

FCA consultation on a new Consumer Duty

Money and Pensions Service response

Introduction

The Money and Pensions Service (MaPS) warmly welcomes the opportunity to respond to the FCA's consultation on the introduction of a new Consumer Duty for financial services firms. We recognise the significant step forward that this consultation represents in seeking to both mandate and support a greater and more consistent commitment by firms to put the 'customer at the heart of their business'.

MaPS is well-positioned to take an informed view of the merits of a new consumer duty, given our track record of gaining insights into the financial experiences of consumers and of providing guidance on money matters across the lifecycle, from financial education to pension decumulation.

While our responses to individual questions indicate areas where we believe certain points could be clarified and enhanced, our overall view is that the introduction of a new duty provides a highly significant opportunity to fundamentally re-set the dial in the relationship between consumers and providers of financial services.

We are gratified that the paper acknowledges that the duty is intended to create 'an inclusive environment where consumers are better equipped to achieve good outcomes from financial services'.¹ An environment where products are designed to meet the requirements of those who use them, and are explained, sold and managed clearly and transparently, will improve the capability of a greater number and diversity of consumers to engage confidently with a wider range of financial products and secure the best results from their use.

In our view, an effective new duty would therefore be of longer term benefit to the financial services sector as well as to consumers, by supporting higher levels of customer engagement, resulting in a 'win-win' scenario. By framing a new duty in terms of inclusivity, the FCA also has an opportunity to bring together a number of key policy priorities, for example those relating to customers in vulnerable circumstances and/or with protected characteristics, into a single thread.

A well-designed duty, effectively supervised, has the potential to support those who often experience the poorest outcomes from financial services, by creating an obligation on firms to identify customers who have been subject to harm but have not complained and to offer them the same level of access to remedy and redress as that available to those who have complained.

On a cautionary note, while the requirement to avoid harm is axiomatic to a definition of consumer protection, focusing primarily on this aspect risks presenting a new duty primarily as a negative set of expectations. We feel that a greater emphasis on the role that financial services can play in enhancing consumer **financial wellbeing** would encourage firms to think more holistically and creatively, and to regard the requirements of a new duty as a positive incentive to improve practices and contribute to the public good.

¹ 1.4

The interface between MaPS' work and a New Consumer Duty

We see a clear synergy between an effective new consumer duty and the aims of the MaPS UK [Strategy](#) for Financial Wellbeing. The Strategy is designed to support work that improves consumers' financial capability and enhances their knowledge - to enable them to develop greater confidence in managing their money and help them assume greater control over their financial lives and feel secure in the choices they make. At relevant points in our response, we draw attention to the role that MaPS can play in complimenting the activities required of firms under a new duty in terms of enhancing financial wellbeing.

Our Strategy is also concerned with exploring routes by which MaPS and our stakeholders can positively engage with regulators, firms, trade bodies and others to help ensure that customers can transact in an environment in which firms meet their customers halfway. Creating such a landscape involves a need for firms to design, market, explain and manage products and services in ways that are both easy to understand and engage with and appropriate to consumers' needs.

An effective new duty must seek to create the market conditions in which better informed, more financially confident consumers can transact, secure in the expectation that if they need help in managing their finances, firms will be equipped with the attitudes and resources to support them. The new duty should encourage firms to consider how their approaches will contribute to improving the financial wellbeing of consumers, and we suggest that the FCA should make this longer-term expectation clear in its forward programme of work.

We strongly recommend that the FCA provides a clear steer in new rules, directing firms to signpost customers to independent money guidance via the MaPS [MoneyHelper](#) website at all/any appropriate points in the product relationship. This would provide a critical regulatory good practice steer to support consumer protection.

About us

The Money and Pensions Service (MaPS) exists to help people make the most of their money and pensions. We were created by the Financial Guidance and Claims Act 2018, bringing together the Money Advice Service, the Pensions Advisory Service, and Pension Wise, under one body.

The Money and Pensions Service is an Arms-Length Body, sponsored by the Department for Work and Pensions (DWP), with a vision of 'everyone making the most of their money and pensions' by ensuring that people throughout the UK have guidance and access to the information they need to make effective financial decisions over their lifetime. We deliver this by means of:

- **Pensions guidance:** to provide information to the public on matters relating to workplace and personal pensions.
- **Money guidance:** based on customer journeys that are designed to enhance day-to-day money management skills and understanding of financial matters, allowing consumers to make better decisions.
- **Debt advice:** to provide people in England with information and advice on debt.
- **Consumer protection:** enabling us to work with Government and the Financial Conduct Authority (FCA) in protecting consumers.
- **Strategy:** work with the financial services industry, devolved authorities and the public and voluntary sectors to develop and coordinate a national strategy to

improve people's financial capability, help them manage debt and provide financial education for children and young people.

Responses to individual 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?

The proposals clearly set out how a new consumer duty could address a range of consumer harms caused by poor firm conduct. We believe that the strongly expressed articulation of harms provided is accurate in terms of expressing the nature and impact of the key detriments to which consumers may be exposed. These include the consequences of actions and policies that are not necessarily intended to cause harm but nonetheless result in detriment.

The document states that the new duty is not intended to ensure that all consumers receive the same level of outcome. However, we would ask the FCA to pay specific regard to the potential of the proposed new duty to improve the experiences of low income consumers, who are often excluded from markets. A case in point is the consumer credit market, where lack of access to mainstream products can lead to over reliance on high-cost or risky alternative products, including illegal loans. The concerns of low-income consumers as a general cohort also have clear equalities implications², given, for example, the over-representation of many ethnic minority communities in lower-income population cohorts.

Below and at other points in our response, we use the pensions market as a case study to illustrate how the types of harm identified in the consultation paper manifest themselves within a specific market context. The issues we raise also have a wider relevance, both in relation to other individual markets and also across the piece, for example in relation to information asymmetries, complex product choices, challenges to making such choices and consumer risk and responsibilities.

Consumer responsibility and ownership of risk

There is a strong case for introducing a new consumer duty in relation to the pensions market because of the significant imbalance between provider and consumer, relating to both locus of risk and information asymmetries. One of the defining trends of the pensions landscape has been a shift of risk away from employers and towards consumers. Many people who would previously have received a defined benefit pension from their employer are now saving into a range of defined contribution schemes, including workplace and personal pensions. This means that consumers have more decisions to make, many of significant complexity, regarding issues such as how much to save, where to invest, and how to access their money. All these decisions carry a significant risk of harm in the event that a consumer makes the wrong choice.

Since most pensions savers are now required to build a pot of money rather than contribute to a guaranteed future income, they are responsible for ensuring they will have invested enough to secure a sufficient level of income for as long as they anticipate they will need it. Many consumers lack the financial capability to make the informed decisions necessary to

² Recent FCA Insight [research](#) found that when all other relevant factors are controlled for, ethnicity does not of itself tend to be a determining factor in governing consumers' experiences of engaging with financial products. IN acknowledging this, however, we should not overlook the impact of wider societal disadvantage by which the financial resilience of ethnic minority consumers is affected by structural inequalities that impact on income, e.g., in relation to differential opportunities to engage in the labour market.

guarantee this, and may not be able to get financial advice because of problems with affordability or accessibility. A new duty would address this by requiring clearer communications from firms to ensure that consumers can understand more about the products into which they are saving and investing.

Irreversibility of decisions

Many of the decisions consumers need to make about accessing retirement income are either actually or effectively irreversible, for example because an individual will incur tax liabilities if they change their mind.³ Customers' comparatively weak position in terms of access to clear information means that if they have made the wrong decision, they do not have an opportunity to correct it. This creates the risk of selecting a pension income level that will be inappropriate to their changing needs over time.⁴ An effective consumer duty would mitigate the transfer of risk from the provider to the consumer by requiring a higher standard of care from the provider, so that the individual is less exposed in their decision-making.

Behavioural biases

Inertia bias, the tendency to rely on defaults to manage finances, is a behavioural tendency that can lead to financial detriment for consumers. Providers can exploit inertia bias and profit from a high probability that customers will not move away from either a default pension fund or their existing provider. Although there are rules in place to mitigate this risk,⁵ these do not apply to all products, meaning that consumers may continue to use products that are unsuitable for them and/or cost excessive amounts in fees and other charges.

Firms may also take advantage of behavioural bias by nudging customers into investments with higher costs and charges, where equally suitable but less expensive funds are available in the fund range. Providers might also name or present more expensive or higher risk funds in a way that makes them sound appealing, which is a particular risk where customers are researching options independently online.

Conversely, however, automatic pensions enrolment provides an example of how behavioural bias can be positively used to generate an outcome that enhances financial wellbeing. We recommend that the FCA draws on and promotes such positive examples as an integral element of its supervisory and support functions to embed the new duty.

Q2 What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Cross-cutting Rules and the Four Outcomes?

The paper states that 'we believe...the [existing Business] Principles remain fit for purpose as a statement of firms' fundamental obligations. However, we consider that in UK retail financial services markets there is a need for something more – a clear statement of expectations that goes beyond our existing Principles and rules, and provides a framework for the ongoing development of retail markets.'⁶ However, if the new duty is therefore to act as a 'super-principle', it is not clear how this role will intersect with its status as being a

³ An example of an irreversible decision is an annuity purchase, where the individual buys a guaranteed annual income which will be set at a level that is determined at the time of the purchase and not subject to change according to market conditions.

⁴ For example, taking out single life annuity that wouldn't provide for a spouse on the party's decease, or lack of awareness/understanding of ill-health annuities, which can confer higher rates of payment to take account of the potentially life expectancy-limiting effects of the medical condition.

⁵ For example, the charge cap – the limit on how much providers can charge for auto-enrolment funds calculated in terms relative to the average level of charges applicable to investments across all funds.

⁶ 2.30

'principle among other principles', substituting for or acting in parallel with other principles. We would welcome further clarification on this point.

Overall, it is difficult to assess the robustness of the proposed structure in advance of the further planned consultation on more detailed rules that will buttress the high-level framework. These rules need to be of sufficient detail to be effectively applied to specific markets and consumer scenarios. There also needs to be clear read-across from these rules to the intentions of the duty, to avoid duplicating what has been perceived in some quarters as a lack of clarity and strength of the current Business Principles. Equally, there will need to be close consideration of how the duty will be supervised and enforced by the FCA and how it will fit with the Senior Managers and Certification Regime (SM&CR).

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?

We agree with the intention, but would highlight the position of occupational pension holders whose employer or related trust is the formal client. It is important that these consumers are not disadvantaged by this intermediated status. Although the FCA does not regulate occupational pension schemes (including commercial master trusts), we would encourage both the FCA and The Pensions Regulator to consider any good practice findings from evaluation of the new consumer duty in terms of whether these could be applicable to occupational pension scheme governance regulation. .

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 'end-user' of their product or service?

We agree that consumers should be protected at all stages of the product relationship, i.e., in the context of interactions with all/any agencies that form part of the retail distribution chain. There will be circumstances in which a consumer experiences detriment as a result of purchasing or transacting with a product that either has been sold to them by an intermediary, such as broker, or following advice provided by a financial adviser. To cover such scenarios, it will be necessary to ensure that relevant rules clearly determine the locus of responsibility for any detriment caused. i.e., was a harmful product sold or brokered in good faith or was a sound product mis-represented?

In the debt collection field, the need for clarity regarding locus of responsibility for ensuring compliance with the new duty applies in respect of both originating creditors and debt purchase companies. In this context, new rules should apply respectively to (a) the original creditor, in terms of exercising due care in the selection of appropriate agencies to whom they would sell debts, and (b) the conduct of debt purchasers themselves. There is a further issue related to use of bailiffs, who are not subject to FCA regulation. Creditors (either the originating creditor or a purchaser) should be required to ensure that collections firms or teams apply appropriate levels of care in their activities.

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?

Two potential formulations of a new duty are proposed in the paper, one dealing with best interests and the other with good outcomes. We would argue that if it fell to a choice between one or other definition, then best interests should take precedence over outcomes, because a duty of best interests presupposes an intention to ensure good outcomes and will help define the nature and quality of what these will look like.

It would seem, however, to make most sense to combine the two so that the Duty reads: ‘A firm should act in the best interests of retail customers in order to help ensure good consumer outcomes.’ This would illustrate the link between quality of input (firms’ conduct) and quality of result (good customer financial outcome).

This synthesis would also clarify that the customer’s best interests should act as the primary guiding principle throughout the product relationship, from marketing and point of sale onwards. An assessment of quality of outcomes would therefore be recognised as the measure of the extent to which a firm had met its best interests duty.

Firms and consumers share responsibility for the achievement of good outcomes in terms of how they play their respective parts in in the product relationship. However, consumers can only adequately exercise their responsibility if they are enabled to do so. This creates a duty on firms both to ensure that products are designed, sold and managed in ways that meet the best interests of the target market and to seek to avoid detriment to the customer throughout the product lifespan.⁷

Q6 Do you agree that these are the right areas of focus for Cross-cutting Rules which develop and amplify the Consumer Principle’s high-level expectations

Overall, we agree that the areas of focus for the cross-cutting rules are the correct ones. However, we make a number of suggestions as to how these might be amended to further enhance consumer protection.

Foreseeable harm

The proposed rule indicates that firms should be required to ‘take all reasonable steps to avoid causing foreseeable harm to customers’. This rule is qualified as follows:

‘This does not mean that consumers will be protected from all bad outcomes:

- Sometimes harm will occur because of circumstances that were unforeseeable.
- Sometimes the harm may be foreseeable too late to enable the firm to act.
- Or the nature of the harm may be such that there are no reasonable steps open to a firm to act to avoid it.’

⁷ As a separate point, the FCA will have to assess and clarify to firms how a duty centred on best interests would interact with or supersede existing regulatory requirements applicable to specific markets that mandate firms to act in customers’ best interests.

We suggest that where harm occurs, the above three qualifiers should be used as a basis on which to test the robustness of firms' approaches, along the lines of:

- What prevented your firm from foreseeing the harm that took place?
- What steps do you take to stress-test the suitability of your products and services before you launch them?
- Having identified that harm was likely to occur, what prohibited your firm from taking action to avoid it?
- Why would it have been unfeasible - rather than simply 'not reasonable' - to address the harm?
- When providing initial advice or as part of the sales process, did your firm take into account whether offering/providing the product was consistent with the principle of promoting the customer's best interests?

Anticipating the needs of customers experiencing or approaching financial difficulty

MaPS research demonstrates that certain common forms of consumer behaviour and mindset are likely to cause long-term financial detriment.⁸ For example, habitual minimum credit cards payments can become behaviourally normalised by consumers, who do not realise they are engaging in problematic behaviour until their situation has deteriorated significantly. We also know that many people associate money problems with a high degree of social stigma, which acts as an obstacle to consumers seeking help before their situation become unmanageable.

Under a new duty, firms could be required to use transactional information to help customers make more effective decisions when they are approaching financial difficulty. Relevant trigger points for intervention might include evidence of unsustainably high levels or increasing frequency of credit use, loss of regular income stream impacting balancing of household budgets, declined payments of priority commitments, etc.⁹

We therefore recommend the introduction of a universal requirement, which may merit the creation of a further cross-cutting rule, obliging firms to monitor whether customers may be at risk of falling into financial difficulty and, where required, make proactive contact with them to discuss potential changes to their financial behaviour. This requirement should supplement, read across to and strengthen existing rules on the treatment of customers in arrears/default or at risk as a result of repeat credit use.¹⁰

This expectation should also be supported by an explicit requirement that customers in debt are offered affordable repayment offers based on a reliable and accurate assessment of their circumstances, as provided by, for example, the [Standard Financial Statement](#). Underpinning this, there should be a default expectation on firms to offer seamless referral pathways to debt advice or other support for those who need it.

Please also refer to the detailed comments on pre-emption in our response to question 12.

⁸ Please see, for example, an infographic produced by MaPS that provides examples of early warning signs of over-use or poor management of credit: <https://moneyandpensionsservice.org.uk/wp-content/uploads/2021/03/symptoms-of-problem-debt.pdf>

⁹ We also suggest that when working with customers in or approaching financial difficulty, firms should discuss potential remedies that take account of all the products the consumer holds with them. For example, a proposed rate of arrears repayment on a credit card should be assessed in terms of its impact on capacity to repay a loan, vis-a-vis respective/relative costs of interest/other charges applicable to each product.

¹⁰ For example, CONC 5.3 and CONC 7.

Q7 Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

Overall, we agree with the approach defined in the cross-cutting rules. However, we make a number of recommendations regarding how these might be strengthened below.

In terms of the questions that firms should be asking themselves,¹¹ we suggest that the following should be added: ‘Do I understand and am I seeking to meet the customer’s best interests?’

In place of ‘Avoid causing foreseeable harm’, we suggest the insertion ‘Take steps to anticipate and avoid potential harm’. This clarification would remove a potential loophole by means of which a firm could argue that any harm caused had not been foreseeable. We also suggest that the ability to foresee must be understood as being contingent on the extent to which a customer’s financial circumstances have been adequately explored and understood by the provider.-

In place of ‘enable customers to pursue their financial objectives’, there may be merit in adding the clause ‘and paying due regard to customers’ financial wellbeing’. This would move firms’ thinking beyond a limited concern with narrow outcomes, and locate the customer’s objectives within the wider context of their overall financial health.

We accept the principle that the consumer has both the responsibility for and the freedom to set their own objectives and make their own decisions. However, a customer’s ability to fully discharge their responsibility is in part contingent on the transparency and overall adequacy of a firms’ conduct. Equally, based on the information a provider is likely to possess about a customer’s financial circumstances, there will be situations where a firm may be as well or even better placed than a consumer to assess the potential risks in taking certain courses of action, such as accessing credit at a price that is likely to become unaffordable over time.

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 Duty is framed in terms of a requirement that ‘**firms must ask themselves** what outcomes consumers should be able to expect from their products and services’. While we are fully supportive of the intention of the requirement, empathy should not substitute for experience, i.e., drawing on the insights provided by customers themselves. However unintentionally, a firm that relies solely on putting itself in the customer’ shoes risks overlooking the informed perspectives provided by customers themselves regarding their needs.

This risk has even greater salience in relation to customers in vulnerable circumstances. Contingent on level of resources, we believe that firms should be required to take steps to closely involve end users, including experts by experience across the range of vulnerabilities, in the design of products, communications, customer service approaches and, critically, outcomes - defining what good looks like from the consumer perspective.

We are concerned that although the FCA expects firms to ‘consider the needs of vulnerable consumers in their target market’, this intention may be undermined both by the latitude ‘not [to] require firms to verify that all individual customers have in fact understood the information provided’, and the proviso that ‘a reasonable degree of checking of individual understanding’ would only be required ‘where the customer is receiving a personalised

¹¹ 3.09.

service with interactive one-to-one communications with a firm and is asked to make important or complex decisions.¹²

Many forms of vulnerability can be missed by firms not checking customers' understanding of what is being discussed, and we therefore suggest that such confirmation should be a default expectation. Equally, what does or does not constitute a personalised service or interactive one-to-one communication is not clear, and this opacity risks leaving the door open to poorly-designed automated processes.

The proviso might also implicitly discourage a flexible multi-channel approach to service delivery where, for example, where a customer using an online product application channel can be encouraged and enabled to visit a branch or make telephone contact at any point where they decide that the information required to make a decision is too complex for them to proceed unassisted.

There is also a need to ensure that firms monitor their customers' transactional behaviour and the product's performance throughout the product lifespan, to enable firms to adapt their approaches to changes in customers' circumstances, particularly in the case of open-ended credit products, such as overdrafts and credit cards.

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?

In our view, a robust new duty should supersede Principles 6 and 7. A clearer injunction to act in the best interests of the consumer represents a substantial improvement on the requirement in Principle 6 to '**pay due regard to** the interests of the customer'. There is also an opportunity and a need for new rules to clarify what is meant by 'fairness', with reference to examples of what would be considered either fair or unfair.

Equally, clear rules that require the provision of communications that are accessible, proportionate and tailored to customers' real needs and capabilities are likely to have a stronger positive effect on customer outcomes than the more general Principle 7 requirement to communicate in a way that is 'clear, fair and not misleading'.

In short, we cannot see any merit in retaining Principles 6 and 7 in parallel with a new duty. To do so would be likely to create confusion for firms regarding the requirements with which they should comply. Experience demonstrates that for a regulatory framework to succeed in terms of translating high-level intentions into daily practice, it must be clear and comprehensible to customers and frontline staff as well as to senior managers.'

Retaining Principles 6 and 7 might also provide a loophole by means of which firms not acting in good faith could choose to build policies based on whichever of the alternative principles they felt provided the least effort to meet consumer protection requirements.

¹² 4.29

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?

The new duty represents a significant step forward in the FCA's expectations on firms to act in the best interests of their customers. In order to illustrate the significance of this paradigm shift, we recommend that the FCA reviews existing Handbook material and, in line with our response to the previous question, replaces material relating to Principles 6 and 7 with new content that expresses the requirements of the new duty.

This would clearly entail a substantial programme of work, (a) for the FCA itself and (b) for firms in terms of adjusting existing policies and practices to fall into line with new requirements. It would therefore seem appropriate to publish a review timetable, indicating how this programme of work would be carried out on a staged basis. As it develops, this work should also be underpinned by a process of familiarisation carried out by FCA supervisory staff to support firms with the introduction of new requirements.

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?

As outlined above, we have a concern that the framing of the Duty in terms of firms being required to 'ask **themselves** what outcomes consumers should be able to expect' applies a test that risks leaving consumers to be treated as a notional objects of intervention, without reference to the true nature of their needs.

As such, we suggest that firms should be required to maximise opportunities to involve consumers in all aspects of product development, communications and customer service approaches and the definition of good outcomes. Without this, processes risk being informed solely by the perspectives of an unrepresentative sample of the overall consumer population, comprising senior managers, Board members, product designers and policy officers, 'thinking their way into' the customer's mindset at one remove.¹³

The FCA asserts that any new duty would not 'remove consumers' responsibility for decision making', which we recognise is consistent with the relevant FCA Principle of Good Regulation. However, as other consumer bodies have argued, this expectation should be tempered by an explicit acknowledgement that the ability of the consumer to exercise responsibility is contingent on the nature and quality of firms' conduct as well as on the capability and behaviour of the consumer themselves.

A consumer can only fully exercise their responsibility if a product or service is inclusively designed, marketed and transacted by the provider. As such, there is a case to be made that Principle 4 of the FCA's Principles of Good Regulation - 'Consumers should take responsibility for their decisions' – should be amended to include a further clause to the effect of '...where a firm has fully discharged its own responsibilities.'^{14,15}

¹³ We accept that this might represent a resource challenge for smaller firms, which in practical terms might be mitigated by the use of proportionate approaches such as small-scale beta-stage product testing and evaluation, for example.

¹⁴ We acknowledge that this might in turn require an amendment to FSMA, however.

¹⁵ For an insightful discussion regarding the attitudes of consumers and firms to the question of responsibility, please refer to a 2013 [report](#) prepared for the FCA Practitioner Panel – 'Consumer Responsibility: Identifying and closing the gap'.

The paper makes reference to the requirement that ‘firms would monitor, test and...adapt their practices and processes on an ongoing basis, to satisfy themselves that they are delivering the expected outcomes.’¹⁶ We look forward to further detail in the subsequent stage of consultation on both how and how closely the FCA will examine and analyse relevant evidence and take action if firms are not acting appropriately.

Clear read-across from the duty to new rules will be critical to the success of the duty in meeting its objectives. This will help reduce the risks associated with reliance on general concepts such as ‘reasonableness’ and ‘fairness’, which are susceptible to a range of subjective interpretations. These terms must be very clearly defined, commonly understood and consistently regulated for.

It could be argued that ‘reasonableness’ is a commonly understood term as defined, for example, by its use in a legal context. However, this does not guarantee that firms would refrain from interpreting it from a purely commercial perspective, i.e., what makes business sense and generates most profit, which would militate against focusing on the best interests of the customer. Compliance with the duty must therefore be assessed by means of a consistent supervisory approach, based on a shared understanding between regulator and industry of what reasonableness and fairness look like in practice.

Although we agree that the duty should not apply retrospectively to past business, we believe there should be an explicit expectation that firms review their current policies and existing products to ensure that their approaches are consistent with the requirements of a new duty.

We are pleased to note the FCA’s explicit expectation that firms should avoid exploiting behavioural biases. . However, it should be noted that consumers may not always be aware that their own behaviour is subject to bias that is vulnerable to exploitation. For example, in markets where consumers have not been prompted to shop around to compare the cost of alternative products, inertia becomes normalised behaviour. Regulating for this issue will therefore require a clear understanding on the part of supervisors of the nature of such biases and how they can be manipulated.

Pre-emption

We are gratified by the intention that the new duty would ‘have a ‘pre-emptive effect, reducing the likelihood of harms arising in the first place,’¹⁷ and suggest that greater emphasis should be put on this point.¹⁸ Pre-emption enables firms to identify and design out potential harms.

An anticipatory approach must be based on active consumer involvement to support an informed understanding of customers’ needs and circumstances, including propensity to different forms of vulnerability .Such an approach will increase the foreseeability and reduction of avoidable detriment. An anticipatory approach would also help erase the false separation between ‘vulnerable’ and ‘non-vulnerable’ consumers. It would recognise that **all** customers are entitled to and should be able to confidently expect that they will be provided with a product or service that meets their needs and is free from barriers or disproportionate penalties in the event that their circumstances change.

¹⁶ 2.36(d)

¹⁷ 2.20.

¹⁸ Also 2.21: ‘We want to bring about an environment where the consumer harms described above do not occur in the first place, because firms are consistently placing their customers’ interests at the heart of their businesses.’

Effective pre-emption also requires the adoption of an anticipatory approach to the emergence of financial difficulty, and we have suggested above that there might be merit in introducing a specific cross-cutting rule to deal with this issue. Firms offering credit facilities and products should be incentivised to make more proactive use of transactional data in support of customers showing signs of diminished financial resilience, not only at the point when payments have already been missed but also beforehand.

Banks in particular have access to unique insights into the financial circumstances and behaviours of their customers, and providers routinely apply market segmentation models to support marketing and sales strategies. As such, approaches and operational frameworks already exist that could be adapted to identify and target support towards customers at risk of harm. The spirit of regulation covering the treatment of customers under-servicing overdraft and credit card commitments should be applied across all relevant markets.

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?

We have no comments to make on this question.

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

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

Outcome: Communications equip consumers to make effective, timely and properly informed decisions about financial products and services.

Clear, simple and accurate communications have a critical role to play in supporting consumers' financial wellbeing, and we see FCA expectations in this area as having a particular complementarity with MaPS' statutory role to 'improve the ability of members of the public to make informed financial decisions'.¹⁹

A well-informed and more confident consumer will be better equipped to understand and exercise good judgement in selecting the products that meet their needs. However, a customer's ability to make such a judgement is reliant on a firm's duty to provide clear and transparent information to assist decision-making processes.

The consumer should not unknowingly take on greater risk without understanding the implications of their decisions. Providers should therefore not present information that is difficult to understand or misleading, and should clearly explain both the outcomes the product is intended to achieve and any risk associated with the customer choosing to make use of it.

MaPS has a key role to play in helping consumers understand the risks that lie with them and how they can mitigate such risks. By means of the guidance and information we provide to consumers, we can explain the differences between different types of products, what those differences mean for the consumer and what their options are.

Information made available and communicated to the consumer should be very clear at the point where they make a decision that is impossible or difficult to reverse. This should not just be a box-ticking risk warning exercise. The consumer duty should require firms to

¹⁹ Financial Guidance and Claims Act 2018.

assess the effectiveness of their actions, one measure of which could be whether consumers understand, for example in the pensions context, that they are making a lifelong commitment to a set level of income. MaPS makes the information and guidance we provide very clear in terms of which decisions will effectively be permanent and any impact on later decisions or future costs.

Research has found that concepts that might be assumed to be readily comprehensible, such as APR and compound interest, are poorly understood by a substantial proportion of consumers. We feel that the proposed proxies for user involvement (surveys or monitoring of relevant management information)²⁰ are not sufficient to the task of gaining informed insight into consumers' communication needs. It is crucial that consumers, including those who have experienced vulnerability (financial or otherwise), are directly involved in the design of appropriate communications to ensure these will have the desired impact, and we support the FCA's proposal for firms to carry this out at a level commensurate with the nature and purpose of the communication.²¹

If consumers are not actively involved in communications design processes, inaccurate and inappropriate assumptions might otherwise be made by firms, leading them to produce content that exceeds the real limitations that many consumers face.²² It is also important to note that conditions of 'scarcity', i.e., a lack of required resources such as time or money, can shrink cognitive bandwidth and reduce a person's available capacity for processing information²³.

Firms should provide consumers with information about what they could or should do in the event that they encounter problems in the course of the product lifetime. These problems may arise for a variety of reasons:

- A product does not perform in a way the customer believed it would
- Changes occur in the customer's financial circumstances
- The customer does not act as a 'model consumer' (e.g., by only making minimum credit card payments)

Firms should therefore take steps to better promote available means of support (either in-house or third-party), such as debt advice or money guidance, as well as routes to complaint or redress.

Firms should not only be required to ensure that communications are clear, but also to monitor whether they elicit the desired behavioural response from the customer. For example, arrears letters are often written in a tone and style that causes disengagement, fear and 'paralysis' rather than engagement and action. Although we are mindful that in the credit sphere the Consumer Credit Act places specific requirements on firms regarding arrears communications, we believe significant improvement is possible here. To ensure customers falling into difficulty take action rather than avoid it, we believe it is critical that such communications are user-tested and optimised.

In addition to ensuring that content is fit for purpose, firms must ensure that approaches to communication are appropriate. For example, sending out frequent, repetitive

²⁰ 4.22.

²¹ Making use of behavioural science principles would be of value, and there is good practice in this area already.

²² As evidenced by research on average numeracy and literacy ages and levels of understanding of financial concepts and terminology.

²³ 'By constantly loading the mind with other processes, [scarcity] leaves less 'mind' for the task at hand. [It] directly reduces bandwidth – not a person's inherent capacity, but how much of that capacity is currently available for use'. Source: S Mullainathan and E Shafir, (2013) 'Scarcity: Why having too little means so much'.

communications will often militate against engagement rather than encourage it. Communications must be timely (relevant to the issue in hand) and proportionate in tone and frequency to the relevant degree of importance/urgency. Offering a channel mix, where for example, a customer can move from a digital journey to a human encounter is also important.

The influence of regulatory language

The FCA itself has a critical role to play in creating a linguistic environment in which the way regulatory expectations are expressed does not oblige firms to represent and communicate terms and conditions in technical or legalistic language that will be poorly understood by consumers.

Communications good practice case study

A building society redrafted product terms and conditions to ensure that content was appropriate for and comprehensible to an adult customer with a UK average reading age of 9. Draft content was reviewed by the organisation's legal and compliance teams, who ensured that the simplification of content adequately expressed key points of law and regulation.

Information asymmetries

Providers have access to significantly more information about complex products than consumers do, for example in a pensions context, about how products are structured, how to save into them, tax implications, the implications of different ways of taking money out of schemes, etc. There are disclosure regulations which require providers to make certain information available to the consumer, but there is no requirement for this to be expressed in plain English.²⁴

Such information is often difficult to understand and contains jargon, which means that consumers are less likely to read or understand it. This increases the risk of consumers buying or saving into products that may not be appropriate for their needs and circumstances, leading to financial detriment.

An effective new consumer duty could assist in requiring firms to avoid the use of confusing, misleading or materially incomplete information. This area provides an illustration of how the quality of input influences the quality of outcomes that consumers should be able to expect, and how such inputs must enable rather than hinder. MaPS has a key role to play in this space, by filling gaps in and further clarifying information.²⁵

Cognitive ageing and cognitive decline

Cognitive decline is a condition that can affect people at any age, while cognitive ageing is a natural consequence of getting older, one that manifests itself in various ways, not all of which will impact on financial capability. That being said, cognitive decline is a significant issue among some members of the ageing population²⁶ and puts consumers at risk of

²⁴ For an example of the positive impact of reframing communications relating to numerical information, such as expression of cost of interest in price terms, please refer to the Plain Numbers Project Initial Trials [Report](#).

²⁵ Consumers can contact our helpline if they have specific questions, or can use our website to find out more about the types of product they are saving into or thinking about. Eligible consumers can engage with Pension Wise to gain an understanding of their options for accessing their pensions.

²⁶ See for example National Endowment for Financial Education (2016) Early Warning Signs: Impact of Aging on Financial Decision Making: <https://www.nefe.org/images/research/Early-Warning-Signs-Impaired-Financial-Skills/Early-Warning-Signs-Impaired-Financial-Skills-Executive-Summary.pdf>

financial detriment. Research suggests that financial and mathematical skills are some of the first to decline.

The introduction of pension freedoms has meant that consumers are increasingly expected to make financial decisions at the point of retirement or after they have retired. This presents a significant challenge with respect to the issues of consumers taking on more risk and the paucity of clear information provided by pensions providers about their products.

In the case of cognitive decline, the consumer's vulnerability is likely to be progressive – worsening over time. This creates a particularly pressing need for firms to avoid publishing information that is misleadingly presented. There are also risks associated with possible impairment to consumers' decision-making ability, associated with, for example, staying in higher risk funds or paying higher costs and charges than necessary. An assurance of good customer service tailored to the individual's needs is therefore vital in this context, which should build in reviews of the ongoing suitability of products and maximising opportunities for customers to understand their options.

In terms of MaPS' contribution in this area, we currently provide guidance about the financial decisions that individuals will need to make, supporting them to make more informed assessments of the options available to them. Our Financial Wellbeing Strategy includes a commitment to produce more focussed guidance to help individuals and their families across the life cycle, which we are taking forward in our operational planning.

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

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

Outcome: Products and services are specifically designed to meet the needs of consumers, and sold to those whose needs they meet.
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We recommend that the FCA encourages firms to involve customers in product design processes. Customers can only be fully put at the heart of a firm's business if they are closely engaged in the design of the products they will use. As part of the MaPS UK Strategy for Financial Wellbeing development work, we have designed a set of creditor standards, which incorporate a recommendation that providers should involve their customers, including those with lived experience of money and mental health problems, in designing and testing their services, systems and products, to ensure that they meet the needs of these vulnerable consumers.²⁷

As part of the longer-term process of culture change that the duty seeks to achieve, we would also encourage the FCA to engage in dialogue with firms regarding how their products and services will actively contribute to customers' financial wellbeing.

As a good practice example, there is a credit union initiative that uses data provided by loan applicants who are declined credit to create a creditworthiness recovery plan. This plan sets out the actions an unsuccessful borrower can take to become more financially attractive to lenders in the future, while also encouraging saving.²⁸ The community finance sector also

²⁷ Please see two valuable [guidance documents](#) published by Fair by Design, which set out policy recommendations and offer practical advice for regulators and firms in relation to fair/inclusive/accessible/universal design.

²⁸ [nestegg Financial Health Indicators](#).

offers good practice examples of product design, such as repay and save loans, an approach that positively exploits behavioural bias to enhance financial capability and longer-term wellbeing.²⁹

The paper makes several references to the ‘mass market’. In our view, the use of this term risks creating an impression of a binary landscape comprising financially-healthy or included consumers on the one hand and financially vulnerable or ‘risky’ consumers on the other. We feel that a more nuanced analysis of the overall consumer population would be useful. This would help firms, and product designers in particular, to consider the needs of particular consumer groups in greater detail and tailor their offers accordingly. As well as drawing on the FCA’s own Financial Lives data, firms could be encouraged to make use of data generated by the MaPS Financial Wellbeing Survey and the consumer segmentation model it adopts as a means to support market analysis.³⁰

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

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

Firms should be required to adopt customer service approaches that take full account of the diverse realities of consumers’ lives. For example, horizon scanning work³¹ conducted for MaPS highlights the importance of offering:

- Longer call centre and webchat opening hours to cater for shift and other variable hours workers
- Smart design to ensure that online services are equally accessible for both smart phone and PC/laptop/tablet users
- Multi-channel options: digital access does not always equate to digital confidence and the flexibility to switch between channels is important.

Customers in financial difficulty need and deserve a quality of customer service at least equivalent to that offered to any other type of customer, and we believe this should be made clear to firms. For this group of customers, the issue is less about ‘not hindering them’ but rather proactively helping them by treating them in a way that elicits a positive behavioural response. In supporting this parity of expectation, we suggest that the FCA should require firms to research how satisfied customers in difficulty are with the provider’s management of their arrears, at a level of scrutiny equivalent to that applied to other services.

At the point at which detailed rules are drafted, we recommend that explicit expectations are placed on firms to ensure that the quality of service provided to authorised third-party customer representatives is of a quality commensurate with that applied to customers representing themselves. This is an issue of longstanding concern and becomes ever more pertinent in light of the demographic trend towards an older/aging population.

²⁹ The customer develops the habit of making regular payments to service a loan and when it is paid off continues to make payments into a savings account.

³⁰ Previously known as the [Financial Capability Survey](#), the last iteration of which was used in 2018. MaPS will be refreshing this survey under its new title in 2021.

³¹ Trajectory (2020): Horizon Scanning for Remote Debt Advice - Report prepared for the Money and Pensions Service. <https://moneyandpensionservice.org.uk/wp-content/uploads/2021/03/horizon-scanning-for-remote-debt-advice.pdf>

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

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

Outcome: The price of products and services represents fair value for consumers.

We are concerned that one of the examples used to justify a potentially higher price in terms of added value relates to making a travel insurance claim. In these scenarios, the time taken to investigate an issue is often influenced by a need for the customer to negotiate potentially complex product terms/conditions. This need stems from the structure of the product, the degree of clarity of communications and the extent to which firms do or do not act in customers' interests in terms of how they assess the plausibility of claims, clarify exclusions at the outset, etc.

It should be made clear that consumers should not be penalised by higher costs applied to compensate for factors that derive from firms' own processes. This is particularly pertinent in the case of consumers with long-term health conditions, who in many cases might fall into the category of 'vulnerable consumers [who] may be more susceptible to receiving poor value'³², and may be penalised by a higher price charged for the additional time taken to negotiate on issues that are directly related to the cause of their vulnerability. This is therefore a market in which 'firms would need to take extra care where consumers...are likely to be vulnerable.'³³

We have two questions for further consideration:

- How can fair value be consistently defined across different product/service types, e.g., comparing the service provided by an independent financial adviser vis-à-vis the features of a loan product?
- How is value to be determined for customers in relation to the cost of fees and charges levied for late payment of credit commitments?

On the last point, it would seem fair to apply a fee proportionate to the extra amount of work generated, i.e., the additional service provided to the customer. However, firms should ensure that their processes are as cost effective as possible in order to minimise the scale of the financial burden placed on customers who are already in financial difficulty. Firms should interpret guidance for the treatment of customers in vulnerable circumstances holistically in these scenarios, to ensure that the level of costs does not exacerbate financial vulnerability. More effective early identification and treatment of customers' financial problems, which we discuss elsewhere, could help reduce levels of cost and complication.

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

Independent research commissioned by the Financial Services Consumer Panel into the merits of a private right of action was equivocal on the issue of its potential beneficial impact on firms' conduct.³⁴ In the absence of clear evidence of the potential merits of introducing a PROA, our view is that to do so might lead to unintended consequences. For example, the risk of legal action might cause firms to take excessively cautious approaches regarding the

³² 4.96

³³ Ibid.

³⁴ Sarah O'Neill Consulting (2020): [The pros and cons of a private right of action for consumers in light of evidence from other sectors and countries](#)

types of product they offered. This could lead to a reduction in the range of products available, which in turn might create barriers to consumer access to markets. Further research on the pros and cons of a PROA is therefore needed. If a PROA were introduced, its potential benefits would need to be weighed against any identified risks.

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?

A new duty, based on a requirement to prioritise the best interests of consumers, together with a commitment to achieving outcomes that meet individual customers' needs and circumstances and enhance their financial wellbeing, would represent a very welcome and significant shift in regulatory approach. Such a duty would have clear merits in its own right, irrespective of whether or not it was supported by a PROA.

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?

Consistency of focus across all functions, back-room and customer-facing, is key to ensuring that approaches adopted, plans made and actions taken are in the interests of customers. However, turning this high-level intention into reality will be a challenge, and risks remaining an aspiration unless supporting rules are clearly defined.

Unless the aim and spirit of the duty are clearly communicated to the frontline by Boards and senior management, practices will not change and customer-facing staff will simply comply with existing training requirements, which tend to lag behind changes in policy direction. Also, levels of staff attrition contribute to the extent of this knowledge and practice gap.

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?

This is a question best answered by financial services providers.

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 are pleased to note that that the paper refers to how the implementation of the new Duty will contribute to consumers' financial wellbeing:

'We want all firms to be putting consumers at the heart of their businesses, offering products and services that are fit for purpose and which they know represent fair value. We want financial services markets to be consistently effective in supporting the lives of consumers across the UK. Products, services, communications and engagement from firms should instil trust, **enabling consumers to make effective and confident choices to advance their financial wellbeing** and build positive futures for themselves and their families.'³⁵

We are also gratified that the paper acknowledges that the duty is intended to create 'an environment where consumers are better equipped to achieve good outcomes from financial services'.³⁶ As we discuss earlier in our response, we see an important synergy between an effective consumer duty and the aims of the MaPS UK Strategy for Financial Wellbeing and look forward to continuing to work with the FCA in to enhance consumer financial wellbeing.

³⁵ 1.14.

³⁶ 1.4

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

We are aware of the argument that a new duty, either with or without a private right of action, could create a risk-averse market constrained by excessive caution, which would act to stifle innovation. However, firms that are committed to and confident in complying with a new duty should have little cause for concern, and they may be able to attract new customers by providing products and services that more risk-averse providers fail to offer.

While not dismissing the possibility that risk aversion might reduce consumer access to a sufficiently inclusive range of products, we feel that a new duty has the potential to provide an impetus for innovation and **positive** competition. Creative approaches to product design that seek to enhance overall financial wellbeing may provide firms with a competitive edge, attract new customers and enhance levels of trust in financial services.

There is, however, a risk of a two-tier level of compliance. Those firms most ethically committed to the intention of the duty will be most successful in driving forward cultural change, while others may seek to adopt a tickbox approach based on a legacy mindset of narrow compliance.

There is also a risk that without a clearly-expressed expectation on firms to involve customers at all stages of customer journey design, they will 'set the bar low' in defining outcomes by create a self-defined set of customer expectations from the perspective of a 'super-consumer' (fully literate and numerate, financially resilient and capable, etc) whose profile does not correspond to that of many consumers, particularly those most at risk of vulnerability.

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 lead-time?

We are not qualified to comment on this question.

James Fearnley

Policy and Propositions Manager

27 July 2021