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Consumer Duty

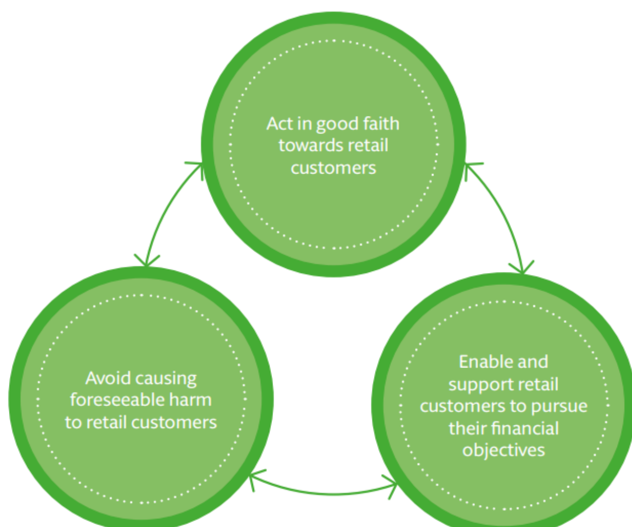
The cross-cutting rules

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



Rule 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 are entitled to. 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.

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Rule 2: Avoid causing foreseeable

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.

Rule 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.

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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