

## **VISA EUROPE**

### **Response to Competition and Markets Authority Consultation on Regulated Payment Systems Appeals – Rules and Guide**

Visa Europe (“Visa”) welcomes the opportunity to provide comments in response to the Competition and Market Authority’s (“CMA”) Draft Rules and Guide for Regulated Payment Systems Appeals (the “Rules” and “Guide” respectively).

We appreciate that many of the requirements for the appeal process flow from the provisions of the Financial Services (Banking Reform) Act 2013 (the “2013 Act”). As such we have been mindful of providing comments on aspects of the Rules where the CMA can apply its discretion.

Our comments mainly pertain to the CMA’s Draft Rules. However, we have also made reference to the Guide where this is appropriate.

As a general observation, we note that the Rules leave a number of elements to the discretion of the CMA and that in places the Rules are not as process-specific as, for instance, The Competition Appeal Tribunal Rules 2015. While we understand the balance to be achieved between user-friendliness and certainty around process, we believe that there are a number of elements that could be improved and have therefore provided some commentary on individual examples.

We hope that the comments below are helpful to the CMA in developing a clear, robust and fair process that supports the timely resolution of appeals with regard to regulated payment systems.

Our specific comments are as follows.

#### **Hearings and Case Management**

The Rules and Guide indicate that the CMA has discretion as to whether to hold hearings at various points in the appeals process, but there are no details as to how the CMA would apply this discretion in particular circumstances. We believe it would be useful for the CMA to provide more details regarding the circumstances under which the CMA would choose (or choose not) to hold hearings in these circumstances.

In any event we believe that effective and swift application of CMA discretion and decision making ‘in practice’ will be vital in ensuring efficient outcomes in relation to appeals under this framework.

#### **Costs**

We understand that the CMA is bound by the 2013 Act to make an order requiring the payment of the CMA’s own costs incurred in connection with an appeal. We are concerned that neither the Rules nor the Guide set out the methodology by which the CMA proposes to calculate such costs, nor how the CMA intends to justify the costs presented to an appellant in such an order, particularly if the appeals process timeline (and by implication, cost) is extended due to factors not related to the conduct of an appellant. We believe this is particularly important, given that under paragraph 17 (1) to Schedule 5 of the 2013 Act imposes no requirement on the CMA for these particular costs to be ‘reasonably incurred’. Parties need to be assured that the CMA’s costs will be evidenced and justified.

Additionally, we note that paragraph 17 (2) to Schedule 5 outlines which parties should pay the CMA's costs in particular circumstances. For clarity, we believe that the Guide and the Rules could more directly refer to these provisions.

Finally, there does not appear to be any specific provisions for parties to raise concerns or disputes regarding the CMA's calculation of its own costs or of any costs incurred by another party. We believe it would be useful if such detail was set out in the Draft Rules.

### **Amending Notices of Appeal and new evidence**

The CMA has helpfully set out the process for submitting a notice of appeal and how such a notice is to be constructed at Rule 5 of the Draft Rules. However, we note that there does not appear to be any formal mechanism for the amendment of notice of appeals. This would be particularly useful where the applicant has identified new evidence that they might wish the CMA to consider in an appeal. Such mechanisms exist within other comparable appeal Rules, for instance under paragraph 12 of the Competition Appeal Tribunal Rules 2015. We believe it would be useful to have such a mechanism included in the Rules currently being consulted on.

### **Intervention**

We note that the 2013 Act does not set out a formal framework for intervention by third parties. We welcome the CMA's proposal to allow this within the appeal process at Rule 10 of the Draft Rules and believe that it will contribute to effective case management.

Our only comment with regard to the Rules as drafted is that it is not clear how costs incurred by virtue of intervener involvement are handled, however we understand that the CMA's ability to further define this position could be constrained by primary legislation.