

# Consumer Duty

## 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. 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.

### 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.

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### 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.

This is part of a series of guides designed to help your organisation better understand the requirements of the FCA’s new Consumer Duty.

Hogan Lovells can help you at every stage of your Consumer Duty journey. We can implement the full toolkit and manage your project through to completion, or we can get involved in specific elements of your workstreams. Please contact one of the team members below to find out how we can advise you.

The Consumer Duty hub on the Hogan Lovells Engage Premium website brings together recent developments, insights, webinars and videos from our team on a range on Consumer Duty-related topics. Visit <https://engagepremium.hoganlovells.com/resources/consumer-duty> to find out more.



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