



ShareSoc

UK Individual Shareholders Society

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CP21/36: A New Consumer Duty: feedback to CP21/13 and further consultation

Introduction

ShareSoc is a not-for-profit organisation, representing and championing the interests of individual investors within the United Kingdom. The society has over 8,000 members, the majority of which fall within the scope of the proposed Consumer Duty as retail consumers. ShareSoc is a member of Better Finance and of the World Federation of Investors.

Our responses relate solely to shares and funds, and derivatives thereof.

Context

Over the past three years we have engaged actively with the FCA at both director and executive level. We believe that the FCA has changed substantially and is working to become a better and more effective regulator. The organisation still has many legacy issues to deal with, and these mean that the public image lags what is happening in the FCA today.

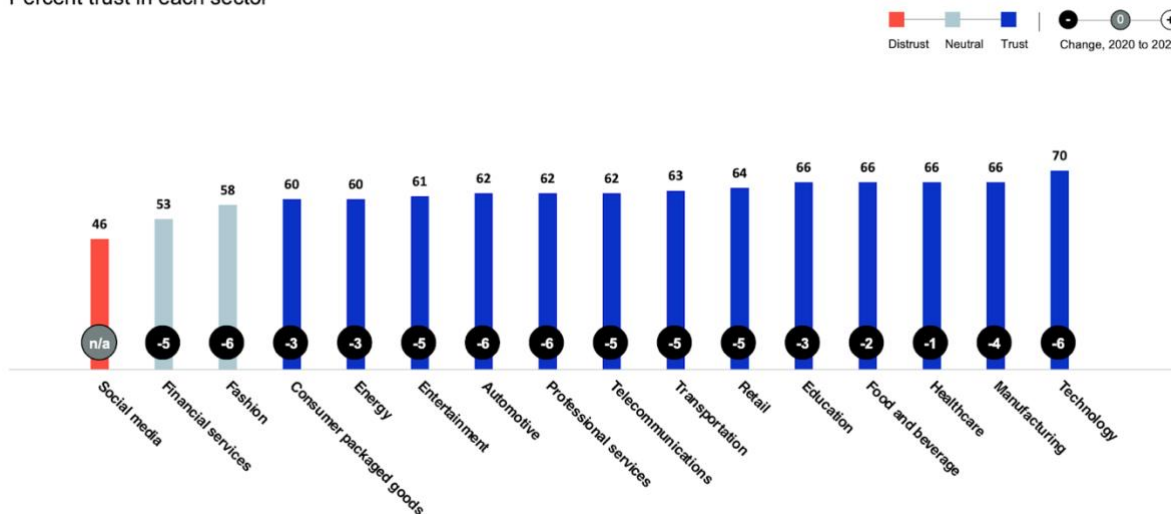
Where we have on occasion made criticisms (as in the ShareSoc Woodford Campaign) these have been made with the intent of improving the way the markets are regulated in the future.

There is valid cause for concern about the reputational integrity of the financial services sector. The highly credible 2021 Edelman Trust Barometer in Financial Services shows it to be the second most distrusted industry; second only to social media.

This should be a great concern for the sector's market participants, trade bodies, professional associations and regulators.

TRUST DECLINES ACROSS SECTORS

Percent trust in each sector



2021 Edelman Trust Barometer. TRU_IND. Please indicate how much you trust businesses in each of the following industries to do what is right. 9-point scale; top 4 box, trust. Industries shown to half of the sample. General population, 27-mkt avg.

Summary of Response

We welcome consultation paper CP21/36 and its proposed new Consumer Duty, which we believe will set *clearer and higher standards*, in accordance with the objective set out in para 1.11 of consultation CP21/13.

CP21/36 declares in Para 1.1:

“We want to see a higher level of consumer protection in retail financial markets, where firms compete vigorously in the interests of consumers. We also want to drive a healthy and successful financial services system in which firms can thrive and consumers can make informed choices about financial products and services.”

We comment as follows:

FCA comment	ShareSoc response
“We want to see a higher level of consumer protection in retail financial markets,	We agree with this objective, but are not convinced that the proposal raises the bar sufficiently.
where firms compete vigorously in the interests of consumers.	<p>We do not see competition as necessarily improving consumer outcomes. Competing “vigorously” has traditionally led to large marketing budgets and excessive costs. Competition for market share often drives a short-term, demand-led culture within providers of financial products and services.</p> <p>Vigorous competition in the energy market was supposed to ensure better consumer outcomes. We now know how that has ended. In financial services, providers often give an appearance of embracing competition when in fact complex pricing structures, which are impossible to compare from one</p>

	<p>firm to another (even when the product being promoted is relatively simple), serve only to confuse and frustrate best-value comparison.</p> <p>We agree that the duty should be in the interests of consumers. Firms' activities are too frequently in the interests of profit targets.</p>
<p>We also want to drive a healthy and successful financial services system in which firms can thrive</p>	<p>We think the FCA has historically been too cosy with the financial services industry it regulates. It has been too tolerant when mistakes occur and slow to shut down malpractice. We include examples in our response below.</p>
<p>and consumers can make informed choices about financial products and services.</p>	<p>There is a yawning gap in the level of financial education in the United Kingdom. Much of the educational content from the financial services industry is not independent, encourages over-trading and steers customers towards products with high fees.</p>

We believe that the proposal should be labelled as a **Duty of Care**. We do not understand why the FCA has not done this. We also believe it is not clear whether the FCA's central proposal is intended to create a duty of care. We believe this to be a failing in the proposal.

Our preference is for the proposal to be formally labelled a duty of care, and for its legal effect to be consistent with this label.

For too long, retail consumers of financial products and services have been treated unfairly. Too often, the financial services industry has exploited weaknesses in the financial education, knowledge and behavioural biases of customers to charge excessive fees and deliver unsuitable products.

We find it very disappointing that the current regime with its Principles and guidance on Treating Customers Fairly is not working, and we agree that radical change is required. For many firms, this will require a significant shift in culture and behaviour.

We believe that the proposal does not adequately address the needs of sophisticated individual investors, and we expect product and service providers to make conservative decisions when addressing this segment. This will be to the detriment of such investors.

Consumer issues differ between asset management, mortgages, credit, insurance and personal banking. We worry that an overarching Consumer Duty and cross-cutting rules may be disruptive to providers while not adequately address the idiosyncrasies/particulars of each market. We also worry that the new Principle and Rules overlap and duplicate existing regulation to an extent which further complicates an interpretation of the Handbook for those without specialist compliance knowledge.

The Draft Handbook Text and the Draft Guidance are complex and impenetrable; it is difficult to form a view of how they will work in practice. It may take years to establish what is and what is not acceptable, what is good practice and what is best practice. We believe this focus on rules to be an extension of the excessive codification which has been a hallmark of recent regulation within the UK and within the EU.

Para 2.5 of CP21/13 highlighted the perceived reticence on the part of the FCA to prosecute and enforce under the Principles unless there is a clear accompanying Rule breach. We believe that the time has come for simplification of the Rules and an

increased reliance on, and direct enforcement of, the Principles. This requires further cultural change at the FCA.

There are significant gender diversity issues in respect of investing. Women are under-represented in the industry. Women are less likely to invest in shares. They tend to be more risk averse and have a greater preference for interest bearing cash accounts rather than shares and funds. See

<https://www.bnymellonim.com/uk/en/intermediary/inclusive-investment/> for further background and data, e.g. "Currently 86% of asset managers admit their default investment customer is a man and 73% state that their products are primarily aimed at men." It is desirable that these issues are addressed a.s.a.p.

We would be pleased to meet with you to explain further our responses.

Yours faithfully,

Cliff Weight
Policy Director
ShareSoc

Questions in this Consultation Paper and our responses

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

We broadly agree with the proposed retail scope, and with the continued application of Principles 6 and 7 to out-of-scope consumers. We are concerned that HNW investors may see a reduction in product and service availability due to confusion and / or conservatism on the part of providers (we have seen this in the past in relation to product and research availability post MiFID II), and would like to see an option for HMWIs to elect to be treated as out-of-scope on the basis of agreed exclusion criteria. SMEs could be treated in the same way.

We are pleased to see that prospective customers will be within scope: this opens up the theoretical possibility that the FCA might enforce against, for example, a misleading financial promotion without having to wait for it to cause identifiable harm to a specific consumer.

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?

We agree with the proposed application, although we feel that this is already largely addressed within PROD.

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?

The asset management industry has had 6 years since the FCA published its 2016 interim report. This highlighted poor value for money and high profit margins. The asset management industry has had more than enough time to get its house in order. Any further delay should be avoided.

We acknowledge that existing contracts that have already been paid for should not be retrospectively changed and we would not expect firms to give up any contractual rights that they enjoy.

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

We do not identify specific hurdles that would prevent firms from following the proposed approach.

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

1. We commented in our response to CP21/13 Question 5 that, of the two alternatives provided we preferred Option 2:

Option 1: 'A firm must act to deliver good outcomes for retail clients'

Option 2: 'A firm must act in the best interests of retail clients'

Option 2 is the stronger formulation and is most consistent with the creation of a legal duty of care. We are concerned that consumers will be unable to distinguish between an unforeseeable bad outcome and a foreseeable one. Consumers measure financial outcomes in absolute terms.

The chosen formulation will lead to confusion and will encourage the application of regulation with the benefit of hindsight. What should matter is the state of mind, intention and attention of the product provider, not the empirical performance of the product or service.

2. We reiterate our preference for the adoption and enforcement of Principles in preference to heavily codified Rules.

Historically, the FCA has shown a reluctance to enforce its Principles and most notably a reluctance to prosecute those who have not observed the Principles. The FCA now proposes a detailed set of Rules, which appears to be its preferred approach to enabling it to better enforce the existing Principles.

We are not convinced this is best route. Any rule-based approach is liable to be stretched to the limit by some industry players, and then the minimum standard becomes the norm. We would prefer a structure that encourages best practice, facilitates rigorous enforcement, discipline and prosecution of offenders, and leads to all other industry players improving their approach.

3. We do not understand the 'cross-cutting rules'. We think that introducing an approach that is impenetrable to the customer is not the best approach. It should be possible to explain what the FCA is trying to achieve in simple terms that all investors should be able to understand.

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

Yes.

Q7: 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?

No. Since Principles 6 and 7 are disapplied where the Consumer Duty arises, the Consumer Duty is effectively a discrete regulatory path. Handbook and non-Handbook material should reflect that and should be amended / duplicated / disapplied as appropriate.

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

We do not understand the need for the cross cutting rules. We think that introducing an approach that makes no sense to the customer is not the best approach. It should be possible to explain what the FCA is trying to achieve in simple terms that all investors should be able to understand.

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?

We agree the proposed requirements, but reiterate that these are heavily duplicative of existing PROD requirements in the case on the investment market.

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?

We agree with the proposed requirements in that they create an onus on providers and distributors to assess the value delivered to the consumer.

In addition to the proposals, greater levels of financial education are required for (many/most) investors to be able to assess value versus price. Disclosure of fees and costs, including transaction costs, needs to be far better.

The way in which firms present fees and costs is often designed deliberately or by default to confuse the market. All too often direct comparisons between providers and the products and services offered are difficult or impossible.

Some investment products are certainly complex. However, there are many products which are suitable for the vast majority of investors and which are relatively simple. We would like to see financial products categorised by the regulator on the basis of their relative complexity. For the simplest ones there should be clear guidance (perhaps even rules) on how fees and charges are presented so that comparison by consumers is possible.

We worry that in the meantime (some people/firms in) the industry will continue to exploit investors.

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

We support the proposals as summarised in 9.38. However, as noted above, this should be accompanied by a focus on improving the financial education of consumers.

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

We support the proposed requirements.

We agree with the proposed change to refer to ‘unreasonable barriers’. The steps in a customer journey must have a purpose aligned with the Consumer Duty. This can include positive friction, for example to make customers aware of risks or prevent scams. Unreasonable barriers are those which frustrate the customer’s use of the product or service without reasonable explanation.

Individual investors continue to have problems moving from one platform to another, for example in the case of in specie transfers (particularly where a platform has negotiated a special class of share that is not available elsewhere), and unreasonable delays in transferring funds.

Jarvis Nominees recently charged Cliff Weight £64 to vote his shares (beneficially held for Cliff Weight via nominee) at a recent AGM. Merryn Somerset Webb in her book Share Power has highlighted the importance of voting; but many platforms put up unreasonable barriers to prevent or make it difficult to vote shares thus reducing shareholder democracy and the share power.

Stewardship, and the ability to exercise shareholder rights, is an important and often neglected part of any investor service.

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

There are specialist firms who focus on vulnerable investors, such as Frenkel Topping. In many cases these firms will be better placed to provide for special requirements than a broad market firm. This should be recognised in the regulatory framework.

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

There are significant gender diversity issues in respect of investing. Women are under-represented in the industry. Women are less likely to invest in shares. They tend to be more risk averse and have a greater preference for interest bearing cash accounts rather than shares and funds. See <https://www.bnymellonim.com/uk/en/intermediary/inclusive-investment/> for further background and data, e.g. “Currently 86% of asset managers admit their default investment customer is a man and 73% state that their products are primarily aimed at men.”

It is desirable that these issues are addressed a.s.a.p.

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, for now.

The FOS provides an attractive alternative to the PROA, and direct / class actions are available for serious breaches of the law, including FSMA, e.g. S90A. This avoids opening a Pandora's box to US style litigation, which might happen if a PROA were enacted.

The immediate introduction of a PROA could leave firms exposed to sizable liabilities; however the FCA should commit to a timescale for reviewing the possible introduction of a PROA once the Consumer Duty has been tested and the industry has had time to become compliant.

A PROA will undoubtedly increase the propensity for group legal redress actions in the UK. This is a two-edged sword; the redress industry is frequently parasitic, providing little net value to the investor community, but at the same time the threat of consumer action will undoubtedly influence the mindset and culture of product and service providers.

A PROA is necessary on those cases where redress exceeds the capacity of FOS / FSCS to pay compensation. It might be possible to predicate a PROA on prior successful action by the FCA and / or FOS.

We disagree with suggestion that the ability of individual to bring private action will increase costs for firms. Firms that change their behaviour will not incur such costs. Firms that fail to change may find themselves litigated out of business.

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

We suggest the start date for investments should be 6 April 2023, the beginning of the tax year, and not the 30 April 2023. Many investment decisions have tax complications and having two sets of rules in one tax year would introduce unnecessary complexity and additional record keeping.

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

We support your approach and note that you say the FCA will “We also want to take a bolder approach to communicating our expectations to firms, consumer organisations and wider stakeholders, particularly during the implementation period. This could include what we are seeing through any thematic and multi-firm work, as well as our authorisation, supervision and enforcement activities. It could include further examples of good and poor practice, and anonymised case studies. “

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?

We support this. Our view is that individuals make decisions and need to be able to be held to account.

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

We believe that the benefits to consumers may be understated in your analysis, but this is a purely subjective view.

Q20: Do you have any other comments on the draft

We believe that the proposal should be labelled as a **Duty of Care**. We do not understand why the FCA has not done this. We also believe it is not clear whether the FCA's central proposal is intended to create a duty of care. We believe this to be a failing in the proposal.

Our preference is for the proposal to be formally labelled a duty of care, and for its legal effect to be consistent with this label.

We are pleased to see this Consumer Duty expressed in terms of outcomes. Historically there has been too much focus on process and not enough on outcomes. Consumers want outcomes and are less worried about process as they do not have the time or knowledge to assess process.

We are, however, concerned that retail consumers of financial services will not be able to distinguish between financial loss and negative outcome. Investing involves risk, and product and service providers cannot, and must not, become responsible for guaranteeing risk outcomes. It is essential that language is formulated which underlines this distinction in the perception of the consumer.

Consumer friendly explanations

We expect firms to move away from lengthy boilerplate language towards a simpler, more consumer-friendly explanation of products and services and their associated risks, costs and reasonable expectations.

The difficulty is that a detailed understanding of complex products often requires a significant and technical explanation. We expect firms to move toward the production of high level (but clear and accurate) consumer guides sitting above detailed technical documents, for example as already seen in the insurance industry.

An example of a possible positive future outcome is that investment advisers would examine some their fundamental assumptions from time to time ,which is a positive.

The FCA's 2016 Interim Asset Management Market Study highlighted the problems of high charges, high profit margins and poor value in many cases.

The concept of asking product and service providers to consider value to the consumer is laudable, and signals an intention on the part of the FCA to continue to move the industry away from a demand led product design mentality towards a value proposition, which we support.

However there are perimeter and definition issues which will prove problematic. The proposals potentially have the effect of banning alternative trading mechanisms such as spread betting and CFD on the basis of cost (in aggregate the outcome for CFD users has been shown to be poor), although for certain investors these instruments may represent a positive utility.

We welcome the continued focus on value and its extension throughout the distribution chain.

An example in the investment and savings sector of improved outcomes might be:

- As well as performance data there would also be information on tracking error. We believe the statistical methods for collecting data on tracking error are inadequate at present and we have separately proposed to meet the FCA to explore how improvements can be made in this regard.
- Information on portfolio turnover (e.g. average length shares held, % held more than say 1, 3, 5, 10 years) and benchmarks that reflect the investment strategy of a fund or investment company (e.g. if the portfolio consists of a mixture of large companies and 35% of small high tech/biotech/health companies, then a FTSE 100 benchmark should not be the only benchmark shown). Often more than one benchmark is needed to provide comparisons that retail investors want and need.

Value is a difficult concept to police, in particular because it is inextricably linked in the mind of many consumers with financial performance.

We hope that this initiative will continue to highlight egregious business models.

We caution that an excessive focus on price can have the effect of increasing barriers to market entry. This can result in reduced competition and can increase the pricing power of the larger incumbent producers.

Lastly, we take the opportunity to underline that all individual investors are not alike, and we caution against a nanny state approach which might have the effect of excluding sophisticated market participants (who do not class as professional investors) from access to certain products, services and markets. Such exclusion might be active (through failing to create appropriate distinctions) or passive (through creating an impression within the industry that such access is frowned upon).

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

Yes. We would be happy to meet with you to explain our views and give you examples.

