Rules and guidance on payment protection insurance complaints

Citizens Advice's response to the Financial Conduct Authority

February 2016

citizens advice

About the Citizens Advice service

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone about their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

The service aims:

- to provide the advice people need for the problems they face
- to improve the policies and practices that affect people's lives.

Citizens Advice is the membership body for local Citizens Advice services in England and Wales. There are over 300 local Citizens Advice services in England and Wales giving advice from about 3,500 locations including high street offices, libraries, courts, prisons, GP's surgeries and hospitals.

Citizens Advice and Citizens Advice Scotland jointly run the Citizens Advice Consumer Service (formerly Consumer Direct), which provides consumers and small businesses with advice about problems with goods and services. The Consumer Service database also provides a source of intelligence for Trading Standards Services across Great Britain and national regulators.

Responses to consultation questions

Q1: Do you agree with our assessment of the PPI landscape and trends, and that we should now seek to draw the PPI issue to an orderly close through the proposed deadline and proposed consumer communications campaign?

Largely we agree with the FCA's assessment of the PPI landscape and trends, in particular with the findings of the extensive research undertaken to assess the impact of a deadline. We also agree with most of the FCA's rationale for a deadline as set out in paragraph 2.50 of the consultation paper. We do, however, have some reservations about two of the FCA's observations and conclusions about the case for a deadline.

We are still concerned that the deadline risks prompting a surge in cold calls from claims management companies (CMCs) desperate to make as much money as possible from consumers whilst they can. Given the experiences of our customers and the public with the claims management sector cold calling consumers, and the

confusion many consumers experience about their rights to claim PPI, we have some real concerns about the proposal to introduce an effective cut off date for new PPI complaints. Our greatest concern is that it will create a flurry of activity amongst the PPI claims management sector, and may even lead to an increase over and above previous activity. This is likely to have a detrimental effect on those members of the public already tired of receiving unsolicited marketing approaches and feeling like they are being cajoled into taking action.

Whilst some consumers are able to resist cold calls from CMCs, others are cajoled into signing up with one. Our evidence suggests that people can lose out substantially from signing up with a CMC to undertake a fairly simple claim for compensation. Our network of local Citizens Advice services and our Consumer Service helpline regularly see people who have ended up paying hefty charges for a fairly straightforward claim. In some cases, this simply adds to their existing debt problems. Recent research we have undertaken on the level of CMC fees for simple financial services complaints that the average fee for our Consumer Service clients with PPI or packaged bank account claims is 35 per cent and could be as much as 52 per cent of the total compensation.

Whilst we welcome the FCA's emphasis in the proposed consumer communications campaign on the ease of making a complaint oneself, we believe that it is vital that the deadline is aligned with proposed action by the MoJ Claims Management Regulator to cap the level of fees for simple financial services compensation claims. We understand from a recent meeting with the MoJ Claims Management Regulator that it is their intention to ensure that the proposed changes to CMC regulation in their recently published consultation on fees will come into effect at the same time as the deadline for PPI claims. This is very welcome.

We agree with concerns raised by other consumer groups that the deadline might encourage CMCs to switch their attention to bringing PPI claims in the courts. We think this is most likely in relation to *Plevin*-type complaints as the amount of compensation is likely to be higher and therefore the fees earned higher.

The credit agreement in *Plevin* was a secured loan to consolidate debts and some home improvements and provided credit of more than £25,000 (the amount was £34,000 for the loan and £5,780 for the PPI). Although this was an exempt agreement for the purposes of the Consumer Credit Act, the unfair relationships provisions of the Act apply to exempt and non-regulated agreements with the exception of regulated mortgage contracts.

We do not agree with the FCA's assessment that the proposed consumer communication campaign combined with the clear deadline will be sufficient to alert consumers who are potentially affected by the *Plevin* judgment that they have cause for complaint. In our view, it will be difficult to get over to consumers the nature and implications of this complex judgment in a standard consumer information campaign. The FCA should therefore consider whether a longer deadline is necessary to ensure that these consumers can make a claim for compensation.

Q2: Do you agree with the proposed nature, date and scope of the proposed deadline?

We agree with the FCA's thinking in relation to the nature and scope of the deadline.

In the light of our comments on complaints resulting from the Supreme Court's decision on *Plevin*, we think a three year deadline might be more appropriate to ensure that all affected consumers have adequate opportunity to complain. We would also reiterate our comments made in answer to question 1 above that the rules implementing the deadline should not start until the MoJ CMR have imposed a cap on the fees CMCs can charge for PPI claims.

Q3: Do you agree with the proposed aims of the proposed consumer communications campaign?

We agree to some extent with the aims of the FCA's proposed communications campaign to encourage consumers to initiate a complaint before the deadline. We particularly welcome the FCA's proposed emphasis on dispelling the myths and confusion about the PPI complaints process as our own research found that some consumers who had used CMCs to complain about PPI felt that if they knew there was readily available information and materials to make a complaint themselves, they would not have used a CMC. We have three observations to make which we feel the FCA should take into account when designing its consumer communications campaign:

- Whilst we agree that firms should be involved in the consumer communications campaign, the FCA needs to bear in mind that consumers may have reservations about about messages from their lender/bank. Our research about PPI redress found that another reason why some consumers used CMCs to complain was that their trust in financial services providers was very low.[1] It seems that part of the reason why these people used CMCs was because of the perceived expertise of the CMC in getting a good settlement.
- Secondly, our 2014 research showed that consumers in social groups C2 and DE may more likely to use a CMC for a PPI compensation claim.
- Finally, the communications campaign needs to address the fact that fraudsters posing as CMCs may cold call and persuade consumers to part with their money. Around half of the calls the Citizens Advice consumer service sees about claims for mis-sold PPI relates to up-front fee fraud - whereby the consumer receives a call from "the Ministry of Justice.

Therefore we believe that the communication campaign needs to take these issues into account to ensure that consumers do not end up being victims of scams or paying a large proportion of their compensation to a CMC unnecessarily.

[1] *The cost of redress - the lessons to be learnt from the PPI mis-selling scandal*, Citizens Advice, 2014

Q4: Do you agree with the proposed audience, channels and cost of the proposed consumer communications campaign?

Yes. We note that the FCA intends to provide a helpline and involve some partnership activity in their consumer communication campaign to reach vulnerable consumers.[2] Citizens Advice is keen to set up a free-to-consumer PPI complaints service, that will provide clients with information, advice and support on understanding and pursuing PPI complaints. We will work in partnership with the FCA and financial sector to heavily promote the service. We think the real benefit for consumers are a trusted, independent and impartial source of advice and information, so consumers will not confuse us with CMCs.

As the largest providers of free money and consumer advice, through the local offices , telephone helplines and email and webchat services, the development of a Citizens Advice PPI complaints service is a natural complement to our existing services. An additional benefit of the FCA and the banks working with Citizens Advice is that we will offer an holistic service to consumers, so those with debts will receive help and advice on managing their debts, which could include repayment or partial repayment from any PPI compensation. Our reach is extensive, with outlets in most local communities, and we see a higher proportion of vulnerable consumers compared to the population as a whole.

Q5: Do you agree with our proposed fee rule for allocating the costs of the proposed consumer communications campaign?

We agree strongly that the cost of the consumer education campaign should be met by firms that caused most detriment in terms of mis-selling PPI. We consider that the FCA's proposed approach to allocate the fee on a pro-rata basis to the 18 firms who have each reported over 100,000 complaints since August 2009 is appropriate and cost-effective. We do not have a view as to whether £42.2 million is sufficient to cover the cost of the campaign based on a two year deadline, as there are no calculations provided in the paper.

Q6: Do you agree with our rationale for proposing rules and guidance now concerning the handling of PPI complaints in light of *Plevin*, and that it is preferable in the circumstances that we, not the Ombudsman service, take the lead in this?

Yes, we agree with the rationale that proposing such rules and guidance will help ensure that firms resolve complaints in an efficient, consistent and fair way in light of *Plevin*. We also agree with the rationale to introduce regulatory intervention now in relation to this issue rather than waiting for further clarification from the courts which may or may not be forthcoming at an indeterminate time.

We agree that it is preferable not to leave the resolution of such complaints solely to the remit of the Ombudsman. The proposed rules and guidance should provide a welcome additional tier of protection for consumers alleging an unfair

[2] paragraphs 3.25 and 3.26 of the consultation

relationship under s140A Consumer Credit Act 1974 (CCA 1974) arising from undisclosed PPI commissions.

This additional protection would otherwise be absent if the resolution of complaints were left solely to the remit of the Ombudsman or through recourse to the courts. The rules and guidance should help more consumers achieve fairer outcomes overall, by ensuring fairer outcomes for those consumers who may not refer their complaint to the Ombudsman either through choice or ignorance of the service's existence. This is to be welcomed.

Introducing these rules and guidance improves Alternative Dispute Resolution (ADR) processes in two ways:

- Firstly, by ensuring fairer outcomes during negotiations between firms and consumers at the early complaint stage, and
- Secondly by providing a specific regulatory framework for the Ombudsman to consider.

These ADR improvements are a very welcome consumer protection, particularly in light of the substantial cost risks associated with litigation which act as a disincentive to the majority of consumers to pursue unfair relationship claims under CCA 1974 and therefore greatly inhibit access to justice.

Q7: Do you agree with the scope of our proposed rules and guidance concerning the handling of PPI complaints in light of *Plevin*?

Yes, we generally agree with the broadly drawn scope of the proposed rules and guidance detailed in sections 5.18 to 5.22 which encompass the various types of PPI policy and the sales which will be the subject of complaints. We would agree that this approach is consistent with the broad principle established at paragraph 18 of the *Plevin* judgment, which seems applicable to all agreements with PPI where a high proportion of the premium is undisclosed commission and to which s.140A-s140B would apply.

We would however suggest some amendments. Regarding sections 5.13 to 5.17, we consider that the guidance should also apply to regulated mortgage contracts and regulated home purchase plans (to which s.140A and s.140B do not apply) on the basis that these transactions are likely to be the most important and costly that consumers will undertake in their lifetimes, with the highest associated risks in the event of default. In light of the importance of these transactions, consumers of these products should be entitled to equivalent transparency regarding the purchase of PPI relating to them.

Q8: Do you agree with our proposed structuring of the new rules and guidance concerning *Plevin* as a separate 'second step' within our existing PPI complaint handling rules and guidance?

Yes, we agree with the proposed structuring of the new rules and guidance to incorporate the '2 step process' outlined in sections 5.23 - 5.24 for the reasons detailed in sections 5.25 and 5.26. The process seems proportionate and

appropriate as *Plevin* addresses the specific and narrower issue of whether particularly high undisclosed sums of commission give rise to an unfair relationship, as opposed to the broader question of whether a PPI product was missold in light of current rules and guidance.

Q9: Do you agree with our proposed definition of "commission" for the purposes of handling PPI complaints in light of *Plevin*?

Yes, we agree with the proposed definition of commission detailed in sections 5.39 to 5.48. We would consider that this is a sufficiently broad definition which is again consistent with the Plevin judgment and we would agree with the reasons cited in these sections for drawing the definition in this way.

Q10: Do you agree with our proposal of a single 50% commission 'tipping point' at which firms should presume, for the purposes of handling PPI complaints, that the failure to disclose commission gave rise to an unfair relationship under section 140A?

No. We strongly oppose the proposed 50 per cent commission tipping point, as it is unfair to consumers and fails to take into account the thinking of the Supreme Court in *Plevin*. Our previous consultation response to CP15-6 in April 2015 regarding commission in relation to proposed changes to FCA Consumer Credit Guidance called for CONC 4.5.3 R to be amended to require firms to disclose the amount of commission that would be paid in every case. We also requested the FCA consider amending CONC 4.5 to require all lenders and brokers to disclose commission in all circumstances for the credit and for any ancillary services funded by the credit agreement, commenting that this would strengthen the *Plevin* judgment.

Whilst we acknowledge the 'tipping point' principle established by *Plevin*, we believe the situation with regards to commission disclosure should be no different in the case of sales of PPI to other consumer credit products. Further to this we believe that ICOB 4.6.2 R should also be revised to require firms to disclose both the fact they are receiving commission and the amount of the commission in sales of consumer PPI policies, rather than only commercial consumer policies.

We also consider that a failure to disclose commission is a breach of the Principles of Business at section 2.1 of FCA Handbook, specifically principles 6, 7 and 8. It is clearly fair and in a customer's best interests to be made aware of the level of commission so they can make an informed decision based on transparent facts about whether or not the PPI is good value for money. There is a clear conflict of interest where firms who are also acting as brokers and therefore an agent of the client, fail to disclose this information, as well as potentially a breach of fiduciary duty under the general law. Such agents should be acting in the best interests of their client by assisting them to navigate what the Supreme Court acknowledged in *Plevin* was 'an inherently unequal relationship'. This principle was also established in the Court of Appeal case *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 which held that borrowers in this particular market were likely to be vulnerable and unsophisticated. It concluded that disclosure of the amount was necessary "to bring home to such borrowers the potential conflict of interest". Whilst this case

concerned loans rather than insurance the issues regarding conflict of interest are the same.

Notwithstanding our previous comments we acknowledge that if the FCA is not minded to amend the rules and guidance to require full disclosure of commission for PPI sales, regardless of the size, we agree that the proposal to introduce a single 'tipping point' in light of Plevin would be appropriate. However, in light of the Supreme Court's comments in this case we consider that 50 per cent or more of the PPI premium constituting an undisclosed commission is too high a proportion to exceed before the non - disclosure should give rise to an unfair relationship.

Whilst the Court of Appeal acknowledged the difficulty in defining where the 'tipping point' should be, Lord Sumption's words when applying the principle in *Plevin* were 'the commissions paid in this case go a long way beyond it.' The proportion of the PPI premium which constituted commission in Plevin was 71.8 per cent. This exceeds the 50 per cent tipping point proposed in the rules and guidance by just 21.8%. This is obviously less than a quarter of the full amount of the premium and is closer to a fifth. We consider that 21.8 per cent of the overall premium is inconsistent with Lord Sumption's words 'a long way beyond' the tipping point. We consider 25 per cent of the overall premium constituting undisclosed commission would be a much fairer proportion at which to place this tipping point. The commission in Plevin would exceed our proposed tipping point by 46.8 per cent which seems more analogous with the court's words 'a long way beyond.'

We also consider that when deciding where this 'tipping point' should be placed, consideration should be given to the purpose of the commission itself and whether this reflects reasonable costs and profit margins incurred by the firm/s involved. To draw analogy from another example, the Office of Fair Trading's April 2006 statement 'Calculating fair default charges in credit card contracts' set the threshold at which a credit card default charge would be deemed to be unfair to be £12. Section 1.3 of this report confirmed the rationale for such a threshold was that anything in excess of this amount could be deemed as unfair because it exceeded the limited administrative costs of the card issuer.

At paragraph 5.56 of the consultation paper the FCA refers to the Competition Commission's 2009 report which states that the average associated costs (including reasonable profit) of the major PPI distributors is 16 per cent. It further acknowledges that the 50 per cent proposed tipping point gives ample headroom where a firm's costs which genuinely exceed this average without negative affect.

If 16 per cent of the PPI reflects the average costs for distributors, we would argue that the same principle as that adopted by the OFT in their April 2006 report should be adopted by the FCA when addressing where the 'tipping point' for disclosure of commission in PPI premiums should be. Therefore a commission which as a percentage of the PPI premium clearly exceeds the actual costs incurred by the distributor including a reasonable profit, should arguably give rise to an unfair relationship. The proposed tipping point should therefore be closer to 16 per cent rather than 50 per cent.

When addressing the question of where to place this tipping point, we believe that the FCA should conduct research as to the level of commission it is reasonable for lenders to be required to disclose to consumers who are purchasing PPI. We note that paragraph 2.48 of the consultation refers to consumer research undertaken

which revealed that most consumers expected commission paid to be between 10% -50%, with some commenting that the proportion in *Plevin* would cause them to question the value of the product and some stating that they thought it unlikely that the commission they paid on their product would be the same as the *Plevin* amount. These consumers would likely be dismayed to learn that the market average for the years 2002 -2006 was 67 per cent as detailed at paragraph 5.54. Although we acknowledge these figures relate to a period before the financial crash it is unclear whether these averages have significantly reduced since then.

Q11: Do you agree with our proposed examples of circumstances in which the presumptions might be reasonably rebutted? Are there other such circumstances which could usefully be specified as examples?

We agree in principle with the examples detailed in which the proposed presumptions can be rebutted. However, we would suggest the following amendments. The presumptions capable of rebuttal detailed in paragraphs 5.60 and 5.61 should both hinge on the 'tipping point' proportion of the PPI premium being 25 per cent as opposed to 50 per cent. This is in accordance with our proposed tipping point discussed in question 10.

With regard to the examples of factors which could support the rebuttal of the defined presumptions we have the following comments in relation to paragraph 5.61. We would suggest that the phrase 'If a complainant was in particularly difficult financial circumstances' is amended to remove the word 'particularly', as this seems too vague a definition which could be used to set the bar for rebuttal too high. This could exclude the possible rebuttal of the presumption for a significant proportion of complainants who are in financial difficulty and for whom the 'tipping point' proportion should reasonably be reduced.

With regards to paragraph 5.62 which states 'where a firm genuinely lacks records of the level of commission applicable to a particular PPI sale in a complaint, we would expect it to make reasonable assumptions about this'. We would suggest that in these situations such assumptions should be supported by reference to independent research such as the UK Competition Commission report referred to in paragraph 5.54.

We consider that rather than the question of unfairness hinging on a single tipping point it might be more appropriate to introduce 2 thresholds with different tests. For example (a) if an undisclosed commission were to exceed 15 per cent then a firm would be required to evidence they had given reasonable consideration as to whether non - disclosure amounted to an unfair relationship, and (b) if an undisclosed commission were to exceed 25 per cent then non - disclosure would give rise to an unfair relationship.

Q12: Do you agree with the key elements of our proposed approach to redress at Step 2 of our proposed rules and guidance concerning PPI complaint handling in light of *Plevin*?

Yes, we agree in principle with the proposed approach to the key elements of redress. However, in accordance with our response to question 10 and particularly

our view that 25 per cent rather than 50 per cent would be a more appropriate tipping point after which an undisclosed commission would give rise to an unfair relationship we would suggest that these key elements are revised to incorporate this 25 per cent tipping point.

Q13: Do you agree with our proposed approaches to the other elements of redress at Step 2? Do you perceive any particular practical or operational difficulties in our proposed approach to these elements?

Yes, we agree with the proposed approaches to other elements of redress at Step 2. These seem proportionate and consistent with the *Plevin* judgment. We have not identified any anticipated practical or operational difficulties in our proposed approach to these elements.

Q14: Do you agree that consumers who have previously made rejected PPI complaints that did not mention undisclosed commission, and whose credit agreements fall within the scope of sections 140A-B, should be able to raise this additional issue with the lender and have this assessed under our proposed new rules and guidance?

Yes, we agree with this statement. However, whilst we acknowledge the rationale for choosing not to retrospectively apply the new rules and guidance to complaints which considered the issue of undisclosed commission but were not not upheld, we would suggest that the guidance should clarify exactly when complaints such as those referred to in paragraph 5.88 will be viewed as having been 'previously assessed' as described in paragraph 5.87.

For example, does 'previously assessed' mean complaints assessed before the date Mrs Plevin lodged her appeal with the Court of Appeal following the initial hearing at Manchester County Court on 5 October 2012? Or, does it mean assessed after 5 October 2012 (or the specific date the appeal was lodged with the Court of Appeal) but before these proposed rules and guidance are finalised and implemented? As it is unclear exactly when implementation will be and the intention of the proposed rules and guidance is to reflect the clarification of the law *Plevin* provided, we would suggest that our former definition of 'previously assessed' should apply.

In effect we are proposing that complaints specifically about undisclosed PPI commissions which were rejected after 5 October 2012 (or the specific date the appeal was lodged with the Court of Appeal) but before the implementation of the proposed new rules and guidance, should be re-assessed under the proposed new rules and guidance once they are introduced.

It does not seem reasonable that firms can reject such complaints, effectively ignoring a pending appeal at the higher courts which they should be aware will set a precedent which is directly material to those complaints. Such complaints should have been put on hold, pending an outcome, when the firms reasonably became aware of the *Plevin* appeal. If their complaint was lodged after it was clear that the issues in *Plevi*n were awaiting the attention of the appellate courts, it is fair that

those complaints are considered in light of the rules and guidance which stem from the final *Plevin* Supreme Court judgment.

Q15: Do you agree with our proposed approach of handling *McWilliam*-type PPI complaints under our existing high level (non-PPI specific) complaints handling rules only?

No, we do not agree with the proposed approach to handling McWilliam type PPI complaints. The Court of Appeal defines its rationale for finding in favour of the consumer in McWilliam at paragraph 51. ' In my judgment the Claimants did not give their informed consent. The critical point is that the Claimants were not told how much commission would be paid'. In *Plevin*, at Paragraph 18, Lord Sumption also makes reference to the non disclosure of PPI in explaining his rationale for finding the relationship unfair: 'The information was of critical relevance..... Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.'

It is clear that both Courts' key reason for deciding in favour of the consumers Plevin and McWilliam was the lack of information regarding commission and the principle of unfairness that stems from this lack of transparency. Whilst we acknowledge the Court of Appeal's comments at paragraph 9 of *McWilliam,* describing the judgment as an unsuitable vehicle for resolving analogous issues in other cases, on the issue of non-disclosure of PPI the court's key rationale for the decision is too similar to that in *Plevin* to justify *McWilliam* style complaints being dealt with differently. Whilst the legal remedies may be different in the two cases, we would highlight that the remit of the Ombudsman is not restricted to mirroring available legal remedies but has the broader remit of considering what is fair and reasonable.

We consider that *McWilliam*-style complaints engage in essence the exact same issue as those in Plevin. This being the lack of transparency created by non-disclosure of commissions in the sale of PPI and the unfairness to consumers which arises from it. In line with our comments in response to question 10, we would assert that *McWilliam*-style complaints should benefit from the same scrutiny proposed for *Plevin* style complaints outlined in Step 2 of your PPI specific proposed approach outlined in section 5.24, especially the requirement to consider whether or not there has been a non-disclosure of commission.

We do not agree with *McWilliam*-type complaints being caught by the same deadline as *Plevin*. We would propose a deadline for these complaints for the same reasons outlined in our response to questions 1 and 2 of this consultation paper.

Q16: Do you have any comments on our cost benefit analysis?

Largely we agree with the cost benefit analysis set out in the consultation. We have the following additional comments to make:

Paragraphs 3.3 and 3.5 - we have some concerns about the FCA's assessment about the impact of the deadline on CMC behaviour and practices. Whilst more consumers might respond to the consumer communication campaign messages about the ease of making a complaint themselves, CMCs and fraudsters posing as CMCs are likely to ramp up cold calling campaigns, as we highlighted in our response to question 1. Consumers are therefore likely to end up out of pocket. We would also point out that people in debt who have used a CMC to obtain redress may end up with an additional debt to the CMC if the compensation the consumer receives from the lender is simply netted off against the linked loan/credit card debt.

Q17: Do you agree with our initial assessment of the impacts of our various proposals on the protected groups and vulnerable consumers? Are there any other potential impacts we should consider?

It is difficult to say from the consultation whether or not the proposals will have an adverse impact on vulnerable consumers and protected groups. Given that PPI was often inappropriately sold to people who would never be able to benefit from it because they were not working at the time or were self employed, they were over the age of 65 or had a pre-existing condition, it seems odd that the deadline and the proposed rules on Plevin would not have a particular impact on vulnerable people and disadvantaged groups. Our own statistics show that clients who were given advice on PPI were more likely to be over 65 or have a long term health condition/have a disability than all Citizens Advice clients:

- 32 per cent of clients given advice on PPI were aged 65 or over compared to 12 per cent of all our clients
- 22 per cent of clients given advice on PPI had a long term health condition compared to 19 per cent for all our clients
- 10 per cent of clients given advice on PPI were disabled compared to 8 per cent for all our clients

Q18: Do you have any comments on our compatibility statement? In particular, do you have any comments on any issues relating to mutual societies that you believe would arise from our proposals?

Citizens Advice has no views on this issue.