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StepChange Debt Charity response to the FCA consultation CP21/30:

Debt Packagers: Proposals for new rules

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Introduction

StepChange Debt Charity is a specialist not for profit debt advice and solutions provider working throughout the UK. In 2020 around 500,000 people contacted our telephone and online debt advice services, and our website was visited by 6 million users. StepChange warmly welcomes these proposals from the FCA, which we believe are necessary to address ongoing harm experienced by financially vulnerable consumers seeking help with their debts through debt packagers

Q1: Do you agree with our assessment that the remuneration model for debt packager firms is driving consumer harm?

We agree with the FCA's assessment of consumer harm set out in the consultation paper.

StepChange has been raising concerns for some years about the model of client acquisition in the debt solutions market that has referral fee-driven lead generators and debt packagers at its heart.

We have seen bad practice by debt solution lead generators who use paid-for online ads that impersonate StepChange and other charities to lure consumers to their lead generation websites.

In 2020 we reported 72 lead generators to major search engines and social media sites on account of misleading advertising or brand infringement. This not only creates an ongoing cost for StepChange but exposes financially vulnerable consumers to the harmful non-compliant advice journeys described in CP21/30. We have estimated that around 15% of people searching for StepChange and other debt charities by name may have been diverted to a lead generator site by misleading paid search ads.

The Advertising Standards Authority (ASA) has upheld complaints about promotions by lead generators, finding these to be misleading. However, despite these rulings and our efforts to report ads to search engine and social media providers, we have continued to see similar examples of misleading ads, exposing more financially vulnerable consumers to the risks of harm highlighted vividly in this consultation paper.

Q2: Do you agree that the only effective remedy is to ban receipt of remuneration for referrals by debt packager firms?

StepChange agrees that a ban on referral fees is the only effective remedy to address the harm caused by debt packagers.

However, we remain concerned that the problem of harmful consumer advice journeys may continue through unregulated lead generation sites, particularly in respect of referrals to IVA and PTD providers. Here we believe that the current 'IP exemption' and the interpretation of that exemption is putting financially vulnerable consumers at risk of harm and is therefore in conflict with the FCA's consumer protection objective.

We are also concerned that ineffective regulatory control of online promotions for debt solutions creates a space for scams that put financially vulnerable consumers at risk of harm.

The harmful consumer journeys described in CP21/30 may begin with misleading lead generator promotions but referral fees are fuelling poor practice and poor consumer outcomes at each stage of this commercial client acquisition chain, from unregulated lead generators to authorised Debt Packers to financial solution providers. Referral fees create a conflict in giving best advice, leading clients to IVA solutions that are not suitable (as the FCA has highlighted, based on budgets that are manipulated and not sustainable), reflected in high termination rates in the industry. StepChange has previously highlighted the contrast in IVA termination rates between industry and voluntary providers.[1]

CP21/30 sets out how the current Debt Packager business model depends on debt solution providers paying referral fees for leads. However, the FCA's findings strongly suggest that these debt solution providers have been unable or unwilling to exercise control over the practices of Debt Packagers they are funding.

Paragraph 2.22 tells us that the FCA had serious concerns with 90% of Debt Packager customer files reviewed where a IVA/PTD or DMP/DASS recommendation was made. However, paragraph 2.19 reports 85% of people recommended an IVA or PTD went on to enter the solution. This represents around 20% of all IVA/PTD registrations over the same period, a significant proportion of the market.

So it appears that the FCA's concerns (including the examples of bad practice outlined in paragraph 2.18) are not being consistently picked up by debt solution providers paying the referral fees.

On this point it seems relevant that the Insolvency Service raised 'significant concerns about how IPs at "volume IVA" firms operate and are regulated' in September 2018. This included a recommendation that the Recognised Professional Bodies (RPBs) 'should examine in all cases the nature of the relationship between introducers and the provider firm and the steps taken by IPs to satisfy themselves that correct advice has been given'. The findings set out in this consultation suggest that this recommendation has not been successful in improving the oversight by IVA / PTD providers or the Debt Packagers or Lead Generators they Fund.

So despite repeated regulatory interventions by the FCA, the Insolvency service and (presumably) the RPBs, the referral free-driven client acquisition model for debt solutions (particularly IVAs and PTDs) has continued to cause consumer harm. ***As a result we strongly support the FCA's view that the only effective remedy to the problems caused by Debt Packages is to ban referral fees.***

That said, we remain concerned that consumers entering the client acquisition chain for IVAs and PTDs are at risk of experiencing harmful advice journeys.

Firstly, Insolvency Practitioners (and therefore volume IVA and PTD providers) are currently able to take advantage of the exclusion in article 72H (3) of the Regulated Activities Order that exempts IPs from FCA authorisation in respect of otherwise regulated debt counselling and debt adjusting where the IP is acting in reasonable contemplation of their appointment as an Insolvency Practitioner.

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[1] www.stepchange.org/media-centre/press-releases/stepchange-comments-on-insolvency-service-data.aspx

We believe that attention to the scope and nature of the IP exclusion is likely to be more important if Debt Packagers leave the market and become less important in the client acquisition chain for IVA's and PTD.

PERG does not appear to give clear guidance on the threshold of reasonable contemplation before the exclusion can apply. We would argue that IPs (and the IVA and PTD providers that employ them) taking advantage of the Article 72H (3) exclusion should only be regarded as acting in reasonable contemplation of an appointment where they can demonstrate that cases they take on have had a prior robust assessment of the suitability of an IVA or PTD against other debt solutions or options for dealing with financial difficulty. IVA and PTD providers should be able to show that such as assessment meets the standards set out in CONC 8 to avoid the risk of regulatory arbitrage creating a lower standard of consumer protection.

Secondly, CP21/30 reports that around half of the debt packagers surveyed used unregulated lead generators to purchase consumer leads. Our concern here is that IVA and PTD providers respond to changes in the Debt Packager market by using unregulated debt packagers or making their own online promotions.

We have seen unregulated lead generator sites that claim to pass cases directly to IPs and we would urge the FCA to continue to work with the Insolvency Service and the RPBs to ensure online promotions by unregulated lead generators for IVAs and PTDs do not continue after the prohibition on Debt Packager referral fees has commenced.

Here we would also point out that financially vulnerable consumers may struggle to differentiate unregulated lead generator websites from scams. Our evidence to the Parliamentary Draft Online Safety Bill Joint Committee highlights cases where people seeking with their debts experienced harm as a result of misleading financial promotions from debt solution lead generators.

For example, a client recommended to StepChange clicked on a copycat debt firm advertised via misleading online search results. After entering her personal information into what she thought was a genuine website, the client was pestered by phone calls into setting up an IVA. The client made a series of payments worth £650 meant for her creditors. It was only after contact from her bank four months later that she realised the debt firm she'd clicked to was a scam.

In another case, having followed the top ranking link from misleading search engine results, a client received a call from someone purporting to work for StepChange. The client shared bank details and personal information, which were passed to another firm that rang the client advising him to take an IVA. However, the client thought something was not right and called StepChange. He was initially very distressed and mistrustful, explaining it had taken him a long time to build up the courage to seek help.

It is also clear that a number of paid for online ads link directly to web pages set up directly by IVA or PSD providers who do not appear to be authorised by the FCA. Here we note the recent ASA ruling published on December 8th upholding a complaint that an online ad was misleading on six out of seven issues investigated. This included findings by the ASA that the promotion suggested an affiliation with a debt advice charity that was misleading. The ASA described the firm subject to the ruling as 'an authorised Insolvency Practitioner'.

This ASA ruling includes a discussion on the limits of promotions and advice that an Insolvency Practitioner (or the IVA and PTD providers who employ them) taking advantage of the Article 72(H)(3) exclusion can make under the conditions of that exclusion. Noting that within the promotion:

> *[T]he phrases "Want To Declare Bankruptcy?" and "Call Us to Find An Alternetive [sic]" were followed by the phrases "Explore All Your Options First" and, later in the ad, "Avoid Bankruptcy Today" and "Expert Debt Advice",*
>
> *the ASA set out a view on how it believes the exclusion operates.*
>
> *We understood that, as an authorised Insolvency Practitioner … could "give debt advice in reasonable contemplation of an IVA". They would be expected to have a fact-finding and information-gathering process with the debtor to establish whether or not they were eligible for an IVA. If they were eligible, [The IVA provider] could say they were "in reasonable contemplation" and could tell the debtor that they could help them. If the debtor was not found to be eligible, [The IVA provider] could tell them that but could go no further with their advice.*
>
> *We acknowledged, therefore, that as long as they had a fact-finding and information-gathering process in place, [The IVA provider] were able to provide a certain amount of debt advice. However, that did not extend to advising against bankruptcy, which is how we considered the claim would be interpreted.'*

We believe that this excerpt from the ruling highlights the difficulties that can arise form IVA and PTD providers trying to square the 'in reasonable contemplation' requirement of the Article 72H (3) exclusion with online promotions aimed at a broad audience of people seeking help with financial difficulties.

As an IVA or PTD is likely to be suitable for only a proportion of those people contacting the provider as a result of the online promotion, it is not clear how the provider can really be said to be acting in reasonable contemplation of an appointment unless at least some debt advice is given. The concern here is that this may amount to an assessment of the suitability of an IVA or PTD following 'a certain amount of debt advice' and without fully advising on the suitability of other options that might be available'. If so, this looks very like the problems that the FCA has found with the advice given by Debt Packagers.

By way of comparison, CONC 8.3.4R (2) requires FCA authorised debt advice providers, including IVA and PTD providers who are FCA authorised, to make:

> *clear the actual or potential advantages, disadvantages, costs and risks of each option available to the customer, with any conditions that apply for entry into each option and which debts may be covered by each option.*

We previously argued that the FCA should require IVA and PTD providers taking advantage of the Article 72H (3) exclusion to demonstrate that they are meeting key CONC 8 advice standards as a condition of that exclusion. This would seem to be particularly important where IVA and PTD providers are making online promotions.

Here we would point out that at present these promotions are apparently being made by IVA and PTD providers which are FCA authorised and those that are not. We doubt that financially vulnerable consumers clicking on to paid for online ads and search engine links will be able to tell the difference. Given that FCA authorisation and the Article 72H (3) imply different consumer rights and protections, this looks like an unnecessary and potentially detrimental form of regulatory arbitrage.

Of course there is a simple solution to this problem, IVA and PTD providers who wish to promote services directly to the market (and rather than receiving leads through lead generators and debt packagers) can apply for FCA authorisation.

Q3: Do you agree that we should not include debt management firms or not-for-profit debt advice firms in our proposals?

We agree with the proposal not to include debt management firms and not-for-profit debt advice firms in the rules restricting receipt of referral fees. However, we agree that the FCA should continue to monitor referral levels to ensure risks remain low as the debt solutions client acquisition chain adapts to the proposed new rules.

Q4: Do you have any comments on our proposed obligation on debt management firms who act as principals?

We agree with the FCA proposal to place obligations on debt management firms to ensure their appointed representatives do not receive remuneration from debt solution providers unless that appointed representative is genuinely acting as a debt management firm itself.

Q5: Do you have any comments on the draft rules?

StepChange welcome the draft rules and, in particular, the provisions on non-avoidance. These rules should hopefully address the detriment caused by referral fees in the debt solutions client acquisition chain. However, we would urge the FCA to continue to monitor the market and online promotions for evidence of avoidance. In particular we would expect to see promotions from unregulated lead generators reduce significantly if the rules prove to be effective.

Q6: Do you have any comments on the planned implementation period?

We agree with the FCA's assessment that the new rules should be implemented as quickly as possible to remove the risk of harm to financially vulnerable people.

Q7: Do you have any comments on, or relevant additional data for, our draft cost benefit analysis?

StepChange has no further comment or data at this time.