

Inquiry into Mobile Payment and Digital Wallet Financial Services Questions on Notice to the Reserve Bank of Australia

Public hearing – 26 July 2021

1. Where are other jurisdictions up to on NFC regulation/legislation?

Page 3

CHAIR: I want to return to something that I was talking about earlier. According to your submission, the European Commission is currently undertaking a formal antitrust investigation into a number of Apple's practices in relation to Apple Pay, including its limitation of access to the near-field technology for payments on the iPhone. It's also considering legislation that would ensure third parties could access technologies used for payments on fair and reasonable terms. You note that the German, Swiss and Dutch national authorities have also considered or are considering access issues related to NFC. Does either of you want to give us an update to the best of your knowledge on where those investigations are up to?

Dr Richards: I'm not in a position to do that. Chay, do you have any additional information?

Mr Fisher: No, I don't. We'd be happy to come back on that question as to exactly where they're up to. I know that there have been some recent changes to the way that the German regulations have approached this. I think there's been a bit of attention around the access fees that you just mentioned and trying to clarify those. I'd be happy to come back with further information if that's of interest, but it is something that we're aware of and are continuing to keep an eye on.

Response:

The Bank has gathered the following information from websites of foreign regulators and news reports on their actions.

In 2019, the German Parliament passed a law that requires providers of technical infrastructure used for payments (such as NFC) to grant third-party payment service providers access to those infrastructures. The law was widely interpreted as a response to Apple Pay's restriction on direct access to the iPhone's NFC technology. The German Parliament has since passed amendments to clarify aspects of the law, most notably a change that would allow providers of technical infrastructures to only charge a fee not exceeding the 'actual costs' of access, rather than 'an appropriate fee' as provided under the original legislation. The amendments would also expand the scope of the legislation by requiring: access to devices other than smartphones (e.g. smart watches); and functional equality, meaning payment service providers would also be guaranteed access to other device features used for payments such as biometric authentication. Providers of technical infrastructure can refuse access if they can prove that doing so would threaten the security and integrity of the service. However, the amended law has tightened this exemption by allowing access seekers to have the reasons for a refusal of access reviewed by an expert.

In 2018, the Swiss competition regulator conducted an investigation into Apple Pay following a complaint from a local QR-based payments app. TWINT, a payments app developed by Swiss banks, had claimed Apple Pay was automatically launching when an iPhone was brought into proximity with a payments terminal, which was interfering with the functionality of its own app. TWINT argued in its claim that this feature of Apple Pay was anti-competitive. Apple subsequently committed to [resolve the matter](#) by providing TWINT with the technical capability to suppress the launch of Apple Pay during a TWINT payment.

The Dutch competition regulator recently conducted an investigation into mobile device manufacturers' restriction of access to NFC technology for contactless payments. In particular, it looked at whether limitations on NFC access breached Europe's Interchange Fee Regulation (IFR). The investigation was [closed](#) in July 2021, concluding that the IFR could not be applied to address NFC access issues in the Netherlands. However, the Dutch regulator stated it was in favour of amendments to European regulations to mandate that 'technical service providers' such as smartphone manufacturers offer access to payments technologies such as NFC.

As part of its proposed Digital Markets Act, the European Commission (EC) is currently considering legislation that would ensure third parties could access operating system hardware or software features on fair and reasonable terms, and under equal conditions to the device or operating system manufacturer. The [draft Digital Markets Act](#) was published in late 2020 and is currently under consideration by the European Parliament. Separately, the EC is conducting a formal anti-trust investigation into NFC access issues related to Apple Pay. The investigation is considering whether a number of aspects of Apple’s conduct in relation to Apple Pay, including limitations on access to NFC technology, violate EU competition rules. [Media reports](#) have suggested that the anti-trust investigation into Apple Pay is “quite advanced”.