



Review of FCA requirements following the introduction of the Consumer Duty - Call for Input response by Transparency Task Force

<https://www.fca.org.uk/publications/calls-input/review-fca-requirements-following-introduction-consumer-duty>

From Transparency Task Force, in an organisational capacity

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For publication

Date of submission: 31st October 2024

About the Transparency Task Force ('TTF')

[TTF](#) is a certified social enterprise, established in 2015, whose mission is 'to promote the ongoing reform of the financial sector so that it serves society better'.



Overall response

We note that the FCA acknowledges (par 4.11 of its [Call for Input paper](#)) that the removal of rules from the Handbook without the introduction of a Private Right of Action ('PROA') for

breaches of the Consumer Duty would diminish the rights of consumers and the powers of the FCA, thus:

- Consumers can sue for breaches of Handbook rules, but not for breaches of the Consumer Duty;
- The FCA can create redress schemes¹ to remedy the former, but not the latter;
- In the event that a firm declares a default, eligible consumers can secure payment from the Financial Services Compensation Scheme for sums awarded by a court or a redress scheme created by the FCA, up to the statutory limit applicable at the time

It is therefore clear that the removal of a rule from the Handbook because there is a similar provision in the Consumer Duty would materially reduce the prospects of consumers being compensated for financial losses caused by breach thereof.

As a consequence such a change would be an irrational act by the FCA, given its statutory responsibility to provide consumers with an appropriate degree of protection.

As a certified social enterprise that advocates for the rights of users of financial services, we therefore oppose such changes, unless fully remedied by the introduction of a PROA for breaches of the Consumer Duty.

Had the FCA consulted on such a measure alongside proposals to ‘refine’ the Handbook, in the light of the introduction of the Consumer Duty, we would have responded constructively to all of the questions posed in the consultation paper. In principle, we sympathise with the view that there should not be duplication of rules, especially where there are differences in wording between the Handbook and the Consumer Duty that could result in firms, whether innocently or otherwise, seeking to rely upon one iteration while actually being in breach of the other.

However, the FCA specifically states, again in 4.11, that, ‘we are not seeking input on this issue [the possible introduction of PROA for breaches of the Consumer Duty] at this stage as it would need to be considered in the context of specific proposals.’ We regret this decision, because it raises the reasonable suspicion that the FCA may be attempting to secure the appearance of consent for the diminution of consumer rights by first consulting on the removal of Handbook rules then either holding a quick consultation about a PROA or going straight to the implementation of the Handbook changes.

A reader who is unaware of the history of the Consumer Duty might consider the above paragraph unduly cynical. Our response would be to remind them of the following:

- The [Financial Services Act 2021](#) placed an obligation on the FCA to consult and bring forward rules on a duty of care to be owed by authorised persons to consumers;

¹ Under [Section 404](#) of the Financial Services and Markets Act 2000

- Some influential voices in the industry have long been implacably opposed to such a right, since it would increase the probability of firms being held liable for the costs suffered by consumers as a result of their misconduct;
- The FCA consulted and brought forward on the [Consumer Duty](#), rather than a duty of care;
- Both [we](#)² and the [Bar Council](#) (which does not normally reply to financial services regulatory consultations, but felt compelled to do so on this occasion as a point of law was at stake) warned that the FCA was wrong to assert that the Consumer Duty amounted to a duty of care and thus that the consultation fulfilled its obligations under the Financial Services Act 2021; however, we were unable to persuade the Treasury to take action to require the FCA to remedy this breach;
- In January 2023 - the Consumer Duty by this time a *fait accompli* - the Treasury [acknowledged](#)³ that the Consumer Duty is an extension of the Principles for Business rather than a duty of care and recognised that it was the FCA that unilaterally decided that the latter was 'not necessary'

If, as would appear from the above to be the case, the FCA gamed a consultation process to avoid introducing a measure feared by powerful stakeholders that lobby it with great success, it is not a huge stretch to suspect that it might be doing the same again to achieve changes the industry would welcome. If it succeeds, not only will consumers have been denied the additional rights Parliament intended them to have when it passed the 2021 Act (the introduction of a legally enforceable duty of care) but it will have had existing rights removed, through the replacement of litigable Handbook rules with non-litigable Consumer Duty ones.

Against this backdrop, we believe it would be inappropriate for us to engage with the detail of the questions posed in the current Call for Input, as doing so would infer our view that this is a legitimate consultation exercise being carried out in good faith. But we do not believe this to be a legitimate consultation exercise being carried out in good faith; or at the very least that it is a consultation exercise that has been recklessly, negligently and irrationally conceived.

Instead, we consider it incumbent on us to point out, despite it not being asked for by the FCA, that the legitimate concerns of the honest majority of firms about the duplication of rules between the Handbook and the Consumer Duty can easily be remedied by their removal from the former, but only if combined with the attachment of a PROA to the latter.

Any attempt by the FCA to proceed without preserving this crucial consumer safeguard will embolden the industry's bad actors while causing further reputational harm to the sector as

² Especially pages 2-8

³ Page 2, paragraph 5

a whole. Specifically, reducing the costs of misconduct for the industry and the prospects of redress for consumers risks widening the already substantial trust deficit, resulting in consumers being understandably reluctant to purchase from the industry.

The FCA's own biannual [Financial Lives survey](#)⁴ shows that:

- Only 11 percent of adults strongly agree that they have confidence in the sector, with a further 30 percent agreeing slightly;
- Levels of confidence have not grown, even as memories of the Global Financial Crisis fade;
- Vulnerable and marginalised groups are the least likely to trust the industry, pointing to problems with financial inclusion;
- Perhaps most disappointing of all, young people are more distrusting than older ones, suggesting that the problem may worsen, not ameliorate, over time.

The FCA research indicates that consumers cite high-profile financial scandals, as well as their own personal negative experiences, as drivers of distrust. They are also more comfortable with their own providers than those they don't currently use, suggesting that the industry as a whole is judged by the standards of its 'bad apples' and implying that consumers may be resistant to trying new products and providers, an obvious impediment to innovation and growth.

If the Government is to succeed in its ambition to boost economic activity and tax receipts from the sector, and if the FCA is to achieve progress against its new growth and competitiveness remit, this trust gap must be bridged. We believe that this requires a substantial reduction in the prevalence of misconduct cases and, crucially, that there must be enhanced focus on ensuring that consumer detriment is fully compensated when things go wrong. Removing routes to redress from wronged customers would self-evidently harm consumer confidence, resulting in a further expansion of the trust deficit and thus increasing public reluctance to transact with the industry, thereby acting as a handbrake on growth -the very opposite of what is needed by UK PLC at this time, according to the Government

For these reasons, we hope that the FCA will consult, soon, on constructive proposals to accompany any changes to the Handbook with the introduction of a Private Right of Action for breaches of the Consumer Duty.

In closing, we acknowledge that our response is highly critical of the FCA, but our criticisms are based upon the empirical evidence that is available for all to see. We would welcome direct dialogue with the FCA if it believes we have misinterpreted or misunderstood the evidence on which we have based our analysis.

⁴ Pages 221-234

Unless or until such dialogue happens, and results in us evolving our perspective of the situation, such that we believe the FCA's approach to be rational and in keeping with its statutory objective we must conclude that our existing view is correct and evidence-based.

We therefore propose discussion on this matter at the earliest possible opportunity and would be happy to meet.