Curve – Written evidence (SCG0041)

Firstly, may I begin by expressing my gratitude for the opportunity to participate in the provision of oral evidence to the House of Lords' Committee in contribution to the discussions about the FCA and PRA's secondary competitiveness and growth objective which forms the subject matter of the Committee's deliberations.

As promised and subsequently requested by the Committee, I have included in this document the written representations of the salient points I raised during the oral evidence I provided to the Committee on Wednesday, 23 October 2024 to facilitate the Committee's consideration of the same. In addition, I have set out in this written note my representations in relation to the follow up information request communicated to me by the Committee's representative.

I have endeavoured to arrange my written representations into categories that correspond with the topics that we discussed during the live session and the topics included in the follow up information request for ease of reference.

Authorised Push Payment Fraud

Regulator Systems Supervision

A topic that was explored during the live Committee session was whether the regulator should have direct access to firms' technology and systems to be able to more effectively supervise firms through a model of continuous supervision whereby the regulator can continuously see what a firm is doing. As articulated in my oral submissions, a regulatory model whereby the regulator has ongoing access to firms' technology and systems is unlikely to enhance the quality of regulatory supervision as regulated firms ultimately would be in control of the level of access that they provide to the regulator from a technological perspective. For example, regulated firms theoretically would have the capability to build technological 'black boxes' which would undermine any enhancement to effective supervision that having ongoing access would deliver for regulators. In addition, the operational metrics that are emitted by the technology and systems may inherently be subjective and vulnerable to firm manipulation which would ordinarily dilute their informational value. My consideration is that a superior approach to enhance effective supervision in this regard is for regulators to create standardised information reporting frameworks and to operate a system of automated regulatory reporting which can be seamlessly integrated to regulated firms' technology to provide conduct and prudential risk relevant MI to the regulator without the addition of administrative

burdens to firms due to the elimination of manual inputs that is associated with the current RegData and FCA Connect portal based regulatory reporting process.

APP Fraud Reimbursement - The Balance Between Consumer Protection and Consumer Responsibility

In our discussion about the APP fraud reimbursement policy we discussed whether this strikes the appropriate balance between protecting consumers and inadvertently unfairly penalising financial institutions in situations where consumers were informed that a prospective APP transaction is likely to be fraudulent and they decide to proceed nonetheless. There are two pertinent points in relation to this topic, namely:

1. The regulatory framework should make provision to recognise unreasonable behaviour in consumers and not penalise financial institutions should consumers exhibit unreasonable behaviour that results in them suffering financial loss. It would be contrary to the consumer responsibility principle introduced by the Financial Services Act 2012 (i.e., consumers should take responsibility for their decisions) to make financial institutions liable for losses that consumers incur as a result of unreasonable behaviour. The notion of reasonableness and the reasonable person is part of the foundational fabric of English tort law as captured by the timeless comparison of the actions, omissions and expectations of a person against the 'man on the Clapham omnibus' in the 1932 case of Hall vs Brooklands Auto-Racing Club and provides a recognised framework that loss should not be compensated where it arises as a result of unreasonable behaviour. Moreover, the complete removal of responsibility from the consumer would introduce an adverse moral hazard issue, whereby the consumer has an incentive to take greater risks or act irresponsibly because the negative consequences of those risks will be borne by someone else which, in turn, is likely to increase such occurrences in the market.

2. Law enforcement bodies should take more action when financial institutions report instances of fraud and other financial crime (particularly when financial institutions provide sufficient information that identify the perpetrator(s) such as customer due diligence information, geo-location data and other metadata). In the absence of law enforcement bodies taking consistent and effective action on reports submitted by financial institutions to bring perpetrators of fraud and other financial crime to justice

there is no real driver to averse perpetrators and change their behaviour.

It is my consideration, as communicated during the oral representation, that the design of the APP fraud reimbursement policy should have been more sophisticated by identifying the relevant gatekeeper to the UK financial system who has given a fraudster access to the UK financial system in the first place in any individual fraud case by virtue of the fraudster holding an account with that financial institution which enables the fraudster to be a recipient of an APP fraud. It is my consideration that a regulatory framework should be sophisticated enough to solely penalise that financial institution that has a business relationship with the fraudster to create a natural incentive for such financial institutions to ameliorate their financial crime prevention controls to the benefit of consumers and the industry as a whole. This also aligns with global principles of gatekeepers (e.g., banks) to prevent fraud and anti-money-laundry risks.

Measuring The Effectiveness of Regulators

During the live Committee session we discussed whether there are specific metrics that can be formulated to measure the effectiveness of the regulators. My representations are that the effectiveness of a regulator is primarily influenced by the organisational mindset/culture that prevails at the particular regulator. In satisfaction of the Committee's desire for specific case studies I made reference to the disparity in actions taken by overseas regulators to address anti-competitive behaviour in the industry versus the actions taken by UK regulators. For example, I made reference to the PSR's lack of decisive action against Visa in the past when Visa engaged in anti-competitive behaviour against Curve by prohibiting cards issued on the Visa payment network from being added to the Curve digital wallet. Despite the aforementioned anti-competitive behaviour being in breach of the objective, non-discriminatory and proportionate access requirements under The Payment Services Regulations 2017, the PSR did not take any notable action against Visa. In contrast, the European regulators (Directorate-General for Competition in this case) ordered Visa to provide Curve access by enabling payment cards issued on the Visa payment network to be added to the Curve digital wallet otherwise regulatory enforcement action would be contemplated. Prior to the aforementioned assertive intervention by DG Comp the PSR in the UK failed to take similar action to mandate Visa to cease from the above described anti-competitive behaviour.

The lack of swift, decisive intervention by the UK regulators (e.g., the

PSR) can give rise to existential crises for financial institutions that seek to challenge the anti-competitive behaviour of behemoths like Visa. This situation appears to be repeating itself in relation to Apple's anti-competitive behaviour pertaining to granting third-party developers access to its contactless payment technology on iOS as a result of regulatory pressure from the Department of Justice in the US and the European Commission following preliminary findings that Apple's failure to historically open up its contactless payments technology to third-party developers constituted anti-competitive behaviour. In comparison to foreign regulators, neither the FCA, the PSR nor the CMA have so far taken similar proactive action regarding Apple's anti-competitive conduct. In fact, the CMA closed its investigation into Apple in August 2024 on grounds of administrative priorities. As a result of the European Commission's empathic action including threatening to sanction Apple with a fine of up to 10% of its worldwide turnover (i.e., about $40bn), Apple has made a commitment to provide access to its NFC technology for free. In contrast to our European neighbours, due to the lack of proactive action from the UK regulators, Apple is charging prohibitive fees to grant third party developers access to its NFC technology in the UK which places UK FinTechs and consumers at a significant disadvantage.

My observation is that there has to be a cultural/mindset change at the UK regulators (e.g., the FCA, the CMA and the PSR) to exercise their competition mandates with a similar sense of urgency as their foreign counterparts.

Lastly, as for objective metrics to measure the effectiveness of regulators, there are several globally accepted metrics which are used today to measure the effectiveness of regulators in a standardised manner. We would recommend reviewing OECD Regulatory Policy Outlook 2021; World Bank's Worldwide Governance Indicators (WGI); UK National Audit Office (NAO) Reports; and European Commission's Better Regulation Agenda, to form guidance on the relevant metrics and benchmarks for the effectiveness of regulators.

Business Inhibition By the UK Regulatory Regime

I am of the view that it is inherently beneficial to operate in a regulated environment as it provides parameters for operation to minimise the risk of inadvertently causing harm to consumers or the market in the ordinary course of business operations which, in turn, supports the ultimate goal of creating a successful and sustainable business.

I noted during the live session that the UK operates a principles-based

and outcomes-focussed regulatory framework. This is beneficial for enterprise in the sense that a principles-based, outcomes-focussed regulatory regime is flexible in nature and therefore supports innovation. On the other hand, the principles-based, outcomes-focussed regulatory regime in the UK creates a level of uncertainty for regulated financial institutions as it is accompanied by a regulator culture of reluctance to provide advice/clear guidance on how the principles and rules are to be interpreted by regulated firms in cases of non-vanilla, innovative propositions and/or technologies.

The UK regulatory regime is at odds with the case law rich UK legal system and doctrine of stare decisis which provides clarity and drives certainty through judicial precedents. In order for regulated firms to effectively manage regulatory risk there has to be a clear understanding of the potential consequences should a particular interpretation or approach to meeting a regulatory requirement be adopted in order to make an informed risk management decision. The culture of reluctance in providing advice to firms and clear guidance that is characteristic of the UK regulators inhibits regulated firms' ability to have a clear understanding of how to interpret key regulatory requirements to take informed risks that drive growth and innovation. In the absence of taking an informed risk posture, firms would either take on more risk (unknowingly) than they should, or avoid it - which, in turn, would stifle innovation.

By way of example, the lack of regulator clarity in a principles-based regulatory system impacted Curve's business model as recently as 2023. Curve offered a cryptoassets rewards scheme whereby we 'gifted' cryptocurrency to customers who made eligible purchases using their Curve card. When marketing relating to cryptoassets was brought into the FCA's financial promotions regime on 8th October 2023 it created uncertainty in the industry. On one hand, the articulated objective of the regulatory change was to protect retail consumers from making uninformed or ill-informed decisions to invest in cryptoassets as set out in CP22/2: Strengthening our financial promotion rules for high risk investments, including cryptoassets. The application of the aforementioned understanding would reasonably result in the conclusion that the cryptoassets financial promotions regime does not apply to Curve's crypto rewards offering due to it entailing 'gifting'/granting customers cryptoassets rather than customers investing/buying cryptoassets. On the other hand, a view that could be adopted is that the bringing of marketing communications relating to cryptoassets into the financial promotions regime intended to apply to any and all marketing communications relating to cryptoassets including crypto rewards offerings. Due to the risks of potentially breaching the financial

promotions restriction in section 21 of the Financial Services and Markets Act 2000, which is a criminal offence, Curve had no other choice than to adopt a prudent interpretation of the cryptoassets financial promotion regime and discontinue our crypto rewards offering in the face of ambiguous regulator guidance.

My VP of Risk & Compliance supported applicant firms to the first cohort of FCA's regulatory sandbox when it first launched in October 2014. It is to be noted that even where applicant firms were unsuccessful in their applications, the FCA reviewed their business models and provided them with an 'informal steer'/guidance on how the various applicable requirements under the regulatory system would apply to them. This is similar to the pre-application meetings that the FCA offers to certain types of applicant firms where it carries out a preliminary review of their business model and provides an 'informal steer'/guidance that is specific to the firm. It is my view that there is a lack of similar support to authorised firms, like Curve, that are outside the Early and High Growth Oversight category of firms that are newly authorised.

My consideration is that a practical change which the regulators can make is to provide 'informal steers'/guidance to the population of authorised firms to remove the veil of ambiguity that overlays the UK regulatory regime and facilitate a marriage between growth and effective competition in the interest of UK consumers and the wider economy.

Please do not hesitate to contact me should you have any queries.

2 December 2024