



connecting the future

**A New Consumer Duty
Feedback to CP 21/13 and further consultation**

FCA

February 2021

Response from The Payments Association

Introduction

The Payments Association welcomes the opportunity to contribute to the FCA “*New Consumer Duty*”.

The community’s response contained in this paper reflects views expressed by our members and industry experts recommended by them who have been interviewed and who are referenced below. As The Payment Association’s membership includes a wide range of companies from across the payments value chain, and diverse viewpoints across all job roles, this response cannot and does not claim to fully represent the views of all members.

We are grateful to the contributors to this response, which has been drafted by Riccardo Tordera, our Senior Policy Manager. We would also like to express our thanks to the FCA for their continuing openness in these discussions. We hope it advances our collective efforts to ensure that the UK’s payments industry continues to be progressive, world-leading and secure, and effective at serving the needs of everyone who pays and gets paid.

With special thanks to:

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The section numbering below corresponds to the numbering of the 'questions for respondents' in this paper.

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

The scope remains broad and concerns arise with regard to the implementation timeline. However, we appreciate the FCA taking The Payments Association's comments regarding the definition of retail customer into account. The way this is now approached (through the link with the term 'banking customer') is correct and we endorse that.

Nonetheless, the end of this definition remains unclear when saying "including any person who is, or would be, the end retail customer in the distribution chain whether or not they are a direct client of the firm". It is unclear how this would apply in the context of payment services. For example, a merchant acquirer or payment processor should not have duties to a cardholder. The issuer is better placed to assess and satisfy the interests of the cardholder.

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?

We continue to have concerns about guidance clarifying responsibilities through the distribution chain. We seek clarification on the proposed application of the Duty where there is no existing relationship. A distinction should be made between when the relationship already exists and if there is going to be a grandfathering of those existing contracts.

Because lots of these rules are written not only for firms dealing directly with customers, but also for indirect relationships, it is very difficult for the firm to assess the customers' best interest and to comply with these rules, where there is no contractual relationship. This should be taken into account within the design and implementation of the rules and regulations.

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?

Particularly looking at the draft rules, we acknowledge they contain both structural and cultural changes, and a significant shift in the obligations for firms.

We believe there should be more reasonableness and proportionality specifications built into the rules, which are not there at present. This lack of clarity may push firms to adopt some defensive practices or to withdraw from the market altogether, which is the opposite of what the FCA wants to achieve. In relation to the definition of product, for example, it's not clear if this applies to regulated payments services that are not connected to the issuers of e-money.

We question whether these regulations should apply to all EMIs and PIs, too, where the costs of adherence and supervision would be disproportionate to the benefits.

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

The main obstacle is the lack of clarity on how the rules would apply in specific situations and the practical assessments which the duty would require.

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

We believe that the meaning of “deliver good outcomes” is unclear and, as a result, it may be hard for firms to demonstrate compliance and for the FCA and courts to determine whether or not a firm has met this obligation. We feel that the new Principle 12 should be subject to a reasonableness qualification. In other words, firms should only be required to take reasonable steps to achieve this outcome.

6. Do you agree with our proposal to disapply Principles 6 and 7 where the Consumer Duty applies?

Yes we agree and we appreciate the FCA considering how to address potential conflicts between principles. But this is subject to all the other comments made about the need for clarity to avoid overlapping with other pieces of regulation.

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

Yes, as long as long as there is clarity to avoid overlapping with other pieces of regulation.

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

While we appreciate that the FCA has provided draft guidance on this, we think that there is uncertainty as to the judicial interpretation of the term “good faith” in this context. As such, it may be difficult for firms and the FCA to assess compliance with this obligation.

More specifically, we believe that:

- Rule 2A.2.1 “a firm must act in good faith towards retail customers”: this creates some legal uncertainty. Generally, under English law there is no general doctrine of good faith related to contracts. By creating this obligation of good faith, the FCA is introducing a concept that has a lot of legal uncertainty and we think it would be difficult for firms (but also for the FCA and the court) to assess how and whether the firm has complied with that duty.
- Rule 2.A.2.2: “...the reasonable expectation of retail customer”. To avoid uncertainty, this reasonable expectation of retail customer should be limited to situations where a firm is, or ought to be reasonably aware, of those expectations.

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?

It remains unclear how these requirements would apply in the context of e-money products and services. Generally, the rules may be appropriate for the manufacturing of investment products but it is more difficult to effectively apply this approach to e-money. We believe there is a need for tailoring, because of the different characteristics of e-money from other regulated products, or even for e-money to be excluded from the scope.

Furthermore, we are worried that this outcome might push firms towards only delivering a particular product in a particular way. We recommend that the FCA ensures that there is still space for different levels of service, and for product features for different customer types.

Finally, we feel that there is no consideration of proportionality although this relates to the complexity of the product and delivery rather than the size of firms.

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?

EMIs & PIs are already subject to detailed pre-contractual/pre-transaction disclosure requirements under PSRs, including detailed breakdown on costs and limitations associated with a service, which should enable customers to determine if a particular service is suitable for them. We are not clear what additional benefits would be achieved from price & value assessments.

Furthermore, we believe it is difficult for a regulator to assess what a fair price is, given that price is determined by a collection of factors, and that a regulator's assessment of "fair" could be easily challenged. As has been proven with a regulator's attempts to impose fair market pricing in the interchange fee regulations, where specification or a reduced price did not result in distribution of additional value to end users/consumers, such attempts to fix prices by a regulator generally fail to achieve the desired outcomes. In general, we feel it is better to allow the market to set a fair price and to enable competition to appear when excessive profit pools arise than for the regulator to specify price and value outcomes.

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 appreciate that the FCA has clarified what it means by customer understanding – it is not that every message needs to be understood (because this will be dependent on the specific customer), but rather than the firm has reason to believe it will be understood.

Nonetheless, EMIs & PIs are already under obligation to notify any changes in their contracts/pre-contractual information to consumers under PSRs, in addition to additional obligations under Principle 6 & 7. We cannot see what additional benefits are offered by the consumer understanding outcome rules. We think that communication testing requirements are likely to be cumbersome, especially for more routine communications.

Furthermore, we respectfully submit that the FCA should take into account the specific nature of the services being provided to a consumer in determining expectations of a firm in relation to consumer understanding. The FCA should make clear that such responsibilities would not extend beyond firms that have a direct contractual relationship with a consumer.

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

These rules should be subject to a reasonableness qualification and we believe that the FCA should acknowledge explicitly that the nature of support that a consumer may need will vary depending on the products and services used.

Further, it is unclear whether the Duty allows for services that are delivered across multiple channels. We foresee a danger that the regulator might discourage services to be offered across multiple channels.

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

Yes, and we agree with the FCA's focus on vulnerable customers.

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

Further guidance and case studies are always welcome in order to help firms understand the relevance to them and how to comply.

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?

Yes, we fully agree, particularly because the expectations on firms are unclear and it would not be proportionate to have a private right of action on them. Consumers in the payments sector are already benefiting from broad and robust protection under the e-money regulation and payments services regulations. Creating a private right of action in relation to the Consumer Duty would only cause multiple and frivolous claims and result in firms adopting defensive practices that are unlikely to be in the interest of consumers.

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

We think that it would be very challenging to meet the proposed timetable. A July 2022 publication date leaves companies very little time for actions required to achieve compliance.

EMIs and PIs vary greatly in their size and business models; to comply with the rules they will have to reassess and consider their practices, policies and procedures across many areas of the business. Achieving compliance with this timeframe can be challenging,

particularly for those with more complicated business models. Small firms may find it a challenge due to resource constraints.

We urge the FCA to reconsider the deadline and guarantee firms not less than 12 months, but ideally 18 months to achieve compliance.

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

We would like to understand how this would be monitored in practice. We request greater clarity about the expectations on firms, so they know which rules are relevant to them. This will help the FCA monitor and assess compliance.

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

We would welcome the addition of a non-exhausted list of examples, specific to Rule 6 such as there is for Rule 4 under COCON 4.1.14 .

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

We believe the cost benefit analysis disproportionately hits smaller firms.

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

We believe the definition of retail market business is not clear. This refers to activities connected to the provision of payments services or issuing of electronic money. The idea that these rules are not limited to regulated services but that they also cover connected activities creates some legal uncertainty as there is no indication of where the line will be drawn.

We believe that the wording used in this definition (“activities connected to the provision of payment services or issuing of electronic money”) effectively extends the FCA supervision beyond the regulatory perimeters set out in the Payment Services Regulations 2017 and the Electronic Money Regulations 2011. This could create uncertainty for firms and customers as to what activities are regulated by the FCA.

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

We believe EMIs and PIs should be excluded from the scope of this regulation. But if they are to be within scope, we believe the lack of specific examples for EMIs and PIs given will inevitably create uncertainty and we would welcome several clear examples. This would be particularly helpful with regard to acquiring, since the acquirer will have a direct contractual relationship with the merchant but there is potential for significant impact on services to the consumers who are making the payments.

Further, publishing the examples of non-standard firms including the various payments service relationship would be helpful.

About The Payments Association

The Payments Association (previously the Emerging Payments Association or EPA) is for payments institutions, big & small. We help our members navigate a complex regulatory environment and facilitate profitable business partnerships.

Our purpose is to empower the most influential community in payments, where the connections, collaboration and learning shape an industry that works for all.

We operate as an independent representative for the industry and its interests, and drive collaboration within the payments sector in order to bring about meaningful change and innovation. We work closely with industry stakeholders such as the Bank of England, the FCA, HM Treasury, the Payment Systems Regulator, Pay.UK, UK Finance and Innovate Finance.

Through our comprehensive programme of activities for members and with guidance from an independent Advisory Board of leading payments CEOs, we facilitate the connections and build the bridges that join the ecosystem together and make it stronger.

These activities include a programme of monthly digital and face-to-face events including our annual conference PAY360 and awards dinner, CEO round tables and training activities.

We run six stakeholder working Project groups: Inclusion, Regulator, Financial Crime, International Trade, Open Banking and Digital Currencies. The volunteers within these groups represent the collective view of The Payments Association members at industry-critical moments and work together to drive innovation in these areas.

We also conduct exclusive industry research which is made available to our members through our Insights knowledge base. These include monthly whitepapers, insightful interviews and tips from the industry's most successful CEOs.

See www.thepaymentsassociation.org for more information. Contact malik.smith@thepaymentsassociation.org for assistance.