Bar Council response to FCA consultation paper CP21/13 on A new Consumer Duty

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the FCA consultation paper on A new Consumer Duty.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Introduction

4. The Bar Council does not commonly respond to FCA consultations, principally because it is relatively rare that such consultations engage matters of law reform on which it is able to offer an informed response. We do not express a view as to the desirability or necessity of a change in the FCA Principles or Rules in this area as these are matters which are largely beyond our remit.

[1] CP21/13: A new Consumer Duty (fca.org.uk)

5. However, we consider the Bar Council can provide assistance in relation to the issues arising from characterisation of the proposed duty as a "duty of care" and as to whether there should be a private right of action in relation to the same. This response is therefore limited to those two areas. We also make some comments about the extent to which the operation of the new duty may be retroactive.

A duty of care

6. Question 12 askes the following: *Do you agree that what we have proposed amounts to a duty of care? If not, what further measures would be needed? Do you think it should be labelled as a duty of care, and might there be upsides or downsides in doing so?*

7. At paragraph 2.31 the Consultation Paper states that the proposals *meet the requirement of the Financial Services Act 2021 for us to consult on the level of care firms provide to consumers, including whether we should make general rules providing for a duty of care.* This is a reference to section 29(1) of the Act, which states *The Financial Conduct Authority must carry out a public consultation about whether it should make general rules providing that authorised persons owe a duty of care to consumers.*

8. The Consultation Paper defines a duty of care in the following terms[2]: *What constitutes a 'duty of care' may have different meanings, and our existing rules already create different duties of care for firms. The generally accepted legal meaning of a duty of care is an obligation to exercise reasonable care and skill when providing a product or service and this is, for example, reflected in Principle 2's requirement that a firm must conduct its business with due skill, care and diligence* (paragraph 2.31).

9. Our key concern in this context is the need to ensure that the use of the language of duty of care does not obscure the true policy intention. For example, in the context of liability for negligence, the "generally accepted legal meaning" referred to above would not be an adequate description of the duty of care. The editors of *Clerk & Lindsell on Torts* express the concept in the following terms:

The duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly. Since damage is the gist of the action, what is meant by "duty of care situation" is that it has to be shown that the courts recognise as actionable the careless infliction

[2] It is not defined in the Act.

of the kind of damage of which the claimant complains, on the type of person to which he belongs, and by the type of person to which the defendant belongs. (paragraph 7-07)

10. It is plainly not in the FCA's gift to extend the scope of negligence liability at common law – that is a matter for the Courts – but the terms in which a statutory obligation is described and the manner in which it "fits" within the regulatory structure plainly do matter. A Court is likely to take into account these factors in determining whether there is any liability in negligence (see, for example, the decision of the Court of Appeal in *CGL Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 2137). Perhaps even more importantly, the way in which the FCA characterises the "duty" will influence those who may seek to litigate claims in due course. In the context of consumer lending, it may also have consequences for claims brought under ss. 140A-C of the Consumer Credit Act 1974 (the "unfair relationship" provisions). We would therefore suggest that it is vital that the FCA makes clear what its use of the phrase "duty of care" is intended to convey and, perhaps even more importantly, what it is not intended to convey.

11. We note that in one of the documents preceding the current consultation paper consideration was given to the pros and cons of creating a *statutory* duty of care, with (we presume) a concomitant right of action in tort for breach of that duty[3], but as that does not appear to be a viable option[4] we do not express a view as to whether such a cause of action is necessary or desirable.

A private right of action

12. The Consultation Paper asks the following questions about a private right of action ("PROA"):

Q21: Do you have views on the PROA that are specific to the proposals for a Consumer Duty?

Q22: To what extent would a future decision to provide, or not provide, a PROA for breaches of the Consumer Duty have an influence on your answers to the other questions in this consultation?

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[3] FS19/2: A duty of care and potential alternative approaches - summary of responses and next steps at paragraphs 3.13-3.15.

[4] The Consultation Paper states, at paragraph 2.29: *We had previously considered, in FS19/02, some stakeholders' calls for a statutory duty. But, as we explained in that paper, we concluded that there were insufficient grounds for asking Parliament to make changes to primary legislation.*

13. Section 138D of the Financial Services & Markets Act 2000 provides a right of action to "private persons" for a breach of relevant FCA Rules. That cause of action is relatively well understood and could therefore provide for a PROA in relation to those aspects of the Consumer Duty which are reflected in applicable Rules. It would not provide a PROA for any aspect which was expressed by way of Principle[5].

14. The proposed Consumer Duty is broad and outcome-focussed. It seems to us that a private right of action for breach of *any* aspect of that Duty will be similarly broad and loosely defined. In our view that is likely to be productive of litigation, and we consider that the fears expressed by some respondees to the previous FCA papers that it would create a risk of substantial claims management activity are soundly based. CMCs are, of course, now subject to FCA regulation, and therefore previous instances of poor practice may not be reflected in the future. However, it seems to us that a realistic evaluation of the desirability of a PROA, particularly one which goes beyond the current structure, has to include the possibility that it will be productive of litigation which may not provide good outcomes for consumers, or for those customers of regulated firms who may ultimately have to foot the bill for increased costs as a result.

15. The potentially uncertain scope of the Duty (and hence of any PROA) is also relevant in terms of the impact it may have on existing relationships between authorised firms and customers. We note that the Consultation Paper stresses that *the Consumer Duty would not* a*pply retrospectively to past business. Nor do we intend to judge practices with the benefit of hindsight* (paragraph 2.37(f)). However, the extent to which this masks an inherent complexity was made clear in the FCA webinar, in the course of which David Geale (Director of Retail Banking and Payments) made the following remarks:
So the Consumer Duty applies to firm's future conduct. This does include thinking about the needs of existing customers and ensuring the future treatment of those existing customers is consistent with the Duty. But to be clear, it will not apply to past business, and we won't be judging firms with the benefit of hindsight. So it really is about that future treatment of customers. But as I say, that includes existing customers. So again, as I say, it will of course be relevant to you with your forward engagement with those consumers and with those customers…

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[5] Other than to the extent set out in the decision of Ouseley J in *Regina (British Bankers Association) v Financial Services Authority and another* [2011] EWHC 999 (Admin).

16. The Courts have considered this problem before, in the context of the unfair relationship provisions in the CCA. In *Barnes v Black Horse Limited* [2011] EWHC 1416 (QB), the Court decided that "completed" related agreements (which were outside the scope of the provisions) could still be taken into account under s.140A(1) in deciding if the consequent consolidating agreement gave rise to an unfair credit relationship. It therefore seems likely, unless the position is made clear one way or the other by the FCA, that the Consumer Duty will give rise to litigation to decide to what extent it does have this form of quasi-retrospective effect.

Bar Council[6]

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For further information please contact

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[6] Prepared for the Bar Council by the Law Reform Committee