

The FCA's Consumer Duty consultation; and why a Private Right of Action is necessary

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10 February 2022 - Mark Bishop

Why are we here today?

- FCA consultation - closes 15 Feb
 - ‘Consumer Duty’ is not a duty of care (but PRoA gets very close)
 - ‘Consumers vs industry’ (Q223) on PRoA - FCA currently siding with industry
 - Consumer groups MUST respond, and speak with one voice, to stand any chance of winning on this
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Why is the FCA against a PProA?

- Two possible explanations:
 - Disintermediation: PProA means consumers can bypass complacent/conflicted/captured regulator and impose negative externalities on bad actor firms (and individuals...)
 - Transition: Industry fears non-compliance in initial period of Consumer Duty, doesn't want attendant liabilities
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How can we challenge these concerns? (Q1/Q15/Q17/Q19)

- Disintermediation: challenge them to admit it (Rathi already has!); show that consumers' empowerment is necessary
 - Transition: propose a reasonable delay to implementation of PRoA
 - Both: continue to challenge legitimacy of consultation, misdirection of respondents
 - Landing zone: FCA announces a delayed PRoA
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Other important points in the consultation

Q2 Distribution chain

- Firms must be responsible for counterparties they introduce, and not just for their own (in)actions
- Example: Link liable for 'appointing' Woodford Investment Management over WEIF
- Authorised firm must be responsible for unauthorised (eg promotions, ARs)

Q3 Existing products

- Firms must be expected to give up expected contractual rights where these conflict with Consumer Duty
- Example: the purchaser of a mortgage book cannot continue to extract unreasonable SVR interest from mortgage prisoners
- FCA [Mortgage Prisoners' Review](#) implied Consumer Duty would help them; it must do so

Q5 Consumer principle

- Consumer Duty (and PRoA) must apply to all *authorised persons* (individuals as well as firms) and to all *consumers* (whether clients or not)
- FCA attempts to parlay one to the other is shameful; it may also be a breach of [Section 29](#) of the Financial Services Act 2021

Other important points in the consultation

Q8 Cross-cutting rules

- A 'good outcomes' test cannot be applied only retrospectively; it must be used, and breach be determined, as soon as it becomes *reasonably foreseeable* that an outcome is likely to be bad

Q9/Q11/Q12

- Manufacture-distribution model ignores a third leg of the tripod: *delivery*
- This may imply that the regulator is emphasising what happens before and at point of sale and ignoring the lengthy process of delivering as promised
- Comms must be ongoing when appropriate (eg products)
- Exit fees unacceptable!

Q10 Price and value

- We're concerned that the FCA doesn't expect the Consumer Duty to prevent firms charging different prices to consumers in different circumstances
- We accept for example that the risk of insuring a driver may vary with age and experience; but not by choice of channel, browser or email provider
- Vulnerability proxies

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