Evidence for House of Commons Public Bill Committee on Clause 164 of the Finance Bill 2016 (Data Gathering Powers)

by the Electronic Money Association on 4 July 2016

The Electronic Money Association ("**EMA**") is the trade body representing electronic money ("**e-money**") issuers and payments service providers. Our members include leading payment and e-commerce businesses worldwide, representing online payments, card-based products, vouchers and those employing mobile channels of payment. A list of EMA members is given at the end of this paper.

We support a fair economy where businesses pay tax appropriate to their income. We therefore support the Government's aims to increase tax revenue by gathering data to aid in the capturing of unreported income (the "**hidden economy**"). However, we believe this aim should not be to the detriment of consumers' rights to the protection of their data. The proposals as set out in Clause 164 of the Finance Bill 2016 give rise to broader powers than those set out in the explanatory notes, resulting in a law that is heavily disproportionate in relation to the intended result.

Clause 164 adds "*providers of electronic stored-value payment services*" ("**ESV-PSPs**") and "*business intermediaries*" ("**BIs**") to the list of data-holders[1] in Schedule 23 to the Finance Act 2011 ("**Schedule 23**")[2] thereby granting HM Revenue and Customs ("**HMRC**") the power to gather data from electronic stored-value PSPs and BIs about business customers.

The data collection powers being proposed are not sufficiently limited: the scope of what data can be collected, and the definition of whose data can be collected are broad, collection will be periodic – annually or even monthly, and the data, once collected, may be used for any purpose[3]. Below we have set out our views in further detail.

1. The law doesn't provide a sufficiently narrow definition of whose data, and what data, can be collected by HMRC.

Whose data will be captured? (Who is the data subject?)

The definition of data subject is: "*the recipient of a payment from a transaction for which the data holder provided electronic [stored-value] payment services.*"[4]

[1] This affects only those data-holders located in the United Kingdom.

[2] By inserting new paragraphs 13B and 13C into Schedule 23.

[3] Paragraph 2 of Schedule 23 to the Finance Act 2011.

[4] As set out in the proposed paragraph 11B (2) of the Data-gathering Powers (Relevant Data) Regulations 2012 (Amended via Regulation 5 of the Draft Data-gathering Powers (Relevant Data) (Amendment) Regulations 2016). The draft regulations have not yet been updated to reflect the revision to clause 164 but we have assumed that version that will be laid before Parliament will be consistent with the definitions in clause 164.

The "*data-holder*" is the ESV-PSP (e.g. a bank, building society or an electronic money institution), and the "*electronic stored-value payment service*" could include the provision of an account such as a bank or building society account or an e-money account. Currently the only *transaction* data that HMRC is permitted to collect is that received by *merchants* through their acquirers. Merchants are registered businesses who have a VAT number, and who are customers of an *acquirer*. An acquirer is a payment service provider (historically part of a bank) that processes the merchant's transactions. Therefore HMRC can currently only collect payment transaction data in relation to registered businesses in order to compare with their reported taxable earnings, but they cannot collect this information in relation to consumers.

The draft new law however, extends the scope of data subject to include *anyone* who receives payments into any electronic stored value account. As most accounts are accessible online, and most transactions take place electronically, this definition now includes not only businesses, but also all consumers of banking, building society and e-money services across the UK.

What data will be captured?

The definition of *relevant data*[5] that will be subject to these new data gathering powers is "*information relating to transactions, including the currency these transactions were made in*;" This is an extremely broad definition, and includes all transactions a data subject makes or receives. Currently, HMRC has permission to collect a fairly extensive range of data from employers, banks, housing agents etc. in order to compare against tax returns. However, in relation to *consumer* payment accounts, they only have permission to collect data in relation to the *interest* earned on current or savings accounts or other investments.

This new definition would include payments consumers receive from family members, gifts, occasional sales such as classified ads or auctions, personal loans, refunds etc.

The law also has a retrospective application, so will include data regarding historic transactions, made prior to the introduction of this legislation.

From whom can HMRC request the data?

HMRC can request the data described above from ESV-PSPs and BIs.

"*Electronic stored-value payment services*" are defined as "*services by means of which monetary value is stored electronically for the purpose of payments being made in respect of transactions to which the provider of those services is not a party*." Contrary to the stated intention of the

[5] As set out in the proposed paragraph 11B (1a) of the Data-gathering Powers (Relevant Data) Regulations 2012 (Amended via Regulation 5 of the Draft Data-gathering Powers (Relevant Data) (Amendment) Regulations 2016 ("Amendment Regulations")).

draft law, the definition is not limited to a small subsection of payment service providers who operate "*digital wallets*". Instead, bank and building society accounts as well as e-money accounts would fall within the definition of "*electronic stored-value payment services*" as described above, as would gift cards.

A BI is defined under paragraph 13C Schedule 23[6] as a person who: "*(a) provides services to enable or facilitate transactions between suppliers and their customers or clients (other than services provided solely to enable payments to be made), and (b) receives information about such transactions in the course of doing so.*" This would include:

- any provider of a platform that facilitates transactions between buyers and sellers e.g. online auction sites, mobile app stores, online games platforms that host third-party subscription and/or freemium games, and price comparison websites that may facilitate introductions.
- Platforms that facilitate the finding of service providers such as tradesmen, or transport and delivery services.
- Providers that facilitate the finding of take-away food services or their delivery
- Online letting, holiday and real estate platforms
- It may also capture telecommunications providers, internet service providers and cable companies when acting as facilitators of communication
- Similarly, this could also capture the non professional facilitating of such introductions such as classifieds, discussion groups and various social networking platforms

The impact in terms of resource and economic cost on the online economy could be substantial; and this appears to be disproportionate to the objectives sought, and is unlikely to be the most effective means of achieving these objectives.

How will the data be collected?

Schedule 23 envisages HMRC issuing information notices to data-holders who must provide the relevant data. HMRC stated that it "*will only issue information notices to data-holders where there is a commensurate benefit from the value of the data that will be obtained and will consider the administrative burden placed on the data-holder.*"[7] However, HMRC's current practice with respect to merchant acquirers is to collect relevant data on an annual basis, and there are plans to increase this to a monthly collection period.

The practical application of the law is therefore not in keeping with the suggested intention: it will not involve targeted requests, but instead a regular data trawl. We do not believe that

[6] Clause 79(1) of the Finance (No. 2) Bill 2016.

[7] HMRC, 2015. *Tackling the hidden economy: Extension of data-gathering powers: Summary of Responses 9th December 2015*. London: HMRC.

the wholesale collection of consumer data is consistent with consumers' expectations of privacy and trust in business dealings. The powers should also be proportionate to the objectives that are sought.

Conclusion

The draft amendments to Schedule 23 (HMRC's data gathering powers) have the effect of widening the scope of data gathering powers to all electronic payment transactions received by any person by any means. This is a far-reaching change, which is neither set out in the explanatory memorandum nor adequately explored by way of the impact assessment. Not only would the impact on consumer trust be profound, as consumers come to regard payment service providers as the channel by which their personal data is transferred to the Government, but the proposed powers are disproportionate with respect to (i) HMRC's aims, (ii) data protection[8], and (iii) the right to privacy[9].

Coupled with the practical application of these powers, we believe this is a significant departure from the current powers, and should be considered in more depth before introducing into law. We propose a number of amendments that would allow HMRC to capture the type of data they are interested in, and would be in line with HMRC's existing powers.

- The definition of Providers of electronic stored-value payment services in the proposed paragraph 13B Schedule 23 should be qualified and amended to: "*a person who provides* ***~~electronic~~*** *stored-value payment services* ***in the course of business*** *is a relevant data-holder*",
- The definition of "*electronic stored-value payment services*" in the proposed paragraph 13B Schedule 23 should be qualified and amended to: "*services by means of which monetary value* ***~~is stored electronically for the purpose of payments being made~~*** ***is transferred to a person acting in the course of business***, *in respect of transactions is to which the provider of those services is not a party.*"
- Qualifying a "*payment recipient*" to a "*payment recipient* ***acting in the course of business***"

[8] The third data protection principle states: "*Personal data shall be adequate, relevant and* ***not excessive in relation to the purpose or purposes for which they are processed***." (Paragraph 3 Part I Schedule 1 to the Data Protection Act 1998). Additionally, articles 8(1) and 8(2) of the Charter of Fundamental Rights of the European Union ("**CFREU**") state: "*1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be* ***processed fairly for specified purposes*** *and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*"

[9] Article 8 of the European Convention on Human Rights (set out in Schedule 1 to the Human Rights Act 1998) and article 7 CFREU.

Our proposed approach would continue to allow HMRC to seek transactional information relating to persons seeking to conceal their business income by operating consumer accounts, but would require HMRC to be specific in this regard, rather than collecting data about all consumers wholesale.

Impact on Fintech

1. In the course of discussions with stakeholders, we have understood that it had not been HMRC's intention to collect equivalent data on transactional income for customers of banks. This would, if implemented in legislation put EMIs, PIs and other affected non-bank financial institutions (including FinTechs) at a distinct competitive disadvantage in relation to banks. This is both an economic resource-related issue and also a reputational matter if consumer data is also collected. Banks already have an advantage in the market by virtue of their established status as the original payment service providers and any disadvantage placed on non-bank financial institution would be likely to restrict customer choice.
2. Hence, we propose that the wording of any legislation should be neutral as to the type of institution that is captured, and the scope of powers to which it is subject.
3. HMRC's August 2014 consultation expects *'the administrative burden will be relatively small'* (Section 3.22). However, a requirement to provide the data in an electronic, standardised format (Section 4.35) places the entire burden of data transformation on the provider without any corresponding recompense. The effect on businesses' systems and demand for resources could be considerable, particularly given the periodic and wholesale request for data that is contemplated. This burden would act as an additional barrier to entry into the payment sector because of the increased upfront cost of putting the necessary systems and processes in place to collect and report customer data to HMRC.
4. We also propose that HMRC be targeted in its policy of collecting data under the proposed revisions to Schedule 23. We suggest that HMRC should only request data under the proposed new powers on an ad hoc basis with specific person in mind rather just trawling through the customer data held by the relevant data-holders.

Comments and questions should be addressed to:

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List of EMA members as of June 2016:

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American Express
Azimo Limited
Bitstamp
Blackhawk Network Ltd
Boku Inc
Citadel Commerce UK Ltd
ClickandBuy International Ltd
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EMP Systems
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First Rate Exchange Services
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