

Consumer Credit: further amendments to DEPP and EG

February 2014



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We are asking for comments on this Consultation Paper by 14 March 2014.

You can send them to us using the form on our website at:
www.fca.org.uk/your-fca/documents/consultation-papers/cp14-03-response-form.

Or in writing to:

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We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

You can download this Consultation Paper from our website: www.fca.org.uk. Or contact our order line for paper copies: 0845 608 2372.

Abbreviations used in this paper

| | |
|-------------|---|
| CCA | Consumer Credit Act 1974 |
| DEPP | Decision Procedure and Penalties Manual |
| EEA | European Economic Area |
| EG | Enforcement Guide |
| FCA | Financial Conduct Authority |
| FSMA | Financial Services and Markets Act 2000 |
| OFT | Office of Fair Trading |
| RDC | Regulatory Decisions Committee |

1. Overview

Introduction

- 1.1** This Consultation Paper (CP) forms part of our wider work in relation to the transfer of consumer credit regulation from the Office of Fair Trading (OFT) to the Financial Conduct Authority (FCA) from 1 April 2014. In this CP we propose to make amendments to the FCA Handbook in light of powers, previously held by the OFT, granted to the FCA to prohibit or restrict European Economic Area (EEA) authorised payment institutions and electronic money institutions from undertaking certain consumer credit business in the UK.
- 1.2** This is in addition to the amendments made in August 2013¹ and September 2013² and those proposed in FCA CP13/10³ and Quarterly Consultation No. 3.⁴
- 1.3** The text of the proposed amendments, and the statutory powers they will be made under, are set out in Appendix 1.

Who does this consultation affect?

- 1.4** This CP will be of interest to firms, their advisers and trade bodies. In particular EEA authorised payment institutions and electronic money institutions are directly affected by these changes.

Is this of interest to consumers?

- 1.5** While consumer organisations may be interested, our proposals are not directly relevant to consumers. However, as our proposals affect the ability of EEA authorised payment institutions and EEA authorised electronic money institutions to carry out certain regulated activities in the UK if they are found to be, or likely to be, committing certain contraventions, consumers may be indirectly affected.

1 PS13/8, *FCA regime for consumer credit: carrying across some Consumer Credit Act secondary legislation into FCA rules* (August 2013).

2 CP13/10, *Detailed proposals for the FCA regime for consumer credit* (October 2013).

3 CP13/10, *Detailed proposals for the FCA regime for consumer credit* (October 2013).

4 CP13/18, *Quarterly consultation No. 3* (December 2013).

Context

- 1.6** The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 was made in February 2014. The Order amends the Payment Services Regulations 2009 and the Electronic Money Regulations 2011 by giving the FCA the power to prohibit or restrict the carrying out of certain activities by EEA authorised payment institutions and EEA authorised electronic money institutions. These regulated activities generally correspond with activities that were considered consumer credit business under the CCA.
- 1.7** The OFT previously had similar powers under the Payment Services Regulations 2009 and the Electronic Money Regulations 2011. The powers have now been granted to the FCA as part of the transfer of consumer credit regulation from the OFT to the FCA from 1 April 2014.
- 1.8** We propose to amend our Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG) to set out our decision-making processes and enforcement approach in respect of the exercise of these powers.

Summary of our proposals

- 1.9** Amendments are proposed to the following elements of DEPP and EG:
- a.** DEPP 2 Annex 1 G – Warning notices and decision notices under the Act and certain other enactments
 - b.** DEPP 2 Annex 2 G – Supervisory notices
 - c.** EG 19 – Non-FSMA powers

Next steps

What do you need to do next?

- 1.10** We want to know what you think of our proposals. Please send us your comments by 14 March 2014.

How?

- 1.11** Use the online response form on our website or write to us at the address on page 2.

What will we do?

- 1.12** We will consider your feedback and publish our rules in a Policy Statement.

2. Amendments to DEPP

- 2.1** We are proposing to adopt our current decision-making procedure for supervisory notices when exercising our power to impose a prohibition or restriction on an EEA authorised payment institution or electronic money institution, or when varying a restriction imposed on such a firm, under our new powers. We propose that our Regulatory Decisions Committee (RDC) will be the primary decision maker in these cases.
- 2.2** We are also proposing to adopt our current decision making procedure for warning notices and decision notices when proposing or deciding to refuse an application to vary the period, event or condition of a prohibition or to remove a prohibition, or to vary or remove a restriction, imposed on an EEA authorised payment institution or electronic money institution pursuant to these new powers. We propose that FCA staff under executive procedures will be the decision maker in these cases, unless representations are made in response to a warning notice given by us. Where such representations are made the RDC will decide whether to give a decision notice.
- 2.3** So we are proposing the following amendments to DEPP:
- a.** DEPP 2 Annex 1 G is amended so that FCA staff under executive procedures will be the decision maker when we are proposing to refuse an application to vary the period, event or condition of a prohibition or to remove a prohibition, or to vary or remove a restriction. FCA staff under executive procedures will be the decision maker when we are deciding to refuse an application to vary the period, event or condition of a prohibition or to remove a prohibition, or to vary or remove a restriction, if no representations are made in response to the warning notice. Otherwise, the RDC will decide to give the decision notice. We propose to adopt the executive procedure in the first instance because we believe this power is more akin to our own initiative variation and requirement powers than our section 56 FSMA prohibition power which applies to individuals only.
 - b.** DEPP 2 Annex 2 G is amended so that the RDC will be the decision maker where we are exercising our power to impose a prohibition or to impose or vary a restriction under the Electronic Money Regulations 2011 or the Payment Services Regulations. FCA staff under executive procedures will be the decision maker whenever a firm agrees not to contest the imposition of a prohibition or imposition or variation of a restriction.

Q1: Do you agree with our proposal to adopt our current decision-making process when exercising the new powers with the RDC as the primary decision maker? If not, what would you recommend instead?

3. Amendments to EG

- 3.1** We are proposing to apply our current approach to enforcement to the exercise of these new powers. So we propose to only make the following amendments to EG:
- c.** New EG 19.92A is inserted to note our new power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised payment institutions.
 - d.** New EG 19.104A is inserted to note our new power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised electronic money institutions.

Q2: Do you agree with our proposal to apply our current approach to enforcement to the exercise of these powers? If not, what would you recommend instead?

Annex 1

Cost benefit analysis

1. The proposals set out in this chapter do not relate to rule changes or to guidance on rules. They are concerned instead with statements of procedure that we are required to publish under the Financial Services and Markets Act 2000 (FSMA) in relation to the FCA's approach to giving statutory notices and our approach to the exercise of the new powers granted to the FCA under the relevant statutory instrument. Since the requirements under section 138I of FSMA are not applicable we are not required to carry out a cost benefit analysis. However, we have considered the impact of our amendments as a matter of good practice.
2. The proposed amendments are a direct result of the transfer of consumer credit regulation from the OFT to the FCA. As part of this transfer, the OFT's powers to prohibit or restrict the carrying on of certain activities by EEA authorised payment institutions and EEA authorised electronic money institutions are being passed to the FCA.
3. We do not expect the proposed decision-making procedure or enforcement approach for the exercise of the new powers to have more than minimal costs for the relevant firms. Overall, our proposals will benefit the FCA and the relevant firms by promoting a consistent approach to the exercise of our enforcement powers.
4. A CBA of the proposed FCA consumer credit regime accompanied CP13/10 and a summary is included in Annex 5 of that CP.⁵

⁵ For the consultation paper, see: www.fca.org.uk/static/documents/consultation-papers/cp13-10.pdf; for the cost benefit analysis, see: www.europe-economics.com/publications/final_europe_economics_report_03-10-13.pdf

Annex 2

Compatibility statement

1. Section 1B of FSMA requires the FCA to explain why it considers that proposed rules are compatible with its strategic objective, and advance one or more of its operational objectives, and promote effective competition in the interests of consumers.
2. A compatibility statement in relation to the proposed consumer credit regime was set out in Annex 7 to CP13/10, including consideration of our competition duty. We are satisfied that the proposed amendments are compatible with our objectives and regulatory principles.

Annex 3

Mutual societies

1. Section 138K of FSMA requires us to prepare a statement about the impact of proposed rules on mutual societies, and in particular whether this will be significantly different than it is for other authorised persons. A statement in relation to the proposed consumer credit regime was set out in Annex 8 to CP13/10.
2. No new rules are proposed in this CP, and as such, the obligations under section 138K of FSMA are not applicable. We have nevertheless considered the impact of the proposed amendments and are satisfied that they do not affect mutual societies more than other firms.

Annex 4

Equality and diversity

1. We are required under the Equality Act 2010 to consider whether our proposals could have a potentially discriminatory impact on the nine protected groups as defined under the Act.
2. An equality impact assessment was set out in Annex 6 to CP13/10. The proposed amendments do not create any negative impacts on this assessment. As a result we do not believe there are any equality or diversity implications arising, but we would welcome your comments.

Annex 5

List of questions

- Q1:** Do you agree with our proposal to adopt our current decision-making process when exercising the new powers with the RDC as the primary decision maker? If not, what would you recommend instead?
- Q2:** Do you agree with our proposal to apply our current approach to enforcement to the exercise of these powers? If not, what would you recommend instead?

Appendix 1

Draft Handbook text

CONSUMER CREDIT (STATUTORY NOTICES) INSTRUMENT 2014

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions of the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 139A (Power of the FCA to give guidance);
 - (2) section 395 (The Authority’s procedures); and
 - (3) the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the FCA’s Handbook.
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [*date*].

Amendments to the Handbook

- D. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex A to this instrument.

Material outside the Handbook

- E. The Enforcement Guide (EG) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as Consumer Credit (Statutory Notices) Instrument 2014.

By order of the Board of the Financial Conduct Authority
[*date*]

Annex A

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Annex **Warning notices and decision notices under the Act and certain other**
1 G **enactments**

Note: Third party rights and access to *FCA* material apply to the powers listed in this Annex where indicated by an asterisk * (see *DEPP* 2.4)

...

| Payment Services Regulations | Description | Handbook reference | Decision maker |
|-------------------------------------|--|---------------------------|---|
| ... | | | |
| Regulation 121(8) | ... | ... | ... |
| <u>Schedule 4A paragraph 5(6)</u> | <u>when the <i>FCA</i> is proposing to refuse an application to vary the period, event or condition of a prohibition, or to remove a prohibition, or to vary or remove a restriction</u> | | <u><i>Executive procedures</i></u> |
| <u>Schedule 4A paragraph 5(7)</u> | <u>when the <i>FCA</i> is deciding to refuse an application to vary the period, event or condition of a prohibition, or to remove a prohibition, or to vary or remove a restriction</u> | | <u><i>Executive procedures, where no representations are made in response to a warning notice, otherwise by the RDC</i></u> |
| Schedule 5 paragraph 1 | ... | ... | ... |
| Notes: (1) ... | | | |

...

| Electronic Money Regulations | Description | Handbook reference | Decision maker |
|-----------------------------------|---|--------------------|--|
| ... | | | |
| Regulation 74(8)(a) | ... | ... | ... |
| <u>Schedule 2A paragraph 5(6)</u> | <u>when the FCA is proposing to refuse an application to vary the period, event or condition of a prohibition, or to remove a prohibition, or to vary or remove a restriction</u> | | <u>Executive procedures</u> |
| <u>Schedule 2A paragraph 5(7)</u> | <u>when the FCA is deciding to refuse an application to vary the period, event or condition of a prohibition, or to remove a prohibition, or to vary or remove a restriction</u> | | <u>Executive procedures, where no representations are made in response to a warning notice, otherwise by the RDC</u> |
| Schedule 3 paragraph 1 | ... | ... | ... |

2 Annex
2G Supervisory notices

...

| Payment Services Regulations | Description | Handbook reference | Decision maker |
|--|---|---------------------------|---|
| 11(6) 11(9) 11(10)(b) 14 | ... | ... | ... |
| <u>Schedule 4A, paragraphs 1(1), 1(2), 2(2)(a), 2(2)(b), 2(3), 4(6) and 4(7)</u> | <u>when exercising its power to impose a prohibition or restriction, or to vary a restriction</u> | | <u>RDC or executive procedures (Note 2)</u> <u>See also DEPP 3.4</u> |
| Notes: | | | |
| (1) ... | | | |
| (2) <u>The RDC will take the decision to give a notice imposing a prohibition or imposing or varying a restriction under Schedule 4A paragraphs 1(1), 1(2), 2(2)(a), 2(2)(b), 2(3), 4(6) and 4(7). However, FCA staff under executive procedures will be the decision maker whenever a firm agrees not to contest the imposition of a prohibition or imposition or variation of a restriction.</u> | | | |

| Alternative Investment Fund Managers Regulations 2013 | Description | Handbook reference | Decision maker |
|--|--------------------|---------------------------|-----------------------|
| ... | ... | ... | ... |

| <u>Electronic Money Regulations</u> | <u>Description</u> | <u>Handbook reference</u> | <u>Decision maker</u> |
|-------------------------------------|--------------------|---------------------------|-----------------------|
| | | | |

| | | | |
|---|---|--|---|
| Schedule 2A, paragraphs 1(1), 1(2), 2(2)(a), 2(2)(b), 2(3), 4(6) and 4(7) | <u>when exercising its power to impose a prohibition or restriction, or to vary a restriction</u> | | <u>RDC or executive procedures (Note 1)</u> <u>See also DEPP 3.4</u> |
| <p>Notes:</p> <p>(1) <u>The RDC will take the decision to give a notice imposing a prohibition or imposing or varying a restriction under Schedule 2A paragraphs 1(1), 1(2), 2(2)(a), 2(2)(b), 2(3), 4(6) and 4(7). However, FCA staff under executive procedures will be the decision maker whenever a firm agrees not to contest the imposition of a prohibition or imposition or variation of a restriction.</u></p> | | | |

Annex B

Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

19. Non-FSMA powers

...

Payment Services Regulations 2009

...

19.92A The FCA also has the power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised payment institutions.

...

Electronic Money Regulations 2011

...

19.104A In addition to its powers that apply to authorised electronic money institutions, generally the FCA has the power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised electronic money institutions.

...



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