



The Money Charity Response – FCA Consultation on a New Consumer Duty CP 21/13 (July 2021)

The Money Charity is a Financial Capability charity whose vision is to empower people across the UK to build the skills, knowledge, attitudes and behaviours to make the most of their money throughout their lives, helping them achieve their goals and live a happier, more positive life as a result.¹

We welcome the opportunity to respond to the Financial Conduct Authority’s consultation CP21/13 on a New Consumer Duty.

In this response, we set out our Key Points, make some overall comments on the issue then answer the questions posed in the Consultation Paper.

¹ See box on back page.

Key Points

1. We would prefer the new Consumer Duty to take a statutory form and be called a Duty of Care. However, we think the Consumer Duty as proposed in the Consultation Paper is a good solution which, if properly enforced, could bring about significant change in the treatment of consumers by financial service firms.
2. The new Consumer Duty should be made a Board-level responsibility with a designated Executive Director (along with the CEO) responsible for implementation as part of their responsibilities under the Senior Managers and Certification Regime.
3. Regarding the wording of the Consumer Principle, we think that Options 1 and 2 in the Consultation Paper should be combined as follows: *“A firm must act in the best interests of retail clients in order to achieve good outcomes for those clients.”*
4. Regarding the proposed rule on avoidance of consumer harm, we think there is a risk that the wording suggested in the Consultation Paper may give rise to an absolute test of foreseeability. Instead, we propose applying a test of “reasonable foreseeability”, which is the normal legal test in relation to duties of care: *“Firms should take all reasonable care to avoid reasonably foreseeable harm to customers.”*
5. The final wording adopted for the rules and outcomes must make absolutely clear that the rules and outcomes constitute a higher standard of care than the previous Treating Consumers Fairly (TCF) principle, which has not proved sufficiently strong.
6. In implementing the new Consumer Duty, firms should be required to apply the principles of Inclusive Design.
7. There are weaknesses in the proposed Four Outcomes and their accompanying examples, particularly relating to the testing of communications, the exemption (which we disagree with) of so-called “sophisticated and/or high net worth” consumers from normal consumer protections, customer service in relation to termination of contracts and the relationship of price to value. To make clear that the Consumer Duty represents a new, higher standard, the Outcomes need to be amended. See our answers to Questions 13-20.
8. Whether the new Consumer Duty will be successful depends in large part, we think, on the approach taken by the FCA in supervision and enforcement. The FCA needs to show at an early stage that it intends the new Duty to be applied conscientiously across all financial products and services marketed to retail consumers.
9. We support the introduction of a private right of action (PROA) for breaches of the Consumer Duty as we think this will reinforce the package that the FCA intends to

introduce. Conversely, *not* introducing a PROA would send a mixed message to the industry, which would undermine what the FCA is seeking to achieve.

Overall Comments

As a Financial Capability charity, our core business involves delivering Financial Education to school pupils, students, employees, self-employed and community groups such as refugees, social housing tenants and ex-offenders. We teach the basics of budgeting and spending, managing different types of credit and how people relate to money emotionally and psychologically (which is where problems often arise). We teach what the FCA would recognise as sensible approaches to money, credit and spending. However, educational workshops cannot offset the pressures arising from adverse product design and weak regulation. Along with others working in this space, we need help from the FCA to make sure that products and services lean in the same direction we do, towards responsible and sensible financial management, and not towards excessive debt, loose budgets and unforeseen losses.

In relation to financial regulation, our core approach is that **financial products and services should be designed to help consumers behave in financially capable ways**, rather than the opposite.

We view the new Consumer Duty from this point of view. As we have submitted to the FCA previously,² we support the introduction of a Duty of Care by financial service firms towards consumers, with the Duty of Care having two aspects: customer best interests and avoidance of reasonably foreseeable harm. Such a Duty needs to be accompanied by enhanced supervision and enforcement by the FCA, supported by a private right of action, so that consumers can, if they wish, combine in collective legal action against errant financial service firms.

Answers to consultation 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?

Despite the existing FCA requirement for firms to treat customers fairly, a range of harms have continued to appear, causing large consumer losses. These harms have arisen from a wide range of activities, for example high-cost credit, overdrafts, credit cards, insurance pricing, pre-paid funerals, mini-bonds and other investment promotions. The harms have arisen in relation to activities clearly within the FCA perimeter as well as activities straddling or lying outside the current perimeter (e.g. mini-bonds, Bitcoin). It is clear that

² <https://themoneycharity.org.uk/media/The-Money-Charity-Response-FCA-Duty-of-Care-Consultation-Nov-2018.pdf>

the regulatory framework needs stronger consumer protections. We welcome the FCA's proposal to move forward with 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 think the option of proceeding with a statutory duty of care should be kept on the table. This is because a statutory duty would be less ambiguous and more able to deal with potential counter arguments based on the FSMA principle that consumers should take responsibility for their decisions.³ We agree with the Consultation Paper that consumer responsibility is predicated on correct behaviour by financial service firms. Because of the issues around complexity and transparency, it is very hard for consumers to take responsibility if the products and services have not been designed to deliver consumer benefit.

Accepting for the purposes of this Consultation Paper that a statutory duty is temporarily off the table, we welcome the proposed Consumer Duty and agree broadly with its proposed structure. However, we think the wording of each element is very important. We comment on this in more detail below.

We think that the Consumer Duty should be made a Board-level responsibility, with a designated Executive Director responsible for ensuring that the firm is in compliance. The new Consumer Duty needs to imbue all the operations of the firm and be overseen by the Board of Directors. It should be quite clear that the designated Executive Director as well as the CEO are responsible under the Senior Managers and Certification Regime.

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 applying the duty to retail clients as defined in the FCA handbook. We would like to see the Duty applied to all products and services supplied to retail consumers, including those that currently have ambiguous status due to the FCA perimeter. We realise that this presents a challenge to the FCA, but we do not think it is acceptable in principle to have certain types of financial services and products that are unregulated, but which are promoted to retail consumers. Inevitably, consumer harm will arise in relation to such products and services. If it is impractical to write detailed regulations for every conceivable product and service, we suggest that the FCA have a

³ Section 1C of the Financial Services and Markets Act 2000.

backup rule enabling it to intervene where it sees a serious risk of consumer harm arising from *any* retail financial service or product promoted to retail consumers.

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?

Yes, we agree. If the activity is a significant part of the supply chain for a retail product, it needs to comply with the Consumer Duty.

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?

To create a strong Consumer Principle, we suggest the two options in the Consultation Paper be combined as follows:

“A firm must act in the best interests of retail clients in order to achieve good outcomes for those clients.”

If we had to choose between Option 1 and Option 2, we would go for Option 1 (good outcomes) because we think this is easier for managers at all levels of financial service firms to understand and implement. However, our preference is for the two Options to be merged.

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?

Yes.

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

We agree with the proposed rules on acting in good faith and enabling customers to achieve their interests, but we think the wording on avoidance of harm needs further consideration.

The Consultation Paper proposes⁴ the wording: “Take all reasonable steps to avoid causing foreseeable harm to customers.” In our view, this wording risks creating an absolute test of foreseeability, whereas in tort law (where the duty comes from) it is more

⁴ CP21/13, page 21.

usual to speak of “reasonably foreseeable harm”, i.e. the reasonableness test is applied to the foreseeability of the harm as well as to the steps taken to avoid it.⁵

Better wording in our view would be: *“Firms should take all reasonable care to avoid reasonably foreseeable harm to customers.”*

The phrase “reasonably foreseeable” takes account of the inevitable uncertainties of life, while still being governed by the principle of reasonableness, which is a standard test applied by the courts.

We have heard that some financial services firms have reacted to the proposed new Consumer Duty by saying “there’s nothing new here. We are already required to do this under Treating Customers Fairly (TCF).” In our view, there is a big difference between the new Duty and the vaguer TCF principles, which speak only of “due regard” to consumers and clients.⁶ We therefore think it is important that in finalising the wording for the Consumer Duty rules, the FCA chooses words that make it absolutely clear that the Duty requires a significantly higher standard of consumer protection than under the existing TCF rules.

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

This very much depends on the FCA’s approach to supervision and enforcement, including of the Senior Managers and Certification Regime. If firms see from the FCA’s enforcement that the regulator is serious about the standards set, then the Consumer Principle plus the Vulnerability Guidance should improve the treatment of vulnerable 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?

Because of the possibility of unintended consequences elsewhere in the FCA rules, we understand the argument for retaining Principles 6 and 7 and the TCF Outcomes. However, it should be made clear that the new Consumer Principle takes precedence as the guiding principle in relation to all retail products and services.

⁵ See, for example the House of Lords discussion in: https://en.wikipedia.org/wiki/Donoghue_v_Stevenson

⁶ See FCA Principles 2.1, available at: <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html>

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?

It should be made clear that in relation to activities to which the Consumer Duty applies, the Consumer Duty takes precedence.

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?

The new Consumer Duty creates a framework for a much higher standard of consumer protection. However, it depends on how the FCA behaves as a regulator. If firms see that the regulator is serious about the standards set, then the Consumer Duty should improve consumer protection. It should also improve competition *in the interests of consumers*, which is the purpose of competition in economic theory.

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?

With its requirements to act in the consumer’s best interests, achieve good outcomes and avoid reasonably foreseeable harm, the proposal comes close to a Duty of Care. To make this clear, we think it would be useful to label it as a Duty of Care. We would also like to see the option of a statutory Duty of Care kept on the table, as this would unambiguously signal that “consumer responsibility” cannot be used as an argument for selling consumers dangerous or poor value financial products.

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

We agree with the emphasis in the Consultation Paper on pitching communications to the intended consumers of the product and testing to make sure that communications *are actually understood*, rather than being theoretically understandable, or understandable to a lawyer or financial market specialist. In the past, we have observed a wide range in the quality of firm communications. For example, in our response to the FCA on Buy Now Pay Later Offers (March 2019), we noted wide variations in terminology and textual reading age used by different firms to describe essentially the same products. Some presentations were easy to understand, while others were difficult because of their use of long sentences, multi-syllabic words and jargon.⁷ Firms should be required to show that they have tested their communications with the target audience and that the target audience shows a reasonably high level of understanding of what they are buying. If such testing reveals groups of consumers who persistently cannot understand product offers,

⁷ <https://thefmoneycharity.org.uk/media/The-Money-Charity-Response-FCA-Consultation-Buy-Now-Pay-Later-Mar-19.pdf>

firms should take additional care to make sure the products are in the best interests of the consumers concerned and not inflicting harm. We support Fair By Design's call for the application of Inclusive Design principles in implementing all aspects of the new Consumer Duty.

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

Again, this depends on the approach taken by the FCA in supervision and enforcement.

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

We agree with the emphasis in the Consultation Paper on products being fit for purpose, correctly targeted and representing fair value for money.

However, we are uncomfortable with the examples set out on page 36 of the Consultation Paper, which involve dangerous products being sold to "sophisticated investors who can absorb potential losses." As set out in our responses to the FCA's DP21/1 on Consumer Investment Promotions (July 2021) and Call for Input on the Consumer Investment Market (Dec 2020),⁸ we do not think there is a large group of "sophisticated investors", nor do we think that dangerous investments should be sold to high-net worth investors simply because they are able to absorb losses. We disagree with the way that "high risk" and "high returns" are linked, because of the contradiction inherent in linking a high risk of losses with "high returns". Fundamentally, we do not think this is the approach to investing that should be endorsed by the regulator. We think that the standard protections for retail customers should extend to all retail investors.

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

The proposal establishes a useful framework but, as we have said in answer to other questions above, it does depend on the actual policy followed by the FCA in its supervision and enforcement. This is the critical thing.

The other problem is with exceptions. If the FCA continues with the idea that "sophisticated and/or high net worth investors" are to be exempt from the protections applicable to other consumers, it should expect cases of high losses affecting certain groups of consumers to continue to occur, with associated political and reputational damage for the FCA. As shown by the London Capital and Finance case, the subject of the Gloster Review, there unfortunately seems to be no limit on the degree of self-interest

⁸ Available at: <https://themoneycharity.org.uk/work/policy/consultation-responses/>

that certain people display when they decide to depart from normal standards of consumer protection to enrich themselves. This might be a small minority, but it is a minority capable of inflicting financial and reputational damage out of all proportion to its numbers.⁹

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

We agree with these. We suggest adding words to make it clear that customers should find it as easy to quit a product as to buy it. The way to terminate a contract should be clear and firms should facilitate this in practice, by making sure there are no online, mobile or telephone barriers to a customer quitting a product.

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

Again, this depends on enforcement by the FCA.

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

We agree with these, and we think it is important to include a requirement that prices represent fair value to consumers.

One of the features of financial markets and financial services is that price and value often diverge far more than is envisaged by rational models of consumer and firm behaviour. This is for various reasons including lack of transparency, exploitation of consumer biases, use of market power, etc, which the FCA is familiar with.

For example, the writer of this response was recently offered a renewal price of £530 for home and contents insurance for 2021/22 but was able to arrange the same cover from an alternative provider for £209. On 1 January 2022, the FCA's new rules on insurance pricing come into effect, but it is striking that so close to the start date for the new rules (and including part of the year to which the new rules will apply) firms continue to price discriminate to this extent.

In consumer investment markets, alignment of price and value is made harder by the relative lack of media reporting of sound ways to assess underlying value. Most stock market coverage is based on price trends, news and subjective factors (for example, the recent sub-orbital flights by Jeff Bezos and Richard Branson) rather than on the process of finding true values for assets. Consequently, markets and the values of individual

⁹ <https://www.theguardian.com/business/2021/apr/19/uk-taxpayers-face-120m-compensation-bill-for-lcf-scandal>

stocks tend to swing between frothy periods of over-valuation and depressive periods of under-valuation, such as we have seen during the Coronavirus pandemic.

In our view, it would be helpful for the regulator to use its influence to encourage a more rational environment for investment valuation, addressing firm behaviour, financial promotions and media coverage. We recognise that this is a challenging and probably long-term task, but it would be a suitable goal for a regulator to set.

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

This depends on the FCA's supervision and enforcement.

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

We support the introduction of a private right of action (PROA) for breaches of the Consumer Duty, which we see as an important part of the overall package of reform. We do not expect such cases to be taken often,¹⁰ nor do we expect cases to be taken by individuals, for whom the cost of action would be prohibitive. However, it will be possible for consumers to take *collective* legal action against serious breaches of the Duty, using the UK's group litigation process.¹¹

In our view, the possibility of facing group litigation for breach of the Consumer Duty will have a significant impact on firms' assessment of their risk environment, with firms being incentivised to make sure they are complying with the Duty.

Having a PROA will help the FCA in its supervision and enforcement. It means that all parts of the regulatory framework will be pointing in the same direction.

The FCA should also consider how a decision *not* to introduce a PROA might be interpreted. It would conflict with other parts of the package and look like a message that the FCA is not absolutely serious about the implementation of the new Consumer Duty.

We also note the point mentioned in paragraph 5.9 (page 48) of the Consultation Paper that having a PROA will enable the FCA to impose an industry-wide redress scheme where such redress is needed. This is an additional argument for a PROA and illustrates the completeness of the package.

¹⁰ The paper on the PROA by the Financial Services Consumer Panel provides strong evidence on this point.

¹¹ The Supreme Court in its recent (Dec 2020) decision in the *Merricks v Mastercard* case noted the importance of collective litigation for consumers to overcome the prohibitive costs of individual action.

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?

We think that having a PROA strengthens the hand of the FCA in carrying out its supervision and enforcement activities, so not having a PROA would place even greater reliance on the FCA for the success of the new Duty.

Having a PROA would give consumers the backstop right to take legal action if all else failed, so in our view strengthens the overall regime, even if (as expected) such cases turn out to be rare. Indeed, we would want the cases to be rare, as this would indicate that the new Duty was generally being complied with.

Q23: To what extent would your firm's existing culture, policies and processes enable it to meet the proposed requirements? What changes do you envisage needing to make, and do you have an early indication of the scale of costs involved?

Not applicable.

Q24: [If you have indicated a likely need to make changes] Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes?

Not applicable.

Q25: To what extent would the Consumer Duty bring benefits for consumers, individual firms, markets, or for the retail financial services industry as a whole?

If enforced, we think the Consumer Duty will bring benefits for consumers, firms, markets and the financial services industry. For the financial services industry and firms, the impacts will be reputational, improving over time the currently distrustful public attitude towards financial services. Markets will be improved by a clearer matching of consumer needs with products and services. Consumers will benefit from financial products and services better aligned with their needs and delivering better value for money.

One of the mistakes some in the financial services industry make, we think, is to develop business models that depend on exploiting consumers rather than serving them. This distinguishes errant financial service firms from firms in other industries such as motor vehicles, supermarkets, building supplies, books, coffee shops (and many more) where, by and large, there is a common understanding between producers and consumers over what is being sold and purchased and the value this delivers to both sides of the bargain.

Companies make profits by delivering products that consumers want at prices consumers consider to be value for money.

If the financial services industry can align with this approach, all sides will benefit.

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

Some have argued that there will be unintended consequences, such as inhibition of innovation. We regard this as a spurious argument. Some of the most innovative companies in the world (including motor vehicles, pharmaceuticals, organic food producers, etc) operate subject to stringent rules and with a duty of care toward their consumers, so this should not be a problem for financial service companies. Indeed, it is generally recognised that rules are a spur to innovation as they prompt companies and individuals to think more creatively about what they are doing and to find the best solution rather than the easy one.¹²

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?

Were some members of the industry to argue that a long lead time is required to introduce a Consumer Duty this would be an extreme and startling form of self-indictment. We suggest that the Duty be introduced with a minimum lead time, long enough only for firms to brief their teams on the implementation requirements.

¹² See for example: <https://hbr.org/2019/11/why-constraints-are-good-for-innovation>

The Money Charity is the UK's Financial Capability charity providing education, information, advice and guidance to all.

We believe that everyone achieves Financial Wellbeing by managing money well. We empower people across the UK to build the skills, knowledge, attitudes and behaviours to make the most of their money throughout their lives, helping them achieve their goals and live a happier, more positive life as a result.

We do this by developing and delivering products and services which provide education, information and advice on money matters for those in the workplace, in our communities, and in education, as well as through influencing and supporting others to promote Financial Capability and Financial Wellbeing through consultancy, policy, research and media work.

We have a 'can-do' attitude, finding solutions to meet the needs of our clients, partners, funders and stakeholders.

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