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Consultation Response:

FCA A new consumer duty further consultation

Response by the Money Advice Trust

Date: February 2022

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Introduction

About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money with confidence.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

In 2021, our National Debtline and Business Debtline advisers provided help to over 170,400 people by phone, webchat and our digital advice tool with 1.63 million visits to our advice websites. In addition to these frontline services, our Wiseradviser service provides training to free-to-client advice organisations across the UK and in 2021 we delivered this free training to more than 1,000 organisations.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

Find out more at www.moneyadvicetrust.org.

Public disclosure

Please note that we consent to public disclosure of this response.

Executive summary

We welcome the detailed proposals set out by the FCA in this paper. We are pleased that the FCA is not intending to change the overall structure of the consumer duty and it will substantially be the same as originally proposed. We agree that the cross-cutting rules are an important component of the consumer duty and we are pleased that the FCA intends to retain these.

Our major concern remains in relation to what have been referred to as “toxic” credit products. We understand that the FCA’s stated intention is not to set prices or intervene to cap prices as part of the consumer duty. We are therefore not entirely sure what the FCA will be able to do in practice to ensure that products and services “represent fair value” particularly in the area of high-cost credit. It is unlikely in our opinion, that consumers will be able to assess if a product or service represents fair value. We do not feel that these concerns have been addressed by the proposals.

We are still concerned that there is a diminishing consumer credit market to serve higher risk consumers. On the one hand, no credit provider can be required to offer low interest or “good value” credit products to “riskier” groups, but on the other hand, those who can least afford to pay, are charged the highest amount for accessing credit via unsuitable credit products.

- ✓ We support the change in emphasis to “consumer understanding” rather than “communications”. It is vital that people receive the information they need and can understand at the right time, and in a way that is easily understandable. Key points in plain English are required, and not just a tick box exercise from firms to say that the full terms and conditions have been dispatched.
- ✓ We agree with the FCA’s proposal to rename the customer service outcome to ensure that the focus is on consumer outcomes and not just elements of good customer service.
- ✓ We are pleased to see the acknowledgement of the importance of firms adopting the inclusive design principle in the paper. We think the guidance could be clearer on the fact that, whatever the product, service or market, there is likely to be a diverse range of needs and potential vulnerabilities present in the target market.
- ✓ We would welcome further measures to make unequivocal the requirements on firms with regard to diversity and inclusion – such as the suggestion to include explicit reference to this within each of the main elements of the duty and to include further guidance on the interaction between diversity characteristics and the FCA’s existing definition of vulnerability.
- ✓ We are disappointed that the FCA has chosen not to bring in a private right of action for the consumer duty at this point.

- ✓ We would suggest that the FCA should set an early formal review date for the consumer duty and a reconsideration of whether to implement a private right of action.
- ✓ We would expect the FCA to introduce stringent new reporting requirements on firms to demonstrate their compliance with the consumer duty and to promote transparency. This should include a range of designated information that firms must gather and report on. If the sole requirement on firms is to pass on monitoring evidence if requested to do so, then we would argue the new consumer duty will not be effective in producing behaviour change amongst firms.
- ✓ We would urge the FCA to include more examples from the consumer credit market within the good and bad practice examples in the non-handbook guidance.
- ✓ We would wish to see the new consumer duty implemented as soon as possible. However, we recognise that firms need a reasonable implementation period in order to make sure the new consumer duty is a success.

Responses to individual questions

Question 1: Do you have any comments on the proposed scope of the Consumer Duty?

We would remain of the view that in addition to retail clients, the consumer duty should protect SMEs. We are pleased to see that the proposals would also apply to SMEs where regulated, and therefore will cover the vast majority of self-employed and microbusinesses that we help through Business Debtline.

Question 2: Do you have any comments on the proposed application of the Consumer Duty through the distribution chain and on the related draft rules and non-Handbook guidance?

As we said in our previous response, it appears sensible to apply the consumer duty across all firms engaging in regulated activities across the retail distribution chain as proposed in the paper.

We raised our concerns in our previous response as to how the FCA can ensure the new consumer duty binds firms on the regulatory perimeter. We continue to believe that the new consumer duty should be designed to ensure that the FCA can crack down on poor practices at the perimeter, otherwise it will not be fit for purpose.

We are pleased to see the proposal in section 3.32 of the paper that the consumer duty will apply to *“unregulated activities which are ancillary to regulated activity”*. However, there does not appear to be sufficient regulatory or supervisory scrutiny of the activities of firms on the perimeter and this needs to be addressed going forward.

Question 3: Do you have any comments on the proposed application of the Consumer Duty to existing products and services, and on the related draft rules and non-Handbook guidance?

It seems sensible to us to expect firms to review their existing products and services during the implementation period. For customers that are sold new products or services after the consumer duty comes into effect, these should be compliant.

Firms can then make sure they are compliant with the consumer duty on the relevant terms and conditions for customers with existing contracts and services. This should ensure that the “live” aspects of existing products or services are compliant with the consumer duty.

Question 4: Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?

We would expect financial services firms to be able to identify obstacles that will affect their ability to apply the consumer duty to existing products and services. Financial services firms will be better placed than we are to do so.

We would suggest the FCA considers the introduction of a self-assessment tool (i.e. a check list). This could allow firms to check existing products / services for compliance. It could also be used for new products and services to ensure that any new initiative complies with obligations for consumer outcomes under the consumer duty.

Question 5: Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?

We are pleased that the FCA is not intending to change the overall structure of the consumer duty and it will substantially be the same as originally proposed.

Our aim has always been that any duty should be constructed around the idea of the requirement to avoid reasonable and foreseeable harm, and to improve outcomes for consumers. Whilst we were amongst those respondents suggesting a combination of the two options for the consumer principle, we would agree that it is more practical to attempt to measure good outcomes for customers rather than demonstrate that firms have acted in the best interests of their customers.

Question 6: Do you agree with our proposal to disapply Principles 6 & 7 where the Consumer Duty applies?

This seems to be a sensible proposal given that it appears that these rules will overlap in most cases, and therefore complying with the detailed rules and guidance that are intended to be provided for the new consumer duty should ensure compliance with the existing principles.

Question 7: Do you agree with our proposal to retain Handbook and non-Handbook material related to Principles 6 and 7 should remain relevant to firms considering their obligations under the Consumer Duty?

We agree with the proposal to retain the materials relating to principles 6 and 7. We agree with the rationale put forward in the paper, that firms failing to act in accordance with the existing guidance on principles 6 and 7 will be likely to breach the consumer duty.

We also agree that firms need to look beyond the guidance on principles 6 and 7 as the consumer duty imposes a higher standard of conduct. However, the existing guidance should still be relevant to firms to consider.

We would agree that it is not vital for a full review of the handbook to be carried out as this would delay the implementation of the consumer duty.

Question 8: Do you have any comments on our proposed cross-cutting rules and the related draft rules and non-Handbook guidance?

We agree that the cross-cutting rules are an important component of the consumer duty, and we are pleased that the FCA intends to retain these.

As we have said, the cross-cutting rules complement the vulnerability guidance in an emphasis on prevention of foreseeable harm rather than responding to harm that has occurred, something we have long called for.

We agree that it would be difficult to identify whether a firm has taken “*all reasonable steps*” to avoid causing foreseeable harm. We understand why the FCA has chosen to remove this more procedural requirement in favour of an expectation that firms will act reasonably to ensure good outcomes for their customers.

We support the FCA’s decision to retain the concept of avoiding “*causing foreseeable harm*”. However, we would suggest this needs firm supporting guidance to ensure firms do not fall back on the defence that no particular harm was foreseeable at the time to avoid responsibility for consumer detriment.

Question 9: Do you have any comments on our proposed requirements under the products and services outcome and the related draft rules and non-Handbook guidance?

We are pleased to see the acknowledgement of the importance of firms adopting the inclusive design principle in the paper.

We are also pleased to see an acknowledgement in the paper that all target markets will include people in vulnerable circumstances, as people can become vulnerable at any point. Therefore, products and services must be designed with this in mind.

However, *the proposed requirements for manufacturers* still says at 7.21 that they should:

“consider if there are any consumers with characteristics of vulnerability in the target market and take account of any additional or different needs of those consumers”.

This does not seem to reflect the stated aim in the paper and should be amended to reflect that people can become vulnerable at any point, and products and services should be designed with this in mind.

As we said in our previous response, it is also vital that firms check outcomes for consumers throughout the lifecycle of a product or service. It is not good enough to test products initially at the design stage without monitoring that the product or service worked as intended and ensured a good outcome for consumers. This should include monitoring ongoing customer service, communications and the experience of people subject to debt collection and recovery processes.

This is particularly important given what we know about transient vulnerability and how a consumer's needs can change during the lifetime of holding a product. Building flexibility in from the product design stage to ensure a product continues to work well for an individual and does not cause preventable harm is something we have long called for, and we hope the new duty will promote this too.

We are still unsure as to how the FCA will act to prevent products and services that are not fit for purpose from entering the market. We have previously suggested that the FCA should act at the authorisation state to prevent the development of such toxic products that are designed to cause harm to consumers. We are still not clear that the FCA has the intention to act in such circumstances.

Question 10: Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?

We understand that the FCA's stated intention is not to set prices or intervene to cap prices as part of the consumer duty.

As we said in our previous response, we are therefore not entirely sure what the FCA will be able to do in practice to ensure that products and services "*represent fair value*". It is unlikely in our opinion, that consumers will be able to assess if a product or service represents fair value. We do not feel that these concerns have been addressed by the proposals.

In addition, the "fair value" evaluation will include an ability for firms to factor in their own costs. However, if this is within a market which routinely attracts higher costs such as HCSTC, then firms may be allowed to offer an extremely expensive product as a "fair value" product.

We are still concerned that there is a diminishing consumer credit market to serve higher risk consumers. On the one hand, no credit provider can be required to offer low interest or "good value" credit products to "riskier" groups, but on the other hand, those who can least afford to pay, are charged the highest amount for accessing credit via unsuitable credit products.

The FCA has quite rightly assessed that many credit products such as HCSTC, rent-to-own, home collected credit, and guarantor lending are not products that are fairly designed and have intervened in these markets to prevent ongoing consumer detriment.

However, this begs the question of how a high-interest product could be offered at fair value.

If the FCA does not intervene in relation to pricing or use other market interventions, then we are not sure that the situation is likely to improve for the more financially vulnerable. We therefore do not think the price and value outcome is likely to make a material difference as it stands.

Question 11: Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?

We welcome the proposals for the communications outcome which should build on the requirements set out in principle 7. It is vital that people receive the information they need and can understand at the right time, and in a way that is easily understandable. Key points in plain English are required, and not just a tick box exercise from firms to say that the full terms and conditions have been dispatched.

We support the change in emphasis to “consumer understanding” rather than “communications” for this outcome. We also support an emphasis on consumer outcomes and understanding throughout the customer journey.

It is vital that firms test understanding with consumers and take into account that many consumers will have vulnerable circumstances. If firms tailor their communications to make sure people with more limited literacy skills can follow them, then they will be ensuring that their communications will be understandable to the average consumer too.

We very much support the FCA’s approach requiring firms to test relevant communications with consumers. This is particularly important in relation to communications regarding consumer credit, debt collections and recovery where it can be expected that people will have particularly vulnerable circumstances.

The requirement to offer services across a wider range of channels is vital for consumers who may be unable to communicate effectively in a more limited range of channels.

It will be interesting to see how firms can go about measuring this outcome to ensure their compliance and how the FCA will ensure this is enforced.

Question 12: Do you have any comments on our proposed requirements under the consumer support outcome and the related draft rules and non-Handbook guidance?

We agree with the FCA's proposal to rename this as the consumer support outcome to ensure that the focus is on consumer outcomes and not just elements of good customer service.

It is vital that firms are deterred from creating friction points and barriers to stop their customers making a claim, contacting firms, making complaints, switching product, or changing provider. These obstacles should be removed by firms. We accept that the concept of firms avoiding the creation of "unreasonable barriers" for good consumer outcomes makes more practical sense than the concept of allowing consumers to act in their own interests "*without undue hindrance*".

However, the FCA will need to be vigilant in ensuring that this rule is rigorously adhered to.

Question 13: Do you think the draft rules and related non-Handbook guidance do enough to ensure firms consider the diverse needs of consumers?

As set out in our response to question nine, we think the guidance could be clearer on the fact that, whatever the product, service or market, there is likely to be a diverse range of needs and potential vulnerabilities present in the target market.

As we have set out here, and in our previous consultation response on the duty, inclusive design¹ is crucial for achieving good outcomes for consumers – particularly those in vulnerable circumstances. We welcome the focus in section five of the guidance on the need for firms to consider a diverse range of needs throughout the whole design process. However, this could be stronger in making clear this will often need to include direct engagement with consumers in different circumstances as they are best placed to articulate their needs. There is sometimes a risk that firms assume they know or understand customers' needs without speaking directly to them. Meaningful engagement is vital to test even well-meaning or seemingly sensible assumptions that firms may make.

We welcome the clear intention set out in 11.16 of the consultation paper that:

"firms should be able to identify when particular groups of customers receive systematically poorer outcomes and should investigate the root cause and what they can do to improve outcomes for those customers least well served."

¹ The Money Advice Trust and Fair By Design have produced guidance on inclusive design for firms and regulators – available at: <https://mailchi.mp/moneyadvicetrust.org/design>

This is integral to ensuring compliance with the Equality Act 2010 and to the Consumer Duty requirement to deliver good outcomes for retail customers. Given this, we would question whether the wording of the guidance (5.17 – 5.18) is currently strong enough. Firms should not just be required to “investigate” causes of different outcomes for consumers with protected characteristics but to act to address this and to robustly monitor and report to the FCA on what they are doing to tackle it.

Question 14: Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?

We would welcome further measures to make unequivocal the requirements on firms with regard to diversity and inclusion – such as the suggestion to include explicit reference to this within each of the main elements of the duty and to include further guidance on the interaction between diversity characteristics and the FCA’s existing definition of vulnerability.

Some of the worst outcomes we see are for people who have protected characteristics, and another characteristic that places them at greater risk of harm (vulnerability). Research by Fair By Design and the University of Bristol’s Personal Finance Research Centre has found that people on low incomes and with certain protected characteristics are more likely to be paying extra costs for essentials such as credit and insurance. This is the case even when compared with low-income households as a whole – suggesting that the marketplace is discriminating against groups of people, albeit indirectly.²

While we recognise that firms do need to retain the right to price based on risk, there remain issues around insurance and credit products which may unfairly penalise certain groups of people who have protected characteristics and / or circumstances of vulnerability. This includes people with health conditions (even when the risk is low), those who live in certain areas, and people from certain ethnic groups. In insurance, for example, there can be little transparency for consumers about how insurers have determined the level of risk, and therefore the price charged, to determine if they are being treated fairly or not. The Consumer Duty must be strong in requiring firms to ensure this risk is accurate and reasonable, and that they are not indirectly discriminating against certain groups. We therefore support stronger measures to require firms to monitor and demonstrate that this is not the case and to take swift action where unequal price or outcomes are unjustified.

² Davies, S., and Collings, D., [The inequality of poverty: Exploring the link between the poverty premium and protected characteristics](#), February 2021

Question 15: Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?

We are disappointed that the FCA has chosen not to bring in a private right of action for the consumer duty at this point. Alongside most other consumer groups we supported attaching the private right of action to the consumer duty in our consultation response.

We of course agree that for most individuals, the Financial Ombudsman Service would be the most appropriate vehicle for complaints and redress. However, we think that a private right of action would be particularly beneficial for establishing industry-wide consumer redress schemes for breaches of the principle.

As the financial services compensation scheme does not apply to consumer credit cases, and there seems to be no intention to change the rules to cover consumer credit firms, there are limited avenues available for redress for individual consumers.

We are pleased that the FCA recognises the potential benefits of the private right of action and will keep the possibility of implementing this proposal under review. We would suggest that the FCA should set an early formal review date for the consumer duty and a reconsideration of whether to implement a private right of action.

At the very least, the FCA should also set out what it considers will be the triggers for a review so that it is clear what to monitor and what mechanism need to be put in place to prompt action.

Question 16: Do you have any comments on our proposed implementation timetable?

In common with most other consumer groups, we would wish to see the new consumer duty implemented as soon as possible. However, we recognise that firms need a reasonable implementation period in order to make sure the new consumer duty is a success.

The proposed timetable for full implementation by 30th April 2023 appears reasonable in the circumstances. However, if there is a potential for any sectors, products or services to become compliant at an earlier stage, this should be explored as a possibility.

Question 17: Do you have any comments on our proposed approach to monitoring the Consumer Duty and the related draft rules and non-Handbook guidance?

We are very concerned that this section of the paper fails to provide the monitoring infrastructure needed to make the consumer duty strategy work in practice.

We are pleased to see a greater emphasis on the boards of financial services firms to oversee the consumer duty. However, we do not agree with the FCA's proposed approach to monitoring firm compliance with the consumer duty. At point 14.20, the paper states:

“We do not propose to introduce new requirements for firms to regularly report information to us to comply with the Consumer Duty. However, we would expect firms to collect suitable data and information to assess consumer outcomes for themselves. We would expect firms to be able to give us evidence of such actions if we request it.”

We would expect the FCA to introduce stringent new reporting requirements on firms to demonstrate their compliance with the consumer duty and to promote transparency. This should include a range of designated information that firms must gather and report on. If the sole requirement on firms is to pass on monitoring evidence if requested to do so, then we would argue the new consumer duty will not be effective in producing behaviour change amongst firms.

The lack of monitoring requirements suggests a lack of due prominence to the strategy and may suggest to some firms that they can deprioritise the urgency of ensuring their adherence to the consumer duty in practice.

We would suggest that the FCA needs to set out what success looks like and how it proposes to measure successful consumer outcomes. This will be of great help to firms. Without systematic reporting requirements, we do not understand how the FCA will be able to assess if any particular market is producing fair outcomes for consumers. This could lead to a lack of accountability for firms. The lack of such requirements will hinder supervision and will make it impossible to collate standardised data for assessment in for example thematic reviews, if firms are using their own metrics.

Question 18: Do you have any comments on our proposal to amend the individual conduct rules in COCON and the related draft rule and non-Handbook guidance?

We welcome the proposal to strengthen the rules in the code of conduct sourcebook to reflect the higher standards of the consumer duty.

We are not able to comment on whether these proposals will be sufficient in themselves to establish clear senior management responsibility for compliance with the consumer duty.

Question 19: Do you have any comments on our cost benefit analysis?

We do not have any detailed comments on the cost benefit analysis included in the paper. We are pleased to see that there is an assessment made of both the initial one-off costs to firms for compliance with the new consumer duty as well as the annual ongoing direct costs to firms.

This reflects the reality that there is an ongoing commitment required by firms of ensuring products and services continue to meet the needs of consumers over time. Such design cycles will be initiated by new services, products, and processes, and will have costs associated with each cycle as different consumer needs are considered. Consequently, it is likely that the cost of this will be ongoing, rather than a one-off.

Question 20: Do you have any other comments on the draft non-Handbook guidance?

We do not have any specific comments on the draft guidance except for our suggestion in response to question 21 below, that the FCA includes a number of good and bad practice examples from the consumer credit and financial difficulties end of the market in the guidance.

We suggest there should be more of an emphasis on how firms should treat consumers in financial difficulties within the guidance.

We would suggest that the “monitoring and governance” section needs to be strengthened to include a reporting requirement on firms. As we said in our response to question 17, we would expect the FCA to introduce stringent new reporting requirements on firms to demonstrate their compliance with the consumer duty.

However, we presume this guidance will be updated, if any changes are necessary as a result of this consultation.

Question 21: Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?

We would urge the FCA to include more examples from the consumer credit market within the good and bad practice examples in the non-handbook guidance. It appears to us that many of the examples relate to investments and insurance and financial advice products.

However, for consumers in vulnerable circumstances, their main financial products are likely to be related to credit, overdrafts and high-cost credit and debt collection as well as dealing with debt and how creditors treat them when they are in financial difficulties. They may have no access to financial advice or have any savings and cannot afford insurance. It is therefore imperative that firms dealing with the most vulnerable people should meet high standards under the consumer duty. The guidance should reflect this and include more examples that firms can utilise and reflect upon in developing their own approach.

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