

The logo for Hogan Lovells, consisting of the name "Hogan Lovells" in a dark green serif font, set against a solid lime green square background.

Hogan  
Lovells

The background features abstract geometric shapes. A large white trapezoidal shape is positioned in the center, with a lime green triangle above it and another below it. To the right, there is a dark green area filled with a pattern of glowing green dots and lines, resembling a network or data visualization.

# Consumer Duty

October 2022

# Contents

---

<b>What is Consumer Duty?</b>	<b>3</b>
<b>Scoping</b>	<b>7</b>
<b>The cross-cutting rules</b>	<b>9</b>
<b>Four outcomes</b>	
Outcome 1 – Products and services	11
Outcome 2 – Price and value	12
Outcome 3 – Consumer understanding	13
Outcome 4 – Consumer support	14
<b>Other things to consider</b>	
Relationships with third parties	15
Litigation and enforcement	17
Data and MI (monitoring and evaluation)	19
<b>How we can help you</b>	
Resources	21
Key contacts	22



# What is Consumer Duty?

Consumer Duty is a wide-ranging initiative and a clear statement that the FCA is seeking an industry-wide shift in the treatment of retail customers, with clearer and higher expectations for firms' standards of care towards their customers.

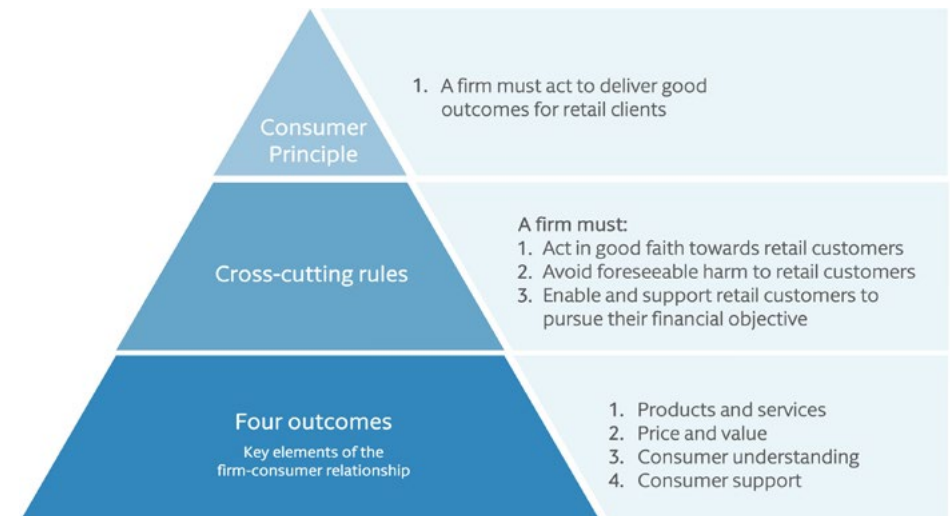
The FCA wants firms to address some persistent issues it sees in the marketplace, such as:

- Firms providing information that is misleadingly presented or difficult for consumers to understand, hindering consumers' ability to properly assess products/services;
- Products and services not being fit for purpose in delivering the benefits that consumers reasonably expect, or not being appropriate for the consumers being targeted;
- Products and services not representing fair value (i.e. because the benefits consumers receive are not reasonable relative to the price they pay);
- Poor customer service that hinders consumers from taking timely action to manage their financial affairs and make use of products and services, or increases their costs in doing so; and
- Other practices which hinder consumers' ability to act, or which exploit information asymmetries, consumer inertia, behavioural biases, or vulnerabilities.

The FCA's solution is introducing a new overarching "Consumer Principle" that will apply to all firms, which provides that:

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

The new Consumer Principle is supplemented by detailed rules and guidance in which the FCA sets its expectations. Most firms will face a significant exercise in understanding and implementing the new requirements.



# What is Consumer Duty?

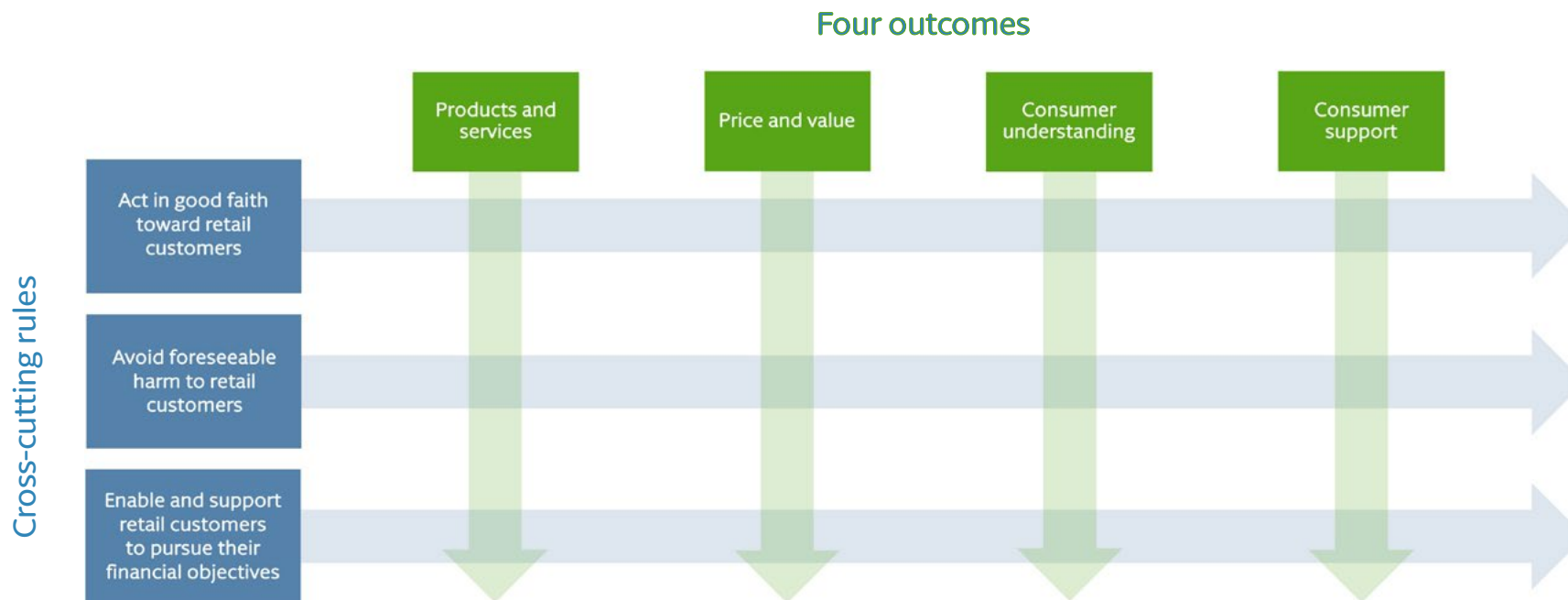


The rules are framed around delivering **four outcomes**, which are divided into the following categories:

1. Products and services;
2. Price and value;
3. Consumer understanding; and
4. Consumer support.

These outcomes are complemented by the FCA's **cross-cutting rules**, which require firms to:

- Act in good faith towards retail customers;
- Avoid foreseeable harm to retail customers; and
- Enable and support retail customers to pursue their financial objectives.



# What is Consumer Duty?



The interrelationship between the outcomes and the cross-cutting rules creates a broad scope of expectations, which goes beyond the requirements to which firms are currently subject.

This means that the Consumer Duty can't be considered only at the level of individual products or services – a holistic, firm-wide view must be taken.

The changes made by the Consumer Duty have the potential to impact:



# What is Consumer Duty?

The FCA's Final Rules came out in July 2022, and the FCA has set an aggressive timetable for implementation. The key milestones that firms must hit are as follows:

## Key Milestones

- **31 October 2022** – the firm's implementation plan must have been created and approved by the Board.
- **30 April 2023** – the firm should target completion of the review in order to share relevant information with third parties (e.g. the distributors who distribute a product).
- **31 July 2023** – Consumer Duty will apply to all new products and services, and to all existing products and services that remain on sale or open for renewal. This is the key deadline other than for closed products (that is, products that were closed prior to 31 July 2023).
- **31 July 2024** – Consumer Duty will apply to closed products and services.



# Scoping

Consumer Duty is a wide-ranging initiative and a clear statement that the FCA is seeking an industry-wide shift in the treatment of retail customers, with clearer and higher expectations for firms' standards of care towards their customers.

For projects of this size we typically look at them with both a "top-down" and "bottom-up" perspective. This can happen in a couple of different ways:

## 1. Expectations of individuals and teams - understanding the intent:

- Top-down: Board, Senior Management Functions (SMFs) and Champion.
  - What is required and how do we prepare individuals for this?
- Bottom-up: Business areas (sales, service, product governance, data, compliance, etc.).
  - Drilling down into the detail and identifying impact.

## 2. The detail and scope - Products and Obligations:

- Top-down: Products, services and customer journeys.
  - Understanding the business structure and organisation.
- Bottom-up: Individual rules and obligations.
  - A full list of the obligations and checking for compliance.

We have listed below some of the key activities and actions required when undertaking the implementation project:

## Individuals and teams

### Board, SMFs and Champion

- Board Briefing – summary of Consumer Duty obligations and the intent behind them.
- Selection of and preparation for Champion role – understanding the ongoing requirement of this role, ensuring they have the information needed and can exert suitable influence.
- Board/SMF roles and responsibilities:
  - Understanding and challenging the implementation plan.
  - Responsibilities once the regulation comes into force (BAU).
- Creating effective board reporting that supports a will to facilitate challenge.

### Business areas

- Analyse the wider implementation project and create full list of changes. This can include:
  - New/amended policies.
  - New/amended processes and procedures.
  - Additional capabilities/capacity needed within teams.
  - Redrafts to customer communications.
  - Changes to scripts or online content.
- Determine which areas of the business are impacted. Develop and deliver training for each area.
- Undertake a review of the existing control framework to determine if it is still suitable.
- Review existing reporting to understand its effectiveness and implement changes as required.



# Scoping

---

## Products and obligations

### Impact on business areas

- Create a map of products (and services) and customer journeys. List the areas of the business that will be affected by Consumer Duty.
- Review each product and journey to understand how the Consumer Duty outcomes and crosscutting rules may impact this area.
- Regardless of individual rules or guidance – consider what is already happening in these areas, how is this monitored/reported and does this (or will this) provide sufficient evidence of compliance?

### Impact of individual obligations/guidance

- Obtain an inventory of the rules and guidance.
- Cross-reference these rules against the map of products and customer journey to determine where the rules will need to be incorporated.
- Empower the business areas to make the changes required to their processes and procedures.
- Ensure that proposed changes and successful implementation are communicated to senior stakeholders to allow challenge and sign-off.

## Project governance and workstream activity

The four areas above are not sequential and will need to be progressed in parallel workstreams. This will be a complex undertaking, with each area dependent on outputs from the other.

For example, what may appear as a relatively minor/simple product change may have the following impacts:

- Changes to terms and conditions.
- Changes to processes/procedures.
- Updating online content/marketing.
- Redrafting service scripts.
- Enhanced controls.
- Additional reporting.

There will need to be clear and comprehensive communication between all the areas of the business that are involved in the implementation. To facilitate this there will need to be robust project governance in place:

- Project sponsor and executive.
- Steering committee and terms.
- Roles and responsibilities directory.
- Project reporting.





# The cross-cutting rules

The overarching Consumer Principle (“a firm must act to achieve good outcomes for retail customers”) is supported by **three cross-cutting rules**.

These rules expand on the Consumer Principle and set out the FCA’s expectations for behaviour, indicating how firms should act in order to deliver good outcomes. They also serve a second purpose, which is to inform – and help firms interpret – **the four outcomes**. Since the cross-cutting rules apply across all areas of firm conduct, they should form the bedrock of every implementation plan.

## The cross-cutting rules



## 1. Act in good faith towards retail customers

This rule is likely to raise the bar in terms of product design and disclosure. For example, it ties in closely with the ‘consumer understanding’ outcome, and requires firms to take steps to ensure that retail customers are given appropriate information at the right time, and in an appropriate format, to allow them to make informed decisions about risks and benefits.

It will also be important to consider this rule in the context of consumer support, where it is intended to eliminate so-called “sludge practices” that make it more difficult for customers to obtain the support or redress they need and to which they are entitled. The requirement to act in good faith will also apply to decisions made by firms in relation to complaints handling and redress. For example, payments firms may need to look at their decision-making processes in relation to fraud complaints and liability for unauthorised transactions: reliance on statutory provisions allocating liability may not be acceptable if that allocation has not been adequately explained in advance, e.g. through customer agreements or FAQs. The FCA’s concern relates primarily to the imbalance in bargaining position, knowledge and expertise between firms and customers and it wants firms to put themselves in their customers’ shoes. This builds on existing concepts such as the ‘unfair relationships’ provisions in the Consumer Credit Act, but applies much more widely.

Whilst proving a lack of ‘good faith’ is – on its face – a relatively high bar, the FCA’s guidance on this topic makes clear that the term has a specific meaning in this context (“a standard of conduct characterised by honesty, fair and open dealing, and consistency with the reasonable expectations of customers”). This is arguably a lower test than might traditionally have been applied by the courts.

# The cross-cutting rules

## 2. Avoid causing foreseeable harm to retail customers

A wolf in sheep's clothing? The formulation of this rule is deceptively simple but may prove to be more difficult to implement than first appears. For example:

- Firms will need to define what amounts to 'harm' in the context of specific products and services. In the context of investments, for example, which are inherently speculative to some extent, this arguably should mean something other than financial loss. However, if that risk was not adequately explained, might firms still be held liable for that loss?
- 'Foreseeable' is a somewhat subjective standard and is not explicitly limited by reasonableness. Whilst the FCA non-Handbook guidance states that this depends on whether a prudent firm acting reasonably would be able to predict or expect the harmful result, this is not reflected in the rule itself. Inevitably, any assessment in practice will also involve an element of hindsight, meaning firms may be judged against what a prudent firm should have done (knowing the outcome) rather than what a prudent firm would have done in the same circumstances. If a risk of poor outcomes is identified but assessed to be low, for example, a prudent firm might decide to take that risk. However, if that poor outcome in fact materialises, it will be difficult to prove that is the case after the event.
- Finally, the legal principles of causation will no doubt prove fertile ground for defences against enforcement action, particularly where more than one firm is involved in the product or service. This is particularly the case, given the FCA's very broad interpretation of 'distribution chains', suggesting that firms may be liable for the actions of the bank that provides them with safeguarding accounts or (even more remotely) that a payment initiation service provider forms part of a distribution chain for the execution of that payment.

## 3. Enable and support retail customers to pursue their financial objectives

The third and final cross-cutting rule more explicitly recognises the responsibility customers have for their own actions. As with the 'good faith' rule, this requirement is closely connected to the consumer understanding outcome; consumers can only take responsibility where they are enabled and supported to make informed decisions. To do this, firms must create the right environment, so culture and governance will be important factors as well. When planning implementation, it is important that firms can show they understand their customer base, and have analysed both what customers are trying to achieve and what obstacles are currently preventing them doing so. To the extent that firms have control over those obstacles, they must have a plan for addressing them.



# Outcome 1 – Products and services

## How should firms approach this outcome?

- **Assess:** You will need to review current governance arrangements for products and services. Are they sufficient to enable you to deliver fair outcomes?
- **Change:** Product terms, and arrangements for the manufacture and distribution of products, may need to be changed.
- **Adapt:** Your products will have to be designed with regard to your target market.
- **Review:** You will need to test your products routinely. This may mean that your processes need to be redesigned.

## What do the rules mean in practice when assessing product governance?

- **Act in good faith:** ensure that customer terms are fair and that arrangements do not take advantage of customers (including vulnerable customers).
- **Avoid causing foreseeable harm:** identify all risks that could arise for the relevant target market and ensure that the product governance terms mitigate against those risks. Consider, in particular, the position of vulnerable customers.
- **Enable and support retail customers to pursue their financial objectives:** identify the target market with sufficient granularity and ensure that the products are designed to meet the requirements of that target market.

## What you should be thinking about when planning your implementation plan

- **Manufacturer v. distributor:** The definition of manufacturer will include firms who can “determine or materially influence” the manufacture of a product or service. Firms involved in e.g. white labelling may find that they are now subject to manufacturer obligations for their product governance.
- **“Services” as a product:** The new rules define the concept of a “product” to include services. Firms that provide services may now need to comply with the obligations for manufacturers (which most firms will not currently be doing).
- **Target market:** A manufacturer must specify the target market for the product at a sufficiently granular level, taking into account the characteristics, risk profile, complexity and nature of the product. The new rules appear to apply this at a greater level of granularity than has applied previously. Firms are also required to identify “all” relevant risks to the target market. Firms that currently apply rules regarding appropriateness or simplified advice may find that they have additional obligations under the new rules.
- **Testing:** Manufacturers must test their products appropriately, including scenario analyses where relevant. Although many firms routinely do testing, it is not currently a requirement – but it will be, under the Consumer Duty.
- **Review of existing products:** Firms must review their products on an ongoing basis, even after the contract has been entered into with the customer. This, in effect, means that the Consumer Duty standards will apply to existing products and services with retrospective effect. Many firms will need to undertake a substantial review of their existing products.
- **Understand the scope:** Manufacturers may need to consider the position of retail customers who are affected by a product but with whom they have no direct relationship. This may be a new exercise for some firms.
- **Firms already complying with PROD:** The “products and services” rules under the Consumer Duty do not apply to firms that are already subject to certain chapters of the FCA’s PROD Sourcebook. Over time, however, firms may find it difficult in practice to maintain the line that the Consumer Duty does not apply to them – and might consider applying the Consumer Duty obligations in situations where they are not obliged to.

# Outcome 2 – Price and value

## How should firms approach this outcome?

- **Assess:** Firms will need to carry out a fair value assessment for all products and services offered to retail customers. Fair value is represented if the amount paid for the product or service is reasonable relative to the overall benefits of a product or service.
- **Change:** The prices of products/services may need to be reviewed in light of the above assessment of fair value.
- **Adapt:** Products and services that do not meet the needs of the target market are unlikely to offer fair value and may need to be updated or withdrawn.
- **Review:** You will need to perform ongoing value assessments throughout the lifecycle of a product or service.
- **Monitor:** You will need to collect and analyse appropriate MI to monitor that the fair value assessments remain valid over a foreseeable period.

## What do the rules mean in practice when assessing price and value?

- **Act in good faith:** Ensure that an assessment/gap analysis has been carried out on all existing products and services to ensure that the price paid is reasonable compared to the benefits.
- **Avoid causing foreseeable harm:** Do the products and services provide fair value to the consumers in the target market? Can evidence of value assessments and the characteristics used to carry out the value assessment be produced?
- **Enable and support retail customers to pursue their financial objectives:** Poorly designed products are more likely to result in unfair value for the customer.

## What you should be thinking about when planning your implementation plan

- **Value assessment process:** Firms have discretion to decide on the factors that they use in their value assessments, but key aspects must be considered – including the overall benefits to the customer, including non-financial benefits such as enhanced customer support.
- **Review of prices charged to customers:** Is there sufficient rationale where different groups of customers are charged more/less for the same/similar products? This type of pricing is not prohibited, but can firms justify fair value to customers in each case? Firms are also expected to demonstrate that the overall costs consumers are likely to pay, including potential default fees, are reasonable relative to the benefits.
- **Distribution chain considerations:** Distributors must obtain relevant information from manufacturers to understand the value a product or service is intended to provide, and to enable them to understand whether their distribution arrangements would result in the product or service ceasing to provide fair value to retail customers.
- **Collection of monitoring data:** Firms will need to demonstrate that they have collected and analysed appropriate data on all products and services in order to demonstrate fair value on an ongoing basis. Firms will need to carefully consider the type of data used to continually monitor fair value – customer feedback on its own is unlikely to be sufficient.

# Outcome 3 – Consumer understanding

## How should firms approach this outcome?

- **Assess:** Firms will need to assess all communications provided to customers (not only those required by law), focusing on how information is received and understood by customers, and not on how it is delivered.
- **Change:** Customer communications may need to be redrafted following an assessment of how they are understood by customers.
- **Adapt:** Communications that do not meet the FCA's expectations may need to be updated or withdrawn.
- **Monitor:** Firms will need to monitor the performance of communications on an ongoing basis, including whether customers are acting in accordance with those communications.

## What do the rules mean in practice when assessing consumer understanding?

- **Act in good faith:** Avoid delivering communications in a way that exploits consumers' information asymmetries and behavioural biases. Firms should 'put themselves in their customers' shoes' and consider whether their communications equip customers with the right information, at the right time, to assess products and services and make effective decisions.
- **Adopt good practices:** Generally enhance the clarity of communications, and, where possible, act to make communications more effective.
- **Consider target market:** Aim to segment or target communications to make them more relevant to the intended recipients, rather than adopting a 'one size fits all' approach.

## What you should be thinking about when planning your implementation plan

- **Equipping customers to make effective decisions:** Firms should ensure that communications are understandable by the intended recipients and presented in a way that is clearly visible and accessible, irrespective of the communication channel used.
- **Existing disclosure requirements:** Firms should continue to comply with existing regulatory and legislative disclosure requirements but should consider additional steps they can take to enhance consumer understanding.
- **Ensuring information is provided on a timely basis:** Firms should communicate with customers in a timely manner and at appropriate touch points throughout the product lifecycle (such as at contractual breakpoints), giving them an appropriate opportunity to take in the information and, where relevant, assess their options.
- **Tailoring communications:** Communications should be suitably tailored for the needs of the intended target market, including characteristics of vulnerability. For example, the information needs for the target market of a complex investment product such as a leveraged contract for difference will likely be different than for a relatively simple mass-market product such as an instant access savings account.
- **Testing communications:** Firms have discretion to develop an approach to testing (where appropriate) that provides assurance that consumers can identify and understand the information needed to make effective decisions. Of interest to firms is that the FCA has indicated that there may be scope to simplify some mandatory disclosure requirements, if firms have evidence from their testing activity that certain mandatory disclosures do not support consumer understanding.
- **Data and monitoring:** Firms should monitor whether their communications are supporting customer understanding and helping their customers make effective, timely and properly informed decisions. At all times firms should consider whether customer behaviour is consistent with their communications. For instance, notably low response rates could be indicative of ineffective communications.

# Outcome 4 – Consumer support

## How should firms approach this outcome?

- **Assess:** Consider the support the customer needs and make sure your customer service can clearly meet this.
- **Change:** Put in place support which means customers can fully utilise products and services through their lifecycle.
- **Adapt:** Provide an appropriate level of support for each product and service to customers so they do not face unreasonable barriers.
- **Review:** Carry out monitoring on a regular basis to confirm whether an appropriate level of support is being provided to customers to identify and mitigate the risk of harm.

## What do the rules mean in practice when assessing consumer support?

- **Act in good faith:** Ensure appropriate assessments are carried out which clearly demonstrate consideration has been given to the level of support that takes the customer's needs into account, which will enable them to realise the benefits of the products and services they buy.
- **Avoid foreseeable harm:** Have all channels of support for the customer been clearly identified in relation to the product or service being offered? This support should be delivered through appropriate channels which allow flexible responses from the customer, which also carefully assesses the needs of vulnerable customers.
- **Enable and support retail customers to meet their financial objectives:** Put in place the right levels of support for the customer at all stages of the customer journey and lifecycle. This will enable the customer to pursue their financial objectives, act in their own interests and ensure particular groups of customers are not disadvantaged.

## What you should be thinking about when planning your implementation plan

- **Accessible:** Allow the customer to be able to fully utilise the products and services offered. This requires positive engagement and clear consideration in the design to understand what support is needed to make it successful.
- **Understandable:** Clearly define the need to support customers without over-complicating the process, and remove barriers that hinder the customer from navigating and identifying the areas and the types of support required. This may involve non-standard interventions which require personal assistance, such as for customers with vulnerable characteristics.
- **Flexible:** Where multiple channels are used to offer support to customers for their product and services, clear consideration should be given to how this will differ based on the channel used, and what standard requirements should be tailored to ensure it remain effective for all customers.
- **Testing and monitoring activities:** Carry out a wide range of testing and monitoring activities to understand whether – from product launch through to full operationalisation – the support offered is sufficient and effective. Where inconsistencies are identified, a firm will need to demonstrate that the right actions are taken where it identifies a need to alter existing consumer support.

# Relationships with third parties

To comply with their obligations under Consumer Duty, most firms will need to consider their relationships with third parties. Any changes to those relationships may mean that new negotiations might need to be entered into and new arrangements implemented – and the firm's implementation plan will need to take that into account.

Third party relationships that are likely to be affected by Consumer Duty can be divided into three categories:

## 1. Third parties in the distribution chain

Many firms will already have thorough arrangements in place regarding their distribution chain – but even the most prepared firms will find themselves subject to additional requirements under Consumer Duty.

Manufacturers of products will have to identify the target market – with a sufficient degree of granularity – and “ensure” that the product is distributed to the identified target market. To be able to meet these requirements, manufacturers may need to engage with their distributors to a greater degree than they currently do, and they may need to amend or renegotiate their distribution agreements to include appropriate protections.

Manufacturers are also expected to support distributors – e.g. by giving them additional information about the target market, or offer additional training about the products.

Distributors will want sufficient information from manufacturers to ensure that they can distribute the product appropriately, and will want to see the new Consumer Duty outputs from manufacturers before they can finalise their own arrangements for complying with Consumer Duty.

Any implementation plan will need to factor in all of these steps.

## 2. Outsourcing arrangements

There are already detailed PRA and FCA rules regarding outsourcings – but any existing arrangements may need to be revisited in order to comply with the new rules.

Firms which outsource to service providers may need to consider:

- Whether they need to change the service description or service levels in their outsourcing agreements to support any additional steps that the firm needs to take to comply with Consumer Duty.
- Whether the terms of the agreement will allow them to do so – and what the additional cost will be.

The firm's implementation plan for Consumer Duty will need to allow:

- The firm to identify the necessary changes to the services.
- The parties to amend (and possibly renegotiate) the outsourcing agreement.
- The provider to implement the changes.
- Where applicable, both parties to comply with the regulators' operational resilience requirements. Services that amount to important business services will need to be identified, impact tolerances will need to be determined, the arrangements documented and mapped, and testing carried out before the services come into effect.

Other things to consider

# Relationships with third parties

---

## 3. New services

The new Consumer Duty requirements may mean that firms need to procure new services from third parties – e.g. new software providers to help create additional data and MI, or third parties to provide focus groups to assist with the testing of products.

Firms will need to factor in time to determine whether they need new services, engage in a tender process, negotiate the new contract, and then implement the new services in time for the implementation deadline of July 2023.





# Litigation and enforcement

As firms move forward and finalise their implementation plans for the final Consumer Duty requirements, they will need to continue to bear the risks of litigation and regulatory action in mind. Below are some of the key areas of the FCA's new rules and guidance which may present litigation and regulatory risk going forward.

## Risk of regulatory action

The FCA has been clear that setting higher standards and putting consumers' needs first is central to its strategy. Although it seems likely that the FCA will not rush to enforce (given the amount of work needed to embed the changes to organisational structures, processes and behaviours that the Consumer Duty requires), firms will nevertheless need to adapt quickly in light of the clear regulatory – and political – expectations as to the positive impact of these new arrangements on consumers. There is a new Consumer Principle (Principle 12<sup>1</sup>), and new Rules<sup>2</sup>, under which the FCA can take action, which we anticipate the FCA will be keen to show that it is making use of. It is also likely that the FCA will continue to take action under existing Principles and Rules (for example, taking action under Principle 3 if a firm's new systems, controls, procedures and processes are insufficient to implement and embed the Consumer Duty and, once implemented, to monitor customer outcomes and remediate where required).

There are a number of concepts and statements in the FCA's Policy Statement (PS22/9) and Guidance for firms on the Consumer Duty (FG22/5) which warrant closer consideration in this regard: we have considered three of these below.

## 1. Reasonableness

The FCA has made clear that the Consumer Duty is underpinned by the concept of reasonableness. This is expressed in a number of ways. For example: the new Principle 12 must be interpreted in accordance with the standard that could reasonably be expected of a prudent firm; (i) carrying on the same activity in relation to the same product; and (ii) taking appropriate account of the needs and characteristics of retail customers; and the good faith cross-cutting rule requires firms to act consistently with the reasonable expectations of retail customers.

The various different formulations of the concept of reasonableness may cause some confusion: if, for example, a firm acts in a reasonable way for the purposes of the Consumer Principle (taking appropriate account of the needs and characteristics of retail customers), could that firm nevertheless not meet the reasonable expectations of retail customers (which is required by the good faith cross-cutting rule)? It seems unlikely, but – as with all new rules – circumstances may arise in the future which challenge this assumption.

## 2. Scope of Principle 12

The FCA has made clear that the Consumer Principle does not mean that individual customers will always get good outcomes or will always be protected from poor outcomes. Nor does it require firms to go beyond the scope of their role. The FCA notes, for example, that firms are not expected to protect customers from risks that come from the nature of the product (such as investment risk), but also notes that those firms need to have complied with their obligations under the Consumer Duty and have good reason to believe the customer understands and accepts that risk. If firms cannot demonstrate a robust methodology for assessing whether a customer understands and accepts the risk of an investment, this is likely to be an area where FCA action could be taken.

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

2. The cross-cutting rules (act in good faith, avoid causing foreseeable harm and enable and support retail customers to pursue their financial objectives) and the rules relating to the four outcomes (products and services, price and value, consumer understanding and consumer support) that the FCA want to see under the Consumer Duty.

# Litigation and enforcement

## 3. Risk of complaints, including to Financial Ombudsman Service (“FOS”)

It is obvious that the Consumer Duty, once implemented, will provide a basis on which consumers who feel that they have not been treated in accordance with the new standards may raise complaints. Firms’ complaints-handling processes and teams need to be prepared to deal with such complaints: this will require complaints-handling teams to understand their firm’s approach to satisfying each of the Consumer Duty requirements. Given the multi-layered approach adopted by the FCA this may not be straightforward – and firms will need to provide a significant level of training and oversight to their complaints teams, both in preparation for and after implementation. Any issues with complaints-handling could precipitate FCA focus.

The FCA has specifically identified FOS final decisions on complaints about fees or charges, or inappropriate product or service sales, as one of the ways in which it can monitor whether consumers are getting products and services which meet their needs and provide fair value. This obviously makes it even more important that firms engage with the FOS process.

One of the major areas of risk in this respect, in our view, relates to the FCA’s confirmation that the Consumer Duty will not have retrospective effect. The FCA states that it has engaged with FOS throughout the development of the Consumer Duty and in finalising the rules and guidance, and expects to work closely with FOS through implementation. The FCA has stated that both it and FOS work on the basis that firms should be held accountable against the standards that prevailed at the time of the problem. This is good to hear, but it remains to be seen whether this will happen in practice.

## Litigation risk

No private right of action (“PROA”) has been introduced for breaches of any part of the Consumer Duty at this time. However, the FCA has made several changes to the Consumer Duty that it says may help to replicate the benefits of a PROA, including: (i) strengthening governance and accountability requirements; and (ii) strengthening its redress requirements under the Consumer Duty: the FCA sees proactivity by firms in providing redress where appropriate as a crucial element of the delivery of good outcomes for customers. The FCA has confirmed that any future decision to attach a PROA to the Consumer Duty would be subject to further consultation.

Although no PROA has been put in place, claimants may nevertheless be able to bring claims based on existing causes of action, including negligence, negligent misstatement and misrepresentation. The concept that a professional person must act with reasonable skill and care is well-established in English law. The specific provisions which address reasonableness in the new Principle 12 and the various new Rules could potentially inform a court’s consideration of the boundaries of the reasonable skill and care that a professional person must demonstrate.

It remains the position that, in most cases, it will be cheaper and quicker for consumers to seek redress via the FOS. However, there remains the possibility that, where significant losses are suffered on a product which has been widely sold, consumers may join together to bring a collective action before the English courts.

# Data and MI (monitoring and evaluation)

Regulated firms have always been required to effectively monitor outcomes for customers. This was brought into greater focus with the introduction of SMCR, and now Consumer Duty brings with it an additional depth and scope to the requirements.

There is a clear expectation from the FCA that firms should undertake a regular assessment of a broad range of metrics related to the experience of products and services customers receive. Based on the results of this MI, senior management should then take appropriate action to rectify any issues.

## Challenges firms face when developing MI

There are many issues firms face when developing and using MI.

Key challenges include:

- **An overfocus on using available data**, rather than considering what is actually required.
- **Inadequate metrics related to customer outcomes**: Firms focus too much on commercial and performance metrics.
- **A failure to align MI to risks**: The firm's risk landscape should be the starting point in developing the MI suite, with an in-depth consideration of what the Key Risk Indicators (KRIs) are in relation to customer outcomes, and how they can be tracked and monitoring.
- **MI reporting which gives a snapshot view**: Simply reporting this month's figures is inadequate for effective analysis. It is important to provide decision-makers with sufficient information on developing trends and issues within the business.

- **A focus on lagging rather than leading indicators**: Many firms build their MI suites around historic data and assessments of potentially poor outcomes customers have already experienced (e.g. complaints data and cancellations). It is far better to include a mix of leading indicators that can give advance warning of issues to come.
- **An imbalance between quantitative and qualitative metrics**: Most firms rely on so-called 'hard metrics' – the kind of data which can be added up or put in percentages. This is valid and important information, but it should not overshadow the need for a more nuanced and subjective analysis. Qualitative data is harder to acquire and categorise, but it can give a far richer insight into outcomes (and potential outcomes) for customers.
- **A failure to demonstrate action has been taken**: This is a key failing. Where firms receive MI which shows customers are receiving poor outcomes, they should be able to demonstrate that senior management assessed the situation and took appropriate action.

## How Consumer Duty will raise the bar

The expectation of the Consumer Duty principle is that firms will:

- Help customers meet their financial objectives by better understanding their needs and what they value from products and services.
- Prevent customers from experiencing foreseeable harm by being more proactive in assessing where detriment could occur.

These expectations, and the rest of the Consumer Duty requirements, will require firms to have a greater understanding of their customers – which will require enhanced MI.

Other things to consider

# Data and MI (monitoring and evaluation)

## The MI expectations for Consumer Duty

- **Increased cooperation and data-sharing by parties in distribution chains:** Up and down the chain, there will be an expectation that parties will share MI and data on the use and value of products, and the outcomes that customers experience. If firms aren't able to obtain adequate information from counterparties, they should consider whether they can continue the commercial relationship.
- **A greater use of leading indicators:** The cross-cutting rule of preventing 'foreseeable harm' has a clear expectation that firms will take a much more forward-looking assessment of what could go wrong with their product or service. The regulator's expectation is that firms will identify and prevent issues before they impact customers.
- **A greater use of qualitative data:** Aligned to the point above, the FCA expects firms to gain far greater insights into the needs and motivations of their customers, and also how they interact with and understand the products and the sales process.
- **A greater focus on customer behaviours:** There is also an expectation that firms will spend more time monitoring how customers behave during the sales process, and in their use of the product. This is a particular challenge with online-only channels, but one the FCA expects firms to address.

Over and above these requirements will be the expectation that senior management will act on the information they receive, and drive the firm to improve products and services for customers and prevent foreseeable harm.



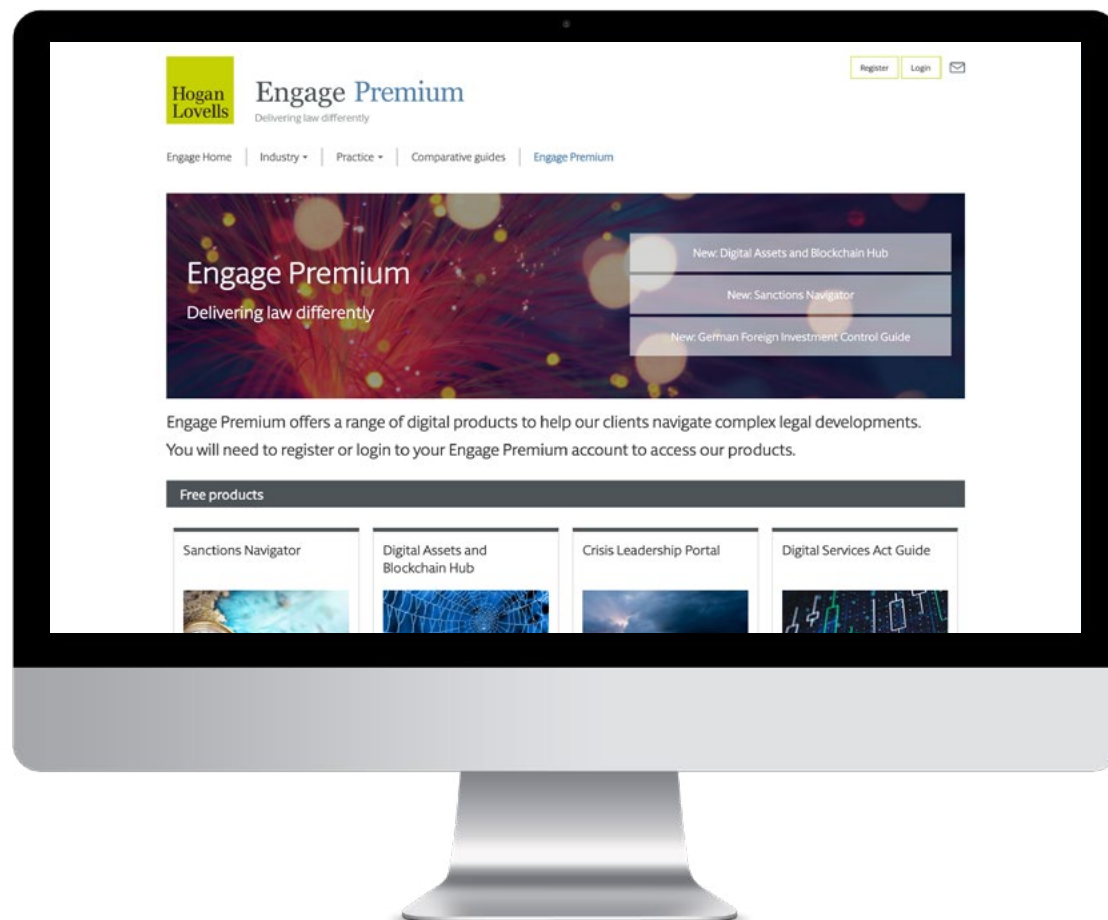
How we can help you

# Resources

The Consumer Duty will set higher and clearer standards of consumer protection across financial services and will require firms to review their business models to ensure that they are achieving the rights outcomes for consumers. In particular, the new rules that firms have to follow are designed to ensure that consumers receive communications they can understand, products and services that meet their needs and offer fair value, and that they get the right customer support.

The Consumer Duty Hub on Hogan Lovells Engage Premium brings together recent developments, insights, webinars and videos from our Financial Services, Insurance and Litigation lawyers and our Consulting team on a range of Consumer Duty-related topics. Visit <https://engagepremium.hoganlovells.com/resources/consumer-duty> to find out more.

With so much to be done, and in such a short timeframe, it is important to choose an advisor who understands the detail of regulatory requirements and who can also apply them in a practical and business-orientated way. Hogan Lovells offers an ideal combination of lawyers and regulatory consultants who work together to provide a 360 degree view of the issues. We can engage with senior management, other external advisors and operational and oversight functions on the ground. Please contact us to find out how we can help you.



How we can help you

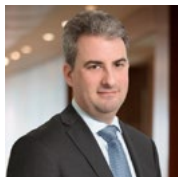
# Key contacts



**James Black**  
Partner – Banking, Lending & Payments  
T: +44 20 7296 5898  
james.black@hoganlovells.com



**Emily Reid**  
Partner – Banking, Lending & Payments  
T: +44 20 7296 5362  
emily.reid@hoganlovells.com



**Jonathan Chertkow**  
Partner – Banking, Lending & Payments  
T: +44 20 7296 2191  
jonathan.chertkow@hoganlovells.com



**Michael Thomas**  
Partner – Investments & Markets  
T: +44 20 7296 5081  
michael.thomas@hoganlovells.com



**Victor Fornasier**  
Partner – General Insurance  
T: +44 20 7296 5423  
victor.fornasier@hoganlovells.com



**Dominic Hill**  
Consultant – Investments & Markets  
T: +44 20 7296 2297  
dominic.hill@hoganlovells.com



**Arwen Handley**  
Partner – Litigation  
T: +44 20 7296 2810  
arwen.handley@hoganlovells.com



**Mark Aengenheister**  
Principal Consultant - Hogan Lovells Consulting  
T: +44 20 7296 5716  
mark.aengenheister@hoganlovells.com



Alicante  
Amsterdam  
Baltimore  
Beijing  
Birmingham  
Boston  
Brussels  
Budapest\*  
Colorado Springs  
Denver  
Dubai  
Dublin  
Dusseldorf  
Frankfurt  
Hamburg  
Hanoi  
Ho Chi Minh City  
Hong Kong  
Houston  
Jakarta\*  
Johannesburg  
London  
Los Angeles  
Louisville  
Luxembourg  
Madrid  
Mexico City

Miami  
Milan  
Minneapolis  
Monterrey  
Munich  
New York  
Northern Virginia  
Paris  
Perth  
Philadelphia  
Riyadh\*  
Rome  
San Francisco  
São Paulo  
Shanghai  
Shanghai FTZ\*  
Silicon Valley  
Singapore  
Sydney  
Tokyo  
Ulaanbaatar\*  
Warsaw  
Washington, D.C.

\*Our associated offices  
Legal Services Center: Berlin



[www.hoganlovells.com](http://www.hoganlovells.com)

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2022. All rights reserved. BT-REQ-989