Consultation Response

StepChange Debt Charity

The FCA's use of temporary product intervention rules

Response from StepChange Debt Charity

February 2013

StepChange Debt Charity London Office
6th Floor, Lynton House, 7-12 Tavistock Square, London WC1H 9LY
Policy Contact: Peter Tutton, Head of Policy
Tel: 0207 391 4596
Email: peter.tutton@stepchange.org

Introduction

StepChange Debt Charity is the new name for the Consumer Credit Counselling Service (CCCS). StepChange is a leading provider of independent debt advice and the country's only major charitable provider of free-to-client debt management plans (DMPs).

Last year over 400,000 people contacted our telephone helpline and online debt remedy tool for help with problem debts. The advice and support we provide is always free, independent and impartial. In 2012, the charity helped clients to repay just under £307 million. We currently manage over £3.7 billion worth of unsecured problem debt.

Our advisers often see cases where our clients have suffered detriment as a result mis-sold or otherwise unsuitable financial products or who have struggled to understand whether products are likely to meet their needs. Therefore StepChange strongly supports the Government's decision to give the Financial Conduct Authority product intervention powers. We also welcome this policy statement setting out the circumstances in which the FCA might consider using temporary product intervention rules. In broad terms, we find this policy statement to be both clear and sufficiently detailed.

We have responded to specific questions as requested below.

Q1: Do you agree with our analysis of some of the circumstances in which temporary product intervention rules might be necessary?

StepChange Debt Charity broadly supports the analysis by the FSA as to the circumstances where temporary product intervention rules might be necessary. We fully agree that the main consideration should be whether prompt action is necessary to reduce or prevent consumer detriment.

While we agree that the potential scale of detriment in the market is a key consideration, we believe that the FCA should also pay specific regard to the potential detriment that individual consumers or groups of consumers could experience as a result of a product or product feature. For some consumers (those in receipt of lower incomes for instance) the individual *impact* of detriment could be more severe than a measure of total detriment in cash terms. As such we believe that the FCA will need to give sufficient weight to impact in broad terms (rather than just cash terms) when considering the effectiveness and proportionality requirements.

We also strongly support the statement in paragraph 12 setting out a general presumption that consumer protection should take precedence over competition concerns where promoting competition would create a conflict with consumer protection aims. For instance, low barriers to entry in consumer credit markets have arguably allowed some firms to market products with features that produce a high risk of consumer detriment for consumers. Measures aimed at promoting competition may raise consumer protection issues that outweigh the possible benefits of competition.

Q2: In what other circumstances might it be necessary to make temporary product intervention rules?

We believe that the FCA should consider using temporary product intervention rules to support the introduction of interim regimes. For instance, we understand that consumer credit is likely to come within scope of FSMA / FCA from 2014, but initially this is likely to be in interim regime with temporary threshold conditions and a developing product governance framework. We also understand that a fully functioning consumer credit regime focused on prevention rather than enforcement may not be in place until 2016.

This leaves a potential consumer protection gap as products and practices attached to an established risk of consumer detriment come into the new temporary regime. The temporary product intervention rules seem to provide the FCA with a good opportunity to start to close this gap while the full and permanent rules and guidance for consumer credit are developed.

We also believe that the FCA should consider using its powers to make temporary product intervention rules where a change in product features by a provider or providers risks exposing consumers to reduced access (or access at increased cost) to financial products or services on which they rely to meet a key financial need. We believe that use of temporary product intervention rules might be justified in these circumstances (reduction or withdrawal of products or services meeting key financial needs) on both consumer protection and competition grounds.

For instance, we note and support the analysis set out in paragraph 2.6 that even vigorous competition can deliver poor outcomes for some groups of consumers. The example cited on bank changes is instructive. Fees structures in the market for personal current accounts that have caused detriment for some consumers are the result of a competitive process that has delivered different outcomes for different groups of consumers. This could perhaps be viewed as a form of competition failure, a product governance issue or both. A ‘product governance’ type approach might concentrate on prohibiting providers from selling products with certain features (such as charging structures or access to credit facilities) to certain specified consumers.

However the same process of competition also contributed to a large number of consumers being effectively excluded from access to transactional banking. This is a different form of consumer detriment that has been in part addressed by the development of ‘basic bank accounts’ (a voluntary product intervention approach of sorts). However recently we have seen some providers of basic bank accounts withdraw functionality from products, or withdraw access to the products for consumers in certain circumstances. It is not inconceivable that access to basic transactional banking could be further reduced in the future in a way that would create new pockets of financial exclusion. This raises the question as to whether the FCA would and could use temporary product intervention rules to prevent a firm or firms from withdrawing products or product features that consumers rely on to meet key financial needs, such as basic bank accounts.

More generally we would ask how the FCA might use its product intervention powers in a way that tackles financial exclusion to support the ‘access have regard’ to the competition objective set out in section 1E 2(b). The current policy statement is fairly silent on this important point. We expand on this in our answer to Question Five.

Q3: Will our proposed approach create an appropriate level of awareness amongst firms affected by temporary product intervention rules?

The approach set out in the consultation paper seems to provide a reasonable balance between raising awareness and the need to intervene quickly to prevent consumer detriment.

Q4: How should the FCA balance the need for clarity and awareness in the market against the likely need for urgent action when making temporary product intervention rules?

In addition to the communication strategy set out in 3.5, we believe that the FCA can add to clarity and awareness in the market by building a general understanding among both firms and consumers of the way that product features can produce a risk of detriment to some or all consumers. Here we highlight two aspects of this.

Firstly, the FCA can draw out lessens from ‘root cause analysis’ of past consumer and on-going problems to identify why products and product features (or the absence of product features) caused consumers problems. The FCA could use this to build guidance to inform firms’ product governance approaches in a way that would help design-out product features that might otherwise attract an intervention by the FCA at a later date.

Secondly, the FCA should ensure that it gathers intelligence of emerging consumer problems and publicise this in such a way that both firms and consumers are aware that the FCA is developing a view on a particular product or product feature. This information need only be ‘generic’ rather than firm specific and could be gathered together in a prominent ‘consumers problems’ section of the FCA website.

Q5: How can the FCA best protect consumers who hold products which might be affected by temporary product intervention rules?

StepChange Debt Charity believes that this question raises two broad issues. Firstly the consultation paper makes it clear that any unenforceability conditions in the rules would only apply to new arrangements and not those entered into before the rules came into force. While consumers with existing arrangements will have the normal channels of redress, this places a heavy emphasis on consumers to resolve problems themselves. This may be beyond the resources and capabilities of consumers facing significant barriers to complaining and as such may result in a low standard of consumer protection.

Therefore we would urge the FCA to consider how any product intervention rules can be supported by requirements on future business conduct and complaints handling by firms in respect of pre-existing arrangements relating to products covered by product intervention rules. The FSA's approach to complaints handling rules in respect to payment protection insurance suggests that supporting product rules in the way will be important to ensure that the FCA is delivering on its consumer protection objective.

The second point relates the possible negative consequences for consumers that might flow from a product intervention by the FCA. Our response to Question Two outlined our concern with the question of access to suitable financial products and services and whether product intervention rules could be used ensure that specified groups of consumers are able to meet key financial needs.

The reverse of this is a concern that the emphasis on prohibition in the legislative power to make product intervention rules could control consumer detriment at the expense of excluding certain groups of consumers from access to certain products and services.

We believe that this outcome is more likely where the FCA interprets its consumer protection objective in a narrow way that focuses on minimising the loss value of a particular cause of detriment. But we would urge the FCA to also consider the broader consumer protection and competition aims of ensuring that a particular market works well for all consumers who have financial needs that would be met if products and services were suitable for their needs. In some cases this might suggest a broader application of product protection rules.

Rather than prohibiting providers from marketing a particular product to specified consumers, could the FCA prohibit providers from marketing any products in a specified class unless their broad offer includes products that will be suitable for the needs of specified groups of consumers? Such a market wide approach to diverse consumer needs would address both the problem of market exclusion (perhaps of groups of consumers that the FCA would be most keen to protect) and the problem of competitive processes producing poor outcomes for some consumers.

Q6: Do you agree with our analysis of how temporary product intervention rules might impact upon innovation and market entry?

StepChange Debt Charity broadly agrees with the FSA's analysis on the possible impact of temporary product intervention rules upon innovation and market entry.

Q7: What issues should we consider in relation to how this Statement of Policy affects equality and diversity?

Our response to Question Five sets out an argument for the FCA to take a broad interpretation of consumer protection to ensure that markets for financial goods and services work well at meeting the needs of all consumers. We believe that this will be especially important in ensuring the market meets the needs of consumers with characteristics protected by the Equality Act 2010 and in promoting equality and diversity more generally. Indeed we would urge the FCA to give particular emphasis and priority to equality and diversity issues when using product intervention and other powers to meet consumer protection and competition objectives.