

Consumer Policy and Outcomes
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

By email: ReviewOfRequirementsCFI@fca.org.uk

31 October 2024

Dear Consumer Policy and Outcomes Team,

Re: BVCA response to Call for Input: Review of FCA requirements following the introduction of the Consumer Duty

The BVCA is the industry body and public policy advocate for the private equity and venture capital (private capital) industry in the UK. With a membership of over 600 firms, we represent the vast majority of all UK-based private capital firms, as well as their professional advisers and investors. In 2022, £27.5bn was invested by private capital into UK businesses in sectors across the UK economy, ranging from consumer products to emerging technology. There are over 12,000 UK companies backed by private capital which currently employ over 2.2 million people in the UK. Over 55% of the businesses backed are outside of London and 90% of the businesses receiving investment are small and medium-sized enterprises (SMEs).

We welcome the opportunity to provide feedback on the FCA's "Call for Input: Review of FCA requirements following the introduction of the Consumer Duty" (the "Call for Input") and support the FCA's stated objective of simplifying its requirements while ensuring it continues to support and protect consumers.

We have responded only to the questions in the Call for Input on which our members have specified views.

Question 2: Is there a lack of clarity on how requirements under the Duty and other FCA rules interact? Please tell us where this issue arises and your views on how it could be addressed. For example, would guidance on the interaction be helpful?

Yes. We would highlight two areas in particular where there is a lack of clarity on how the Duty and other FCA rules interact.

1) Proportionality

The Consumer Duty is underpinned by the concept of reasonableness, meaning that its rules and guidance must be interpreted in light of what is reasonable given the circumstances. However, in practice, it is often unclear how a firm is permitted to apply the Consumer Duty proportionately when faced with its prescriptive rules and requirements.

The four sets of retail customer outcome rules and guidance at PRIN 2.3A- PRIN 2.6A, the rules on governance and culture at PRIN 2A.8 and the rules on monitoring at PRIN 2A.9 include many prescriptive rules as to how firms must act. It is unclear to what extent, if at all, firms are permitted to disapply or modify such rules on the grounds of proportionality. By way of example, PRIN 2A.3 prescribes specific processes and procedures that a firm must put in place in relation to product governance, ongoing review and testing. PRIN 2A.8.3 - PRIN 2A.8.5 stipulates prescriptive rules relating to governance, such as, at least annually, preparing a report for its governing body setting out the results of its monitoring, which is reviewed and approved. Where these rules are prescriptive in

nature, either they apply or they do not, and so it is unclear to what extent a firm is permitted to modify or disapply them on the basis that their application would be disproportionate to the firm's circumstances.

To address this, we would welcome the FCA providing further guidance to firms when they are considering whether they are permitted to disapply or modify the detailed, prescriptive rules on the grounds of proportionality.

2) Application to non-UK investors

There is continuing uncertainty on how requirements under the Duty and other FCA rules interact in relation to activities carried on in a distribution chain involving non-UK investors. This is especially relevant in the context of institutional funds whose distribution chains include non-UK investors, particularly where the non-UK investors are not classified as retail investors (or equivalent) according to the laws of their own jurisdiction but would be classified as such were they in the UK.

PRIN 3.3.1R sets out that the Consumer Duty will apply "with respect to activities carried on with retail customers located in the United Kingdom unless another applicable rule or onshored regulation which is relevant to the activity has a different territorial scope, in which case [the Consumer Duty will] apply with that scope in relation to the activity described in that rule or onshored legislation". The second part (following the word "unless") suggests, in principle, that the Consumer Duty may apply in circumstances where activities are not carried on with any retail customers located in the UK in relation to an activity described in a rule (or onshored legislation) which has territorial application outside the UK.

In practice, it is a complicated exercise for firms to identify whether they carry out any activities which are subject to FCA rules relevant to the activity which have extraterritorial scope. Moreover, it is then often unclear how the Consumer Duty, which is designed with the protection of UK retail customers in mind, is intended to apply in the context of those specific extra-territorial FCA rules. This creates considerable uncertainty for firms who do not actually carry out any activities which involve a UK retail customer, but their activities with non-UK customers might bring them within scope of the Consumer Duty. It produces the odd result that firms may need to comply with the Consumer Duty solely in relation to their activities with non-UK customers, imposing a significant burden on firms without any benefit for UK retail customers.

Such extraterritorial application of the Consumer Duty also introduces inconsistencies with local rules. For example, where institutional investor products are marketed to investors based outside of the UK, this must be done in compliance with the relevant marketing regime applicable in that jurisdiction, which includes the consumer protections that the relevant authorities consider appropriate for that type of investor. However, local marketing regimes vary materially. In particular, the criteria to be considered a professional or semi-professional investor (or the local equivalent) may differ from the criteria applicable under the Consumer Duty, and it is not clear what interest is served by overlaying UK rules in this context.

To address this uncertainty, we would suggest that the FCA either confirms that the Consumer Duty does not apply in the context of distribution chains where the only retail investors are outside the UK or specifies the intended extra-territorial application of the Consumer Duty more precisely. This would create certainty for firms and be consistent with the Consumer Duty's purpose of protecting UK retail customers. Alternatively, the FCA could consider providing guidance confirming that the Consumer Duty does not apply in relation to activities carried on in relation to non-UK customers where the investor would not be treated as a retail customer according to the applicable laws or regulations of its own jurisdiction.

Question 4: Do you agree that work towards simplifying our retail conduct rules can help us meet all our objectives, including the secondary objective? Please explain why or why not.

We agree. We would emphasise that it is important for the FCA to be clear – as well as simple – in terms of the scope and application of its requirements and expectations on firms, including on territorial application. Working through areas of regulatory uncertainty creates significant burdens for firms in terms of resources and costs.

Question 5: In which circumstances do you think it is appropriate to rely on:

- a) high-level rules under the Consumer Duty
- b) more detailed rules
- c) a hybrid approach with both high-level and detailed rules?

We would respectfully disagree with the view that Consumer Duty is made up of a set of high-level, outcomes-focused requirements which give firms scope to determine how best to deliver good outcomes for retail customers. Our member firms' practical experience of implementation suggests that it would be more accurate to consider that the Consumer Duty follows a hybrid approach, combining high-level rules with detailed and prescriptive requirements which, on their face, apply to all firms within scope of the Consumer Duty. Despite the Consumer Duty being underpinned by the concept of reasonableness, the inclusion of detailed and prescriptive requirements in PRIN 2A makes it difficult for firms to be confident that the FCA would accept any disapplication or modification as 'reasonable', or prevents them from doing so without incurring significant cost and expenses in working through areas of regulatory uncertainty. This has a disproportionate impact on smaller firms, which typically are less able to bear such costs.

Please do not hesitate to get in touch if you have any questions or if you would like to discuss any of the above in more detail (please contact Tom Taylor ttaylor@bvca.co.uk / Nick Chipperfield nchipperfield@bvca.co.uk).

Yours faithfully,



Tim Lewis

Chair, BVCA Regulatory Committee