

Ref: FCA's Consultation on a New Consumer Duty

Link to consultation: <https://www.fca.org.uk/publications/consultation-papers/cp21-13-new-consumer-duty>

BETTER FINANCE response to UK FCA's Consultation on a New Consumer Duty

About BETTER FINANCE

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

Introduction

The UK Financial Conduct Authority (FCA) is looking for feedback on the proposal for introducing a new consumer duty related to products and services sold to retail clients. The consumer duty would require companies to:

- Look at the outcomes that the consumers would expect from products and services
- Facilitate rather than hamper outcomes
- Assess effectiveness of their actions

As stated in the consultation paper, the objective of the Consumer Duty is to ensure that products and services sold to consumers are fit for purpose.

The Consumer Duty will be based on the following 3 aspects:

- **A Consumer Principle**, which sets a clear tone and uses language that reflects the overall standards of behaviour we want from firms. The conduct this Consumer Principle requires would be developed in the other elements of the Consumer Duty.¹
- **'Cross-cutting Rules'** which develop our overarching expectations for common themes that apply across all areas of firm conduct,²
- **The 'Four Outcomes'**: a suite of rules and guidance setting more detailed expectations for firm conduct for 4 specific outcomes representing the key elements of the firm-consumer relationship.³

¹ <https://www.fca.org.uk/publication/consultation/cp21-13.pdf>

² Ibid.

³ Ibid.

General duty of care and private right of action

BETTER FINANCE welcomes the proposal of the FCA on consumer duty. We consider general duty of care to be at the core of investor protection in securities markets. In fact, in the BETTER FINANCE report on “Sustainable Value for Money”⁴, BETTER FINANCE and CFA Institute embarked on a project to analyse what industry and consumer stakeholders understand by **sustainable value for money** and how this can be achieved. It examined the results of a survey that took into consideration both consumers and professionals in capital markets and addressed, among others, **duty of care** that could be potentially be seen as similar to the Hippocratic oath, i.e. a commitment to always act in the best interests of the investors. Looking at BETTER FINANCE’s survey, the majority of respondents (65%) consider that all financial advisers should have such duty of care (and the majority agrees that it should be mandatory).

At the same time, we would like to recall the importance of **the right to private redress** which is a fundamental part of consumer protection mechanism that needs to be attached to the definition of duty of care. The concern of BETTER FINANCE and its associate member – Transparency Task Force - is that the consultation fails to:

- give rise to the right of private action by parties due to a breach
- and to strictly connect the right to private action to the definition of duty of care.

The advantage for consumers regarding the definition of duty of care is to provide to consumers who suffered a loss due to the action of determined actors the right to get damages from them. Unfortunately, in the proposed by FCA’s duty of care definition, this doesn’t seem possible as it seems that receiving compensation would be only possible if FCA imposes a restitution order or via a voluntary redress.

The main concern of BETTER FINANCE and its member association Transparency Task Force is that the consultation could fail to determine how financial firms would behave in the future and at the same time it would dispossess consumers of the right to private action which is an extremely important aspect of duty of care.

Consumer principles: consumer outcomes & consumer best interests

The FCA proposes two alternative wordings for its Consumer Principle:

- *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”*

First of all, BETTER FINANCE is concerned with the use of the term ‘firm’ as we believe that a duty of care should be owed by all those *authorised by the FCA* - individuals as well as firms.

Secondly, we are concerned with the term ‘clients.’ We think that the term ‘consumers’ should be used, and defined as in Section 1G of Part 1A Chapter 1 of the Financial Services Act 2012.

As regards the EU financial markets legislation, we have observed an important issue regarding the lack of a proper definition of “best interest” and how investments firms are expected to ascertain their duty. In the absence of any specific indication⁵ as to what should be understood through “best interest” of a client is left it up for investment firms to determine it on a case-by-

⁴ <https://betterfinance.eu/wp-content/uploads/BETTER-FINANCE-CFA-Institute-Report-on-SUSTAINABLE-VALUE-FOR-MONEY-201119.pdf>

⁵ at Level 1-MiFID II

case basis. An exhaustive definition could harm retail clients and even be contrary to the target market, suitability, and appropriateness assessments, which all build on the idea that generalisation leads to mis-selling. However, **guiding provisions** would be beneficial for retail clients, such as general principles, which investment firms should take into account when ascertaining the client's best interest.

Therefore, BETTER FINANCE advises to provide a clear guiding provision regarding the "best interest":

"Best interest of consumers means the ultimate purpose or target of achieving the outcome expectations from a financial instrument at the end of consumers' investment horizon or desired holding period; therefore the provider's outcome objective and recommended holding period must match those of the consumers. "Outcomes" must be specified in terms of value for money for the consumers."

Nevertheless as regards the preference for option 1 and 2, 'deliver good outcomes' and 'act in best interests', we believe that outcomes are more important than intentions. However, since 'best' is better than 'good', we would prefer an option foreseeing 'delivering **best outcomes**'. We do acknowledge that there is usually a gap, sometimes very long, between the firm's actions and the outcomes for consumers, therefore we would recommend a test of *reasonable foreseeability*: **'a firm must deliver the best (in terms of value for money) reasonably foreseeable outcome for consumers.'**