

Authorised push payment fraud – extending the jurisdiction of the Financial Ombudsman Service

Consultation Paper

CP18/16**

June 2018



How to respond

We are asking for comments on this Consultation Paper (CP) by 26 September 2018.

You can send them to us using the form on our website at: www.fca.org.uk/cp18-16-response-form.

Or in writing to:

Racquel Thomas-Smith
Financial Conduct Authority
25 The North Colonnade
London E14 5HS

New address from 14 July 2018:
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

Telephone:

020 7066 5026

Email:

cp18-16@fca.org.uk

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1 Summary

Why we are consulting

- 1.1** Authorised Push Payment (APP) is where a payer, often an individual consumer, instructs their payment service provider (PSP)¹ to send money from their account to another account. APP fraud is where a fraudster tricks a payer into making an APP to an account controlled by that fraudster.
- 1.2** We are proposing to change our rules to reduce the harm experienced by consumers and micro-enterprises² that have fallen victim to APP fraud, where they believe the receiving PSP did not do enough to prevent or respond to it. We propose to require PSPs to handle complaints about alleged fraud relating to funds they have received as a result of APPs in line with the Dispute Resolution: Complaints sourcebook (DISP). We propose to allow eligible complainants to refer these complaints to the Financial Ombudsman Service if they are unhappy with the outcome reached by the PSP, or if they have not received a response to the complaint at all.
- 1.3** The Financial Ombudsman Service proposes to mirror our proposed changes to the Compulsory Jurisdiction (CJ) in the Voluntary Jurisdiction (VJ), which they oversee. As such, this consultation is issued jointly by the FCA and the Financial Ombudsman Service.

Who this applies to

- 1.4** The proposals apply to respondents covered by the CJ and VJ of the Financial Ombudsman Service.
- 1.5** This paper will also be of interest to:
- consumers and micro-enterprises
 - consumer groups
 - industry representative bodies

The wider context of this consultation

- 1.6** This consultation is linked to the identification and diagnosis stages of our Decision-Making Framework, and was informed by Which?'s super-complaint to the Payment Systems

1 For the purpose of this CP, the term payment service provider includes credit unions

2 Trusts and charities would also be eligible to complain under our proposals. Details of who is an eligible complainant are set out in DISP 2.7



Regulator (PSR) and the FCA regarding measures to safeguard consumers against APP fraud.³ We set out more detail on the context of this consultation in Chapter 2.

What we want to change

1.7 We are seeking views on the following proposals which relate to the DISP sourcebook, and the Glossary of the FCA Handbook:

- applying our complaint handling rules to complaints brought by a payer in relation to the alleged failure of a receiving PSP in a payment transaction to prevent or respond to an alleged APP fraud, and bringing these complaints into the Financial Ombudsman Service's CJ and VJ
- bringing complaints about the failure of the receiving PSP to cooperate with the sending PSP in recovering a misdirected payment into the Financial Ombudsman Service's CJ and VJ

1.8 We plan to consult on requiring firms to report data on these complaints, and on fraud more generally later in the year.

Outcome we are seeking

1.9 The proposals will provide victims of alleged APP fraud (where they are eligible complainants) with access to dispute resolution through the Financial Ombudsman Service for complaints against PSPs who receive payments relating to the alleged fraud. This should advance our objectives of protecting consumers and enhancing market integrity.

Measuring success

1.10 Later in the year, we plan to consult on requiring PSPs to record and report these complaints. These data could be used by PSPs and consumers as an indicator of progress on this issue, and to inform our supervisory work.

Next steps

What you need to do next

1.11 We want to know what you think about our proposals. Please send us your comments by 26 September 2018. You can use the online response form on our website or write to us at the address on page 2.

What we'll do next

1.12 We will consider your feedback and publish any finalised rules in due course.

³ www.psr.org.uk/sites/default/files/media/PDF/which-super-complaint-sep-2016.pdf

2 The wider context

The harm we are trying to address

- 2.1** APP is where a payer, often an individual consumer, instructs their PSP to send money from their account to another account. These payments are typically executed by the Clearing House Automated Payment System (CHAPS) and Faster Payment Service (FPS). APP fraud is where a fraudster tricks a payer into making an APP to an account controlled by that fraudster. This is different to other kinds of fraud, for example where a fraudster steals money from an account without the owner of the account knowing, because in APP the account owner actually authorises the payment, albeit under false pretences.
- 2.2** UK Finance data on APP fraud show there were 43,875 cases of APP fraud and total losses of £236 million in 2017. Of these cases, 88% involved consumers who lost on average £2,784 per case, and the remaining 12% were businesses who lost on average £24,355 per case. Financial providers have returned £60.8 million of the losses.⁴ We share concerns with the PSR and other stakeholders that APP fraud is a growing problem.
- 2.3** On 23 September 2016 Which? made a super-complaint to the PSR and the FCA, setting out concerns about the protection available to victims of APP fraud. They said there are insufficient protections for consumers who are victims of APP fraud, compared to the protection available for other types of fraudulent payments. For example, consumers authorising 'pull' payments (where a party takes the money from the account) have legal protection under the Consumer Credit Act 1974 for credit cards, 'chargeback rules' for debit cards, and the Direct Debit Guarantee for direct debits. Online banking fraud (where a fraudster gains unauthorised access to the account) has legal protection under the Payment Services Regulations (PSRs) 2017. But there is no equivalent protection for APPs.
- 2.4** The FCA and PSR investigated the super-complaint, and our findings in response to the super-complaint are on our websites.⁵ We found that receiving PSPs could do more to identify fraudulent incoming payments and prevent accounts from being compromised by fraudsters.
- 2.5** In November 2017, the PSR highlighted a range of developing industry initiatives which, if used by PSPs, should help better prevent and respond to APP fraud. The PSR also consulted on introducing a contingent reimbursement model code – to be developed by the industry and consumer representatives – for PSPs, who have sent or received funds, to follow when resolving complaints about alleged APP fraud.⁶ There will be a public consultation on the code in September 2018.⁷

4 www.ukfinance.org.uk/wp-content/uploads/2017/06/UKFinance_2017-annual-fraud-update-FINAL.pdf

5 www.psr.org.uk/psr-focus/which-super-complaint-payment-scams
www.fca.org.uk/news/statements/update-which-super-complaint-push-payments
www.fca.org.uk/news/statements/fca-response-psr-paper-authorized-push-payment-scams

6 www.psr.org.uk/psr-publications/consultations/APP-scams-report-and-consultation-Nov-2017

7 www.psr.org.uk/sites/default/files/media/PDF/Factsheet_Outcome_of_CRM_Consultation_Feb_18.pdf



2.6 The Financial Ombudsman Service resolves individual financial services disputes between consumers and businesses. But, it cannot currently consider complaints by payers made against PSPs who have received funds transferred as a result of APP fraud, as they are outside its jurisdiction.

2.7 We are proposing to change this. Our proposals address the harm posed by APP fraud by allowing eligible complainants to refer complaints to the Financial Ombudsman Service if they believe the PSP who received the payment as result of this fraud did not do enough to prevent it or respond to it. This is in addition to the work the PSR is doing on APP fraud.

How it links to our objectives

Consumer protection

2.8 Our proposals are intended to help protect consumers by giving them access to dispute resolution through the Financial Ombudsman Service for complaints by payers against PSPs who have received their funds as a result of alleged APP fraud.

Market integrity

2.9 The changes we propose should enhance market integrity by improving trust in the financial system, and encouraging respondents to review their approach to APP fraud and handle complaints appropriately.

Wider effects of this consultation

2.10 Our proposals could result in PSPs increasing security measures to avoid APP fraud by carrying out more intense checks. This could potentially have the effect of making opening an account or requesting a push payment more complex.

What we are doing

2.11 We are seeking your views on our proposals set out in paragraph 1.7, which are explained further in Chapter 3.

Equality and diversity considerations

2.12 We have considered the equality and diversity issues that may arise from the proposals in this CP.

2.13 In summary, our proposals may result in positive and negative implications on all consumers, and therefore may have an impact on individuals with any of the protected characteristics.

2.14 Positive implications affecting all consumers include access to potential dispute resolution through the Financial Ombudsman Service, and potentially less APP fraud

in future as a result of PSPs handling these complaints in line with DISP, and these complaints being made referable to the Financial Ombudsman Service.

- 2.15** The effect of our proposals is likely to have the greatest positive impact on vulnerable consumers. We recognise that consumers may be considered vulnerable for a variety of reasons, and could have multiple protected characteristics. Within this context, we have identified that consumers who are elderly or young (age), non-UK nationals (race), or have disabilities may be more likely to be targeted and fall victim to APP fraud, or have difficulties with banking. Therefore they are most likely to be impacted by our proposals. However, we recognise that consumers may be vulnerable due to other protected characteristics and for a wider range of reasons – such as due to dealing with significant life events.
- 2.16** Negative implications affecting all consumers include PSPs applying more strict systems and controls to prevent APP fraud, which could result in difficulties for some consumers accessing banking and payment services.
- 2.17** The potential harm posed by the negative implications we have identified is mitigated by existing rules and guidance on financial inclusion. For example, our rules state that firms should ensure their systems and controls include appropriate measures to ensure that identification procedures do not unreasonably deny new customers with access to services.⁸ Further guidance on this issue is provided in Part 1 of the Joint Money Laundering Steering Group's Guidance.
- 2.18** We will continue to consider the equality and diversity implications of the proposals during the consultation period, and will revisit them when making the final rules.
- 2.19** In the meantime we welcome your input to this consultation on these issues.



3 Our proposals

Introduction

- 3.1** In this chapter, we set out our proposals to provide eligible complainants with access to dispute resolution through the Financial Ombudsman Service for complaints by payers against PSPs which may not have done enough to prevent or respond to the receipt of funds in relation to alleged APP fraud. The Financial Ombudsman Service can already consider complaints against the PSP who sent the payment.
- 3.2** The Financial Ombudsman Service proposes to mirror our proposed changes to the CJ in the VJ, which they oversee. As such, this consultation is issued jointly by the FCA and the Financial Ombudsman Service.
- 3.3** Our proposals relate to changes to the DISP Sourcebook and the Glossary of the FCA Handbook. The instrument for consultation is set out in Appendix 1.
- 3.4** Subject to responses to the consultation, we plan to make final rules to give effect to our proposals in November 2018 to take effect from 1 January 2019 – with the exception of the rules relating to a PSP’s obligations under regulation 90(3) of the PSRs, which we propose to take effect as soon as the rules are made (applying to any act or omission from the date regulation 90(3) of the PSRs came into force – being 13 January 2018).

The Financial Ombudsman Service

- 3.5** The Financial Ombudsman Service was set up under the Financial Services and Markets Act 2000 (FSMA) to quickly and informally resolve complaints about financial services firms.
- 3.6** The Financial Ombudsman Service has a CJ and a VJ. The FCA is responsible for setting the scope of the CJ, which generally applies to complaints relating to regulated activities and certain other activities such as payment services and lending money. The Financial Ombudsman Service is responsible for setting the scope and standard terms for the VJ, which may cover complaints that cannot be dealt with under the CJ.
- 3.7** A complainant may be eligible to complain to the Financial Ombudsman Service if they fall within a class of person specified as eligible (eg a consumer or micro-enterprise) in the rules for the CJ or the VJ.
- 3.8** The Financial Ombudsman Service generally looks into complaints once the PSP the complaint is against has had the opportunity to resolve the complaint. A complaint is typically referred to it if the eligible complainant is unhappy with the response it has received from the PSP, or has not received a response at all.

- 3.9** The Financial Ombudsman Service considers complaints within its jurisdictions on a fair and reasonable basis, having regard to relevant law and regulations, rules, guidance, standards, codes of practice, and what it considers to have been good industry practice at the time of the alleged act or omission.
- 3.10** There are limited circumstances where the Financial Ombudsman Service can consider complaints against third parties, ie where the complainant and the respondent to the complaint do not have a direct relationship.⁹

APP fraud

- 3.11** There are a range of types of APP fraud. Some examples of the more common types of APP fraud are described below.¹⁰
- 3.12** Impersonation: the payer intended to transfer the funds to a particular person or organisation but was instead deceived into transferring funds to a different person or organisation.
- **Example A:** B received 2 calls from someone pretending to be from his bank. They were asked whether they authorised 2 transactions in Manchester and London. B denied authorising these transactions and was told their account had been compromised. B was then told that, to protect their account, they needed to transfer money into a new account which turned out to be under the scammer's control. B ended up losing £18,700, which could not be recovered.
- 3.13** Purchase: the payer transferred funds to another person or organisation for what they believed were legitimate purposes, but which were in fact fraudulent.
- **Example B:** S attempted to buy a motorhome online. S transferred £4,500 to the purported seller of the motorhome, who turned out to be a scammer. The motorhome was never provided. S told the police but the money could not be recovered.
- 3.14** We plan to give effect to our policy by creating a Glossary definition for APP fraud which includes the kinds of fraud described in paragraph 3.12 and 3.13. This definition is included in the instrument for consultation.

**Q1: Do you agree with the Glossary definition for APP fraud?
Please explain why.**

Complaints about APP fraud

- 3.15** As set out in Chapter 2, the Financial Ombudsman Service cannot currently consider complaints by payers against PSPs who have received funds in a payment transaction, as they are not in its jurisdiction. So victims of APP fraud cannot escalate their complaints against receiving PSPs to the Financial Ombudsman Service if they are

⁹ Examples of indirect relationships in the Financial Ombudsman Service's jurisdiction are set out in DISP 2.7.6R
¹⁰ www.psr.org.uk/sites/default/files/media/PDF/PSR-Which-super-complaint-response-December-2016_0.pdf



unhappy with the outcome that the PSP the complaint is against has reached, or if they have not received a response at all.

- 3.16** In light of the background set out in Chapter 2, we are proposing to address the harm experienced by eligible complainants who have been the victim of alleged APP fraud. We are proposing to require PSPs who received the payment to handle their complaints in line with the DISP sourcebook complaint handling rules, and allow eligible complainants to refer their complaints to the Financial Ombudsman Service.
- 3.17** The Financial Ombudsman Service's jurisdictions provide limited circumstances in which it can consider complaints against third parties (see paragraph 3.10). This proposal would extend its jurisdiction to consider complaints against third parties in the circumstances we have set out, for acts or omissions from 1 January 2019.
- 3.18** The Financial Ombudsman Service would consider these complaints on the basis set out in paragraph 3.9. The code being developed by consumer representatives and the industry with PSR oversight, explained in paragraph 2.5, would be a relevant consideration for it when determining these complaints.
- 3.19** The Financial Ombudsman Service is willing to consider suggestions for extending its VJ to include complaints about other kinds of fraud, which would not be covered by our proposals in relation to alleged APP fraud. The Financial Ombudsman Service welcomes views on whether this is something stakeholders would want, the form it should take, and what types of complaints it should include. Depending on feedback, this would be developed and consulted on separately by the Financial Ombudsman Service.

Q2: Do you agree with our proposal to apply our complaints handling rules to complaints by payers against receiving PSPs about a failure to prevent alleged APP fraud, and bring these complaints into the Financial Ombudsman Service's CJ and VJ? Please explain why.

Q3: Do you support a wider voluntary scheme, run by the Financial Ombudsman Service, to cover complaints which are not covered by our proposals? If yes, what do you suggest such a scheme should cover?

Complaints about cooperation between PSPs

- 3.20** Under the Payment Services Directive 2 (PSD2), if the account details (or other details provided to identify a payee) the payer provides are incorrect, the receiving PSP must cooperate in efforts by the payer's PSP to recover the funds involved in the payment transaction.¹¹
- 3.21** PSD2 also requires that disputes between payment service users and PSPs concerning a PSP's obligations under Titles III and IV of PSD2 can be considered by an Alternative Dispute Resolution (ADR) scheme.¹² As such, we are also consulting on bringing these disputes into the Financial Ombudsman Service's CJ and VJ as soon as the rules are

¹¹ Article 88 of PSD2 which is implemented in the UK by regulation 90(3) of the Payment Services Regulations 2017

¹² Article 102 PSD2



made applying to any act or omission from the date regulation 90(3) of the PSRs came into force, being 13 January 2018.

Q4: Do you agree with our proposal to give effect to the requirement to bring these complaints (about a payee's PSP's cooperation with the payer's PSP to recover funds involved in a payment transaction where incorrect details have been provided) into the Financial Ombudsman Service's CJ and VJ? Please explain why.



Annex 1

Questions in this paper

- Q1:** Do you agree with the Glossary definition for APP fraud? Please explain why.
- Q2:** Do you agree with our proposal to apply our complaints handling rules to complaints by payers against receiving PSPs about a failure to prevent alleged APP fraud, and bring these complaints into the Financial Ombudsman Service's CJ and VJ? Please explain why.
- Q3:** Do you support a wider voluntary scheme, run by the Financial Ombudsman Service, to cover complaints which are not covered by our proposals? If yes, what do you suggest such a scheme should cover?
- Q4:** Do you agree with our proposal to give effect to the requirement to bring these complaints (about a payee's PSP's cooperation with the payer's PSP to recover funds involved in a payment transaction where incorrect details have been provided) into the Financial Ombudsman Service's CJ and VJ? Please explain why.
- Q5:** Do you agree with the costs, benefits and transfers we have identified? If not, please explain why.

Annex 2

Cost benefit analysis

Introduction

1. FSMA, as amended by the Financial Services Act 2012, requires us to publish a cost benefit analysis (CBA) of our proposed rules. Specifically, section 138I requires us to publish a CBA of proposed rules, defined as 'an analysis of the costs, together with an analysis of the benefits that will arise if the proposed rules are made'.
2. This analysis presents estimates of the significant impacts of our proposal. We provide monetary values for the impacts where we believe it is reasonably practicable to do so. For others, we provide estimates of outcomes in other dimensions. Our proposals are based on carefully weighing up these multiple dimensions and reaching a judgement about the appropriate level of consumer protection, taking into account all the other impacts we foresee.

The harm we are seeking to address

3. As set out in Chapter 2, in 2017 there were 43,875 cases of APP fraud, with losses of £236 million (UK Finance) – and there are concerns this could grow. We are proposing to change our rules to reduce the harm experienced by consumers and micro-enterprises and other eligible complainants who have fallen victim to APP fraud, by providing them with access to potential dispute resolution through the Financial Ombudsman Service against the party who received the payment. We are also proposing to bring certain complaints about cooperation between PSPs into the Financial Ombudsman Service's jurisdiction, in line with PSD2.

Costs

4. The data published by UK Finance, referred to above, suggests there could be around 44,000 complaints about alleged APP fraud each year. However, these data do not distinguish between complaints against PSPs who sent the payment, and those who received the payment.
5. Under our proposals, complaints by payers against those who received the payment would be brought into the Financial Ombudsman Service's jurisdiction.
6. We do not believe it is reasonably practicable to calculate an estimate of the cost to all PSPs affected by this proposal, though we have sought to identify a range of likely costs to individual PSPs.



7. Based on previous estimates, we think it costs between around £22 and £332 to handle a complaint in line with DISP. This estimation includes costs associated with making eligible complainants aware of their right to refer their complaint to the Financial Ombudsman Service.¹³ We estimate that between 5% and 15% of complaints handled under DISP are referred to the Financial Ombudsman Service.
8. Respondents to these complaints will also be liable to pay a levy and case fees to fund the Financial Ombudsman Service. The case fee is currently £550 per complaint, which is charged for the 26th complaint the Financial Ombudsman Service considers, and any after that.¹⁴ PSPs who are subject to the Financial Ombudsman Service's group fee funding arrangement are generally entitled to more free cases.
9. The Financial Ombudsman Service expects its unit cost to be £706 in 2018/19.¹⁵ Its unit cost is higher than its standard case fee and the difference is covered by a levy on the industry.
10. The levy is set by the FCA and informed by the Financial Ombudsman Service forecasts for the proportion of resources it expects to devote to complaints in each sector over the financial year. As such, it varies depending on the industry block a respondent falls into, and in some instances their relevant income. Respondents can calculate the general levy for the Financial Ombudsman Service using our online fees calculator.¹⁶ PSPs that are affected by our proposed rule changes are very likely (in the vast majority of cases) to already be subject to the levy.

Table 1: potential costs

| Considerations | Estimated values |
|---|------------------|
| Potential cases | 44,000 cases |
| Potential cost of complaint handling | £22 to £332 |
| Proportion of cases typically referred to the Financial Ombudsman Service | 5% to 15% |
| Financial Ombudsman Service case fee | £550 |
| Financial Ombudsman Service general levy | Variable |

11. We expect most PSPs affected by our proposals are already subject to DISP, and required to report complaints. We consider that our proposals to require respondents to report data on complaints about alleged APP fraud, which we plan to consult on later in the year, are unlikely to result in significant costs.
12. In addition to the costs described above, we expect there to be unintended costs that we are unable to quantify. This includes the possibility that our proposals could result in PSPs applying more stringent checks when opening and operating accounts. This could potentially make it more difficult for some consumers and micro-enterprises and other eligible complainants to access banking and payments services.

13 www.fca.org.uk/publication/consultation/cp18-03.pdf

14 www.financial-ombudsman.org.uk/publications/our-plans-2018-19.pdf

15 www.financial-ombudsman.org.uk/publications/our-plans-2018-19.pdf

16 www.fca.org.uk/firms/fees/calculate-annual-fee

Benefits

13. Benefits as a result of our proposals include:
- increased consumer trust and confidence in the financial system as a result of greater consumer protection and access to potential redress
 - PSPs improving their complaint handling, to reduce the likelihood of complaints being referred to the Financial Ombudsman Service
 - PSPs improving their systems and processes, as a result of PSPs working to prevent APP fraud and related complaints
14. It is not reasonably practicable to quantify these benefits of our proposals. We consider our proposals advance our objectives of protecting consumers and enhancing market integrity, and will help to address the concerns and harm highlighted by Which?'s super-complaint regarding APP fraud.

Transfers

15. Redress may be paid to an eligible complainant by a PSP who received funds as a result of alleged APP fraud if a complaint is upheld in favour of the eligible complainant. Redress is not considered to be a cost. Redress represents a transfer of wealth from the PSP to the complainant, to put them back into the position they would have been in if the act or omission complained about had not occurred.
16. Based on data published by UK Finance on cases of APP fraud in 2017, a respondent may be liable to pay up to £2,784 on average for losses to individual consumers, and £24,355 on average for losses to individual businesses. However, this would depend on the proportion of complaints upheld.
17. Additionally there are likely to be more complaints from consumers than businesses – as 88% of the victims in the 43,875 cases of APP fraud in 2017 were consumers, and the remainder were businesses.¹⁷ This data is not restricted to businesses who are eligible complainants to the Financial Ombudsman Service, so the average redress for complaints from businesses that can be considered by the Financial Ombudsman Service could be lower than the figures from UK Finance.

Q5: Do you agree with the costs, benefits and transfers we have identified? If not, please explain why and provide supporting information.

17 https://www.ukfinance.org.uk/wp-content/uploads/2017/06/UKFinance_2017-annual-fraud-update-FINAL.pdf



Annex 3

Compatibility statement

Compliance with legal requirements

1. This Annex records the FCA's compliance with a number of legal requirements applicable to the proposals in this consultation, including an explanation of the FCA's reasons for concluding that our proposals in this consultation are compatible with certain requirements under the Financial Services and Markets Act 2000 (FSMA).
2. When consulting on new rules, the FCA is required by section 138I(2)(d) FSMA to include an explanation of why it believes making the proposed rules is (a) compatible with its general duty, under s. 1B(1) FSMA, so far as reasonably possible, to act in a way which is compatible with its strategic objective and advances one or more of its operational objectives, and (b) its general duty under s. 1B(5)(a) FSMA to have regard to the regulatory principles in s. 3B FSMA. The FCA is also required by s. 138K(2) FSMA to state its opinion on whether the proposed rules will have a significantly different impact on mutual societies as opposed to other authorised persons.
3. This Annex also sets out the FCA's view of how the proposed rules are compatible with the duty on the FCA to discharge its general functions (which include rule-making) in a way which promotes effective competition in the interests of consumers (s. 1B(4)). This duty applies in so far as promoting competition is compatible with advancing the FCA's consumer protection objective.
4. In addition, this Annex explains how we have considered the recommendations made by the Treasury under s. 1JA FSMA about aspects of the economic policy of Her Majesty's Government to which we should have regard in connection with our general duties.
5. This Annex includes our assessment of the equality and diversity implications of these proposals.
6. Under the Legislative and Regulatory Reform Act 2006 (LRRRA) the FCA is subject to requirements to have regard to a number of high-level 'Principles' in the exercise of some of our regulatory functions and to have regard to a 'Regulators' Code' when determining general policies and principles and giving general guidance (but not when exercising other legislative functions like making rules). This Annex sets out how we have complied with requirements under the LRRRA.

The FCA's objectives and regulatory principles: Compatibility statement

7. The proposals set out in this consultation are primarily intended to advance the FCA's operational objective of protecting consumers, as set out in paragraph 2.8. They are

also relevant to the FCA's operational objective of ensuring market integrity, as set out in paragraph 2.9.

8. We consider these proposals are compatible with the FCA's strategic objective of ensuring that the relevant markets function well because they seek to address the harm posed by APP fraud. For the purposes of the FCA's strategic objective, "relevant markets" are defined by s. 1F FSMA.

9. In preparing the proposals set out in this consultation, the FCA has had regard to the regulatory principles set out in s. 3B FSMA.

The need to use our resources in the most efficient and economic way

10. Our proposals should improve incentives for PSPs to improve complaints handling and account management. Without such incentives, the alternative could be more intensive supervision which is likely to be less efficient.

The principle that a burden or restriction should be proportionate to the benefits

11. We consider that our proposals impose burdens or restrictions that are proportionate to the benefits we expect to see, as set out in the CBA. Their impact on respondents is primarily driven by transfers of wealth from PSPs to eligible complainants. There will be further costs from fees paid to the Financial Ombudsman Service, and administrative costs to PSPs of handling these complaints in accordance with DISP. Relevant businesses and consumers should see benefits as a result of changes in conduct that should eventually reduce the number of complaints.

The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term

12. Our proposals should improve outcomes for the sector, as a result of increased consumer confidence and market integrity.

The general principle that consumers should take responsibility for their decisions

13. When considering these complaints, the Financial Ombudsman Service will have regard to relevant law and regulations, rules, guidance, standards, codes of practice when determining what is fair and reasonable when determining the outcome for complaints.

The responsibilities of senior management

14. We have had regard to this principle in developing our proposals. Senior managers should ensure their business has adequate systems and controls and handles complaints in accordance with DISP.

The desirability of recognising differences in the nature of, and objectives of, businesses carried on by different persons including mutual societies and other kinds of business organisation

15. We have had regard to this principle and do not believe the proposals undermine it.

The desirability of publishing information relating to persons subject to requirements imposed under FSMA, or requiring them to publish information

16. This principle is not relevant to our proposals as they do not involve any requirements imposed under the FSMA, nor do we require persons subject to such requirements to publish information.



The principle that we should exercise of our functions as transparently as possible

- 17.** We believe that by consulting on our proposals we are acting in accordance with this principle. We have discussed our proposals with relevant stakeholders, including the PSR, industry, and Financial Ombudsman Service, and have considered their feedback when developing our proposals.
- 18.** In formulating these proposals, the FCA has had regard to the importance of taking action intended to minimise the extent to which it is possible for a business carried on (i) by an authorised person or a recognised investment exchange; or (ii) in contravention of the general prohibition, to be used for a purpose connected with financial crime (as required by s. 1B(5)(b) FSMA).

Expected effect on mutual societies

- 19.** The FCA does not expect the proposals in this paper to have a significantly different impact on mutual societies, compared to any other type of respondent to a complaint.

Compatibility with the duty to promote effective competition in the interests of consumers

- 20.** The proposals are compatible with this duty as they apply to all PSPs equally, and are unlikely to have negative competition implications for relevant PSPs.

Consideration of the recommendations made by the Treasury

- 21.** We have developed the proposals with consideration of the recommendations to the FCA made by the Treasury, and believe the proposals advance our operational objectives to protect consumers and enhance market integrity which contribute to economic policy.

Equality and diversity

- 22.** We are required under the Equality Act 2010 in exercising our functions to 'have due regard' to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act, advance equality of opportunity between persons who share a relevant protected characteristic and those who do not, to and foster good relations between people who share a protected characteristic and those who do not.
- 23.** As part of this, we ensure the equality and diversity implications of any new policy proposals are considered. The outcome of our consideration in relation to these matters in this case is stated in chapter 2 of the CP.

Legislative and Regulatory Reform Act 2006 (LRRRA)

- 24.** We have had regard to the principles in the LRRRA for the parts of the proposals that consist of general policies, principles or guidance. For example, we consider that our approach to the consultation is transparent and consistent – as it clearly sets out our proposals and the instrument for consultation, accountable – as we have followed internal governance processes and are committed to reviewing responses to the consultation before making final rules, and targeted – as our proposals relate to areas of potential harm and PSD2 requirements.
- 25.** We have had regard to the Regulators' Code for the parts of the proposals that consist of general policies, principles or guidance. For example, the proposals advance our operational objectives on consumer protection and market integrity, and the consultation invites feedback on the proposals.



Annex 4

Abbreviations used in this paper

| | |
|--------------|---|
| ADR | Alternative Dispute Resolution |
| APP | Authorised Push Payment |
| CHAPS | Clearing House Automates Payment System |
| CBA | Cost benefit analysis |
| CJ | Compulsory Jurisdiction |
| DISP | Dispute Resolution: Complaints sourcebook |
| FPS | Faster Payments Systems |
| FSMA | Financial Services and Markets Act |
| LRRA | Legislative and Regulatory Reform Act 2006 |
| PSD2 | Payment Services Directive 2 |
| PSP | Payment Service Provider |
| PSR | Payment Systems Regulator |
| PSRs | Payment Services Regulations 2017 |
| SYSC | Senior Management Arrangements, Systems and Controls sourcebook |
| VJ | Voluntary Jurisdiction |

We have developed the policy in this Consultation Paper in the context of the existing UK and EU regulatory framework. The Government has made clear that it will continue to implement and apply EU law until the UK has left the EU. We will keep the proposals under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework in the future.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 9644 or email: publications_graphics@fca.org.uk or write to: Editorial and Digital team, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS



Appendix 1

Draft Handbook text

DISPUTE RESOLUTION: COMPLAINTS (AUTHORISED PUSH PAYMENT FRAUD) INSTRUMENT 2018

Powers exercised by the Financial Ombudsman Service

- A. The Financial Ombudsman Service Limited makes and amends the Voluntary Jurisdiction rules as set out in the Annexes to this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 227 (Voluntary Jurisdiction);
 - (2) paragraph 8 (Information, advice and guidance) of Schedule 17;
 - (3) paragraph 20 (Voluntary jurisdiction rules: procedure) of Schedule 17; and
 - (4) paragraph 22 (Consultation) of Schedule 17.
- B. The making and amendment of the Voluntary Jurisdiction rules by the Financial Ombudsman Service Limited is subject to the approval of the Financial Conduct Authority.

Powers exercised by the Financial Conduct Authority

- C. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Act:
- (1) section 137A (FCA’s general rule making power);
 - (2) section 137T (General supplementary powers);
 - (3) section 139A (Power of the FCA to give guidance); and
 - (4) section 226 (Compulsory jurisdiction).
- D. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.
- E. The Financial Conduct Authority approves the Voluntary Jurisdiction rules made and amended by the Financial Ombudsman Service Limited under this instrument.

Commencement

- F. Part 1 of Annex B comes into force on [date of instrument]. The remainder of this instrument comes into force on [1 January 2019].

Amendments to the Handbook

- G. The Glossary of definitions is amended in accordance with Annex A of this instrument.
- H. The Dispute Resolution: Complaints sourcebook (DISP) is amended in accordance with Annex B of this instrument.

Citation

- I. This instrument may be cited as the Dispute Resolution: Complaints (Authorised Push Payment Fraud) Instrument 2018.

By order of the Board of the Financial Ombudsman Service Limited
[*date*]

By order of the Board of the Financial Conduct Authority
[*date*]

Annex A

Amendments to the Glossary of definitions

Insert the following new definition in the appropriate alphabetical position. The text is not underlined.

*authorised push
payment fraud*

a transfer of funds by a *payer* to a *person* where:

- (1) the *payer* intended to transfer the funds to a certain *person* but was instead deceived into transferring the funds to a different *person*; or
- (2) the *payer* transferred funds to another *person* for what they believed were legitimate purposes but which were in fact fraudulent.

Annex B

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text unless otherwise stated.

Part 1: Comes into force on [date of instrument]

2 Jurisdiction of the Financial Ombudsman Service

...

2.7 Is the complainant eligible?

...

2.7.6 R To be an *eligible complainant* a person must also have a *complaint* which arises from matters relevant to one or more of the following relationships with the *respondent*:

...

(2A) the complainant is (or was) a *payer* in a *payment transaction* in relation to which the *respondent* is (or was) involved, provided the *complaint* relates to the *respondent's* obligations under regulation 90(3) of the *Payment Services Regulations*.

...

TP 1 Transitional provisions

1.1 Transitional provisions table

| (1) | (2) Material provision to which transitional provision applies | (3) | (4) Transitional provision | (5) Transitional provision: dates in force | (6) Handbook provision: coming into force |
|-----------|--|----------|---|--|---|
| ... | | | | | |
| <u>45</u> | <u>DISP 2.7.6R(2A)</u> | <u>R</u> | <u>DISP 2.7.6R(2A) applies in relation to a <i>complaint</i> concerning an act or</u> | <u>[date of instrument]</u> | <u>[date of instrument]</u> |

| | | | | | |
|--|--|--|---|--|--|
| | | | <u>omission which occurs on or after 13 January 2018.</u> | | |
|--|--|--|---|--|--|

...

Part 2: Comes into force on [1 January 2019]

2 Jurisdiction of the Financial Ombudsman Service

...

2.7 Is the complainant eligible?

...

2.7.6 R To be an *eligible complainant* a person must also have a *complaint* which arises from matters relevant to one or more of the following relationships with the *respondent*:

...

(2A) the complainant is (or was) a *payer* in a *payment transaction* in relation to which the *respondent* is (or was) involved, provided either:

(a) the *complaint* relates to the *respondent*'s obligations under regulation 90(3) of the *Payment Services Regulations*; or

(b) the complaint:

(i) relates to an alleged authorised push payment fraud;
and

(ii) is not a PSD complaint.

...

2.7.7 G (1) *DISP 2.7.6R(5)* and *DISP 2.7.6R(6)* include, for example, employees covered by a group permanent health policy taken out by an employer, which provides in the insurance contract that the policy was taken out for the benefit of the employee.

(2) *DISP 2.7.6R(2A)(b)* includes any complaint that the respondent did not do enough to prevent, or respond to, an alleged authorised push payment fraud.

...

TP 1 Transitional provisions

1.1 Transitional provisions table

| (1) | (2) Material provision to which transitional provision applies | (3) | (4) Transitional provision | (5) Transitional provision: dates in force | (6) Handbook provision: coming into force |
|-----|--|----------|--|--|---|
| ... | | | | | |
| 45 | <i>DISP</i> 2.7.6R(2A) | R | <i>DISP</i> 2.7.6R(2A) applies in relation to a <i>complaint</i> concerning an act or omission which occurs on or after 13 January 2018. [deleted] | [date of instrument] | [date of instrument] |
| 46 | <i>DISP</i> 2.7.6R(2A)(a) | <u>R</u> | <i>DISP</i> 2.7.6R(2A)(a) applies in relation to a <i>complaint</i> concerning an act or omission which occurs on or after 13 January 2018. | [date of instrument] | [date of instrument] |
| 47 | <i>DISP</i> 2.7.6R(2A)(b) | <u>R</u> | <i>DISP</i> 2.7.6R(2A)(b) applies in relation to a <i>complaint</i> concerning an act or omission which occurs on or after [1 January 2019]. | [1 January 2019] | [1 January 2019] |

...

