

FSR OUTLOOK 2022: IMPROVING CONSUMER OUTCOMES

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Legal Briefings - By **Enno Appel, Hannah Curtis, Brendan Donahue, Andrew Eastwood, Jon Ford, Ben Goodman, Hywel Jenkins, Vicky Man, Yorick Ng, Fiona Smedley, Wojtek Zaluska**

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The regulatory pendulum is swinging further towards ensuring the delivery of good consumer outcomes

In a nutshell:

- **The rebalancing of consumer protections is not yet over. Firms should expect more changes in the coming year as the consumer protection pendulum shifts further towards delivering good consumer outcomes.**
- **Firms will be expected to monitor, test and (where necessary) adapt their policies, practices and processes so they can satisfy themselves, and their regulators that customer outcomes achieved are in line with regulatory expectations.**
- **Regulators remain strongly focused on the fair treatment of vulnerable customers.**

The regulatory pendulum is swinging further in favour of consumers. A perception of continued poor outcomes for consumers, and insights derived from behavioural economics, are increasingly driving global regulators to focus on consumer outcomes. The traditional approach had regulators focusing on firms' processes, ensuring fair treatment of customers, and communications that are clear, fair and not misleading, in order to maintain the balance between ensuring consumers are protected, respecting consumers' responsibility for their choices, and maintaining an environment in which firms are able to innovate.

Whilst not abolishing the principle of consumer responsibility, the balance has clearly shifted. Firms will increasingly be required to assume more responsibility and consider consumer outcomes over the full product lifecycle, from the design, price and fair value of products, to sales processes, ongoing communications, through to complaints and redress. Firms will be expected to monitor those outcomes, and alter their practices where good consumer outcomes are not being achieved.

UK

In the **UK**, MiFID II requirements, including the duty to act honestly, fairly and professionally in the interests of clients, were onshored and retained following Brexit. However, in addition, the FCA is proposing to introduce a new Consumer Duty that would set clearer and higher expectations for the standard of care that firms must provide to consumers in relation to their retail market activities. The FCA says this will require a significant shift in culture and behaviour for many firms; they will need to focus on the actual outcomes experienced by consumers, and to put customers in a position where they can act and make decisions in their interests.

The Consumer Duty aligns with the FCA's final guidance on the fair treatment of vulnerable customers, published in February 2021. The FCA is seeking to drive improvements in the way firms treat vulnerable consumers and bring about a practical shift in firms' actions and behaviour. The FCA wants vulnerable consumers to experience outcomes as good as those for other consumers, and to get consistently fair treatment across the sectors the FCA regulates.

AUSTRALIA

In **Australia**, firms are readying for more consumer protection changes next year in the form of legislative enhancements to the design and distribution obligations ("**DDO**") which commenced in October 2021. The DDO reforms represented a significant rebalance and move away from the traditional 'conduct and disclosure model', placing an onus on firms to seek to deliver good consumer outcomes, protect the vulnerable and design and distribute products that are likely to be suitable for consumers. The upcoming DDO changes are expected to address some of the implementation pain points for firms but also some of the regulator's lessons learnt from complaints and early enforcement activity.

HONG KONG

In **Hong Kong**, the regulators have to date been less interventionist than the FCA when it comes to consumer protection. A duty to act in the best interests of customers currently features in various non-statutory regulatory guidance, such as various General Principles in the Securities and Futures Commission's main code of conduct (in the case of firms licensed under the Securities and Futures Ordinance) and the Code of Banking Practice (in the case of banks and deposit taking companies). The Hong Kong Monetary Authority has also worked with the industry to develop a Treat Customers Fairly (TCF) Charter. All retail banks in Hong Kong have signed up to the TCF Charter, which refers to good practices locally and overseas. Given the interconnected nature of financial markets and Hong Kong's status as an international financial hub, the Hong Kong regulators will no doubt be paying close attention to developments in overseas markets (including the FCA proposals), and will consider to what extent similar developments should be adopted in Hong Kong.

EU

In Spain, policymakers and regulators largely followed EU law applicable to investment services. Certain duties broadly analogous to the UK Consumer Duty are established in Spanish domestic law and EU law, in particular MiFID II and the Spanish Securities Act that transposes the provisions of MiFID II. These establish the duty to act "with honesty, impartiality and professionalism, in the best interest of their client", which applies to both retail and professional clients (albeit to a varying degree, as professional clients are presumed to have the knowledge and experience to make their own investment decisions and to correctly assess their risks). In addition to those obligations that are specific to investment services, parallel obligations exist under general EU and Spanish consumer law.

In Germany, there is no dedicated provision for a consumer protection duty in general. Instead, there are various consumer protection provisions distributed in individual laws. The German regulator BaFin has had its own department for collective consumer protection since 2015. BaFin focuses primarily on the transparency of financial and insurance products as well as financial services, consumer education, monitoring of potential mismanagement and product intervention. The protection of individual consumers, on the other hand, is the task of the ombudsmen, arbitration boards and the ordinary courts.

As an example, paragraph 11 of the Securities Trading Act (Wertpapier-handelsgesetz (WpHG)) includes, among others, laws that oblige securities services providers to act in the best possible interest of clients (section 63 (1) WpHG) and to provide understandable information in a timely manner (section 63 (7) WpHG). Section 89 WpHG also requires an auditor to review compliance with certain consumer protection reporting and notification obligations on an annual basis.

The conduct regulators in the UK and Australia are first movers in focusing on the delivery of good consumer outcomes as opposed to the way firms provide services or sell products to consumers. Whilst it is not yet clear how far other regulators will embrace the same shift in approach, pressures from changing social attitudes and the increasing global concern about ESG issues are mounting. We expect this will continue to drive firms to prioritise social financing, human rights, client experience, people and the workplace and the community more generally, as discussed in our [2021 Global Bank Review](#).

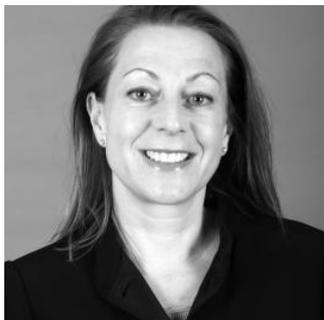
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