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Dear Michelle,

Consumer Rights Bill Call for Evidence

1. This is the Financial Services Consumer Panel's response to the House of Commons Public Bill Committee call for evidence on the Consumer Rights Bill.
2. The Consumer Panel supports the Consumer Rights Bill and the numerous positive benefits it will undoubtedly bring for consumers and businesses. However, for the Bill to be further improved it is our view that amendments need to be made in the following three areas:

Exemption from the 'fairness' test

3. The Panel submitted an amendment (no. 72 in the marshalled list) which would have required that the exemption should apply only to a transparent price, agreed by the consumer at the point of entering the contract, and not to variable future fees or charges which are unknown at the time the contract is signed.
4. During the debate on 6th March the Minister argued that the introduction of the requirement for terms to be both transparent and prominent, in line with the views of the Law Commission stated in 2013, would adequately protect consumers. Consequently the amendment was withdrawn.
5. The Panel believes it to be helpful that it is on the record that the intention is that future fees and charges can be assessed for fairness.
6. However, not making the Minister's interpretation explicit on the face of the Bill will undoubtedly give rise to the scope for different legal interpretations and legal disputes. Consumers are often at a practical disadvantage when it comes to litigation against firms, and we would not want to see consumers having to engage in litigation which is then clouded by arguments over statutory interpretation. It would be much better for consumers if the Minister's interpretation was reflected in the relevant clauses of the Bill to avoid any ambiguity.

The definition of ‘average’ consumer

7. The Panel submitted an amendment (no 73) that the phrase ‘taking into account social, cultural and linguistic factors’ should be added to the definition in the Bill, to account for groups of consumers with different characteristics, and to allow for the ways in which individuals interact with information. This would also bring the definition in line with European Courts of Justice jurisprudence.
8. During the debate the minister argued that this amendment is not required on the grounds that it is not an objective test, and that all the circumstances relating to whether an individual consumer is vulnerable can be taken into account when assessing the fairness of the terms. The amendment was subsequently withdrawn.
9. However, the Panel still believes that a mismatch between UK and European legislation may lead to a lack of clarity that may have to be resolved in the courts in future, and therefore wishes to continue to argue for the specific wording suggested.
10. As in paragraph 6 above, not making the Minister’s interpretation explicit on the face of the Bill will give scope for different interpretations putting consumers at a practical disadvantage.

The right to cancel for mortgage prisoners

11. The Panel submitted an amendment (no. 67) dealing with the issue of ‘mortgage prisoners’, as the right to cancel may not protect consumers who are unable to secure an alternative mortgage product. This set of circumstances should be added to the indicative list of unfair contract terms.
12. The minister argues that Financial Conduct Authority rules require firms to treat their customers fairly at all times (FCA Principle 6), and has a wide margin in which it can consider all the circumstances of a case and take some situations into account. The amendment was subsequently withdrawn.
13. However, the Panel remains to be convinced that the FCA’s powers in this area are sufficient to address the problem.
14. In March 2013 the Panel wrote to the FCA expressing its concerns about the Mortgage Market Review (MMR) rules affecting mortgage prisoners (MCOB 11.8.1E¹).
15. This particular provision, unlike the rest of the MMR rules which do not take effect until April 2014, was implemented in 2012. Its aim, as indicated in Policy Statement PS12/16, was to protect “those borrowers who find

¹ FCA Handbook at <http://fshandbook.info/FS/html/FCA/MCOB/11/8>

themselves 'trapped' with their current lender", the group often described as 'mortgage prisoners'. The provision was switched on with immediate effect as it was aimed at protecting not only those borrowers who may find themselves trapped in future following the implementation of the MMR, but also those borrowers who find themselves trapped today because they do not meet current tightened lending criteria.

16. The Panel fully supported the notion of MCOB 11.8.1E, given that we consider there is real potential for detriment to existing creditworthy borrowers if they are unable to get an affordable mortgage under revised lending criteria. However, we believe that as currently drafted the provision does not achieve its intended aim.
17. In its response to CP11/31, the FSA's substantive MMR consultation, the Panel suggested a specific rule to protect mortgage prisoners from being treated unfairly, and we maintain that suggestion would be more effective in mitigating the risks that exist in this space.

Open to interpretation

18. The Panel believes that the current drafting of the provision creates uncertainty.
19. For example, the wording sets out that providers should not treat the customer (mortgage prisoner) less favourably than other customers with similar characteristics. It is not clear to us, or others, whether "customers with similar characteristics" refers to other mortgage prisoners, or other non-trapped customers (e.g. people on the same income, repayment history, etc).
20. The Panel therefore believes that an amendment such as it proposed to the Consumer Rights Bill still remains necessary.
21. The Panel's amendments are attached. We would be happy to provide further information on request or to discuss any of these issues in more detail if necessary.

Yours sincerely,

Sue Lewis

Chair
Financial Services Consumer Panel

Amendments proposed by the Financial Services Consumer Panel

Amendment 67

Schedule 2, page 51, line 37, at end insert—

‘(23) A term which has the object or effect of enabling a trader to increase the price of the contract unilaterally without a valid reason and where the consumer is unable to—

(a) enter into a new regulated mortgage contract or home purchase plan or vary the terms of an existing regulated mortgage contract or home purchase plan with the existing mortgage lender or home purchase provider; or

(b) enter into a new regulated mortgage contract or home purchase plan with a new mortgage lender or home purchase provider.

The terms “regulated mortgage contract” and ‘home purchase plan’ have the same meaning as in the Financial Services and Market Act 2000 (Regulated Activities) Order 2001 as amended.’.

Amendment 72

Clause 64, page 37, line 19, leave out from ‘that’ to end of line 23 and insert ‘the assessment is of the appropriateness of the price payable under the contract, by comparison with the goods, digital content or services supplied under it, but only where the price payable does not relate to future variable fees or charges payable under the contract.’.

Amendment 73

Clause 64, page 37, line 32, after ‘circumspect’, insert ‘, taking into account social, cultural and linguistic factors.’.