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Nisha Arora
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Consumer and Retail Policy
Financial Conduct Authority
12 Endeavour Square
London E20 1JN
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30 July 2021

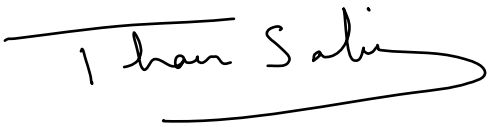
Dear Nisha

Re: EMA response to FCA CP21/13 on a New Consumer Duty;

The EMA is the EU trade body representing electronic money issuers and alternative payment service providers. Our members include leading payments and e-commerce businesses worldwide that provide online payments, card-based products, electronic vouchers and mobile payment instruments. A list of current EMA members is provided at the end of this document.

I would be grateful for your consideration of our concerns.

Yours sincerely



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA response to consultation

General EMA Comments

Our view is that issuance of electronic money and payment services should be removed from the scope of the Consumer Duty.

We appreciate that the FCA is required to carry out a public consultation about whether it should make general rules providing that authorised persons owe a duty of care to consumers.[1] Please note that firms only issuing electronic money and providing payment services are not authorised persons.[2] E-money and payments have been drawn into this consultation merely because the FCA has chosen to use PRIN as the mechanism through which to incorporate these general rules.

The Consumer Duty has been designed for firms offering much more complex financial products with more risk of causing harm to consumers; it is not proportional to impose rules and guidance on firms for which such rules and guidance were not designed.

Our responses to the questions below reiterate two central points:

First, the harms the FCA seek to address by imposing the Consumer Duty do not seem to have been highlighted or experienced by consumers of EMIs and PIs; imposing such additional measures would be disproportional and unnecessary, particularly given the existing legislative and regulatory framework that already applies to firms in this sector.

Second, any harms faced by customers of EMIs and PIs can be addressed by existing requirements such as the Payment Services Regulation 2017, Principles for Business, the Handbook and guidance, which the FCA has adequate powers to enforce.

For these reasons, we consider the Consumer Duty should not include e-money and payment services within its scope.

[1] S. 29, Financial Services Act 2021
[2] As defined in Section 31, Financial Services and Markets Act 2000

If the FCA must subject firms providing e-money and payment services to the Consumer Duty, we ask the FCA to:

I. identify which harms they have identified with respect to e-money and payment services;
II. clarify why these harms cannot be addressed by enforcing existing rules;
III. provide guidance specific to the e-money and payments sector as to how to comply with the Consumer Duty;
IV. provide firms with no less than a three-year lead time in order to make the extensive changes necessitated by the Consumer Duty. The proposed rules lean towards firms who have an advisory relationship with their clients. Whereas in the e-money and payment services sector, products, primarily, are (i) designed for mass market, (ii) digital and (iii) allow for customer self-service. Accordingly, the level of analysis required for firms to apply the Consumer Duty is disproportionate to the harm sustained by the consumer. Firms would like to understand what applies within the rules before making an end-to-end assessment; particularly smaller firms who have limited compliance teams, this is a significant compliance resource.

Q1: What are your views on the consumer harms that the Consumer Duty would seek to address, and/or the wider context in which it is proposed?

The first type of harm is "firms providing information which is misleadingly presented or difficult to understand, hindering consumers' ability to properly assess the product/service". [CP 2.13] The FCA gives the example of overdraft charges; overdraft facilities are available on bank accounts. Overdrafts are not available on e-money accounts. E-money is issued, at par value, on receipt of funds. E-money is redeemable, at par value, at any time. There is no overdraft available and this example of harm does not affect e-money customers. We invite the FCA to elaborate on consumer harms in the e-money or payments sector that are a result of misleading information that prevents the consumer from being able to properly assess the product/service, and which cannot already be addressed through existing BCOBs rules.

The second type of harm is "products and services that are not fit for purpose in delivering the benefits that consumers reasonably expect, or are not appropriate for the consumers they are being targeted at and sold to". [CP 2.13] The example given by the FCA here relates to contracts for difference ("CFD"). As discussed above, e-money is issued on

receipt of funds at par value. If an e-money holder considers that an e-money product does not deliver the benefit they reasonably expect, the e-money holder can redeem their e-money for fiat currency at any time and there is no risk of loss (except for the value of currency fluctuating). The harm identified by the FCA in this instance is not relevant to e-money products; it would not be proportional to impose measures designed for CFDs (risky products) on e-money (limited risk, if any). As above, we invite the FCA to elaborate on consumer harm caused by products not being fit for purpose or delivering the benefits that consumers reasonably expect in the e-money or payments sectors. Without such examples or evidence, it is difficult to make the case for the need for a consumer duty for EMIs and PIs.

The third type of harm identified by the FCA and is a catalyst for the Consumer Duty is "products and services that do not represent fair value to the consumer, where the benefits consumers receive are not reasonable relative to the price they pay. For example, where the premium for an insurance product is so high that it does not reflect the likelihood and value of any claim". [CP 2.13] Similar to the above, it is not clear how this harm could arise in the context of an e-money product. E-money, by definition, represents "fair value" as it is issued and redeemed at par. The example given by the FCA is insurance premiums. It is clear how expensive insurance premiums could result in the consumer not being afforded "fair value" as there may be limited possibilities for the consumer to claim on the insurance policy due to exclusions or other terms of the contract. On the other hand, a consumer will always be able to use and get value out of an e-money product, such as a prepaid card, by transacting. An e-money holder may use their prepaid card on a daily basis, and it is much easier for the user to calculate the value of the product in relation to the price paid, in comparison with other financial service products such as credit, investment or insurance products. In addition, the cost to the consumer is usually relatively low (if anything), particularly in comparison to the cost of these other financial service products. The type of harm described by the FCA has limited – if any – relevance for e-money products.

The fourth type of harm identified by the FCA is "poor customer service that hinders consumers from taking timely action to manage their financial affairs and making use of products and services, or increases their costs in doing so. For example, complaints being dismissed without proper investigation, leading to consumers missing out on redress payments to which they are entitled." [CP 2.13] The example given by the FCA with respect to this harm is about CT Capital and their regulatory failings relating to CT Capital's handling

of customer complaints regarding mis-sold Payment Protection Insurance ("PPI"). CT Capital's Final Notice states that the FCA fined CT Capital £2,360,900 for breaches of the FCA's Principles for Business, including Principle 6 (customers' interests).

This example indicates that the Principles for Business already sufficiently empower the FCA to impose multi-million-pound fines on firms causing this type of harm.

The final type of harm as set out by the FCA is "exploitation of consumer loyalty or inertia". [CP 2.13] Similar to the points above, this harm is not applicable to e-money products and is not a harm faced by e-money customers. The FCA gives the example of a motoring insurance firm charging their customers a 'loyalty penalty' to illustrate this harm. Again, this type of harm is not present in e-money products and there is no context or incentive for an e-money issuer to begin imposing such penalties. Unlike motoring insurance, or other financial service contractual arrangements, an e-money holder is not bound to an e-money issuer for any period of time (in the same way an insurance policy holder is bound to their insurer for the term of the policy). An e-money holder is free to redeem their e-money at any moment and move to a new provider. A consumer may also elect to hold several e-money products at once (e.g. various cards, accounts). They are unlimited in choice. It is evident that there is no possibility of a 'loyalty penalty' in the e-money industry; there is no requirement or incentive for consumers to remain with a single provider.

As illustrated above, the harms identified by the FCA in CP 2.13 have not been associated with the e-money industry; where they might exist, they do not have the same impact on e-money holders that they do on customers of credit, investment or insurance products. For this reason, we urge the FCA to remove e-money and payment services from the scope of any new rules arising out of a Consumer Duty.

If the FCA decide to continue to extend the scope of the Consumer Duty to apply to the provision of e-money and payment services, we urge the FCA to take a proportionate approach in relation to this sector.

Q2: What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Cross-cutting Rules and the Four Outcomes?

We consider the FCA would be best placed to overhaul the existing consumer requirements in the Handbook in order to 'streamline' the requirements and make the Handbook more manageable for compliance teams. We suggest the Handbook has one sourcebook dedicated to consumer requirements including subsections that relate to different sectors.

Restructuring the Handbook would be preferable over implementing the proposed structure of the Consumer duty, as this proposed structure is excessive and results in duplication of requirements, as well as a lack of certainty for firms, as demonstrated below.

First, the FCA's conduct of business sourcebooks (COBS, ICOBS, MCOB, BCOBS, CMCOB 3 and CONC 3) set out requirements with respect to a firm's relationship with its customers.

In addition to complying with these conduct of business rules, firms are subject to the Principles for Businesses, in particular:

- Principle 7, which requires a firm to "pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading" [PRIN 2.1].
- Principle 6, which sets out the over-arching requirement on firms to treat their customers fairly (TCF) (the TCF principle) [PRIN 2.1].

Second, section 49 of the Consumer Rights Act 2015, which provides: "Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill." Section 49 means that a firm supplying a service to a consumer is obliged to perform the service with reasonable care and skill.

Further, firms are subject to a significant number of consumer protection requirements including the Principles for Business, conduct of business rules arising from the Handbook, conduct of business rules arising from regulation such as the Payment Services Regulations 2017 (as amended) and the Electronic Money Regulations 2011 (as amended) as well as general consumer law. The four examples given in CP 2.33 do not represent the full extent of consumer requirements levied on firms, for example:

- Consumer Protection from Unfair Trading Regulations 2008,
- Consumer Rights Act 2015,
- Sale of Goods Act 1979,

- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013,
- Consumer Rights (Payment Surcharges) Regulations 2012,
- Electronic Commerce (EC Directive) Regulations 2002,
- Provision of Services Regulations 2009,
- Consumer ADR Regulations 2015.

With respect to the Consumer Principle, the FCA is already empowered to fine firms millions of pounds for failings relating to their treatment of consumers (i.e. for breaches of Principle 6, which provides that "a firm must pay due regard to the interests of its customers and treat them fairly"). The FCA has not provided a clear case for why any further powers or means of enforcement are necessary.

With respect to the Four Outcomes, we note the FCA will provide "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". The EMA has formally requested on two occasions 'guidance setting more detailed expectations' in relation to the application of thee existing Principles for Business on the e-money and payments' sectors, and have not received any such guidance. We consider that it would be more effective and helpful for firms if the FCA could:

(1) provide guidance around the application of the current Principles to EMIs and PIs, in the first instance, and
(2) Elaborate where the existing Principles do not provide a sufficient level of consumer protection for the payments and e-money sectors, such that the introduction of a consumer duty is necessary.

Q3: Do you agree or have any comments about our intention to apply the Consumer Duty to firms' dealings with retail clients as defined in the FCA Handbook? In the context of regulated activities, are there any other consumers to whom the Duty should relate?

We disagree with the proposal to apply protections to customers falling within the definition of "Retail Client". Extending consumer protections to Retail Clients means firms must extend consumer protections to large corporate clients (including SMEs). There is no basis for extending consumer protections to these types of businesses.

In instances where the PSP is a start-up or relatively small (common in the payments and e-money sectors), the client may well be larger than the PSP, and have greater negotiating power over the contract and realisation of the contract than the PSP.

For EMIs and PSPs, the FCA must follow the Electronic Money Regulations 2011 (as amended) ("EMRs") and Payment Services Regulations 2017 (as amended) ("PSRs") by extending consumer protections to consumers and microenterprises only. [3] We consider that the consumer duty should equally apply consumer protections to this category of customers only, in order to preserve alignment with the existing rules and guidance.

Please note that the scope of the Consumer Duty is not only inconsistent with the PSRs but is also inconsistent with the jurisdiction of the Financial Ombudsman. Please see DISP 2.7. With respect to complaints concerning payment services and e-money, the Financial Ombudsman may adjudicate complaints from:

- Consumers
- micro-enterprises
- small charities with annual income under £1 million at the time of the complaint; and
- small trusts with net asset value under £1 million at the time of the complaint.

The Consumer Duty thereby creates a deficit between customers who may seek redress by complaining to the Financial Ombudsman and those who are ineligible. Retail Clients who are not eligible to complain to the Financial Ombudsman have no access to redress other than pursuing litigation (as proposed by the PROA) as set out in Chapter 5.

Creating an environment that encourages parties to litigate is not ideal; litigation should be a last resort. To avoid disparity and a context that lends itself to litigation, the Consumer Duty should align with the PSRs (and, by extension, with the jurisdiction of the Financial Ombudsman).

We invite the FCA to clarify that the Consumer Duty applies only in respect of regulated products and services, and not in relation to unregulated products and services. Without such clarification, firms that fall within the scope of PRIN will be subject to heavier regulatory obligations than unregulated firms that may be offering the same unregulated products.

[3] A microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million. [PSR 2(1)]

We understand that the consumer duty is intended to apply differently in respect of SMEs; we invite the FCA to elaborate on how this might operate in practice.

Q4: Do you agree or have any comments about our intention to apply the Consumer Duty to all firms engaging in regulated activities across the retail distribution chain, including where they do not have a direct customer relationship with the 'end-user' of their product or service?

The CP provides "some firms may be involved in the manufacturing or supply of products and services to consumers in the retail market, but have no direct customer relationship with the end-user. Other firms may be responsible for performing a limited role in relation to a product or service (e.g. administering a mortgage). The Consumer Duty would apply where a firm can, through its regulated activities, influence material aspects of the design, target market or performance of a product or service that will be used by consumers. So, some firms that operate exclusively in wholesale markets as part of a distribution chain for retail products or services would be subject to the Consumer Duty. What it will require will be dependent on their ability to influence outcomes for consumers." [CP 3.7]

Whilst we acknowledge the FCA's intention with this element of the proposed scope, it is unclear how it would apply in practice, including how the relative liability between parties within a payment chain would need to change or adjust. The current position where the customer-facing entity is responsible for ensuring the protection of their customers is clear, and allows this entity to set the parameters for product design, marketing and distribution. It is not feasible for all firms within the distribution chain that do not have any visibility of the customers, and that specialise for example in providing a technical service to ensure the movement of funds, to be mindful of end-user customers and their needs. It should be the customer-facing entity that communicates these objectives to the entities on which they rely to provide their product or service to their customers.

Extending the scope of the Consumer Duty may have a negative effect on a firm's reputation. Whilst the intention is to hold all firms in the retail distribution chain subject to the Consumer Duty, customers will associate any issues with the firm in which they have a relationship. To explain, if a non-customer facing firm in a retail distribution chain is enforced against for breach of the Consumer Duty with respect to their contribution to a particular

product or service, the customer will associate that enforcement with the firm from which they procured the product or service – not the third-party manufacturer of which they have never heard. In the eyes of the customer, the customer-facing firm (the firm with which they have their Framework Contract) is wholly responsible.

If the FCA do intend to extend the scope of the Consumer Duty to non-customer facing firms in the retail distribution chain, in order for the new rules to be feasible, the language must explicitly state that firms are not responsible for the conduct of third-party firms within the distribution chain, nor are they responsible for the compliance of such third parties with the Consumer Duty.

It is also unclear how this extension of scope provides any additional protection not already provided by the Product Governance and Product Intervention rules and guidance (PROD). We invite the FCA to elaborate on the areas where the product governance provisions do not provide sufficient consumer protection, such that a new Consumer Duty principle is necessary.

Q5: What are your views on the options proposed for the drafting of the Consumer Principle? Do you consider there are alternative formulations that would better reflect the strong proactive focus on consumer interests and consumer outcomes we want to achieve?

We disagree with the proposal of a Consumer Duty in general; however, if there must be a Consumer Duty as proposed by the CP, we elect Option 1 '*A firm must act to deliver good outcomes for [retail clients]*'.

Please note our comments above stating that we disagree with the FCA extending consumer protections to retail clients. The terminology should be amended to say 'consumers and microenterprises' in accordance with the standard set down in the PSRs.

In any case, we consider the Consumer Principle unnecessary. In order for a business to be successful, they must 'act to deliver good outcomes' for their clients. A business that does not deliver good outcomes for their clients will not remain in business for very long.

Please note that we would require sectoral guidance as to what the FCA considers to be "good" outcomes. We would require specific guidance, including examples, as to how EMIs and PIs can give effect to "good" outcomes.

Option 2, which states "*A firm must act in the best interests of retail clients*", is not feasible. That is not the purpose of a corporation. Whilst the purpose of the corporation is no longer to solely to maximise shareholder value, it is also not solely to provide a public benefit.

Q6: Do you agree that these are the right areas of focus for Cross-cutting Rules which develop and amplify the Consumer Principle's high-level expectations?

The harms the FCA seek to address by way of the Cross-cutting rules are already addressed either by regulation or elsewhere in the Handbook. We invite the FCA to elaborate where the consumer harms identified are not already addressed by existing rules or guidance – or where it would be impossible to address such harms by way of rules or guidance.

For example, the CP notes "*[firms] should be fair in describing the benefits and risks of their products and services, not disguise these through misleading framing, omission, or burying key terms in documents they know customers won't read*". [CP 3.25]

For EMIs and PIs, the key terms relating to their products or services are disclosed to the customer in the Framework Contract. The contents of the Framework Contract are set out in PSR 48; it is not possible to omit any terms, as CP 3.25 suggests, as all key terms are mandated by PSR 48. The Framework Contract is provided to the customer 'in good time' before they are bound. Including a term in a Framework Contract, when its contents are explicitly prescribed by regulation, is not 'burying' the term 'in documents they know the customer won't read'.

More generally than EMIs and PIs, each of the FCA's conduct of business sourcebooks (COBS, ICOBS, MCOB, BCOBS, CMCOB 3 and CONC 3) set out further requirements relating to communications with customers.

In addition to complying with these conduct of business rules, firms must ensure that they comply with the Principles for Businesses that are relevant to promotions, in particular:

- Principle 7, which requires a firm to "pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading" [PRIN 2.1].
- Principle 6, which sets out the over-arching requirement on firms to treat their customers fairly (TCF) (the TCF principle) [PRIN 2.1].

Q7: Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

We note the following statement: “We propose to embed a concept of reasonableness in the Consumer Duty, applying to the interpretation of all of its elements, including the Consumer Principle. This will clarify the objective standard of conduct that firms would need to meet. We intend to set out factors that influence what is reasonable.” [CP 3.28] We note the Cross-cutting rules will require firms to “take all reasonable steps to …” [CP 3.24] and the FCA’s reference to “foreseeable harm”. [CP 3.24]
We look forward to receiving further clarification regarding the objective standard referenced by the FCA, and suggest that the FCA have regard to the canon of English case law that sets down what constitutes reasonableness, “all reasonable steps” and “foreseeable harm” i.e. foreseeability.

As noted earlier, the proposed rules lean towards firms who have an advisory relationship with their clients. Whereas in the e-money and payment services sector, products, primarily, are (i) designed for mass market, (ii) digital and (iii) allow for customer self-service. Accordingly, the level of analysis required for firms to apply the Consumer Duty is disproportionate to the harm sustained by the consumer. Firms would like to understand what applies within the rules before making an end-to-end assessment; particularly smaller firms who have limited compliance teams, this is a significant compliance resource.

Again, we request sectoral guidance setting out what reasonable steps an e-money and/or payment services firm must take in order to comply. The early-stage indications are written broadly and it is not clear what the rules will entail; guidance is therefore necessary to understand the FCA’s expectations. Guidance will also assist the FOS in deciding cases thereby avoiding the creation of ‘FOS Case Law’.

Q8: To what extent would these proposals, in conjunction with our Vulnerability Guidance, enhance firms' focus on appropriate levels of care for vulnerable consumers?

It would be helpful if the FCA could clarify whether they seek to impose heightened requirements (i.e. above those set out in the Vulnerability Guidance) on firms with respect to the treatment of vulnerable customers.

Q9: What are your views on whether Principles 6 or 7, and/ or the TCF Outcomes should be disapplied where the Consumer Duty applies? Do you foresee any practical difficulties with either retaining these, or with disapplying them?

This question and the following two statements from the CP are admissions that there is an overlap between existing rules and the rules proposed under this CP:

"Where it would apply, the Consumer Duty would overlap with existing Principles, particularly Principles 6 and 7, as well as the TCF Outcomes. We believe that conduct that met the requirements of the Consumer Duty would generally meet our expectations under Principles 6 and 7 as well." [CP 3.36]

"It is likely in future that we would make use of the Consumer Duty, and its more developed rules, in preference to the existing Principles 6 and 7. And firms and consumers may find it simpler if the overlap with these existing Principles were removed by disapplying them where the Consumer Duty would apply." [CP 3.37]

We therefore invite the FCA to elaborate on these statements and clarify why the harms identified in the CP cannot be dealt with by way of enforcement of existing rules. As above, we do not consider a Consumer Duty to be necessary for the e-money sector. However, where one is introduced, we consider that Principles 6, 7 and the TCF Outcomes should be disapplied where the Consumer Duty applies. We also find it difficult to comment in detail without having sight of the rules themselves.

Please also see our response to Question 2 in relation to streamlining the consumer requirements in the FCA Handbook. Disapplying certain requirements when others apply is not immediately apparent; this would need to be set out clearly in the Handbook. Again,

streamlining consumer requirements under the Handbook would assist all firms and make it manageable.

Q10: Do you have views on how we should treat existing Handbook material that relates to Principles 6 or 7, in the event that we introduce a Consumer Duty?

As above, we do not consider a Consumer Duty to be necessary for the e-money sector. However, where one is introduced, we consider that Principles 6,7 and the TCF Outcomes should be disapplied where the Consumer Duty applies.

Q11: What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?

The proposed Consumer Duty purports to advance the FCA's consumer protection and competition objectives to an extent that is unnecessarily burdensome to firms; the Consumer Duty proposes rules that, in the case of the e-money and payments sector, disproportionately outweigh any benefit incurred by consumers.

Does this outcome qualify as advancement?

We consider that the existing Principles, legislation, Rules, and Guidance provide a sufficient basis on which the FCA supervision team can address any consumer harms identified in the e-money or payments sectors.

Q12: 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?

Any proposals levied e-money and payment services firms should not be labelled as a duty of care; for e-money and payment services, we propose that alternative terminology is adopted, in order to avoid confusion and misunderstanding within the market.

We note the FCA previously published:

- DP 18/5 (Discussion Paper on a duty of care and potential alternative approaches) in July 2018 (link: https://www.fca.org.uk/publication/discussion/dp-18-05.pdf); and
- FS 19/2 (Feedback Statement on a duty of care and potential alternative approaches: summary of responses and next steps) in April 2019 (link: https://www.fca.org.uk/publication/feedback/fs19-02.pdf).

Both of these consultations and their responses addressed this question to a large extent.

Q13: What are your views on our proposals for the Communications outcome?
Our view is that the proposal is unnecessary.

The instances set out in CP 4.6 where the FCA provide examples of customers not receiving 'good outcomes' are already addressed under existing requirements as follows:

Example 1: "[…] we have seen communications that encourage consumers to make decisions without full possession of relevant information, e.g. on costs and exclusions." [CP 4.6]

All relevant information (including costs and exclusions) is contained in the Framework Contract. This is a regulatory requirement pursuant to PSR 48. Accordingly, the customer always has 'full possession of relevant information' as they are provided with and may obtain a copy of the Framework Contract at any time, free of charge. It is an express requirement to set out costs in the Framework Contract. Please see PSR Schedule 4.

Please see paragraph 8.81 of the FCA Approach Document further setting out this requirement: "This can be done by providing the customer with a copy of the draft contract. For distance contracts concluded online, we expect PSPs to be able to provide information beforehand. PSPs could achieve this by, for example, emailing the customer the terms of the framework contract and Schedule 4 information as part of the process." [FCA AD 8.81]

The FCA Approach Document also sets out guidance on what costs must be disclosed and the required level of detail: "Details of all charges payable by the customer to the PSP and, where applicable, a breakdown of them. The customer should be able to understand what the payment services to be provided under the contract will cost them. We take "where applicable" in this context to mean that, where charges are capable of being broken down into constituent parts to provide more transparency to customers, they should be broken down." [FCA AD 8.81]

In the event a firm does not disclose information in the Framework Contract as required by the PSRs, the result is that they have infringed the provisions of the PSRs. There is no gap here that the FCA need to fill by imposing a new Consumer Duty.

Example 2: “Key information being hidden within a large volume of material, or hard to find on a website, rather than being clear, visible and accessible. We have seen examples of lengthy and technical communications that are **likely to confuse or overwhelm their readers**, when the salient information could have been presented in a simple and understandable format.” [CP 4.6]

Part 6 of the PSRs specifies the information a PSP must disclose to its customer. Part 6 specifies the contents of any communication, the timing and the form (i.e. provided / made available and in a durable medium). Please note PSR 55 which requires PSPs to provide information required by Part 6 in “in easily understandable language and in a clear and comprehensible form”. Accordingly, if a firm did communicate with customers in a way that was “likely to confuse or overwhelm their readers”, the firm would have infringed several provisions of Part 6 of the PSRs, including PSR 55. The FCA are already competent to penalise firms for such infringements; adding more rules to the Handbook is therefore unnecessary.

Example 3: “**Insufficient information** being provided to consumers, or **provided at a time when consumers don’t have enough opportunity to reflect and consider their options**.” [CP 4.6]

Similar to the points made above, if a PSP provides “insufficient information” to its customer, this would be a breach of various provisions in Part 6 that mandate what information must be provide to the customer. In the event a PSP “provided [information] at a time when consumers don’t have enough opportunity to reflect and consider their options”, the PSP would be in breach of PSR 50 which requires PSPs to give customers 2 months’ prior notice of any changes to the Framework Contract. The FCA is already competent to penalise firms for these types of breaches of the PSRs.

Please note that we consider the proposals relating to “testing” unclear. In the course of providing sectoral guidance, we ask the FCA to clarify how and when they expect EMIs and PIs to test their communications with customers. The testing of consumer communications can require significant time commitment on behalf of the firm, and can also delay the communication of important consumer information.

Q14: What impact do you think the proposals would have on consumer outcomes in this area?

The proposals would have a limited effect on consumers because firms already communicate with consumers in a specific way mandated by regulation (i.e. the conduct of business rules in Part 6 of the PSRs). It is unclear how these proposals would benefit consumers in any additional way (above that of Part 6).

Q15: What are your views on our proposals for the Products and Services outcome?

We note the CP confirms that the Consumer Duty will not be applied to products sold prior to the Consumer Duty coming into force. In the first instance, we request that the FCA confirm whether the Consumer Duty would apply in respect of products that were designed and sold prior to the Consumer Duty coming into effect but continue to remain in use after the Consumer Duty comes into effect? Or whether the Consumer Duty will only apply to products that are sold after the Consumer Duty comes into effect?

We consider the proposals concerning Products and Services to be repetitive and do not relate to e-money or non-bank payment service products. We have set out our reasoning below.

First, the FCA Handbook already contains an entire sourcebook on this topic (i.e. the Product Intervention and Product Governance Sourcebook "**PROD**") and already largely contain the same requirements as those proposed in the CP:

CP 4.40(d) provides "Firms would be expected to:
(a) Identify the consumer need the firm is aiming to meet with its product, and specify a '**target market**'. This is a group of consumers sharing the need or objective that the product will be designed to meet, and for whom the product is likely to be a good option;" and
(b) Design the product in such a way as to ensure that it will meet the identified need of consumers in the target market. [CP 4.40(a)]

These requirements are already covered by the provisions of PROD, as demonstrated by its overall purpose as follows:
"Good product governance should result in products that:

1. meet the needs of one or more identifiable **target markets**;
2. are sold to clients in the target markets by **appropriate distribution channels**; and
3. deliver appropriate client **outcomes**." [PROD 1.1.3]

The FCA may therefore wish to amend PROD to give effect to this outcome, rather than creative rules and guidance that may appear repetitive.

Second, the CP further provides "Firms would be expected to: (d) Ensure that their products and services do not include features that impose undue costs or risks on the consumer, or features that otherwise **unduly hinder the consumer from acting in their interes**ts. For example, generally speaking, products should not contain terms or features intended to make it difficult for the consumer to switch to a better alternative (**e.g. an unjustifiable lock-in period**), or ones which undermine the consumer's ability to use the product or for the product to meet the need it is designed to meet."

The harm identified by the FCA in this paragraph does not arise in the case of e-money and non-bank payment services products. The PSRs provides the customer with a right to terminate the Framework Contract for **convenience** on no more than one-month's prior notice. [PSR 51] Generally speaking, EMIs do not require one-month's notice, and allow the customer to terminate immediately. It is therefore not possible for a customer to become "locked in" to a product offered by an EMI or PI.

We do note that the proposals are founded with respect to other products (e.g. mortgages whereby a customer may become 'locked in'); however, there does not appear to be any benefit to imposing rules and guidance on firms carrying on activities to which the rules and guidance do not relate.

In other words, there is no benefit in imposing rules and guidance that purports to regulate banks and investment firms on EMIs and PIs.

Further, CP 4.40(e) provides an example of harm the FCA seek to address: "A consumer credit firm designs a lending product with **late payment fees**. **The target market includes consumers who are likely to be less financially resilient**. The firm identifies that a sizeable proportion of its customers are not making payments on time and are paying **substantial sums in late payment fees**. The firm concludes that the product is not meeting the needs of its target market as they are paying far higher fees than the firm had

anticipated, resulting in **unaffordable borrowing rates for these customers**. **The firm suspends sales of the product while it reviews these consumer outcomes,** whether the product is meeting customer needs, and whether it should reposition the target market or product design."

The issues raised in this example, again, do not relate to e-money or non-bank payment services. For e-money accounts (for example), there is no line of credit. Accordingly, there is no risk of an e-money holder being subject to late fees, going into debt or being subject to unaffordable borrowing rates. EMIs and PIs should not be subject to rules that are designed for firms offering products that are completely different.

Third, there is already existing FCA Guidance speaking to a number of the requirements set out in CP 4.40, for example:

"Firms would be expected to: (e) Consider whether the target market for their product or service could include vulnerable consumers and, if so, take this into account in how the product is designed and targeted. It is not our intention that this requirement would lead firms to exclude particular groups such as those who might be vulnerable and whose needs a product might meet. Rather, we want the design of products and services to take account of the needs of all groups within the target market." [CP 4.40(e)]

Please see the FCA's Guidance for Firms on the fair treatment of vulnerable customers: https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf

The CP reiterates the requirements set out in Chapter 2 "Understanding the needs of vulnerable customers" and Chapter 4 "Taking practical action". Here are key sections from Chapter 2 and Chapter 4 for reference as to allow for comparison with the requirements set out in the CP:

"It is important for all firms to understand the needs of vulnerable customers in their target market or customer base. This includes firms that offer self-service digital channels or are part of a distribution chain, and so do not directly interact with customers. If firms do not do this, they may not be able to ensure their staff have the right skills and capability (Chapter 3) or take appropriate practical action (Chapter 4). This may result in gaps in the provision

of suitable services and products and lead to poor outcomes for vulnerable consumers." [FG 21/1 Guidance for Firms on the fair treatment of vulnerable customers 2.2]

To ensure products and services meet the needs of vulnerable consumers in their target market or customer base wherever possible, firms should take such needs into account at all stages of the product and service design cycle. They should also take them into account if they are considering changing a product or service. For example, if they are closing a communication channel or branch or reducing the services offered by a particular channel. Firms may use different terminology to refer to their design process but the key considerations will remain the same. [FG 21/1 Guidance for Firms on the fair treatment of vulnerable customers 4.12]

An analysis of Chapter 2 and Chapter 4 of FG21/1 indicates that firms are already required to "design products and services to take account of the needs of all groups within the target market". [CP 4.40(e)] Firms would be unable to comply with Chapter 2 and Chapter 4 of FG 21/1 without taking into account the needs of all groups when designing products and services. There does not appear to be any clear distinction between the proposals in the CP and the requirements as set out in FG 21/1.

Q16: What impact do you think the proposals would have on consumer outcomes in this area?

The benefits to e-money customers arising from these proposals regarding Products and Services are not immediately clear. The CP sets out issues such as products being offered to consumers "not in the target market" and risks such as late payment fees, unaffordable borrowing rates, customers incurring loss, investment performance etc.

Conversely, e-money is issued at par and may be redeemed at par at any moment, [EMR 39] and, therefore, do not face these risks.

We would invite the FCA to clarify whether they are primarily concerned about a service (for example, an entire platform) sustaining a major operational incident? We ask this because the harms identified in the CP are not related to e-money or payment services; however, we do acknowledge that customers will have issues from time to time, such as if the service was not available.

The rules proposed by the CP will also create duplication and therefore confusion, as a number of proposals reiterate existing requirements, for example in FG 21/1 Guidance for Firms on the fair treatment of vulnerable customers.

Q17: What are your views on our proposals for the Customer Service outcome?

The harm the FCA seeks to address here does not relate to e-money.

CP 4.55 provides a description of the harm the FCA seek to address through new rules:
"We sometimes see 'sludge practices' in customer service processes where they are deliberately designed to hinder consumers from taking action that would benefit them. For example, some insurance firms use customer service processes that make it difficult for customers to stop their policy from automatically renewing, to deter them from switching to a different provider. A firm could also make it difficult for customers to access the benefits a product promised. For example, an unclear or excessively complex claims process may discourage customers from making a valid insurance claim." [CP 4.55]

The harms identified here relate to insurance, for example, customers' policy automatically renewing to deter them from switching providers. The harm identified by the FCA does not translate to e-money; E-money holders may always get the full benefit out of their product because an e-money holder may redeem their e-money at par value, at any moment. [EMR 39] There is no impediment to an e-money holder utilising all aspects of the e-money product.

In relation to firms "making it difficult to switch to a new provider", this concern also does not relate to e-money. Unlike insurance policies or mortgages, for example, a customer may hold multiple e-money products at the same time. Accordingly, there is healthy competition and customers are free ("at any moment") to vote with their feet.

Q18: What impact do you think the proposals would have on consumer outcomes in this area?

We consider the proposals relating to Customer service would have little effect on e-money customers. The issues the FCA seeks to address by creating rules with respect to Customer Service are not faced by e-money holders.

E-money holders would likely place more importance on the efficacy of an EMI's cell phone application ("app"); how easy-to-use, quick and simple it is to access the customer's account and make payments via the app is likely to be more important to e-money customers than their interactions with customer service staff, which are seldom. For example, there is no need to contact customer service (i) to make a claim (as with insurance), (ii) to prevent automatic renewal, or (iii) to switch to a new provider. E-money is differentiated from other products to which the CP refers (e.g. insurance, mortgages, investments) because e-money is – in most cases - wholly within the customer's control.

E-money firms are, of course, committed to providing reliable and helpful customer service. E-money and payment services firms acknowledge that good customer service is important, particular in the event that there are issues with the service provided, for example.

For example, the follow example provided in the CP setting out an instance which the FCA seeks to address would not occur in an e-money context: "A retail banking customer telephones their bank to transfer money from a savings account into a current account, to avoid going overdrawn. The customer waits on hold for a long time but is unable to get through to an agent to make the transfer. This results in the customer going overdrawn and incurring charges. It is very likely in this example that the firm would have failed to meet the customer service standards we are seeking."

An e-money customer would not find themselves in this position; an e-money customer has full control over their e-money. Generally speaking, e-money customers can access their e-money account via the EMI's app and make payments immediately. Where this does not occur, the EMI would be in breach of Part 5 of the EMR and the Framework Contract and thus could be subject to a customer complaint, if not supervisory action.

Q19: What are your views on our proposals for the Price and Value outcome?

We disagree with the proposals outlined in the CP in this respect and consider the price of a firm's products and services should be wholly determined by the firm. Please note that there is a margin on all e-money and payment services products that a firm must make in order to remain viable. An end-user does not take this margin into account. They are a rational consumer, which means their ideal price for a product or service is zero. A more

feasible approach would be to assist firms in attaining an equilibrium price for their products and services. This would further encourage competition within the relevant sectors, including in the e-money and payments sector.

E-money and payment service customers are provided with "details of all charges payable by the payment service user to the payment service provider, including those connected to the manner in and frequency with which information is provided or made available and, where applicable, a breakdown of the amounts of any charges". [PSR 48 and Schedule 4; paragraph 3]

The customer must be provided with this information as to charges 'in good time' before entering into the Framework Contract. [PSR 48] Accordingly, the customer has the opportunity to consider the charges and whether they accept them prior to entering into the Framework Contract. If the customer considers the charges are too expensive or otherwise do not align with the customer's expectations, the customer is free to not sign the Framework Contract and may, instead, procure products and services from a competitor.

Q20: What impact do you think the proposals would have on consumer outcomes in this area?

The proposed outcomes concerning Price and Value would likely have little effect on e-money and payment service customers. As noted above, e-money and payment service customers have full visibility of all fees and charges before they enter into the Framework Contract. The customer is free to review the fees and charges and, if they deem the fees and charges to not reflect good value (in their personal opinion), may walk away. In addition, the prices charged to consumers of e-money and payments products are generally speaking much lower than those charged to customers of credit, investment or insurance products.

Similarly, if an e-money or payment service customer considers the fees and charges are not good value after entering into the Framework Contract, the customer may terminate the Framework Contract for convenience on no more than one-months' prior notice. [PSR 51] As discussed previously, the one-month period is normally not required and customers may usually terminate immediately.

An e-money holder or payment service customer retains a high-level flexibility in terms of price and value.

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

We disagree with the FCA introducing a PROA with respect to breaches of the Principles, including the Consumer Principle.

Please note that payment service users are already afforded a private right of action for breaches of consumer protection requirements (as well as other provisions) of the PSRs pursuant to PSR 48 as follows:

"148.— (1) A contravention—

(a)which is to be taken to have occurred by virtue of regulation 21 (authorised payment institutions, small payment institutions and registered account information service providers acting without permission);

(b)of a requirement imposed by regulation 23 (safeguarding requirements); or

(c)of a requirement imposed by or under Part 6 (information requirements for payment services) or 7 (rights and obligations in relation to the provision of payment services),

is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty."

Accordingly, payment service users are already afforded the right to pursue a payment service provider for loss by way of litigation.

Including a PROA with respect to the Principles is not feasible as the Principles are completely different in nature to the provisions of the PSR. The Principles are a supervisory tool, designed for use by the regulator when overseeing the activities of regulated firms. They are not designed as a tool against which consumers, the FOS, or the courts, should be in a position to make any judgements. The PSRs on the other hand, set out specific regulatory requirements governing the payment service provider's relationship with the payment service user. For example, to safeguard customer funds. Here, the payment service user would set out to establish the payment service provider did not safeguard the funds.

On the other hand, it would not be feasible to create a cause of action for breach of the Principles as they are too broad in concept. For example, for Principle 1 (Integrity), what elements would the payment service user establish to prove a breach?

Further, introducing a PROA with respect to the Principles would:

- take control away from the FCA as to the meaning of the Principles (including the Consumer Principle). A PROA will result in courts creating precedent, which will bind future decisions with respect to the Principles. Please note that cause of actions by a payment service users would be brought in the County Court or the High Court and be heard by judges who do not specialise in financial services. Further, if a payment service user elected to pursue their PROA with the FOS instead of litigating, with any guidance at present, the FOS would then be tasked with determining the meaning of the Principles. This would create a situation that gave rise to "FOS case law", thereby further taking control over the meaning of the Principles away from the FCA;
- create risk for consumer-plaintiffs whereby they may be ordered to pay a firm's litigation costs;
- give rise to a favourable environment for vexatious litigation, tying up the courts
- significantly increase firms' compliance and legal costs, reducing the proportion that can be allocated to day-to-day compliance with compliance and legal obligations such as prevention of money laundering etc.

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?

We do not think a future decision to provide or not provide a PROA for breaches of the Consumer Duty would have any impact on our responses to this consultation.

Q23: To what extent would your firm's existing culture, policies and processes enable it to meet the proposed requirements? What changes do you envisage needing to make, and do you have an early indication of the scale of costs involved?

Firms will have to make significant changes in order to comply with the Consumer Duty. For example, firms must, in the first instance, carry out an assessment to determine the gaps between its current conduct and the standard required by the Consumer Duty. Firms will

have to carry out a substantial regulatory assessment of all processes and procedures, including, but not limited to, existing and retrospective products and services, customer journeys, customer communications, framework contracts, relationships with firms in the distribution change necessitating contractual amendments and so on.

The changes are significant and will result in extensive costs and resource expenditure. This is particularly challenging for smaller firms, who have limited compliance teams and budget, and must focus their attention on regulatory obligations that will have direct and immediate impact on the business (capital requirements), their customers (safeguarding of funds) or on for example the prevention of money laundering or terrorist financing. We invite the FCA to reconsider whether the harms identified are proportionate to the cost of applying the consumer duty to this sector. The e-money and payments sector has already been identified as the least profitable financial services sector, and adding another burden such as the Consumer Duty, without any identification of particular harms in this sector is not only hugely disproportionate, but it is entirely unnecessary.

Q24: [If you have indicated a likely need to make changes] Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes?

As above, the changes are significant and will result in extensive costs and resource expenditure.

Q25: To what extent would the Consumer Duty bring benefits for consumers, individual firms, markets, or for the retail financial services industry as a whole?

Whilst the consumer duty may bring some benefits to consumers of credit, investment or insurance products (although it is unclear why the harms identified cannot be addressed through targeted, sector-specific rules instead), we do not consider that the Consumer Duty would provide any benefits to consumers, individual firms, or markets within the payments sector. Existing rules, Principles, legislation and Guidance already provides a sufficient framework on which to base any supervisory activity by the FCA to address identified consumer harms.

Q26: What unintended consequences might arise from the introduction of a Consumer Duty?

Please see our response to question 21 which sets out consequences of introducing a PROA.

Further, we believe an unintended consequence of the Consumer Duty will be that it will supress innovation in all sectors. We consider that once a decision is handed down by a court or by the FOS, with respect to product design, for example, firms will, from that point in time, only develop products in conformance with that holding (whether court or FOS) in order to avoid a new product being viewed as non-compliant with the Consumer Duty.

This is another reason why we specifically request detailed sectoral guidance informing us (and potentially future decision makers such as courts and the FOS) of the FCA's expectations as to how the Consumer Duty should be interpreted.

Q27: What are your views on the amount of time that would be needed to implement a Consumer Duty following finalisation of the rules? Are there any aspects that would require a longer lead-time?

The changes are significant and will result in extensive costs and resource expenditure.

We request the FCA allow firms a lead time of no less than three years prior to the day the FCA will begin enforcing compliance with the Consumer Duty.

We note the Vulnerability Guidance has a lead time of two years allowing firms to comply prior to enforcement. The Consumer Duty, as set out in the CP, is more extensive than the Vulnerability Guidance. Accordingly, we request a longer lead time.

List of EMA members as of July 2021:

AAVE LIMITED
Account Technologies
Airbnb Inc
Airwallex (UK) Limited
Allegro Group
American Express
ArcaPay Ltd
Azimo Limited
Bitpanda Payments GmbH
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network Ltd
Boku Inc
CashFlows
Circle
Citadel Commerce UK Ltd
Contis
Corner Banca SA
Crosscard S.A.
Crypto.com
Curve
eBay Sarl
ECOMMPAY Limited
Em@ney Plc
emerchantpay Group Ltd
ePayments Systems Limited
Euronet Worldwide Inc
Facebook Payments International Ltd
Financial House Limited
First Rate Exchange Services
FIS
Flex-e-card
Flywire
Gemini
Globepay Limited
GoCardless Ltd
Google Payment Ltd
HUBUC
IDT Financial Services Limited
Imagor SA
Ixaris Systems Ltd
Modulr FS Europe Limited
MONAVATE
Moneyhub Financial Technology Ltd
Moorwand
MuchBetter
myPOS Europe Limited
OFX
OKTO
One Money Mail Ltd
OpenPayd
Own.Solutions
Oxygen
Park Card Services Limited
Paydoo Payments UAB
Paymentsense Limited
Payoneer
PayPal Europe Ltd
Paysafe Group
Plaid
PPRO Financial Ltd
PPS
Remitly
Revolut
SafeCharge UK Limited
Securiclick Limited
Skrill Limited
Snowy Pay Ltd.
Soldo Financial Services Ireland DAC
Square
Stripe
SumUp Limited
Syspay Ltd
Token.io
Transact Payments Limited
TransferMate Global Payments
TrueLayer Limited
Trustly Group AB
Uber BV
Vitesse PSP Ltd
Viva Payments SA
Vivid Money Limited
WEX Europe UK Limited
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Wise
WorldFirst
WorldRemit LTD