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Alerter

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The New Consumer Duty

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The New Consumer Duty has been described as a "paradigm shift" by the FCA. But what will it actually do? In this alerter, we consider the duty in the context of mortgages and cryptoasset advertising - two of the issues of the day - as well as the broader picture of actionability of the new duty, which will apply to all firms affected.

INTRODUCTION

1. The new Consumer Duty is now live. It represents arguably the most significant change to the consumer law landscape since the implementation of the Consumer Rights Act on 1 October 2015.

2. In July 2022, the Financial Conduct Authority ("**FCA**") published its final rules and guidance for the new Consumer Duty. Those rules came into effect on 31 July 2023.

3. The new Consumer Duty is expressed in a single new Principle, set out in r.2.1.1(12) in the Principles for Business module of the Handbook ("**PRIN**"):

> "*Principle 12: A firm must act to deliver good outcomes for retail customers.*"

4. Principle 12 is accompanied by the new PRIN 2A, which features a suite of new rules and guidance setting out detailed expectations for firm conduct. It includes three 'cross cutting' obligations at PRIN 2A.2 (the "**Cross-Cutting Obligations**"), which set out the "*overarching conduct which firms*

must demonstrate" (PRIN 2A.1.10R). They are to: act in good faith; avoid foreseeable harm; and enable and support retail customers in pursuing their financial objectives. There are also four outcomes as set out in PRIN 2A.3–6 (the "**Outcomes**"), which are as follows:

- governance of products and services,
- price and value,
- consumer understanding, and
- consumer support.

5. The overall aim is to further the FCA objectives of consumer protection and effective competition.

6. The reasons given for the new Consumer Duty are fourfold (PRIN 2A.1.9G):

   a. Consumers typically face a weak bargaining position in their relationship with firms;

   b. They are susceptible to cognitive and behavioural biases;

   c. They lack experience or expertise in relation to products offered through retail market business; and

   d. There are frequently information asymmetries involved in retail market business.

7. The new Consumer Duty has been described as a "paradigm shift", and certainly places higher standards on firms in their relationship with consumers. In this article, we aim to illustrate the application of the Duty by reference to three issues which solicitors may find themselves considering over the coming months: (i) mortgage arrears; (ii) crypto asset advertising; and (iii) actionability of the Duty.

Mortgages

8. In the current political and financial climate, borrowers are facing ever-increasing costs of borrowing as interest rates continue to climb. Such difficulties will inevitably be particularly pronounced in the secured lending sector, such that mortgage lenders will see – if they have not already – increased levels of customers in financial difficulty and default. Effectively managing and resolving such issues is likely to represent the first and most significant application of the Consumer Duty for many firms.

9. It is noteworthy that the FCA already has the application of the Duty in this context well in-mind. In its "Dear CEO" letter of 3 February 2023 it noted:

> *While our work on the duty pre-dates the cost-of-living crisis, it is particularly important while consumers face increasing pressures on their household finances. …the crisis underlines the need for high standards and strong protections. It is more important than ever that consumers can make informed, effective decisions, act in their interests and pursue their financial objectives.*

10. It is therefore reasonable to suppose that the regulator will have a close eye on how firms apply the Duty in this context over the coming months.

11. It is to be borne in mind that mortgage firms already owe sector-specific obligations to customers in financial difficulty pursuant to MCOB 13. The rules and guidance therein remain the primary source of firms' obligations in this context. However, the Consumer Duty requires firms "*to go beyond*" those rules and guidance, to "*test, monitor and adapt communications*" to ensure they satisfy the Outcomes. Firms should therefore first look to comply with MCOB 13 and then consider what further is required by the Consumer Duty. The "Dear CEO" letter in particular noted the specific application of the Consumer Duty to consumers consolidating unsecured

debt into a mortgage. To do so is likely to increase the term over which interest is to be paid and default puts the consumer's home at risk. Information about such decisions must be tailored to the characteristics of those intended to receive them, including characteristics of vulnerability.

12. Likewise, the regulator has highlighted practices such as accepting token payments of less than the interest accruing each month as potentially giving rise to "significant harm" by reason of an escalating outstanding balance. This issue becomes increasingly acute as interest rates continue to rise. Under the Consumer Duty, firms will need to act to avoid foreseeable harm and equip customers to make timely and informed decisions. They will also need to consider whether offering payment reductions of that type to customers in financial difficulty truly represent fair value. See §7.27, FG22/5.

13. In practical terms that will require firms, before simply agreeing to accept token payments, to consider the longer-term implications of doing so. If the ultimate result is likely to be a far less sustainable debt, that will be relevant both to Cross-Cutting Obligation to avoid foreseeable harm under PRIN 2A.2.8R and the firm's requirement to undertake a value assessment pursuant to PRIN 2A.4.8R under the fair value Outcome.

14. Crucially, however, Principle 12 and the Consumer Duty is not intended to create a fiduciary relationship between a firm and its customer where one would not otherwise exist (PRIN 2A.1.11G).

Cryptoassets

15. In a less reported development, the new Consumer Duty will apply to authorised firms communicating or approving cryptoasset financial promotions, as part of the financial promotion rules for cryptoassets, due to come into effect on 8 October 2023.

16. It is interesting to note that the Consumer Duty will only apply to MLR-authorised firms, meaning those business registered with the FCA under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("**MLRs**"). The decision to not apply the Consumer Duty to unauthorised MLR-registered firms communicating their own promotions is based on the lack of rule-making power held over unauthorised MLR-registered firms (§4.29, PS23/6).

17. It is worth bearing in mind that, in terms of the assessment of "reasonableness" under the Consumer Duty, factors relevant to the assessment must include (FG22/5, §4.17-4.19):

    a. The nature of the product or service being offered (which includes, among other things, the risk of harm to customers, complexity of the product or service, and the relative utility to the customer of the product).

    b. The characteristics of customers in the relevant target market (which includes their resources, degree of financial capability or sophistication, and known or reasonably foreseeable characteristics of vulnerability if a firm knows or should know about it).

    c. The firm's role in relation to the product or service.

18. These factors will require serious navigation by firms in the cryptosphere, who are dealing in an inherently risky product with a good deal of misinformation already out there.

19. However, before a firm even gets to the new Consumer Duty, there are only four routes to legally promoting cryptoassets to consumers (§1.15, PS23/6):

    i. The promotion is communicated by an authorised person.

ii. The promotion is made by an unauthorised person but approved by an authorised person. Legislation is currently making its way through the UK Parliament which, if made, would introduce a regulatory gateway that authorised firms will need to pass through to approve financial promotions for unauthorised persons.

iii. The promotion is communicated by (or on behalf of) a cryptoasset business registered with the FCA under the MLRs in reliance on the exemption in Article 73ZA of the FPO.

iv. The promotion is otherwise communicated in compliance with the conditions of an exemption in the Financial Promotion Order.

20. Promotions made outside of these four routes is a breach of section 21 of FSMA 2000: a criminal offence punishable by up to two years in prison.

21. What implications will the new Consumer Duty have for cryptoasset advertising? There may be far less of it. According to the FCA's website, prior to the introduction of the marketing rules for cryptoassets, the ASA (Advertising Standards Authority) had already banned a number of promotions, including billboards by Luno and a sponsor of Arsenal Football Club. The FCA "*will continue to work with ASA*", suggesting that the new rules will entail an even harder line on the trivialisation of crypto to the mass market. The new Consumer Duty also goes further than simple advertising, and requires firms to consider the "*needs, characteristics and objectives*" of the target group.

22. While the rules may be seen as a maturing of the market with the goal of protecting consumers, others may see them as an overreach that could stifle innovation and limit marketing opportunities. There can be no doubt that firms entering the market, or without sophisticated operational teams, will face a minefield of advertising and financial regulation just to communicate

with potential customers. Such firms would be well advised to consider their position carefully, in light of the implications of a FSMA breach.

Actionability of the new Consumer Duty

23. Finally, firms will now inevitably begin to see complaints and litigation alleging non-compliance with the Consumer Duty. Crucially, it does not introduce any private law right of action; it forms part of the Principles which are non-actionable. Instead, the FCA has indicated that it is "*allowing industry time to embed the Duty without the prospect of private action*" but will keep the position "*under review*" ((§11.1, PS22/9).

24. However, there may be other routes by which the Consumer Duty could be relied upon by consumers. Most obviously, it may be relevant to the standard of care required of a financial services provider pursuant to the implied term of reasonable care and skill imposed by s.49 of the Consumer Rights Act 2015. Indeed, in *Seymour v Caroline Ockwell & Co* [2015] EWHC 1137, at §77, regulatory standards were described as "*strong evidence as to what is expected*" under the implied term.

25. Similarly, in the context of consumer credit, it is likely to be relevant to a court's determination of an unfair relationship allegation pursuant to s.140A of the Consumer Credit Act 1974. For example, per *Kerrigan v Elevate Credit International Ltd t/a 'Sunny' (In Administration)* [2020] EWHC 2169 (Comm), at §190: the "*line drawn by the FCA*" in other parts of the Handbook were considered to provide at least a "*starting point*" if not "*a powerful factor*" in resolving an unfair relationship allegation. Certainly, "*when the rules are breached in a substantive way, it is likely to be difficult for the Defendant to show the relationship was fair.*"

26. However, the strength of such analysis in circumstances where the regulator has deliberately decided against granting a private law right of action remains to be seen. See, for example, *Green v Royal Bank of Scotland plc* [2014] Bus LR 168, at §23.

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