

Chapter 2

Statement of policy with
respect to the making of
temporary product
intervention rules



2.1 Purpose

- 2.1.1 G This chapter explains the *FCA’s* policy with respect to the making of *temporary product intervention rules* under sections 137D and 138M of the Act. This statement of policy replaces the “Statement of Policy for making temporary product intervention rules” published in Policy Statement PS13/03 (see <https://www.fca.org.uk/publication/policy/fsa-ps13-03.pdf>).
[Note: see section 138N of the Act]
- 2.1.2 G Product intervention *rules* are *rules* made under section 137D of the Act which apply to specific products (or types of products), product features or marketing practices relating to specific products.
- 2.1.3 G Product intervention *rules* may be made without consultation under section 138M of the Act but are limited to a maximum duration of 12 *months* and are referred to as “*temporary product intervention rules*”.

2.2 General rule making and product intervention rules

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- 2.2.1** G The *Act* empowers the *FCA* to make general *rules* as appear necessary or expedient for the purpose of advancing one or more of its *operational objectives*.
[**Note:** see section 137A of the *Act*]
- 2.2.2** G The *Act* also provides that the *FCA* may use its general rule-making power to make product intervention rules prohibiting *authorised persons* from, among other things, entering into specified agreements (section 137D of the *Act*). These *rules* may be made to advance:
- (1) the consumer protection objective; or
 - (2) the competition objective; or
 - (3) the market integrity objective.
- 2.2.3** G Section 137D(2) of the *Act* sets out that the *FCA* may prohibit *authorised persons* from:
- (1) entering into specified agreements with any *person* or specified person (specified person means a person who meets the description specified by *FCA rules*);
 - (2) entering into specified agreements with any *person* or specified person unless requirements specified in the *rules* have been satisfied;
 - (3) doing anything that would or might result in the entering into of specified agreements by *persons* or specified persons, or the holding by them of a beneficial or other kind of economic interest in specified agreements; and
 - (4) doing anything within paragraph (3) unless requirements specified in the *rules* have been satisfied.
- 2.2.4** G Section 137D of the *Act* makes it clear that a range of options would be available to us in making *rules* prohibiting *authorised persons* from entering into specified agreements.

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The extent of the *rules* which are made will generally depend on the type of intervention deemed necessary to address the issues identified, having regard to whether the intervention would be a proportionate response to the perceived risk to *consumers*, competition issues or market integrity issues.
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Rules may include:

(1) requiring certain product features to be included, excluded or changed; or

(2) requiring amendments to promotional materials; or

(3) the imposition of restrictions on sales or marketing of the product; or

(4) in more serious cases, a ban on sales or marketing of a product in relation to all or some types of *client*.
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Where the product is provided by a business outside of the *UK*, *rules* may be made targeting *regulated activities* by *authorised persons* in the *UK* that would lead to a specified agreement being formed.

[Note: see sections 137D(2)(c) and (d) of the Act]



2.3 Agreements made in breach of
product intervention rules

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In relation to agreements entered into in breach of product intervention rules, section 137D(7) sets out that the rules may:

 - (1) provide for a relevant agreement or obligation to be unenforceable against any person or specified person;
 - (2) provide for the recovery of any money or other property paid or transferred under a relevant agreement or obligation by any person or specified person; and
 - (3) provide for the payment of compensation for any loss sustained by any person or specified person as a result of paying or transferring any money or other property under a relevant agreement or obligation.
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Where a rule provides for a relevant agreement or obligation to be unenforceable, the relevant agreement or obligation would only be unenforceable if the sale of the product was made after the introduction of the rules and there was a contravention of those rules. Clients with products bought after the introduction of rules incorporating unenforceability provisions would generally need to seek redress through the usual channels of complaints to the firm and to the Financial Ombudsman Service, or legal action against the firm.
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Arrangements made before the introduction of the rules would not be affected by the unenforceability and compensation provisions. Clients holding contracts made before these rules were in place would still be able to seek redress through the usual channels of complaints to the firm and to the Financial Ombudsman Service or legal action against the relevant firm. These clients would need to establish their claim to redress in the usual way, for example by demonstrating that the advice they received was unsuitable, or that they bought the product after receiving a misleading financial promotion.

2.4 Temporary product intervention rules

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- Normally the *FCA* must consult the public before making any *rules*. However, the *Act* allows a general exemption in section 138L where the *FCA* considers that the delay involved in complying with the requirement to consult would be prejudicial to the interests of *consumers*.
- 2.4.2
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- There is also a specific exemption to the consultation requirement in relation to making *temporary product intervention rules* (section 138M of the *Act*). The *FCA* may make *temporary product intervention rules* without consultation if it considers that it is necessary or expedient not to comply with such a requirement to advance:

(1) the consumer protection objective, or
(2) the competition objective, or
(3) the market integrity objective.
- 2.4.3
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- The *FCA*’s discretion to act under section 138M is therefore wider than under section 138L.
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- Decisions to make any *rules*, including *temporary product intervention rules*, will be taken by the *FCA* Board. In doing so, the *FCA* Board will have regard to all the available, relevant evidence, as well as the impact of the measure to be introduced by the *rule*.
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- The *FCA* Board will consider whether the evidence is sufficient to support the proposed measure and whether the measure is a proportionate response to the issue identified.
- 2.4.6
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- In publishing *temporary product intervention rules* the *FCA* will also publish the rationale for these *rules*.



2.5 Factors the FCA will consider when
making temporary product
intervention rules

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 In general terms the *FCA* will consider a product intervention *rule* where we identify a risk of *consumer* detriment, a threat to market integrity or ineffective competition arising from a particular product, type of product, or practices associated with a particular product or type of product.
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 In deciding whether the *rule* should be made as a *temporary product intervention rule*, the *FCA*'s main consideration will generally be whether prompt action is deemed necessary in seeking to reduce or prevent *consumer* detriment or a threat to market integrity or ineffective competition arising from that product, type of product or practices.

		<div>2.6</div> <div>General considerations for product intervention rules</div>
2.6.1	<div>G</div>	Together with the considerations in ■ PROD 2.5, when making temporary or permanent product intervention <i>rules</i> , the <i>FCA</i> will have regard to the regulatory principles set out in section 3B of the <i>Act</i> , (see ■ PROD 2.9).
2.6.2	<div>G</div>	<p>The <i>FCA</i> will also take into account general considerations that include, but are not limited to, whether the proposed <i>rules</i> are:</p> <div><div>(1)</div>an appropriate and effective means of addressing actual or potential <i>consumer</i> detriment associated with a particular product or group of products;</div> <div><div>(2)</div>a proportionate and deliverable means of addressing actual or potential detriment;</div> <div><div>(3)</div>compatible with the <i>FCA</i>’s duty to promote effective competition in the interests of <i>consumers</i> (section 1B(4) of the <i>Act</i>);</div> <div><div>(4)</div>supported by sufficient and appropriate evidence;</div> <div><div>(5)</div>transparent in their aim and operation;</div> <div><div>(6)</div>likely to be beneficial for <i>clients</i> when taken as a whole; and</div> <div><div>(7)</div>compatible (where relevant) with other applicable law.</div>

2.7 Contextual considerations for product intervention rules

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2.7.1

- G** When the *FCA* is considering whether to make temporary or permanent product intervention *rules* in response to an identified issue with a product, the following factors may be taken into account:
- (1) The potential scale of detriment in the market. Issues involving products with a large or potentially large *client* base are more likely to require product intervention.
 - (2) The potential scale of detriment to individual *clients*. Issues that may lead to high detriment for individual *clients* are more likely to require product intervention.
 - (3) The social context. Issues that may lead to detriment for particular groups of *clients* (such as, in particular, vulnerable *client* groups) are more likely to require product intervention.
 - (4) The market context. Market mechanisms such as information disclosure and competition do not always work to protect *consumers*.
 - (5) Possible unintended consequences. Whether the use of product intervention *rules* or the timing of the intervention would in itself create undue risk of further *consumer* detriment, including harm to existing *clients* and in the market (although this will not necessarily comprise a full cost benefit analysis).



2.8 Competition considerations for
temporary product intervention
rules

- 2.8.1 **G** When making a temporary or permanent product intervention *rule*, the *FCA* will seek to promote effective competition in the interests of *consumers* where doing so is compatible with its consumer protection objective or integrity objective.
- 2.8.2 **G** In accordance with section 1E of the *Act* the *FCA* also has a competition objective and may make *rules*, including *temporary product intervention rules*, specifically to advance competition.
- 2.8.3 **G** Relevant competition-related considerations for the *FCA* in the context of temporary or permanent product intervention *rules* are likely to include:
- (1) Whether there is reasonable scope for the *rules* under consideration to promote effective competition in the interests of *consumers*, for instance by addressing *consumer* behaviours that impair their ability to benefit from competition, by reducing information asymmetries or by correcting misaligned incentives.
 - (2) Whether the *rule* under consideration may have a negative impact on competition factors such as product innovation and barriers to entry for new market participants.
 - (3) Whether any negative impact on competition factors is proportionate, having regard to the aims of the *rule* under consideration.
 - (4) Whether alternative solutions may deliver the same intended outcome while having a more positive impact on competition.
 - (5) The overall effect of a proposed *rule* upon the operation of effective competition in the market for financial services, having regard to the interests of *consumers*.



2.9 Regulatory principles

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- 2.9.1** **G** The *FCA* will have regard to the regulatory principles set out in section 3B of the *Act* when making *temporary product intervention rules*.
- 2.9.2** **G** As part of the *FCA*'s consideration of issues including the desirability of facilitating innovation, we will consider the potential deterrent effect on entry to the market and innovation when making *temporary product intervention rules* against the potential for reducing anticipated *consumer* detriment.



2.10

Process for making temporary product intervention rules

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- Once initial proposals have been discussed, a paper will be prepared at working group level for a committee (the Committee) with appropriate authority to propose *temporary product intervention rules* to the *FCA* Board.
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- The Committee will either endorse the proposals and recommend that they are taken to the Board, or suggest rethinking or amending the proposals and coming back at a later date. A decision may be taken to use a different regulatory tool, or not to proceed.
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- If the Committee decides that the proposals should go to the Board, the paper will be taken to the next available scheduled Board meeting, unless the matter is of great importance or there is an emergency, in which case the Board may convene specifically to consider the issue.
- 2.10.4
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- If the Board makes a decision to act on the policy proposals the *FCA* will publish the *temporary product intervention rules* on its website and take the necessary follow-up actions.



2.11 Consulting the panels

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The *FCA* will generally seek the views of the Financial Services Practitioner Panel, the Smaller Businesses Practitioner Panel and the Financial Services Consumer Panel during the process for making *temporary product intervention rules* if there is sufficient time to do so.



2.12 Consulting the PRA

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Before any proposed product intervention *rules* are made (whether temporary or not) the *FCA* will consult the *PRA*.

2.13 Communication, publication and post-implementation review of temporary product intervention rules

- 2.13.1** **G** Before making a *temporary product intervention rule*, the Committee will consider how affected *firms* and *clients* are to be informed of the *rule* in good time.
- 2.13.2** **G** The *FCA* will publish a statement on its website explaining why it is introducing the *rule*. The *FCA* may choose to invite feedback, but this will not amount to a consultation exercise.
- 2.13.3** **G** The *FCA* may choose to review a *temporary product intervention rule* during the term for which the *rule* is in force. Such a review will generally depend on the perceived risk the *rule* seeks to mitigate. These reviews may be informed by market monitoring and feedback from stakeholders, including product *manufacturers*, *distributors* and *clients*.
- 2.13.4** **G** Where the *FCA* perceives potential uncertainty about how the *rule* operates, it may consider publishing *guidance*.
- 2.13.5** **G** Reviews are likely to consider whether a *rule* is functioning as intended, including whether:
- (1) there have been any breaches of the *rule*; or
 - (2) there are any unintended consequences, such as an impact on products that were not intended to be caught by the *rule*; or
 - (3) there is evidence suggesting *firms* are avoiding or seeking to avoid the *rule* rather than complying with it, for instance where new products enter the market or new features are added to existing products that expose *clients* to the same or similar potential detriment; or,
 - (4) new evidence demonstrates that the *rule* is not necessary or detriment is unlikely.

- 2.13.6

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As a result of these reviews, where necessary, the *FCA* may:

(1) revoke a *temporary product intervention rule*; or

(2) amend the *rule*, for example where a *rule* specifies certain criteria under which the sale of a product may continue, change these criteria.
- 2.13.7

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Subsequent changes to a *temporary product intervention rule* will be communicated by issuing a new statement containing the revised *rule* and the rationale for the changes. Such changes will not extend the lifespan of the *temporary product intervention rule*.
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However, the *FCA* may consult on a new *rule* to replace the *temporary product intervention rule* from the date on which the *temporary product intervention rule* ceases to have effect. This exercise would be subject to the *FCA*'s standard *rule*-making procedure including market failure analysis, cost benefit analysis and consultation to which all stakeholders, including *manufacturers, distributors* and *clients* would be invited to reply.

2.14 Revocation or replacement of rules

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- 2.14.1** **G** When making *temporary product intervention rules* the FCA will state the duration of the *rule* and the date from which it will be effective. *Temporary product intervention rules* will have a maximum duration of 12 *months* from when the *rule* is made, but the FCA may decide on a shorter duration for a *rule*.
- 2.14.2** **G** The FCA may review or revoke *temporary product intervention rules* at any time before the end of the period for which they apply.
- 2.14.3** **G** *Rules* may be revoked or amended for a number of reasons, including but not limited to:
- (1) new *rules* are introduced on a permanent basis following a consultation exercise; or
 - (2) industry initiatives are developed that specify sufficient minimum standards to address the sources of *consumer* detriment; or
 - (3) further evidence is submitted that demonstrates that *consumer* detriment will not occur; or
 - (4) demand for, or supply of, the relevant product disappears and is deemed unlikely to return; or
 - (5) the FCA identifies unforeseen negative effects of the *rule* which outweigh any positive impact upon consumer protection.
- 2.14.4** **G** Where *temporary product intervention rules* have been made, the FCA may not make further *temporary product intervention rules* containing the same, or substantially the same, provisions within 12 *months* beginning on the day on which the limited duration of the initial *rules* ends (whether or not the *rules* were revoked early). This period does not apply to *rules* that are not *temporary product intervention rules*, (i.e. *rules* which had been made subject to consultation, whether or not of set duration).

