

## Consultation Response

### **Which? Response to FCA's 'A new Consumer Duty - Feedback to CP21/13 and further consultation'**

Which? welcomes the opportunity to respond to the FCA's 'A new Consumer Duty - Feedback to CP21/13 and further consultation'.

#### **SUMMARY OF OUR KEY POINTS**

- Which? welcomes the FCA proposals for a Consumer Duty which offers the prospect of delivering a step-change in the way consumers are treated by financial services firms.
- The critical factor in determining whether the FCA proposals make a tangible difference to consumers and deal with industry poor practice will be how they are implemented, supervised and - where necessary - enforced.
- The FCA must set out more clearly how it will determine the success of its Consumer Duty proposals, and commit to a full assessment of the impact of the Duty within two years of its implementation.
- We are disappointed that the FCA has decided not to proceed with a Private Right of Action (PRoA) at this stage. It must be revisited when a full assessment of the impact of the Duty is undertaken, and should be introduced if industry fails to respond positively to the higher standard.
- We strongly support proposals to make senior management accountable for meeting the Consumer Duty, including annual sign-off of the firm's actions. However the FCA should strengthen its proposals and require greater transparency from firms.
- It is not clear how the FCA's proposed approach to data collection will enable it to pursue a data-led approach to proactively identify poor practices.
- Publication of draft Handbook rules and guidance and non-Handbook guidance help to provide greater clarity on FCA expectations. However, ultimately the onus must be on firms themselves to develop policies and processes which meet the Consumer Duty.
- Ahead of the implementation of the Consumer Duty, the FCA should institute an extensive communications programme to disseminate information to firms and consumers, making clear the step-change in expectations that the Duty will bring about.

## KEY POINTS

**Which? welcomes the FCA proposals for a Consumer Duty which offers the prospect of delivering a step-change in the way consumers are treated by financial services firms.**

Efforts to raise industry standards remain essential since far too many consumers continue to suffer harm at the hands of financial services firms. We think that the Consumer Duty - if properly supervised and, where necessary, enforced - offers the prospect of sending a clear signal to firms about a step-change in expectations, and that from this point forward they must consider consumer needs in everything they do and put them at the heart of their business models.

While we are disappointed at the decision not to proceed at this stage with a Private Right of Action (PRoA - see below for our detailed comments on this), overall we are pleased the FCA intends to take forward most of the main components of its previous proposals. We continue to support the proactive, anticipatory approach which will be required from firms, the Consumer Duty's 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.

**The critical factor in determining whether the FCA proposals make a tangible difference to consumers and deal with industry poor practice will be how they are implemented, supervised and - where necessary - enforced.** We were not alone in asserting the importance of FCA's own activities in delivering a higher level of consumer protection, with the FCA noting that among respondents to the previous consultation "*almost all agreed that the Consumer Duty would succeed or fail based on how we supervise and enforce it*".<sup>1</sup> Without a PRoA, it becomes even more important for the FCA to step up its supervisory activity to ensure that industry meets the higher standards of the Consumer Duty. To make a difference, the FCA must not only raise standards but hold firms to account against these higher expectations. We expect to see the FCA mainstream the Consumer Duty across all its activity; it should be a 'golden thread' in its regulatory approach, informing everything it does from authorisations to supervision and enforcement, with the onus placed on firms to demonstrate to the regulator that their activities are in line with the Consumer Duty. We will scrutinise the FCA's actions to see if they match its ambitions on this point.

Since the Consumer Duty represents a new approach, it is right and appropriate that the FCA does all that it can to draw firms' attention to its introduction and develops guidance to help firms implement the Duty appropriately. In this regard, the iterative approach outlined by the FCA is entirely correct. However, where the FCA discovers firms falling short of meeting the Consumer Duty rules it must not hesitate to take enforcement action. Robust enforcement of the Consumer

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<sup>1</sup> [A new Consumer Duty: Feedback to CP21/13 and further consultation](#), December 2021, FCA, Para 1.18

Duty, and its attendant publicity, is likely to do far more to signal the step-change expected of firms and prompt them to take the Duty more seriously than any number of communications updates. Such action would not just be about meting out punishment for the recalcitrant. Rather, it will be important to help create a fairer, more consumer-focused and level playing field, rewarding those firms which have sought to engage constructively to meet the higher level of the Consumer Duty.

**The FCA must set out more clearly how it will determine the success of its Consumer Duty proposals, and commit to a full assessment of the impact of the Duty within two years of its implementation.** The FCA consultation includes a short section (paragraphs 1.64 and 1.65) on how it proposes to evaluate the success of the Consumer Duty, explaining that it will use data from a variety of sources and proposing that it will seek to measure outcomes achieved across four metrics (fair value, products and services, treatment, confidence). This is a helpful start but we urge the FCA to set much more targeted outcome measures in keeping with the approach set out in its Business Plan which involves setting measurable goals and reporting publicly on progress made<sup>2</sup> and which was adopted in the FCA's recently published *Consumer Investments: Strategy and Feedback Statement*<sup>3</sup> where specific, detailed target outcomes were published. Such an approach would also be in line with the proposals recently set out in HMT's Future Regulatory Framework consultation for regulators to publish and maintain frameworks for how they review their rules to provide improved transparency to stakeholders.<sup>4</sup>

We recognise it may be difficult to provide evidence of success, for if the Duty is successful it may be that consumer harm is pre-emptively tackled and no longer emerges. However, we are not alone in pushing the FCA to go further in defining the outcomes it seeks to deliver through the Consumer Duty - the FCA Board has expressed similar sentiments, noting *"the importance of setting granular, sector specific outcome measures for the FCA's performance and embedding a strategic supervision and enforcement strategy to achieve those outcomes would be critical to the success of the NCD"*.<sup>5</sup> We would suggest that one practical way to determine the success of the Duty would be to undertake assessments of firms' internal decision-making processes to understand at what level decisions were taken, how the Duty influenced actions taken, and the outcomes delivered. We expect the FCA to publish outcome measures as part of its planned Policy Statement and to commit to far greater levels of transparency, including setting out the timescales against which progress will be measured. Such measures are essential for the FCA and others to make informed judgements about the success of the Consumer Duty. As part of this, we would expect the FCA to commit to a full assessment of the outcomes achieved by the Consumer Duty within two years of its implementation, supplemented by more regular informal updates in the interim period which could usefully draw attention to examples of both good and poor practice.

<sup>2</sup> <https://www.fca.org.uk/publication/business-plans/business-plan-2021-22.pdf>

<sup>3</sup> <https://www.fca.org.uk/publications/corporate-documents/consumer-investments-strategy>

<sup>4</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032075/FRF\\_Review\\_Consultation\\_2021\\_-\\_Final\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032075/FRF_Review_Consultation_2021_-_Final_.pdf)

<sup>5</sup> <https://www.fca.org.uk/publication/minutes/fca-board-minutes-25-november-2021.pdf>

**We are disappointed the FCA has decided not to proceed with a PRoA at this stage. It must be revisited when a full assessment of the impact of the Duty is undertaken, and should be introduced if industry fails to respond positively to the higher standard of the new Duty.** We consider that a PRoA could have helpfully opened up an additional route to allow consumers to hold firms to account where they failed to meet the higher standard set by the Consumer Duty. But its potential impact would have extended far beyond redress. Critically, a PRoA would have had a strong, positive effect in encouraging firms' senior management to devote sufficient attention to implementation of the Duty and, in this way, offered the potential to make a real difference in bringing about much-needed behavioural and culture change throughout industry. While enhanced supervisory activity may partially fill this gap, the FCA should consider how it can replicate the likely positive impact of a PRoA so that senior management is incentivised to consider the Consumer Duty and ensure that its impact permeates throughout all that a firm does. The suggestions we make above in relation to senior management are intended to help achieve this outcome.

In addition, the FCA must be clear that the option to introduce a PRoA as part of its Consumer Duty proposals has not been removed altogether but rather has been set aside - for now - to give industry the opportunity to demonstrate it can respond positively to the higher standards demanded by the Consumer Duty. However, if the FCA review of the impact of the Duty, which we recommend takes place after two years, finds that the industry has failed to respond positively, then the FCA must not hesitate to bring in a PRoA without delay. In its forthcoming Policy Statement the FCA should set out clearly the conditions which must be met for a PRoA to be reconsidered, which should link to its stated success measures.

**We strongly support proposals to make senior management accountable for meeting the requirements of the Consumer Duty, including annual sign-off of the firm's actions. However the FCA should strengthen its proposals and require greater transparency from firms.** We are strongly supportive of the proposal to anchor compliance to the Consumer Duty with senior management, and welcome the requirement that a firm's Board should, at least annually, review the firm's assessment of how it is delivering in line with the Consumer Duty and sign off on the assessment. This will help to embed accountability at the appropriate senior level rather than being relegated to the compliance function, and instil the prospect of real cultural change led from senior positions. We understand this annual assessment may be shared with the FCA as part of ongoing supervisory activity. However, we think the FCA should do more. We suggest it should require:

- firms to publish their annual review, or at the very least some form of summary, setting out the most substantive actions taken. Without some form of publication, it is not clear how industry commentators, stakeholders or consumer representatives will gain an insight into the impact of the Consumer Duty, other than from a vague, intangible sense that things may have generally improved or deteriorated; and
- A single person of suitably senior stature to be named as the responsible person for ensuring that the firm's actions meet the obligations set out by the Consumer Duty.

**It is not clear how the FCA's proposed approach to data collection will enable it to pursue a data-led approach to proactively identify poor practices.** The FCA rightly sets great store on how firms will need to monitor compliance with the Consumer Duty, making clear that it expects firms to be able to 'demonstrate effectively' how they are monitoring outcomes, identifying harms, and addressing the issues they have identified. However, it does not specify any metrics or mandate any new reporting to enable the FCA or others to scrutinise this. The FCA has in recent times made repeated high-level statements about adopting a more 'data-led approach'<sup>6</sup> to enable it to more quickly identify practices that negatively affect the delivery of good consumer outcomes so it can intervene before they become entrenched as market norms. It is not clear how it will be able to do so under the Consumer Duty, other than through reliance on consumer groups reporting instances of non-compliance, or via resource-intensive supervisory activity, if firms are not required to collect and submit some form of meaningful, consistent data on a regular basis. The failure to collect standardised data will also unhelpfully stymie the FCA's ability to measure the success of the Duty. Elsewhere in its consultation document the FCA suggests taking a sectoral approach where it may be difficult to apply a single set of requirements (e.g. in relation to the scope of the rules, and also when setting expectations) so it may be that a similar approach could be adopted to the collection of data if data requirements which apply across all sectors are deemed to be too difficult to define.

**Publication of draft Handbook rules and guidance and non-Handbook guidance helps to provide greater clarity on FCA expectations. However, ultimately the onus must be on firms themselves to develop policies and processes which meet the Consumer Duty.** The draft guidance and non-Handbook guidance published alongside the draft Handbook rules will prove helpful to firms, as well as consumers and their representatives since they clarify certain concepts (e.g. fair value) which can be open to interpretation. However, in spite of regular complaints from industry about the onerous nature of the rules and guidance they must currently follow, we anticipate that parts of industry are likely to make requests for ever-more detailed guidance on the implementation of the Consumer Duty. The FCA should resist these calls other than where legitimate questions about its application arise. Instead it should point out that since the Consumer Duty focuses on seeking to deliver good consumer outcomes, and there are different routes to achieve this, the onus for determining how it is achieved must ultimately sit with a firm's senior management. In this respect, the FCA should repeat the approach adopted in its Vulnerability Guidance where it provided some examples of good and poor practice but then asserted clearly that "*Firms will need to use their judgement to consider what each section of the Guidance means for them and what they should do to make sure they treat customers fairly*".<sup>7</sup> Ultimately, firms should be left in no doubt whatsoever that they are responsible for meeting the NCD and that the guidance is not exhaustive.

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<sup>6</sup> For example: <https://www.fca.org.uk/news/speeches/drivers-change-financial-services-industry-and-how-we-are-responding>

<sup>7</sup> <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>

**Ahead of the implementation of the Consumer Duty, the FCA should institute an extensive communications programme to disseminate information to firms and consumers making clear the step-change in expectations that the Duty will bring about.**

This activity should set out how the Consumer Duty differs significantly from existing requirements, stress the magnitude of change it expects it to prompt among firms, and make clear that the FCA will intervene and take enforcement action where firms fail to meet the higher standards. In this endeavour, the FCA should beware of sending out mixed messages to firms about the similarity to existing requirements or underplaying the step-change required of firms since this may have the unfortunate effect of fostering complacency among some parts of industry. The inclusion of examples of good and poor practice is useful but the FCA should build on this during the run-up to the implementation of the Consumer Duty to ensure that both fixed portfolio firms and flexible portfolio firms (which may not have dedicated resources to devote to consider how the Duty should be implemented, and generally have far less engagement with the FCA) have clarity on FCA expectations. This activity should continue following the formal 'go live' date. We support the FCA's suggestion that it will communicate the action it expects from different sectors through all its supervisory and communication channels and will also provide regular updates on its views on what it has encountered to provide ongoing clarity to industry and other stakeholders. As part of this, we'd like to see the FCA doing more to reach out to those flexible firms which may not have much day-to-day interaction with the FCA to provide information to them about the Consumer Duty. We note that the FCA has recently deployed a range of different mechanisms to reach audiences which may not traditionally engage with the FCA, and would encourage the FCA to consider adopting a similar, more innovative approach to communicating with flexible firms.

## **ANSWERS TO QUESTIONS**

### **Q1: Do you have any comments on the proposed scope of the Consumer Duty?**

We understand the rationale for aligning the scope of the Consumer Duty with the existing scope of the FCA's sectoral sourcebooks (i.e. in insurance, the scope of the Consumer Duty will follow the position set out in the Insurance Conduct of Business Sourcebook) rather than applying a single, standard retail client definition across all sectors. However, this approach creates the risk that it may be difficult for consumers and SMEs to understand if they are covered by the Consumer Duty. It should be incumbent on firms to make it clear to consumers and SMEs when they are, or are not, covered.

We also support the confirmation that the Consumer Duty will apply to prospective customers, which will help ensure that firms consider the needs and characteristics of a target market of customers when conducting marketing activities, and in designing their products or services.

### **Q2: Do you have any comments on the proposed application of the Consumer Duty through the distribution chain and on the related draft rules and non-Handbook guidance?**

We welcome the confirmation that the Consumer Duty will apply throughout the distribution chain. In general, the FCA's proposals provide sensible clarifications about how this should work in practice, for example that:

- All authorised firms will need to comply with the Consumer Duty when carrying out business with retail customers. We welcome clarification that this will include firms in the temporary permissions regime, and would expect the FCA to maintain a vigilant approach to the application of the Consumer Duty to these firms;
- Firms with a direct relationship with the end user will have the greatest responsibility but all firms that have an impact on consumer outcomes must consider their obligations;
- Firms will not be able to transfer their responsibilities to other firms; and
- The Consumer Duty will not apply to activities outside the FCA's perimeter, though it would apply to unregulated activities which are ancillary to regulated activity.

We are pleased to note that the Duty will apply to payment services and firms issuing e-money, reflecting the way the Principles for Business were applied to these activities in *PS19/3: General standards and communication rules for the payment services and e-money sectors*.

We note that the FCA states that “*We only expect firms to be liable for their own activities, so potential complications in contractual relationships should not arise*” and that “*where firms work together to manufacture a product or service they should have a written agreement setting out their mutual responsibilities*”. We have some doubts about whether, in practice, it will be as straightforward as the FCA anticipates to separate out how liabilities may apply to firms along the distribution chain, for example where the distribution chain is lengthy or complex. The non-Handbook guidance which will be published alongside the Consumer Duty provides some clarification, but we expect that this may need to evolve and be revised in light of queries raised once the Duty is implemented.

Since unregulated activities are outside the FCA's perimeter, we understand why the Consumer Duty will not apply. However, the FCA helpfully clarifies that the Duty will apply to unregulated activities which are ancillary to regulated activity (i.e. those which are carried out for the purposes of a regulated activity). Since this is potentially confusing to consumers, we would urge the FCA to make clear, as far as possible, which activities are, and are not, covered by the Consumer Duty, for example whether it will apply to regulated advice providers where they sell unregulated products and services. This information should provide clear examples rather than refer to regulatory terminology which is simply not understandable to most consumers.

**Q3: Do you have any comments on the proposed application of the Consumer Duty to existing products and services, and on the related draft rules and non-Handbook guidance?**

**Q4: Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?**

We answer Questions 3 and 4 together.

We recognise and support the FCA's intention to apply the Consumer Duty to existing products and services, noting that this is different to retrospective application. This is essential to ensure that all consumers stand to benefit from the Consumer Duty, especially for products that are no longer being sold or for longer-term products (e.g. pensions, investments) which may not have fixed renewal points which might ordinarily act as a prompt for firms to review contractual terms and conditions. The FCA's approach should help to prompt all firms to reconsider the value their products and services offer consumers, and to make changes where they provide poor value.

How this should apply is not simple or straightforward, however. We note that the FCA itself states that the products and services outcome cannot be easily applied on a forward-looking basis to certain existing contracts. We would suggest that the same difficulty is likely to apply to the fair value outcome. Based on the consultation paper, it is not wholly clear to us how this will work in practice and, more importantly, what the FCA would expect firms to change to their existing products and services where they undertake a review and determine that they do not meet the Principle itself or the cross-cutting rules relating to products and services or price and value. It would be helpful for the FCA to provide greater clarity about its expectations - for example, do they expect firms to unpick the existing contract and make changes (e.g. to the charging structure) to what has previously been agreed so that it aligns with the requirements of the Consumer Duty?<sup>8</sup>

A clearer steer is required to set out the FCA's expectations of firms, and it should be in no doubt that merely asking firms to consider making changes is unlikely to result in positive consumer outcomes. In this regard, it may be instructive for the FCA to consider the approach adopted in previous cross-industry work to address poor value legacy products, including work conducted by both the FCA<sup>9</sup> and industry<sup>10</sup>.

It will also be important for FCA to discuss and agree a consistent approach to the application of the Consumer Duty to existing products and services with the Financial Ombudsman Service. This will help to provide clarity to both firms and consumers. We note that the FCA consultation makes clear its intention to work closely with the Financial Ombudsman to reach a consistent view on the interpretation of the Consumer Duty, and helpfully clarifies that both it and the Financial Ombudsman work on the basis that firms should be held accountable against the standards that prevailed at the time of the problem.

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<sup>8</sup> For example, Chapter 2 of the FCA consultation which states "assessment of existing contracts may give rise to implications where this indicates firms should consider changes to a contract" and "where [firms] identify that aspects of the design could cause the product or service to breach the cross-cutting rules, we would expect them to take appropriate action to mitigate harm" but goes on to state that "where a firm is taking action to comply with the Consumer Duty in respect of any product or service with existing contracts, we would not expect firms to give up any contractual rights they had a firm expectation of being able to enjoy, although they would be free to do so".

<sup>9</sup> <https://www.fca.org.uk/publication/research/remedying-poor-value-legacy-workplace-pension-schemes.pdf>

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<https://www.abi.org.uk/globalassets/sitecore/files/documents/publications/public/2014/pensions/defined-contribution-workplace-pensions-the-audit-of-charges-and-benefits-in-legacy-schemes.pdf>

**Q5: Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?**

In our response to the FCA's previous consultation on this subject we recommended that the wording of the Consumer Principle should be '*a firm must act in the best interests of retail clients*'. We considered that this formulation was stronger and more accurately reflected the FCA's aim to signal to firms the 'paradigm shift' in expectations that the Consumer Duty represents, as well as capturing the FCA desire for firms to take proactive, anticipatory action in delivering good consumer outcomes. We also think that the 'best interests' formulation would offer significant advantages to 'good outcomes' in relation to longer term products (e.g. investments or pensions) where it can be impossible to determine at point of sale whether a certain product or service delivers a good outcome for consumers.

We continue to believe that the 'best interests' wording is preferable, and we are therefore disappointed that the FCA has opted instead for the Principle to be '*a firm must act to deliver good outcomes for retail clients*'. For the proposed wording to make a positive, practical difference and elevate the standard set out under Principle 6 (Treating Customers Fairly) it becomes even more important for the FCA to stand ready to robustly supervise and, where necessary, enforce against the new Consumer Principle.

The FCA document clarifies that it is not possible for all consumers to receive (or feel that they have received) a good outcome, for example a borrower whose house is repossessed or a consumer who loses money on an investment. This is obviously correct. Regulation should protect consumers from bad outcomes where these are attributable to the actions of firms, but it cannot protect consumers from all risk or poor outcomes. In this way, a firm could not generally be expected to be on the hook where an investment had fallen due to stock market volatility. However, where it had failed to provide adequate information to enable the consumer to understand the risks inherent in the investment, or the timeframe over which it should be expected to deliver returns, then it could be seen to have failed to meet the Consumer Duty (e.g. the consumer understanding outcome). The FCA states that one of its aims in introducing the Duty is to make it easier for consumers to know what they should expect following its introduction, so it will be important to make clear in its communications in what circumstances the Consumer Duty will apply and when and how it will protect consumers from poor outcomes.

**Q6: Do you agree with our proposal to disapply Principles 6 & 7 where the Consumer Duty applies?**

Yes, disapplying Principles 6 and 7 where the Consumer Duty applies makes sense and should help reduce confusion about the rules which apply in any given circumstance.

**Q7: Do you agree with our proposal to retain Handbook and non-Handbook material related to Principles 6 and 7 should remain relevant to firms considering their obligations under the Consumer Duty?**

We support the decision to retain Handbook and non-Handbook material linked to Principles 6 and 7 since these resources may prove helpful to firms as they look to determine the differences

between the existing regulatory framework and the Consumer Duty. However, such material must come with a 'health warning' which makes clear that adherence to the existing material in most circumstances is unlikely to be sufficient for firms to meet the higher standard demanded by the Consumer Duty. The FCA should take the opportunity to remind firms that the new Consumer Duty represents a higher standard and, in the vast majority of cases, simply doing what was done to comply with Principles 6 and 7 will no longer be sufficient.

**Q8: Do you have any comments on our proposed cross-cutting rules and the related draft rules and non-Handbook guidance?**

The cross-cutting rules are an important part of the Consumer Duty, and should help to develop and amplify the standards of conduct that the FCA expects across all areas of firm conduct. We consider that they cover the right areas.

Rather than requiring firms to take all reasonable steps to avoid foreseeable harm, the FCA states that it wants firms to focus on acting reasonably and notes that the Consumer Duty itself is underpinned by a concept of reasonableness. While the concept of 'reasonableness' is widely used in regulation and standards, what is deemed to be reasonable is often still open to interpretation. Care must therefore be taken by the FCA in framing this concept, and expectations of firms must be made clear through supporting materials and supervisory activity.

In our previous response we drew attention to the fact that 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. While we continue to think that this should be reflected in changes to the FCA's Principles for Good Regulation and the relevant legislation<sup>11</sup>, we welcome confirmation from the FCA about where it views the boundaries of consumer responsibility lie, in particular its statement that "*consumers can only reasonably be expected to take responsibility for their choices and decisions if firms act openly and with honesty, avoid causing customers foreseeable harm and take proactive steps to empower consumers to make good choices by establishing an environment in which consumers can make decisions in their own interest and realise their financial objectives*"<sup>12</sup>. In an increasingly complex financial services world this assumes ever greater importance, and so we would expect the FCA to make clear to firms its views on this subject, as well as in discussions with the Financial Ombudsman Service about how the Duty should apply.

**Q9: Do you have any comments on our proposed requirements under the products and services outcome and the related draft rules and non-Handbook guidance?**

We welcome the proposed requirements which seek to ensure that all products and services should be designed to take account of customer needs, have an appropriate distribution

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<sup>11</sup> 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"

<sup>12</sup> [A new Consumer Duty: Feedback to CP21/13 and further consultation](#), December 2021, FCA, Para 6.15

strategy and be reviewed regularly to check they are delivering the intended benefits. We strongly support the emphasis placed on firms to test products or services and their distribution with target markets, as well as confirmation that this should not be a one-off undertaking prior to product launch but rather a regular activity to ensure that they remain appropriate and continue to deliver good outcomes.

We note that elsewhere in its Consultation Paper the FCA suggests that “*where firms already meet existing rules in relation to, for example product governance, these will usually meet the new requirements we are consulting on under these outcomes*”<sup>13</sup>. We suggest that this statement may unhelpfully foster complacency and lead some firms to conclude that the Consumer Duty represents no change to current rules. The FCA should think carefully about how it presents such messages to industry, first and foremost highlighting what is new and different and the consequent need for firms to review existing processes, and only then noting that those with existing product governance requirements may already meet some part of the new requirements.

Our response to the previous FCA consultation on a new Consumer Duty made the point that there would be clear benefits for firms in considering the needs of vulnerable customers as an intrinsic part of their product design and development process. We note that the FCA’s current consultation suggests that the proposed rules would require firms to identify any group of customers with characteristics of vulnerability in their target market and take account of any additional needs when designing products and services. This is welcome, as is the suggestion in Paragraph 7.9 that the FCA will monitor the outcomes experienced by different consumer groups, including those in vulnerable circumstances, to check they are not being disadvantaged. However, we would welcome more information about how this will be achieved given our reservations about the FCA’s proposed approach to monitoring compliance - see our comments in response to Q17 for more information on this.

**Q10: Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?**

We welcome the proposed requirements under the price and value outcome which mean that all firms will need to evidence that their products offer fair value when they are first manufactured as well as on an ongoing basis, including when circumstances change.

It is helpful that the FCA clarifies that fair value is about more than just price and sets out a number of factors which firms must consider, as well as criteria they may consider, when evaluating this. We also welcome the clarification that where firms charge different prices to different groups of customers they should provide fair value for each group. However, we still anticipate that this is likely to be an area where many firms may struggle to undertake thorough assessments so it will be important for the FCA’s guidance to be clear, and that examples of good and poor practice are widely disseminated so that firms and the companies which support

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<sup>13</sup> *ibid*, Para 2.13

them in meeting their obligations can reflect the criteria which should be taken account of when assessing fair value.

The FCA has already undertaken some assessments of whether firms are delivering fair value, for example in its *General insurance product value and coronavirus (Covid-19) Guidance – update*<sup>14</sup>. It's fair to say the conclusions were underwhelming in relation to re-evaluating price and value in the context of the pandemic, with the FCA finding that only a small number of firms made partial refunds where they had identified their products had materially reduced value, though some other firms did seek to offer other benefits. Such results demonstrate the scale of the task facing the FCA in this area, and make clear that this will be an important topic for the FCA's supervisory activity to focus on to ensure firms are meeting requirements.

In seeking to assess whether the price charged represents fair value, one action a firm is likely to take is to look across the market to see what its competitors charge. Yet if the market itself is not working as it should, it could be the case that other firms are also offering products or services which have high prices and offer poor value. Market dynamics may even mean that firms are forced to adopt similar practices in order to compete. In recent times we have seen a number of examples where this was the case (e.g. Payment Protection Insurance and unarranged overdraft fees). We would welcome information from the FCA on how the price and value outcome will work in these circumstances, and how the FCA will support firms to break out from such an unhealthy equilibrium when market-wide pricing is unfair but the detriment is not clear, or is contested, or its impact does not crystallise for some time.

**Q11: Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?**

We are supportive of the proposals made for the consumer understanding outcome. The proposed requirements represent a welcome raising of standards from existing Principle 7 and will require firms to focus on consumer understanding, not simply the provision of information.

At present, there is much poor practice, with too many firms issuing lengthy, opaque documents which are often impenetrable to consumers. The move to a focus on consumer understanding should lead to an improvement with firms more focused on meeting the information needs of their customers and equipping them to make informed decisions to achieve better outcomes.

**Q12: Do you have any comments on our proposed requirements under the consumer support outcome and the related draft rules and non-Handbook guidance?**

We support the proposed requirements under the consumer support outcome and consider that they should help to ensure that firms provide a level of support that meets consumers' needs.

**Q13: Do you think the draft rules and related non-Handbook guidance do enough to ensure firms consider the diverse needs of consumers?**

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<https://www.fca.org.uk/publications/multi-firm-reviews/general-insurance-product-value-and-coronavirus-covid-19-guidance-update>

**Q14: Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?**

We answer Questions 13 and 14 together.

We recognise that the draft rules and related non-Handbook guidance make multiple references to the need for firms to consider the diverse needs of customers, including those who may be in vulnerable circumstances. However, we think there would be merit in making more explicit reference to diversity and inclusion within each of the main elements of the Consumer Duty. In our view, this enhanced prominence would help to send a clear message to firms about the importance attached to this topic. Given the significant numbers of UK consumers who display characteristics of vulnerability such as poor health, low financial resilience or recent negative life events<sup>15</sup> such prominence is merited. An increased level of focus on this would also be similarly helpful for the wider consumer population since steps taken to take account of the diverse needs of consumers - for example by adopting principles of inclusive design - ultimately stand to benefit all consumers.

**Q15: Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?**

No. We are disappointed the FCA has decided not to proceed with a PRoA at this time. We consider that a PRoA could have helpfully opened up an additional route to allow consumers to hold firms to account where they failed to meet the higher standard set by the Consumer Duty. But its potential impact would have extended far beyond redress. Critically, a PRoA would have had a strong, positive effect in encouraging firms' senior management to devote sufficient attention to implementation of the Duty and, in this way, offered the potential to make a real difference in bringing about much-needed behavioural and culture change throughout the industry. While enhanced supervisory activity may partially fill this gap, the FCA should consider how it can replicate the positive impact of a PRoA so that senior management are incentivised to consider the Consumer Duty and ensure that its impact permeates throughout all that a firm does. The suggestions we make elsewhere in this response in relation to senior management are intended to help achieve this outcome.

In any event, the FCA must be clear that the option to introduce a PRoA as part of its Consumer Duty proposals has not been removed altogether but rather has been set aside - for now - to give industry the opportunity to demonstrate it can respond positively to the higher standards demanded by the Consumer Duty. If the industry fails to respond positively within two years of implementation of the Duty then the FCA must not hesitate to introduce a PRoA. In its forthcoming Policy Statement the FCA should set out clearly how it will judge the success of the NCD and the metrics which it will use to make an assessment of the industry response.

**Q16: Do you have any comments on our proposed implementation timetable?**

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<sup>15</sup> FCA research suggests that there are now 27.7 million adults in the UK with characteristics of vulnerability - <https://www.fca.org.uk/news/press-releases/fca-finds-covid-19-pandemic-leaves-over-quarter-uk-adults-low-financial-resilience>

The proposed implementation timetable seems ambitious but achievable. Clearly, it is in neither firms' nor consumers' interests for introduction of the Consumer Duty to be rushed if it means there are adverse consequences or the impact of reforms are muted. However, firms have had plenty of notice about the intended direction of travel, with the FCA's Discussion Paper issued in July 2018 and extensive consultation conducted since then. The proposed iterative approach to implementation advocated by the FCA should also mean that there is no need to delay the introduction of the Duty any longer.

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. It should also seek to incentivise firms to move early rather than wait until 2023 before making the required changes. 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 Consumer Duty changes. Failure to move swiftly to introduce the Consumer Duty should not be countenanced since any delay will mean consumers will continue to suffer due to the poor practices that the FCA itself admits continue to cause significant consumer harm.

**Q17: Do you have any comments on our proposed approach to monitoring the Consumer Duty and the related draft rules and non-Handbook guidance?**

The FCA rightly sets great store on how firms themselves will need to monitor compliance with the Consumer Duty, making clear that it expects them to be able to 'demonstrate effectively' how they are monitoring outcomes, identifying harms, and addressing the issues they have identified. Helpfully, the FCA makes crystal clear that this should not be a one-off process but a continual cycle of review and improvement. However, the FCA does not specify any standardised metrics or mandate any new regular reporting to enable it or others to scrutinise how firms are performing in meeting the obligations which will apply under the Consumer Duty.

Elsewhere the FCA has made clear its intention to adopt a more 'data-led approach'<sup>16</sup> to enable it to more quickly identify practices that negatively affect the delivery of good consumer outcomes so it can intervene before practices become entrenched as market norms. The Consumer Duty is an important test of the FCA's commitment to this. If firms are not required to collect and submit some form of meaningful, consistent data to the FCA on a regular basis then the regulator will have to rely on other methods which inevitably involve some form of time-lag such as consumer groups reporting instances or non-compliance, reference to complaints statistics, or via resource-intensive supervisory activity (including market studies) which can only ever hope to touch a small proportion of the around 51,000 financial services firms the FCA regulates. The failure to collect standardised data will also stymie the FCA's ability to easily measure the success of the Duty, as we point out above. We do not underestimate the challenges in mandating reporting metrics which might apply across a wide range of different financial services markets in order to generate meaningful insight. Elsewhere in its consultation

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<sup>16</sup> For example: <https://www.fca.org.uk/news/speeches/drivers-change-financial-services-industry-and-how-we-are-responding>

document the FCA suggests taking a sectoral approach where it may be difficult to apply a single set of requirements (e.g. in relation to the scope of the rules, and also when setting expectations) so it may be that a similar approach could be adopted in relation to the collection of data if requirements which apply across all sectors are deemed to be too difficult to define.

Throughout this and our previous response on the Consumer Duty, we have made clear that we consider that its success will rely on the way that the FCA supervises and enforces it. We were not alone in asserting the importance of FCA's own activities in delivering a higher level of consumer protection, with the FCA noting that among respondents to the previous consultation "*almost all agreed that the Consumer Duty would succeed or fail based on how we supervise and enforce it*". Without a PRoA, it becomes even more important for the FCA to step up its supervisory activity to ensure that industry meets the higher standards of the Consumer Duty. To make a difference, the FCA must not only raise standards but hold firms to account against these higher expectations. We expect to see the FCA apply the Consumer Duty across all its activity; it should be a 'golden thread' in its regulatory approach, informing everything it does from authorisations to supervision and enforcement, with the onus being on firms to demonstrate to the regulator that its activities are in line with the Consumer Duty. We will scrutinise the FCA's actions to see if they match its ambitions and rhetoric on this point, and have been encouraged by some immediate changes made by the FCA to adopt a more assertive approach, for example in reports that the FCA has stopped one in five applications from new firms for authorisation who could not convince the regulator they had the consumer's interests at heart<sup>17</sup>.

**Q18: Do you have any comments on our proposal to amend the individual conduct rules in COCON and the related draft rule and non-Handbook guidance?**

We welcome confirmation from the FCA that it sees senior-level accountability as an important part of the Consumer Duty, and we are supportive of its proposal to enshrine this through interaction between the Consumer Duty and the Senior Managers and Certification Regime (SM&CR).

We support the FCA's proposal to introduce a new rule for all conduct rules staff, obliging them to act to deliver good outcomes for retail customers. This is stronger than the existing rule '*You must pay due regard to the interests of customers and treat them fairly*'.

To anchor compliance to the Consumer Duty with senior management, we also welcome the requirement that a firm's Board should, at least annually, review the firm's assessment of how it is delivering in line with the Consumer Duty and sign off on the assessment. This will help to embed accountability at the appropriate senior level rather than being relegated to the compliance function. We understand this annual assessment may be shared with the FCA as part of ongoing supervisory activity. However, the FCA should do more. We suggest it consider requiring:

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<sup>17</sup> <https://www.ftadviser.com/regulation/2021/09/29/fewer-small-firms-means-better-outcomes-for-consumers-says-fca/?page=2>

- firms to publish their annual review, or at the very least some form of summary, setting out the most substantive actions taken. Without some form of publication, it is not clear how industry commentators, stakeholders or consumer representatives will gain an insight into the impact of the Consumer Duty, other than from a vague, intangible sense that things may have generally improved or deteriorated.
- a single person of suitably senior stature is named as the responsible person for ensuring that the firm's actions meet the obligations set out by the Consumer Duty. Allocating senior responsibility in this way will help to concentrate minds and is likely to result in clearer accountability rather than a system in which all are equally responsible which can result in everyone leaving it to someone else and no-one actually holding the reins.

### **Q19: Do you have any comments on our cost benefit analysis?**

We recognise that it is difficult to quantify the benefits from the introduction of a Consumer Duty, not least because its primary benefit - if the Duty is embraced by firms and actively supervised by FCA - is likely to be a reduction in the level of harm which takes place. Proving the value of something that has not occurred is of course impossible to do but it may be instructive to consider that the total cost of the Payment Protection Insurance scandal amounted to somewhere in the region of £50bn.<sup>18</sup> By comparison, the adoption of a higher regulatory framework which offers the prospect of stopping a repeat of such activity would seem to represent money well-spent.

We would agree with the FCA that where consumer harms occur, they lead not just to potential financial loss but also to lower levels of wellbeing and can impact consumer confidence. Recent research undertaken by Which? in conjunction with Simetrica-Jacobs sought to make use of HM Treasury's Wellbeing Guidance<sup>19</sup> to quantify the wellbeing impact of scams on victims, looking beyond just the financial losses suffered.<sup>20</sup> In total, the research found that victims of scams in the UK suffer a hit to their well-being that can be calculated at £9.3bn a year, well beyond estimates of financial losses. The FCA may find it helpful to consider whether a similar approach would be instructive in helping to quantify the total costs which would be incurred if the status quo is allowed to continue, should the proposals for a Consumer Duty not be introduced.

To make the costs that need to be incurred worthwhile, the Consumer Duty needs to be markedly different from the existing regime and to make a tangible difference to consumer outcomes. This is why it is incumbent on the FCA to ensure that it explains clearly to firms how the Consumer Duty represents a higher standard than TCF, and that the FCA itself makes strenuous efforts to supervise firms in an assertive manner, standing ready to take enforcement action when required. Firms which endeavour to do the right thing and which respond positively

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<sup>18</sup> <https://www.ftadviser.com/your-industry/2019/08/22/ppi-scandal-costs-industry-50bn/>

<sup>19</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1005388/Wellbeing\\_guidance\\_for\\_appraisal\\_-\\_supplementary\\_Green\\_Book\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005388/Wellbeing_guidance_for_appraisal_-_supplementary_Green_Book_guidance.pdf)

<sup>20</sup> <https://www.which.co.uk/policy/digital/8403/scams-and-subjective-wellbeing>



to the higher standard required by the Consumer Duty also have a strong interest in this. After all, it is only right that the rules of the game are applied equally to all players to ensure competition is fair and firms which pioneer innovative offerings or offer better products and services at lower costs are rewarded rather than those which seek to gain a competitive advantage through evasion of their regulatory responsibilities.

**Q20: Do you have any other comments on the draft non-Handbook guidance?**

The draft guidance and non-Handbook guidance published alongside the draft Handbook rules will prove helpful to firms, as well as consumers and their representatives. However, in spite of regular complaints from industry about the onerous nature of the extensive rules and guidance they must currently follow, we anticipate that parts of industry are likely to make requests for ever-more detailed guidance on the implementation of the Consumer Duty.

The FCA should resist these calls other than where legitimate questions about its application arise. Instead it should point out that since the Consumer Duty focuses on seeking to deliver good consumer outcomes, and there are different routes to achieve this, the onus for determining how it is achieved must ultimately sit with a firm's senior management. Firms should be left in no doubt that the buck stops with them and pleading that the guidance does not cover every circumstance when seeking to defend poor practice will not be tolerated.

**Q21: Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?**

The examples included in the non-Handbook guidance are extremely helpful in explaining how the FCA envisages key elements of the Consumer Duty will apply. Given our answers to Q4 and Q10 we would suggest that it would be helpful to provide more examples of good and poor practice in relation to the 'Price and Value' outcome, and particularly how this should be applied to existing products and services.

**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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