



**MM**  
Money Mirror

IN THIS ISSUE

# The Payment Systems Regulator issues its first Competition Infringement Decision

*“Collusion in payments is absolutely unacceptable. Where we see it happening, we will take action, stop it, and seek to impose significant penalties.”*

**Chris Hemsley, Managing Director of the Payment Systems Regulator, 31 March 2021**

## Introduction

The Payment Systems Regulator (PSR), as a concurrent UK competition regulator, has published the full details of its first infringement decision under the Competition Act 1998 in relation to two cartels in the prepaid cards market in Great Britain. The cartels related to market-sharing and customer allocation agreements and arrangements in relation to the supply of prepaid cards to local authorities for the distribution of welfare payments to vulnerable members of society (such as, the homeless, domestic violence victims and asylum seekers). The PSR fined the five cartel participants (Mastercard, allpay, APS, PFS and Sulion) in total over £33m.

## The PSR’s Investigation

This decision brings to a close the PSR’s lengthy investigation which had begun with a formal investigation into suspected anti-competitive behaviour being launched in October 2017; the scope of the investigation was extended during the process. Dawn raids were undertaken by the PSR in February 2018. One of the companies under investigation then made a leniency application (which was successful and resulted in a 30% reduction in their ultimate fine). In March 2021, the PSR issued the companies under investigation with a Statement of Objections (SO), setting out its provisional infringement findings, which is a necessary procedural

step before any infringement decision can ultimately be issued. As part of the settlement, the companies admitted their involvement in the cartel activities and agreed to pay a maximum penalty, as well as to the more streamlined administrative process. Three of those under investigation entered into settlement agreements with the PSR prior to the SO being issued and the other two shortly afterwards (with the PSR reducing their respective fines by 20% and 10% depending on this timing). The PSR [announced](#) its infringement decision in January 2022 before following up a few months later with the publication of its [decision](#).

The cartel participants were: (i) Mastercard, the global payment system operator, which had sponsored and mostly funded the National Prepaid Cards Network (the “**Network**”), which brought together public sector bodies potentially interested in prepaid cards and Mastercard’s programme managers (“**PMs**”); (ii) Sulion, which provided services to Mastercard and whose mandate was “to promote the use of prepaid cards in the public sector”; and (iii) allpay, APS and PFS, which were electronic money institutions, PMs and licensed issuers of Mastercard.

## The Infringement Decision

Chapter I of the Competition Act 1998 prohibits agreements, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the UK (or part of it) and which may affect trade within the UK. By their very nature, cartel activities, such as market sharing and customer allocation, are deemed to be a restriction of competition by object.

As mentioned above, there were two cartels. The first cartel involved all five companies. In the context of the Network, it was agreed that, whilst there was a contract or pilot programme in place, the PMs would not target or poach each other’s existing

public sector customers. Customer information was shared to achieve this. In addition, in the early days of the Network, the parties had also colluded to allocate exclusively between them potential new customer leads arising from Network promotional events. The PSR concluded that Sulion had facilitated the cartel. In addition, Mastercard had been involved in the discussions and had been aware of the adoption of the non-poaching arrangement. The cartel activity had been commercially beneficial to Mastercard as well as the PMs as the latter concentrated their efforts in expanding the number of public sector bodies using Mastercard prepaid cards rather than competing with each other for existing customers.

The second cartel only involved APS and PFS, who agreed not to target each other’s existing public sector customers when a contract was up for renewal (or a pilot programme was expiring), including through a public tender.

As the PSR has made clear, as a result of these cartels, local authorities could have missed out on an alternative supplier or products which were either cheaper or better suited for both their needs and those of the prepaid card users.

## Implications of the Decision

This decision by the PSR highlights the PSR’s willingness to use its competition law powers and take enforcement action, particularly where the vulnerable in society are being impacted, as well as demonstrating its objectives in action, namely to ensure that payment systems are operated and developed in a way that considers and promotes the interests of all the business and consumers that use them and to promote effective competition in the markets for payment systems and services.

The PSR’s position was succinctly presented by Chris Hemsley, the PSR’s Managing Director, when the decision was announced:

*“This investigation and the significant fines we have imposed send a clear message that the PSR has zero tolerance for cartel behaviour. We will intervene and enforce the law strictly to ensure there is effective competition in payments markets. This case is particularly serious because the illegal cartel behaviour meant there was less competition and choice for local authorities. This means they may have missed out on cheaper or better-quality products which were used by some of the most vulnerable in society.”*

On a practical basis, it is a reminder to businesses of the possible consequences of breaching competition law. Investigations are lengthy and resource intense. Infringement findings can lead to fines of up to 10% of group turnover, as well as the risk of private follow-on damages claims being brought by those adversely affected by the illegal behaviour. In the worst-case scenario of being investigated for suspected breaches, it is important for a company to carefully consider, on the basis of legal advice, whether to make a leniency application and/or seek a settlement agreement.

# FCA gets tough with consumer credit financial promotions

**On 6 May 2022, the Financial Conduct Authority (FCA) wrote to 28,000 credit brokers and high-cost lenders to remind them that financial promotions are to be clear, fair and not misleading. The FCA makes it clear that its remarks might also be relevant for other firms engaging in these activities.**

By way of reminder, consumer credit financial promotions are an invitation or inducement to enter into a regulated credit agreement. To communicate such financial promotion in the course of business, a person must either be authorised, the content approved by an authorised person or exempt. The FCA recognises that the cost of living is ever increasing and as result is expecting to see a greater demand for credit, particularly for those in vulnerable circumstances.

The FCA's strategy is to keep the sector under close review and to remind firms that they need to focus on their customers' needs and deliver the right information at the right time (all of which is to be done in accordance with the FCA's rules). In its letter, the FCA has highlighted a number of practices which it does not consider to be compliant with its rules. For example:

- Firms using phrases such as "no credit check loans", "loan guaranteed", "pre-approved" or "no credit checks"
- Promotions offering broking/direct lending services for high-cost short-term credit that does not specify the required risk warning
- Failing to include the representative APR, where a representative APR has been triggered
- Firms failing to make it clear whether they act as broker or lender, as required by CONC 3.7.7R

The letter also includes a reminder that FCA social media rules are media neutral, and that standalone compliance cannot be compromised even where there are character limitations on social media platforms. Advertising should also comply with the UK Code of Non-broadcasting and the Direct & Promotional Marketing (CAP Code) administered by the Advertising Standards Authority.

## What does this mean for you?

The FCA expects firms to review issued or approved financial promotions to ensure that they comply with the financial promotion rules in CONC 3. Firms are also to conduct a review of processes and systems and controls for financial promotions to determine they are sufficiently robust. Finally, the letter should be brought to the attention of the boards of relevant firms to consider the issues and approve any actions taken.

Relevant firms must consider the FCA's concerns and make a start on addressing its subsequent expectations. The FCA has expressed that it intends to proactively monitor the market to assess compliance and if it identifies non-compliant financial promotions it will consider possible further action which could include directions to withdraw an advert, a ban of the advert or the worst-case scenario, a fine.

Firms who didn't receive the letter directly from the FCA should not rest on their laurels. We would expect these firms to do the same and commence a review etc (as if the letter was directly sent to them), by way of good regulatory practice to avoid being caught out by the FCA. This is particularly important as the FCA has made it clear that it is important that all authorised firms issuing and/or approving consumer credit financial promotions should ensure that all financial promotions are clear, fair and not misleading and otherwise comply with CONC 3.



# Buy Now Pay Later – the next instalment...

## Background

Following the Woolard Review in February 2021, you may remember that HM Treasury published a consultation in October 2021 which closed on 6 January 2022. It set out proposals to extend regulation to unregulated Buy Now Pay Later (BNPL) products. The consultation sought views on the scope of regulation in relation to the activities which should be regulated, and the regulatory controls applicable to these types of products. It also considered whether other forms of short-term interest free credit (STIFC) should be treated in the same way as BNPL.

For helpful context, when HM Treasury refers to BNPL it means products that are generally taken out online by consumers who enter into an overarching arrangement with a third party-lender, under which numerous low value agreements are made. By way of distinction, STIFC includes products usually offered in-store to enable customers to pay for a single high value item when they take out the one agreement for a higher value with either a third-party lender or the retailer/supplier themselves.

## Where are we now?

On Monday 20 June 2022, HM Treasury [responded](#) to this consultation and confirmed the scope of regulation for BNPL products and STIFC that is provided by third-party lenders. Further feedback is now being sought as to whether or not the scope is extended to BNPL and STIFC provided by merchants. The deadline for stakeholders to provide further information is Monday 1 August 2022.

## What will remain unregulated?

As well as confirming the scope of regulation for BNPL and STIFC products, HM Treasury has also provided clarification

on arrangements that will remain exempt from regulation. These include:

- invoicing finance;
- interest free agreements which finance contracts of insurance;
- charge cards;
- trade credit; and
- employer/employee lending.

## Proposed regulatory controls

The Woolard Review and the consultation established that, while there is evidence of possible consumer detriment, the risk for consumers is lower when compared to interest-bearing credit products. Therefore, it is HM Treasury's view that the regulatory controls applied to agreements falling within scope of regulation are proportionate to the risk level of that product and the need to provide effective consumer protection.

HM Treasury put forward certain proposals in its consultation and has responded accordingly:

- **Credit broking** – it was proposed that merchants who offer BNPL (from a third-party lender) as a payment option should be exempt from regulation and do not need to apply for authorisation as credit brokers.  
**Response:** The intention is to exempt merchants as per the consultation proposal with certain exceptions to this in relation to domestic premises suppliers. The government has considered consumer detriment risks that might arise from these merchants and believes these risks can be mitigated by existing protections and other proposed new controls eg financial promotions.
- **Advertising and promotions** – apply the financial promotions regime to the advertising and promotions of BNPL.

**Response:** The government maintains that the financial promotions regime should apply to merchants offering BNPL and STIFC products. Legislation will need to be amended to bring promotions relating to BNPL and STIFC within scope of the financial promotions regime.

- **Pre-contractual information** – the consultation proposed that the FCA's rules on pre-contract disclosure and adequate explanations would be sufficient for BNPL agreements rather than applying the full suite of pre-contractual requirements specified under the Consumer Credit Act 1974 (CCA).  
**Response:** The view remains that the CCA pre-contractual requirements should be disapplied and that application of the FCA rules is the proportionate approach.
- **Form and content of the credit agreement** – it was proposed that bespoke legislation be drafted and implemented to set out the requirements for the form and content of BNPL agreements as the CCA requirements might not be appropriate.  
**Response:** The government considers it appropriate for the form and content requirements of the BNPL agreement to be prescribed in legislation secondary to the CCA rather than taking an FCA rules-based approach. The extent of the requirements in this bespoke legislation will be carefully considered and will require further engagement from stakeholders.
- **Improper Execution** – apply the improper execution provisions under section 61 of the CCA to BNPL agreements.  
**Response:** The maintained view is that it is proportionate to apply the CCA improper execution provisions to BNPL and STIFC agreements that will be within scope of regulation.
- **Creditworthiness and credit files** – the consultation sought views as to whether or not there should be specific creditworthiness requirements for BNPL agreements, and also whether they should be reported on credit files.

**Response:** It has been considered proportionate by the government to apply the FCA creditworthiness rules to in scope agreements, but it has given the FCA the decision-making powers to decide if the rules are to be applied as currently drafted or modified for BNPL and STIFC agreements. As with all other regulated credit agreements, there is no particular regulatory requirement to report information to credit reference agencies. The view held is that there should however, be clear, consistent and timely credit reporting from a responsible lending perspective. Credit reference agencies are being engaged to develop how they approach BNPL in a reporting context.

- **Arrears, default and forbearance** – the government set out its view that some of the requirements under the FCA arrears and default rules should apply to BNPL agreements. It also thought it was proportionate to apply the CCA post-contractual information provisions on arrears and default in order to address the lack of consistent treatment of customers who are in financial difficulty.  
**Response:** It is held that the FCA rules and CCA provisions on arrears and default are vital for customer protection. It is therefore the intention that the CCA provisions on arrears and default, will apply to BNPL and STIFC agreements, although it is recognised that these provisions may need to be adapted given that these types of agreements are generally short-term in duration. This will be considered, and any tailored requirements will be included in the draft regulations.
- **Section 75 CCA** – section 75 is a strong consumer protection measure already known and employed by consumers and therefore it should apply as with other regulated credit agreements.  
**Response:** The government feels very strongly that section 75 should not be disapplied and recognises that the monetary threshold of section 75 will mean that certain BNPL transactions

## Buy Now Pay Later – the next instalment... (continued)



fall outside of scope. However, this is the situation across other regulated credit agreements so there will be consistency in applying this.

- **Small agreements** – It was suggested that the small agreement provisions in the CCA be disapplied so that BNPL agreements which have a value of less than £50 do not fall outside of scope of all the CCA requirements.

**Response:** A consistent approach to consumer protection is key and to ensure that this occurs, the small agreement provisions set down in the CCA will be disapplied for BNPL and STIFC agreements.

- **Financial Ombudsman Service ('FOS') jurisdiction** – The view was that FOS jurisdiction should be extended to apply to BNPL agreements.

**Response:** As set out in the consultation, the view remains that consumers should have access to the FOS and therefore the jurisdiction of FOS will apply to BNPL and STIFC agreements. The FOS case fee will be considered in further detail as the current

case fee of £750 may be disproportional high when compared with the average BNPL transaction amount of £50-100.

### Next steps

1. The government now wants more information to help them form the view as to whether the scope of regulation should be extended to encompass STIFC products provided by merchants. The window to respond is open until **Monday 1 August 2022**. Views are welcome from everyone but in particular those from certain sectors including, *dentistry, healthcare, sport clubs and SME retailers*. Once these views have been considered the government will decide whether to bring STIFC products provided by merchants within the scope of regulation.
2. Towards the end of the year, HM Treasury aims to publish and consult on draft legislation.
3. By mid-2023 following the second consultation, the aim is to lay secondary legislation before Parliament. The FCA at this point, will be able to consult on its approach and the extended regime, after having worked closely with the government.

This is one to watch closely.

# Access to Cash Update: Government's response confirms legislation is on the horizon and FCA as access to cash regulator

In our last issue (which can be found [here](#)) we spoke about access to cash and [the initial Treasury consultation](#). The wait for the responses is now over, following publication on 19 May this year, alongside the Treasury's own policy plans to protect continued access to cash, confirming that legislation is indeed on the horizon.

The Treasury's [Summary of Responses](#) document, sets out the government's approach to legislate in this area in the Financial Services and Markets Bill.

Most notably, the Treasury plans to make the biggest banks and building societies "designated firms" who will need to comply with legislative and regulatory cash access requirements based on criteria set out in the consultation paper and introduce legislative geographical access requirements to ensure availability of, and a geographical spread of, cash withdrawal and deposit facilities across the UK.

The FCA is set to be the main regulator on access to cash at a local and national level. Its powers will be broadly consistent with its existing regulatory toolkit for other regulated activities. The regulator will be given powers to monitor designated firms to ensure they are continuing to offer adequate access to cash and will be able to enforce compliance on any cash access requirements.

To further support the FCA, the government will in due course set out its expectations as to a reasonable distance for people to travel when depositing and withdrawing cash, which will likely mirror the current spread of cash withdrawal and deposit facilities in the UK.



# Latest developments

## Buy Now Pay Later (BNPL)

- Apple will offer BNPL services in the US for iPhone users, which will be available on iOS 16 in Autumn 2022. Users will be able to take out an interest-free four-month loan on payments made using Apple Pay. It is also partnering with e-commerce platform Shopify to allow users to track the progress of their orders in the Apple Wallet app.
- The UK government has set out proposals for the regulation of the BNPL sector and will publish a consultation on draft legislation towards the end of this year. Following this, the government aims to lay secondary legislation by mid-2023, after which the Financial Conduct Authority (FCA) will consult on its rules for the sector. Lenders will be required to carry out affordability checks, to ensure BNPL advertisements are fair, clear and not misleading and will need to be approved by the FCA. Borrowers will be able to take complaints to the Financial Ombudsman Service.

## Retail Banking

- Under updated guidance proposed by the FCA, banks and building societies will need to assess the impact of changes to their services. The FCA is also consulting on requirements for more detailed analysis on how firms assess the impact on customers when they plan to close a branch, remove or convert an ATM or reduce the services they provide.

## Green fintech

- The Green Digital Finance Alliance and the Swiss Green Fintech Network, with support from the Swiss State Secretariat for

International Finance (SIF), launch the final version of the world's first green fintech classification. The Green Fintech Classification will be a tool to further evolve and stimulate the green fintech market by enabling a harmonised approach for investors, policy makers and market actors in relation to green fintech markets.

## Payments System Regulator

- The Payments Systems Regulator (PSR) announced plans that will see c.400 more financial firms provide Confirmation of Payee (CoP), a form of fraud protection service will increase coverage from 92% of transactions made via Faster Payments and CHAPS to 99%.
- The PSR welcomed the PSR Panel's Digital Payments Initiatives report. The PSR Panel identifies the barriers and potential solutions to enable more people to use digital payments and the report identified improving understanding and trust in digital payment options, tackling barriers to new digital payment services, reducing digital exclusion and placing better data in place to monitor the shift in digital payments as key areas of focus.

## Cryptoassets

- The FCA has highlighted that it has no regulatory oversight over direct investments in cryptoassets and NFTs and that there are no consumer protections for those who buy any cryptoassets and NFTs, and they are not Financial Services Compensation Scheme (FSCS) protected. Customers buying cryptoassets should be prepared to lose all the money invested. Companies marketing crypto were warned to stick to ASA guidelines, and to

stipulate they are not regulated by the FCA nor are protected by financial compensation schemes.

## Digital Payments

- A new study by Juniper Research found the value of biometrically authenticated remote mobile payments will reach \$1.2tn in 2027, rising from \$332bn in 2022. The growth is driven by recent regulatory changes, with the introduction of SCA (Strong Customer Authentication) pushing greater adoption.

## Anti-fraud

- The FCA's ScamSmart anti-fraud information page only received 63,578 views last year, despite it investing £2.12m on the campaign. Although push payment fraud has risen the number of people consulting the FCA's ScamSmart page has fallen.



## Contacts



**Charles Buckworth**  
Partner  
Commercial, Technology and Outsourcing  
+44 20 3060 6641  
[charles.buckworth@rpc.co.uk](mailto:charles.buckworth@rpc.co.uk)



**Whitney Simpson**  
Of Counsel  
Financial Services Regulatory - Payments  
and Consumer Finance  
+44 20 3060 6586  
[whitney.simpson@rpc.co.uk](mailto:whitney.simpson@rpc.co.uk)



**Leigh Gapinski**  
Associate  
Commercial, Technology and Outsourcing  
+44 20 3060 6927  
[leigh.gapinski@rpc.co.uk](mailto:leigh.gapinski@rpc.co.uk)

If you would like to get in touch with the Money Mirror team, please contact us at [moneymirror@rpc.co.uk](mailto:moneymirror@rpc.co.uk)



Check out our latest edition of **Retail Compass**, together with **Crypto Corner** in our **Financial Crime Time**



rpc.co.uk