

Harriett Baldwin MP
Chair
Treasury Select Committee
House of Commons
SW1A 0AA

20 March 2024

Dear Harriett

Thank you for your letter of 21 February following the PSR's appearance before the Treasury Committee on 30 January. Please see below response to your questions.

Promoting competition is one of our four strategic priorities, as well as being one of our statutory objectives. When markets are competitive, this drives up quality, acts as a spur to innovation and drives down prices, which supports good outcomes for people, businesses and the economy. Market reviews are an important tool to fully understand particular markets, but by their very nature require significant and intensive work. When starting our market review into card fees we made clear there is no 'quick fix', as these are complex issues that need thorough investigation.

It is essential that the legal framework underpinning our work enables us to be effective and supports compliance. We actively keep under review our legal regime to ensure it is fit for purpose, keeps pace with technological developments and is informed by wider adjustments to regulator's powers. Some of our thinking on this issue is set out below.

1. What enforcement powers you have to place a price cap on regulated market participants (in any market within your remit) with immediate effect [without having to consult prior to the imposition of any such cap]?

Powers overview

Our interim report relating to interchange fees charged in respect of outbound (EEA-UK) cross-border transactions (the 'XBIF Interim Report'), considers the option to cap such fees charged by Visa and Mastercard under sections 54 and 55 FSBRA.

In response to the XBIF Interim Report, Visa and Mastercard have made representations to us that the PSR's powers under sections 54 or 55 FSBRA do not extend to imposing a cap on fees, owing to the lack of express provision in those sections (as opposed to section 57 FSBRA) conferring an ability on the PSR to do so, and therefore that the PSR could only impose such caps if the limited circumstances specified in section 57 apply.

However, our view is that this is incorrect, and that we have the power to impose price caps on regulated payment systems under sections 54, 55 and 57 of the Financial Services banking Reform Act 2013 ('FSBRA').

- Section 54 FSBRA provides the power to direct a participant /s in a regulated payment system to require or prohibit the taking of specified action in relation to the system, or set standards to be met in relation to the system;

- Section 55 FSBRA provides the power to require an operator of a regulated payment system to change the rules for the operation of that system in a specified way, or so as to achieve a specified purpose;

- Section 57 provides the power, on the application of a party to certain agreements (including any agreement concerning fees or charges payable in connection with regulated payment systems), to vary such agreements (including any of the fees or charges payable under these).

You specifically asked about the need to consult prior to imposing price caps and to the possibility of any cap having “immediate effect”. In our market review of cross border interchange fees, taking into account our public guidance on market reviews, our obligations under FSBRA and the principles of administrative law, we consider it necessary and appropriate to consult prior to the imposition of any price cap, and there would then be a further period between any directions being published and them entering into force to allow any affected parties to make required changes to their policies and systems.

The schemes’ opposing views highlight an increased litigation risk arising from arguments based on conflicting interpretations of the statute. This could delay the implementation of any price cap, if the PSR ultimately decides a price cap is appropriate.

2. What enforcement powers you have to sanction firms who do not comply with requests for information in a timely manner? (b) What [do] you consider to be a timely manner for responses to information requests?

Enforcement powers

As a starting point, the powers we have depend on the legislation underpinning our action. Our market reviews are conducted under FSBRA.

We have limited powers under FSBRA to enforce compliance with notices we issue to persons requiring them to produce information or documents to us (an ‘information notice’)¹. In contrast to the FSBRA regime, where our only formal recourse is through the courts, under the Competition Act 1998 (CA98), we have powers to impose administrative fines for non-compliance without reasonable excuse.

The Committee will be aware that, applying to the court to hold a person in contempt is a complex and resource-intensive route to sanction non-compliance. Other regulators more typically have the ability to impose penalties for non-compliance with information notices, and such powers are being reinforced through legislation. In particular, the Digital Markets, Competition and Consumers Bill proposes to increase the amount of penalty that can be imposed by the Competition and Markets Authority (and other regulators in relation to concurrent CA98 functions). The power to impose fines directly for non-compliance with information notices across our functions (not just in connection with CA98) would greatly support the effectiveness of the PSR’s functions, including incentivising compliance and

¹ Under s.81 FSBRA we have the power to require any person to produce documents or information to us if we think it will help the Treasury in determining whether to make a designation order (which designates a payment system as regulated payment system for the purposes of FSBRA), or if we require that document or information in connection with our functions as set out in FSBRA.

ensuring the PSR can act efficiently. We have discussed this point with government officials and HM Treasury has expressed support for the PSR acquiring powers of this nature.²

Timelines

What comprises a timely response to information notices is acutely fact sensitive. We specify timescales for submitting information and documents to us in the relevant information notices. Those timescales vary from notice to notice. Timescales are carefully considered in light of factors such as the nature and volume of the information and documentation sought, the owner of that information's ability to efficiently retrieve the information and documentation, and any operational or technical issues impeding that person's ability to respond in a timely manner. We expect timely receipt of information and documentation. When determining the scope of our information notices and the accompanying deadlines, we are mindful of the administrative burden they place on businesses and stakeholders, what is necessary in the circumstances, and what is a reasonable deadline.

3. Your full range of enforcement powers, and the administrative requirements and limits on each.

'Enforcement' has a specific meaning within FSBRA and relates to the PSR's ability to enforce against specific 'compliance failures'. A 'compliance failure' is defined by s.71 FSBRA and means a failure by a participant in a regulated payment system to comply with directions or requirements imposed by the PSR.³ As such, these powers support our wider regulatory and competition functions. In our response below we discuss first our 'enforcement' powers (i.e., failure to comply with directions and requirements), before touching upon our powers to impose such directions and requirements under FSBRA so as to promote our payment systems objectives. We have covered the enforcement of information notices above.

We have different concurrent enforcement powers in the event of a CA98 investigation, which mirror the CMA's powers. We do not expand on these powers further in this letter, but additional information on the CA98 process can be under the Competition Act 98 guidance⁴ and on our website⁵. We also have separate enforcement powers enabling us to enforce compliance with obligations imposed under the Payments Services Regulations 2017 and the Interchange Fee Regulation as assimilated EU Law. For the purposes of this letter, we focus on the enforcement powers conferred on the PSR by FSBRA.

PSR's enforcement powers under FSBRA

The enforcement powers conferred on the PSR by FSBRA are: -

- the power to impose a penalty⁶;
- the power to publish details of a compliance failure and a penalty⁷;

2 Paragraph 117 of HMT's Payments Regulation and the Systemic Perimeter Consultation Response August 2023 "The government intends to provide the PSR with the ability to issue fines, as a means for ensuring it can act more effectively and decisively as part of its investigations in relation to market access and competition practices".

3 Specifically, a failure to (a) comply with a direction given under section 54 FSBRA, (b) comply with a requirement imposed under section 55 FSBRA or 56 FSBRA or (c) comply with rules made by the Regulator under paragraph 9A of Schedule 4 of FSBRA.

4 <https://www.gov.uk/government/collections/cma-ca98-and-cartels-guidance>

5 <https://www.psr.org.uk/publications/consultations/psr-cp-15-1-psr-competition-concurrency-guidance/>

6 S.73 FSBRA.

7 S.72 FSBRA.

- the power to apply to the court for an injunction restraining conduct constituting a compliance failure, or to compel a person to remedy a compliance failure⁸.

We investigate a compliance failure before it reaches a conclusion that a compliance failure has in fact occurred. Our ability to make findings of compliance failures and use our enforcement powers are governed by statute and the principles of public law. They are challengeable in the courts. Our Powers and Procedures Guidance⁹ explains the administrative arrangements we currently have in place to investigate compliance failures, whilst the PSR's Penalty Statement explains how we approach deciding whether to impose a penalty and if so, how much a penalty might be.¹⁰

We have a number of powers we might use to investigate a potential compliance failure, once and if an investigation is opened¹¹.

PSR's regulatory and competition powers under FSBRA

Our powers (and how we discharge our general functions) relate to our general duties and "payment system objectives", spanning the competition objective, innovation objective and service-user objective. When discharging our functions, we also must have regard to a number of specified considerations under s.49 FSBRA.

Our powers to promote our payment systems objectives under FSBRA are as follows: -

Sections 54, 55 and 57 FSBRA (all described above).

- Section 56 FSBRA, which enables the PSR by order, and provided that a person applies to the PSR for such an order, to require the operator of a regulated payment system to enable the applicant to become a payment service provider in relation to the system;
- Section 58 FSBRA, which enables the PSR to require disposal in specified circumstances;
- Section 59 FSBRA, relating to the function of making a market investigation reference to the Competition and Markets Authority under the Enterprise Act 2002.

The main powers for the PSR to intervene are therefore sections 54 and 55 FSBRA. However, these powers are written in broad terms, and are not linked to a specific legal test (contrast with section 58 FSBRA which refers to a likely restriction or distortion of competition or market investigations that require findings of 'adverse effects on competition'), and do not have a specific statutory process or timetables (contrast with market investigation references which must reach a conclusion within two years).

Such broadness has obvious benefits in terms of flexibility, but also means that there is more scope for parties to challenge the PSR's exercise of its powers (Mastercard and Visa's challenges to the PSR's powers to impose price caps being an example of diverging views regarding the scope of our powers). In the absence of explicit powers, the exact scope of our powers is more likely to be challenged in

8 S.75 FSBRA.

9 [Powers and Procedures Guidance - June 2020 | Payment Systems Regulator \(psr.org.uk\)](#)

10 [Revised Penalty Statement \(psr.org.uk\)](#)

11 For example, if an investigator is appointed by the PSR to conduct an investigation on its behalf under s.83 FSBRA, the investigator may require the person under investigation, or any person connected with the person under investigation to attend before the investigator at a specified time and place and answer questions, or, otherwise to provide any information which the investigator requires (s.85 FSBRA).

court, with obvious potential to impact the PSR's resources and ability to achieve results as swiftly as we would want.

4. In the original terms of reference for the market review for scheme and processing fees, the final report was due to be published in Q2 of 2024. However, in an update the PSR has stated it will publish an interim report in April 2024. Has there been a delay on your final findings, and if so, what is the reason for this delay?

We had originally intended to publish our scheme and processing interim report in Q4 2023. We decided to reschedule publication until April 2024 to allow us to further develop our evidence base, including through additional engagement with market participants. The rescheduled interim report will lead to a revised timeline for publication of the final report, provisionally scheduled for Q2 2024. We are now aiming to publish the provisional remedies (if required) and the final report in Q4 2024 and the final remedies (if required) in Q2 2025.

Whilst we view this new timeline as stretching but achievable, we would also note that the nature of the remedies can take different forms and these later dates may need to be reviewed again.

5. Your card acquiring review found that scheme fees more than doubled between 2014 and 2018. What has been happening to scheme and processing fees more recently?

In June 2023, we published a working paper on our emerging thinking on how Mastercard and Visa approach fee changes, which included an overview of some of the most significant fee changes in the last few years.¹² We observed at the time that “competition does not appear to have been an impediment to implementing material increases in mandatory fees”. I can confirm that our interim report will include updated quantitative analysis of scheme and processing fees set by Mastercard and Visa.

6. Is a cap for scheme and processing fees also under consideration, as with cross-border fees?

Our interim report will reflect the evidence we have gathered, and our provisional conclusions, and we also plan to set out options for potential remedies. Once we have completed our assessment, we will be in a position to set out in more detail our proposed next steps.

7. In a letter to us last May you told us “it has proven incredibly challenging to gather the full evidence we need from the card schemes”. How co-operative would you say Visa and Mastercard are being in these reviews?

Mastercard and Visa have engaged with us across both market reviews. As I mentioned in January, where possible, we have used our formal powers to seek information from stakeholders from the beginning. Stakeholders, including Mastercard and Visa, do not always hold the required qualitative or quantitative information in a way that is readily accessible to us. This has had a challenging impact on our ability to gather robust information on the market and has meant we have needed to be flexible in

12 <https://www.psr.org.uk/media/2zsbl3k1/mr22-1-6-recent-changes-to-scheme-and-processing-fees-public-june-2023.pdf>

our approach to information gathering. We are looking at the ways that schemes hold data in the context of this market review which we will set out in the interim report.

I would like to take this opportunity to clarify that publication date for the final report on Cross Border Interchange Fees is Q2 2024 and not Q1 2024 as published in the review's interim report and suggested at the hearing on 30 January. We have extended our target publication date to allow us more time to further consider stakeholder representations before we reach our conclusions.

I hope you find the above information useful. I look forward to keeping the Committee updated on our two markets reviews into fees charged to ensure there is effective competition in payments and that businesses and consumers are getting a good deal.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'Hemsley', with a stylized flourish underneath.

Chris Hemsley
Managing Director