Welcome to TISAtalk, this week –

- Malcolm Small, Director of Policy at TISA, provides some views on the FSA Consultation Paper CP12/35 regarding the FSA's use of temporary product intervention rules.
- Peter Smith, Head of Distribution Engagement at TISA, comments on the FSA's focus on advisers in distribution who were involved with Arch Cru.

PRODUCT REGULATION

This week I've been analysing the FSA/FCA Consultation Paper CP12/35 on the FSA's use of temporary product intervention rules – well, somebody had to. This is part of a wider regulatory focus on pro-active intervention when a product or proposition is causing detriment to consumers or where it may do so. However, the FSA is on record as saying it does not want to regulate products as such, and will not pre-approve products before launch. Thinking about this, I wonder if what we have here is not a little bit like having the regulatory cake and eating it; you cannot intervene in products already operating in the market without effectively, by implication, approving those where no intervention takes place.

Let's take the example of a product which is sold for a number of years before, perhaps for a tax change reason, being closed to new business across the market. A few years after this, a problem emerges which no-one, not even the FCA, had conceived could be the case at the time, although in retrospect it might have been possible to foresee. Widespread losses result. Would product holders sue the adviser, the product provider or the FCA, for failing to "intervene" when they should reasonably have done so? These are murky waters indeed. Worse, how does "intervention" work where the product, such as a QROPS (Qualifying Recognised Overseas Pension Schemes), is outside the jurisdiction of the FSA/FCA? This is very much potentially the case in "pension liberation", with both advisory firm and liberating scheme based offshore. In this case, the act of transferring may be technically legitimate, but frustrates public policy rather than the law. Who draws lines here?

There must be some sympathy for what the FSA/FCA is trying to do here. Too often it has been accused of locking the stable door after the horse has bolted. It is trying to get into a position where it can stop the damage before it starts and we should support that. But, as with many things in regulatory life, it is often easier said than done.

Malcolm Small, Director of Policy

NO HIDING PLACE

As 2013 begins, the FSA has warned that it is on alert and will not tolerate "Phoenix-ing" for those advisers in distribution who were involved with Arch Cru. This focuses on those advisers who were considering trying to offload their liabilities and return to the market under a different firm or a reorganised business.

This is in line with FSA policy statement on consumer redress. Adviser firms are compelled to write to clients who were advised to effect Arch Cru products and clients have to opt in to have the advice reviewed. Estimates are that circa 600 adviser firms are involved, of which 110 have already cancelled their permissions, with up to 100 more firms set to default as a result of the opt in scheme.

The regulator is clearly watching for any attempts by advisers to force liabilities onto the Financial Services Compensation Scheme (FSCS) and for them then to return to the market. Accredited bodies should also be mindful to this fact when issuing statements of professional standing.

Peter Smith, Head of Distribution Engagement