

FCA Mission: Our Future Approach to Consumers

BSA Response

29 January 2018

Executive Summary

- **Consumer responsibility (question 1):** We note and support the FCA's continued acknowledgement that consumers have responsibilities, but we appreciate the fact that there are circumstances where consumers cannot be expected to take responsibility. We would welcome further engagement, across all relevant parties, on the important subjects of consumer rights, responsibilities, and financial education.
- **Vulnerable customers (question 2):** We strongly agree that building societies and other financial services firms have a regulatory and a moral responsibility to support customers who have particular needs and are at particular risk of harm. We suggest an appropriate framework for applying this responsibility.
- **FCA remit (question 3):** Regarding the question about the FCA's remit, one of the failings of the FSA was loss of focus - the FCA has clear statutory objectives and, in our view, should adhere to them.
- **Well-functioning market (question 4):** There is much to support in the FCA's vision for a well-functioning market that works for consumers, although we make an observation about the risk of conflating the concepts of inclusion and vulnerability – they can overlap but are not identical.
- **Metrics for good consumer outcomes (question 5):** We suggest that, from a regulatory standpoint, the two key requirements for good consumer outcomes are (1) a properly functioning competitive market, and (2) clear and sensible consumer rules that are properly enforced. Therefore, we suggest that metrics that the FCA might use should focus on ensuring that 1) and 2) are effective in practice.
- **Additional or alternative factors (question 6):** We appreciate that the FCA should engage with wider government policy where appropriate to do so. However, in its work designed to tackle “areas of greatest harm”, it is important that the FCA does not seek to place inappropriately wide responsibilities on the firms that it regulates.

Responses to FCA Questions

In January 2017, the BSA [responded](#) in detail to the FCA's *Our Future Mission* consultation. Although that response covered much of the ground comprised in the FCA's current *Our Future Approach to Consumers* consultation (the CP), we do not repeat those extensive comments but refer only to key points in our response below.

1. While having regard to the general principle that consumers should take responsibility for their decisions, do you agree that there are circumstances where consumers cannot be expected to take responsibility? What do you think these circumstances are? How could – and should – the FCA intervene in these cases?

We note and support the FCA's continued acknowledgement that consumers have responsibilities, but we appreciate the fact that there are circumstances where consumers cannot be expected to take responsibility.

Consumer responsibility has been an ongoing topic of conversation for a long time and it would be very useful to all concerned if we could reach some consensus, even if only on a broad level. We believe that consumers have a right to know their responsibilities, just as much as they should know their rights. The BSA has carried out work in this area for many years and is happy to engage.

Unfortunately, consumer rights and responsibilities are not sufficiently defined. The Consumer Rights Act 2015 was a good attempt to introduce greater clarity regarding rights but, as a consolidating measure, it did not go far enough because it omitted certain matters; notably, unfair commercial practices (and much of it - currently - has to be predicated on EU measures).

Consumer financial education is very important but provision for this is not as good as it should be – the lack of clarity on consumer rights and the, more recent, inability of many consumers to access financial advice are aggravating factors.

At some point, even if it must wait until after Brexit (or, indeed, after any Brexit transitional period), we would welcome a proper discussion among all interested parties of how the UK can move forward on consumer rights, responsibilities and education.

Turning to the question about the circumstances in which consumers cannot be expected to take responsibility, there is certainly an important discussion to be had in the context of vulnerable customers. We are, therefore, pleased that the FCA raises the matter in the CP and we say more about it in response to question 2.

Away from vulnerable customers, and considering consumers in general, they are obliged to take responsibility for their own decisions. This is recognised by Parliament – now section 1C (2)(d) Financial Services and Markets Act 2000 – *“the general principle that consumers should take responsibility for their decisions”*.

However, in practice, this must be caveated by a condition that the consumer had received from the firm information that was clear, fair and not misleading. If a firm had misled a consumer in a particular respect, then the firm cannot expect to hold the consumer to a related obligation.

For example, as happened in many past PPI cases, suppose a firm that told some consumers that a certain insurance product was obligatory with a loan product (although it was not) or that they would be covered by the product (but due, say, to their self-employed status they were not covered). In such cases, it would obviously be wrong for the firm to say that the

customers, who acted on the information, were then bound to take responsibility for their own decisions or by the contract.

Similarly, consumers will not have either responsibility (or the same level of responsibility), or their responsibility would be qualified, in other areas such as –

- advice cases
- certain complicated products
- products where there had been a very poor product governance process, etc.

Firms have important responsibilities to provide services of good quality; clear, honest and timely information; treatment that is fair; and contract terms that are fair and intelligible.

We believe that FCA should predicate intervention upon –

- fewer, stronger rules that are fairly and proportionately – but robustly – enforced
- coherent consumer protection
- a competitive, transparent marketplace (essentially a matter for one of the separate FCA *Mission* CPs, but we include it here for completeness and because it is important)
- constructive engagement with relevant parties on risk and regulation, and
- stable regulatory structures and requirements.

We recognise that not all these matters are entirely within the FCA's gift and a number of other agencies are involved. Naturally, a strong and effective Ombudsman service, and proper regulation of claims management companies are also important parts of the consumer protection equation.

We note the comments about 'duty of care' on page 15 of the CP. We have serious reservations about this suggestion, and explained our concerns in our earlier response. We do not repeat those points now because the FCA plans a discussion paper on the topic, and we will engage with that DP.

2. Do you agree that firms have a responsibility to take reasonable steps to identify the signs of vulnerability, and to have processes in place to take appropriate action where they have identified a consumer with a particular need and at a particular risk of harm?

We strongly agree that building societies and other financial services firms have a regulatory and a moral responsibility to support customers who have particular needs and are at particular risk of harm. This is a very important subject on which the BSA has done considerable work. We suggest that the following would be an appropriate framework for applying this responsibility –

- steps taken to identify vulnerability should not be intrusive and should respect the consumer's right to privacy

- financial services firms should not be expected to take on the role of medical, social care or law enforcement professionals in identifying vulnerability and deciding on appropriate action. Some appropriate actions to address a particular vulnerability will require expertise (medical, police, social services etc) outside of a financial services firm's competence and the nature of their relationship with the customer. Firms should not be required to substitute for other professionals to deliver those actions
- firms should act in the consumer's best interests based on the situation/decision in front of them. However, there are important distinctions between vulnerability in general and consumers who do not have the mental capacity to make decisions for themselves.

We also believe that this responsibility encompasses risk of harm from crime and financial abuse as well as the categories of health, resilience, life events and capability identified by this report – criminals do deliberately target individuals who are vulnerable.

We hope that the FCA's future approach to vulnerable consumers recognises this responsibility and that there can sometimes be tension between the right action to empower these consumers to allow them to participate in markets and the right action to protect them from crime.

3. Which consumer issues do you think sit directly within the FCA's remit, and which are more a matter for Government? Are we right to commit our resources to working with other organisations, such as firms, other regulators, Government, courts, consumer groups etc., where improved consumer outcomes may require action that is not within the FCA's regulatory toolkit?

We deal with the two questions separately. First, as we noted in our earlier response, there is a real risk of loss of focus and of watering down of regulatory objectives if the FCA takes an excessively broad view of its role. The key FCA objective relevant to this CP is identified in Andrew Bailey's foreword; namely, *'to secure appropriate protection for consumers'*. In our view, it is crucial for the FCA to maintain focus on that objective.

For example, financial inclusion is essentially a policy area for government. Financial inclusion might come within the regulator's purview if government introduced relevant laws that affected FCA rules – aspects of equality legislation might be a case in point. It might also be a matter for the FCA if a firm acted in a way that excluded customers and, by that behaviour, breached FCA conduct rules.

The FCA's competition remit (*'promoting effective competition in the interests of consumers in the markets for regulated financial services'*) is to do with properly competitive markets and, whilst greater inclusion might be an outcome of the FCA's work in this area, it does not appear to be fundamental to it. Therefore, we broadly support the FCA's discussion of this issue on page 12 of the CP.

In summary, one of the failings of the FSA was loss of focus - the FCA has clear statutory objectives and, in our view, should adhere to them.

Taking the second question, it is of course right that all organisations with a consumer protection objective should liaise with one another to help ensure reasonable consistency and, where appropriate, work co-operatively. Indeed, the diverse, fragmented and uncoordinated nature of the UK consumer protection regimes (despite the best efforts of the Consumer

Rights Act 2015) is, in our view, a major reason why many, probably most, consumers do not know or understand their rights.

In an ideal world all parties (including government, business and consumer agencies, and not only in relation to financial services but also other private and public sectors) would work together, post-Brexit, for a clear and comprehensive UK statutory code of consumer rights. The BSA would be happy to engage in any such discussions but we appreciate that, in the current political and regulatory climate, the government is unlikely to see it as a priority.

Given that such a radical route is very unlikely to be the path taken, an alternative (relevant only to financial services) would be for the FCA to consider revising its own approach to consumer protection rules and the contents of the FCA Handbook. Once the post-Brexit position is clear, the BSA would be very happy to make practical suggestions.

Whichever route is followed Post-Brexit, simplification should be possible and would be highly desirable. We discussed this matter in more detail in our response to the earlier Mission consultation.

It would also be very welcome in principle for dual (PRA and FCA)-regulated firms if the regulators could, again presumably post-Brexit, consider undertaking some rationalisation of their respective rulebooks. For example, as things stand, dual regulated firms must have regard to the FCA Handbook, the PRA Rulebook, PRA supervisory statements and PRA statements of policy even when dealing with fundamentally the same (or similar) subject-matter – eg the senior managers' and certification regime. We think it should be possible, longer-term, to streamline this position.

4. Do you agree with the aspirational vision and outcomes that we explore? Are there any further barriers or risks to us achieving it?

There is much to support, and little to disagree with, in the table on page 33 of the CP, summarising the FCA's vision for a well-functioning market that works for consumers.

One observation though is that the FCA conflates inclusion with vulnerability. Of course, the two can overlap but, notwithstanding the potential complexities of vulnerability, a financial inclusion agenda potentially goes much wider than vulnerability and is essentially a matter of government policy (see our comments above).

5. What further metrics would you use? Are there any specific data sources or tools that may be of benefit?

We suggest that, from a regulatory standpoint, the two key requirements for good consumer outcomes are (1) a properly functioning competitive market, and (2) clear and sensible consumer rules that are properly enforced. Therefore, we suggest that metrics that the FCA might use should focus on ensuring that 1) and 2) are effective in practice.

From a thematic point of view, external measures might include completed Ombudsman complaints that, while not telling the whole story, do give part of the picture of which firms and sectors treat their customers fairly and which products, or elements of products, might be problematic (eg complaint levels relative to market share and uphold rates per firm, sector or product). Other sources might include independent and legitimate customer service surveys, and the FCA's own enforcement cases.

For many years, the BSA has supported its members in relation to good consumer/ TCF/ conduct risk metrics (both quantitative and qualitative), engaged with the FCA's predecessor

(the FSA) during its TCF exercise and on the topic of conduct risk, and would be happy to engage further with the FCA on these matters.

Of course, it is right for the FCA, in order to better inform its consumer protection work, to consider carefully a range of other relevant factors, such as innovation and technological change, the effects of a long-term low Bank base rate, behavioural psychology, demographic trends, different categories of consumers and products etc. As we did in our earlier response, we simply caution the FCA against following an overly complicated route that could lead it to water down, or pay insufficient attention to, its stated objectives.

6. Do you agree with this framework? Would you like us to consider any additional or alternative factors in how we regulate:

- a. for all consumers**
- b. for the most vulnerable or excluded, and**
- c. to meet the challenges of the future?**

Again, we appreciate that the FCA could, and should, engage with wider government policy where appropriate to do so. We discussed this matter in relation to financial inclusion (above). However, in its work designed to tackle “areas of greatest harm” (page 5 of the CP), it is important that the FCA does not seek to place inappropriately wide responsibilities on the firms that it regulates.

For instance, the BSA and our members fully support, and have for many years actively engaged in, the work to help protect vulnerable consumers. While all consumer-facing businesses have strong responsibilities with regard to vulnerable customers, this does not mean that they can be expected to make up or deficiencies in state education and social services (see comments above). A sensible balance must be achieved, and central and local government must also meet their responsibilities.

Page 10 of the CP refers to the use by the FCA of informal tools. While we recognise that such approaches can be beneficial to good firms and to consumers, it is important to distinguish issues that are amenable to such tools (eg changes to process following the *Bank of Scotland v Rea* judgment) and those where early and robust enforcement is needed (eg as should have happened with PPI mis-selling). We welcome the Smarter Consumer Communications initiative (page 37).

We also caution against excessive use of voluntary codes of practice. The FSA fundamentally changed the landscape when it, in effect, brought the *Banking* and *Mortgage Codes* to an end by replacing them with regulatory rules. While voluntary approaches can still have a place in certain limited circumstances, nowadays they should usually be left to the market. A proliferation of voluntary codes alongside, broadly overlapping, laws and regulations is a recipe for consumer confusion and double jeopardy.

In our previous response, we encouraged the FCA to provide flexible portfolio firms with supervisors who had greater sector expertise and a named FCA contact. We have also liaised the FCA and its Contact Centre about how performance might be improved.

Therefore, we were pleased to see from recently published FCA Board minutes ([October 2017](#)) that the FCA plans to group flexible portfolio firms according to business model, and they will have a designated point of contact for most issues. Accordingly, we look forward to the ‘Approach to Supervision’ document that the FCA expects to publish in early 2018.

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The Building Societies Association (BSA) is the voice of the UK's building societies and also represents a number of credit unions.

We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our members have total assets of over £345 billion, and account for approximately 20% of both the UK mortgage and savings markets