

PAYDAY LENDING MARKET INVESTIGATION ORDER 2015

DRAFT ORDER – CONSULTATION

Background

1. On 27 June 2013, the Office of Fair Trading, in exercise of its powers under section 131 of the Enterprise Act 2002 (the Act) referred the supply of payday lending in the UK to the Competition Commission (CC) for investigation and report.
2. On 24 February 2015 the successor body to the CC, the Competition and Markets Authority (CMA), published its report titled Payday lending market investigation (the report).
3. In the report, the CMA concluded that:
 - (a) features of the market for the supply of payday lending in the UK prevent, restrict or distort competition and thereby have an adverse effect on competition (AEC); and
 - (b) the CMA should take action to remedy, mitigate or prevent the AEC and the detrimental effects flowing from it.
4. The CMA indicated in its report that it intended that the CMA would implement some remedies by an Order.
5. On 1 May 2015, in accordance with section 165 of, and paragraph 2(1)(a) of Schedule 10 to, the Act, the CMA published a Notice of its intention to make an Order as part of a package of remedies to remedy, mitigate or prevent the AEC, which it had identified in the report.
6. The Explanatory Note accompanying the Order provides an explanation of how the Order is expected to operate.

The Order

Reference and power

The CMA makes this Order in performance of its duty under section 138, within the period permitted by section 138A of the Act, and in exercise of its powers under section 161 of, and paragraphs 2, 10, 17 to 19, 21 and 22 of Schedule 8 to, the Act and under sections 86 and 87 (as applied by section 164) of the Act.

Part 1

General

1. Title, commencement, application and scope

- 1.1 This Order may be cited as the Payday Lending Market Investigation Order 2015.
- 1.2 Subject to Article 1.4, Parts 1, 2, 3, 5, 6, and 7 come into force on the day this Order is made.
- 1.3 Subject to Article 1.5, Part 4 comes into force on the day 12 months after the day on which this Order is made.
- 1.4 Once the Obligation to Publish Date has passed, the provision in Article 7.1 comes into force one month from the date when at least one FCA-authorized payday loan PCW or a portal listing all such PCWs exists.
- 1.5 Once 12 months have passed since the day on which this Order is made, the provisions in Article 13.3 (c) to (f) come into force one month from the date when at least one FCA-authorized payday loan PCW or portal listing all such PCWs exists.
- 1.6 This Order applies to any person supplying payday loans in England, Wales, Northern Ireland or Scotland.
- 1.7 This Order shall continue in force until such time as it is varied or revoked under the Act. The variation or revocation of this Order shall not affect the validity or enforceability of any rights or obligations that arose prior to such variation or revocation.

Part 2

Interpretation

2. Interpretation

2.1 In this Order:

'Act' means the Enterprise Act 2002;

'Additional standards' means the standards applicable to payday loan PCWs under the FCA's rule-making instrument concerning PCWs for High-Cost Short-Term Credit agreements, which implements the CMA recommendations;

'AEC' means adverse effect on competition for the purposes of section 134(2) of the Act;

'Borrower' means the individual receiving credit under a regulated consumer credit agreement, and in relation to a prospective regulated consumer credit agreement includes the prospective borrower;

'CMA' means the Competition and Markets Authority;

'Commencement date' means the date specified for the relevant provision in Articles 1.2 to 1.5;

'Cost of borrowing' means the amount of

- (a) all fees and charges relating to the original loan or credit agreement; and
- (b) any fees or interest charges arising from rollover or extension of the loan; and
- (c) any fees or interest arising from late payment or default; and
- (d) the total of (a) to (c); and
- (e) any costs accrued but not paid as a result of default or forbearance.

'Credit card' means a credit agreement which is a credit-token agreement within the meaning of the Consumer Credit Act 1974, other than a Store Card;

'Credit union' means a society registered under the Industrial and Provident Societies Act 1965 and a society registered as a credit union under the law of Northern Ireland;

‘Decision date’ means the date on which the FCA makes its rules concerning PCWs for High-Cost Short-Term Credit agreements;

‘Durable medium’ means paper or any instrument or medium which enables the recipient to store information addressed personally to the recipient in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

‘Community benefit society’ means a society registered (or deemed to be registered) under the Industrial and Provident Societies Act 1965 which fulfils the condition in section 1(2)(b) of that Act or a society registered (or deemed to be registered) under the Industrial and Provident Societies Act (Northern Ireland) 1969 which fulfils the condition in section 1(2) of that Act;

‘Community interest company limited by guarantee’ is a company within the meaning of Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004;

‘FCA’ means the Financial Conduct Authority;

‘FCA-authorised payday loan PCW’ means a payday loan PCW which is operated by an FCA-authorised person;

‘FCA-authorised person’ means a person who has been authorised by the FCA pursuant to section 55E of the Financial Services and Markets Act 2000 (as amended by the Financial Services Act 2012, section 11(2) in relation to its activity as a payday loan PCW);

‘High street lender’ means a lender supplying payday loans exclusively from a retail store or stores or the part of a lender’s business supplying payday loans exclusively under a brand offered only from a retail store;

‘Home credit loan agreement’ means a debtor-creditor agreement that satisfies either or both of the following conditions:

- (a) the agreement provides that all or most of the sums payable by the debtor are to be collected by or on behalf of the creditor at the debtor’s home or at the home of a natural person who makes the payment to the creditor on the debtor’s behalf (or, in either case, to be so collected if the debtor so wishes); and
- (b) as at the time the agreement is entered into, the debtor could reasonably expect, from representations made by or on behalf of the creditor at or before that time, that all or most of the sums payable would be so

collected (or, in either case, would be collected as specified in subparagraph (a) if the debtor so wished);

‘Interconnected body corporate’ means a body corporate that is interconnected to the online lender because:

- (a) it is a subsidiary of the online lender; or
- (b) it is a parent of the online lender; or
- (c) the online lender and the body corporate are both subsidiaries of one and the same body corporate.

‘Lender’ means a person supplying payday loans and which is not a registered charity, a community benefit society or a community interest company limited by guarantee;

‘Material interest’ means an interest that enables its holder, directly or indirectly, to control or materially influence the operations or policy of any FCA-authorised payday loan PCW;

‘Notice’ means notice in writing;

‘Obligation to Publish Date’ means the later of the date on which the FCA’s additional standards become effective or the date 12 months after the Decision Date;

‘Online lender’ means a lender exclusively supplying payday loans via a website or other internet-based platform or the part of a lender’s business that supplies payday loans via a website or other internet-based platform;

‘Overdraft’ means a negative balance in a current account;

‘Payday loan’ means any unsecured loan with an APR equal to or greater than 100%, taken out for 12 months or less, and where the amount borrowed is less than £1,000 (excluding home credit loan agreements, credit cards, store cards, credit unions and overdrafts);

‘Payday loan PCW’ means a website that, as its primary business, gathers and presents price and/or non-price information about different suppliers’ products and provides comparisons between payday loans in order to allow users to compare those products, and the owner or operator of such a website;

‘Portal’ means an internet site providing access or links to other sites;

'Store cards' has the same definition as that set out in the Store Cards Market Investigation Order 2006;

'Total amount payable' means the total loan amount plus all the costs including interest, commissions, taxes and any other kind of fees payable in respect of a loan paid on time, except for notarial costs;

'Working day' means any day which is not a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom, a day appointed for public thanksgiving or mourning, or a Saturday, a Sunday, Good Friday or Christmas Day.

- 2.2 Section 11 of the Interpretation Act 1978 applies to this Order except where words and expressions have been expressly defined.

Part 3

Prohibition on supplying payday loans unless the lender has published information on an FCA-authorized payday loan PCW

3. Prohibition on supplying payday loans unless the lender has published information on an FCA-authorized payday loan PCW

- 3.1 Subject to Article 6, online lenders are prohibited from entering into any payday loan agreement with borrowers in the UK unless they comply with the requirements of Article 3.2.
- 3.2 Online lenders must cause up-to-date details of their payday loan products to be continuously published on at least one FCA-authorized payday loan PCW, in a manner complying with the requirements of Articles 4, 5 and 7 of this Order.
- 3.3 Articles 3.1 and 3.2 do not apply to high street lenders.

4. Timeframe for publishing information

- 4.1 Online lenders must cause details of their payday loan products to be continuously published on an FCA-authorized payday loan PCW by the Obligation to Publish Date.
- 4.2 Where there is no FCA-authorized payday loan PCW in existence on the Obligation to Publish Date, or where such PCW exists on that date but an online lender does not have details of its loan products published on that FCA-authorized payday loan PCW, the CMA may grant an extension of three

months from the Obligation to Publish Date on application from an online lender, where that online lender demonstrates to the satisfaction of the CMA that:

- (a) commercial negotiations are underway with one or more existing FCA-
authorised payday loan PCWs and are reasonably likely to result in
agreement; or
- (b) there is a reasonable prospect that they will be able to negotiate terms
with an FCA-authorized payday loan PCW which is about to become
operational.

5. Information to be supplied

5.1 Online lenders are required to supply their selected FCA-authorized payday loan PCW(s) with relevant information on each of their payday loan products.

5.2 For the purposes of this part, 'relevant information' is:

- (a) the structure and amount of interest and other fees and charges;
- (b) the minimum and maximum duration of the loan and the available
incremental length of the loan;
- (c) the minimum and maximum initial value of the loan and the available
incremental values of the loan;
- (d) the repayment structure;
- (e) the structure and value of fees and interest arising from late payment or
default;
- (f) the effect, if any, of early repayment;
- (g) any other information required to enable calculation of the total amount
payable for any given loan; and
- (h) such other information as may be required by the FCA after
implementation of its additional standards.

6. Exception

6.1 Where an online lender is able to prove to the satisfaction of the CMA that it has been unreasonably excluded from all FCA-authorized payday loan PCWs, the general prohibition in Article 3.1 and the duty in Article 7.1 do not apply for the period that lender remains unreasonably excluded.

6.2 The general prohibition in Article 3.1 and the duty in Article 7.1 also do not apply for the period between the submission to the CMA by the lender of the required information to enable the CMA to form a view as to whether the lender has been unreasonably excluded from all FCA-authorized payday loan PCWs and the date when the CMA notifies the lender of its view on this question.

7. Duty to display a hyperlink

7.1 Each online lender is required to display a hyperlink prominently on its own website to at least one FCA-authorized payday loan PCW on which its own loans appear and/or to a portal containing hyperlinks to all FCA-authorized payday loan PCWs in the event that such a web portal has been created.

8. Fall-back position

8.1 Where no FCA-authorized payday loan PCW exists by the Obligation to Publish Date and:

(a) no application for authorisation as a credit broker to operate a payday loan PCW is being considered by the FCA; or

(b) any application for authorisation then being considered by the FCA is not likely to result in the payday loan PCW becoming operational within three months;

online lenders, collectively or individually must, within six months of the Obligation to Publish Date, establish or commission a payday loan PCW and apply for FCA authorisation.

8.2 Where the CMA is satisfied that demonstrable progress is being made towards obtaining authorisation by the FCA of a payday loan PCW under Article 8.1 and no other payday loan PCW has been authorised by the FCA, the CMA may grant an extension of up to six months to the period specified in Article 8.1 for the submission to the FCA of the authorisation application.

8.3 Where a payday loan PCW has been established or commissioned under Article 8.1 and authorised by the FCA, details of the online lenders' payday loan products must appear on the FCA-authorized payday loan PCW within three months from the date of authorisation.

8.4 If an application for authorisation of a PCW submitted pursuant to Article 8.1 is declined by the FCA, an additional period may be granted by the CMA if it considers that this would enable the online lenders to obtain FCA authorisation.

- 8.5 If an online lender or lenders commission an authorised credit broker to establish a payday loan PCW under this article on their behalf, FCA authorisation for the payday loan PCW will not be required. In these circumstances, lenders will have a period of six months from the Obligation to Publish Date for the payday loan PCW to become operational.
- 8.6 If the payday loan PCW established or commissioned under Article 8.5 is not operational at the end of the period specified in Article 8.5, but the CMA is satisfied that demonstrable progress has been made, the CMA may grant an extension of six months to the period specified in Article 8.5 for that payday loan PCW to become operational.
- 8.7 Where a payday loan PCW has been established or commissioned under Article 8.5, details of the online lenders' payday loan products must appear on that payday loan PCW within three months of the date upon which that payday loan PCW became operational.
- 8.8 Where an online lender or online lenders establish or commission a payday loan PCW on behalf of themselves or other online lenders in accordance with Article 8.1 or Article 8.5, each of them must individually notify the CMA of their association with the application for authorisation of the payday loan PCW.
- 8.9 The prohibition in Article 3.1 will apply:
- (a) from three months after authorisation is granted, where a lender has established or commissioned a payday loan PCW under Article 8.1;
 - (b) from three months after the date upon which the PCW becomes operational, where a lender has established or commissioned a payday loan PCW under Article 8.5;
 - (c) at the point authorisation is declined, unless an extension is granted under Article 8.4;
 - (d) from six months after the Obligation to Publish Date where no FCA- authorised payday loan PCW exists and none has been established or commissioned under Article 8.1 or 8.5, unless an extension is granted under Article 8.2.

9. Alternative PCW

- 9.1 An online lender cannot satisfy the terms of the order by publishing details of its products on an FCA-authorized payday loan PCW in which that online lender or any interconnected body corporate has a material interest, unless the online lender can demonstrate either (i) that it has been unreasonably

excluded from all other FCA-authorized payday loan PCWs; or (ii) that the FCA-authorized payday loan PCW in which it or the interconnected body corporate has a material interest is open to all online lenders on non-discriminatory terms.

10. Notification to the CMA

10.1 Online lenders must forthwith notify the CMA of:

- (a) the FCA-authorized payday loan PCWs on which details of their products have been published;
- (b) any application for an extension or additional time pursuant to Articles 4.2, 8.2, and 8.5;
- (c) any intention to apply for authorisation for a PCW under Article 8 of this Order;
- (d) their belief that they have been unreasonably excluded from all authorised payday loan PCWs;
- (e) the FCA-authorized payday loan PCW or portal to which they have included a hyperlink on their website pursuant to Article 7 of the Order.

Part 4

Summary of borrowing

11. Prohibition on supplying payday loans unless customers are provided with a summary of the cost of borrowing

11.1 Lenders are prohibited from entering into any payday loan agreement with borrowers in the UK unless the requirements of Article 11.2 are met.

11.2 Lenders must ensure that:

- (a) a summary of the cost of borrowing with that lender is made available to the borrower in accordance with Article 12.1;
- (b) the borrower is informed of how to obtain this summary in accordance with Articles 12 and 13; and
- (c) they have systems in place that enable them to comply with the obligations in Article 11.2(a) and (b).

12. Timing and method of provision of summary

12.1 The summary must be made available when:

- (a) a borrower settles the balance of the payday loan; or
- (b) a borrower's account is closed as a result of default or forbearance; or
- (c) a borrower is in default and three months have passed since a payment was missed but the lender does not close the account.

12.2 The borrower must be notified of the availability of the summary as soon as practicable and at the latest within one working day of the event described in Article 12.1(a), (b) or (c), with the exception of high street premises that are closed on the given day, in which case on the next working day.

12.3 The summary must be made available to borrowers according to the method that the loan was issued:

- (a) Where the relevant loan was issued online: the summary must be available via the lender's website (through a means accessible only to the lender and the borrower), or by email if requested by a borrower at the time at which the application for that loan was submitted.
- (b) Where the relevant loan was issued from high street premises: the method of distribution should be chosen by the borrower at the time at which the loan is issued. A high street lender must offer borrowers the opportunity to receive the summary in a durable medium in store but may choose additionally to offer access via post, via its website (through a means accessible only to the lender and the borrower) or by email. Where the summary is not distributed directly by a lender to the borrower, notification of the availability of the summary must be in accordance with the expressed preference of the borrower at the time at which the application for that loan was submitted.

12.4 Lenders must take all reasonable steps to bring the summary to borrowers' attention. To demonstrate this, before a borrower commences a further loan application process with a lender, the lender must request that the borrower confirms that they are aware that they have had the opportunity to access the summary issued following the conclusion of the borrower's most recent loan with that lender. At the point of this confirmation, a link must be available for the borrower to access the summary, or for high street lenders, borrowers must be reminded of the availability of the summary.

12.5 The obligations placed upon lenders under Articles 11 and 12 exist for a period of 12 months after the date on which the summary must be made available to the borrower in accordance with Article 12.1.

13. Content of summary

13.1 The summary must state, for the borrower's most recent loan with a lender:

- (a) the initial amount borrowed;
- (b) the original duration of the loan or the facility;
- (c) details of any subsequent increase in the amount borrowed or the duration of the loan or facility;
- (d) details of whether payment was received in full and on time or whether partial or late payments were made;
- (e) where the loan was repaid in multiple instalments, details of the number of instalments where the borrower either did not make the agreed payment or payment was late;
- (f) the cost of borrowing; and
- (g) a summary of any costs accrued but not paid as a result of default or forbearance.

13.2 Where a borrower has taken out more than one loan with that lender during the 12 month period preceding the date on which the summary is made available, the summary must also state for this period;

- (a) the total number of loans taken out;
- (b) the total amount of all fees and charges paid; and
- (c) the total amount of fees and charges incurred as the result of late or partial payment.

13.3 The summary must also include:

- (a) where the borrower has not taken out any loans with that lender during the preceding 12 month period, confirmation that this is the case;
- (b) how borrowers can access more detailed information on their loans, if available;

- (c) where the summary is provided by an online lender, the web address of one or more FCA-authorized payday loan PCWs on which that lender's payday loans are listed and/or a list of all FCA-authorized payday loan PCWs;
- (d) where an online lender is unable to comply with Article 13.3(c) because it meets the exception in Article 6 and no such portal exists, the web address of an FCA-authorized payday loan PCW;
- (e) where the summary is provided by a high street lender, the web address of an FCA-authorized payday loan PCW on which that lender's payday loans are listed or the web address of a portal listing all such FCA-authorized PCWs; and
- (f) where a high street lender is unable to comply with Article 13.3(e) because its payday loans are not listed on any FCA-authorized payday loan PCW and no portal listing all such FCA-authorized PCWs exists, the web address of an FCA-authorized payday loan PCW.

Part 5

Monitoring and compliance reporting

14. Investigation powers

- 14.1 Section 174 of the Act shall apply to the enforcement functions of the CMA under this Order.

15. Obligation to submit Compliance Reports re compliance with Part 3

- 15.1 Online lenders must submit a progress report to the CMA quarterly from the date which is six months after the Decision Date until six months after the date on which they are first listed on an FCA-authorized payday loan PCW and annually thereafter. Such progress report must include:
 - (a) whether they are in discussion with PCWs about publishing details of their loans on an FCA-authorized payday loan PCW (until details of their loans are published on at least one FCA-authorized payday loan PCW);
 - (b) whether details of their payday loans are published on an FCA-authorized payday loan PCW;
 - (c) details of the FCA-authorized payday loan PCWs on which details of their payday loans are published;

- (d) details of the FCA-authorized payday loan PCW or portal to which there is a hyperlink from the online lender's own website; and
- (e) details of any FCA-authorized payday loan PCW from which the online lender considers itself to have been unreasonably excluded and the steps taken to gain access to those FCA-authorized payday loan PCWs, including in respect of any additional FCA-authorized payday loan PCWs of which it has become aware or of which it has been notified by the CMA during the reporting period.

16. Obligation to submit Compliance reports re compliance with Part 4

- 16.1 A Compliance Report must be submitted to the CMA in accordance with Article 16.2 by each lender.
- 16.2 Each lender must submit a Compliance Report:
 - (a) within three months of the date on which this Order was made and thereafter quarterly until the first anniversary of the making of the Order ('Quarterly Compliance Report'); and
 - (b) thereafter annually from the first anniversary of the making of this Order ('Annual Compliance Report').
- 16.3 The Quarterly Compliance Report must report on the steps being taken to ensure that the lender will be in a position to comply with the requirements of Part 4 of this Order on the date on which that part comes into effect.
- 16.4 The Annual Compliance Report must report on the steps taken by the lender to ensure compliance with Part 4 of this Order during the reporting period.
- 16.5 Where lenders are members of the same Corporate Group:
 - (a) only one Compliance Report for the Corporate Group must be submitted; and
 - (b) the Compliance Report must identify the information in Articles 15 and 16 separately for each lender.
- 16.6 A lender must ensure that:
 - (a) the Compliance Report includes a signed certificate stating that:
 - (i) the Compliance Report has been prepared in accordance with the requirements of this Order; and

- (ii) for the period to which the Compliance Report relates, the lender has complied in all material aspects with the requirements of this Order and is reasonably expected to continue to do so; and
 - (b) the certificate is signed as follows:
 - (i) for an incorporated lender, by a director and non-executive director or where there are no non-executive directors, two directors of the lender;
 - (ii) for an unincorporated lender, by an FCA-authorized person; or
 - (iii) for a sole trader lender, by an FCA-authorized person.
- 16.7 The obligation to provide a Compliance Report will be satisfied if it is submitted within one week of the due date in each case.

Part 6

Directions by the CMA as to compliance

17. Directions

17.1 The CMA may give directions falling within paragraph 2 of this article to:

- (a) a person specified in the directions; or
- (b) a holder for the time being of an office so specified in any body of persons corporate or unincorporated.

17.2 Directions fall within this paragraph if they are directions:

- (a) to take such actions as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or
- (b) to do, or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain from doing.

Part 7

Supply of information to the CMA

18. Duty to supply information to the CMA

- 18.1 Any person to whom this Order applies is required to provide any information and documents required by the CMA for the purposes of enabling the CMA to monitor the carrying out of this Order or any provisions of this Order and/or to review the effectiveness of the operation of this Order, or any provision of this Order.
- 18.2 Any person to whom this Order applies may be required by the CMA to keep and produce those records specified in writing by the CMA that relate to the operation of any provisions of this Order.
- 18.3 Any person to whom this Order applies and whom the CMA believes to have information which may be relevant to the monitoring or the review of the operation of any provisions of this Order may be required by the CMA to attend and provide such information in person.
- 18.4 Subject always to Part 9 of the Act, the CMA may publish any information or documents that it has received in connection with the monitoring or the review of this Order or any provisions of this Order for the purpose of assisting the CMA in the discharge of its functions under or in connection with this Order.