

PAYDAY LENDING MARKET INVESTIGATION ORDER 2015

DRAFT EXPLANATORY NOTE – CONSULTATION

[This note is not a part of the Order]

Introduction

1. The Competition and Markets Authority (CMA) published its findings in a report under section 136 of the Enterprise Act 2002 (the Act) entitled *Payday lending market investigation: final report* on 24 February 2015 (the Report).
2. The Report set out the CMA's findings that there are features of the market for payday lending which alone or in combination adversely affect competition.
3. The CMA decided on a package of remedies to be implemented by it in order to remedy, mitigate or prevent the adverse effect on competition that it found arising from the following features:
 - (a) The context in which customers take out payday loans is often not conducive to customers shopping around to find a good-value loan and may amplify the adverse effects of other barriers to shopping around and switching lender.
 - (b) It can often be difficult for customers to identify the best-value loan product on offer given their borrowing requirements.
 - (c) Customer demand is particularly insensitive to fees and charges incurred if a borrower does not repay their loan in full on time.
 - (d) Many online customers take out payday loans via a lead generator's website. Lead generators generally sell customer applications on the most favourable commercial terms for the lead generator – often to the highest bidder.
 - (e) Where their choice of lender is not dictated by concerns about credit availability, customers can be dissuaded from looking at alternative suppliers by the perceived risks associated with using a new lender, particularly in light of the negative reputation of the payday lending sector.

- (f) The ability of new entrants to expand and establish themselves as an effective competitor is likely to be obstructed by the difficulties associated with raising customers' awareness of their product in the face of the barriers to shopping around and switching, the strength of the well-established brands that already exist in the market, and the extensive advertising costs required to overcome these obstacles.
 - (g) While the ability to assess credit risk accurately is a necessary requirement for any provider of personal credit, it is likely to be a particularly important determinant of a provider's success in the payday lending sector, because of the high credit risk associated with payday loan customers. Because of their greater reliance on new customers and the role of learning in the credit risk assessment process, new entrants are likely to face some disadvantages in their ability to assess credit risk for a period, which would put them at an initial cost disadvantage relative to more established providers.
 - (h) The history of non-compliance and irresponsible lending by some payday lenders, and the resulting negative reputation of the sector, are likely to reduce the constraint imposed by the prospect of new entry on payday lenders' pricing.
4. The Payday Lending Market Investigation Order 2015 (the Order) gives effect to some of these remedies. Different articles in the Order will come into force on different days. Unless otherwise stated, it is not intended that there should be any further transitional period in relation to any of the provisions contained within the Order.
 5. Other remedies are the subject of recommendations to the Financial Conduct Authority (FCA) to take action, specifically in relation to standards to be adopted by the operators of price comparison websites and the transparency of operations of lead generators.
 6. The Order is subject to any overriding requirements of the laws of the European Union, including any jurisdictional requirements.

Possible consequences of not complying with the Order

7. Section 167 of the Act places a duty on any person to whom the Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action.

8. The CMA has the power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
9. Section 167 of the Act also provides that the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

Review of the Order

10. The CMA has a duty under section 162 of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances. Payday loan providers may apply for a variation or cancellation of all or part of the Order on the basis of a change of circumstances, or recommend that the CMA reviews the need for the Order or part of it.

Status of this Explanatory Note

11. Nothing in this Explanatory Note is legally binding. In the event of a conflict between this Explanatory Note and any provision of the Order, the Order shall prevail.

Structure of the Order

12. The Order is divided into seven parts:
 - (a) Part 1 contains general provisions, which include specifying when the Order comes into force and the scope of the Order.
 - (b) Part 2 contains definitions that are used throughout the Order (and which are also used in this Explanatory Note).
 - (c) Part 3 prohibits the supply of payday loans unless the lender has published information on an FCA-authorized price comparison website.
 - (d) Part 4 prohibits the supply of payday loans unless customers are provided with a summary of the cost of borrowing.
 - (e) Part 5 contains an obligation on payday loan providers to produce compliance reports and submit them to the CMA.
 - (f) Part 6 contains provisions allowing the CMA to give directions as to compliance with the Order.

- (g) Part 7 relates to the provision of information to the CMA for the purposes of monitoring compliance with the Order and reviewing its operation.

Part 1 – General

13. Article 1 provides that the Order shall come into force on different dates as follows:
- (a) Subject to Article 1.4, Parts 1, 2, 3, 5, 6 and 7 will come into force on [date Order is made].
 - (b) Subject to Article 1.5, Part 4 will come into force on [date 12 months after Order is made].
 - (c) 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.
 - (d) 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.

Part 2 – Interpretation

14. Article 2 includes definitions of various terms used in the Order, some of which were not defined in the Report. Key definitions are:

FCA-authorized payday loan PCW – this is a payday loan price comparison website that is operated by an FCA-authorized person.

FCA-authorized person – this is a firm that has been authorised by the FCA pursuant to the Financial Services and Markets Act 2000. It does not include a firm that has only an interim permission by virtue of article 56 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013.

Obligation to Publish Date – this is defined as being the later of two dates, with the intention being that online lenders will have at least 12 months from the Decision Date before they are required to publish details of their payday loan products on at least one FCA-authorized PCW. The Obligation to Publish Date will be more than 12 months after the Decision Date if the FCA's additional standards do not come into force until more than 12 months have elapsed since the Decision Date.

Payday loan – this is defined as an 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).

High street lender – this term includes a lender which supplies payday loans exclusively from a retail store or stores and also the part of any lender's business which supplies payday loans exclusively under a brand offered only from a retail store.

Part 3 – Prohibition on supplying payday loans unless the lender has published information on an FCA-authorized price comparison website

15. The aim of Part 3 is to allow borrowers easily and quickly to compare multiple loan products to establish the best-value loan product for their needs and to identify loan costs.
16. Article 3 provides that, subject to Article 6 of the Order, which applies if online lenders have been unreasonably excluded from all FCA-authorized payday loan PCWs, online lenders are prohibited from entering into any agreement to supply payday loans to borrowers in the UK unless they comply with certain requirements relating to use of FCA-authorized payday loan PCWs. These provisions require online lenders to cause up-to-date details of their payday loan products to be continuously published, in a manner complying with the requirements of Articles 4, 5 and 7 of the Order, on at least one FCA-authorized payday loan PCW.
17. For the avoidance of doubt, the prohibition on online lenders entering into any agreement to supply payday loans to customers in the UK unless they continuously publish up-to-date details of their payday loan products on at least one FCA-authorized payday loan PCW does not apply to high street lenders.
18. Whilst there is no requirement that high street lenders cause up-to-date details of their payday loan products to be published on at least one FCA-authorized payday loan PCW, they are nevertheless free to do so if they so choose.

Timeframe for publishing information

19. Article 4.1 sets out the timeframe within which online lenders are required to have details of their payday loans published on an FCA-authorized payday loan PCW, failing which the prohibition in Article 3 would apply. The key date is the Obligation to Publish Date. This is the later of the date 12 months after

the date on which the FCA publishes its rule-making instrument concerning PCWs for High-Cost Short-Term Credit agreements or the date on which the FCA's additional standards come into force. By this date, online lenders must have details of their payday loans published on an FCA-authorized payday loan PCW. The timeframe that applies under the Fall-back Position is set out separately in Article 8.9.

20. Article 4.2 deals with the situation 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. In such a case, the CMA may grant an extension of three months from the Obligation to Publish Date on application from an online lender. However, in order to obtain such an extension, the online lender must demonstrate to the satisfaction of the CMA that:
 - (a) commercial negotiations are underway with one or more existing FCA-authorized 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.
21. The CMA will require evidence of the above information and this may include:
 - (a) copies of all correspondence between the lender and payday loan PCWs;
 - (b) evidence of the lender's commitment to achieving publication;
 - (c) the online lender's internal planning documentation;
 - (d) any other information which the CMA may require.

Information to be supplied

22. Article 5.1 provides that online lenders are required to supply their selected FCA-authorized payday loan PCW(s) with relevant information on each of their online payday loan products.
23. By 'relevant information', the CMA means:
 - (a) the structure and amount of interest and other fees and charges. By 'structure' the CMA here means the method by which the interest, fees and charges are calculated;

- (b) the minimum and maximum duration of the loan and the available incremental length of the loan, ie whether the period can be extended by single days or only by increments of five days, ten days etc;
- (c) the minimum and maximum initial value of the loan and the available incremental values of the loan, ie whether the sum borrowed can be increased by individual pounds or only by increments of £10, £50 etc;
- (d) repayment structure, ie when repayment of capital, charges and fees is required, at what intervals if in instalments and the amounts of those repayments;
- (e) the structure and value of fees and interest arising from late payment or default, ie the method by which such fees and interest are calculated and the amount(s) of those fees;
- (f) the lender's early repayment rules and details of any fees or charges levied in the event that repayment is made before the contractual due date and when such charges are payable;
- (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.

Exception

- 24. Article 6.1 deals with the situation where an online lender is unreasonably excluded from all FCA-authorized payday loan PCWs. Where an online lender can demonstrate 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 during which that lender remains unreasonably excluded.
- 25. However, online lenders are expected to continue to make efforts to comply with the obligations. In these circumstances, the lender must continue to seek to identify an FCA-authorized payday loan PCW on which its products would be listed and must provide the CMA with evidence of the steps taken, pursuant to Article 15.
- 26. If an online lender is to prove to the satisfaction of the CMA that it has been unreasonably excluded from all FCA-authorized payday loan PCWs, the CMA would expect that lender to provide the CMA with all the necessary

information to enable it properly to assess that this is the case, which may include:

- (a) copies of all correspondence with FCA-authorized payday loan PCWs;
- (b) details of attempts made by the lender to address any concerns raised by the FCA-authorized payday loan PCWs;
- (c) evidence that the exclusion has been raised with the FCA and any response received from the FCA;
- (d) the online lender's internal planning documentation;
- (e) any other information which the CMA may require.

27. Relevant objective factors in an assessment of unreasonable exclusion might include:

- (a) the lender's reputation and how it advertises its products;
- (b) the lender's willingness/ability to provide information and meet the PCW's service levels;
- (c) the lender's record of regulatory compliance;
- (d) the lender's financial standing;
- (e) customer complaints regarding the lender.

28. The CMA would expect a PCW's concerns about a lender's reputation to be based on factors such as FCA regulatory action or customer complaints to the PCW which were significantly greater in volume or severity than for other lenders.

Duty to display a hyperlink

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

30. By 'prominent', the CMA means that the hyperlink is to be on the lender's homepage, legible, in at least the same sized font as the other information on the same web page and visible above the fold of the web page.

Fall-back position

31. Article 8.1 provides for the situation where no FCA-authorized payday loan PCW exists by the Obligation to Publish Date and:
- (a) no applications for authorisation as a credit broker to operate a payday loan PCW are 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.

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

32. The CMA expects lenders actively to monitor whether any such application has been made.
33. Article 8.2 provides for the situation where, although no FCA-authorized payday loan PCW yet exists, 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. In these circumstances, the CMA may grant an extension of six months to the period specified in Article 8.1 for the submission to the FCA of the authorisation application.
34. If an online lender is to prove to the satisfaction of the CMA that demonstrable progress is being made towards obtaining authorisation by the FCA of a payday loan PCW under Article 8.1, the CMA would expect to be provided with all the necessary information to enable it properly to assess that this is the case, which may include:
- (a) copies of all correspondence between the lender and the relevant payday loan PCWs;
 - (b) details of steps taken by the lender and the PCWs to obtain authorisation;
 - (c) relevant correspondence with the FCA;
 - (d) the online lender's internal Board papers;
 - (e) any other information which the CMA may require.
35. Article 8.3 provides that 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 that FCA-authorized

payday loan PCW within three months from the date of authorisation. This provision recognises that lenders may need this time to get their information ready for publication once an FCA-authorized payday loan PCW exists.

36. Article 8.4 provides for the situation where an application for authorisation of a PCW submitted pursuant to Article 8.1 is declined by the FCA. In these circumstances, an additional period may be granted by the CMA if it considers that this would enable the online lenders to obtain FCA authorisation within that time.
37. If an online lender is to prove to the satisfaction of the CMA that an additional period should be granted by the CMA under Article 8.4, the CMA would expect to be provided with all the necessary information to enable it properly to assess that this is the case, which may include:
 - (a) copies of all correspondence between the lender and the relevant payday loan PCWs;
 - (b) details of steps taken by the lender and the PCWs to obtain authorisation;
 - (c) the lender's detailed plans for obtaining authorisation;
 - (d) relevant correspondence with the FCA;
 - (e) the lender's internal Board papers;
 - (f) any other information which the CMA may require.
38. Article 8.5 deals with the situation where an online lender or lenders commission an authorised credit broker to establish a payday loan PCW under this article on their behalf. It explains that, in these circumstances, FCA authorisation for the payday loan PCW will not be required. This is because the authorised credit broker is already in possession of the necessary authorisation, and will be required to comply with the FCA's additional standards applicable to payday loan PCWs in order to publish details of payday loan products. For this reason, lenders will have a period of six months from the Obligation to Publish Date for the payday loan PCW to become operational.
39. Article 8.6 provides for the situation where the payday loan PCW established or commissioned under Article 8.1 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. In these circumstances, 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.

40. If an online lender is to prove to the satisfaction of the CMA that demonstrable progress has been made towards establishing or commissioning a payday loan PCW pursuant to Article 8.5, the CMA would expect to be provided with all the necessary information to enable it properly to assess that this is the case, which may include:
- (a) copies of all correspondence between the lender and the relevant payday loan PCWs;
 - (b) details of steps taken by the lender and the PCWs to obtain authorisation;
 - (c) the lender's detailed plans for obtaining authorisation;
 - (d) evidence of the resources committed by the lender to achieving authorisation;
 - (e) relevant correspondence with the FCA;
 - (f) the online lender's internal Board papers;
 - (g) any other information which the CMA may require.
41. Article 8.7 sets out the timeframe for publication where a payday loan PCW has been established or commissioned under Article 8.5. In these circumstances, 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.
42. Article 8.8 sets out notification requirements 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. In these circumstances, each of them must individually notify the CMA of their association with the application for authorisation of the payday loan PCW.
43. Article 8.9 sets out the details of when the prohibition in Article 3.1 will apply in the different situations covered by the Order.

Alternative PCW

44. Article 9.1 states that 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. The two exceptions to this are where the online lender can demonstrate that it has been unreasonably excluded from all other FCA-authorized payday loan PCWs or where it can demonstrate 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.

45. For the purposes of Article 9.1, in assessing whether an online lender or any interconnected body corporate has a material interest in an FCA-authorized payday loan PCW, the CMA will take into account, for example:
- (a) the ownership of the FCA-authorized payday loan PCW;
 - (b) its governance structure;
 - (c) financial links; and
 - (d) relevant agreements between the lender and the FCA-authorized payday loan PCW.

Notification to the CMA

46. Article 10.1 sets out matters that online lenders must forthwith notify to the CMA. This information is required to enable the CMA to monitor progress in compliance with the Order.

Part 4 – Prohibition on supplying payday loans unless customers are provided with a summary of the cost of borrowing

47. Subject to Article 1.5 of the Order (which sets a different date for compliance with the requirements of Article 13(3)(c) to (f)), Part 4 of the Order comes into force on the day 12 months after the day on which the Order is made.
48. The aims of Part 4 are to encourage borrowers actively to shop around and to address borrowers' over-confidence in their ability to repay a loan and their insensitivity to fees and charges for late payment.
49. Article 11.1 provides that lenders are prohibited from entering into any agreement to supply payday loans to UK customers unless certain requirements are met.
50. Article 11.2 sets out those requirements. Only one summary is required at the end of each relevant loan.

Timing and method of provision of summary

51. Article 12.1 provides that the summary must be made available:
- (a) when a borrower settles the balance of the payday loan; or

- (b) when a borrower's payday loan account is closed by the lender as a result of default or forbearance; or
 - (c) three months after a borrower has missed a payment where the borrower is in default but the lender does not close the payday loan account.
- 52. Article 12.2 states that the borrower must be notified of the availability of the summary as soon as practicable. This must be at the latest within one working day of the event described in Article 12.1(a), (b) or (c), except in the case of high street premises that are closed on the given day, in which case they must be notified on the next working day.
- 53. Article 12.3 provides that 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 (this must be only through a means accessible only to the lender and the borrower), or by email if this was the method 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 when the loan is issued. A high street lender must offer borrowers the opportunity to receive the summary in a durable medium in store (this will usually be a paper copy) but may choose additionally to offer access via post, via its website (this must be only 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 of the application for the previous loan.
- 54. Article 12.4 states that lenders must take all reasonable steps to bring the summary to borrowers' attention. This means that 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. In the case of high street lenders, borrowers must be reminded of the availability of the summary.
- 55. Article 12.5 clarifies that 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. Where a borrower returns to a lender more than 12 months after the date on which the summary was made available, there is no requirement to issue any further summary prior to entering into a new loan agreement with that customer.

Content of summary

56. Article 13.1 specifies the required content of the summary.
57. As is set out in Article 13(1)(c), the summary should state details of any subsequent increase in the amount borrowed or the duration of the loan or facility and there is no requirement to provide a separate summary in relation to these.
58. The requirements of Article 13(1)(d) could be met by the provision with the summary of a full transaction history covering the relevant period.
59. Article 13.2 sets out the additional required content of the summary in the situation where a borrower has taken out more than one loan with a lender during the 12-month period preceding the date on which the summary is made available. The requirement to provide the summary is limited to the events set out in Article 12.1. There is no requirement that the summary must be continuously available to borrowers on demand.
60. Article 13.3 details other information that the summary must also include in certain situations.
61. Article 13.3(f) deals with the situation 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 FCA-authorized payday loan PCWs exists. In these circumstances, the summary must also include the web address of an FCA-authorized payday loan PCW. The CMA considers that high street lenders should make their choice of this PCW with regard to the FCA's Principles for Business.

Part 5 – Monitoring and compliance reporting

Regarding Part 3 – the prohibition on supplying payday loans unless the lender has published information on an FCA authorised payday loan PCW

62. Article 15 sets out the detailed compliance reporting requirements in relation to Part 3. It requires online payday loan providers to submit compliance statements. These must be submitted 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 a payday loan PCW and annually thereafter. The article lists the information which must be included in the compliance statements. This information is required to assist the CMA in complying with its statutory duty to monitor compliance with the Order.

Regarding Part 4 – the prohibition on supplying payday loans unless customers are provided with a summary of the cost of borrowing

63. Article 16 sets out the compliance reporting requirements in relation to Part 4. It requires lenders to submit compliance statements to the CMA within three months of the date on which the Order was made, then quarterly until the first anniversary of the making of the Order ('Quarterly Compliance Report') and thereafter annually from the first anniversary of the making of the Order ('Annual Compliance Report'). The content requirements for the Quarterly and Annual Compliance Reports are different and are set out in the article. This information is required to assist the CMA in complying with its statutory duty to monitor compliance with the Order.

General provisions applying to compliance reporting on Part 3 and Part 4

64. Article 16 also clarifies the compliance reporting requirements where lenders are members of the same Corporate Group. It explains that only one Compliance Report for the Corporate Group must be submitted but it must identify the information in Articles 15 and 16 separately as applicable to each lender. The certification requirements are also set out in this article.
65. 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

66. Article 17 provides that the CMA may give directions as to compliance with the Order.

Part 7 – Supply of information to the CMA

67. Article 18 provides for any person to whom this Order applies to provide information required by the CMA to allow it to monitor and review compliance with and operation of the Order.