

Consultation response

CP12/35 The FCA's use of temporary product intervention rules

4th February 2013

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on CP12/35: The FCA's use of temporary product intervention rules. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive summary

In general AFME members are supportive of the approach being adopted by FCA in respect of its use of temporary product intervention rules. There are inevitably a number of areas where members have observations, seek additional clarification or would like to see minor amendments made to the Policy outlined in the CP.

In particular members:

- would like to see some form of benchmark against which it would be possible to validate use of these rules e.g. number/complaints, potential impact, relevant consumer behaviour, relationships to other similar products that may be disadvantaged as a consequence of action;
- would ask that the FCA are mindful of the potential for product intervention rules to have a detrimental impact on consumers especially those that have already purchased/invested in the product subject to the intervention process. Members stress the importance of a full impact analysis being undertaken before intervention rules are used on a temporary (or permanent) basis; and,
- are concerned that, to date, regulatory staff have limited experience in areas such as competition, value for money, product manufacture or product intervention and consequently members would ask that FCA adopt a very cautious approach to the use of the temporary product intervention rules where there is only limited scope for consultation ahead of implementation.
- appreciate the potential for product intervention rules to be introduced at a European level and would urge the Committee and the FCA Board to seek to ensure that due account is taken of the regime established in the UK. Every effort should be made to ensure that EU legislation takes into account national arrangements and that additional burdens are not placed on the industry.

1. Overview

No comments on this section

2. Making temporary product intervention rules

Q1: Do you agree with our analysis of some of the circumstances in which temporary product intervention rules might be necessary?

Members welcome and are encouraged that the FCA does not envisage using these rules on a regular basis. Members believe that such intervention should be a last resort and only used where there is clear evidence that it is the underlying product is a fault as opposed to deficiencies in the assessments made regarding appropriateness or suitability by a firm or group of firms distributing the product. In particular, evidence that a product has been mis-sold should not, of itself, be taken as justification for making use of the temporary product rules. Members believe that enhanced supervision at point of sale would, in many cases, address potential concerns regarding consumer detriment and avoid the need for product intervention rules to be introduced.

Paragraph 2.5 refers to the significant consumer detriment that may occur during any consultation period associated with the introduction of product intervention rules. Members believe however that it may well be to the advantage of the consumers for FCA to undertake a full market wide consultation before use of intervention rules. The fact that the FCA were consulting on the potential to use product intervention rules in respect to a particular product would itself act as a warning to investors and provide them with information that could be taken into consideration before any decision to invest. Such a consultation should also act as a warning to sales staff that potentially there were issues regarding the suitability of a product. It is likely that any such consultation exercise would of itself also result in further publicity and public debate. Members feel that the combination of these factors go a long way to addressing the concerns regarding potential consumer detriment and consequently should further reduce the rationale for use of the temporary intervention rules without wide consultation with interested parties.

Members believe that there is a need to focus on the relevant sector(s) when product intervention rules are used e.g. it may be considered appropriate to intervene to protect normal retail customers but in such cases the rules should not automatically be extended to include expert investor or inter-professional business.

Taking into account the perceived need for urgent action members believe that adequate time must be devoted to assessing the potential impact of the proposed action. FCA must develop clear messages to consumers including, where appropriate, the fact that the intervention does not itself imply that the product is/was unsuitable in all cases.

Q2: In what other circumstances might it be necessary to make temporary product intervention rules?

It is difficult to identify potential scenarios where temporary product intervention rules may be required given the very wide potential for the development of new products in the market. However, members would like to see some form of benchmark established against which it would be possible to justify use of product intervention rules e.g. numbers/type of complaints, potential impact on consumers, relationship to other similar products that may be disadvantaged as a consequence of action.

3. Maintenance and impact of temporary product intervention rules

Q3: Will our proposed approach create an appropriate level of awareness amongst firms affected by temporary product intervention rules?

Members are deeply concerned that publication of the application of the temporary product intervention rules will be based solely around a publication made on the FCA website. Whilst it is likely that such publication will stimulate discussion and commentary in the press etc members do not feel it is appropriate to rely on such measures. Member firms believe that the FCA should write to all CEOs informing them of the decision to intervene.

When communicating the decision to use the product intervention rules members believe that the FCA should include full details of the rationale for the action and including warnings and/or advice to consumers that may have already purchased the product in question. The communication should also include details of what action FCA propose to undertake to further review/analyse the situation including where possible an indication as to the timescale the FCA intends to work to.

Q4: How should the FCA balance the need for clarity and awareness in the market against the likely need for urgent action when making temporary product intervention rules?

Members feel strongly that any form of product intervention by the FCA in the market (as opposed to action taken with a firm prior to the public launch of a product) should not come as a “surprise” to consumers or the market. FCA should use every opportunity including discussions with individual firms, trade associations, speeches or press releases to highlight any concerns it may have at an early stage. It should also engage with the FCA panels established under the Financial Services Act. Such early communication will ensure that the market has adequate warning of potential action by the FCA and have an opportunity to address concerns before the use of market wide product intervention rules become necessary.

Q5: How can the FCA best protect consumers who hold products which might be affected by temporary product intervention rules?

Members feel that the key to ensuring the best protection to consumers including those that have already purchased a particular product and/or those likely to make a purchase in the

near future is to ensure that a full and detailed impact analysis is undertaken before any intervention is made. Any such analysis should include seeking the views of firms active in the market for that product as well as consumer groups such as the Practitioner panel.

In particular members feel that specific consideration should be given to products that are tradable in a secondary market where the use of product intervention rules may have an immediate adverse impact on the value and/or liquidity of consumers' holdings. It is therefore particularly important that the views of the Markets Practitioner Panel are sought in such cases.

Q6: Do you agree with our analysis of how temporary product intervention rules might impact upon innovation and market entry?

Members are concerned as to the reference made section 3.2.3 regarding "value for money" offered by products and the potential for judgements in this area to be price regulation under a different name. Members would like to see clear guidance for the FCA as to how it proposes to judge value for money and provide illustrative examples where, in FCA's view, the value for money judgement would lead FCA into considering the use of temporary product intervention rules. Members are also concerned that unless carefully calibrated, intervention has the potential to reduce customer choice and lead to a move towards 'vanilla' products. There is an associated concern that the prospect of intervention will heighten firms' concerns over being first to market.

Q7: What issues should we consider in relation to how this Statement of Policy affects equality and diversity?

Member firms believe that a robust impact assessment should be made before undertaking any form of product intervention. Such analysis should include factors such as consumer choice where use of product intervention may significantly impact the ability of a consumer to participate in the market e.g. number of competing/similar products available, products with specific characteristics designed for particular types of consumer such as those targeted at particular professions, age groups or based upon Sharia Law etc.

4. Statement of Policy for making temporary product intervention rules

Section 2.3 of CP12/35 confirms that FCA will consider the use of temporary product intervention rules where there is a risk of significant "consumer detriment" however the use of the term in the actual policy document is limited to one occasion (para. 13). This limited use of the term may result in confusion in the application of the policy e.g. in paragraph 18.d there would be a substantial difference in providing evidence that demonstrates "consumer detriment is unlikely" compared that required to show that significant consumer detriment was unlikely. Members believe that the Policy should be reviewed to ensure that the intended "significant consumer detriment" term is used consistently where appropriate.

The Financial Services Act 2012 introduces the requirement for the FCA to establish a Markets Practitioner Panel to represent the interest of practitioners yet this panel has been

omitted from the list of panels FCA would expect to consult (time permitting) during the rule-making process associated with temporary product intervention rules (see paragraph 39 of the Policy). Members would like to understand the rationale for not including the Markets Practitioner Panel or confirmation that this was a drafting error.

Paragraph 44 - Member firms believe that a post implementation review should be undertaken following the introduction of any temporary product intervention rules. Members believe it is essential to undertake such reviews to ensure that the efficacy of any interventions made are assessed and that appropriate lessons can be learnt which will potentially influence when and how future product intervention are made.

Paragraph 46.d refers to “customer” rather than “consumer”; if this is not a typographical error members would ask that FCA explain the rational for use of the different terminology in this paragraph.

5. Annex 1 - Market failure analysis

Members are concerned that much of the material in the Market Failure Analysis section is related to poor sales and marketing practice rather than deficiencies in an underlying product. Whilst these may well be features of a failure that warrants regulatory action they are not, of themselves, indications of a product failure that justifies the use of market wide product intervention rules.

6. Annex 2 - Compatibility statement

No comments on this section.