

# THE PAYMENT SYSTEM REGULATOR'S CONSULTATION ON AUTHORISED PUSH PAYMENT SCAMS

Issued: 8 April 2021

The Fraud Advisory Panel welcomes the opportunity to comment on the consultation on Authorised Push Payment (APP) scams (CP21/3), published by the Payment Systems Regulator on 11 February 2021, a copy of which is available from this [link](#).

We are very happy to discuss any aspect of our comments and to take part in all further consultations on the issues we've highlighted to the Payment Systems Regulator.

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## GENERAL COMMENTS

1. The Fraud Advisory Panel welcomes the opportunity to respond to the Payment Systems Regulator's consultation: *Authorised push payment (APP) scams (CP21/3)*, published 11 February 2021. However, as a named stakeholder within the consultation document itself we are disappointed to have not been contacted directly to be given the opportunity to respond.
2. As you will be aware, we have previously advocated for proactive engagement with key stakeholders on the Contingent Reimbursement Model Code (CRM Code) which we believe is crucial to developing a well-rounded and improved response to authorised push payment fraud (APP fraud).
3. It is our view that in order to ensure a consistent approach to tackling APP fraud the CRM Code should be mandatory for all Payment Service Providers (PSPs). This is an important step in apportioning responsibility and accountability across the industry to protect consumers from fraud.
4. Our response has been prepared by a small group of our members. The Fraud Advisory Panel (the 'Panel') is the UK's leading counter fraud charity. We act as the collective voice of the counter fraud profession and provide practical support to almost 300 corporate and individual members. Our members come from a wide range of professions and sectors but are united in their determination to counter fraud.

## BACKGROUND

5. Fraud Advisory Panel was originally approached by the Payment Services Regulator (PSR) on 14 November 2016 regarding the *Which?* super complaint which raised concerns about consumer safeguards for push payments. We understand that the PSR was introduced to our work through *Which?* and our own submission to the Law Commission's consultation on its *Thirteenth programme of law reform*. The same week we met with PSR representatives to discuss our views on the issue and to further assist in the PSR's investigation.
6. Further to this we have responded to several consultations including the following.
  - a. *Authorised push payment scams: PSR-led work to mitigate the impact of scams, including a consultation on a contingent reimbursement model (CP17/2)*, published by the Finance Conduct Authority Payment Services Regulator on 7 November 2017.
  - b. *Authorised push payment fraud – extending the jurisdiction of the Financial Ombudsman Service (CP18/16\*\*)*, published by the Financial Conduct Authority on 26 June 2018.

- c. *The draft contingent reimbursement model code*, published by the Authorised Push Payment Scams Steering Group on 28 September 2018.
7. On 28 March 2018 we wrote to the Chair of the APP Steering Group requesting the opportunity to participate on the authorised push payment fraud steering group as an independent stakeholder. We re-extend our offer and would still welcome the opportunity to actively and constructively contribute to work on this important issue.

## RESPONSES TO SPECIFIC QUESTIONS

### Question 1

Do you have any comments on the data presented in section 3 'The current framework'?  
Do you have any supplementary information on customer outcomes under the CRM Code?

8. We are pleased to see the increase in repatriation and reimbursement to victims of APP fraud reported in this consultation paper following the introduction of the CRM Code, but echo concerns that the current application of the CRM Code is inconsistent between PSPs.
9. We agree with *Which?* that the CRM Code should be mandatory and believe this will result in fairer and more consistent outcomes.<sup>1</sup> This is essential to improve the response to APP fraud and the experiences of fraud victims.<sup>2</sup>
10. We consider there is further data available which is relevant to the objective of lowering rates of APP fraud and increasing reimbursement to victims. Additional data that could be helpful in driving these objectives might include the following.
  - a. Data which demonstrates whether there is any discrepancy between the level of loss and the percentage of repatriation. For example, are losses more likely to be refunded to the victim where their loss is low level or high level (or is there no difference)?
  - b. Data from both sending and receiving banks as to the reason(s) for their rejection of the whole or part of the victim's refund request. For example, between July to December 2020 what percentage split was there between rejections on the grounds of:
    - (i) failing to act upon effective warnings,
    - (ii) failure to hold a 'reasonable belief', and
    - (iii) gross negligence.

<sup>1</sup> Which? Policy research report *Reimbursement for authorised push payment fraud* (August 2020).  
<https://www.which.co.uk/policy/money/6249/pushpaymentfraud>

<sup>2</sup> Fraud Advisory Panel response to *Authorised push payment scams: PSR-led work to mitigate the impact of scams, including a consultation on a contingent reimbursement model* (CP17/2) published by the Financial Conduct Authority Payment Services Regulator (12 January 2018).

- c. Data ought to be provided from recipient banks to show:
  - (i) the value the bank contributed in its role as a recipient bank,
  - (ii) the number of interventions in the flow of the transaction before onwards transfer by fraudsters from the recipient banks' banking ecosystem, both successful and unsuccessful (i.e. was it able to stop money being sent on), and
  - (iii) of the money it contributed as a recipient bank, how much of that was recovered funds (i.e. from the APP fraud) and how much was simply a refund from the bank's own money.
- d. Data showing how many victims have received a 100% refund/repatriation. Our experience in practice is that:
  - (i) not all victims are offered a refund, and
  - (ii) (of those who are refunded) it is rarely 100% of the loss.

These two factors coupled together may explain why less than 50% of losses are reimbursed.

- e. Correlation between fraud exposure and repatriation rates.
  - f. Data on the number of APP fraud complaints made to the Financial Ombudsman Service (FOS), as this data might not be reported by PSPs once it is passed to FOS.
11. Consistency of application of the CRM Code could be more transparent if statistics were made available to demonstrate the refund rate for differing fraud types as listed in paragraph 2.2 of the consultation paper. This would also help other stakeholders to focus fraud awareness efforts on those demographics more susceptible to those fraud types. For example, those targeted for romance APPs tend to have a different demographic to those caught by conveyancing APPs; if we can understand that victims of romance APPs are twice less likely to be refunded, efforts can be concentrated on education of that target market.

## Question 2

Do you have any comments on the appropriate balance of liability for APP scams costs between individuals and PSPs?

12. Our expectation following the introduction of the CRM Code was that reimbursement rates would be in excess of between 75% - 80%. We agree with the PSR that it defies logic that in over 50% of APP frauds the individual is responsible for their loss to the extent the exemptions in the CRM Code can be properly applied.

13. PSPs must do more or be more transparent about the basis of their decision making such to compare if PSPs are applying the same approach on similar case facts. Ideas for further positive action by PSPs to prevent APP frauds include the following.
  - a. Force test payments of £1 each time a new payee is set up.
  - b. Require customers to verify receipt of test payment by at least two methods (not email) to encourage them to independently verify telephone numbers for businesses. This may only be applicable to individuals given they make up circa 80% of the victims of APP fraud.
14. We recognise that these steps will not defeat all fraud, but in a significant number of cases it might allow for the genuine intended recipient to confirm the payment has not been received.
15. A greater focus should also be placed on the balance of liability between sending and receiving banks, with less focus on how much liability should rest with the victim. A more restrictive interpretation of the exemptions to cover, coupled with an assumption of entitlement to reimbursement, will see the starting point genuinely shift towards the proper question of, '*how will we reimburse this victim*'? Where funds cannot be recovered (because the onward laundering has occurred too quickly) the sending and receiving banks should work more collaboratively in apportioning liability between them.

### Question 3

Do you have any comments on our analysis of what is driving the CRM Code outcomes we're seeing?

16. Our members experience is that the starting point for banks is rejection of reimbursement. The exemptions are often cited indiscriminately and without proper explanation or application to the facts at hand.
17. By way of example, we believe that the PSPs are over-zealous in their application of the term '*gross negligence*'. PSP decision-makers appear to demonstrate an inconsistent understanding and application of gross negligence as a basis for rejection of reimbursement. An assessment of '*gross negligence*' (i.e. that a customer has been *significantly careless*) is made without demonstrating why this conclusion is fair against the case facts. This goes against the expectation of the Treasury Select Committee which concluded '*If firms do find individual consumers to have been grossly negligent, we recommend their customer responses quote the legislation the firms are relying upon to refuse making a reimbursement, alongside an explanation of how this conclusion was reached. Although it may cause distress, we believe that using the phrase 'grossly negligent' would provide a very clear explanation to the consumer why their claim is being refused, and on what grounds*'.<sup>3</sup>

<sup>3</sup> House of Commons, Treasury Select Committee (1 November 2019). *Economic Crime: Consumer Views: Consumer rights and responsibilities*. <https://publications.parliament.uk/pa/cm201919/cmselect/cmtreasy/246/24608.htm> [see paragraph 141]

18. PSPs also seem to place an overly onerous expectation on customers as a '*reasonable basis for belief*'. In our view the concept is too subjective; guidance is needed to make it clear that the assessment of the subjective belief needs to be based upon what the *customer* thought at the time, not what the PSP (with the benefit of hindsight), thinks the customer ought to have thought. The approach adopted by PSPs is incorrect in the converse. The natural starting point is that the customer will have believed they were dealing with a legitimate party – otherwise why would they have made the transfer? From that point, a PSP needs to identify what was in the knowledge of the customer at the time they made the transfer that ought to have made them act differently.
19. In short, the approach being adopted by the PSPs to the application of the CRM Code is not working because it appears that the exemptions are being incorrectly and over-zealously applied. It is highly improbable that half of victims fit the criteria envisaged by the exemptions.
20. PSPs have taken steps to try to improve fraud awareness in respect of APPs and to put practical barriers in place to prevent them from occurring. However, the language used often down-plays the seriousness of the potential problem. For example, the CoP notice which many PSPs have now adopted tends to warn customers of the risk of a '*scam*'. Many lay people consider a '*scam*' to be the loss of small sum of money. However, the use of the '*fraud*', is likely to trigger a more serious reaction.

#### **Question 4**

What could be done to ensure consistency in the outcomes of dispute resolution, and to give customers and industry transparency into how these outcomes are arrived at?

21. We would welcome the introduction of an independent adjudicator who could provide clear guidance to consumers on the CRM Code. We believe that the FOS would be best placed for this role and we would also expect the publication of outcomes in a manner akin to how the FOS publish their case findings. This will help drive accountability, transparency and consistency across the industry.
22. The banks' reasoning needs to be seen in a similar way to a case authority in courts. One positive effect of this may be to reduce cases going to the FOS as customers and their advisors are better able to predict how a particular case should be treated.
23. Ahead of this process, it would be helpful to have the engagement of the FOS to guide PSPs as to their expectations of reasonable application of the CRM Code and its meanings.

#### **Question 5**

Are there any other issues with the CRM Code you would like to tell us about?

24. The FOS reported a 40% increase in fraud and scam complaints in 2018/19, and in the year 2019/20 they received nearly 11,000.<sup>4</sup> We are concerned that fraud victims are still not receiving the appropriate redress through the CRM Code as is reflected in the statistics provided in this consultation paper.
25. Previously we stated that the CRM Code would incentivise PSPs to improve their complaint handling processes to reduce the likelihood of complaints being referred to the FOS. However, the increase in complaints reported above suggest that this is still not the case and there is more to be done.
26. Given the recent case of Philipps v Barclays, it is clear that unless the CRM Code makes quite specific the requirements of banks to monitor and assess risk of fraud against their customers, the duty on banks in this area shall not be extended to customers (the Quincecare Duty). As to the APP fraud issue, that case shows that the expectation of the judiciary is codification in clear terms when it comes to a bank's duty to a customer. The APP fraud situation is no different; clearer rules as to what conduct amounts to 'gross negligence' for example, allows for the FOS and the Courts to intervene with greater ease.
27. A greater emphasis should be placed on the reduced expectation of the vulnerable to be able to identify and protect themselves from fraud. The scope and definition of a vulnerable customer, whilst not being binary, should be widened. It should be clear to include that vulnerability and for it to be linked to a customer's role in a transaction and their personal circumstances. By way of example, a customer may be a highly qualified individual in their 40s and successful in business. However, their personal/home circumstances may make them particularly vulnerable to romance APP frauds. PSPs ought to adopt an approach that if a customer claims to be vulnerable within the context of the particular APP fraud they are victim to, the onus should fall to the bank to demonstrate that they are not.
28. We agree that a 'central fund' would be a positive step forward and would be interested to know how it is envisaged this could be applied. We would encourage consideration to be given to a model that requires PSPs to pay a levy into the central fund based on their previous year's performance. That previous year's performance would be based on the prior year's data as to how they have responded to customers and as a recipient bank in APP fraud events. The better the performance in preventing APP fraud and reimbursing victims, the lower the levy. The aim would be to see the lowering of the occurrence of hosting accounts to APP fraud victims, the use of money mules as well as having a high level of reimbursement as both a sending and receiving bank. We recognise this suggestion would be subject to legislative permissibility and a mandatory CRM Code for all PSPs.
29. More could be done by the broader collective of stakeholders to educate the public about the existence of the CRM Code and the PSPs who are signatories. Our experience is that many victims, when reporting APP fraud to their banks are:

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<sup>4</sup> Financial Ombudsman Service (2020) *Annual report and accounts for the year ended 31 March 2020*. Available from <https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-ended-31-March-2020.pdf>

- a. not told the CRM Code exists
  - b. not told the bank is a signatory to the CRM Code, and
  - c. not told what to expect pursuant to the CRM Code.
30. Stakeholders can and should do more to encourage the public to consider whether they are banking with a CRM Code signatory. This will inform customer choice and may encourage more PSPs to participate in the scheme.

#### **Question 6**

Do you have any comments on this measure, or its effectiveness and proportionality? For example, do you have feedback on the information we propose for publication outlined above, or on who should publish the data?

31. The publication of APP 'scams' data is undoubtedly needed and our view is that the Lending Standards Board (LSB) or PSR would be best placed to publish this information because they are independent of the banks. Independence is needed in the eyes of the customer as to the authority of the data planned to be published in years ahead.
32. The greater the level of data that is required to be made public, the more likely PSPs are going to be to identify and prioritise areas for improvement.
33. With specific regard to the statistics provided in paragraph 4.5 of the consultation paper it may also be helpful to include details as to the amount recovered via indemnities and/or recovery. This will help achieve greater transparency around the responsibility being accepted by recipient banks and the effectiveness of measures to interrupt APP frauds when funds arrive in the mule account and/or the extent to which they are willing to share liability where they are unable to do so.
34. Reporting times between victim's bank and recipient bank would also prove to be helpful data. A key theme throughout the consultation seems to be that greater strides need to be taken to improve the speed and efficacy with which APP fraud risk is communicated between the two PSPs involved. We would agree with this; it is fundamental if the onward transmission of money is to be interrupted.

#### **Question 7**

Do you have any comments on this measure, or its effectiveness and proportionality? For example, do you have feedback on its feasibility, how it could work, or whether the issues and requirements set out would be best dealt with by a working group?

35. This measure is a good idea in principle but is exposed to a risk of becoming overly complicated.
36. The gateway to APP fraud remains the AML KYC onboarding process of recipient banks. If a recipient bank is provided with information that puts them on notice of a potential risk



it is likely to help identify APP frauds either before the account is used to mule money, or to interrupt the onward flow of funds when received.

37. Given that 79% of victims of APP frauds are individuals we would be interested to learn more about the composition of recipient accounts. Our own experience is that these are often individuals – vulnerable and targeted to mule money – such as the young and the student population.
38. We have considered the possibility of whether a change to the terms and conditions for individual accounts might be possible to slow down payments, particularly the transfer of money abroad, so rather than being instantaneous it takes 48 hours. This would allow for a short '*circuit break*' for a victim to realise their error and put the PSPs concerned on notice. Broadly speaking, individuals are unlikely to undertake large volumes of international transfers that cannot be planned for and require same day payment. A possibility for customers to opt out of this term and condition may allow PSPs to flag this account as requiring closer scrutiny for AML. The rationale for this is to prevent APP funds moving out of jurisdiction. If they can be curbed in jurisdiction and the onward transmission generally slowly it may assist in recovery rates such that the loss is not left with the banks and more repatriation of funds (as opposed to compensation) can occur.
39. The ultimate goal must remain prevention. Therefore, a balance needs to be struck between the imposition of penalties and the incentivisation of banks to invest more in this area to protect their customers.

#### **Question 8**

Do you have any comments on Measure 3A? For example, do you have feedback on the design, or its effectiveness and proportionality?

40. We have previously raised concerns that the measures are aimed only at consumers and micro-enterprises (including trusts and charities). We ask that further thought is given to including not-for-profit organisations (such as the housing and education sectors) who are also particularly vulnerable and often do not operate with the same level of sophistication as larger commercial businesses.
41. We agree that SMEs should be excluded from the CRM Code. SMEs should be encouraged to implement appropriate and proportionate fraud control measures and governance arrangements within their businesses. Furthermore, they may be better placed to take out insurance policies to cover negligence of directors, officers and employees and/or cyber fraud.
42. All forms of APP fraud should be covered by the CRM Code.
43. Further steps could be taken by PSPs to compel a basic level of fraud awareness training in return for customers being permitted to use online banking facilities. For example, a compulsory annual (short) video which includes the eight types of APP fraud

listed on page 7 of the consultation and provides advice on how consumers can protect themselves.

#### **Question 9**

Do you have any comments on Measure 3B? For example, do you have feedback on the design, or its effectiveness and proportionality?

44. Please refer to our comments in paragraph 3 above.
45. Whilst every PSP should be required to sign up to the CRM Code, we accept that not every customer should be reimbursed. The CRM Code should not act as a guarantee (in a similar way to the direct debit guarantee) to avoid disincentivising individuals from taking any responsibility for their transactions and protecting themselves from fraud.

#### **Question 10**

Do you have any comments on these issues? For example, do you have feedback on whether we should use a direction or a rule change to pursue these measures, or whether BACS should be included?

46. Neither the direction nor self-governance of the CRM Code is working to the extent we had hoped, not just in terms of the low level of reimbursements but also the failure of the CRM Code to be causative of changes which reduce the occurrence of APP fraud in the first place and the limited number of signatories to the CRM Code.
47. We recognise the struggles some smaller PSPs may face with adherence to certain aspects of the CRM Code (or new rules and measures which the consultation seeks to explore), however, these should not be used as a barrier to change. It is possible that some exemptions to certain aspects of the CRM Code can be agreed upon and applied where it is disproportionate to expect the smaller PSPs to comply. That is not to say, they are not able to comply with the vast majority of the CRM Code's intention.
48. Furthermore, BACs payments should not be covered by the CRM Code. This is because BACs already have due diligence and fraud safeguards embedded within their onboarding process to become a BACs accredited payer.
49. More importantly, we consider that the focus of this question is incorrect. It ought not to be about the method through which the APP fraud has occurred but more about whether the victim falls within the categories covered by the CRM Code.
50. Thought should also be given to whether there would be a benefit from a joint initiative with Action Fraud to raise awareness and assist in educating the public, including younger people about the risk of APP fraud. This should be tackled both from the perspective of being a victim and also as being groomed to become a money mule.

51. Many money mules are led to believe their actions are consequence free – they have no understanding of the damage to their credit, CIFAS warnings, closure of their bank account and failure to open another account for 6 years etc. and the impact this can have on them progressing into adult and seeking employment.
52. We are aware of a number of fraud awareness initiatives such as Take Five which works to raise awareness of fraud and financial crime. We are very supportive of such initiatives and the more educated we can make the public, the greater the chance of avoiding them becoming future victims.

**Question 11**

Do you have any comments on our proposal to conduct an equality impact assessment for any measures developed following this call for views?

53. It remains a reality that fraudsters often target the most vulnerable in society. Therefore, an equality impact assessment is an essential step in ensuring the most vulnerable are afforded the greatest protections.