Consultation Response

FCA CP 21/36: A new Consumer Duty

15 February 2022

Introduction

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the FCA's Consumer Duty Consultation Paper CP 21/36.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its Members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME[1] is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

We welcome the opportunity to respond to this consultation and have provided our comments to each of the questions below. We would be happy to talk through any aspects of our response with the FCA, if it would be helpful.

Executive Summary

AFME Members welcome the overarching objective of the FCA's approach of increasing levels of consumer protection in retail markets and recognize the FCA's strategic objective and operational objectives, for markets to function well underpinned by consumer protection, integrity and competition objectives.

Our response to CP 21/36 focuses on wholesale firms' activities and in particular on a series of concerns relating to the proposed approach, application, and scope of the Consumer Duty ("Duty"), which we consider will result in unnecessary and complex obligations for wholesale firms and in consequence may have negative implications for retail customers.

AFME notes:

- *This is an ambitious programme and timetable, which will require significant work to be undertaken by firms at the outset, we welcome an extension to the proposed implementation timetable to enable firms to take the appropriate steps;*
- *We welcome clarity on the iterative approach;*
- *We note that there are fundamental scope and application questions that need to be addressed before firms can begin planning for the new Consumer Duty;*
- *There are also questions on how the existing Rulebook and 'overlay' approach will work in practice and concerns that this will add to operational, timing and customer expectation difficulties; and*
- *We note the need for a tailored approach to particular products, for example closed products which present particular difficulties*

AFME Members welcome the overarching objective of the FCA's approach of increasing levels of consumer protection in retail markets and recognise the FCA's strategic objectives for markets to work well.

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Our response focuses on wholesale firms' activities where we note that in some areas, the proposals, as drafted, appear problematic for wholesale firms for a variety of reasons (provided in our response).

Q1: Do you have any comments on the proposed scope of the Consumer Duty?

Yes, please see below. Please also refer to our comments in question 5.

Overarching comments

Whilst AFME Members understand the rationale behind the FCA retaining existing Rulebooks and scope of application of requirements (e.g. ICOBS, MCOB, COBS, PROD), we believe that this approach:

- creates complexity for wholesale firms and consumers; and
- makes it operationally challenging in practice to understand the uplift required by member firms;
- may lead to divergent interpretations and/ or longer lead times (when time frames for implementation are ambitious given the scope of the initiative and expectations);
- may lead to customer confusion around when they benefit from the enhanced standards and when they do not (where they receive more than one product or service, with one product or service within scope and at least one outside scope); and
- may inadvertently apply to primary capital markets activities if the proposed exclusions from "retail market business" are not revised (please see our comments in question 5)

We believe that it is better for firms to be deemed in compliance where they comply with existing rulebook requirements for products or services with specific requirements (e.g. PROD) and for the FCA to specify situations where this is not the case.

Particular challenges

Members foresee particular challenges relating to:

- the scope of the Consumer Duty for closed and products and propose a more tailored and proportionate approach to these (see the answer to question 4); and
- the territorial scope of the obligations which may need clarification (where PRIN 3.3.1 R (amended as per the below) should override the rulebooks).

Detail and examples of some of these challenges are set out below.

Territorial Scope

There are possible extra territorial scope implications in respect of a UK distributor involved with a non-UK product. We consider that the PRIN text should clarify that the requirements only apply to UK retail end client business (rather than relying on the Sourcebook territorial scope).

We note, for example, that COBS requirements will apply outside the UK for a UK MiFID firm (but not an overseas firm); it is unclear how will this work alongside the PRIN 3.3.1R Territorial application of the Principles which states:

> "Principle 12 and PRIN 2A apply with respect to activities carried on with retail customers located in the United Kingdom unless another applicable rule or onshored regulation which is relevant to the activity has a different territorial scope, in which case Principle 12 and PRIN 2A apply with that scope in relation to the activity described in that rule or onshored legislation".

We are concerned that the broader territorial scope of, in this case, COBS, could result in Principle 12 and PRIN 2A applying to the business conducted by UK MiFID firms outside the UK, thus making the UK a more expensive and less attractive location for manufacturing and distributing retail financial products for the rest of the world. Given that it seems clear that the policy intention is that the duty should apply only to UK retail customers, the Handbook should be clear and explicit about this, we suggest that this is achieved by amending the proposed PRIN 3.3.1R as set out below:

> "Principle 12 and PRIN 2A apply with respect to activities carried on with retail customers located in the United Kingdom**. ~~unless~~ *This is the case even if*** another applicable rule or onshored regulation which is relevant to the activity has a different territorial scope, in which case Principle 12 and PRIN 2A apply to ***activities carried on with retail customers located in the United Kingdom.*** ~~***with that scope in relation to the activity described in that rule or onshored legislation***~~***".***

Definition of "retail customer"

As currently drafted, the definition of "retail customer" links to the definitions of retail in other areas of the FCA Handbook. This then links to definitions which use the concept of client, which is narrower than that of customer. There may be a gap between this and the definitions (e.g. where the end customer in a distribution chain is a regulated firm). Clients may be treated as a "retail customer" for PRIN 2A for a firm involved in the initial manufacturing of a product, as the end consumer would not satisfy the definition of a "professional client" due to not being a client of the manufacturer.

Our Members propose that the FCA amends the definition of retail customer to include any persons who would meet the existing categorisation if they were a client of the firm – for example, using the additional language in bold below, retail customer means:

> (2) (in PRIN):
> (a) in relation to activities to which *BCOBS* applies, or to *ancillary activities*, a *banking customer* or prospective *banking customer*;
> (b) in relation to activities to which *ICOBS* applies, or to *ancillary activities*, a *policyholder* or prospective *policyholder*, excluding a *policyholde*r or prospective *policyholder* who does not make the arrangements preparatory to the conclusion of the contract of insurance ***and/ or wholesale client policy holders;***
> (c) in relation to activities to which *COBS* applies, or to ancillary activities, a *customer* who is not a *professional client*; and
> (d) in relation to any other activities, a *customer*; 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 ***if such person would meet the relevant test above if they were a direct client of the firm***

We also note that policy holders includes wholesale client policy holders so suggest the additional text above.

Ancillary business

We observe that it may be possible that the ancillary business concept has been transferred from the insurance market and PROD 4.2.14 (about ancillary insurance or packages). If this is the case, the wording should be refined to ensure it relates exclusively to insurance products given that as drafted it leads to uncertainties in application.

Q2: 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?

Yes, please see below.

Our Members believe that the application will be:

- complex to implement in practice requiring longer lead times than the nine months envisaged;
- practically challenging given the detail and granularity for the reasons set out below;
- complex because the roles and responsibilities are not necessarily neatly delineated in the way that the FCA envisages;
- far broader than today given Members have noted the expansive definition of a manufacturer to include creating, developing, designing, operating or underwriting (which is more extensive than MiFID II).

Manufacturer's Role

We note two concerns with the current proposals:

- the introduction of wide obligations which do not easily fit into the operation of a manufacturer role, and
- lack of clarity in the consultation and accompanying guidance about how this applies to manufacturers, especially when they have no direct relationship with the end user.

The manufacturer's (or co-manufacturer's) role in the design and outcome of a product is often more limited than anticipated in the consultation. The roles may be based on insurance market examples which do not translate into other products and services. There appears, as drafted, to be an imbalance in the requirements for manufacturers.

In relation to structured product issuance, for example, firms do not generally consider their role as a structured product issuer to be co-manufacturing apart from in very specific circumstances. We consider that structured products (or more broadly MiFID financial instruments) should be either a) carved out entirely from the Consumer Duty or b) the FCA should confirm that the test of reasonableness (applicable to the Principle 12) is satisfied through the current framework i.e., PROD/PRIIPs/COBS. This is because these instruments (structured products) have had specific and individual attention within the regulatory framework (PROD), which is still relatively recent (MiFID II, 2018). PROD sets out obligations on manufacturers and distributors, that are tailored to the distribution chain, and allocates specific responsibilities (covering target market, distribution channels and stress and scenario analysis). We believe that the existing approach is already finely calibrated in a way that the proposed Consumer Duty is not.

A wholesale manufacturer may not have input in the process around decisions on who to sell to and at what price and is unlikely to know the final price paid by the retail customer, nor is it always defined or known at the outset. On services, it is even less likely they will have any information.

The consultation paper indicates that firms will only be responsible for their own activities. We consider that this appears to conflict with the requirement that manufacturers consider information, which is not currently

held, and which is affected by the activities performed by other firms (e.g. price and value assessments requiring manufacturer firms to assess the end price paid by consumers which includes fees levied by distributors).

Practicality of Approach

There is a requirement in PRIN 2.A.3.15 R for distributors to provide information to manufacturers. The draft rules suggest that this is captured in the roles and responsibilities in the process but omits recognition of how this assessment could be undertaken when the information is not made available (nor is there a practical mechanism to request it), for example when the distributor no longer exists.

Proportionality and Reasonableness

Members propose an amendment to add specific drafting in the text on proportionality and reasonableness in relation to Principle 12 and would suggest a change to PRIN 12, 2A.7.1 R to state:

"Principle 12 and the obligations in this chapter ***are underpinned by the concept of reasonableness and proportionality . This is an objective test and means the rules and this guidance*** must be interpreted in accordance with the standard that could reasonably be expected of a prudent firm…."

Q3: 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?

Yes, there are particular challenges in relation to closed products. Please see our answer to question 4.

Q4: Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?

Yes, we believe that there are:

- operational and customer expectation challenges;
- complexities in understanding the uplift in practical terms and operational difficulties;
- proportionality and reasonableness questions for closed products and longer tenor products; and
- a risk that firms will decide to remove products altogether (given the conditions to satisfy and ongoing review implications), but it is not clear in all instances whether they will be permitted to do so and/ or whether they will need to engage with the FCA in advance of doing so.

AFME Members suggest a restricted approach is implemented for closed products, as set out below.

Closed Products

Closed products is an area where we note difficulties. Firms will have hundreds or thousands of products and services that are undergoing migration or wind-down where the application of the Duty requirements would entail a multi-year implementation programme with limited customer benefit. From a practical perspective, providing firms with less than nine months to assess, monitor and review these products and services is not feasible or proportionate.

There will be factors (such as a distributor no longer existing) which will compound the challenges. At present the FCA's approach is open ended, unclear and not proportionate or reasonable. These products were not designed with this in mind.

In relation to closed products, Members would therefore welcome a more tailored approach given there will be a range of practical difficulties.

The approach currently only envisages the disapplication of the target market and distribution strategy elements, and disapplies requirements to review terms and conditions and vested payment or remuneration rights (PRIN 2A.3.5R), which are limited in practice. We have identified the following areas, where we welcome further review by the FCA:

- the cross-cutting rules (as set out in PRIN 2A.3.5 R)which give an example of a design element that needs to be considered (p.130 Appendix 2);
- Mitigation of any harms where a firm identifies adverse effects (PRIN 2A.3.8 R) and prompt information to intermediaries (who may not still be in operation/ business);
- Ongoing price/ value questions (PRIN 2.A.4.18G specifically references this for closed products);
- Testing of ongoing communications, and customer support questions (PRIN 2A.6.2R) ; and
- Monitoring of outcomes, management, remediation requirements and board reporting (PRIN 2A.8) (which are very granular requirements set out on pages 38-39 of the draft Rules).

Members would suggest that the approach to closed products is limited at the outset to :

- ongoing customer support; and
- raising managing information on customer support.

However, if there are specific priority areas for closed products, we would be grateful if the FCA could also provide clarification of the areas (and would suggest the more limited approach for remaining products). Where the FCA sees or foresees a specific market deficiency, firms would look to engage and work with the FCA. This would also assist firms with prioritisation. There are workability considerations which Members would like to discuss further with the FCA.

Further, Members have noted that distributors appear to have very general obligations comparatively (PRIN 2A.3.17R) which may not work in parallel (they only have obligations maintaining, operating and reviewing closed products).

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

Yes, AFME Members would welcome clarity in the following areas:

- additional detail/clarity on reasonableness and reasonable steps under PRIN 2A.7.1 R (noting that it is unusual to see the requirements set out in the rules);
- The clarification that 'underwriting' refers to 'insurance underwriting' (given the scope of PROD 1.4.5 A R) with a corresponding clarification (see below);
- Clarity on the scope extensions of the definitions of "manufacturer" and "distributor" given possible unintended consequences (such as the 'underwriting' and 'operating' scope extension for manufacturers).

Manufacturer scope

We propose that the new manufacturer definition should read:

> "Manufacturer (1)….
> …
> (4) (in PRIN)
> (a) creating, developing, designing, issuing or operating or ***providing insurance*** underwriting ***for*** a product; or
> (b) in relation to a closed product or an existing product;
> (i) having created, developed, designed or issued the product; or
> (ii) currently operating or ***providing insurance*** underwriting ***for*** the product."

Underwriting

It is not clear in practice, what the FCA intends to capture by the inclusion of (non-insurance) underwriting within the manufacturing scope in particular, because a firm will benefit from the corporate finance adviser exclusion in COBS 3.2.2 in relation to underwriting and other regulated activity for corporate finance clients of the firm, provided that the firm complies with the requirements. Member firms would not in the ordinary course treat a corporate finance contact (including any consumers) as a client or prospective client of the firm in this context. Members understand that the applicable COBS requirements are restricted to financial promotion requirements under COBS 3.2.2 and would welcome clarification that compliance with COBS financial promotion requirements will satisfy the Duty. Any further expectation would overlook or would appear to disregard the definition in the glossary which already provides for instances where a firm accidentally creates an expectation that a corporate finance contact is being offered protections. Members note the FCA intention that the Duty would not change the nature of a firm's relationship with its customers.

We think that the FCA was considering insurance underwriting and that the FCA should clarify this in the drafting as suggested above and provide confirmation that compliance with the existing requirements should suffice for investment banking underwriting activities.

Primary Markets Activities Questions

AFME Members welcome the clarification that the FCA does not intend to capture primary market activities in relation to real economy securities within the Duty. The proposal to exclude from the scope of the Duty activities that involve the issuance of non-complex financial instruments and non-retail financial instruments is welcome in principle.

However, Members expressed concern that these exclusions are too narrow and do not effectively exclude all intended activities. We note that the views contained herein are those of the AFME ECM Division and, unless otherwise noted, relate to equity capital markets.

1. **Exclusion: "offer of non-complex financial instruments directly from issuer to investor"**

(a) The definition of "non-complex financial instruments" as currently drafted appears narrower than the MiFID non-complex financial instrument as it requires the instruments to be listed in the UK. This introduces operational complexity for firms in situations where a firm may work on a non-complex financial instrument which may be listed in Europe and then distributed into the UK, and there is no policy rationale for distinguishing between UK and non-UK listings.

In addition:

Members are concerned with the concept of a "real economy security" as it divides a single public offer regime into two types - public offers to which additional obligations apply, and public offers to which they do not, even though the regime is intended to identify offers which are suitable for the public on the basis of a prospectus. The definition is a backward step compared to the constructive dialogue held with FCA recently on similar topics, such as the application of the MiFID product governance regime and the PRIIPS rules applicable to debt instruments containing make-whole provisions. Members believe that all primary market securities activities should be out of scope of the Duty.

There is an additional limb to consider whether the average retail client could make an informed decision based on the information that is already publicly available in relation to the characteristics of the product. This places an unnecessary further burden on primary market underwriters which would need to consider such an assessment when there are already multiple safeguards for investor protection in the context of the requirements imposed on issuers of shares under each of the Prospectus Regulation, the Market Abuse Regulation and the MIFID Product Governance rules. These rules each have different ways of ensuring transparency of information disclosure by issuers to the marketplace that should have already been satisfied.

The requirement to be regularly traded is obscure and would require further guidance as to what this means and how firms would assess whether or not their product is regularly traded. Equity products are routinely traded, and this requirement would necessitate a case-by-case assessment and continuous monitoring of trading activity. This would be particularly onerous during differing levels of market liquidity. Additionally, there are examples of equity shares which do not trade regularly in comparison to others, for multiple reasons.

(b) The phrase "offers of non-complex financial instruments directly from issuer to investor, included in the definition of "retail market business" is too narrow. The word "directly" should be removed; it is unhelpful as offers are typically conducted by firms acting as intermediaries in their role as placing agents/ bookrunners / settlement agents. In addition, reference to the "issuer" should be expanded to also include reference to "secondary offerors" to ensure that offers which involve shareholders of securities selling in such transactions also benefit from the exclusion. For example, the exclusion should equally apply to an IPO whether it involves an issuer issuing securities or existing shareholders selling securities by way of such IPO. The exclusion should also capture block trades sold by way of accelerated bookbuilds and other similar transactions as the role of a bookrunner on such transactions is very similar. There should be no policy distinction with regard to such transactions.

2. Exclusion: "activities carried on in relation to non-retail financial instruments"

We support the ICMA response to the consultation paper in the context of primary market bond activity in relation to institutional bonds, and note that this would, where relevant, capture convertible bonds and therefore the concerns raised by ICMA would apply equally to convertible bonds issued within the equity-linked primary markets.

The definition of "non-retail financial instruments" is problematic and may not effectively exclude wholesale offerings. In particular:

- the definition requires instruments' minimum denomination of £100k (or the same amount expressed in different currency); this may be problematic for transactions denominated in another currency (e.g. with denomination of EUR100k), as they may fall short of the £100k denomination;

- the definition contains a requirement that an issuer (or distributor in the secondary market) must take reasonable steps to ensure that the offer and promotional communications are directed only to investors eligible as professional clients or eligible counterparties. This obligation raises a question whether a breach by one distributor would result in the "loss" of the exclusion from the Consumer Duty regime with respect to the entire transaction and other involved distributors;

- the cumulative nature of the conditions, which could be a problem for offerings of convertible bonds with denominations beyond £100k (and possibly other types of offerings). With respect to convertible bonds, we support the ICMA response to the consultation paper in the context of primary market bond activity, and note that this would, where relevant, capture convertible bonds and therefore the concerns raised by ICMA would apply equally to convertible bonds issued within the equity-linked primary markets; and

- that the instrument must not be a speculative illiquid security.

3. Retail Customers

- Occasionally firms may act, in relation to capital market transactions, for one or more individuals (who meet the definition of "retail customer") to whom regulated and/or ancillary services are provided by a firm in connection with such seller(s)' sale of securities. For example, such individual could be selling securities as part of the IPO (e.g. founder or employee of the company being IPO-ed) or in a secondary offering (with firms typically providing services of placing and underwriting to such seller) or by way of M&A sale (with a firm acting as an M&A adviser for such seller and providing corporate finance advice). Depending on the interpretation of the definition of a "product" and because of the breath of the definitions of "product", "retail market business" and "distributor", the provision of services to such seller could be caught under the Duty. However, the obligations set out in the proposed new regime relate to the manufacture and distribution of the product and not to the facilitation of sale of securities, and would be, by their nature, inapplicable to the above scenarios or bring no benefit to such seller. We would propose therefore that the provision of services to individual sellers in connection with capital market transactions or M&A transactions are also carved out from the Consumer Duty regime or that guidance is provided to this effect.

We also note that the terms "manufacturer" and "distributor" are defined more broadly compared to how those terms are defined under MiFID/UK MiFID Product Governance regime. For example, the definition of "manufacturer" under the Consumer Duty regime includes "underwriters," whilst the product governance definition captures those who advise the issuer in connection with issuance of the securities (and therefore do not capture firms acting in the "junior" underwriting role on the transaction). Under these broader definitions, it would be difficult operationally to implement the Duty, when such firm is not caught by the Product Governance regime. As mentioned above, we believe the drafter intended to refer to insurance

underwriting and have suggested language that clarifies what it intended and avoids the difficulty highlighted in this paragraph.

We believe that these concerns and additional burdens to primary market participants are not in line with the prevailing trend and work that has been done as part of this series of consultation papers, and with the objective of tailoring the UK's regulatory regime to encourage an open, proportionate, and competitive UK marketplace.

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

Yes, AFME understands why the FCA chose this approach but notes that it results in a complex web of layered regulatory requirements, which is difficult for Members to map, interpret and understand, and even more complex for clients and consumers to understand in practice.

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 Consumer Duty?

Yes, as firms are familiar with this guidance, which remains relevant for parts of the business not subject to the Duty and can provide a useful starting point for the parts of the business subject to the Duty. We welcome examples of good and poor practice, demonstrating where the Duty applies and that firms can use to establish a minimum standard.

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

Yes. In relation to the customer outcomes cross cutting rule, Members welcome further guidance from the FCA, on how firms will reconcile and differentiate the stimulation of demand and exploitation of cognitive and behavioural bias. It would be helpful to have (in relation to PRIN 2A.18-20G):

- further non-Handbook guidance examples around the boundary between reasonable and unreasonable, ideally these would be in the form of examples of good and bad practice, rather than prescriptive requirements; and

- further information on how to monitor and assess exploitation of cognitive and behavioural bias.

Q9: Do you have any comments on our proposed requirements under the products and services outcome and the related draft rules and non-Handbook guidance?

Yes, please see below.

Members welcome the FCA restating where and how the obligation will apply to firms with an 'indirect relationship' and our Members request that the FCA takes a reasonable and proportionate approach. We also request further clarity from the FCA as to 'how' firms can achieve this and in what circumstances. For example, a manufacturing firm would not request information about the end client, and instead their focus is on the product and target market group. Understanding the needs of the end client (and vulnerable clients within that group) would be beyond what is proportionate or reasonable. If a product is distributed to vulnerable

customers without their design or awareness, for example, this potentially changes the target market group assessment (and level of care expectation) outside their control. We are unclear how this will work in practice.

In relation to the evidential provisions, Members do not expect that the FCA intended to have a substantially different approach to the issue of compliance with PROD or COLL when looked at through the lens of PRIN 12 and the product and services and price and value outcomes. Indeed, initial discussions seem to suggest the approach is the same, in which case we would suggest it is made clear by amending the following evidential provisions:

> PRIN 2A.3.28E(2) "Compliance with (1) ***is evidence of*** compliance with PRIN 2A.3"
>
> and similarly, for:
>
> PRIN 2A.3.30E(2) "Compliance with (1) ***is evidence of*** compliance with PRIN 2A.4"

If the FCA considers that there are situations where a firm that is currently subject to and complying with PROD/COLL would need to change its approach due to an uplift under the relevant Duty outcomes. Members would welcome examples in the non-Handbook guidance.

More generally, Members welcome a reasonable and proportionate approach where there are complications with how this can be evidenced by firms.

Q10: Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?

Yes, our Members wish to illustrate the following:

1. Causing harm: Members note that the consultation paper text refers to 'causing' foreseeable harm and the draft rule (and cross cutting rule) states 'A firm must avoid foreseeable harm to retail customers"; we suggest that a more proportionate approach would be 'A firm must avoid causing foreseeable harm to retail customers" .

2. Explicit uplift clarifications: wholesale banks, as manufacturers, will comply with MiFID II/PROD in terms of costs and charges; it would be good for the non-Handbook Guidance to reflect the impact of PRIN 2A.3.30E, as amended above, and state explicitly that in these circumstances the manufacturer's compliance with the existing costs and charges requirements would be sufficient.

3. Value assessments for manufacturers (set out in PRIN 2A.4.7.R, later defined in PRIN 2A.4.12G/13G and PRIN 2A.4.14G): the consultation suggests that manufacturers take into account non-financial costs. In practice it is unclear how these could be quantified. Members would therefore suggest that the non-Handbook guidance provides clarification, possibly in the form of an example, that non-financial costs (and benefits) should be considered but need not be quantified.

4. Manufacturers would require clarification on items they are not required to assess in relation to PRIN 2A.4.1R given the requirements are in a rule (which would be assessed by others in the chain). Often, for example, wholesale firms will set a wholesale price for a product they manufacture which will incorporate aspects relating to the wholesale relationship between the wholesale bank and the distributor. The distributor or adviser will be responsible for the fair value and pricing assessments with end clients (as set out in the example on page 128). This should be explicit in the rule.

Q11: Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?

Yes, please see below.

Conflicts with existing rulebook requirements:

Our Members welcome clarity from the FCA on how the consumer understanding outcome will interact with existing Rulebook or legislative obligations for example, PRIIPs, Prospectus Rules, ESG Sourcebook disclosures. We note that some of them are aimed at generating standardised communications for all clients or investors, and many of them require specific formats (e.g. ESG 1 and 2 specific the target consumer group and the format (including specific guidance around the use of hyperlinks)). The legislation and Rulebooks require a series of disclosures and anticipate consumer audiences in many of their existing provisions, and the overlay approach proposed by the FCA creates complexity risks. For example, it is unclear whether vulnerable customers would require tailored communications and how this would fit with existing requirements to treat clients or investors fairly and equally.

We therefore propose that where a mandatory disclosure requirement exists, this should take precedence over the Consumer Duty outcome. Our understanding is that in these examples, the Duty may solely impact the format of disclosures (e.g. additional format possibilities for vulnerable customers). It would be helpful if the FCA could clarify this. This would also facilitate a smoother implementation.

Customer understanding across a range of products and services with varying application of the duty

There are complexities where firms offer a range of products and services, some within scope and some outside scope. It will be hard for firms to demonstrate that clients have understood that some products are in scope and others are not.

There is a risk that clients will be under the misunderstanding that they have a higher standard of protection (and benefit from the Duty for some products or services), when they do not, creating confusion for clients and requiring considerable efforts by firms.

No End Client Relationship

The Duty remains unclear regarding a firm's responsibilities when they hold an indirect relationship with the customer – particularly in relation to communications and customer understanding. The Duty should clarify that where firms do not hold a direct relationship with the customer, and therefore are unable to hold sufficient information regarding direct interactions or materially influence direct interactions, they should not be expected to monitor consumer support or consumer understanding. If PRIN 2A.8.5-12 disapplies the consumer support and consumer understanding outcomes for firms who do not hold direct relationships with the customer, this would ease implementation and avoid the need for contractual renegotiation with distributors to provide communications and support information in order for manufacturers to comply.

Q12: Do you have any comments on our proposed requirements under the consumer support outcome and the related draft rules and non-Handbook guidance?

No comment

Q13: Do you think the draft rules and related non-Handbook guidance do enough to ensure firms consider the diverse needs of consumers?

No comment

Q14: Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?

No comment

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, our Members welcome this proposal. We consider that a PROA does not fit naturally within the FCA's remit. We also consider that any litigation against the high-level nature of the FCA's Principles would prove problematic for retail clients, firms and the FCA. There is a potential risk of creating parallel and contradictory case law that would supplant the FCA's ability to interpret and issue guidance on its rules. We remain of the view that the application to wholesale activities would be problematic.

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

Yes, please see below.

Members would further like to understand what the FCA's iterative approach outlined in paragraph 1.29 will mean, how the FCA anticipates prioritisation of efforts, how it will communicate this in a timely way to assist firms, in a way they can work this into their plans, which will need to be prioritised given the above. We welcome the opportunity to engage further with the FCA on this.

Further to this, our Members have assessed that a two-year time period from the publication of final rules is a more realistic timeframe for the following reasons:

1. Wholesale firms will each need to individually map the Duty uplift as against the existing Rulebook requirements, which requires an assessment Rulebook by Rulebook, resources and time and an end-to-end process;

2. In areas not previously subject to product governance rules and now subject to the Duty, manufacturers, distributors, and relevant platform providers will need to re-negotiate contracts, establish their respective roles and responsibilities, and establish processes to exchange the requisite information; firms will also need to re-visit outsourcing arrangements that impact in-scope products and services;

3. Wholesale firms will need to assess Management Information (MI) changes and begin to collect and assess that MI, and then implement meaningful Board reporting following the collection and analysis of data: this process requires significant time to implement and embed;

4. Wholesale firms will be implementing in a continually evolving retail landscape in a dynamic state given parallel HM Treasury and FCA proposals which impact consumer thresholds and the scope of

the UK regulatory perimeter, and for which firms are awaiting final rules: including FCA's CP 22/2 and HMT's consultation on 'Financial promotion exemptions for high-net-worth individuals and sophisticated investors' and HMT's pending update on the Overseas Persons Exclusion;

5. There are challenges around consistency of implementation across products, services and business lines which have operational implications for firms. In particular, for wholesale firms, there will be a sub-set of business within scope (for example, SME and small corporate MiFID retail business) which will need to be identified and remediated (and this will be on a product and service level basis): this will be operationally complex and may require in scope/ out of scope flags to assist staff in understanding the application, MI feeds and scope for testing and controls;

6. Given the implications for individuals (under COCON new conduct rule 4 and the enhanced expectations of senior management under COCON), individuals and firms need an adequate time frame to seek to ensure they can take reasonable steps to meet the requirements and expectations in advance of the deadlines, in the interests of fairness given the implications at an individual level.

Q17: Do you have any comments on our proposed approach to monitoring the Consumer Duty and the related draft rules and non-Handbook guidance?

Yes, please see below.

Firms recognise that they will need to review how they monitor their communications and relationships with clients. However, it is not clear how this would work in practice and the standards that firms should follow to meet this requirement. We welcome further guidance on this point.

We also note that in PRIN 2A.8.7 R and PRIN 2A.8.11 R, our Members suggest that the FCA removes *'or omissions'* given the open-ended nature of this requirement and lack of clarity around how a firm can assess omissions; it is not clear how to measure the impact and assess the causality (including for example for manufacturers). It would be more reasonable and practical for firms to monitor their actions and the sufficiency of those, and for the FCA to clarify separately in guidance the practical steps it expects of firms in relation to identifying omissions.

We also wish to illustrate a potential conflict between the guidance in PRIN 2A.2.8G, for firms where there is not an ongoing relationship, and the requirements for ongoing monitoring and review of consumer outcomes in PRIN 2A.8. We consider that a firm without an ongoing relationship should not be required to act to *avoid* harm which only later becomes foreseeable (PRIN 2A.2.8G). We are unclear how a firm with no end client relationship can conduct monitoring and indeed, what is the purpose or benefit of conducting that monitoring.

Q18: 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?

Yes, please see below.

We request that the FCA provides parameters around when and how in COCON 4.1.23 'failure to act' will not meet the consumer duty expectations.

We note that in COCON 2.4.8 (3) R, where there are recipients with varying vulnerability characteristics receiving a product or service, there may not be an obvious average retail concept. As stated above,

manufacturers will not usually have visibility at an individual client level, and it is hard to anticipate how this will work in practice in a distribution chain. For example, easier to read terms could be helpful to some neurodiverse audiences, but this would not assist a visually impaired client who might need braille or a format capable of conversion: presumably firms would need to therefore consider both in their materials? As a result, Members would welcome additional clarity from the FCA.

Q19: Do you have any comments on our cost benefit analysis?

No comment

Q20: Do you have any other comments on the draft non-Handbook guidance?

Yes, please see below.

We note that it would be useful for the non-Handbook guidance to include a clarification that it only applies to "retail" even when the terms customer / client are used, as this could help to clarify that the non-Handbook guidance does not apply to wholesale bank clients.

This could be repeated beyond section 2.3, for example by consistently referring to retail customers/consumers throughout, or by adding "retail" to 1.8 and 1.9 of the non-Handbook guidance as shown below:

> 1.8 In this guidance we use the term 'consumer' and 'customer' interchangeably to mean retail customers who are within the scope of the Consumer Duty and this guidance. The Consumer Duty applies to potential as well as actual ***retail*** customers of firms.
>
> 1.9 We use 'consumer' when talking about the wider ***retail*** group of those who use financial services. We use 'customer' when talking about an individual firm's ***retail*** customers or potential ***retail*** customers.

We would also suggest a signpost in 2.2 that the way the FCA uses "customer" and "consumer" throughout the guidance is explained in 1.8 and 1.9.

Q21: Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?

Yes, please see below.

1. For firms providing payment services in a wholesale distribution chain, please could the FCA provide examples of how PRIN 3.2.7R could apply i.e. what could constitute a firm being able to *"determine or materially influence retail customer outcomes".* It would also be helpful if, in addition to the example under 2.15, there could be another that considers a firm, which is a pure manufacturer, which only has relationships with other regulated firms and no direct retail interaction. It needs another example, other than communicating to customers or offering them support, which is the example in the box currently.

   Firms also welcome non-Handbook guidance on how firms can manage a scenario where a firm and client have different views on what is a good outcome. This could include good practice, and what a good outcome includes (and conversely what does not represent a good outcome).

Our Members also welcome specific examples of scenarios where a firm could be in compliance with existing product governance rules, but not with other aspects of the duty.

2. We also propose the addition of a new paragraph after 9.5 on page 187:

   "When a firm's business model means that its activities are out of scope, we would expect it to monitor changes to its current activities, to ensure that it either remains out of scope or that, if parts of its business change and come into scope, appropriate measures are taken. In terms of governance, the board of a firm that is out scope should review an annual assessment of the monitoring measures described in this paragraph and an assessment of how the firm's future business strategy may or may not be affected by the Consumer Duty. "

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