



# PPI complaints - current state of play on proposed FCA rules and guidance

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On 2 August 2016 the Financial Conduct Authority (FCA) published a further consultation paper on proposals as to how Payment Protection Insurance (PPI) complaints should be handled. The new consultation confirms the FCA's belief that the overall package of reforms proposed in its earlier consultation in November 2015 should be taken forward. The FCA has however proposed some changes to the rules and guidance on how firms should handle PPI complaints fairly in light of the Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 (*Plevin*). The consultation paper also includes a likely timetable for implementation of the overall package of reforms should the FCA decide to proceed.

## Recap on FCA's November 2015 proposals

In CP15/39 the FCA proposed:

- a new rule that would set a deadline for consumers to make PPI complaints or lose their right to have them assessed by firms or the Financial Ombudsman Service (Deadline Rule);
- an FCA-led communications campaign designed to inform consumers of the deadline;
- a new fee rule which would provide for the 18 firms that have generated the most PPI complaints to fund the estimated £42.2m cost of the communications campaign (Fee Rule);
- new rules and guidance on the handling of PPI complaints in light of the *Plevin* decision (*Plevin* Rules and Guidance).

## *Plevin* Rules and Guidance

In *Plevin* the Supreme Court considered whether non-disclosure of the commission paid to a lender or intermediary out of a PPI premium could make the lender's relationship with the consumer unfair under s. 140A of the Consumer Credit Act 1974 (CCA). It concluded that although there was no regulatory requirement for firms to disclose commission there might be a tipping point where the commission becomes so large that the relationship cannot be regarded as fair (taking into account all circumstances) if the customer is kept in the dark. In Mrs Plevin's case 71.8% of the premium she paid was taken as commission. The court regarded this as "*beyond the tipping point*" but did not indicate exactly where the tipping point lay. Mrs Plevin's case had to be remitted to the County Court for that court to decide what relief if any should be granted taking into account all of Mrs Plevin's individual circumstances and the specific facts of her case.

The *Plevin* decision led to fears that this would create uncertainty and inconsistency in how non-disclosure of commission complaints would be handled, especially as County Courts would have to individually analyse each complaint on its specific facts. The FCA therefore suggested new rules and guidance which would reduce

uncertainty and help firms to take a fair and consistent approach. It anticipated that the Ombudsman would take these new rules into account when considering relevant PPI cases thereby avoiding the need for extensive use of costly court process.

The proposed *Plevin* Rules and Guidance provide that when a firm is assessing a complaint in respect of a PPI policy covering a credit agreement under s.140A of the CCA, it should presume that a failure to disclose a commission of more than 50% does give rise to an unfair relationship.

In such cases the firm should offer redress amounting to:

1. the percentage of the premium which the customer paid as commission less 50%. (So, for example, if 70% of the premium was paid as commission, the difference between that percentage and 50% would be 20%);  
and
2. the historic interest the customer paid on that portion (i.e. the interest paid, in this example, on the 20%);  
plus
3. annual simple interest at 8% on the sum of 1 and 2.

## Changes to the proposed *Plevin* Rules and Guidance

Initially the FCA had focussed only on the non-disclosure of commission. Following mention in a County Court judgment in the case of *Brookman v Welcome Financial Services Ltd (Brookman)* and feedback it received from various interested parties, the FCA was prompted to investigate whether non-disclosure of "profit share" sums should also be factored into the equation. "Profit share" arrangements between lenders and insurers are fairly typical, although they vary substantially from lender to lender, and insurer to insurer, and never relate to any individual PPI policy or transaction. This makes it hard, if not impossible, in individual cases to categorically state what relevant sum was received by the lender, and/or whether any such sum could be properly attributable to any specific customer.

However the FCA's further investigations into profit share arrangements revealed that when looked at over an extended period (covering many customers/policies) profit share sums were in fact more significant, relative to upfront commission, than it had originally thought with some lenders receiving up to £1 of profit share per £3 of commission.

All this led the FCA to propose the following changes to the *Plevin* Rules and Guidance:

- non-disclosure of any anticipated profit share sums will now be taken into account as well as non-disclosure of commission, both in terms of identifying whether an unfair relationship exists, and in respect of any redress that is then due to the customer;
- there will be guidance on what to do where commission and profit share rates vary during the life of the PPI policy;
- the guidance will provide that sums rebated to a consumer when they cancelled a single premium PPI policy early can be partly included in and so reduce, any redress due.

## Likely timetable for implementation

The latest consultation will remain open until 11 October 2016. If the FCA subsequently decides to proceed with its proposals it envisages the following timetable for implementation:

- The Deadline Rule, Fee Rule and the *Plevin* Rules and Guidance will be made by the end of December 2016;
- The Fee Rule and the *Plevin* Rules and Guidance will come into force by the end of March 2017;
- The Deadline Rule will come into force by the end of June 2017 which is when the consumer communications campaign will start;
- The deadline for consumers bringing complaints will fall at the end of June 2019.

## Comment

If the proposed change to the *Plevin* Guidance to include profit share sums is adopted this will lead to an increase

in the number of cases where an unfair relationship is presumed and perhaps more significantly, may result in more redress being paid relative to the original proposals. It will also complicate the way in which claims are evaluated, as firms will need to estimate what sums might have been reasonably foreseeable as payable as profit share sums at the time of sale in order to assess whether a presumption of unfairness arises. Calculating the level of redress will also become more complicated as profit share sums actually received will have to be factored in.

If the FCA does decide to press ahead with its proposals, it remains to be seen whether Claims Management companies proceed with threats made previously that they will challenge the proposed rules and guidance in the courts. This could lead to further delay and uncertainty in this area.

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