



THE SOCIETY OF PENSION  
PROFESSIONALS

*making pensions work*

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Consumer and Retail Policy  
Financial Conduct Authority  
12 Endeavour Square  
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9 February 2022

Dear Consulting Team

**SPP RESPONSE TO FCA'S CONSULTATION CP 21/36 ON THE CONSUMER DUTY**

We welcome the opportunity to respond to this consultation. Please note that we have only referred to those questions where we wish to provide a response.

**Executive Summary**

- The FCA should clarify the application of the Consumer Duty ("CD") in the context of services provided to pension schemes and trustees.
- A concept of reasonableness should be reflected in the wording of the proposed Consumer Principle.
- The FCA must revisit its position in relation to a review of the FCA Handbook (the "**Handbook**").
- The practicalities of disapplying Principles 6 and 7 remain unclear as the FCA has not clearly articulated the types of behaviours over and above those required by Principles 6 and 7 required to satisfy the CD.
- Firms require longer to implement the requirements of the CD.

**Detailed Response**

**Q1: Do you have any comments on the proposed scope of the CD?**

We agree that the scope should be limited to retail clients only, and that this should be interpreted by reference to the existing scope of the sectoral rulebooks.

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We seek clarification regarding the scope of the CD where it impacts members of trust-based defined contribution schemes, who in other circumstances would be regarded as retail investors. Would the CD extend to the trustees of occupational defined contribution schemes (and hybrid defined benefit/ defined contribution schemes) who have to meet Department of Work and Pension regulations and the Pensions Regulator guidance?

Q2: Do you have any comments on the proposed application of the CD through the distribution chain and on the related draft rules and non-Handbook guidance?

We welcome the clarifications that the scope will be limited to authorised FCA firms only, and in particular that matters regulated by the Pensions Regulator (e.g. occupational pensions schemes) are out of scope of the CD.

We also continue to agree that the broader retail distribution chain should be taken into account by FCA authorised firms; however, we would welcome confirmation that FCA authorised firms providing investment management services to pension schemes and/or trustees would not be viewed as being in-scope for the CD (i.e. that their management services would not be viewed as being “distributed” to retail customers).

In more detail, the investment decisions/advice on the portfolio of assets relating to a scheme are likely to be provided on the basis of a professional client categorisation (i.e. scheme operators and trustees are usually categorised as such). Accordingly, the “provision of the service” is to a professional client and it is not a service which is “to be distributed to a retail customer”

Q5: Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?

In line with our response to CP21/13, we are broadly supportive of the proposed Consumer Principle.

However, we would reiterate the position that we think that the Consumer Principle could be made subject to a “reasonableness” requirement: “*a firm must act reasonably to deliver good outcomes for retail customers*”. This would ensure for a proportionate response by firms and is in keeping with the draft rules which confirm (at PRIN 2A 7.1) that reasonableness is the expected standard for firms when complying with Principle 12 and PRIN 2A.

In CP21/13 it was stated that the FCA wished to “*embed a concept of reasonableness in the Consumer Duty, applying to the interpretation of all of its elements, including the Consumer Principle*”. It seems remiss not to take the opportunity to reflect that in the wording of the Consumer Principle itself and make it very clear to firms that that is the case.

Q6: Do you agree with our proposal to disapply Principles 6 & 7 where the CD applies?

As the SPP understands the proposals, if firms comply with the new Principle 12 and the CD, they will necessarily comply with Principles 6 and 7. If so, it seems to us that it makes little difference whether the FCA retains or disapplies Principles 6 and 7 where the CD applies. Principles 6 and 7 will, in effect, represent a minimum standard which firms must meet for non-retail business and may need to exceed to comply with Principle 12.

The operating of two regimes for institutional and retail customers with Principle 6 and 7 governing the treatment of the former and the CD governing treatment of the latter, is compounded by the fact that the FCA has not articulated sufficiently clearly the types of behaviours over and above those required by Principles 6 and 7 that are required to satisfy the CD.

Q7: 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 CD?

In our response to CP21/13, we stated that we did not think it was an acceptable position for the FCA to make no commitment to reviewing and removing superfluous and duplicative material from the existing Handbook. The FCA is on record acknowledging even before the CD, that the Handbook was unwieldy and needed reviewing.

We reference the FCA's 2016's "Our Future Mission" publication which states that "*We continue to believe that we should review the Handbook to ensure consistency with the principles of good regulation. While we cannot begin this work until the outcome on EU withdrawal is clear, we are committed to the review and have begun scoping work to start as soon as it is possible to do so.*"

We therefore find the statement in paragraph 5.34 that the FCA will "*bear these responses in mind when considering whether, or how, we conduct a Handbook review in the future*", to be a serious revision of position that must be addressed. For the avoidance of doubt, we do not believe the review should take place before the CD is implemented, as we do not underestimate the very significant task it represents, but for the FCA to now question whether a review is actually required is not an acceptable position to adopt.

Turning now to the question in relation to Principles 6 and 7 specifically, the SPP considers that the retention of the guidance relating to Principles 6 and 7, whilst simultaneously disapplying both where Principle 12 applies, is problematic. This layering of rules and guidance causes confusion for firms and is also presumably harder for the FCA to supervise. Firms need a single clear set of rules and guidance governing their obligations towards consumers. Requiring firms to consider guidance for principles that do not apply and which are said to represent a lower standard than the operative rules (Principle 12 and PRIN 2A) is unsatisfactory. This must also be considered in the light of the increase in Handbook and non-Handbook material occasioned by the transfer of powers from the EU post-Brexit. There is a real risk that the FCA's Handbook is becoming unworkable.

If the CD imposes obligations beyond those contained in Principles 6 and 7 (as the FCA asserts it does) then the FCA should not need to retain Handbook and non-Handbook material relating to them. It should have sufficient material in the Consumer Principle, related rules and guidance to supervise against. If the Principle 6 and 7 Handbook and non-Handbook material is to be retained, then the rules and guidance related to the CD should cross-reference these. They should also set out clearly the different or additional steps firms seeking to comply with the CD need to take and when, over and above the steps they would take to comply with the existing treating customers fairly ("TCF") framework. There is only merit in retaining the TCF guidance if it provides qualitatively different, relevant guidance that firms subject to the CD cannot obtain from other Handbook or non-Handbook material.

Q8: Do you have any comments on our proposed cross-cutting rules and the related draft rules and non-Handbook guidance?

We remain unclear as to the necessity to include "*Act in good faith*". Firms are already required to comply with Principles 1 and 2 and conduct their business "*with integrity*" and "*due skill, care and diligence*". The new cross cutting rule seems to add very little, if anything, and is in our view, superfluous.

Q15: Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?

Yes. The SPP agrees with the FCA's conclusion that the existing redress framework is likely to be a more appropriate route for customers than a private right of action.

Q16: Do you have any comments on our proposed implementation timetable?

Firms need to be given longer to implement the requirements of the CD. The scale of the challenge for firms in implementing the CD is immense. By the FCA's own admission, this represents a fundamental reset of the industry's approach to its customers. The amount of work that will need to be undertaken in terms of reviewing products, setting up systems and governance to ensure compliance with the CD across the product and customer lifecycle is enormous. It cannot realistically be attempted in nine months.

Firms who already take their responsibilities seriously will likely bear the greatest burden in implementing the CD well, and monitoring and evidencing how they have done so. 'Bad actors' are less likely to collect data and comply with their reporting obligations. There is a risk of regulatory attention being skewed towards minor infractions by compliant firms who actually submit data, as the FCA does not hear about genuinely harmful activity by less scrupulous firms until it is too late.

Firms may make a case that they need years to implement the CD but clearly that will be a position that other stakeholders, those applying parliamentary pressure holders on the FCA, will not accept. It maybe, therefore, that the middle ground is to be found in what exactly the FCA expects of firms at the implementation date. To expect firms to be "fully compliant" seems unreasonable, if not practically impossible, therefore perhaps the FCA should be clearer in its expectations of firms by the implementation date it sets.

Yours faithfully

**Sebastian Barling**

Financial Services Regulation Committee, SPP

**Fred Emden**

Chief Executive, SPP

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