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15 February 2022

**Via e-mail to:**

Consumer and Retail Policy

Financial Conduct Authority

12 Endeavour Square

London

E20 1JN

Dear Sir or Madam

**CP21/36: A new Consumer Duty – Feedback to CP21/13 and further consultation**

We welcome the opportunity to respond to the consultation published by the Financial Conduct Authority in December 2021 entitled: A new Consumer Duty – Feedback to CP21/13 and further consultation (“**the Consultation**”). We would be happy to discuss our response with you.

The **Payments Innovation Forum** (“**PIF**”), formerly the Prepaid International Forum, is the not-for-profit industry body representing e-money and payments firms that are regulated under the Electronic Money Regulations 2011 and Payment Services Regulations 2017 (“**PSRs**”). Our members vary in size, e-money/payment service offered and business model. It is in this capacity that we submit our response.



## **General Comments**

We fully support the regulatory goal to ensure firms consistently consider the needs of their customers, and which requires firms to focus on delivering good outcomes for consumers that goes beyond ensuring a narrow compliance with specific rules.

However, we reiterate our difficulty in seeing what harms the Consumer Duty intends to fix in the payments and e-money sector. Almost all the examples provided in paragraph 2.2 of the Consultation relate to financial products such as funeral plans, insurance, asset management, pensions and credit that, due to their nature and complexity, pose a greater risk of causing harm to consumers in pursuit of their financial objectives.

Further, in CP21/13, the FCA gave the example of a retail banking customer going overdrawn and incurring charges because the bank had kept the customer on hold for too long. In comparison, e-money and payment services are, where no additional regulated activities are involved, relatively straightforward products which enable the customers to (a) (in the case of e-money) spend their fiat funds exchanged for e-money on receipt of funds; or (b) (in the case of payment services) execute payments from A to B on customer's instructions. We appreciate that the likelihood of consumer harm may be higher where a particular product or service involves investments or credit. However, those are not the types of services typically offered by EMIs or PIs (except some who would hold additional permissions for such activities). For example, they generally cannot offer overdraft facilities. Further, because e-money is redeemable, at par value, at any time, it is difficult to see the potential harm these types of products would give rise to.

Concerns raised to date by the FCA in connection with EMI and PI activities (where the FCA believes there is a risk of harm occurring to consumers) have related to circumstances where delinquent firms have not complied with their existing regulatory obligations e.g., in relation to safeguarding, and complaint handling and customer communications. Redress for such non-compliance is set out in such regulatory framework. We are concerned that bringing the EMIs and PIs within the full range of the new Consumer Duty requirements is disproportionate and will inevitably result in; (i) higher compliance costs without addressing any specific harms identified in the e-money and payment services sector (typically, this sector operates on a low

margin of profit, with limited scope for firms to absorb additional costs to their business); (ii) higher costs to users of such services; (iii) reticence for new entrants to launch in the UK as compared to other countries on a complexity and cost basis; and (iv) no significant impact to the behaviour of those firms that currently do not meet their regulatory obligations.

We would like to see more detail and examples of harm that uniquely correlate with the e-money and payment sector or which evidence issues that have occurred and which the FCA has identified. We also reiterate our need for clarity on why the existing rules and guidance are insufficient in preventing the identified harms the Consumer Duty intends to remedy in the e-money and payments sector. With this detailed information in hand, our members will better understand the FCA's expectations.

Finally, we welcome that the FCA plans to use the implementation period to work with firms to mitigate any residual risk of unintended consequences. In doing so, we would urge the FCA to consider that many smaller e-money and payment firms have fewer resources than larger firms and will find the cost of complying with the added layer of additional rules difficult to absorb, hindering their ability to compete in the marketplace. Specifically, we invite the FCA to elaborate on why it does not agree that the Consumer Duty will have a negative impact on competition.

### **Consultation Questions:**

#### **Q1: Do you have any questions on the proposed scope of the Consumer Duty?**

We welcome the FCA's recognition that applying a single standard retail client definition would create challenges. The concepts of 'professional clients' and 'eligible counterparties' which were proposed to be excluded from scope do not translate well in the context of e-money and payment services and are not concepts EMIs and PIs are ordinarily accustomed to. We welcome greater clarity that, as regards EMIs and PIs, the types of customers within scope of the Consumer Duty are consumers, alongside micro-enterprises and charities who are treated on par with consumer customers in the PSRs.

**Q2: 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 are concerned that the draft rules and guidance on the responsibilities across the distribution chain are ill-fitted to and can introduce, more rather than less, uncertainty in the e-money and payments sector.

In delivering their e-money and payment services, EMIs and PIs often use the services of authorised third party providers, for example, banks offering agency banking services or other services of a payment nature offered by specialised payment service providers. EMIs and PIs have a direct contractual relationship with their customers and are subject to regulatory obligations as applicable to the services they provide to those customers, and it is the responsibility of such EMIs and PIs to ensure that every underlying wholesale service they may be using in bringing their services is managed and overseen appropriately. The underlying / wholesale banks or payment service providers are, in turn, subject to their own regulatory responsibilities as regards the services they provide to such EMIs or PIs. This current approach offers certainty and clarity amongst the responsibilities of various providers who may be involved in the delivery of a particular e-money or payment service.

PRIN 2A.1.5. states Principle 12 and PRIN 2A will concern not only obligations of firms with their own direct customers but also with firms in a distribution chain. The draft non-Handbook guidance provides “*The Consumer Duty applies across the distribution chain ... to all firms that could have an impact on retail customer outcomes, whether or not they have a direct relationship with the customer*” (para. 2.11) and “*A firm that is remote from the consumer... whose role has only limited impact on consumer outcomes, will have more limited obligations*” (para. 2.13). The proposed approach seems to introduce uncertainty in requiring various (wholesale) PSPs who are providing services to EMIs and PIs, to exercise judgement as to how much impact they could have on the outcomes to the customers of the EMIs and PIs in order to understand how Consumer Duty rules apply to them. Such wholesale PSPs may have no detailed knowledge of the EMIs’ or PIs’ customer base or detailed knowledge over how their services fit into the overall services delivered by such EMIs or PIs as they do not typically play any part in the EMI’s or PI’s strategic product or distribution strategy decisions. On the other hand, such PSPs determine the prices for their services which, in turn, form part of the

EMI's or PI's costs which may be passed on to their consumer customers (and so may be of relevance in the context of the price and value outcome). Is this type of wholesale PSP impact enough to bring them within the scope of the Consumer Duty? If the answer is yes, we are concerned that this will introduce significant uncertainty, which may lead such wholesale PSPs exercising more influence over the activities of EMIs or PIs who use their services, or potentially limiting the services they offer to such EMIs or PIs, in either case distorting or otherwise negatively impacting the competitiveness of the e-money and payments sector. In any case, it is disproportionate to apply such requirements to wholesale PSPs when their EMI and PI customers themselves are subject to the Consumer Duty.

Further, the proposed definitions of “product”, and consequently, the “manufacturer” and “distributor” in the Glossary appear ill-fitted to the e-money and payments sector. These definitions are tied to “specified investments” and/or “regulated activities” which generally do not concern e-money and payment services offered by EMIs or PIs. The EMRs and PSRs have a concept of agents (who may, provided they are registered with the FCA, carry on payment services on behalf of EMIs or PIs) and distributors (who may distribute e-money). Typically, neither agents nor distributors are authorised firms in their own right and at all times come under the regulatory responsibility of the EMI or PI appointing them. Whilst we understand the new rules are only intended to apply to firms in the distribution chain which are authorised by the FCA, the use of the term “distributor” can be confused with distributors and agents operating in the e-money and payment sector who should not be subject to the new rules. We suggest the term used is changed or the FCA expressly excludes e-money distributors or payment service agents.

**Q3: 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?**

We do not have any comments.

**Q4: Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?**

We do not have any comments.



**Q5: Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?**

We do not have any comments.

**Q6: Do you agree with our proposal to disapply Principles 6 & 7 where the Consumer Duty applies?**

We do not have any comments.

**Q7: 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 do not have any comments.

**Q8: Do you have any comments on our proposed cross-cutting rules and the related draft rules and non-Handbook guidance?**

We do not have any comments.

**Q9: 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 do not have any comments.

**Q10: Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?**

The FCA states that 'firms should not rely on individual customers' willingness to buy a product or service as evidence of their fair value' (paragraph 8.7 of the Consultation). Further, paragraph 6.18 of the draft non-Handbook Guidance provides "[firms] should not rely on individual customers to consider whether the price provides fair value in relation to the benefits." However, this does not consider that there are already detailed pre-contractual/pre-transaction disclosure requirements under the PSRs, including on detailed breakdown on costs and limitations associated with a service, which enable e-money and payment services customers to assess whether the product or service is suitable for them, and to choose or not to choose that product or service. We would welcome clarity on why the existing regulatory framework is insufficient in this regard.

We would also welcome adding an additional consideration in carrying out value assessments under PRIN 2A.4.11, namely whether the costs and limitations of a given product have been disclosed to a customer. We are concerned that the individual customer responsibility for their decisions as to which products or services they wish to use is effectively taken away in the expectation that firms now have to make those assessments for them. We are also concerned, generally, that the new rules will, albeit it may not be the FCA's intention, effectively result in price regulation.

**Q11: Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?**

In our response to CP21/13 we queried what, if anything, the proposals would add to existing requirements relating to the adequacy of consumer communications, and how this would interact with pre/post contractual and on-going disclosures under the EMRs and PSRs – e.g., whether a firm that has provided all of the statutorily required disclosures would be required to actively do more in order to comply with the new rules. Firms in the e-money and payments sector are already obliged to ensure consumers are provided with detailed information about the product or service they are considering in accordance with the PSRs and per the FCA Approach Document (8.81) which provides further guidance on the required level of detail and the costs firms must disclose. Retail customers must also be given at least 2 months' notice of changes to the terms of a framework contract or pre-contractual information given, explaining the changes and allowing customers an opportunity to terminate the relationship without penalty before changes come into effect. It would be helpful if the FCA could elaborate on why the existing rules and regulations are inadequate with examples of good or poor practices across the different types of firms and business models in the e-money and payment services sector.

The obligation on firms to test their communications is likely to be very onerous to e-money and payments services firms, particularly the smaller ones. The said testing obligation under PRIN 2A.5.8 is expressed in absolute terms (i.e., "a firm must ... test communications") whereas PRIN 2A.5.10 implies that testing may not be necessary in all circumstances. We would welcome greater clarity in the rules to say that testing is only required where



appropriate. We would also welcome specific examples of when testing may or may not be appropriate in the e-money and payment services sector.

**Q12: Do you have any comments on our proposed requirements under the consumer support outcome and the related draft rules and non-Handbook guidance?**

We do not have any comments.

**Q13: Do you think the draft rules and related non-Handbook guidance do enough to ensure firms consider the diverse needs of consumers?**

We do not have any comments.

**Q14: Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?**

We do not have any comments.

**Q15: Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?**

We strongly agree with the FCA's proposal not to provide a private right of action (PROA) for breaches of the Consumer Duty. As we stated in our response to the FCA's first consultation (CP21/13), we believe that attaching a PROA to any aspects of the new rules would be harmful to the industry resulting in high costs in managing and litigating potentially spurious claims.

In keeping the possibility of a PROA under review, we would urge the FCA to consider that allowing for a PROA, and courts assessing whether a firm has met a particular standard, bears the risk of conflicting interpretations and setting precedents which may diverge from the standards set in the FCA's own rules and guidance. This may, by default, result in rules that are constantly changing and so are difficult for firms to keep up with or comply with.

**Q16: Do you have any comments on our proposed implementation timetable?**

We welcome the publication of the non-Handbook guidance and its intention to provide firms with enough clarity to begin implementation. However, the non-Handbook guidance is supplemented with very few relatable examples of good and poor practice which makes it



difficult for firms in the e-money and payments sector to contextualise the new requirements. The full implementation of the Consumer Duty by 30 April 2023, i.e., only 9 months after the intended date of publication of the final rules, will be challenging to most firms. To prepare for compliance with the rules, e-money and payment services firms will need to conduct a wholesale review of their current practices, policies and procedures affecting all areas of business (considering the all-encompassing nature of the Consumer Duty) and consider several factors, in particular the firm's size and business model and the types of e-money and payment service offered. Ultimately, the changes will have significant cost and resource implications for firms of all sizes. On that basis, we anticipate that firms will find it difficult to implement the Consumer Duty by the proposed date and we advocate for a longer lead time. We believe firms would need at least 18 months from the date the final rules are published in order to prepare for compliance with the Consumer Duty. For example, we note that firms were allowed a much longer lead period in order to comply with the FCA's Operational Resilience rules, being 1 year from the publication of the rules to implement preparational steps (i.e., mapping and scenario testing) with an additional 2 years to allow them to comply with the rules.

We welcome the opportunity to work closely with FCA in order to identify and work through examples of good and poor practice that are uniquely applicable to the payments and e-money sector during the implementation period.

**Q17: Do you have any comments on our proposed approach to monitoring the Consumer Duty and the related draft rules and non-Handbook guidance?**

We do not have any comments on the FCA's proposed approach.

**Q18: 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 do not have any comments.

**Q19: Do you have any comments on our cost benefit analysis?**

This is a question for our members to comment on.

**Q20: Do you have any other comments on the draft non-Handbook guidance?**

We do not have any other comments.



**Q21: Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?**

See our answer to Q16 above.

We would welcome the opportunity to discuss our response with you. We should add that the views expressed in our response do not necessarily reflect the views of all members of the Payments Innovation Forum.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Diane Brocklebank', is displayed on a light green rectangular background.

**Diane Brocklebank**

Executive Director

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