of limited resources.

- Alignment would also ensure a more straightforward approach for customers and avoid multiple changes to customer communications.

- **Recommendations** - Communications and the wording of the Order should be explicit that the Monthly Maximum Charge is specific to unauthorised overdraft charges application at an account level, and do not include authorised overdraft fees or represent the maximum monthly total overdraft fees on the account.

  CMA should clarify whether there is any intended difference between the relevant charges definition in Article 8.5 and Schedule 2.

- The commencement date of Part 7 in Article 2.5 is aligned with the implementation of other regulatory Directives (PAD or PSD2) to deliver efficiencies.