FINANCIAL CONDUCT AUTHORITY

Guidance consultation

Authorised Push Payment Fraud: enabling a risk-based approach to payment processing

GC 24/5

9 September 2024

1. Introduction

Why we are consulting

1.1. The UK has seen a significant increase in authorised push payment (APP) fraud. This is where someone is deceived into authorising a payment either:

(i) to an account that they think belongs to a legitimate payee but is actually controlled by a fraudster, or

(ii) for something they believed was legitimate but is actually fraudulent

1.2. To reduce the impact of APP fraud and encourage the payment industry to invest further in fraud prevention, the Payment Systems Regulator (PSR) has introduced an APP fraud reimbursement requirement within the Faster Payments System. This will come into effect on 7 October 2024. This requirement means banks and other payment service providers (PSPs) will be required to reimburse payment service users who fall victim to APP fraud in most cases.

1.3. Treasury has published a draft Statutory Instrument (SI) that proposes amendments to the Payment Services Regulations (PSRs 2017) to enable PSPs to delay making a payment transaction where they have reasonable grounds to suspect fraud or dishonesty ('payment delays legislation'). We expect the Treasury to lay this instrument before Parliament in due course.

1.4. The flexibility of the payment delays legislation does not oblige PSPs to delay payment-processing. In their Policy Note on the draft Payment Services (Amendment) Regulations 2024, the Treasury states the changes will allow PSPs to adopt a risk-based approach to payments and give them more time to assess potentially fraudulent payments when this is needed. The policy aims to increase firms' ability to tackle APP fraud while minimising the impacts on legitimate payments.

1.5. Reducing and preventing financial crime, including APP fraud and money laundering, is a priority for us and is a key outcome in our Business Plan for 2024/25. Our proposals in this guidance consultation (GC) aim to support this objective.

1.6. This GC proposes changes to the guidance in the FCA's '*Payment Services and Electronic Money – Our Approach*' (Approach Document) to explain how PSPs should apply the legislative changes to minimise the impact on legitimate payments. We are also consulting on changes to the Approach Document which explain how we expect PSPs to address suspicious inbound payments while continuing to process payments quickly and efficiently.

Who this applies to

1.7. PSPs and the trade bodies representing them should read this GC. This GC affects credit institutions providing payment services as well as payment institutions (PIs) and electronic money institutions (EMIs). It also applies to Gibraltar PSPs providing payment services in the UK.

1.8. Merchants that use PSPs for processing a large volume of transactions may also be interested. The GC clarifies that the existing corporate opt-out applies to the payment delays legislation. This enables PSPs to reach bespoke arrangements with certain business customers to disapply the provisions of the payment delays legislation.

1.9. This GC will also be of interest to:

(i) consumers

(ii) micro-enterprises

(iii) charities

(iv) consumer groups

(v) retailers

(vi) credit unions

(vii) law enforcement agencies

1.10. We want to amend our guidance in the Approach Document to ensure PSPs have clear information about how to implement and apply the new payment delays legislation and existing, related legislative provisions. The changes will also help PSPs take a proportionate approach in line with the legislation's intended effect. This will include clarifying:

(i) when and how PSPs should consider whether to delay an outbound payment transaction, and when to tell customers about these

(ii) how PSPs should treat potentially suspicious inbound payment transactions and

(iii) how we will monitor and evaluate PSPs' implementation of the payment delays legislation, and the types of information we plan to get from PSPs.

Outcomes we are seeking

1.11. We want to ensure that the revised Approach Document meets the needs of PSPs by providing a clear explanation of how we expect PSPs to comply with the new payment delays legislation. This will enable PSPs to adopt an approach to implementing the new regulations that reflects the legislation's intended purpose.

1.12. In particular, it is important that the new legislation does not result in a negative impact for customers and that PSPs continue to process payments quickly and efficiently. The purpose of revising the Approach Document is to help PSPs use the amended regulations to further tackle fraud in a targeted and proportionate way.

1.13. Specifically, we want to:

(i) minimise impacts on legitimate payment transactions, such as uncertainty about how long the execution of a payment order will take

(ii) offer additional clarity and detail on issues such as the threshold for delays, as well as the treatment of inbound payments so that firms adopt a similar approach and

(iii) monitor trends in the sector, to understand the effect of the payment delays legislation, to identify outlier PSPs and to enable us to make targeted supervisory interventions where needed.

How we will implement these changes

1.14. The consultation period will run from 9 September 2024 until 4 October 2024. During this time, the FCA will be seeking feedback on the draft guidance.

1.15. Following the end of the consultation period, we will update the draft guidance to reflect feedback from stakeholders. We plan to publish a revised Approach Document for payment services by the end of 2024.

Measuring success

1.16. We will evaluate the success of our proposals by monitoring how effectively PSPs are using additional time the payment delays legislation gives them to reduce fraud. This could be measured by:

(i) the number and value of payment transactions which are delayed and then completed

(ii) the number and value of payment transactions which are delayed and then identified as fraudulent during the additional permitted processing time, and

(iii) the length of time of the delays.

1.17. This data could be compared against data for payment transactions initiated before the payment delays legislation came into force, such as the:

(i) amounts and values of payment transactions which PSPs identified as fraudulent and refused

(ii) number and value of payment transactions which were fraudulent but completed

1.18. We will initially do this through a combination of voluntary ad-hoc data collection and surveys.

1.19. We will also evaluate the success of the changes through firm supervision and interventions using key metrics, such as cases where APP fraud is highlighted.

1.20. We will continue to engage regularly with industry stakeholders, to gain their informal feedback about the effectiveness of the guidance.

Next steps

1.21. Please respond to the consultation by 4 October 2024. We plan to publish final guidance with an accompanying policy statement by the end of 2024.

2. The wider context

The harm we are trying to reduce

2.1. Since the PSRs 2017 came into force there has been a substantial increase in electronic payments. A growing number of non-bank PSPs have entered the market, resulting in a significant change in how consumers make payments. This reflects the underlying aim of the PSRs 2017 to encourage greater competition in the payments market by introducing new categories of PSPs. The regulations also provided an overarching framework to support innovation in delivering fast and reliable payments.

2.2. As the volume of electronic payments has grown, PSPs have introduced new security measures to help protect customers from fraud. These include strong customer authentication requirements and confirmation of payee when transferring funds. However, according to UK Finance data, APP fraud losses totalled an estimated £459.7m last year, with £376.4m in personal losses and £83.3m in losses to businesses.

2.3. The Government's approach to tackling fraud and other types of illicit financial activity includes the *'Financing-Growth'* commitment to allow PSPs flexibility to delay suspicious payments.

2.4. From 7 October 2024, the PSR's reimbursement requirements will require PSPs to reimburse customers who fall victim to APP fraud, in most cases. This will replace the voluntary 'Contingent Reimbursement Model Code' developed in 2019. The new requirement will apply to authorised push payments processed via the Faster Payments System, which currently accounts for approximately 97% of all APP fraud payments according to PSR data.

2.5. Alongside this new reimbursement requirement, we expect the Government to enable PSPs to take a risk-based approach to processing payment transactions where they suspect fraud. This will be done mainly through amending regulation 86 of the PSRs 2017 to allow PSPs to delay making an outbound payment transaction by up to 4 business days after they receive the payment order if they have reasonable grounds to suspect fraud or dishonesty on the part of someone other than the payer. These changes will apply to authorised push payments executed wholly in the UK in sterling.

2.6. Currently, once an outbound payment order is received, subject to certain exceptions, regulation 86(1) of the PSRs 2017 requires PSPs to credit the payment amount to the payee's PSP's account by the end of the business day after they received the payment order (D+1).

2.7. It is important that PSPs' implementation of the legislative changes does not adversely affect consumers by causing unnecessary delays to legitimate payments and that customers continue to get fast and reliable payment services.

2.8. Through the course of the Treasury developing the legislation, it became clear that amending the guidance in our Approach Document, to cover these changes and related legislative provisions, would help PSPs understand how to implement payments delays. The purpose of this consultation is to ensure the accompanying guidance provides industry with sufficient clarity for the amended regulations to work as intended.

2.9. The guidance will clarify how PSPs should apply the 'reasonable grounds to suspect' threshold for delaying payments. It will also give further detail on how they should use the extended timeframe (up to 4 business days) for processing transactions and how to balance this flexibility with their overarching obligations to deliver good customer outcomes.

2.10. Treasury's Policy Note explains that the amendments to the PSRs 2017 do not make any changes to inbound payments, where a PSP receives a payment from another PSP. This is because there are already obligations under financial crime legislation for PSPs to delay inbound payments in some circumstances. However, industry has raised concerns about circumstances where a PSP may identify a higher risk of fraud for a payment transaction, but not be able within the timeframe permitted to determine whether the legal threshold for delaying the payment transaction has been met. So, we will clarify the application of the force majeure (unforeseeable events that mean a contract cannot be fulfilled) provisions in the PSRs 2017 in the context of suspicious inbound payments. This will include clarifying when we consider those provisions might be triggered. For example, where a PSP delays crediting an inbound transaction because it either knows or suspects that a person is engaged in, or attempting, money laundering or terrorist financing. Another example, in certain limited circumstances, is where a PSP needs additional time to determine whether it has met the threshold of reasonable grounds to know or suspect money laundering or terrorist financing.

How it links to our objectives

2.11. Our proposals align with the commitment in our Business Plan for 2024/25 to reduce and prevent financial crime including money laundering, and in particular, our aim to slow the growth in APP fraud cases and losses. Our proposals also support our Consumer Duty which requires firms to 'act to deliver good outcomes for retail customers'.

2.12. We will use our powers under the PSRs 2017 to issue the guidance. We believe our proposals will also help advance our primary statutory objectives of protecting consumers and enhancing market integrity by providing guidance that supports PSPs in adopting a risk-based approach to processing payments.

Wider effects of this consultation

2.13. The aim of this consultation is to ensure the guidance helps industry to take a targeted approach to using the flexibility in the payment delays legislation. In particular, we would like input on whether we can include further examples in the guidance to clarify how and when PSPs should use the payments delay legislation.

2.14. In response to industry feedback, we are also consulting on guidance on PSPs' ability to delay inbound payments under the existing regulations. We are making clear that the threshold for delaying an inbound payment is high and requires a rigorous, case-by-case approach. We are using the consultation to see whether we can include further practical examples to illustrate the limited circumstances where it may be appropriate to use the regulations. We do not expect this guidance will have a significant impact on inbound payments, as we are clarifying how we expect PSPs should currently apply the existing regulations.

Environmental, social and governance considerations

2.15. In developing this GC, we have considered the environmental, social and governance (ESG) implications of our proposals. We have considered our duty under ss. 1B(5) and 3B(c) of FSMA to have regard to contributing towards the Secretary of State achieving compliance with the net-zero emissions target under section 1 of the Climate Change Act 2008 and environmental targets under s. 5 of the Environment Act 2021. Overall, we do not consider that the proposals are relevant to contributing to those targets. We will keep this under review during the consultation period.

Equality and diversity considerations

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

2.17. Overall, we do not consider that the proposals materially impact any of the groups with protected characteristics under the Equality Act 2010 (in Northern Ireland, the Equality Act is not enacted but other antidiscrimination legislation applies). However, our assessment is that our proposed approach, in helping to tackle fraud, is likely to be particularly valuable to older and disabled people as our research suggests that they suffer disproportionately greater harms if they fall victim to APP fraud.

2.18. We will continue to consider the equality and diversity implications of the proposals during the consultation period and will revisit them when issuing the final guidance. In the meantime, we welcome your input on the issues raised in this GC.

3. Approach to delaying outbound payments

Overview

3.1. The purpose of the amended legislation allowing PSPs to delay processing outbound payment transactions is to enable PSPs to adopt a risk-based approach to preventing APP fraud. Industry has said that the current 'D+1' requirement - to process transactions by the end of the next business day after they receive a payment order - limits PSPs' ability to properly investigate potentially fraudulent transactions. The new legislation will extend this maximum time to 4 business days. This is to give industry the flexibility to assess these payments more fully by communicating with the payer, a payment initiation service provider (PISP) or other relevant parties (such as law enforcement agencies).

3.2. The legislative changes do not create an obligation on PSPs to delay payments, nor do they affect PSPs' ability to refuse to process payments where they suspect fraud. Our guidance explains that under the PSRs 2017, a PSP may continue to refuse to process a payment where it would be unlawful to do so, or where it is agreed in the terms and conditions of the customer's payment account.

3.3. The corporate opt-out applies to these provisions. This means that where the payer is not a consumer, a micro-enterprise or a charity, they and their PSP may agree for example that regulation 86 (2A) to (2D) of the PSRs 2017 do not apply.

3.4. The legislative changes aim to both protect consumers and reduce the compliance cost to firms by giving PSPs more time to decide whether to block fraudulent transactions that would otherwise have to be reimbursed. This is in response to PSPs explaining the challenges of detecting and assessing cases of APP fraud in particularly complex scams, including investment, impersonation and romance scams, while complying with the D+1 payment execution requirements.

Deciding to delay a payment where there are 'reasonable grounds to suspect fraud or dishonesty'

3.5. A PSP will have the option to delay a payment where:

(i) the PSP has established that there are reasonable grounds to suspect that a payer's payment order has been made subsequent to fraud or dishonesty perpetrated by someone else ('reasonable grounds to suspect fraud or dishonesty')

(ii) those grounds must be established by no later than the end of the next business day following receipt of the payment order (D+1)

(iii) the PSP needs more time to contact the customer or a third party, such as a law enforcement agency or the payee's PSP or a PISP, to establish whether to make the payment, and

(iv) the payment is:

- authorised by the payer in accordance with regulation 67 of the PSRs 2017,
- executed wholly within the UK in sterling,
- is not initiated by or through a payee

3.6. The guidance explains that we have taken a similar approach to defining 'reasonable grounds to suspect fraud or dishonesty' as that taken in the Joint Money Laundering Steering Group Guidance on the Prevention of Money Laundering/ Combatting Terrorist Financing ('JMLSG Guidance') to defining 'reasonable grounds to know or suspect that a person is engaged in, or attempting, money laundering or terrorist financing'.

3.7. The courts have defined suspicion as being beyond mere speculation and based on some factual foundation, yet falling short of knowledge where a PSP in fact knows that a payment order has been placed following fraud or dishonesty.

3.8. 'Reasonable grounds to suspect fraud or dishonesty' is an objective test. To help industry apply this test to APP fraud transactions we propose to update our Approach Document to set out:

(i) what PSPs will need to be able to demonstrate to show that they have met this test, and

(ii) examples of factors that might increase the risk a payment order has been made subsequent to fraud or dishonesty

3.9. For PSPs to be able to demonstrate they have met this test, the guidance explains:

> *'staff within PSPs would need to be able to demonstrate that they took reasonable steps in the particular circumstances, in the context of a risk-based approach, to understand the nature and rationale of the transaction, the amount involved, the intended destination of the funds, and whether the payee appears to have any links with criminality.'*

3.10. Factors which might increase the risk that a payment order has been made following dishonesty or fraud include:

(i) where one or a series of payments is made to a new payee the payer has not had a transaction with before, and the purpose, size or frequency of the transaction is inconsistent with the payer's normal spending patterns

(ii) where the name of the payee's account does not fully or partially match the name of the payee specified in the payment order and the stated purpose or size of the transaction is inconsistent with the payer's normal spending patterns

(iii) evidence from the payee's PSP or a law enforcement agency that the payee has previously received payments which they have quickly transferred on to third parties without a clear rationale

(iv) where the payer's PSP identifies evidence of increased digital or behavioural risk before or during the payer making the payment

(v) where a payer is unwilling to explain or evidence the checks they have made to confirm that the payee and the purpose of the payment are legitimate

(vi) where a payer's PSP obtains other evidence about the specific payment transaction, from third parties such as law enforcement agencies or the payee's PSP, that the payment transaction has a higher risk profile

(vii) where the PSP engages with the payer, there are signs that the transaction's purpose may fall into one of the signs of common types of fraud, including:

(a) safe account – where criminals convince people to move money to another payment account, saying this is to protect against fraud but that "safe account" is in fact controlled by criminals

(b) romance scams – where criminals, typically using a false profile, form a relationship to ask for money, or have enough personal information to steal the victim's identity

(c) investment scams – where criminals convince their victim to pay for a fake investment

(d) purchase scams – sending money to a criminal to buy goods that do not exist or are not as advertised

(e) invoice scams – where criminals send a false invoice, often pretending to be from a business from which the victim is expecting a bill

3.11. The guidance explains that no single factor is decisive, with the relevance and weight of each depending on the context.

Questions on reasonable grounds threshold:

Q1: Are there other factors that might increase the risk of a payment order having been made following dishonesty or fraud, which you consider we should refer to in our guidance? Are there further examples that we can include in the guidance to clarify how and when payment delays legislation should be used?

Q2: Are there further aspects on the 'reasonable grounds to suspect threshold' that the guidance should cover? Is there anything else it would be necessary to include to ensure that industry adopts an approach that minimises the impacts on legitimate payments?

Utilising the 4 business day payment delay period

3.12. The purpose of allowing PSPs to delay making an outbound payment by 4 business days is to give the PSP the opportunity to investigate and assess whether the payment is in fact fraudulent. The guidance explains:

'PSPs may only delay crediting the amount of a payment transaction under these provisions for the purpose of contacting the payer or other relevant

third parties (e.g. law enforcement agencies or the payee's PSP or a PISP) to establish whether they should execute the payment order.'

3.13. The length of the delay should be decided by the time it takes for the PSP to investigate the transaction. As the guidance explains:

'The delay must not be longer than necessary to achieve that purpose, and in any event, no longer than the end of the fourth business day following the day when the payment order was received'.

3.14. PSPs will only be able to use the full 4 business days where this is necessary to decide whether the payment is fraudulent. The public authorities have chosen this period to ensure PSPs have enough time to gather the necessary information and engage with the customer and law enforcement agencies to prevent fraud. This is therefore a maximum period within which PSPs must make a decision on whether to make a payment. The maximum permitted 4 business day period should not necessarily be used automatically in every case when payments are delayed.

Question on the payment delay timeframe:

Q3: Are there further issues regarding how a PSP uses the 4 business days timeframe that needs clarification in the guidance?

Obligations to notify relevant parties when delaying a payment

3.15. Under the amended regulations, when a PSP delays a payment transaction it must notify the payer and give them information about the reason for the delay and how to resolve it. The PSP must communicate this information to the payer whether or not it intends to ask them for further information as part of its investigation to decide whether the transaction is fraudulent. The guidance sets out further detail about the substance of what the PSP should communicate to the payer, as well as how the payer should be notified:

'A PSP that delays crediting the amount of a payment transaction under these provisions must notify the payer of the delay, the reason for the delay, and any information or action needed from the payer to enable the PSP to decide whether to execute the order. Such notification must be provided or made available in an agreed manner as soon as possible, and in any event by no later than the end of the next business day following receipt of the payment order. We consider that the notification should give the payer sufficient information to enable them to understand the risks that the PSP has identified.'

3.16. While this communication is not required to take any specific form or use a specific channel, the PSP should consider its obligations under the Consumer Duty (the Duty) when notifying and engaging with the payer. The guidance notes that:

'As noted in our Consumer Duty guidance, it is likely the PSP will need a real-time human interface, such as a phone service, to respond to its customer's questions, provide effective support and deliver good customer outcomes. As part of this, we consider that the PSP should notify their customer when they have determined whether or not to execute the payment order.'

3.17. Our guidance explains that the payer's PSP should also tell the payee's PSP where a payment transaction has been delayed. This will enable the payer's PSP to undertake an effective investigation and reduce the risk of additional delays and duplicative investigations being made by the payee's PSP. We also refer PSPs to guidance relating to data sharing published by the Information Commissioner's Office (ICO).

3.18. Open banking is designed to bring more competition and innovation to financial services by enabling consumers to make payment transactions directly and securely from their payment accounts without using a credit or debit card. It enables payment initiation service providers (PISPs) to initiate payment orders on behalf of consumers and can be used, for example, by consumers to buy goods online. PISPs have reported that it may help to reduce uncertainty about transaction execution, where a payment order is initiated by a PISP if:

(i) the payer's PSP notifies the PISP of a delay at the same time as it notifies the payer, and

(ii) the PISP was able to cancel the payment transaction order, with the payer's consent

3.19. The Treasury's amendments to the PSRs 2017 do not include provisions that would require the payer's PSP to make such a notification or carry out such a cancellation.

3.20. We welcome industry feedback on whether the guidance gives sufficient clarity on deciding when, how and whether to communicate with stakeholders about payment delays.

Questions relating to notifying relevant parties when delaying a payment:

Q4: Aside from PSPs having to inform customers of any delays, the reasons behind their decision and the information or actions are required to help decide whether to make the payment order, is there anything else PSPs should provide?

Q5: Should PSPs be obliged to notify and update PISPs regarding any payment delay and would there be any challenges with doing this?

Q6: Are there any further aspects of a PSP's obligations to notify relevant parties that we should clarify in the guidance?

Q7: Are there any further issues about notifying or communicating issues about payment delays among relevant parties we should be capture in the guidance?

Financial obligations to the payer by the PSP arising from a payment delay

3.21. A decision to delay a payment will have the effect of placing a hold on the funds. We consider that the funds should be treated as remaining in the payer's account for interest accrual purposes until the payment order is processed.

3.22. If the payer incurs interest and charges as a result of the payment delay, the PSP will be liable for them and will be obliged, under the terms of the legislation, to reimburse the payer whether or not the payment order is ultimately made. That provision is narrowly constructed to apply only to interest and charges directly, and not to wider losses that a customer may experience from a payment delay, for example the loss of opportunity from an investment that the customer was unable to make in a timely way due to a payment delay being applied. We understand that the Treasury intends to provide this same explanation in the Explanatory Memorandum to the policy, which it considers is fully consistent with the underlying legislative provision itself.

3.23. We would welcome industry feedback on whether further guidance is needed to clarify the scope of any financial obligations from a payment delay.

Question relating to liabilities incurred by a PSP in the event of a payment delay:

Q8: Are there any issues relating to the scope of liabilities incurred by a PSP or the process of reimbursing the payer that the Approach Document should capture?

4. Approach to delaying inbound payments

Overview

4.1. Although the payment delays legislation is restricted to outbound payments, industry has reported uncertainty about PSPs' ability to delay inbound payments where they suspect fraud. We therefore propose to update our guidance which covers when and how PSPs should consider delaying inbound payments, and seek input on those changes as part of this consultation.

Scope for delaying inbound payments

4.2. The PSRs 2017 place obligations on PSPs on the timeframe within which they must process inbound payments. They also provide flexibility for PSPs to comply with their wider obligations under UK law, including preventing financial crime.

4.3. Under regulation 89(3) of the PSRs 2017, a PSP is required to make incoming funds available to a payee immediately after they have been credited to that PSP's account*.* The existing Approach Document guidance notes that 'immediate' should normally be no longer than 2 hours and can never mean the next business day (unless the payment is received outside of business hours). However, regulation 96(2) of the PSRs 2017 includes a force majeure provision under which PSPs will not be liable for contravening the requirement to make funds available to a payee immediately where this delay is due to the obligations of the PSP under other provisions of national law.

4.4. The guidance seeks to provide further clarity on how PSPs should approach balancing their obligations to assess inbound payments for fraud and process them within the parameters in the PSRs 2017.

4.5. Our guidance explains that in our view, the effect of the force majeure provisions under regulation 96(2) of the PSRs 2017 is that a payee's PSP would not be liable for contravening the requirement under regulation 89(3) to make the funds available to a payee immediately after they have been credited to the payee's PSP's account where:

(i) making the funds available to the payee would breach any of the provisions of Part 7 of the Proceeds of Crime Act 2002 and/or Part 3 of the Terrorism Act 2000, or

(ii) for reasons outside the payee's PSP's control, it is impossible for their nominated officer to determine if making the funds available to the payee would breach any of the provisions of Part 7 of the Proceeds of Crime Act 2002 and/or Part 3 of the Terrorism Act 2000

4.6. This second circumstance might occur where the nominated officer needs additional time to get information from the payee, the payer's PSP or a law enforcement agency to determine whether they know, suspect, or have reasonable grounds for knowing or suspecting that a person is engaged in, or attempting money laundering or terrorist financing. We expect a payee's PSP to act as quickly as practicable to access or obtain the information it needs to make its determination.

4.7. The threshold for triggering the provisions of regulation 96(2) of the PSRs 2017 is high, and we expect PSPs to take a rigorous case-specific approach to assess when the threshold has been reached.

4.8. A PSP should make funds available to a payee as soon as it has decided it is not prevented from doing so, for example, because the transaction would not breach the provisions of Part 7 of the Proceeds of Crime Act 2002 and/or Part 3 of the Terrorism Act 2000.

4.9. The Joint Money Laundering Steering Group produces detailed guidance for firms in the UK financial sector on how to comply with their legal and regulatory obligations on money laundering and terrorist financing. The JMLSG's guidance remains a key resource for PSPs.

4.10. The guidance is not intended to provide a list of the scenarios in which the force majeure provisions may be triggered, but to help indicate the types of circumstances where PSPs may rely on them.

4.11. PSPs should consider force majeure provisions as part of a broader regulatory framework, in which they are required to establish and maintain systems and controls, such as transaction monitoring, to deter and detect financial crime.

4.12. We expect a PSP to consider its obligations under the Duty when deciding to delay making funds available to a payee. These include our consumer understanding and consumer support outcome rules. For example, we expect PSPs to ensure that customers do not face unreasonable barriers to using a product or service. We also encourage a PSP that has delayed making funds available to a payee to explain this to the payee to help deliver good customer outcomes where it can do so without breaching restrictions on tipping-off.

4.13. As part of the Duty's consumer support outcome, we expect PSPs to have exceptions processes to deal effectively with non-standard issues in their business, such as applying the force majeure provisions to delay an inbound payment. The Duty's guidance explains it is likely that PSPs will need a real-time human interface, such as a phone service, to deal with some of these issues and provide effective support to customers.

4.14. The Duty's rules also require PSPs to monitor and regularly review their customers' experience to ensure that the PSPs' products and services are delivering outcomes consistent with the Duty. Therefore, we expect PSPs to review the customer impact of any increase in the proportion of payment transactions which delay available funds to the payee, and the proportion of these delayed payments PSPs later assess as being legitimate. This should include monitoring the level of support available to customers when a payment is delayed. PSPs should seek to minimise the impact of delays on legitimate inbound payments minimise negative impacts of delays on customer outcomes.

4.15. As the amendments to the PSRs 2017 do not change their obligations under the Proceeds of Crime Act 2002 or the Terrorism Act 2000, we do not expect PSPs to use a lower threshold for the force majeure provisions on the basis of this guidance. Should PSPs make greater use of the provisions, we would expect to see evidence they were correctly identifying suspicious inbound payments. The circumstances in which PSPs can use these provisions remain tightly limited and apply to exceptional cases. We would expect to see usage reflect this. We welcome industry feedback on whether the guidance provides enough clarification on using force majeure provisions or if a more extensive set of examples is necessary.

Questions relating to inbound payments:

Q9: Is further guidance needed on the cumulative effect of delays to inbound payments? Specifically, how the force majeure guidance might interact with the amendments to the PSRs 2017 execution time provisions?

Q10: Does the guidance provide sufficient clarity on how and when the force majeure provisions can be used?

5. Monitoring and evaluation

Overview

5.1. We plan to monitor and evaluate the impact of the changes to the PSRs 2017 to assess how effective the guidance is and whether we need to make further clarifications to improve PSPs' compliance. While we are not consulting on the specifics of the accompanying monitoring regime, we have chosen to set out our intentions on how we will collect information for industry's awareness.

How we will monitor and assess the impacts of the payments delay legislation

5.2. As part of our responsibility to evaluate the impact of financial services regulation, we require industry to provide certain types of information on specific financial activities. Once the payments delay legislation has come into effect, we will establish a process to monitor and evaluate its implementation by PSPs. This will help us make sure the payments delay regime is working appropriately and enabling PSPs to better protect customers from APP fraud without having negative effects on consumers.

5.3. We plan to collect data from industry on a voluntary, ad-hoc basis through existing supervisory engagement processes.

5.4. This approach will help us understand the types of information that PSPs hold and to identify the most helpful data in assessing the impact of these changes. We expect, in the first instance, that this is likely to include information on volumes and values of delayed inbound and outbound payments, the length of delays, the outcomes and the value of APP fraud prevented. Other material that may be relevant could include information on the frequency of delays, impact by banking channel and a breakdown of true and false positives where payments have been delayed.

5.5. We want to understand industry's views on this once the payment delays legislation has come into force. When we have assessed the types and utility of information available (via the ad-hoc collection of data), we will consider proposals for the scope and content of a permanent monitoring and evaluation regime. We intend to streamline data collection between the FCA and the PSR where possible, so reducing risk of duplicative data requests.

Annex 1 Questions in this paper

Q1: Are there other factors that might increase the risk of a payment order having been made following dishonesty or fraud, which you consider we should refer to in our guidance? Are there further examples we can include in the guidance to clarify how and when payment delays legislation should be used?

Q2: Are there further aspects on the 'reasonable grounds to suspect threshold' that the guidance should cover? Is there anything else it would be necessary to include to ensure that industry adopts an approach that minimises the impacts on legitimate payment transactions?

Q3: Are there further issues about how a PSP uses the 4 business days timeframe that needs clarification in the guidance?

Q4: Aside from PSPs having to inform customers of any delays, the reasons behind their decision and the information or actions required to help decide whether to execute the payment order, is there anything else PSPs should provide?

Q5: Should PSPs be obliged to notify and update PISPs about any payment delay and would there be any challenges with doing this?

Q6: Are there any further aspects of a PSP's obligations to notify relevant parties that we should clarify in the guidance?

Q7: Are there any further issues about notifying or communicating issues about payment delays among relevant parties that we should capture in the guidance?

Q8: Are there any issues relating to the scope of liabilities incurred by a PSP or the process of reimbursing the payer that the Approach Document should capture?

Q9: Is guidance needed on the cumulative effect of delays to outbound and inbound payments? Specifically, how the force majeure guidance might interact with the amendments to the PSRs 2017 execution time provisions?

Q10: Does the guidance provide sufficient clarity on how and when the force majeure provisions can be used?

Annex 2 Cost benefit analysis

1. Section 138I of FSMA requires us to perform a cost benefit analysis for new rules but not for guidance (see s.139A of FSMA on power of the FCA to give guidance and s.139B of FSMA on the meaning of general guidance).
2. However, it is our policy to produce a CBA for general guidance about rules if a high-level assessment of the impact of the proposal identifies an element of novelty, which may be in effect prescriptive or prohibitive, that may result in significant costs being incurred.
3. In this case, the proposed guidance is not expected to result in materially different costs or benefits. This is because the steps in the guidance are the kind of detailed steps we expect firms would reasonably have to undertake to comply with the Treasury's draft legislation. We consider our guidance will not result in substantive additional or onerous obligations on firms compared to the Treasury's policy set out in their published policy note and the payments delay legislation.

Annex 3 Draft guidance

We are consulting on adding the text underlined below to Chapter 8 of the Approach Document.

OUTBOUND PAYMENTS

Applicability (regulation 85)

For all other types of transactions, the requirements will apply unless the PSP and its customer agree otherwise (but see also regulation 86(3) of the PSRs 2017). See also the table of jurisdiction and currency in Chapter 2 – Scope.

The execution time requirements set out in regulation 86 (2A) to (2D) of the PSRs 2017 apply to any payment transaction:

- authorised in accordance with regulation 67 of the PSRs 2017;
- executed wholly within the UK in sterling; and
- not initiated by or through a payee.

Payment transactions to a payment account – time limits for payment transactions (regulation 86)

An extra day may be added to the above period when the payment order is initiated in paper, rather than electronic form.

Regulation 86(2A) to (2D) of the PSRs 2017 permits a PSP to delay crediting the amount of a payment transaction to the account of the payee's PSP until the end of the fourth business day following the time the payment order was received if both the following conditions apply:

- the PSP has established that there are reasonable grounds to suspect a payment order has been placed subsequent to fraud or dishonesty perpetrated by a person other than the payer ("reasonable grounds to suspect fraud or dishonesty"); and

- such grounds are established no later than the end of the business day following the time of receipt of the payment order.

In our view, this means that if a PSP has not met the threshold of having reasonable grounds to suspect fraud or dishonesty by the end of the business day following the receipt of the payment order, it will need to execute the payment transaction.

We take a similar approach to defining reasonable grounds to suspect fraud or dishonesty as that taken in the Joint Money Laundering Steering Group Guidance on the Prevention of Money Laundering/Combating Terrorist Financing ("JMLSG Guidance") in relation to "reasonable grounds to know or suspect that a person is engaged in, or attempting, money laundering or terrorist financing".

Suspicion has been defined by the courts as being beyond mere speculation and based on some factual foundation yet falling short of knowledge, where a PSP in fact knows that a payment order has been placed subsequent to fraud or dishonesty.

A payment order which appears unusual is not necessarily suspicious. Even customers with a stable and predictable transaction profile will have periodic transactions that are unusual for them. Many customers will, for good reasons, have an erratic pattern of transactions or account activity. A payment transaction appearing to be unusual is, in the first instance, only a basis for further enquiry, which may in turn require judgement as to whether it is suspicious.

"Reasonable grounds to suspect fraud or dishonesty" is an objective test. To show that they have met this threshold, staff within PSPs would need to be able to demonstrate that they took reasonable steps in the particular circumstances, in the context of a risk-based approach, to understand the nature and rationale of the transaction, the amount involved, the intended destination of the funds, and whether the payee appears to have any links with criminality.

Factors which might increase the risk that a payment order has been made subsequent to dishonesty or fraud include:

i. where one or a series of payments is made to a new payee the payer has not had a transaction with before, and the purpose, size or frequency of the transaction is inconsistent with the payer's normal spending patterns

ii. where the name of the payee's account does not fully or partially match the name of the payee specified in the payment order and the stated purpose or size of the transaction is inconsistent with the payer's normal spending patterns

iii. evidence from the payee's PSP or a law enforcement agency that the payee has previously received payments which they have quickly transferred on to third parties without a clear rationale

iv. where the payer's PSP identifies evidence of increased digital or behavioural risk before or during the payer making the payment

v. where a payer is unwilling to explain or evidence the checks they have made to confirm that the payee and the purpose of the payment are legitimate

vi. where a payer's PSP obtains other evidence about the specific payment transaction, from third parties such as law enforcement agencies or the payee's PSP, that the payment transaction has a higher risk profile

vii. where the PSP engages with the payer, there are signs that the transaction's purpose may fall into one of the signs of common types of fraud, including:

   a) safe account – where criminals convince people to move money to another payment account saying this is to protect against fraud but that "safe account" is in fact controlled by criminals

   b) romance scams – where criminals, typically using a false profile, form a relationship to ask for money, or have enough personal information to steal the victim's identity

c) investment scams – where criminals convince their victim to pay for a fake investment

d) purchase scams – sending money to a criminal to buy goods that do not exist or are not as advertised

e) invoice scams – where criminals send a false invoice, often pretending to be from a business from which the victim is expecting a bill

The list of factors set out above is not exhaustive. No single factor is determinative. The relevance and weight of each will be context dependent.

The maximum period of 4 business days for delaying a payment order is intended to ensure that PSPs have sufficient time to gather the necessary information and to engage with the customer and law enforcement agencies to prevent fraud.

PSPs may only delay processing a payment transaction under regulation 86 (2A) to (2D) of the PSRs 2017 for the purpose of contacting the payer or other relevant third parties (e.g., law enforcement agencies or the payee's PSP or a PISP) to establish whether they should execute the payment order.

The delay must not be longer than necessary to achieve this purpose. In our view, this means that a PSP must execute a payment order as soon as it has contacted the payer or other relevant third parties and established that it should execute the payment order, rather than pursuing a policy of waiting until the end of the fourth business day to do so.

We also expect PSPs to treat payment orders initiated by PISPs in the same way as payments initiated by customers directly unless there are objective and duly evidenced reasons for example relating to fraudulent or unauthorised access by the PISP that justify different treatment.

We consider that funds which are subject to delay should remain in the payer's account for interest accrual purposes but be unavailable to the payer to spend during the period of delay.

A PSP that delays crediting the amount of a payment transaction under these provisions must notify the payer of the delay, the reason for the delay, and any information or action needed from the payer to enable the PSP to decide whether to execute the order. Such notification must be provided or made available in an agreed manner as soon as possible, and in any event by no later than the end of the next business day following receipt of the payment order. We consider that the notification should give the payer sufficient information to enable them to understand the risks that the PSP has identified. The PSP should communicate this information to the payer regardless of whether it intends to seek further information from the payer as part of its investigation into determining whether the transaction is fraudulent. However, if giving the notification to the payer would be unlawful (e.g., due to restrictions on tipping-off), the notification should not be made.

We encourage the payer's and payee's PSPs to exchange information about payment transaction delays to facilitate effective investigations and mitigate risks of additional delay and duplicative investigation by the payee's PSP, subject to restrictions imposed by UK data protection law. We refer PSPs to guidance relating to data sharing published by the Information Commissioner's Office (ICO) (*What are the conditions for processing? | ICO, Legitimate interests | ICO,* and *Data sharing | ICO*).

We expect a PSP to consider its obligations under the Consumer Duty when deciding to delay processing a payment order. These include the Duty's consumer support outcome rules. These rules require PSPs to ensure they include appropriate friction in customer journeys to mitigate the risk of harm and give customers sufficient opportunity to understand and assess their options, including any risks. They also require PSPs to ensure that customers do not face unreasonable barriers during the lifecycle of a product or service. As noted in our Consumer Duty guidance, it is likely that the PSP will need a real-time human interface, such as a phone service, to respond to its customer's questions, provide effective support and deliver good customer outcomes. As part of this, we consider that a PSP should notify its customer when it has determined whether or not to execute the payment order unless it is unlawful to do so (eg due to restrictions on tipping-off).

The corporate opt-out applies to regulation 86 (2A) to (2D) of the PSRs 2017 (see Glossary of Terms). Where the payer is not a consumer, a micro-enterprise or a charity, the payer and the PSP may agree that regulation 86 (2A) to (2D) of the PSRs 2017 does not apply to payment transactions under framework contracts and single payment transactions.

Liability of payment service provider for charges and interest 94.

A PSP is liable to its payment service user for:

- any charges for which the payment service user is responsible, and
- any interest which the payment service user must pay,

as a consequence of delay to the execution of a payment order in reliance on regulation 86 (2B) of the PSRs 2017 irrespective of whether the payment order is ultimately executed.

INBOUND PAYMENTS

Value date and availability of funds (regulation 89)

It is recognised that in practice some processing of the payment by the payee's PSP may be needed before the customer can access the funds. The requirement for "immediate" availability, however, means that the time taken for this processing must be kept to a minimum and we see no reason why, in normal circumstances, this should be longer than two hours. For the avoidance of doubt, unless the payment concerned is received out of business hours, "immediate" can never mean the next business day (and whether the payment is received outside of business hours must be considered in accordance with the paragraphs [x]).

In our view, the effect of the force majeure provisions in regulation 96(2) of the PSRs 2017 is that a payee's PSP would not be liable for contravening the requirement under regulation 89(3) to make funds available to a payee immediately after they have been credited to the payee's PSP's account where:

- making the funds available to the payee would breach any of the provisions of Part 7 of the Proceeds of Crime Act 2002 and/or Part 3 of the Terrorism Act 2000, or
- for reasons outside the payee's PSP's control, it is impossible for their nominated officer to determine if making the funds available to the payee would breach any of the provisions of Part 7 of the Proceeds of Crime Act 2002 and/or Part 3 of the Terrorism Act 2000

This second circumstance might arise where the nominated officer needs additional time to access information or obtain information from the payee, the payer's PSP, or a law enforcement agency, to determine whether they know, suspect, or have reasonable grounds for knowing or suspecting that a person is engaged in, or attempting, money laundering or terrorist financing. We expect a payee's PSP to act as quickly as practicable to access and/or obtain the information it needs to make its determination.

The threshold for triggering the provisions of regulation 96(2) of the PSRs 2017 is high, and we expect PSPs to take a rigorous, case-specific approach to assessing whether this threshold has been reached.

A PSP should make funds available to a payee as soon as it has concluded that it is not prevented from doing so, for example because the transaction would not breach the provisions of Part 7 of the Proceeds of Crime Act 2002 and/or Part 3 of the Terrorism Act 2000.

The Joint Money Laundering Steering Group (JMLSG) produces detailed guidance for firms in the UK financial sector on how to comply with their legal and regulatory obligations related to money laundering and terrorist financing. The JMLSG's guidance remains a key resource for PSPs.

We expect a PSP to consider its obligations under the Consumer Duty when deciding to delay making funds available to a payee. These include our consumer understanding and consumer support outcome rules. For example, we require PSPs to ensure that customers do not face unreasonable barriers during the lifecycle of a product or service. We would also expect a PSP that has delayed making funds available to a payee to communicate with the payee to help deliver good customer outcomes, unless it is unlawful to do so (e.g. due to restrictions on tipping-off).

As part of the Consumer Duty's consumer support outcome, we expect PSPs to have exceptions processes in place to deal effectively with non-standard issues that arise in the context of their business, such as the application of the force majeure provisions to delay an inbound payment. Our Consumer Duty guidance explains that it is likely that PSPs will need a real-time human interface, such as a phone service, to deal with some of these issues and provide effective support to customers (*https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf - paragraph 9.18*).

Our Consumer Duty rules also require PSPs to monitor and regularly review the outcomes their customers are experiencing to ensure that the products and services that PSPs provide are delivering good outcomes for customers. This means that PSPs should monitor the proportion of inbound payment transactions that are delayed and the proportion of delayed inbound payment transactions that are later credited to payees. PSPs should also monitor the length of delays. We also expect PSPs to monitor the level of support made available to customers when a payment is delayed. PSPs should seek to minimise the impact of delays on legitimate inbound payments and minimise negative impacts of delays on customer outcomes.

We consider when funds have been made available to a payee subsequent to a delay, the receipt of funds in the payee's account should be value dated from the time of receipt by the payee's PSP.

Refusal of payment orders (regulation 82)

A PSP may only refuse to execute a payment order or initiate a payment transaction if the conditions in the framework contract have not been met or execution would be unlawful (e.g., in line with anti-money laundering legislation). In line with the recitals to PSD2, customers should be able to rely on the proper execution of the payment order unless the PSP has a contractual or statutory ground for refusal. For ASPSPs, this applies irrespective of whether the payment order is initiated by the customer, through a PISP or by or through a payee.

Where a PSP refuses to execute a payment order or to initiate a payment transaction, it must notify the customer of the refusal, unless it is unlawful to do so (e.g. due to restrictions on tipping-off). The notification must, if possible, include the reasons for the refusal. Where it is possible to provide reasons for the refusal and those reasons relate to factual matters (e.g. if the customer has not provided the required details to allow the payment to be processed or did not have available funds) the notification must also include what the customer needs to do to correct any errors that led to the refusal. The notification must be provided or made available in the way agreed in the framework contract (e.g. online) at the earliest opportunity and no later than the end of the next business day following receipt of the payment order or, if a payment has been delayed under regulation 86 (2B) of the PSRs 2017, no later than the end of the fourth business day following the day on which the payment order was received.