



## **Response by TISA to CP 21/36 A New Consumer Duty**

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## About TISA

**The Investing and Saving Alliance (TISA)** is a unique, rapidly growing membership organisation for UK financial services.

**Our ambition is to improve the financial wellbeing of all UK consumers.** We do this by convening the power of our broad industry membership base around the key issues to deliver practical solutions and devise innovative, evidence-based strategic proposals for government, policy makers and regulators that address major consumer issues.

TISA membership is representative of **all sectors of the financial services industry**. We have **over 200-member firms involved in the supply and distribution of savings, investment products and associated services**, including the UK's major investment managers, retail banks, online platforms, insurance companies, pension providers, distributors, building societies, wealth managers, third party administrators, Fintech businesses, financial consultants, financial advisers, industry infrastructure providers and stockbrokers.

As consumers, the financial services industry and the economy react to and recover from the effects of the pandemic, the importance of the three key pillars of work that TISA prioritises has never been more apparent:

- **Strategic policy initiatives** regarding the financial wellbeing of UK consumers & thereby enhancing the environment within which the industry operates in the key areas of **consumer guidance, retirement planning, later lifetime lending, vulnerable customers, financial education, savings and investments**.
- TISA is recognised for the **expert technical support provided to members** on a range of operational and regulatory issues targeted at improving infrastructure and processes, establishing standards of good practice and the interpretation and implementation of new rules and regulations covering **financial crime prevention, CASS, ESG/RSI, operational resilience, data, governance, conduct and culture** and a range of other areas.
- **Digital transformation initiatives** that are driving ground-breaking innovation and the development of industry infrastructure for greater operational effectiveness and revenue promoting opportunity for firms. TISA has become a major industry delivery organisation for consumer focused, digital industry infrastructure initiatives – **TISAtech** (a digital marketplace that brings together financial institutions and FinTechs for greater collaboration and innovation) and **TURN** (TISA Universal Reporting Network – a digital platform providing a secure data exchange for financial services using blockchain technology) – alongside projects **Digital ID** and **Open Savings, Investments & Pensions**. This reflects TISA's commitment to open standards and independent governance.



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## Executive Summary and Recommendations

TISA welcomes the opportunity to respond to the FCA's Consultation Paper: CP 21/36 A New Consumer Duty. As a consumer-focused body, we are supportive of the high level aims of the proposal. We believe that it is right that consumers should be able to expect firms to put them at the heart of their business.

We have consulted widely with our members, and generally, the introduction of a principle that puts consumers at front and centre has been positively received. Our members welcome a framework in which firms consistently focus on consumer outcomes and put customers in a position where they can act and make decisions in their interests, and the opportunities it presents have been recognised.

However, we also have concerns about the proposals. Our summary recommendations are as follows:

- We believe that the proposed implementation period is not sufficient for firms to effectively assess their products and services, plan and execute implementation. We recommend that the FCA considers a two-year phased implementation period, with the FCA setting out what areas of harm should be prioritised. This is similar to, indeed less than, the period of implementation for SMCR and Operational Resilience.
- Taking into account the scale of change that firms may need to implement, which may include system enhancements, product review and design, renegotiation of legal contracts, changes to the service model, pricing review and resulting potential loss of revenue, we believe the FCA has underestimated the cost of change. These costs will fall, ultimately, on customers.
- It is important that the costs imposed do not result in raising barriers to entry to the market or imposing disproportionate costs on smaller firms. Both outcomes will be bad for competition and we should have liked to see an analysis of the impact on competition for such important proposals.
- We recognise that the FCA does not want compliance to be driven only by the processes and inputs, but should rather focus on the outcomes, but we believe further guidance is required regarding concepts such as 'reasonableness' and 'good faith'. These concepts can be open to different interpretations and should be expanded on by providing further examples across a range of different sectors. We should also like to see more emphasis on proportionality, as indeed, we see in Operational Resilience.
- The investment sectors products and services are already subject to comprehensive regulation, and in our view some elements of the Consumer Duty would already be met if the firm is complying with the existing rules. It would be helpful if the FCA could acknowledge this within the next iteration of the Consumer Duty within the Handbook and/or non-Handbook guidance, so that firms may direct their resource to remediating areas which may not be compliant with the Consumer Duty. We do not see that this would absolve the firm from their responsibility to comply with the Consumer Duty in any way. For example, a firm complying with PROD will still need to consider their relationship with distributors and the flow of management information up and down the chain but would avoid extensive gap analysis which will likely result in no action required. Such guidance would enable firms to move ahead quickly with priority actions, benefitting customers more quickly.



- We would like more clarity on the concepts of “cause” and “foreseeable”. Since the high standards that the Consumer Duty seeks to impose are subject to what is ‘reasonable’, it becomes very subjective when assessing what harms may be foreseeable, and what the causation of any harm might be. In addition, the term “outcome” can be difficult to define in the context of a service a firm provides during the life cycle of the customers ownership of a product, since there may be a number of customer engagements and decisions, and therefore “outcomes” throughout the lifecycle of the product. We would welcome further clarification of this point within the non-Handbook guidance.
- Where firms provide products, which span across the remit of more than one regulator e.g., FCA and The Pensions Regulator, it would be beneficial to industry and to consumers if a joined-up approach was taken, so that the principles and changes introduced result in the same protection and opportunities for consumers, irrespective of the regulator of the product they are in. For example, the Department for Work and Pensions brought in new Value for Money (VfM) requirements for Occupational schemes and The Pensions Regulator will oversee the governance of those requirements, and the FCA have brought in their own requirements for VfM which relates to Contract Based schemes. The Department for Work and Pensions are currently consulting on even more change in this area.
- As per our ongoing work with the FCA, there issues in existing advice regulations and legislation that are creating an obstacle for firms to personalise their support services and communications to consumers. In short, we do not believe the new Consumer Duty proposals will address the issues consumers are facing when making savings & investment decisions, and the opportunity to improve consumer outcomes will not be maximised without addressing the advice-guidance boundary issues. Furthermore, we are concerned that without solving the advice-guidance boundary issues for firms, the introduction of the new Consumer Duty proposals may lead to conservatism amongst firms to avoid consumer harm, which could inadvertently create more financial exclusion.

We are working with our members to document examples of where such harms are being caused and will be providing these to the FCA in due course.

TISA and our members are looking forward to continuing our support to the FCA into this exercise.

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## Question Responses

### 1. Do you have any comments on the proposed scope of the Consumer Duty?

We agree that the consumer duty should apply to all retail clients and think it a sensible approach to align the new Handbook and non-Handbook guidance with the existing scope of the sectoral sourcebooks.

We note that there are some areas of the proposed Consumer Duty where it appears investment firms will already meet the requirements through existing specific regulation such as PROD and it would be useful to clarify that if the rules in question are complied with, then the expectations of the Consumer Duty will be met.

We are pleased to note that High Net Worth (HNW) clients have not been subject to a general exclusion from the New Consumer Duty and are only excluded when existing regulation takes this group outside of the regulatory perimeter. However, we do have concerns around the use of such exemptions that take HNW client outside of the regulatory perimeter, in relation the monetary values used to determine a HNW client and the assumed correlation between HNW and financial sophistication. We are communicating these concerns to the FCA separately.

### 2. 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 welcome the additional guidance and reference to proportionality in relation to the application of the Consumer Duty through the distribution chain, and the reference in the non- Handbook guidance to the Consumer Duty not imposing an open-ended obligation that extends beyond the scope of the business' goods and services.

However, in practice contractual issues could be complex and impact on implementation timeframes especially where multi-party agreements concerned. For example, within the guidance in Annex 2, and specifically the example of responsibilities throughout the distribution chain of an investment product, there is reference to the Fund Manger having responsibility for the appropriate distribution of the product. In practice, a fund manager would not have visibility of the holdings of the end retail client where the product is sold via a platform. Therefore, in order to assess whether the product is distributed as anticipated, the Fund Manger would require considerable anonymised data analysis from the Platform, which may be a disproportionate to the Fund Managers responsibilities, and difficult to negotiate as a contractual responsibility.

We anticipate that the industry would need to come to an understanding of best practice when performing due diligence across the distribution chain, as system constraints and outsourcing arrangements may make it difficult to implement bespoke M.I requirements.

We therefore request that the FCA provides further clarification and guidance on the roles and responsibilities across the distribution chain.

The FCA should be aware of the challenges in the context of MiFID with requiring this oversight of the distribution of products.



**3. 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?**

Considerations where a product is still being sold are very different to consideration made in relation to products that are no longer being sold or renewed.

In relation to products which are no longer sold or renewed, our members would benefit from further examples of actions that might be taken to address any harms in order to comply with the Consumer Duty without the firm giving up any contractual rights they expected to enjoy. For example, consideration will need to be made as to:

- The extent of application to parties with one-off involvement in production/distribution;
- Uncertainty around approach to ongoing assessments of closed products and remedial action;
- How the costs of reviews and remediation will be borne for historic products for contractual arrangements which did not cater for the Consumer Duty;
- There is no longstop which adds significantly to the time and cost of any review exercise; and
- Cost/benefit for long term products with minimal time left to run.

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

Whilst it may be possible to signpost a customer to a like for like product that may have a specific improved features such as being better value for money by way of cheaper charges or improved customer service, we do not believe it is possible to fully assess an individual client's financial objectives and recommend alternative products based on the firms understanding of those financial objectives, within the current advice-guidance boundary.

**5. Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?**

We acknowledge and understand the comments regarding the option 2 wording to the extent that 'Best Interests' may be interpreted as imposing a fiduciary duty on firms, and therefore we broadly agree with the proposal to choose Option 1 as the wording for the principle.

We welcome the clarification with the non-Handbook guidance that the imposition of either the Principle nor the Cross Cutting Rules will not mean that all individual consumers will achieve good outcomes or be protected from all harms, and that it does not remove the principle of consumer duty. However, we believe that "good" should be replaced with "fair" in alignment with TCF and the Fair Treatment of Vulnerable Customers. We believe that the term "fair" will convey a sufficiently high standard, since Principle 12 will require firms to "act" rather than "pay due regard" as is the requirement of Principles 6 and 7.

In addition, we would like to point out that the term "good outcome" can be difficult to define in the context of a service a firm provides during the life cycle of the customers ownership of a product, since there may be a number of customer engagements and decisions, and therefore "outcomes" throughout the lifecycle of the product. We would welcome further clarification of this point within the non-Handbook guidance.



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

Yes, we do agree with the proposal to disapply Principles 6 and 7 where the Consumer Duty applies. However, in relation to the proposed changes to the COCON rules, it may be difficult for staff at all levels to understand the conceptual difference between Principle 6 and 7 and the New Consumer Duty (see response to Q. 18)

**7. Do you agree with our proposal to retain Handbook and non-Handbook material related to Principles 6 and 7 should remain relevant to firms considering their obligations under the Consumer Duty?**

We agree to the extent that failure to consider this material will likely amount to breach of the New Consumer Duty. However, we welcome the FCA's proposal to use the implementation period to perform a full review the Handbook to determine whether there are any areas that require amendment in line with the Consumer Duty.

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

We welcome the amendments proposed by the FCA in relation to the term "all reasonable steps" and agree that the term is one firms will be familiar with under common law.

Given that the FCA have stated in section 9.37 that it is not proposing to change the point at which communication becomes advice, we are also pleased to note the clarification that a firm providing an execution only or non-advised service can assume their customers' objective to be the enjoyment and use of the product and service they have purchased.

In relation to the term 'foreseeable harm' we would welcome some clarification of how the Financial Ombudsman Service (FoS) will approach complaints going forward that fall under the Consumer Duty. As the framework stands today, there can be disparity between the regulation and FoS interpretation of what is fair and reasonable, and therefore we believe the industry would benefit from this being clarified at the outset.

Finally, the term "should" is used consistently throughout the non-Handbook guidance. In practice, this term used in guidance is taken to mean within the industry that the guidance should be applied as precisely as if it were a rule. Since the Consumer Duty leaves firms to decide how it proportionally applies to their business, we would welcome clarification that non application of the guidance should not be presumed a breach.

**9. 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 are concerned that in the current drafting of the Handbook and non-Handbook guidance it is incumbent upon a product manufacturer to ensure that the product is distributed to the intended target market.

We firmly agree that a manufacturer should have a target market in mind when designing a product, and make the information referenced in the example in section 5.29 of the guidance





available to distributors, and we note that in section 5.27 the guidance states that manufacturers are not responsible for the actions of distributors.

However, to truly understand the performance of a product over time, and whether good outcomes are being achieved within the target market, a product manufacturer would need to broadly understand the characteristics of the consumers to which the product is being sold. The enormity of the data that would be required from the distribution channels to enable the manufacturer to make these assessments on an ongoing basis should not be underestimated, which will impact both the costs and timing of the implementation of the Consumer Duty, as well as additional ongoing cost which may ultimately be passed on to the consumer.

**10. Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?**

If an investment firm (Fund manager/manufacturer or a Distributer) is acting in compliance with PROD, RPPD and COLL and other areas aspects of the Consumer Duty, then we believe that that price and value outcomes will already have been met, and that greater enforcement of the existing rules would achieve a better protection for consumers. This outcome in particular, is an example of where the consumer duty appears to have been prepared with large-scale retail banking and lending front of mind.

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

We are supportive of the ambition to improve Consumer Understanding and equip consumers with the information they need to make their own decisions. We find the non-Handbook guidance section 7.15 particularly helpful in setting out some examples of effective communications. TISA has begun work, and is in dialogue with the FCA on reviewing consumer communications, in particular T&Cs and what legislative and regulatory changes may be required in order to allow firms to reform the way in which information is given to consumers.

However, we do find this section has again been prepared with large-scale retail banking and lending front of mind. Investment firms are currently significantly curtailed in their ability to communicate with clients in a way that they understand. TISA's primary research on the issues consumers are facing when researching savings and investments, shared with the FCA recently, evidence the detriment being caused to consumers from the lack of personalised support. Without changes to the Advice-Guidance boundary, we are concerned that little may be achieved. Therefore, we welcome the continued dialogue with the FCA on this issue, as we believe that outcomes would be greatly improved in line with the Consumer Duty if firms were allowed to provide personalised guidance.



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

We welcome the introduction of rules and guidance to address ‘sludge practices’ such as unreasonable barrier which frustrates a customer’s use of a product or service without reasonable explanation and ensuring customers do not have to undertake unreasonable additional steps to exit a product compared with taking it out. At the other end of the spectrum, it is possible that a digital customer journey which plays on behavioural or cognitive biases to facilitate seamless product purchases may benefit from a degree of positive friction being built into it. Firms will need time to properly review their product and service offering and ensure that it is striking the right balance.

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

Since its introduction, firms have been embedding the Fair Treatment of Vulnerable Customer guidance, and the feedback from our member firms indicate that this guidance was very well received and welcomed by the industry. However, whereas the Vulnerable Customer Guidance focuses on ensuring processes are in place to fairly deal with individual customers who have characteristics of vulnerability, the Consumer Duty requires firms to ensure ‘Good Outcomes’ for vulnerable customers, and to for firms to understand the likely vulnerabilities of their target market as a group.

The issue of understanding what characteristics of vulnerability the target market may have, who the vulnerable customers are, and how they are affected may be time consuming and subjective. Therefore, it would be useful for more examples and guidance to be provided as to how this requirement might be applied proportionately.

There is a risk that firms may not be able undertake proportionate steps to identify the needs of the target market. The resulting risk and potential consequences of a consumer not understanding communications, may result in firms withdrawing certain products or stifling innovation.

**14. Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?**

We agree that there are diversity characteristics that may interact with the FCA existing definitions of vulnerability and would welcome further guidance and examples of how firms should make diversity and inclusion consideration in the design and distribution of their products. We would suggest that the FCA introduce some of the aspects of its other consultations on Diversity and Inclusion.

**15. 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, we agree with this proposal, and that the existing framework is sufficient for Consumer to seek any necessary redress.



**16. Do you have any comments on our proposed implementation timetable?**

The shifting towards a more outcomes-based regulation is a significant undertaking for the industry. There are number of steps that firms will need to go through in order to successfully embed the Duty into their products and services, including:

- Gap analysis between the current processes and new rules;
- Scoping of all foreseeable harms that could arise in connection products and services;
- Interpretation of reasonable steps and translation into business controls;
- Re-negotiation of distribution agreements
- Changes to customer journeys which could include staff training and system changes;
- Review of products and product governance arrangements including legacy products; and
- Implementation of governance and MI requirements.

We appreciate and agree with the FCAs ambition to be able to effect positive changes within a short timeframe, however significant changes that are implemented without time for proper consideration, design and testing often result in unintended and inconsistent outcomes.

The scope of the proposed Consumer Duty is far reaching and requires firms to not only consider their own products and services in the context of their target market, but also to consider and be satisfied with the processes of other participants in the distribution chain. Added to this, firm may have legacy business that they will need to review. The changes that we envisage, will take considerable time and expense.

We therefore propose that the FCA considers a two year phased implementation period. With the FCA setting out the areas for prioritisation, and target dates with this two year period as to when compliance to certain aspects of the Consumer Duty should be achieved. This will assist firms in making a clear plan as to which areas of their business to focus on and when, and we believe will also assist the FCA when assessing progress firms have made throughout the implementation period.

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

Although it is clear that the example Management Information (MI) list in 14.22 is not intended to be prescriptive or exhaustive, it is helpful in setting a baseline for firms to build a monitoring framework to assess its ongoing compliance to the Consumer Duty.

To support the FCAs ambition to be a more data led regulator, and to assist in focussing its resources on areas of harm and 'bad players', we believe that the FCA should reconsider whether an ongoing data provision from member firms may better support this objective.

**18. 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 believe that it may be a difficult concept for staff at all levels to understand and put into practice the conceptual differences between the new rule and the existing conduct rule 4.4. With



TCF embedded into organisations, the introduction of Principle 12 may cause some confusion. Additionally, it would be useful for firms for the FCA to set out its plans in relation to TCF and the associated terminology so that this can be taken into account when implementing training to support the Consumer Duty.

According to a precedence set by case *Unwin v. Bond* [2020], an express duty of good faith imposes as a minimum obligation to act honestly; not to use powers for ulterior purpose; deal openly and fairly; and consider own interests whilst also having regard to other party's interests. However, how the concept of 'good faith' is applied in practice will depend on the circumstances and the context.

Additionally, we would like more clarity on the concepts of "cause" and "foreseeable". It may be difficult to assess in retrospect if loss/harm would have been suffered in any event and if there was an intervening act that "broke the chain". Since the high standards that the Consumer Duty seeks to impose is subject to what is 'reasonable', it becomes very subjective when assessing what harms may be foreseeable. In order that firms do not fall foul of these legal concepts, legal advisors will need to be engaged which will add significantly to costs.

In the months and years following implementation of the Consumer Duty, as the regulation embeds into the industry it will be important to find common practices in addressing these concepts, and that other participants in the financial services ecosystem are aligned.

There is an additional consideration as to whether a wrongdoer should be held liable for the consequences of any foreseeable events. Liability and responsibility should be clarified in any changes to COCON and the FCA might consider whether making compliance to the Consumer Duty a prescribed responsibility under SM&CR.

#### **19. Do you have any comments on our cost benefit analysis?**

Whilst we appreciate that it is difficult to quantify the immediate and on-going benefits to both consumer and firms, we are of the opinion that the FCA has not fully detailed the cost benefit analysis of imposition of the Consumer Duty compared to other possible interventions such as better enforcement of existing rules and guidance, and/or enhancement of the existing rules.

Taking into account the scale of change that firms may need to implement, which may include system enhancements, product review and design, renegotiation of legal contracts, changes to the service model, pricing review and resulting potential loss of revenue, we believe the FCA has underestimated the cost of change. These costs, as well as the complexity of such change should be considered when proposing and implementation timeline.

Chapter 14 refers to "cost being passed on to consumers". In addition to the direct costs, the FCA believes firms may also incur indirect costs in the form of potential loss in profits due to changes they make to their product design and prices. It would be helpful to clarify if the FCA believes that this loss of profits should be transferred to consumers as this seems to be in conflict with the principle.

In the end, customers bear the cost of regulation within the charges, so we would wish for the regulation to be imposed in the most cost-efficient way possible.



In addition, we note that the Treasury is consulting on regulatory principles including a new competitiveness principle, which we welcome and, indeed, called for in our initial response in February 2021. It would be useful if the FCA would subject its proposals to a competitiveness analysis to ensure that unnecessary barriers to market entry are not raised by these proposals, and that smaller firms do not face disproportionate costs.

**20. Do you have any other comments on the draft non-Handbook guidance?**

No further comments.

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

No further comments.