

Consultation Response

FCA consultation on *A new Consumer Duty (CP 21/13)*

Headline messages

Which? supports the FCA's proposals for a new Consumer Duty

- Which? welcomes the opportunity to respond to the FCA's consultation on a new Consumer Duty (NCD).
- The current regime has failed to provide customers with an adequate level of protection. There continue to be far too many instances - many of them detailed in the FCA consultation - where the financial services market does not meet consumer needs and causes significant levels of consumer harm.
- We support the FCA's proposals and its ambition to introduce a higher level of consumer protection in retail financial markets. Taken together, the core components of the NCD offer the prospect of enabling customers to benefit from a higher standard of protection. We are particularly supportive of several elements of the NCD package: the proactive, anticipatory approach which will be required from firms; its focus on consumer outcomes rather than prescription of inputs; and confirmation that it will apply at every stage of a retail firm's processes and at every level of the organisation, as well as to firms across the supply chain even if they do not have a direct relationship with the end customer.
- While we anticipate that the NCD has significant potential to raise standards, the FCA must continue to be ready to make use of other, existing tools to address areas where consumer harm emerges or where market-wide remedies may be needed to tackle long-standing issues, in the same way that the FCA has, for example, taken action to address issues in relation to pricing practices in general insurance markets. In addition, the planned introduction of the NCD should not be used by either the FCA or industry to delay more immediate, targeted interventions which may be required to tackle sector-specific harms which emerge ahead of the NCD coming into force.

Robust supervision and enforcement are essential if the NCD is to make a difference to consumers

- For the FCA's proposals to make a practical difference to consumers it is imperative that firms are held to account for meeting the higher standard. Significant change will not be brought about by changes to wording alone - a number of financial services sectors already have obligations to act in the 'best interests' of their customers yet we have seen no noticeable uplift in treatment of their customers.

- The FCA must adopt a far more proactive and robust approach when authorising and supervising firms, and enforcing the rules, so the NCD is mainstreamed from the FCA's very first contact with firms. In this regard, the transformation demanded of industry must be reflected by the FCA's own internal transformation, with the FCA to be judged on how its actions help to deliver good consumer outcomes. Recent references from the FCA to 'assertive supervision' and the commitment to develop a 'regulatory nursery' to enable enhanced oversight of newly authorised firms signal a move in this direction and are to be welcomed¹. However, the size of the task should not be underestimated - it will require more resources but more importantly it demands a major, sustained change in approach from the entire FCA organisation, involving the FCA adopting a far more proactive and robust approach to apply the key tenets of the NCD when authorising and supervising firms, and taking enforcement action against them for breaches of the NCD.
- There is a lack of information about how the FCA will approach supervision and enforcement of the NCD. While references to 'assertive supervision' are to be welcomed, the FCA should provide more detail about its approach to supervisory oversight in its follow-up NCD consultation.

The NCD should be accompanied by a Private Right of Action

- Consideration must also be given to opening up other routes to allow consumers to hold firms to account where they fail to meet the higher standard. In our view, the proposals for a Private Right Of Action (PROA) offer the potential to help deliver the step-change in treatment of customers which is required. In the absence of detailed information from the FCA on how the higher standard will be supervised and enforced, and in the context of some industry participants asserting they already meet the higher standard, the PROA - particularly if it also enables consumers to take part in class action and obtain collective redress - offers the prospect of making a real difference and bringing about behavioural and culture change at senior levels throughout the industry.
- We recognise that fundamental changes to the regulatory framework can have wide-ranging impacts so we acknowledge that the FCA must be mindful of unintended consequences when considering how best to allow consumers to bring a PROA for breach of its Principles, including the Consumer Principle. However, the FCA has considered the issues surrounding a duty of care for almost four years so its next NCD publication should make clear its views on the desirability and consequences of including a PROA in the NCD package.

The FCA must set out a clear framework to judge the success of its NCD proposals and an ambitious timetable for delivery

- The FCA should set out a clear framework for how it proposes to measure the success of its proposals and the timeframes over which it anticipates they will be delivered.

¹ <https://www.fca.org.uk/news/speeches/transforming-forward-looking-proactive-regulator>

- It is right and proper for careful consideration to be given to proposals to make fundamental changes to the regulatory framework. Yet the FCA's Discussion Paper on a duty of care was issued in July 2018 and under current plans any new rules are unlikely to be introduced until late 2022, at the earliest. While details have changed during this period, the direction of travel is largely unaltered. The FCA should set an ambitious yet achievable timetable for the introduction of the NCD package.
- To assist industry in making the requisite changes, the FCA should undertake a comprehensive communications programme to disseminate timely information about the scale and content of the forthcoming changes, the steps firms need to take and the timescale for doing so, and the change programme that the FCA itself is undergoing. Failure to move swiftly will mean consumers will suffer due to the litany of practices that the FCA itself admits continues to cause consumer harm.

Answers to questions

Q1: What are your views on the consumer harms that the Consumer Duty would seek to address, and/or the wider context in which it is proposed?

The Consultation Paper identifies a long list of examples where the financial services market does not meet consumer needs. It goes on to provide examples of how these can cause significant levels of consumer harm. These harms include firms making it harder for consumers to make an informed or timely decision, selling products and services that are inappropriate for consumers' needs, forcing consumers to pay more than they should, providing poor levels of service, and making it difficult to change products or providers. These harms are the issues which consumers spend huge amounts of time and effort grappling with in order to get firms to deliver what they should provide in the first place.

These issues are long-standing, yet far too many examples continue to emerge under the existing regulatory framework. It is for this reason that we are supportive of the FCA's proposals to introduce a new 'Consumer Duty' that would set higher expectations for the standard of care that firms provide to consumers. The need to take action and raise standards is becoming ever more pressing due to the increasing reliance on digital technologies which further tip the balance of power towards firms. As the FCA notes, the data which firms now hold allows them to 'rig the system' to exploit consumers' behavioural biases and to insert frictions which make it difficult to act in their own interests. In this context it is right and proper that the FCA is seeking to reset the regulatory framework and move it so that it reaches a better equilibrium in which the consumer interest is placed front and centre in firms' decision-making.

A New Consumer Duty

Q2: What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Cross-cutting Rules and the Four Outcomes?

We are supportive of the proposed structure of the new Consumer Duty. The overarching principle sets out the aim of the duty in simple terms, and it is helpful for this to be accompanied by cross-cutting rules and outcomes since these provide clarity to firms about what they should be seeking to deliver, and for customers to understand how they should be treated and the services they should expect.

We think there are several other positive features which flow from the proposed structure:

- The clarification and amplification of the Consumer Principle will be set out in enforceable rules, rather than guidance, as was the case for the Treating Customers Fairly (TCF) outcomes², meaning that it should be easier for the FCA to take action against firms which fail to meet the necessary standard;
- The publication of the cross-cutting rules and outcomes which underpin the duty from the outset provide clear standards for firms to adhere to and are applicable across sectors. This should make it easier for firms to exercise their own judgement when considering whether consumer outcomes are in line with the Duty's standards. It should also enable the FCA to resist calls from industry to produce ever-more detailed guidance for specific sectors and circumstances.

Q3: Do you agree or have any comments about our intention to apply the Consumer Duty to firms' dealings with retail clients as defined in the FCA Handbook? In the context of regulated activities, are there any other consumers to whom the Duty should relate?

We agree with the FCA's intention to apply the Consumer Duty widely, and therefore for it to apply to firms' dealings with 'retail clients'. We consider this to be the right scope for the new duty as the harms which the NCD seeks to tackle relate to all retail-facing markets, including those accessed by SMEs.

Q4: Do you agree or have any comments about our intention to apply the Consumer Duty to all firms engaging in regulated activities across the retail distribution chain, including where they do not have a direct customer relationship with the 'end-user' of their product or service?

We are extremely supportive of the FCA's proposal to apply the NCD to all firms across the retail distribution chain, including where they do not have a direct relationship with the end-user.

We consider that one of the primary causes of consumer harm in financial services markets is that in too many instances products are developed with little reference to consumer needs or interests. The increasing use, and importance, of data in determining the products and services that are developed and sold to consumers, and how they are designed, means that it is now

² <https://www.fca.org.uk/firms/fair-treatment-customers>

more important than ever that all the firms in the retail distribution chain are properly oriented to meeting consumer needs and delivering good consumer outcomes. If this is not the case, then this use of data can, as the FCA notes, lead to the design and development of products and services which seek to either deliberately exploit consumers or to make it harder for them to make good decisions.

The FCA proposal to impose obligations on firms across the retail distribution chain offers the prospect of placing consumers at the heart of the product development process. It has the potential to help to engender a different mindset right across the retail distribution chain, including in upstream development, which places greater emphasis on consumers, rather than relegating such considerations to those who have direct contact with end consumers. We think that such an approach could pay dividends by limiting the development of products and services which are of questionable value to consumers, or which even actively seek to exploit them, and helping to place issues such as consumer need and inclusive design at the heart of the product development process.

Q5: What are your views on the options proposed for the drafting of the Consumer Principle? Do you consider there are alternative formulations that would better reflect the strong proactive focus on consumer interests and consumer outcomes we want to achieve?

While we recognise that the NCD is made up of a package of proposals which should be considered together, the wording of the Consumer Principle itself is important in setting the right tone and in helping to give a clear message about the FCA's expectations of firms.

On this basis, we think that Option 2, which states that "a firm must act in the best interests of retail clients", is preferable. We consider that this formulation is stronger and more accurately reflects the FCA's aim to signal to firms the 'paradigm shift' in expectations that the NCD represents. In addition, we think that the 'best interests' option also more effectively captures the FCA desire for firms to take proactive, anticipatory action in delivering good consumer outcomes.

We are aware that a duty for firms to act in the best interests of customers already exists in a number of sectors (e.g. insurance and investments). There may therefore be a risk that firms in these sectors consider there is no need for them to make further changes or to adapt their approach to meet the higher standard of the NCD principle. This confidence is misplaced. We remain concerned about certain practices in these sectors which appear to run contrary to acting in the best interests of customers (e.g. selling third party motor insurance where it is more expensive than fully comprehensive cover), and urge the FCA to make very clear that its proposals are much more than an extension of the existing duty to other sectors. To ensure all firms are fully cognisant of the step-change in approach that will be expected of them, we suggest the FCA undertake a comprehensive communications programme to disseminate timely

information about the scale and content of the forthcoming changes, the steps firms need to take, and the timescale for doing so.

Q6: Do you agree that these are the right areas of focus for Cross-cutting Rules which develop and amplify the Consumer Principle's high-level expectations?

Q7: Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

The Cross-cutting Rules are intended to develop and amplify the standards of conduct that the FCA expects under the Consumer Principle. We consider that they cover the right areas, and that requiring firms to 'take *all* reasonable steps' (emphasis added) sets a high, though appropriate and achievable, standard.

We make several other observations:

- The FCA proposes to embed a concept of reasonableness to clarify the objective standard of conduct that firms would need to meet, and to set out factors that influence what is reasonable. The FCA suggests that these may include the nature of the product or service being offered or provided, the potential of the product or service to harm consumers, the complexity of the product or service, the reasonable expectations of consumers and their specific characteristics. While this may be helpful - for example in enhancing the expectation on firms when the product is complex - we are concerned that what is deemed to be 'reasonable' is not necessarily objective but rather appears inherently open to interpretation. Care must therefore be taken by the FCA in framing this concept, and expectations of firms must be made clear through supervisory activity. If this is not the case, we fear that the concept of reasonableness may undermine the FCA's wider objective of raising the standard of care that firms provide to consumers.
- The FCA consultation makes reference to the principle that consumers should take responsibility for their choices and decisions³. We agree with this in theory, and research suggests that consumers themselves agree that they should act responsibly when making decisions and accept responsibility for those decisions⁴. However, consumers can only be expected to take responsibility where they are given the tools and the information which enable them to do so, and where firms do not seek to take advantage of asymmetries of information or behavioural biases. Neither the FCA's Principles for Good Regulation nor the relevant legislation makes consumer responsibility contingent on the provision of tools and information which allow consumers to make an informed decision. Moreover, in an increasingly complex financial services world the FCA needs to be realistic about what it can expect consumers to take into account and to assume responsibility for when making decisions about financial products. In the same way that

³ [FCA Principles of Good Regulation](#) include: "*4 Consumer responsibility - Consumers should take responsibility for their decisions*" and this derives from <https://www.legislation.gov.uk/ukpga/2000/8/section/3B> which sets out "(d)the general principle that consumers should take responsibility for their decisions"

⁴ https://www.fca-pp.org.uk/sites/default/files/fca_practitioner_panel_consumer_responsibility_report_september_2013.pdf

the FCA seeks to embed a concept of 'reasonableness' to clarify the standard of conduct that firms would need to meet, we would suggest that a similar concept be applied to the expectations of consumers in taking responsibility for their decisions, one which should be grounded in evidence of actual consumer understanding and behaviour. We were pleased to note that in its Business Plan 2021-22 the FCA stated that "Where disclosures are ineffective, we will intervene so consumers have appropriate protection and competition works in their interests"⁵. We recommend that the FCA reiterates and expands on this point in its follow-up consultation on the NCD to clarify where the limits of consumer responsibility lie.

Q8: To what extent would these proposals, in conjunction with our Vulnerability Guidance, enhance firms' focus on appropriate levels of care for Vulnerable consumers?

We consider that the FCA's NCD proposals helpfully echo the steer provided in its Vulnerability Guidance since they focus on good customer outcomes, and encourage firms to make sure they are meeting the needs of customers, including through product design and delivery of customer service.

We think that this joined-up approach should help to raise the bar in terms of the standard of treatment and protection that all consumers - including those with vulnerable characteristics - can expect from interactions with financial services firms.

There would appear to be clear benefits for firms in considering the needs of vulnerable customers as an intrinsic part of their product design and development process, rather than assessing this separately. FCA research suggests that there are now 27.7 million adults in the UK with characteristics of vulnerability such as poor health, low financial resilience or recent negative life events⁶ so there needs to be a presumption that any retail product is likely to be purchased by or sold to someone with vulnerable characteristics. Such an approach would bring benefits for customers with vulnerable characteristics but would also be likely to be similarly helpful for the wider consumer population since simpler design and clearer communications stand to benefit all consumers.

Q9: What are your views on whether Principles 6 or 7, and/ or the TCF Outcomes should be disapplied where the Consumer Duty applies? Do you foresee any practical difficulties with either retaining these, or with disapplying them?

Q10: Do you have views on how we should treat existing Handbook material that relates to Principles 6 or 7, in the event that we introduce a Consumer Duty?

We answer Questions 9 & 10 together.

⁵ <https://www.fca.org.uk/publication/business-plans/business-plan-2021-22.pdf>, p.24

⁶ <https://www.fca.org.uk/news/press-releases/fca-finds-covid-19-pandemic-leaves-over-quarter-uk-adults-low-financial-resilience>

The FCA describes its NCD proposals as setting clearer and higher standards for the culture of firms and the conduct expected of them which goes beyond its existing Principles and rules. It is therefore difficult to envisage situations where compliance with the NCD would run counter to the obligations set out in Principles 6 and 7. Given this, we recommend that these principles and associated guidance and materials which are likely to prove to be helpful to firms should be retained, but with two caveats:

1. The FCA should make clear that in most circumstances adherence to Principles 6 and 7 on their own is unlikely to be sufficient for firms to meet the higher standard demanded by the NCD; and
2. Where there are clashes or contradictions between the existing principles and the NCD, the NCD takes precedence. Where these clashes prove difficult to reconcile, the FCA should consider dis-applying specific material.

Q11: What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?

We think the FCA's proposals set out a promising framework which offers a greater prospect of advancing its consumer protection objective, which the existing Principles have demonstrably failed to do. We also consider that the proposals are more aligned to the FCA's competition objective since they seek to embed good customer outcomes at the heart of a firm's actions and make clear that competition in and of itself is not the aim, but that competition should be in the interests of consumers.

However, the extent to which the proposals actually advance the FCA's consumer protection and competition objectives is ultimately difficult to determine at this stage. This will depend not just on changes to the wording of the relevant principle and associated rules and guidance, but how the FCA applies them in practice. To advance its consumer protection and competition objectives, we would expect to see the FCA adopting a far more proactive and robust approach to apply the key tenets of the NCD when authorising and supervising firms, and taking enforcement action against them for breaches of the NCD.

To help measure the impact of the proposals, and the extent to which they advance the FCA's consumer protection and competition objectives, we recommend that the FCA sets out clearly not just its aspirational objectives for how it anticipates the NCD will work, but a clear framework for how it proposes to measure the success of its proposals and the timeframes over which it anticipates they will be delivered.

Q12: Do you agree that what we have proposed amounts to a duty of care? If not, what further measures would be needed? Do you think it should be labelled as a duty of care, and might there be upsides or downsides in doing so?

Our focus is on whether FCA proposals are likely to deliver good outcomes for consumers, and whether they represent an improvement on existing consumer protections.

In this regard, we repeat our central thesis that we consider that the proposals developed by FCA offer the potential to make significant improvements to the level of consumer protection, provided that they are subject to rigorous supervisory and enforcement activity, and are supported by the introduction of a private right of action.

The Four Outcomes

Q13: What are your views on our proposals for the Communications outcome?

Q14: What impact do you think the proposals would have on consumer outcomes in this area?

Q15: What are your views on our proposals for the Products and Services outcome?

Q16: What impact do you think the proposals would have on consumer outcomes in this area?

Q17: What are your views on our proposals for the Customer Service outcome?

Q18: What impact do you think the proposals would have on consumer outcomes in this area?

Q19: What are your views on our proposals for the Price and Value outcome?

Q20: What impact do you think the proposals would have on consumer outcomes in this area?

We answer questions 13-20 together.

We agree with the FCA's focus on the four outcomes in relation to communications, products and services, customer service, and price and value. In our view, these areas represent the key elements of the relationship between firms and consumers. However, it will be important for the FCA to make clear that while it is providing additional information about the outcomes it wants to see in these key areas, the FCA expects to see improvements - and a focus on delivering good consumer outcomes - in all areas.

We understand the FCA's desire to set out the proposed requirements in narrative form rather than as draft Handbook rules to encourage feedback, but it should be noted that the absence of detail and proposed finalised wording makes it difficult to provide definitive views.

We have the following comments to make in relation to the specific outcomes:

Communications outcome - We support the move from a prescriptive approach which mandates the content of communications to one which seeks to focus on consumer understanding. As the FCA itself acknowledges, it is essential that communications are understandable if consumers are to take responsibility for their decisions. At present, there is much poor practice, with too many firms taking a narrow view of their obligations and seeking

to discharge their responsibilities by issuing lengthy, opaque documents which are impenetrable to consumers. The move to a focus on consumer understanding should lead to an improvement, encouraging firms to make use of the insight they hold about what consumers will or will not read based on how and when it is presented, where it is located etc, as well as prompting them to adopt best practice from research into this area⁷, to help consumers better understand products and services.

Products & Services outcome - We are not aware that the application of the Product Intervention and Product Governance Sourcebook (PROD) has resulted in noticeably superior standards in relation to the design, approval, marketing and management of certain products and services. Indeed, a recent FCA review which looked at product governance in a sample of 8 asset management firms confirmed that *"some asset managers are not undertaking activities in line with MiFID II's PROD regime. This increases the risk of investor harm, particularly where investors buy products that may not be appropriate. As a result, we believe there is significant scope for asset managers to improve their product governance arrangements"*.⁸ Nevertheless, we are supportive of applying this requirement more widely provided that the FCA recognises that doing so will only have a realistic prospect of delivering improvements if it is accompanied by more robust supervision and enforcement activities. If this is the case, we would expect to see firms doing far more to (among other things) actively consider the consumer needs that the product or service seeks to meet, the target market it is aimed at, the appropriate distribution channel(s), and to review this regularly to ensure that these remain valid.

Customer service outcome - We agree that the proposed outcome, provided it is assertively supervised, should help to make it easier for consumers to engage with their financial services provider. In an increasingly digital environment, where firms have extensive data and insight into consumer behaviour and how the framing of information can influence decision making, it is imperative that the FCA seeks to ensure that such insight is aimed at delivering positive outcomes, and redressing the information asymmetries which can put consumers at a significant disadvantage.

Price and value outcome - we are supportive of the FCA's proposals which seek to ensure that products and services are fit for purpose and represent fair value to consumers relative to the price they pay. This is an important area, and one which it is essential for the FCA to address if it is serious about raising the standard of consumer protection. We would expect this outcome to have potentially far-reaching implications, for example we anticipate that firms would need to consider issues relating to fairness of pricing in their product design and development processes, and also to review products and services regularly to ensure that they continued to deliver fair value. On this basis, this outcome would seem to be a potentially powerful tool in efforts to stop firms from taking advantage of certain types of consumers (e.g. those who are disengaged) or from introducing products based on business models which appear to be designed to exploit consumers through the imposition of fees and charges.

⁷ See, for example <https://www.fca.org.uk/publication/feedback/fs16-10.pdf> and <https://plainnumbers.org.uk/the-evidence>

⁸ <https://www.fca.org.uk/publications/multi-firm-reviews/mifid-ii-product-governance-review>

A Private Right of Action

Q21: Do you have views on the PROA that are specific to the proposals for a Consumer Duty?

Under the current regulatory framework, the FCA is able to determine whether individuals have a PROA for damages for loss caused by a breach of its rules. The current position is that a PROA applies to most FCA rules but does not apply for breaches of the Principles. It is not clear to us why the FCA decided to 'switch off' this option for a private action to be taken for a breach of the principles. We think that there are compelling grounds for the FCA to correct this anomaly and allow consumers to bring a private right of action for breach of its Principles, including the Consumer Principle.

There are several reasons for this:

- It has the potential to act as a powerful tool to hold firms to account. While we are supportive of the aims of the Consumer Principle, and the main components of the FCA's proposals, we are clear that significant change will not be brought about by changes to wording alone. For the FCA's proposals to make a practical difference to consumers it is imperative that firms are held to account for meeting the higher standard. The primary means to achieve this is through FCA's activity in relation to authorisations, supervision and enforcement. However, we consider that additional routes to hold firms accountable should also be included in the proposals for a NCD. Even if this change may not result in many actions being taken, we consider the threat of action would help to shift firm behaviour and culture in a positive direction, forcing decisions to be taken at senior levels and engendering a focus on delivering good customer outcomes.
- It offers an alternative route for consumers to seek redress which may be swifter than waiting for the regulator to investigate, consult and publish its findings.
- It would give the FCA an additional tool to order an industry-wide redress scheme for breaches of the Principles, allowing it to seek redress for consumers if there was significant harm. In an environment where regulatory focus is shifting from prescription of processes to consideration of outcomes that are delivered, this is likely to be a powerful tool. Provided that the FCA was willing to make use of such an extended power, it would also help to ensure that consideration of consumer outcomes permeates the most senior levels of firms and influences decisions.
- It brings the FCA approach on breach of Principles into line with that which currently applies for breach of its rules.

We would also suggest that the FCA should consider how a PROA might offer consumers the ability to take part in class action and allow for collective redress.

We recognise, however, that changes to the regulatory framework can have wide-ranging consequences so we urge the FCA to be mindful of unintended consequences when considering how best to allow consumers to bring a PROA for breach of its Principles, including the Consumer Principle.

Q22: To what extent would a future decision to provide, or not provide, a PROA for breaches of the Consumer Duty have an influence on your answers to the other questions in this consultation?

Throughout our response to this consultation we make clear that we are supportive of the FCA's aims in introducing the Consumer Principle, and the main components of the proposals, but for the FCA's proposals to make a practical difference to consumers it is imperative that firms are held to account for meeting the higher standard. The PROA represents an additional means of achieving this, and offers the prospect of driving a cultural shift among firms by forcing senior decision makers in firms to actively consider consumer interests and outcomes when making decisions about products and services.

If the FCA were to decide not to provide a PROA for breaches of the Consumer Duty, we consider its proposals would be less likely to achieve the step-change in firm culture and behaviour that the FCA seeks. It would also be more likely that the FCA, industry and consumer stakeholders would have devoted significant time and resources to a project that may result in only marginal improvements to the treatment of customers.

The absence of a PROA would also mean that the onus to hold firms to account would fall almost solely on the FCA's activities, with its supervision and enforcement having to do all the 'heavy lifting'. We are encouraged by recent statements from the FCA about its desire to take a more assertive approach to supervision and to act quickly to stop harm and impose sanctions⁹. However, the scale of transformation required within the FCA itself to deliver on this and to reorient itself so it becomes a regulator that is focused on consumer outcomes across all financial services markets, must not be underestimated. In these circumstances, it might be prudent for the regulator to seek to harness all available tools - including the PROA - to help deliver on its ambition to achieve a cultural and behavioural shift among firms.

More broadly, we would observe that it is difficult to provide definitive views on what could amount to potentially significant changes to the regulatory framework when it is not clear whether a core component - in this case the PROA - will be included or omitted. While we acknowledge that the PROA is a contentious issue, the FCA has gathered evidence about this for some time and it would now be helpful for the FCA to set out clearly its own views on whether a PROA is appropriate. This should form part of the second consultation to be issued later this year.

⁹ <https://www.fca.org.uk/news/speeches/transforming-forward-looking-proactive-regulator>

Q26: What unintended consequences might arise from the introduction of a Consumer Duty?

We are concerned that if the Consumer Duty is not accompanied by a transformation in the FCA's approach to authorisations, supervision and enforcement, and through the inclusion of a PROA, then we are likely to find that the FCA, industry and consumer stakeholders have spent huge amounts of time, effort and resources on something which fails to make much difference to the treatment of consumers in financial services markets. Not only that, but the attempt to fundamentally alter the framework comes with huge opportunity costs and could mean that other pressing matters did not receive the attention they merited or that they were not adequately addressed.

We are also fearful that the introduction of a Consumer Duty has the potential to have a chilling effect on both the FCA's and industry's appetite to take more immediate and discreet action to address consumer harm. We would urge the FCA to continue to stand ready to make use of other, existing tools at its disposal to address areas where consumer harm emerges rather than to delay interventions until the Consumer Duty comes into force.

Q27: What are your views on the amount of time that would be needed to implement a Consumer Duty following finalisation of the rules? Are there any aspects that would require a longer lead-time?

It is right and proper for careful consideration to be given to proposals such as the Consumer Duty which seek to make fundamental changes to the regulatory framework, since it is clearly in neither firms' nor consumers' interests for this to be rushed if it means there are adverse consequences or the impact of reforms are muted.

However, we note that the FCA's Discussion Paper on a duty of care was issued in July 2018 and under current plans any new rules are unlikely to be introduced until late 2022, at the earliest. While details have changed during this period, the direction of travel has remained largely unaltered. We recommend that the FCA set an ambitious yet achievable timetable for the introduction of the NCD package. To assist industry in making the requisite changes, the FCA should undertake a comprehensive communications programme to disseminate timely information about the scale and content of the forthcoming changes, the steps firms need to take, and the timescale for doing so. This should be accompanied by information about the scale of the transformation that the FCA itself is undertaking to ensure that it too is ready for the changes that will be ushered in by the NCD package. Failure to move swiftly will mean consumers will suffer due to the litany of practices that the FCA itself admits continues to cause consumer harm.



Which? works for you

About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

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