

Telephone: 020 7066 9346

Email: enquiries@fs-cp.org.uk

15 September 2023

By email: appscams@psr.org.uk

Dear Sir / Madam,

Financial Services Consumer Panel response to the Payment System Regulator's Consultation Papers on APP scams: the consumer standard of caution AND excess and maximum reimbursement level for Faster Payments and CHAPS

The Financial Services Consumer Panel (the Panel) is an independent statutory body. We represent the interests of individual and small business consumers in the development of policy and regulation of financial services in the UK. Our focus is predominately on the work of the FCA, but we are responding to these consultation papers from the Payment Systems Regulator (PSR) because payments – and the safety and security of those payments – are essential to consumers.

We welcome the opportunity to comment on these consultations on controls around APP scam reimbursement. We are responding to both consultation papers together because many of our overarching points are applicable to the proposals around the consumer standard of caution, as well as the excess and cap on maximum reimbursement. We have however answered the questions posed in each consultation separately in Annex A (consumer standard of caution) and Annex B (excess and maximum reimbursement).

As we have said in responses to previous consultations on the topic, we strongly support mandatory reimbursement for victims of APP fraud. In 2022, £485 million of consumer funds were lost to APP fraud¹ in the United Kingdom. The total amount of APP fraud losses reimbursed increased by 5% compared to the previous year, however the total amount reimbursed was just 58% of the amount stolen². Even if we just look at those victims putatively covered under the APP scam code, the

¹ https://www.ukfinance.org.uk/system/files/2023-05/Annual%20Fraud%20Report%202023_0.pdf p47

² https://www.ukfinance.org.uk/system/files/2023-05/Annual%20Fraud%20Report%202023_0.pdf p48

reimbursement figure stood at a paltry 66%³. This shows precisely why mandatory reimbursement is necessary.

However, we are very concerned by the measures proposed in these consultation papers as we feel they add unnecessary barriers in seeking redress for victims of APP fraud. Being a victim of fraud is a devastating experience for consumers, always psychologically and often financially. They should not suffer further distress and inconvenience by being asked lots of questions to establish whether they had been grossly negligent, nor should they face a financial penalty as a result of being the victim of fraud.

The best way to address the growing prevalence of APP fraud in the UK is to prevent it. We think the proposals in these consultation papers actually reduce the incentive for firms to have robust and effective fraud controls needed for effective prevention. In turn, this will erode consumer trust in the overall Payments System. Payments must be safe, and they must be trusted. Payments are not optional nice-to-have products used only by a sophisticated subset of consumers. All consumers throughout the United Kingdom have to make and receive payments and they need to have confidence in the payments system as well as in their ability to access and use it. With the increased use of e-commerce, the declining availability and acceptance of cash and the closure of bank branches, more and more consumers are required to use Faster Payments. These factors, along with the PSR's stated strategic priority of unlocking account-to-account payments and the move to open banking-initiated account-to-account payments, require all consumers to be able to use the system with confidence. We believe these proposals if implemented would not protect consumers adequately from the harms associated with APP fraud and risk undermining consumer confidence in the system.

We are also concerned that some of the proposals could lead to negative outcomes for vulnerable consumers if further guidance is not issued to ensure PSPs consider that vulnerable consumers may be less able to meet the consumer standard of caution than other consumers. This is especially concerning as the FCA's Financial Lives Survey shows that vulnerable consumers are much less likely to be able to protect themselves from fraud in the first place and are therefore more likely to fall victim⁴.

Finally, the PSR must not forget that small and micro businesses are also victims of fraud. The proposals to cap the maximum amount of reimbursement is likely to have a particularly detrimental on these types

³ https://www.ukfinance.org.uk/system/files/2023-05/Annual%20Fraud%20Report%202023_0.pdf p51

⁴ <https://www.fca.org.uk/publication/financial-lives/financial-lives-survey-2022-key-findings.pdf> p285

of consumers who would likely be moving larger sums of money than individual consumers.

In summary we do not support the PSR's proposals in this area and would urge them to reconsider.

Yours sincerely,

Helen Charlton
Chair, Financial Services Consumer Panel

Annex A – answers to questions

Question 1: Do you agree that the PSR should specify the standard of care that PSPs can reasonably expect of consumers? Please provide reasons for your answer.

In theory, yes. In our response to the PSR's previous consultation on mandatory reimbursement, we called on PSR to provide clarity on what gross negligence means. This consultation paper is a welcome step in this direction.

The paper rightly states that gross negligence is a high standard, higher than is applied in common law. It also rightly puts the burden on PSPs to prove that the standard has been met. However, we question whether this is possible in modern, digital payment journeys. PSPs are designing consumer journeys to be ever smoother, faster, and less visible and the payment process ever less experiential to payers. Given this, it is difficult for us to envisage circumstances in which it *would* be fair to argue that the consumer had been grossly negligent. If the standard is of little or no practical use, then it places an unnecessary and unfair barrier in the way of fraud victims accessing the redress they are owed.

We would also encourage the PSR to bear in mind the impact of disputes about the consumer standard of caution. The guidance is currently silent on what should happen in the event of a dispute and there is potential for a large number of disputes to arise. If disputes cannot be adequately resolved between consumers and their PSPs then it is likely they will become complaints that will add to the Financial Ombudsman Service's caseload and cause consumers further distress and harm.

Question 2: Do you agree that the standards of care specified by the PSR should be exhaustive, and that PSPs should not be able to introduce additional standards through their contractual relations with consumers? Please provide reasons for your answer.

Yes we do. It is well documented that consumers do not – and indeed are not able to – understand the legalistic terminology of contracts. It would therefore be unfair to allow PSPs to use their contracts to significantly reduce the protections offered to consumers. Consumers would be unable to make informed decisions about which firms to contract with.

There would also be a high risk of inconsistency if PSPs could amend the standards through their contractual relations which would quickly become impossible for consumers to navigate.

If PSPs were to be permitted to vary the expected standards of care via contractual relations then it would be imperative they did so in such a way that was compliant with the 'consumer understanding' outcome of the Consumer Duty. This would, for example, require firms to prominently and clearly draw consumers' attention to variations in contractual terms in a way that allows them to make an informed decision. This would need to be intensely supervised.

Question 3: Do you agree that the burden of proof should fall on the PSP to demonstrate that a consumer – through gross negligence – has failed to meet one or more of the standards at paragraph 3.2? Please provide reasons for your answer.

Yes. This minimises the burden on consumers at an already stressful time. The requirements around 'reasonable and proportionate' information requests must be adhered to by PSPs to ensure that consumers are not bombarded with requests to help the PSP establish gross negligence that risk deterring or frustrating reimbursement claims.

Question 4: Do you agree that PSPs should not be able to introduce, through their contractual relations with consumers, terms or conditions that shift the burden of proof onto consumers, or seek to reduce the burden on providers? Please provide reasons for your answer.

Yes, for the reasons set out in answer to Question 4.

Question 5: Do you agree that consumers should be expected to have regard to tailored, specific warnings raised by their PSP before a proposed authorised push payment has been executed, where those warnings make clear that the intended recipient of the payment is likely to be a fraudster? Please provide reasons for your answer.

We welcome the need for warnings to be transaction and consumer specific and not be boilerplate. However, in order for consumers to be deemed grossly negligent by *not* having regard to these warnings, we think it must be proven that such warnings *are* actually effective in reducing the likelihood of consumers falling victim to fraud. This will require consumer testing. We suggest the PSR takes learnings from the FCA's consumer testing of risk warnings related to high-risk investments.

We note the PSR's express desire not to be prescriptive about the warnings but suggest it may wish to set out some examples of good and bad practice. It must also stand ready to quickly and publicly call out incidences in which prior warnings do not meet the required standards.

Question 6: Do you have any other comments on the requirement to have regard to warnings, taking into account the draft policy document at Annex 1 and the draft guidance at Annex 2?

No.

Question 7: Do you agree that consumers should be subject to a standard to promptly notify their PSP when they suspect they have, or may have, fallen victim to an APP scam? Please provide reasons for your answer.

Yes. The Panel supports the proposed 13-month minimum time limit, on the understanding that customers would have recourse to the Financial Ombudsman Service if they believe the time limit has been unfairly applied. This time limit should not be shortened in any circumstances.

It must be as easy as possible for consumers to report a scam. We welcome the PSR's guidance that PSPs must maintain accessible and non-discriminatory channels for consumers to report fraud. This area of the guidance could however be strengthened by a requirement that PSPs show understanding of consumers' individual circumstances, especially where consumers may be vulnerable.

We note the PSR's stated purpose of this measure is to avoid PSPs having to reimburse consumers who fall victim to multiple subsequent scams after one initial scam. The PSR believes the PSP could 'reasonably argue that the later scams might have been averted, had the consumer promptly reported the initial scam'. We do not agree with this line of argument. Scam techniques are evolving at a rate that the industry is finding impossible to keep up with, so consumers – especially vulnerable consumers – should not be deemed to be grossly negligent for falling victim to numerous scams in relatively short periods. Furthermore, we know that scammers deliberately target prior victims as well as consumers with characteristics of vulnerability who are more likely to fall victim to scams repeatedly⁵ and potentially less likely to detect them.

Question 8: Do you have any other comments on the prompt notification requirement, taking into account the draft policy document at Annex 1 and the draft guidance at Annex 2?

No.

Question 9: Do you agree that consumers should be subject to a standard to respond to reasonable and proportionate information

⁵ <https://www.theguardian.com/money/2021/dec/19/confused-and-at-risk-the-vulnerable-are-key-targets-for-fraudsters>

requests from their PSP, where those requests are necessary to establish whether the consumer is the victim of an APP scam, or where they are necessary under our 'stop the clock' policy? Please provide reasons for your answer.

Yes. We welcome reference to vulnerability in this part of the PSR's guidance and vulnerability being a reason for why consumers may not engage with information requests. With this in mind, it should be clear to PSPs that not engaging with information requests alone is not enough to determine that a consumer has been grossly negligent.

Question 10: Do you have any other comments on the information sharing requirement, taking into account the draft policy document at Annex 1 and the draft guidance at Annex 2?

No.

Question 11: Do you have any additional feedback on the draft policy document at Annex 1 or the draft guidance at Annex 2?

We would like to see much greater discussion of vulnerability throughout the guidance, not just in relation to the information sharing requirement and requirement to have regard to warnings. The latest Financial Lives Survey data from the FCA shows that 47% of UK adults showed 1 or more characteristics of vulnerability⁶. It would therefore be a reasonable regulatory starting point to assume that in at least 47% of APP scam incidents the consumer might be vulnerable. It is also important to note that the FCA's Financial Lives Survey shows that vulnerable consumers are much less likely to be able to protect themselves from fraud and are therefore more likely to fall victim⁷.

PSPs should take this into account when assessing negligence and regulators should question firms about how they are applying a 'vulnerability lens' to assessments and how this is influencing reimbursement decisions. For instance, it is possible that the consumer could have vulnerable traits such as a cognitive impairment or a developmental condition; in such circumstances they might be less capable of clearly understanding information, communicating, and making informed decisions.

We would also welcome further clarity from the PSR about the experience consumers can expect in cases where a PSP suspects they have been

⁶ <https://www.fca.org.uk/publications/financial-lives/financial-lives-survey-2022-key-findings>

⁷ <https://www.fca.org.uk/publication/financial-lives/financial-lives-survey-2022-key-findings.pdf> p285

grossly negligent. We believe the PSR should limit how long investigations can take and offer rules or guidance on what communications consumers can expect. Firms need to avoid people feeling stigmatised or even “criminalised” at a time when they may be feeling vulnerable. The PSR should also set out the expected process if consumers wish to dispute a PSP’s determination that they have been grossly negligent (see our answer to Question 1 above). Communications and consumer support in this area should meet the high standards expected under the FCA’s Consumer Duty.

Finally, we would encourage the PSR to include guidance that requires PSPs to ensure continuity of service for consumers who are victims of scams. There is a risk that PSPs response to potential repeat victims of fraud is to freeze their wallets or accounts and/or to cease serving customers. Were this to happen, scam victims could find themselves unable to pay and be paid. This could exacerbate financial hardship as well as make it difficult for these consumers to participate in society whilst their accounts or wallets are frozen.

Question 12: Do you have any additional suggestions for inclusion in the standard of care that PSPs can expect of consumers in relation to authorised push payments?

No.

Question 13: Do you agree that a standard to report a suspected APP scam to the police should not be included at this stage? Please provide reasons for your answer.

Yes. We recognise that fraud is a hugely underreported crime and there could be societal benefits to increased incidence of reporting. We strongly encourage consumers to report fraud and believe it should be as easy as possible to do so.

However, for the reasons set out throughout this response we do not support the addition of further barriers to victims of accessing the redress they are owed and therefore do not believe reports to the police should be a prerequisite to seeking redress from PSPs. We are also concerned that the police reporting system is not set up to receive the hundreds of thousands of reports of APP fraud and if consumers have a negative experience of reporting to the police they may be deterred from further pursuing matters with their PSP and would therefore lose access to the reimbursed funds.

Annex B – Excess and maximum reimbursement level for Faster Payments and CHAPS

Question 1: Do you agree that PSPs should be free to apply a partial excess, as well as not levy an excess at all, should they want to?

No. We are not convinced by the benefits of an excess. We would recommend the PSR introduce an enabling power so that an excess could be introduced in the future, should such benefits become evident and be proven.

We understand that firms may disapply these limits, but in the interests of protecting every user of the system, we would prefer regulation to maximise coverage. The inconvenience and stress of a misplaced payment, and the importance of smaller sums to many people, may place unnecessary burdens on consumers, deterring them from reporting incidents or seeking redress. The impacts may be detrimental, especially for those who are vulnerable.

On vulnerability, we recognise the PSR's intention to exclude vulnerable consumers from the excess however the effectiveness of this approach relies on PSPs' ability to appropriately identify vulnerable consumers. We are not confident that firms would consistently be able to do this well, especially given the virtual nature of the relationships between providers and consumers and the fast and online nature of consumer journeys in this market.

Question 2: Are these factors the correct ones when considering the excess?

AND

Question 3: Is there anything else we should consider when setting the level for the excess?

We note one of the factors is minimising financial loss for consumers. We think this should be reworded to "minimising harm to consumers" so that it would also include minimising distress and inconvenience.

Close supervision will be required of how PSPs apply these factors. For example, the 'operational demand' factor could easily be exploited by firms claiming it is too burdensome to offer a tailored approach to consumers.

Question 4: We are seeking views on whether the excess should be a fixed amount or a percentage of the fraud value. Should the excess be a fixed value, a percentage or a percentage with a cap? If fixed, what value should it be and why? If a percentage, what amount and why? If a percentage with a cap, what amount and what should the cap be?

No comment.

Question 5: Do you have any data, evidence or views to suggest how an excess should be calibrated?

No.

Question 6: Should the excess remain static? Increase with inflation? Some other metrics? Not increase at all?

If implemented, any excess should be reviewed every three years to ensure it remains appropriate. A cost benefit analysis of any change should be conducted to assess the extent to which any excess achieves the benefits stated in this consultation.

Question 7: Do you agree that the maximum reimbursement level should be applied to all consumers, including those who might be classed as vulnerable?

No. This essentially puts a cap on how much money can be safely moved through the Payment System at any one time. Individuals and SMEs rely on the System for all levels of payment, from buying groceries to purchasing homes and or other assets. This means that occasionally they need to make very high-value payments – exactly the kind of payments that are in strong need of protection from fraud (not just because of the value, but also because of consumers’ lack of familiarity with making them). To introduce a cap on reimbursement would reduce PSPs’ incentive to prevent fraud on these types of transactions. It could also increase costs for consumers by requiring them to purchase insurance for high-value transactions above the reimbursement cap.

Question 8: Are these factors the correct ones when considering the maximum reimbursement level?

AND

Question 9: Are there any other factors we should consider?

The cost to consumers and SMEs of protection outside of the cap should also be considered.

Question 10: Do you gather any data that would show what type of cases are likely to fall outside the maximum reimbursement level?

No.

Question 11: Should the maximum reimbursement level align with the Financial Ombudsman Service going forward? Increase by inflation? Some other metrics? Not increase at all?

As stated above, we do not believe that there should be a maximum reimbursement level. The Payment System is vital for all payment transactions, whether high or low value, and it is imperative that consumers retain their trust in the system in its entirety.

In the normal course of their activity PSPs should apply particular scrutiny to higher value and unusual payments, especially those to new payees. Were a cap on reimbursement to force consumers to make multiple purchases of lower amounts to – say – make house purchases or investments – these might not trigger the same scrutiny and yet pose the same risk.

Question 12: What factors should we consider as part of the review of a maximum reimbursement level?

We reiterate that we do not believe there should be a maximum reimbursement level for the reasons stated above.

Questions from the Bank of England in relation to CHAPS

As with Faster Payments, we do not believe that there should be a maximum reimbursement level for APP fraud claims. CHAPS is, by definition, a High Value Payment System, and should be trusted to be used as such. It sits at the very centre of the UK Payment System and trust in making high value payments through the system is absolutely key to the UK and its consumers.

Because consumers make CHAPS payments relatively rarely and mostly only for high value payments (such as house purchases), neither applying due care to the processing of such payments nor imposing such a reimbursement requirement should be over-burdensome to providers.

Question 13: Do you agree that the current ombudsman service limit of £415,000 should be the maximum reimbursement level for APP fraud claims in CHAPS?

AND

Question 14: For CHAPS, should the maximum reimbursement level be applied to all consumers?

No as before we do not believe there should be an upper limit. CHAPS is a high value payment system which is predominantly used for interbank and institutional payments. Consumers are charged for using CHAPS and will only ever make CHAPS payments a handful (if any) times during their lifetimes. By definition they will be unfamiliar with the system and should be able to feel protected.

We would further observe that consumer payments are a fraction of the total processed through BACS, both by volume and by value; applying extra scrutiny to these payments is not over-burdensome for providers.

Finally, we would note that the average value of a CHAPS payment would appear to be around £1.8 million pounds; the average price of a house in parts of the UK is over £500,000. Any cap should take these two metrics into account.

Question 15: For CHAPS, do you gather any data that would show how many and what type of cases are likely to fall outside the maximum reimbursement level?

No.

Question 16: Should the maximum reimbursement levels for Faster Payments and CHAPS diverge now or in the future?

AND

Question 17: For CHAPS, should the maximum reimbursement level align with the ombudsman service going forward? Increase by inflation? Some other metrics? Not increase at all?

AND

Question 18: Should a limit higher than £415,000 be adopted instead for CHAPS, and if so, what level?

We do not believe there should be a cap set either for CHAPS or for Faster Payments. If caps are set, the cap for Faster Payments should be set at the value threshold and the cap for CHAPS at the average value of a CHAPS payment. Again, though we would caution that any caps imposed will encourage (informed) consumers to make multiple lower value payments that will escape the scrutiny that would otherwise be applied to them. This would complicate the providers efforts to properly scrutinise high-value outgoing payments.