LONDON'S GLOBAL UNIVERSITY

Centre for Ethics and Law

Duty of care and financial services

Response to the FCA's Consultation Paper 21/13 A new Consumer Duty

June 2021

Introduction

The UCL Centre for Ethics and Law encourages ethical reflection, awareness and positive change through teaching, research and stakeholder engagement with the public, policy makers, regulators, practitioners and academics.

The Centre's members are particularly interested in the relationships between ethics and the professions; law, ethics and business; innovation, technology and ethics and ethics and risk drawing on law, philosophy, psychology and practice. The Centre is sponsored by a small number of commercial organisations and the views expressed in this response are not necessarily those held by the Centre's sponsors.

We welcome the opportunity to comment on the FCA's Consultation Paper 21/13 A new Consumer Duty. We would be happy to discuss further any of the issues raises in this response.

Issues

It is important that the reasons are elucidated for developing a new 'Consumer Duty' including why the existing rules, Principles and guidance are deficient. Where there are specific issues or gaps these should be addressed directly unless the FCA see the problems as so overwhelming that only a new Principle will suffice.

Central are the concerns that:

- it is very difficult for retail and small business customers of financial institutions to successfully bring legal actions in the courts,

University College London, Gower Street, London WC1E 6BT
Tel: +44 (0)20 7679 2000
email@ucl.ac.uk
www.ucl.ac.uk

- many of the current issues appear to flow from an apparent lack of enforcement of the existing rules and Principles,

- finally, it is questionable whether a new duty of care onto top of the existing Principles will do much to reinforce the cultural changes which lie behind, for example, the Senior Managers and Certified Persons Regime and a subject frequently mentioned by, for example, Andrew Bailey (eg 'Transforming culture in financial services' a speech given on 19 March 2018).[1]

This response looks at aspects of these issues in the light of the Consultation Paper. However, there is a need, first, to stand back and to consider what problems the proposed solutions seek to address.

What problems do the proposals for a new set of duties seek to address?

There are many issues with the current provision of financial services in the UK. Many may be found in retail financial markets. These include: poor quality products, products mis-sold, existing customer charged much higher fees than new customers as firms rely on customer inertia, and cross-subsidies which are significantly market distorting. However, they can be summarised as those that relate to:

- the creation and distribution of financial products,
- the mis-placed expectation that increased competition will resolve many of the issues,
- products that only reveal their inherent issues after a long period of time (eg equity release),
- products and services that operate on the periphery of regulation (eg crypto-currencies and investments in commodities such as gold and copper),
- how firms manage the products once sold. This includes issues such as the allocation of profits and losses and fees levied,
- the ability of regulated firms to interpret FCA pronouncements in a way that resonates with their business,
- the ability of boards and senior executives of regulated firms to delude themselves into believing that they are operating to the right standards.

In an ideal market competition would probably resolve these issues but the financial services market is very far from this state of perfection. Nevertheless, not all markets and products share all the current list of issues. For example, highly commoditised products such as car and household insurance are now largely purchased on price with little or no advice sought or provided. This is evident in the relatively low number

[1] https://www.fca.org.uk/news/speeches/transforming-culture-financial-services

of complaints recorded by the Financial Ombudsman Services.2 In these areas it is not clear that any additional duties are required or needed.

As mentioned earlier, poor quality financial advice has been an issue in financial services for many decades. The Retail Distribution Review (RDR) has been instrumental in largely eliminating this issue by, in practice, restricting financial advice to a relatively few high-net-worth individuals. 'Between 10% and 12% of adults had no investible assets whatsoever, and a further 17% to 22% had £1 to £1,000. In total, just 30%-38% had more than £10,000'.3 The figures in the most recent FCA Financial Lives publication indicate that almost 40m UK adults having no investments whatsoever.4 It is certainly, true that since RDR there has been a significant decrease in FCA Enforcement action for mis-selling financial products.5 However, it is worth noting that the National Audit Office review report issued in 2016 indicated that 'the FCA lacks good evidence on whether its actions are reducing overall levels of mis-selling'. 6

Consequently, based on limited data, there is not so much an imbalance in information available on products for consumers but more likely an imbalance in interest and attention on the part of consumers. While financial services firms remain focused consumers remain much less diligent when it comes to financial services products and services demonstrating a general lack of engagement.[7] The perception is of a large population with basic, largely commoditised, financial products, such as bank accounts and motor insurance, and a small minority owning any appreciable financial assets. Consequently, the debate about esoteric issues such as fiduciary duties or duties of care passes by the vast majority of citizens. In summary, most people are financially 'disengaged' relying on commoditised products to meet basic needs while much of financial services regulation remains concerned with a few relatively well-off consumers.

---

2 National Audit Office, "Financial services mis-selling: regulation and redress", HC 851, Session 2015-16 24, (February 2016), 16, https://www.nao.org.uk/wp-content/uploads/2016/02/Financial-services-mis-selling-regulation-and-redress.a.pdf

3 FCA, Financial Lives 2020 Survey, (February 2021), 53, Financial Lives 2020 survey: the impact of coronavirus (fca.org.uk)

4 Ibid, 52

5 FCA, Enforcement Annual Performance Report 2018/9, 8, Enforcement annual performance report 2018/19 (fca.org.uk) which indicated that **no** mis-selling cases were closed in 2018/9 out of 343 enforcement cases opened of all types in that period. This compares with six in 2017/8 and seven in 2016/7. Earlier FCA reports do not provide sufficient information to make a similar analysis

6 Supra n2, (NAO report), 8

7 Supra n3 (Financial Lives), The reports notes this in detail particularly in relations to pensions and, separately, insurance, 162-176

Why general law duties are of little help

It is very unlikely that imposing increased duties of care will bring clarity in the legal expectations of financial services providers' behaviour, or indeed substantially change behaviour. We are publishing an academic legal paper to explain the incompatibility of the 'duty of care' and 'fiduciary duty' under general law with the needs that have been articulated in the Consultation paper.

The common law duty of care has been largely interpreted to the same standard as regulatory duties in many cases, such as the standard of suitability for investment advice and appropriateness for other transactions. Where no regulatory duty is attracted, in execution-only transactions, the common law duty of care is also frequently also excluded as its elements of 'assumption of responsibility' and 'reliance' cannot be established. The common law duty of care is increasingly raised as a fall-back action where regulatory duties do not apply and have rarely been of any help to claimants. The perception that the common law duty of care would somehow fill the gaps of protection left by regulatory duties is misplaced, and this role is often played by the 'Treating Customers Fairly' Principle instead.

In the retail financial services market the customer places trust in the financial institution and its representatives. However, there may be a misunderstanding between the parties. The financial institution may accept that it has to provide a certain level of responsibilities: operate the bank account competently, keep proper account of the transaction, execute the insurance contract etc. However, these may not coincide with the expectations of the customer. The latter may see the financial services business as subject to a much higher duty - as a keeper of their trust. Financial services regulation, for public policy reasons, seeks to bridge and, in many ways, mitigate this disjunct in perceptions.

While general duties have an important role they place a considerable responsibility on the boards and senior management of regulated firms to judge what they need to do to comply with the broad duty. This may be appropriate for the larger regulated firms which is in daily contact with their supervisory teams and for whom specific guidance is readily available and provided. However, for the vast majority of regulated firms they are expected to decide for themselves according to their own lights. This would seem to be a high risk regulatory strategy to balance on potentially questionable judgements.

Culture and ethics and the internalisation of good behaviour in firms is more important

All the evidence points to the need to continue the process of improving the culture and ethics of financial firms. This includes improved governance and risk management. However, even more important is who the firms seek to recruit, how they are inducted into the firm and trained and supervised. Critical to success is the measurement of success and recognition within the firm including target setting and remuneration policies and practices. This has been clearly identified by the recent Australian Royal Commission Interim Report on misconduct in banking and financial

services.[8] 'An employee will treat as important what the employee believes that the employer generally, or the employee's supervisors and peers, treat as important. When the employee and others in the organisation, including the employee's supervisors and peers, are remunerated according to …how much revenue or profit they contribute to the entity, sales or revenue and profit are treated as the goal to pursue. How the goal is pursued is treated as a matter of lesser importance'.[9]

Similarly, regulated firms watch closely what the regulator does and will deem important whatever they see the regulator actively doing. Consequently, there needs to be intense supervisory activity and enforcement action and this needs to be very apparent as a communication means to the industry and more widely.

Improving poor culture and behaviour

As identified by Sharon Gilad in her empirical research, firms, generally, have a considerable ability to self-justify and to rationalise their actions. It is likely that any new duty imposed upon them will go the same way as the 'treating customers fairly' (TCF) initiative. Her work found that in many regulated firms: 'management communication of TCF messages through posters and training programs were cynical attempts at 'cosmetic compliance' – posters appeared just before a visit from the regulator, and internal communications were …focused on providing the regulator with superficial evidence of 'cultural transformation'.' [10] The research found that changes in regulation would not be 'internalised' within an organisation and that existing practices and cultures would 'diverge from the ideal preferences of managers and from the expectations of regulators and external stakeholders'.[11] The central issue is the need to persuade regulated firms to reflect and to analyse their business model, their approach to corporate governance, risk management etc and who they recruit, train etc and their management style, targeting and remuneration.

It is also questionable whether imposing a revised, or replacement, Consumer Duty on firms and advisors would significantly improve customer protection. While, for example, paying 'due regard to the interests of its customer' sets a lower threshold to imposing a fiduciary duty this issue is more likely to be one of how the Principles are interpreted by the business itself. For example, the empirical work by Gilad found that there was a significant disjunct between what regulated firms did and the regulatory expectation when applying the need to comply with Principle to 'treat

---

[8] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - Interim Report, (2018) Volume 1, https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf

[9] Ibid, 302

[10] Christine Parker and Sharon Gilad, 'Internal corporate compliance management systems: structure, culture and agency" in Christine Parker and Vibeke Lehmann Nielsen, *Explaining compliance: business responses to regulation*, (Edward Elgar, 2012), 185

[11] Ibid, 185

customers fairly'.[12] 'Managers' perceptions were associated with firm-specific cognitive frames regarding their organizations attributes (e.g. successful, doing the right thing for customers, being a customer champion, etc.)'. [13] They saw their firms as automatically compliant and their perception was that this Principle applied 'to other firms, but not to their'.[14] Nevertheless, it may be appropriate to tighten the Principles. A revised Principle could require the firm to 'prioritise the interests of their customer above all others'. This is not to decry the approach underlying the TCF Principle. It can and should be made to work but it requires a different approach by both regulated firms and the regulators.

However, there are gaps in the regulatory framework that require specific thinking about policy choices. One, in terms of scope of protection, there are gaps. For example, consumers are not protected in execution-only transactions, and if customers are classified as non-retail (even borderline, like small businesses) then their scope of protection is narrow and often excluded. Specific thinking can be directed to reforming the scope of protection. Second, we do believe that regulatory standards can be raised. For example, the Australian duty of best interests is a combined duty of general and specific enunciations that go beyond the advisory duty here. We also think the Principles could be tightened. For example, the Principle requiring regulated firms to pay 'due regard to the interests of its customer' sets a lower threshold. A revised Principle could require the firm to 'prioritise the interests of their customer above all others'. This would set a clearer regulatory expectation of the standard to be reached. Moreover, empirical work indicates a significant disjunct between what regulated firms do and regulatory expectations. In part, this could be because some managers perceived their firms as automatically compliant with no need to change.

Many of these mis-judgements are due to poor cultural norms within firms. There has been lots of good work published on how cultures within firms can be measured, properly reported and changed, as necessary. The Banking Standard Board (now the Financial Services Culture Board) has undertaken extensive good work in this area in recent years. There may be scope for the FCA to learn and apply these lessons more widely. The FCA could provide detailed information and guidance on how firms should measure culture with set benchmarks drawn form its own experience. Where things have gone wrong these methodologies and benchmarks should be backtested and the results published.

The general public only gets glimpses of the regulatory work undertaken in this area and increased transparency would be welcome. For example, the Senior Managers and Certified Persons Regime had the potential to greatly improve culture within regulated firms, however, progress, if any, is opaque.

---

[12]Gilad, Sharon Gilad, 'Institutionalizing fairness in financial markets: mission impossible?', (2011) Regulation and Governance, 5(3), 309–332, 315

[13] Ibid

[14] Ibid

FCA 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?

It is possible to categorise regulated firms into three broad groups:

- those that have the right culture and will aim to adopt the right standards. They are the model subject for the broad Consumer Duty,

- rogue firms at the other end of the spectrum. They are likely to have little or no grasp of the rules and standards expected and the proposed new duty is likely to fall on stony ground here,

- the main issue will be firms justifying to themselves that the approach they have, or will adopt, is actually in the best interests of their customers, whether this is objectively true or not. It may be rare for regulated firms to actively decide on a course of action which they perceive is harmful to customers. It is much more likely, looking at the various financial services scandals, that individuals in these businesses will misperceive that the firm's and customer's interests are aligned and sincerely be able to justify this to themselves and sleep easy as a result.

Additionally, there will be a number of industry-wide practices (eg in areas such as asset management, front and back pricing etc) which are inimicable to the interests of customers. These are best addressed by direct and specific regulatory action.

Specific rules on troublesome areas would help this third category of the 'weaker brethren'. There would be less scope for them to delude themselves that they were comply with the broad Principles. Unfortunately, the rogue firms will probably ignore all types of regulation which conflict with their own objectives. Only strong regulatory 'gate-keeping' and enforcement action will be effective with this group.

Q2: What are your views on the proposed structure of the Consumer Duty, with its highlevel Principle, Crosscutting Rules and the Four Outcomes?

This structure is too complex for either consumers or regulated firms to understand and, in the case of the latter, operationalise. Additionally, without a lot more guidance it will leave decision-making to the whim of each supervisory team. If a firm has no supervisory team the judgements to be made are likely to be dispersed across the regulated firm with each to his or her own interpretation.

It would be better, if the new Principle is adopted, to supplement with examples of good and bad practice across different types of financial services business with a focus on areas where there may be difficult choices and where the right outcome may not always be obvious. Additionally, as mentioned, specific rules will still be needed where there areas of known bad practice.

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?

This approach appears appropriate.

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 'enduser' of their product or service?

This approach appears appropriate and is the approach taken under the 'Treating Customers Fairly' initiative.

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?

Q6: Do you agree that these are the right areas of focus for Crosscutting Rules which develop and amplify the Consumer Principle's highlevel expectations?

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

This response takes Q5, 6 and 7 together.

The 'Treating Customers Fairly' Principle should have worked with its focus on six outcomes.

'Consumer outcomes

There are six consumer outcomes that firms should strive to achieve to ensure fair treatment of customers. These remain core to what we expect of firms.

- **Outcome 1:** Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
- **Outcome 2:** Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
- **Outcome 3:** Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
- **Outcome 4:** Where consumers receive advice, the advice is suitable and takes account of their circumstances.
- **Outcome 5:** Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.

- **Outcome 6:** Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint'.[15]

The TCF arrangements have been in place since 2003. If the regulatory view is that these have ended up being implemented within firms as processes what is to stop the same happening to the proposed 'Consumer Principle'? Again, the empirical work by Sharon Gilad is instructive.[16]

There is also a potential issue with over-complexity. The 'cross-cutting' rules may look good on a powerpoint slide superimposed on the standard consultants' pyramid, but they are likely to perplex regulated firms (and possibly supervisors). How are individuals in firms to interpret regulatory requirements to 'act in good faith' and to apply 'reasonableness'? Many will have to call in the self-same consultants to assist with a substantial new industry created as a result; much as TCF did in its early days.

While broadly applicable regulations have a role, cross-cutting rules and outcomes may result in a lack of clarity when, for example, they need to be reconciled with existing regulation and it is hazardous if they give rise to wrong expectations on the part of consumers.

The crucial test of the new Principle will how it is applied by the FCA's supervision teams and, in due course, its Enforcement unit. Firms will be looking for what is on the supervision team checklists. In all likelihood the result will be a series of complex process arrangements within each business as they struggle to interpret the new Principle in a way which can be operationalised in their business.

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

The approach taken by the FCA in relation to what is termed 'vulnerable customers' may be too narrow and a better approach my be that adopted by the Financial Services Ombudsman which deduces vulnerability based on individual circumstance.[17] The Guidance is targeted and contains several practical examples which can be used by firms. Clearly, there remain potential issues of whether some regulated firms will actively seek to avoid having 'vulnerable' individuals as

---

[15] FCA, 'Fair Customer Treatment', website, FCA Principles for Customers and PRIN for Firms | FCA, (accessed 27 May 2021)

[16] Supra, n12

[17] FOS Newsletter Aug 2015, https://www.financial-ombudsman.org.uk/files/2858/issue_127.pdf. FCA, Guidance for firms on the fair treatment of vulnerable customers', (FG21/1, February 2021), FG21/1: Guidance for firms on the fair treatment of vulnerable customers (fca.org.uk)

customers to avoid the increase obligations and regulatory scrutiny and potential reputational damage.

Firms may seek to interpose other regulated businesses (eg lawyers, accountants, independent financial advisers etc) between themselves and the customers as a form of 'risk transference'.

There are also issues with spreading FCA supervision resources too thinly. There are a number of large regulated firms that will be daily contact with their supervisors while the vast majority of regulated firms will very rarely, if ever, see a regulator. The latter will, by and large, be left to their own devices to read, understand and apply FCA rules and guidance. Consequently, it is important that the rules and guidance are easy to understand and apply. This means that phrases used in the guidance such 'good faith' and 'foreseeable harm' may not resonate with many firms. This also means that, even if businesses, are aware of the changes they will interpret them by their own lights which may, or may not, be in accord with regulatory intentions. Even with the larger regulated firms the supervisory team will be subject to many competing priorities and important aspects of the new guidance may fall by the wayside as a consequence as more important issues come to the fore.

Consequently, it may be more fruitful, in regulatory terms, to concentrate resources on a few critical areas which reflect high levels of consumer harm. This will, of necessity, change over time and markets, technology and needs change. There is a debate to be had on what these may be and which ones are superseded over time. It is a public engagement which would include the engaged media, Parliament and its Select Committees, HM Treasury etc. It means ensuring that all stakeholders understand that there are choices to be made.

There is also a conceptual discussion needed on the FCA's approaches to regulation. This would include considering whether the concept of the market and competition remains valid. The FCA, in much of the current regulations, particularly in the area of retail financial services, recognises that the efficient functioning of the market is a chimera. It may be better to adopt a fuller more paternalistic approach in many more aspects of the retail areas.

In parallel, the FCA has developed elements of being an economic regulator. The FCA has touched on this in its Feedback Statement (FS) follows the publication of our Discussion Paper (DP) on Fair Pricing in Financial Services in October 2018.[18] Discriminatory pricing and excessive margins are easy to manipulate, even assuming that firms have effective cost allocation systems in place to do this. This is likely to present problems for both firms and supervisory staff to identify with any ease. The FCA could specify how these calculations should be undertaken and require the external auditors to verify this information to the firm's board and to the FCA. The latter could also provide guidance on acceptable parameters and margins falling outside these tolerances. The more efficient firms, that maintained high

[18] FCA, Fair Pricing in Financial Services, (DP18/9, October 2018) DP18/09: Fair Pricing in Financial Services (fca.org.uk), and Fair Pricing in Financial Services: summary of responses and next steps, (FS19/04, July 2019), FS19/4: Fair Pricing in Financial Services: summary of responses and next steps (fca.org.uk)

margins, would easier to identify. This information could be made public as an aid to great transparency in the industry.

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?52 CP21/13 Annex 1 Financial Conduct Authority A new Consumer Duty

Considering Qs 9 and 10, as mentioned earlier we see no issues with the existing Principles. The proposed Consumer Duty does not improve them substantially. The more important factors are also mentioned earlier. It is not clear to what extent, if any, TCF has been successful. The empirical evidence, mentioned earlier, suggests that its effectiveness has been limited. As always it comes down to the regulator expressing clear messages which regulated firms, and they advisers, can understand and implement coupled with effective supervision and enforcement.

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 do not believe that the current proposals do much to advance consumer protection or the FCA's competition objectives for the reasons given earlier.

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?

No, the proposals do not equate to a 'duty of care' and it would be wrong and misleading to label them as such. For more on this see our paper 'Changing financial services firms' behaviour through a duty of care'.[19] Imposing a 'duty of care' would appear to promise in a shorthand form all the benefits of the legal tradition and interpretation that are imbued in it. However, as the 'duty of care' is fundamentally a legal concept, it has to be unpacked within that framework in order to ascertain what it offers for financial services customers. Adoption of a statutory 'duty of care' by the FCA cannot and should not mean something entirely different from the common law 'baggage' that it carries, or else this will cause immense legal uncertainty and confusion for legal practitioners who are at the forefront of advising financial services providers. The adoption of a statutory 'duty of care' must import the common law jurisprudential development of this duty, or it is meaningless to consider the utility of such an adoption in a vacuum. It is worth noting that the common law duty of care is

[19] Iris Chiu and Alan Brener, 'Changing financial services firms' behaviour through a duty of care', (2018) Journal of Financial Compliance Vol. 3, No. 1, Brener_Changing financial services firms' behaviour through a duty of care_VoR.pdf (ucl.ac.uk)

nowadays raised in private litigation largely as a fall-back if claimants are not able to benefit from the protection of existing regulatory duties.[20]

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

We do not consider that the proposals add much, if anything, to the existing FCA requirements covering the adequacy of consumer communications. These have the potential to be very effective especially when coupled with the FCA's behavioural research and its other extensive powers in this area.[21] From time to time there will be new product areas (eg crypto assets) which operate outside, or on the fringes of, existing regulations which may raise issues that need to be addressed. As far as we are aware the FCA does this. For example, see the FCA's actions set out in its Policy Statement PS20/15 on 'High-risk investments: Marketing speculative illiquid securities (including speculative mini-bonds) to retail investors' in December 2020.[22]

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

See comments in answer to Q13 above.

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

It is not clear what research has been undertaken to establish what consumers see as the desirable 'outcomes'. We suspect, but do not have any empirical evidence, that consumers are largely bemused by existing regulations. They may not, for example, appreciate the difference between firms that are regulated and those that provide products and services which are, or are not, subject to regulation. The concept of 'regulatory permissions' may also be obtuse. Similarly, consumers may not understand the difference between 'advice' and 'information' and where the boundary falls and the consequences. There is considerable empirical evidence to suggest that many consumers are innumerate and numeric information and graphics are not understood. Consequently, the whole issue of defining 'outcomes' is problematic.

---

[20] Iris Chiu and Alan Brener, 'Articulating the gaps in financial consumer protection and policy choices for the financial conduct authority—moving beyond the question of imposing a duty of care', (April 2019) *Capital Markets Law Journal*, Volume 14, Issue 2, 217–250

[21] FCA, 'Financial promotions quarterly data', (6 April 2021), data shows 'the number of financial promotions that have been amended or withdrawn due to non-compliance with our rules'. Financial promotions quarterly data | FCA

[22] FCA, PS20/15, 'High-risk investments: Marketing speculative illiquid securities (including speculative mini-bonds) to retail investors', (December 2020), PS20/15: High-risk investments: Marketing speculative illiquid securities (including speculative minibonds) to retail investors (fca.org.uk)

It is not clear that the proposals add anything to the existing Principle 6 and the FCA's related guidance. Where there are activities in the market that may contravene the spirit of this Principle the FCA has issued additional specific guidance and, in specific problem areas, introduced new rules. Firms likely to operate contrary to the spirit of Principle 6 are likely to do the same even if there is a new 'Consumer Duty'. It is an issue which may indicate problems with individual firm cultures. This is a matter for the FCA supervisors. We are not aware that the latter have claimed that they lack sufficient powers to act.

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

Negligible for the reasons explained earlier.

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

It is likely that many of the issues relating to poor customer services are the result of regulated firms outsourcing key customer facing and processes operations. This is an important area and the FCA has rules governing this and has issued guidance.[23] If necessary customer service elements could be specifically addressed through this FCA set of initiatives and would be more likely to be effective since they will be specifically addressed to the relevant senior executives and board members under the apportionment of responsibilities under the FCA's Senior Managers and Certification Regime.

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

See comments in answer to Qs 13 and 15 above.

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

The FCA started work on pricing and value in October 2018. However, progress in this area appears to have been somewhat limited as we approach the three year anniversary. For the reasons given in our response to Q11 above it is very unlikely that a 'Consumer Duty' will have any significant effect without a major FCA policy shift and new specific initiative with the FCA becoming an effective pricing and economic regulator.

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

---

[23] FCA website, Outsourcing and operational resilience, Outsourcing and operational resilience | FCA

See our response to Qs 11, 15 and 19 above.

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

We see the regulators, with their extensive powers, as the primary means for protecting financial service stakeholders and for arranging redress processes if appropriate. In this light regulatory enforcement should more frequently be coupled with compensation or restitution orders under s384, FSMA. Processes should be instituted to facilitate consumer redress through coupling with successful enforcement, such as carried out by the US Consumer Financial Protection Bureau (CFPB). Redress procedures implemented by firms such as consumer redress schemes should be monitored so that consumers are treated properly. There should also be easier access by a wider range of persons to the Ombudsman for individual redress, bearing in mind that the court recognises the final nature of Ombudsman orders.

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?

None

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?

We do not support the creation of a new Consumer Duty Principle for the reasons set out in this response. At this stage, more effective steps revolve around specific rules addressing particular areas of perceived harm and effective regulatory 'gate-keeping', supervision and enforcement.

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?

We believe that the benefits would be negligible for the reasons given above. This is not because the objectives are wrong but we consider that there are better methods of achieving them using existing and, if necessary, implementing new and more targets rules and guidance.

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

We take the view that it would be viewed as another FCA initiative which would take sometime to be implemented with new processes within firms influenced by advice from outside consultants. It would displace TCF and be a distraction for both regulated firms and FCA supervisory teams when more effective supervision and enforcement of existing requirements would be more useful. However, markets change and the FCA needs to be attuned to these changes and it needs to act in time as it has done in a number of areas such as high cost credit.

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 leadtime?

This is really a question for the regulated firms to answer but in practice it is likely to take a number of years.