

## **DRAFT – Payments Strategy Forum Terms of Reference**

### **Preamble**

1. The Payment Systems Regulator (PSR) has a duty to promote the development of, and innovation in payment systems in the interests of those who use, or are likely to use, the services provided by those payment systems (service-users).
2. Due to the network effects inherent in payment systems, we recognise that the development and innovation of payment systems can require participants to work together, or invest collectively.
3. The PSR has established the Payments Strategy Forum (the Forum) to provide coordination where collective action can promote innovation or downstream competition in the interests of service-users.
4. This is distinct from unilateral innovation, which is an important source of competitive advantage, market dynamics and competition generally. In order to preserve incentives for participants to keep innovating for the benefit of service-users, the Forum will avoid activities in those innovation spaces which are best left to individual firms.
5. These Terms of Reference will be reviewed, and may be altered, in consultation between the PSR and the Chair, within six months of the first Forum meeting.

### **Objectives**

6. The Forum will lead an ongoing process to identify, prioritise and develop strategic initiatives where industry can work together to deliver innovation for the benefit of those who use services provided by payment systems.
7. The Forum will proactively engage with a broad and diverse range of consumer representatives and service-users, and put their views at the beginning of the strategy setting process.

## Scope

8. The Forum will consider both payment systems and payment services in so far as the development of payment systems can be an enabler of new or improved payment services.
9. In line with competition law, where the work of the Forum and its working groups involves cooperation between firms who would otherwise compete, stringent measures should be applied to ensure that such cooperation delivers substantial progress and real benefits for service-users. The Forum will also work to ensure that such cooperation is the only way those benefits can be realistically achieved.
10. To determine areas where co-operation is necessary and/or which require strategic coordination, the Forum's working groups are expected to make use of robust evidence and cost benefit analysis.
11. The PSR will develop a draft evaluation framework for the Forum's consideration. The framework will be designed to assist the Forum and its working groups in considering how to examine proposals in an objective manner and take steps to abide by competition law. It should ensure that the Forum only pursues initiatives that require collaborative work by industry and have a substantial net benefit to users of payment systems.
12. The Forum will be concerned with the identification, prioritisation and development of initiatives to deliver innovation. However, delivery itself will take place outside the Forum's scope. The Forum will monitor the industry's progress in delivering against its initiatives.

## **A . Constitution of the Forum**

### **The Forum Chair**

13. The Forum will have a Chair who is independent of payments industry interests. They will be appointed and accountable to the PSR.
14. The Chair is responsible for leadership of the Forum and ensuring its effectiveness in all aspects of its role.
15. The Chair is responsible for preparing and publishing each year an assessment of the Forum's delivery against its objectives and any areas for improvement. In the first year, this will form part of the joint review which the PSR will undertake with the Chair.

### **The Forum and the Payments Community**

16. The Forum, a focused group of senior individuals, will facilitate discussions, agree priorities and formulate strategic recommendations. It will have around 20 members in senior positions, with the ability to shape and make decisions on strategy and/ or policy, within their organisations and/ or their sector more broadly.
17. Each member will demonstrate a track record of performance in similar strategy setting roles and commitment to delivering good outcomes for the benefit of service-users. Forum members will not represent specific constituencies of stakeholders or organisations but they should be aware of the general viewpoint of their sector where such a consensus can be identified.
18. The Forum will work with the payments 'community', which is open to all interested stakeholders. The payments community will be an integral part of the strategy setting process. It will allow the Forum to continuously engage and consult with a broader range of interested stakeholders as the Forum develops its strategic recommendations.

## **Membership and appointments**

19. The PSR will appoint the Chair for an initial term of three years.
20. The Chair and the PSR will jointly manage the selection process for Forum members.  
The Chair and the PSR may introduce succession planning for the Forum membership at an appropriate time.
21. Members will be appointed for an initial two year term. The PSR will review the Forum's membership as part of the joint review of the operation of the Forum, which the PSR will undertake with the Forum's chair, after a year.
22. Members who are no longer able to participate in the Forum's discussions may be replaced for the remainder of their term at the discretion of the Chair, with the agreement of the PSR.
23. The Chair, in consultation with the PSR, may also consider and decide on applications for membership received on an ad hoc basis and may admit an additional member where the views of a relevant category of participant or stakeholder are not properly reflected in discussions of the existing membership.

## **B. Forum activities and deliverables**

24. To achieve its objectives, the Forum will:
  - a) Put the interest of service-users at the center of its deliberations.
  - b) Seek, and demonstrate that it has properly considered, the wider views of relevant stakeholders at all key stages of its discussions, in particular through engaging with the payments community.
  - c) Seek to reach consensus on what desirable outcomes look like for service-users, based on available evidence.

- d) Seek to identify and prioritise areas with a positive net benefit, where joint work is needed to deliver these outcomes. Define and agree strategic recommendations to coordinate activity in line with these priorities. The Forum recommendations will include high-level timelines and deliverables.
- e) Publish an annual report which tracks progress of relevant stakeholders against the Forum's strategic recommendations and assesses where these have been adopted.

### **C. Functioning of the Forum**

- 25. It is expected that appointed members will be present at all meetings of the Forum.
- 26. The Chair will endeavor to achieve consensus between Forum members on priorities and recommendations under discussion. Dissenting opinions will be reflected in the minutes of the meeting.
- 27. Progress towards reaching consensus will be supported by evaluating options using robust evidence and cost benefit analysis.
- 28. The Forum has no powers to direct its members, or the wider sector to undertake any action.

#### **The role of the PSR and other authorities**

- 29. The PSR will attend all Forum meetings and actively support the Chair where guidance is required in relation to its objectives. The Chair will be appointed by and accountable to the PSR.
- 30. The Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority may observe meetings and provide guidance to the Chair in relation to their objectives, in consultation with the PSR.
- 31. Other Authorities may attend Forum meetings where appropriate to provide relevant input into discussions.

## Meetings

32. It is expected that the Forum will have between four and six meetings a year and there will be a number of additional stakeholder engagements or events.
33. Minutes and a summary of meeting outputs suitable for publication through relevant channels will be approved by Forum members after each meeting.

## Secretariat

34. The Chair will be supported by a secretariat provided by the PSR.
35. The secretariat will be responsible for supporting the Forum, its meetings and related events. All Forum-related communications between Members outside of meetings will be exchanged through the Secretariat.
36. Staff providing secretariat support will remain solely accountable to the PSR in the performance of their duties.

## Agenda

37. The agenda will be circulated in advance of Forum meetings. Forum members, the PSR and relevant authorities may suggest forward agenda items to the Chair via the secretariat.

## Working groups

38. The Forum may establish and commission working groups for a limited period of time to engage in more detail or undertake more analysis on a particular issue, or to develop recommendations in further detail. It is expected that industry will provide resources and where necessary fund these working groups.
39. The Forum should agree terms of reference for each working group. This should include clear scope, objectives and a timetable in advance of the working group starting to meet.

40. The Forum will agree working group membership and a working group chair. This may include members or chairs who are not current Forum members. At least one of the working group members should be a Forum member. The PSR, and other regulators, may choose to attend.
41. The working group(s) Chairs will report back to the Forum.

### **Research and analysis**

42. In order to support Forum discussions, develop positions or support recommendations, the Forum may commission research or analysis. It is expected that industry will provide resources and where necessary fund this research and analysis.
43. The funding arrangements for this research or analysis will be agreed by discussion of the Forum, and will depend on the scope of the task at hand.
44. The Forum will make use of the resources of its members while seeking to ensure that research or analysis commissioned meets high standards of objectivity and independence.

### **Transparency**

45. Summaries of meetings, reports and working papers developed by the Forum or its working groups will be published through relevant channels, including websites.
46. Stakeholders with an interest in the Forum's work and who do not participate in the Forum itself will be encouraged to engage through the Forum working groups or the payments community.

### **Evaluation**

47. The PSR will review the effectiveness of the Forum annually taking industry and regulatory developments into account and considering the views of other regulators / the Bank of England. This will include a joint review in the first year, which the PSR will undertake with the Chair.

48. The review will assess the extent to which the Forum is able to achieve its objectives as set out above and whether changes are needed to its remit, composition or approach.

### **Information sharing**

49. The Forum may need to share sensitive information from time to time and the PSR or the Forum may issue guidance to working groups on such exchanges for competition law purposes.

50. Guidance on information sharing taking place between Forum members can be found in annex 1 below.

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## **ANNEX 1 - Guidance on Information sharing and**

### **The Payment Systems Forum**

#### **Introduction**

The purpose of this note is to provide guidance to the Payments Strategy Forum (“the Forum”) in respect of competition law and in the sharing of sensitive information between competitors and potential competitors.

The objective of the Forum is to identify, prioritise and deliver strategies to coordinate and drive collaboration where this is necessary to promote innovation in payment systems for the benefit of users. Such coordination necessarily involves sharing of information, sometimes between competitors in various parts of the payments industry.

The PSR is duty-bound to promote competition and is charged with enforcing competition law in relation to payment systems. The responsibility for ensuring the lawfulness of any exchange of such sensitive information between competitors rests solely with the undertakings concerned and their representatives.

#### **Information sharing and competition law**

The sharing of certain information can be damaging to the process of competition by enabling competitors to substitute coordination for competition. In certain circumstances, such information exchanges may infringe either UK or EU competition law<sup>1</sup>. Such infringements can lead to financial penalties<sup>2</sup>.

Information exchange is unlawful if it establishes a concerted practice between competitors.

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<sup>1</sup> The Chapter I prohibition under the UK Competition Act 1998 , prohibits:-

“Agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.”

Article 101 also prohibits similar arrangements where they affect trade between EU member states.

<sup>2</sup> Of up to 10% of annual turnover under the UK Competition Act 1998 and European competition law

A concerted practice refers to a form of coordination where practical cooperation between undertakings is knowingly substituted for the risks of competition.

Information exchanges may distort competition in at least three ways. They may allow companies to reach a common understanding as to future commercial behavior, they may provide the basis for monitoring any departure from a collusive arrangement or they may support market foreclosure activity against new entrants.

**Under competition law it is for competing undertakings to ensure that any cooperation or information exchange is lawful.**

Where it is likely that an information exchange may pose a problem but is nevertheless necessary for the effective working of the Forum, members will need to identify compliance risk, take legal advice and ensure that sufficient safeguards are in place *prior to sharing the information.*

### **Key Factors in assessing information exchanges<sup>3</sup>**

The effect on competition resulting from information exchange depends on the characteristics of the market in which it takes place, the nature of the firms involved as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination. It is not therefore possible to be categorical about which information exchanges are unlawful. However, it is possible to identify aspects of information exchange and the context in which they occur as problematic and likely to infringe competition law.

For an information exchange to have restrictive effects on competition within the meaning of competition law, it must be likely to have an appreciable adverse impact on one (or more) of the parameters of competition such as price, output, product quality, product variety or innovation<sup>4</sup>. Firms can exchange information if that information is

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<sup>3</sup> This is a summary only and undertakings should make themselves aware of the relevant information and circumstances when an exchange becomes unlawful.

<sup>4</sup> Generally therefore only information exchanges between competitors will be prohibited; however, in certain situations where third party intermediaries are used as a conduit for information exchange, other information exchanges can also be unlawful

genuinely in the public domain<sup>5</sup>. Information is genuinely in the public domain, however, only if it has been published widely and the information is equally accessible to all competitors and customers. Similarly information which is historical, aggregated or anonymised will be generally acceptable.

The types of information which would be inappropriate to share include prices and pricing policies, discounts and rebates and quotas or caps on production. The exchange of information may also lead to restrictions of competition where it is liable to enable undertakings to be aware of market strategies of their competitors.

### **The Work of the Forum and Information Sharing**

In relation to the Forum, a particular issue that may arise might be the possible sharing of information which has a strategic quality. This need could arise in relation to the Forum assessing various innovative options and making recommendations. Given the risks that such information could be used to facilitate collusive activity, particular care will need to be taken by the undertakings concerned both in identifying the problem beforehand and effecting any exchange in a compliant manner.

The PSR expects and the law demands that undertakings will ensure that such exchanges are conducted lawfully by, for example, organising the aggregation or anonymisation of information.

**If members have any doubts about their legal position in sharing the information proposed, then they should avoid sharing the relevant information until they have sought independent legal advice and they have taken steps to ensure that the exchange would be lawful.**

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<sup>5</sup> However, Forum members should not assume that sharing information in the Forum, which has been previously published in some way, is automatically acceptable.