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Consultation Response:

# Financial Conduct Authority A new consumer duty

Response by the Money Advice Trust

Date: July 2021

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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 2020, our National Debtline and Business Debtline advisers provided help to 161,560 people by phone and webchat, with 1.86 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 2020 we delivered this free training to over 920 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](http://www.moneyadvicetrust.org)

## Public disclosure

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

# Executive summary

We welcome the proposals on the new consumer duty. We would like to see the consumer duty seek to address a variety of consumer harms that have been identified over the years. It is vital that there is a focus on consumer outcomes, and that products meet the needs of consumers.

We have set out many of the consumer harms in our answer to question one. These include the following.

- ✓ The FCA needs to be able to tackle so called “toxic products” before they are launched or at an early stage.
- ✓ Too often we see poorly designed products that rely upon targeting vulnerable consumers or exploiting consumer behaviour and biases
- ✓ People in vulnerable situations are at higher risk of scams and other risky financial situations.
- ✓ As the FCA has itself identified, there are problems with the regulatory perimeter and the consumer detriment that can result from trusting firms who offer unregulated products but trade off their status as a regulated firm.
- ✓ We see issues where some groups of consumers – often those on lower incomes or in vulnerable circumstances – are excluded from accessing credit that meets their needs, at a fair and affordable price.
- ✓ Low-income consumers pay more for credit such as loans and credit cards.
- ✓ We also see harm through the appointed representative process, which we do not think is functioning well in relation to lead generators for debt.
- ✓ The FCA needs to find a way to ensure that the new consumer duty binds firms on the regulatory perimeter. We find that consumer detriment occurs through online advertising for unsuitable debt options and leads passed on to firms who may be FCA authorised for debt counselling or be appointed representatives of other firms who are.

We would caution that this will require a considerable response from the FCA in terms of its interventions as the authorisation stage as well as the supervision and enforcement functions. We believe that a reformed authorisations process and robust supervision and enforcement regimes will be crucial to the success of the consumer duty measures. The consumer duty can only advance the consumer protection objective if properly supervised and enforced. We look forward to seeing the proposals in this area alongside the next set of proposals.

- ✓ We believe that the proposed system for the consumer duty comprising of the high-level principle, cross-cutting rules, and four outcomes should provide a robust structure within which the FCA can achieve the outcomes for consumers that are required.
- ✓ To have confidence in the consumer duty, this must be accompanied by enhanced and more robust authorisations, supervision and enforcement regimes. This will allow the FCA to focus on good consumer outcomes. A robust authorisation regime will be able to prevent firms from entering the market and selling poorly designed or toxic products to consumers. An enhanced supervision and enforcement regime will allow the FCA to better monitor firms to identify poor practice and intervene before that practice becomes the market norm.
- ✓ We suggest that the FCA needs to look at adopting clearer definitions of concepts such as “reasonableness” and “good faith” in order to achieve strong outcomes and to make it easier to monitor firms’ conduct. There is a risk that the ambitious aims of the consumer duty will be watered down by firms using their own interpretation of reasonableness and so on, to ultimately soften the impact of the consumer duty.
- ✓ We welcome the two proposals for the drafting of the consumer principle and can see merits in both approaches. We would suggest combining the two outcomes to ensure that a firm both acts in the best interests of retail clients and to deliver good outcomes for them.
- ✓ We agree that the adoption of the cross-cutting rules would constitute a significant shift in focus from the current rules and principles to a requirement to prevent harm occurring in the first place.
- ✓ We believe that the combination of these proposals and the strengthened vulnerability guidance will enhance the ability of firms to focus on appropriate levels of care for vulnerable customers. The aim to have outcomes as good for people in vulnerable circumstances as for other consumers, will raise the bar for everyone. A requirement to take reasonable steps to avoid harm and not just identify, and respond to, existing harm will be a great step forward.
- ✓ Whilst we support the four outcomes, we are concerned about the price of products representing fair value. With high-cost credit products, we come back to the fundamental problem that some products may be so toxic for consumers that they should not be allowed to be offered in the future under these rules. However, as the FCA does not have the powers to mandate firms to create and market new products that are more suitable, there is a risk that more vulnerable consumers and those on low incomes will be unable to access credit. It is very difficult to square this circle, as a provider who cannot see a profit in a product, will not offer it, and the FCA cannot ensure they do so.

- ✓ There is little or no real competition in the credit market for higher risk consumers with low incomes and poor credit ratings. It is possible that lenders could all withdraw from that market, or that the only way people in desperate circumstances can borrow is via a product that the FCA deems does not represent fair value. There needs to be a social policy solution that allows for interest free or low interest lending.
- ✓ On balance, we would support the extension of the existing statutory right of action under the Financial Services and Markets Act 2000. We believe that it would be a great consumer benefit if the effect of granting the right for consumers to take private action against breaches of the principles is to allow the FCA to impose an industry-wide redress scheme where appropriate, as part of its enforcement powers.

# Responses to individual questions

## Question 1: 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?

We welcome the FCA's proposals on the new consumer duty. We would like to see the consumer duty seek to address a variety of consumer harms that have been identified over the years. It is vital that there is a focus on consumer outcomes, and that products meet the needs of consumers. We recognise that the FCA has taken action in a variety of areas such as high-cost short-term credit, and unauthorised overdrafts. However, it is clear that more can be done. The following areas of potential consumer harm are of particular concern.

- ✓ **The FCA needs to be able to tackle so called “toxic products” before they are launched or at an early stage.** We have raised our concerns over various forms of high-cost credit over the years. The ability to tackle concerns about the design of a product or model of lending such as guarantor lending, before it is subject to many complaints for mis selling at the Financial Ombudsman Service, can only help prevent unnecessary consumer detriment.
- ✓ **Too often we see poorly designed products that rely upon targeting vulnerable consumers or exploiting consumer behaviour and biases** to create a product that relies on late payment fees or repeat borrowing. Good product design is integral to ensuring good practice. We have championed inclusive design as a way to transform the way markets, products and services work, to deliver improved outcomes for people in vulnerable circumstances.<sup>1</sup>
- ✓ **People in vulnerable situations are at higher risk of scams and other risky financial situations.** For people in vulnerable situations to benefit from technology, application developers should take their particular needs into account when designing new products and processes.

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<sup>1</sup> <https://mailchi.mp/moneyadvicetrust.org/design>

- ✓ **As the FCA has itself identified, there are problems with the regulatory perimeter and the consumer detriment that can result from trusting firms who offer unregulated products but trade off their status as a regulated firm.** The perimeter causes confusion and allows for scams to proliferate and firms to develop unfair but unregulated products whilst themselves being authorised by the FCA. Ideally, we would want the consumer duty to tackle this type of harm, although it is unclear whether it would be able to do this unless all financial products to come under the regulatory umbrella. This may need new legislation to be put in place to achieve this aim.
- ✓ **We see issues where some groups of consumers – often those on lower incomes or in vulnerable circumstances – are excluded from accessing credit that meets their needs, at a fair and affordable price.** This can push people towards using harmful high-cost credit, which can cause or exacerbate financial difficulties, or can mean they pay more for forms of credit that others take for granted (such as has been seen with overdrafts and credit cards). Consumers who are deemed higher risk are offered riskier and more expensive credit products at much higher interest rates. This means that those who can least afford to pay back such credit products are unable to find an alternative. The cumulative effect of unaffordable lending and patterns of repeat borrowing can be extremely damaging for people in vulnerable circumstances and on low incomes.
- ✓ **The work of Fair by Design has identified that low-income consumers pay more for credit such as loans and credit cards.<sup>2</sup>** There has been a great deal of similar work to examine the poverty premium in financial services, in particular in relation to insurance and high-cost credit. The poverty premium is exacerbated by factors such as vulnerability, digital exclusion and where someone lives.
- ✓ **Finally, we also see harm through the appointed representative process, which we do not think is functioning well.** It's not yet clear how the FCA will deal with the problem of lead generator companies who have been appointed to act as appointed representatives, or how this would be covered by a duty? Given the concerns that have been raised in the past about lead generation companies acting as appointed representatives for debt advice and the FCA's recognition of such concerns in their recent "Dear CEO" letter, we do not think authorised firms should be left to regulate their appointed representatives. While this may sit outside the consumer duty, we believe the FCA should supervise all firms giving debt advice as lead generators or debt packagers directly. These firms should then be subject to a close regime of supervision and enforcement action taken where appropriate.

The FCA could consider a 'deeper' regulatory approach which could involve strengthening consumer protection by mandating or prohibiting certain features to encourage fair design and good consumer outcomes. New products would need to meet set standards on affordability assessments, product information, vulnerability, sustainability and fair outcomes for consumers. A universal design standard could be adopted to ensure these product rules are met.

<sup>2</sup> <https://fairbydesign.com/poverty-premium-research-turn2us/>



As part of their work on the new consumer duty, we would encourage the FCA to consider how they too can take more of an outcomes-focused and inclusive design approach to their own work, to ensure they fully understand the diversity of consumer needs and experiences and develop regulatory solutions that work for all consumers. Just as the FCA has rightly highlighted, through the Vulnerability Guidance and through this work on the consumer duty, that inclusive design is key to firms achieving positive outcomes for vulnerable consumers, so too is it critical in achieving regulators' aims and responsibilities. We do not think it is enough for regulators to direct others to utilise inclusive design; they must also embrace it in their own work and culture too. We hope the FCA will commit to adopting inclusive design principles in their own work, as part of their consumer protection objectives.

## Question 2: What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Crosscutting Rules and the Four Outcomes?

We believe that the proposed system for the consumer duty comprising of the high-level principle, cross-cutting rules, and four outcomes should provide a robust structure within which the FCA can achieve the outcomes for consumers that are required.

We believe that this allows the consumer duty to be embedded throughout the regulatory framework and will therefore have a much greater effect on outcomes than a one-line duty or principle would have done.

To have confidence in the consumer duty, this must be accompanied by enhanced and more robust authorisations, supervision and enforcement regimes. This will allow the FCA to focus on good consumer outcomes. A robust authorisation regime will be able to prevent firms from entering the market and selling poorly designed or toxic products to consumers. An enhanced supervision and enforcement regime will allow the FCA to better monitor firms to identify poor practice and intervene before that practice becomes the market norm.

The network of consumer bodies should be involved in providing an early warning system for the FCA in relation to its supervision and enforcement duties. The Financial Services Consumer panel could have an enhanced role if the FCA was to adopt greater transparency in relation to supervision and enforcement.

We suggest that the FCA needs to look at adopting clearer definitions of concepts such as “reasonableness” and “good faith” in order to achieve strong outcomes and to make it easier to monitor firms’ conduct. It is assumed in the paper that these terms have a common interpretation. However, these concepts are open to interpretation in law and need to be defined with reference to rules and real practical examples in order to be enforceable. Otherwise, there is a risk that the ambitious aims of the consumer duty will be watered down by firms using their own interpretation of reasonableness and so on, to ultimately soften the impact of the consumer duty.

### Question 3: 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 support the intention to apply the consumer duty to retail clients. 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.

However, we are unable to comment on how wholesale or professional client markets could benefit from the application of a consumer duty.

In the context of regulated activities, the FCA needs to find a way to ensure that the new consumer duty binds firms on the regulatory perimeter. In our experience of dealing with lead generation firms for debt, we find that consumer detriment occurs through online advertising for unsuitable debt options and leads passed on to firms who may be FCA authorised for debt counselling or be appointed representatives of other firms who are. There does not appear to be sufficient regulatory or supervisory scrutiny of the activities of firms on the perimeter. In addition, firms who advertise or provide products that are not regulated can give a reassuring impression to consumers that there is nothing to be concerned about, because the firm is authorised. A 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.

Question 4: 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?

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.

Question 5: 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?

We welcome the two proposals for the drafting of the consumer principle and can see merits in both approaches. 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. It is difficult to prioritise one of these consumer principles over the other when both are important.

We therefore wonder if it would be a sensible approach to combine the two outcomes. As the FCA acknowledges, it is not necessarily always within the gift of firms to direct outcomes (which may be outside their influence), so while this should always be a focus, ensuring they act in the best interests of their customers gives the best possible chance of a positive outcome.

We appreciate that this involves further shaping of alternative wording but would suggest this approach will provide the best outcome for consumers.

## Question 6: 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?

We agree that these are the right areas of focus for the cross-cutting rules. We have previously discussed the importance of taking steps to avoid harm to consumers. The adoption of these rules would constitute a significant shift in focus from the current rules and principles to a requirement to prevent harm occurring in the first place. We also support the focus on ensuring that firms do not exploit behavioural bias.

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.

Identifying whether a firm has taken “all reasonable steps” will of course be an area of contention. We expect that clear rules and guidance will be needed to ensure firms understand the expectations on them and how to make sure they are taking the appropriate measures to ensure compliance. Reasonable steps will depend upon the products or services a firm offers, the potential for harm and characteristics of customer group e.g. specific vulnerabilities.

## Question 7: Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

Yes, we agree with the early-stage requirements for the rules as set out in the paper.

## Question 8: To what extent would these proposals, in conjunction with our Vulnerability Guidance, enhance firms' focus on appropriate levels of care for vulnerable consumers?

The proposals achieve a high level of consistency with the vulnerability guidance with the four proposed outcomes aligning with major sections of the existing guidance.

We believe that the combination of these proposals and the strengthened vulnerability guidance will enhance the ability of firms to focus on appropriate levels of care for vulnerable customers. The aim to have outcomes as good for people in vulnerable circumstances as for other consumers, will raise the bar for everyone. A requirement to take reasonable steps to avoid harm and not just identify, and respond to, existing harm will be a great step forward.

## Question 9: 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?

We would support retaining principles 6 and 7 and the treating customers fairly outcomes even where the consumer duty applies. 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 10: 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?

We would support whatever is simplest for the FCA and firms to comply with. It appears that it is simpler to maintain the legal status of the handbook by retaining the material that relates to principles 6 and 7.

## Question 11: What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?

We are confident that the proposals would advance the FCA's consumer protection objectives considerably. By placing the emphasis on preventing harm and acting before consumer detriment has taken hold in the market, there should be substantial benefits for consumers.

We would caution that this will require a considerable response from the FCA in terms of its interventions as the authorisation stage as well as the supervision and enforcement functions. We believe that a reformed authorisations process and robust supervision and enforcement regimes will be crucial to the success of the consumer duty measures. The consumer duty can only advance the consumer protection objective if properly supervised and enforced. We look forward to seeing the proposals in this area alongside the next set of proposals.

We believe that a requirement on firms to make good judgments and to act to ensure good outcomes for their customers benefits all firms, including in relation to competition. This will help to create a level playing field for all firms, and prevent some firms undercutting the firms that already do the right thing. Removing exploitation of consumer bias or vulnerability also means firms can genuinely compete around innovation, level of service and on meeting customer needs. This should help to drive healthy competition in the market.

## Question 12: 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 believe that the proposals effectively amount to a duty of care but in a way that is easier to understand and for firms to implement. We do not think it is necessary for the consumer duty to be called a duty of care as this may cause some confusion as to the extent of the powers conveyed by the measures, particularly in relation to the fiduciary duty concept.

## The four outcomes

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

### Question 13: What are your views on our proposals for the Communications outcome?

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 are particularly pleased to see a requirement to carry out testing of types of communications to ensure consumer understanding. It will be interesting to see how firms can go about measuring this outcome to ensure their compliance.

### Question 14: What impact do you think the proposals would have on consumer outcomes in this area?

We hope that the proposals will have a positive impact. We have long argued for plain English communications and simple products. It will, however, be vital that firms are vigilant in spotting the signals that indicate customers have not understood their communications, and that they are regularly testing communications to ensure they are clear.

However, we note that the paper states at 4.26 that firms will still need to follow product-specific rules and guidance. If these rules are not updated to match the new communications outcome, then communications could still be very lengthy and complex, and therefore hard to understand for many consumers. Hopefully, this will be tempered by an expectation that firms may have to send out the terms and conditions but should highlight what has changed in a simple and clear format.

It would be sensible to review the information requirements on firms to mitigate the ongoing tension between the information requirements on firms throughout the FCA rules and a new requirement for simpler communications.

The requirement to offer services across channels is vital for consumers who may be unable to communicate effectively in a more limited range of channels. Regulations and guidance should ensure firms make this happen.



## Question 15: What are your views on our proposals for the Products and Services outcome?

Products and services are specifically designed to meet the needs of consumers, and sold to those whose needs they meet.

We very much support the intention to ensure that products and services are specifically designed to meet the needs of consumers. It is clear that some products and services are not fit for purpose and are designed to exploit information asymmetry and consumer behavioural biases. It is vital that the FCA acts at the authorisation stage to prevent the development of products such as a credit product that generates profit from late payment fees because it is designed to be targeted at people who will not be able to pay on time.

The examples cited in the paper are mainly related to investment products. We would like to see how this outcome would work in practice for consumer credit products. We have long argued that some products such as guarantor lending models are not fit for purpose (for reasons that have been rehearsed elsewhere). It is unclear if the FCA would now be in a position to step in and refuse permission for such a product at the design stage before it was launched?

This focus must include design and marketing of products to ensure that the target market is identified correctly, and only consumers who fit into that target market are sold that particular product or service. This means that sales practices will need to be examined as part of this process.

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 note that section 4.37 talks about firms designing to meet an '*identified need or objective of consumers in an identified target market.....*'. We would suggest that it is important the needs identified in the design stage are based on consumer research, not just what the individual firm thinks the need could be.



Our most serious concern with this outcome is that section 4.40e states firms should:

*“e. Consider whether the target market for their product or service could include vulnerable consumers and, if so, take this into account in how the product is designed and targeted.”*

We believe that this would be a backward step and does not reflect the FCA vulnerability guidance. Given what we know about vulnerability, any target market will undoubtedly include vulnerable customers. As anyone can become vulnerable at any time, it is vital that products are designed to be flexible and able to adapt. If this section remains the same, then the fundamental issue that has caused problems to date will remain. We would suggest that this demonstrates the importance of inclusive design and designing with vulnerability in mind as standard. We believe that that question should be about ‘what types of vulnerability / characteristics are likely to be present in target market’ instead.

## Question 16: What impact do you think the proposals would have on consumer outcomes in this area?

We are of the view that these proposals could have a considerable impact on consumer outcomes if done properly and enforced rigorously. However, with high-cost credit products, we come back to the fundamental problem that some products may be so toxic for consumers that they should not be allowed to be offered in the future under these rules. However, as the FCA does not have the powers to mandate firms to create and market new products that are more suitable, there is a risk that more vulnerable consumers and those on low incomes will be unable to access credit. It is very difficult to square this circle, as a provider who cannot see a profit in a product, will not offer it, and the FCA cannot ensure they do so.

We are therefore concerned that the proposals will not have a substantial impact on financial exclusion. There is a risk that a focus on target markets could exclude others who are not part of the target market. However, we recognise that this must be balanced with the need to protect people from being sold unsuitable products. Without a social lending requirement on lenders or a government initiated social lending scheme, it appears to us that substantial levels of financial exclusion will still remain in place.

Furthermore, once the potential for bias in the way decisions are made in certain markets through digital algorithms bias is factored in, then this is a considerable risk. The FCA needs to ensure a considerable level of transparency in the way decisions are made and products offered.

## Question 17: What are your views on our proposals for the Customer Service outcome?

Customer service meets the needs of consumers, enabling them to realise the benefits of products and services and act in their interests without undue hindrance.

We would applaud the FCA for clearly stating its intention to protect consumers via the customer service outcome and to reduce “sludge practices” both pre-sale and post-sale. 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. However, the FCA will need to be vigilant in ensuring that this rule is rigorously adhered to.

## Question 18: What impact do you think the proposals would have on consumer outcomes in this area?

We hope that the concept of allowing consumers to act in their own interests “without undue hindrance” will have a substantial effect on firms’ practices. It should help to lower artificial barriers that firms may want to put in place to deter their customers from taking specific action. We particularly welcome the requirement not to cause consumers “*unreasonable additional costs*” by way of “*time, money or inconvenience as a result of bad customer service*”.

## Question 19: What are your views on our proposals for the Price and Value outcome?

We want to ensure that products and services are fit for purpose and represent fair value, not just because they meet consumers’ needs and objectives as set out in our Products and Services outcome, but also because their price represents fair value.

We are not convinced that these proposals go far enough. We have set out some of our concerns below.

We understand that the FCA’s stated intention is not to set prices or intervene to cap prices. 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.

If firms are able to justify pricing differentials on the basis that their target market is higher risk, then there is a potential for high pricing for products like credit to continue. This will particularly be the case for consumers who have poor credit ratings, and low incomes such as our clients. Many of the more vulnerable consumers will have little choice of products or services, and there will be little competition in the market for high-cost credit. We are also keen to ensure the duty means the situation we saw with overdrafts and credit cards – whereby very high pricing for certain groups was justified on the basis that it was ‘fair’ for the majority of consumers. The duty’s focus on the best interests / outcomes of individual consumers should help here but we would welcome the FCA giving particular focus to this challenge.

Similarly, while we recognise that firms do need to retain the right to price based on risk, particularly in insurance markets, more could be done through the duty to require firms to ensure this risk is accurate and reasonable. This is needed to tackle issues around insurance products which may unfairly penalise certain vulnerable groups – such as those with health conditions (even when the risk is low), those who live in certain areas, and those who are unable to shop around. 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. Stronger requirements on firms are therefore needed in this respect.

If the FCA does not intervene in relation to pricing or other market interventions, then we are not sure that the situation is likely to improve for the more financially vulnerable.

We are 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.

The Woolard review put forward a range of recommendations in relation to high-cost credit stating in recommendation 7:

*“Consumers who have experienced financial difficulties and have poor credit files struggle to access a wide range of credit options. These consumers need products which not only offer a suitable and sustainable source of credit, but which are designed to help them to improve their credit files and build financial resilience.”*

We would suggest that recommendation 10 from the Woolard review is worth repeating.

*“To date, mainstream lenders have been reluctant to offer or fund alternatives to high-cost credit. Greater involvement of these lenders directly in non-prime credit markets, with their expertise and economies of scale, is essential to driving competition and innovation. Consumer choice and outcomes will likely remain limited without this. **The FCA in collaboration with the Treasury, Fair 4 All Finance and leaders from industry, should convene discussions with mainstream lenders on their participation in providing alternatives to high-cost credit.** These discussions should seek to find ways to overcome the barriers (eg regulatory and reputational risks) to entering this market.”*

There is little or no real competition in the credit market for higher risk consumers with low incomes and poor credit ratings. It is possible that lenders could all withdraw from that market, or that the only way people in desperate circumstances can borrow is via a product that the FCA deems does not represent fair value. There needs to be a social policy solution that allows for interest free or low interest lending.

It seems to us that people in vulnerable circumstances will not necessarily be empowered to make financial decisions by these changes. They may, for example, find it very hard to shop around for other products. There may be an increased risk of being misled by an advertisement on social media or a search engine. Some consumers might find it hard to understand what is being offered, or to comprehend the pricing structures. They may not switch to cheaper products as there may be none available. A reliance on firms to “take all reasonable steps” to ensure a good outcome will not be enough in itself without continuous monitoring and evaluating the product and services.

We are not sure that these proposals would address the poverty premium in relation to credit products and insurance.<sup>3</sup> The stated intention of the proposals would not:

*“Prevent firms from charging different prices to different groups of consumers which could be for a range of reasons, including different risk profiles of different groups. However, the firm should justify the price offered to each group in terms of fair value, with particular consideration given to vulnerable consumers and consumers with protected characteristics.”*

## Question 20: What impact do you think the proposals would have on consumer outcomes in this area?

We are pleased to see an intention that firms will be expected to withdraw a product or amend the pricing structure if it is not clear that the price charged is reasonable when compared to the benefits for consumers.

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<sup>3</sup> <https://fairbydesign.com/whats-the-poverty-premium/>

However, we are still not sure what the impact will be on certain sectors of the consumer credit lending market and whether this intervention will have a beneficial outcome for low income or vulnerable consumers whose only option is high-cost credit on poorer contractual terms.

We note that the FCA does not intend to set the levels at which firms should price products or services. However, the hope is that firms giving greater consideration to price and value will reduce the need for future market interventions such as the price cap in HCSTC or the overdraft market. We remain to be convinced that this will definitely be the result and will reserve judgment on whether this set of rules will be sufficient without further pricing interventions being required in the future. We suggest this will need to be an area which the FCA monitors closely.

## A private right of action

### Question 21: Do you have views on the PROA that are specific to the proposals for a Consumer Duty?

On balance, we would support the extension of the existing statutory right of action under the Financial Services and Markets Act 2000 as suggested in the report for the Financial Services Consumer Panel into the pros and cons of a private right of action for consumers.<sup>4</sup>

We believe that it would be a great consumer benefit if the effect of granting the right for consumers to take private action against breaches of the principles is to allow the FCA to impose an industry-wide redress scheme where appropriate, as part of its enforcement powers.

As we have said before, we believe that the FCA should continue to move away from over-complicated redress schemes such as the PPI scheme, that require potential beneficiaries of the scheme to jump through application hoops in order to qualify. Redress should be automatic, and the scheme should operate through the FCA and not left to firms to determine how they will operate the scheme, so that the redress appears to happen “seamlessly” for those affected. Firms should be required to proactively review historic case files. Any scheme that requires individual consumers to “opt in” and apply will only reach a small proportion of the potentially eligible consumers affected.

We appreciate that individual consumers may not exercise a right to take private action very frequently due to the complexity and costs of doing so. It is therefore unlikely that there will be a flood of claims as a result of any new right of private action being put in place. However, without the ability to enforce the principles in court, these become more of a set of guidelines for the FCA than effective consumer protection.

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<sup>4</sup> [fscp\\_report\\_final\\_version\\_23\\_july\\_20.pdf \(fs-cp.org.uk\)](#)

To quote the Financial Services Consumer Panel report:

*Section 148 “A new private right of action could be one aspect of a wider overall approach by regulators, firms, FOS and consumer organisations with the aim of improving culture and behaviour among financial services providers in the longer term.”*

## Question 22: 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?

On balance we support the provision of a private right of action for breaches of the consumer duty for reasons we have set out above. Therefore, our answers to other questions in this consultation are unaffected.

For more information on our response, please contact:

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