



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Regulation of the Retail Payments System Additional Policy Approvals	Date to be published	8 September 2021

List of documents that have been proactively released

Date	Title	Author
29 June 2021	<i>Regulation of the Retail Payments System Additional Policy Approvals</i>	<i>Office of the Minister of Commerce and Consumer Affairs</i>
30 June 2021	<i>Regulation of the Retail Payments System: Additional Policy Approvals Cabinet Minutes</i>	<i>Cabinet Office</i>
23 June 2021	<i>Regulatory Impact Statement: Additional tools for regulating the retail payments system</i>	<i>MBIE</i>

Information redacted

YES

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Some information has been withheld for the reason of Confidential advice to Government.



Cabinet Economic Development Committee

Minute of Decision

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Regulation of the Retail Payments System: Additional Policy Approvals

Portfolio Commerce and Consumer Affairs

On 30 June 2021, the Cabinet Economic Development Committee (DEV):

Background

- 1 **noted** that on 14 April 2021, DEV:
 - 1.1 agreed to introduce a regime to regulate (on a case by case basis) classes of retail payments system participants, their providers, and any associated infrastructure operators;
 - 1.2 agreed that the Commerce Commission be empowered as the regulator for the new regulatory regime;
 - 1.3 agreed that the overall objective of the regime be to ensure the retail payments system delivers long term benefits to merchants and consumers;
 - 1.4 invited the Minister of Minister of Commerce and Consumer Affairs to report back in June 2021 on the secondary policy issues, following targeted consultation;

[DEV-21-MIN-0075]

Objectives of the regulatory regime

- 2 **agreed** that the specific objective of the regime be to ensure that the retail payments system delivers long-term benefits to merchants and consumers through efficient retail payment networks and competition in the supply of retail payment services;
- 3 **agreed** that in considering the objective of the regime, decision makers should also, as a secondary consideration, have regard to fair distribution of costs to merchants and consumers, and transparency within the retail payments system;

Design of regulatory model

- 4 **noted** that Cabinet has previously agreed that the regime should adopt a designation model to provide flexibility and future-proof regulation [DEV-21-MIN-0075];
- 5 **agreed** that designation can potentially apply to any retail payment network (excluding cash) in the retail payments system;

- 6 **agreed** that a designation captures all the participants in the retail payment network, which includes network operators, payment service providers and infrastructure providers, and captures all payment instruments within the retail payment network;
- 7 **agreed** that the Minister of Commerce and Consumer Affairs be responsible for recommending the designation of retail payment networks to the Governor General, through an Order in Council, on a recommendation from the Commerce Commission;
- 8 **agreed** that the Commerce Commission, when making a recommendation to designate a retail payment network designation, must consider the following:
- 8.1 whether designation of the retail payments network is likely to promote the objectives of the regime;
 - 8.2 any features or conduct of the retail payment network that reduces or is likely to reduce competition or efficiency in the supply of retail payment services;
 - 8.3 the nature of the retail payment network being designated, which includes consideration of:
 - 8.3.1 the number and value of the transactions that the system presently processes or is likely to process in the future;
 - 8.3.2 the nature of the transactions that the system presently processes or is likely to process in the future;
- 9 **agreed** that in making a designation, the Minister must have regard to other regulatory requirements applying to the retail payment network;
- 10 **agreed** that the Commerce Commission must consult affected parties and publish the rationale for designation;

The Commerce Commission's toolkit

- 11 **noted** that Cabinet has previously agreed that the Commerce Commission would have the ability to impose requirements regarding pricing limits and principles, and has agreed in-principle that the Commerce Commission would have the ability to impose requirements regarding information disclosure, accept enforceable undertakings, and make directions to amend rules and systems [DEV-21-MIN-0075];
- 12 **agreed** that the Commerce Commission have the power to issue standards imposing the following requirements on participants in designated retail payments networks:
- 12.1 information disclosure requirements;
 - 12.2 pricing method requirements;
 - 12.3 access requirements;
 - 12.4 pricing limits and pricing principles;
- 13 **agreed** that standards can differ in application between retail payment networks, between classes of participants within retail payment networks, and between product types within retail payment networks;

- 14 **agreed** that the Commerce Commission have the ability, in regard to a designated retail payment network, to:
- 14.1 direct the network operator to set network rules;
 - 14.2 direct the network operator to seek authorisation before any substantive rule changes are implemented;
 - 14.3 direct the network operator to amend the network rules;
 - 14.4 direct participants of a designated retail payment network to comply with a network rule;
- 15 **agreed** that the Commerce Commission must have regard to the objectives of the regime, and to the following criteria when issuing standards or directions:
- 15.1 setting an information disclosure standard – the party is a participant of a designated retail payment network;
 - 15.2 setting a pricing standard – the Commerce Commission must consider whether features are present, or likely to be present, in a retail payment network that are resulting or that are likely to result in the objectives of the regime not being met;
 - 15.3 setting a standard for access – the Commerce Commission must consider whether features are present, or likely to be present, in a retail payment network that are resulting or that are likely to result in the objectives of the regime not being met, and consider the effect of intervention on innovation;
 - 15.4 directions to amend and establish network rules – the Commerce Commission must consider whether features are present, or likely to be present, in a retail payment network that are resulting or that are likely to result in the objectives of the regime not being met;
 - 15.5 directions to comply with network rules – actual or suspected non-compliance of the party;
- 16 **agreed** that the Commerce Commission have the ability to issue standards that will apply to merchants detailing what payment surcharging is prohibited for the purposes of the Fair Trading Act 1986, and that may differ depending on the retail payment network and the type of merchant;

Monitoring, enforcement, general powers and penalties

- 17 **agreed** that the Commerce Commission have powers to monitor and publish reports on the state of the retail payments system;
- 18 **agreed** that the Commerce Commission have the power to require participants in the retail payments system to produce new information to support the monitoring function, and to provide this information to the Commerce Commission;
- 19 **agreed** that the Commerce Commission have the power to enter into enforceable undertakings with any participants in the retail payments system, as an alternative to regulation or to remedy non-compliance;

- 20 **agreed** that the Commerce Commission will carry out its functions (including enforcement of contraventions) under the regime drawing on its relevant powers and provisions in the Commerce Act 1986 (with any reasonable or necessary modifications), including provisions relating to the making of a determination, and the power to demand information, accept enforceable undertakings, and the offence for obstructing the Commerce Commission;
- 21 **agreed** that a contravention of the obligations set out in the table in Appendix 1 to the paper under DEV-21-SUB-0146 be subject to the corresponding maximum pecuniary penalty amounts in the same table;
- 22 **agreed** that the court may make orders in relation to conduct that contravenes or may contravene the regime, including granting injunctions, requiring compliance with the regime, and other orders in relation to contracts, including compensation and damages for affected parties;

Initial designation of Mastercard and Visa retail payment networks

- 23 **noted** that Cabinet has previously agreed to establish a transitional price path to reduce interchange fees for the Mastercard and Visa credit and debit cards [DEV-21-MIN-0075];
- 24 **agreed** that the Retail Payments System Bill include initial designations of the Mastercard credit, Visa credit, Mastercard debit and Visa debit retail payment networks, which can be amended, or revoked in the same manner as a designation recommended by the Minister of Commerce and Consumer Affairs;
- 25 **agreed** that the transitional price path will be implemented as initial pricing standards that can be amended or revoked in the same manner as a standard issued by the Commerce Commission;
- 26 **agreed** that the initial pricing standards include a prohibition on issuers receiving either directly, or indirectly, net monetary or non-monetary compensation from network operators (the schemes);
- 27 **agreed** that the initial pricing standards for the designated credit retail payment networks exclude internationally issued cards and commercial credit cards;
- 28 **agreed** that the initial pricing standards for the designated debit retail payment networks exclude internationally issued cards and prepaid cards;
- 29 **agreed** that the interchange fee caps in the initial pricing standard apply on a per transaction basis;
- 30 **agreed** that the reference to 'cards' in the initial pricing standard can include any payment instrument, including virtual cards and tokenised credentials;
- 31 **agreed** to include in the initial pricing standard that, where a contactless debit card interchange fee is charged by the cents, that interchange fee should be capped at five cents per transaction;

Institutional arrangements for the Commerce Commission

- 32 **agreed** that the Minister of Commerce and Consumer Affairs have the power to transmit statements of government policy to the Commerce Commission to which it must have regard;

- 33 **agreed** that Commerce Commission determinations under the regime shall be deemed to also be statutorily authorised for the purposes of Part 2 of the Commerce Act 1986;

Financial implications

- 34 Confidential advice to Government

- 35 **noted** that consideration and acceptance of enforceable undertakings will benefit individual participants, warranting the recovery of costs through fees;
- 36 **agreed** to the Retail Payments System Bill including the ability to make regulations allowing the Commerce Commission to recover, through fees, costs incurred to consider and assess enforceable undertakings, and to review and approve substantive network rule changes;

Commencement

- 37 **agreed** that the initial pricing standard come into effect six months after enactment of the Retail Payments System Bill;
- 38 **agreed** that the remainder of the proposals come into effect upon enactment of the Retail Payments System Bill;

Legislative implications

- 39 **noted** that the above proposals will be given effect through the Retail Payments System Bill, Confidential advice to Government
- 40 **agreed** that the Retail Payments System Bill provide that the Act will bind the Crown; with the exception of pecuniary penalties, which the Crown shall not be liable for;
- 41 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 42 **authorised** the Minister of Commerce and Consumer Affairs to make minor or technical changes to the above policy decisions, consistent with the general policy intent, on issues that arise in drafting and passage through the House;
- 43 **authorised** the Minister of Commerce and Consumer Affairs to make additional policy decisions, consistent with the general policy intent, on issues that arise in drafting and passage through the House, in order to meet the timelines for a Bill to be enacted in 2021.

Janine Harvey
Committee Secretary

Present: (see over)

Present:

Hon Grant Robertson (Chair)
Hon Dr Megan Woods
Hon Chris Hipkins
Hon David Parker
Hon Poto Williams
Hon Damien O'Connor (via zoom)
Hon Stuart Nash
Hon Dr David Clark
Hon Dr Ayesha Verrall
Hon Meka Whaitiri
Rino Tirikatene MP
Dr Deborah Russell MP

Officials present from:

Office of the Prime Minister
Officials Committee for DEV