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Our ref:PR8/MT

Dear Jeremy

CP 196: Implementation of the Distance Marketing Directive: proposed rules and guidance

This is the Consumer Panel's response to CP196.

The Panel is concerned that the definition of a distance contract appears to have been drafted to rule out large swathes of business from the directive's requirements. The Panel acknowledges that there are problems with the requirement for full contractual terms and conditions to be given up front but the Panel would prefer that a sensible solution was found rather than disqualifying a whole range of business.

In our response to the HMT consultation on the implementation of the directive we mentioned our concern over the removal of the right of withdrawal from financial services linked to the stock market. The current cancellation rules do not protect investors against movements in the market, but they do mean that someone who cancels does not have to bear the cost of any initial charges.

The Panel believes that cancellation rights should be extended to second charge mortgages and equity release schemes. The markets for first and second charge mortgages are very different, and consumers in the second-charge market face considerable pressures, particularly those seeking second mortgages for the purposes of debt consolidation. An opportunity to cancel after the conclusion of the agreement would provide a valuable safeguard against poor selling practices in the second-charge market. Rights of withdrawal for equity-release mortgages would also provide protection for a very vulnerable group of consumers, who might otherwise be stuck with a poor-value or unsuitable mortgage for life.

Chapter 3

Q3.1: Do you agree with our view of the scope of 'distance contract' and that it will provide a practical and workable divide between distance contracts and others, for firms and consumers? If not, it would be helpful to be provided with examples of situations where you consider our proposal is not consistent with the DMD and its definitional provisions.

The Panel is concerned the proposed definition of a 'retail consumer' would result in the unnecessary exclusion of persons acting on behalf of small organisations, such as small clubs, who would not normally be regarded as non-retail consumers.

The Panel is concerned by the FSA's preliminary inclination to view the situation outlined in paragraph 3.15 (where a customer receives information about a branch product or service in a leaflet picked up at the branch, but does not discuss it, and then deals with the branch, by post or telephone), as 'meaningful simultaneous presence'. The Panel believes that this view would result in the removal of valuable consumer protection and urges the FSA to reconsider its views on this situation.

The Panel does not believe that the proposed test will be a practical or a workable one. In addition the Panel is surprised and concerned by the omission of consumer representation groups from the list of interested bodies that the FSA will continue to work with on the meaning of 'distance contract'. Will the meaning be finalised by informal negotiations with these bodies or will consultation take place?

The Panel's response to HM Treasury's consultation on the implementation of the DMD stated that the increase in consumer protection provided by the DMD is modest. In the light of this, the Panel disagreed with the proposal not to put the burden of proof on the supplier. The protections offered by the Directive fall mainly in the provision of information, yet the consumer is not in a good position to show (for example) that information has not been sent. Putting the burden of proof on consumers in these circumstances would effectively require them to prove a negative.

Q3.2 Do you agree that our interpretation of the territorial scope of the DMD will appropriately protect consumers while maintaining the competitive position of UK and non-UK based firms?

The Panel is concerned that rules have been drafted on the assumption that the DMD is intended to operate on a 'country of origin' basis, without first establishing clearly that this is a common interpretation across all Member States. A common interpretation is important in ensuring a coherent approach across the European Union.

The Panel supports the FSA's proposal to retain the existing prohibitions on the marketing to UK consumers of broker funds, derivatives, and warrants and unregulated collective investment schemes.

Chapter 4

Q4.3: What will be the impact of requiring a direct offer financial promotion to include all the contractual terms and conditions on which the investment or service will be provided?

The Panel supports the requirement in principle, however we are concerned that the supply of the full contractual terms and conditions could result in consumers receiving indigestible information. Recital 21 refers to the need for well-informed choice. We support this aim and will look to the FSA to ensure that the right level of information is given and that the key contractual terms are summarised in accessible form.

Q4.4 *Do you agree with our view that few direct offers will be provided other than at a distance and that we should require all the information that the DMD requires in all direct offer financial promotions?*

The Panel supports this view, provided that the key contractual terms are summarised in an accessible form and do not reduce the overall clarity.

Chapter 5

Q 5.2: *Do you agree that for products for which we are introducing cancellation rights for the first time, we should allow firms on cancellation to charge for the service actually provided? What would be the impact of not allowing such a charge?*

The Panel disagrees with the Treasury's initial view that for general insurance it would be reasonable to allow insurers to charge for the services (including cover) already provided. The provider should not be able to deduct the cost of arranging a policy as this would effectively be a penalty undermining the right of withdrawal.

Chapter 6

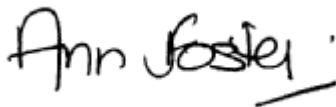
Q6.3: *What business impact would there be on implementation of a 14 day right to cancel a distance contract for all deposit products (including fixed rate and 'structured' deposits) entered into by distance means? Quantification of any impact would be particularly helpful.*

The Panel supports the introduction of cancellation rights for deposit products including fixed rate and structured deposits. The Panel has considered the arguments put by the FSA and the industry against this but note that cancellation rights have not been inappropriately used in the investment field and given that these fixed term products are often long term and can be complicated there is a case for allowing consumers to reflect on whether they have made the right decision.

Q6.5: *Do you agree that we should not apply the DMD requirements to non-distance contracts for deposit-taking? Is there any significant case for doing so?*

The current proposals, as we understand them, would result in a right of withdrawal for deposit contracts sold at a distance basis but not face to face, while unit-linked products would qualify if sold face to face, but not on a distance basis. The Panel has already (in its response to DP21) expressed its concern about this anomaly and believes that rights of withdrawal should be extended to non-distance contracts for deposit-taking.

Yours sincerely,



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cc. The Consumer Panel

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