

KEY POINTS

- The FCA is proceeding with proposals for a new Consumer Duty.
- A new Principle of Business, along with cross cutting rules and outcome-based rules, will be implemented by 31 July 2022.
- The new Consumer Duty is a far-reaching initiative codifying various regulatory guidance, rules and enforcement decisions.
- The extent to which it adds to the duties already contained in FCA Handbook Principles 6 and 7 depends in particular on interpretation and enforcement of the price and value outcome.
- There is uncertainty as to enforcement approach and the interrelationship between the new Consumer Duty and common law obligations.

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The new FCA consumer duty: the interrelationship with regulatory and common law obligations

This article considers the FCA's proposed consumer duty in financial services, expected to be introduced by 31 July 2022 (the new consumer duty). It concludes that:

- the extent to which the New Consumer Duty imposes a higher standard than that already contained in FCA Handbook Principles 6 and 7 is especially dependent on interpretation of the Price and Value Outcome;
- the interrelationship between the New Consumer Duty and existing regulatory and common law obligations poses uncertainty to regulated firms; and
- there are likely to be differences in the enforcement approach of the FCA, civil courts and the FOS.

This article does not cover the interrelationship between the New Consumer Duty and common law contractual obligations. Neither does it cover the overlap between the New Consumer Duty and the Senior Managers and Certification Regime, which aligns senior accountability with certain FCA Handbook rules. Both topics will be analysed in a further article.

CONSULTATION BACKGROUND

The December 2021 FCA Consultation Paper (CP 21/36) and draft wording of the New Consumer Duty follows a feedback process which began in July 2018 (DP18/5). Looking across the consultation materials over that period, the FCA objectives can be summarised as follows:

- to promote a "higher level of consumer protection in retail financial markets";
- to allow consumers to be able to make "informed choices" about financial products and services; and
- to promote effective competition in the interests of consumers.

The consultation has progressed as part of the FCA's wider efforts to fulfil its underlying statutory objective of consumer protection. Initially the FCA considered recommending that Parliament enact a statutory duty of

care, and it was required to hold a public consultation on the issue under s 29 of the Financial Services Act 2021. Alternatively, the FCA considered using its powers to impose a new rule incorporating elements of both a duty of care and a fiduciary duty, or extending the client's best interests rules already contained in the FCA Handbook.

NEW CONSUMER DUTY

In the end, the draft wording of the New Consumer Duty reflects an outcomes-based approach. It is set out in new FCA Handbook Principle 12:

- A firm must act to deliver good outcomes for retail customers.

Principle 12 is supplemented by cross cutting rules (the Cross-Cutting Rules) requiring firms to:

- act in good faith towards retail customers;
- avoid foreseeable harm to retail customers;

- enable and support retail customers to pursue their financial objectives.

Rules also apply in respect of achieving good outcomes in four areas (the Outcomes):

- Products and services.
- Price and value.
- Consumer understanding.
- Consumer support.

For now, the FCA is not proposing to introduce a private right of action under the New Consumer Duty. However, it will review the possibility subject to the evidence which firms produce on compliance.

Standard of the New Consumer Duty

The FCA has referred to Principle 12 as a "significant uplift" from the protections contained in Principles 6 (a firm must pay due regard to the interests of its customers and treat them fairly) and 7 (a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading).

However, it does not seem likely that a regulated firm could be found to be in breach of the obligation to act to deliver good outcomes but not also be in breach of existing obligations to pay due regard to customer interests and treat them fairly under Principle 6. CP 21/36 does not address this point convincingly, commenting only that new Principle 12 enables a "clear shift in approach" and avoids a change in expectations related to the existing principles.

The same argument can be applied in relation to the Cross-Cutting Rules. Although dependent on the supervisory approach of the

Feature

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FCA, it is difficult to envisage conduct which does not meet the standard of good faith, or avoiding foreseeable harm, as conduct which would be compliant with existing Principle 6.

It would therefore appear that the heightened standard derives from the Outcomes, and so their interpretation is of particular interest to both consumers and regulated firms.

Price and Value Outcome

Compliance with the Price and Value Outcome is likely to be the most difficult aspect of the New Consumer Duty. The draft Handbook Guidance states that “a product provides fair value where the amount paid for the product is reasonable relative to the benefits of the product”. It is unpredictable how an objective test of reasonableness can apply to whether a price is fair. A value fairness assessment seems to inherently require a subjective assessment. Further FCA Guidance or future enforcement decisions may be useful in identifying how the Outcome is to be interpreted.

There is no prescriptive price assessment test to be undertaken by firms, but there is an obligation to consider various factors. Those factors include overall price, and the benefits, limitations and nature of the product. While firms will be reassured by the FCA’s commitment not to limit the margins which firms can earn on products/services, the draft Handbook Guidance states that a firm may consider whether it has achieved “savings and benefits from economies of scale ...”, and whether these could be shared with the retail consumer when reaching a price assessment. Savings and benefits to the firm may also be considered by the FCA in determining whether the Price and Value Outcome has been achieved for the consumer. Although this Outcome does not necessarily represent an explicit price control, it appears that regulated firms will have to be alert as to how they might justify pricing by reference to the savings and benefits they derive from their products and services. The New Consumer Duty will likely form the basis under which the FCA supervises price in a more direct way than under existing rules and guidance.

To minimise the risk of breach, comprehensive and regularly updated records as to rationale for the conclusion reached on value are going to be important. There are

many regulated firms which have already introduced processes to assess the value of products in compliance with the incremental steps taken by the FCA in this area since it acquired its competition mandate in the Financial Services Act 2012. For example, since the inception of the competition mandate, the FCA has set limits on payday loan interest charges and overdraft charges. It has made enforcement decisions which find a breach of Principle 7 in cases where consumers have entered transactions which represent bad value and has implemented rules requiring authorised fund managers to conduct an annual assessment of value. Still, regulated firms may need to review and expand their existing processes for assessing value to comply with the New Consumer Duty.

Date of assessment of whether there is a good outcome

In consultation, there have been questions raised as to the relevant date of assessment in respect of whether a consumer benefits from a good outcome. In particular, there is concern that firms may be penalised for failure to deliver a good outcome with the benefit of hindsight. It is questionable whether this concern has been adequately addressed in CP 21/36. The rules are intended to be proportionate but that may conflict with the “obligation to avoid foreseeable harm [applying] throughout the customer journey and lifecycle of the product or service”. On the basis that observance of the Outcome Rules is an ongoing duty, there is a risk of breach if there is not a good outcome and that is foreseeable at *any* time during the product lifecycle. This may present challenges, for example to the pricing of long-term products/services. Again, it is difficult to predict how the FCA will interpret and enforce this aspect of the Outcome Rules.

SECTION 138D FSMA CLAIMS: INTERRELATIONSHIP BETWEEN THE NEW CONSUMER DUTY AND EXISTING FCA HANDBOOK RULES

Notwithstanding extensive consultation, some uncertainties regarding the New Consumer Duty remain. Unintended consequences may follow its implementation. Financial services firms have raised

concerns as to confusion in interpreting the relationship between the New Consumer Duty and existing obligations contained elsewhere in the FCA Handbook.

In its current form, there is no provision for a private right of action under s 138D FSMA, either in respect of Principle 12, Cross Cutting Rules or Outcome Rules. Retail consumer claimants bringing civil claims will therefore continue to rely on existing rules in the FCA Handbook (most likely those supplementing Principles 6 and 7) but may plead that the New Consumer Duty should be relevant in interpreting existing rules under which they have a private right of action. Whether the New Consumer Duty will be relevant to the interpretation of obligations under the existing regulatory framework in practice is unclear.

It is arguable that, given the New Consumer Duty is introduced by the FCA to impose a higher standard than under existing rules, interpretation of the two sets of rules should not be conflated. It would follow that the new rules should not colour the interpretation of existing rules either in FCA enforcement or in s 138D claims.

On the other hand, both the existing and new rules are drafted broadly. Various factors fall to be considered in assessing compliance with them. This drafting provides some flexibility in their interpretation, and it is possible that a court would be willing to consider aspects of the new rules and guidance in the interpretation of existing rules, rather than consider existing rules in isolation.

INTERRELATIONSHIP BETWEEN THE NEW CONSUMER DUTY AND OTHER COMMON LAW OR STATUTORY CLAIMS

Section 138D claims aside, if the New Consumer Duty significantly enhances consumer protection, there may also be questions as to its interrelationship with common law and other statutory duties. Enhanced consumer protection and increased expectations in the financial services sector would likely impact the common law on negligence. Where a duty of care is found, the standard of that duty may be higher in light of heightened industry standards. It may also be more difficult for defendant firms to argue

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that they are not in breach of duty given that reasonableness of conduct is also informed by industry standards.¹

The starting position is that a statutory duty does not in and of itself give rise to an equivalent common law duty. In *Green v Royal Bank of Scotland Plc* [2013] EWCA Civ 1197, Tomlinson LJ stated that it was “misconceived” to suppose that “the mere existence of the COB Rules [or other sources of a statutory duty] gives rise to a co-extensive duty of care at common law”. However, caselaw on the issue has been in a state of flux since the *Green* judgment. For non-advised sales, there appears to be movement towards a higher common law duty applying to firms regarding the information which they provide consumers. This movement has coincided with the FCA interpreting its rules on information provision to be increasingly onerous.²

Based on the direction of travel on the information provision duty at common law, it is possible that the New Consumer Duty further heightens common law duties. A heightened common law duty of care may not be limited to information provision but also cover the other Outcomes related to product suitability, price and consumer support.

Uncertainty may also arise in the context of claims for breach of statutory duty brought by consumers in the financial services area. For example, it is possible that the New Consumer Duty colours the interpretation of whether services are performed with reasonable care and skill under s 49 of the Consumer Rights Act 2015 or s 13 of the Supply of Goods and Services Act 1982. Claimants may also argue that other contractual terms or notices are unfair under s 62 of the Consumer Rights Act with reference to the standards contained in the new rules.

The possibility of the New Consumer Duty affecting the interpretation of common law and statutory obligations as explained does not appear to have been contemplated by the FCA. While there is no right of action under the New Consumer Duty, creative claimants may be able to rely on it in other litigation.

INCONSISTENCY IN ENFORCEMENT BY THE FCA, FOS AND CIVIL COURTS

CP 21/36 states that the FCA intends

to collaborate with the FOS to “ensure a consistent view on the interpretation of the Consumer Duty, while respecting [that the FCA and FOS have] different roles”. Even if there is consistency of interpretation as to meaning, there will be differences in enforcement. The FOS has jurisdiction to consider what is “fair and reasonable in all the circumstances of the case”³ when determining a complaint. Therefore, a FOS determination will likely consider the New Consumer Duty, even though it is not in itself actionable.

In contrast, and as mentioned, a claimant cannot bring a claim for breach of the New Consumer Duty in a civil court under s 138D. The relevance of the New Consumer Duty on common law and other statutory obligations is uncertain. The FCA is also unable to establish a redress scheme under s 404 FSMA for breaches of the New Consumer Duty while there is no private right of action. Such inconsistencies in the enforcement of the New Consumer Duty may create confusion and result in forum shopping by claimants. In this context, complex issues and recent caselaw as to whether *res judicata* applies to complaints determined by the FOS will require further consideration.

Separately, the lack of private right of action means there will be no judicial interpretation of the New Consumer Duty. Sources of interpretation will therefore be limited to FCA Guidance and, in certain circumstances, Tribunal Decisions.⁴ Given the FOS will likely apply a different test in determinations (under its “fair and reasonable” jurisdiction) as compared to civil courts, the FOS is unlikely to stay complaints determinations pending any test cases in civil courts.

While there is no private right of action, the FCA intends to assess compliance by requiring increased reporting. There is an expectation that a firm's board considers a report assessing compliance with the Consumer Duty “at least annually”. The FCA is “increasingly focus[ed] on firms demonstrating the outcomes consumers are getting ... [and] becoming more data led”. It is also likely that any past business review mandated by the FCA would require an assessment of compliance with the New Consumer Duty. Firms should therefore prepare for extended disclosure obligations, even if they are not subject to a formal investigation.

In CP 21/25, the FCA has proposed to change its internal decision-making procedure to reduce the involvement of its Regulatory Decisions Committee in favour of broader enforcement powers by FCA executives. The proposed changes would result in FCA executives taking over from the RDC in decisions concerning regulatory authorisations and whether to initiate civil or criminal proceedings, etc. A lack of clarity as to how executive power might be exercised in the enforcement of the New Consumer Duty may exacerbate concerns as to how it will be enforced.

CONCLUSION

There appears to be a conflict in the FCA's commitment to allow consumers to make their own decisions, and the Outcome Rules contained within the New Consumer Duty. The drafting of the New Consumer Duty and accompanying Handbook Guidance seeks to address this balancing act, but uncertainty remains for certain aspects. In particular, difficult issues may arise regarding the interrelationship between the New Consumer Duty and common law obligations, interpreting the Outcome Rules and anticipating enforcement approach. ■

¹ See, for example, *Baker v Quantum Clothing* [2011] 1 W.L.R. 1003.

² For further analysis, see ‘Non-advised sales of financial products: an end to caveat emptor?’ J.I.B.L.R. 2018, 33(4), 148-152.

³ Section 228 FSMA.

⁴ Although note that enforcement cases in the Tribunal are invariably brought for breaches of FCA Handbook Principles, rather than rules. Tribunal Decisions would therefore be of limited use in interpreting the rules forming the New Consumer Duty.

Further reading

- A new Consumer Duty in financial services: a significant change or more of the same? (2021) 8 JIBFL 552.
- LexisPSL: Financial Services: News: PIMFA welcomes FCA Consumer Duty but states it must be accompanied by clarity for firms.