

Consumer Duty – what does it mean for third-country firms?

1. Speed read

The FCA published its final rules on the Consumer Duty in a Policy Statement on 27 July 2022 (**PS22/9**) and firms now have until **31 July 2023** to fully implement such rules for new and existing products or services and until **31 July 2024** for closed products or services. Firms must establish implementation plans by **October 2022**. This briefing discusses the territorial scope of the Consumer Duty and the implications for third-country firms conducting business with retail investors in the UK. A separate briefing: (i) summarising the basic requirements of the regime is available [here](#).

2. Territoriality of the Consumer Duty

Consideration of the territorial scope of the regime will be key for firms headquartered, or operating, outside the UK – particularly in light of the application of the Consumer Duty to manufacture and distribution.

PRIN 3.3.1R establishes territorial scope and states that the Consumer Duty applies generally

with respect to activities carried out 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 Principle 12 and PRIN 2A [the Consumer Duty] apply with that scope in relation to the activity described in that rule or onshored legislation'*.



This rule is somewhat obscure – not least as multiple rules and regulations with different territorial scopes may apply to any given activity – but we think it is intended to render the Consumer Duty coextensive with the conduct of business

obligations applicable to each class of regulated business to which it applies. As territorial scope applies differently across different regulated activities, this would seem to leave firms with the following:

No.	Category	Scope of Consumer Duty application	Source
1.	Investments	Activities conducted from: (a) a UK establishment; or (b) an overseas establishment in relation to UK clients, <u>except</u> where, were the overseas establishment a separate person, either (i) the overseas persons exclusion would apply, or (ii) the activity would not be regarded as carried on in the United Kingdom	COBS 1 Annex 1 Part 2
2.	Consumer credit	Unclear: no territorial scope	N/A
3.	Home finance	Activities conducted from: (a) a UK establishment; or (b) an overseas establishment to UK clients	MCOBS 1.3.1R; PERG 4.11.8
4.	Non-investment insurance	Activities conducted from a UK establishment	ICOBS 1.1.1R; see also ICOBS 1 Annex 1 Part 3
5.	Payments	Unclear: Payment services provided ' <i>in the United Kingdom</i> '. Precise application is unclear and guidance on this issue is not sufficiently clear. HM Treasury is consulting on potential regulation of foreign payment service providers	Payment Services Regulations 2017 (the PSRs); PERG 15
6.	E-money	E-money issued ' <i>in the United Kingdom</i> '. Generally foreign e-money issuers will not be authorised, unless they have a UK branch, so the Consumer Duty will not apply to them	Electronic Money Regulations 2011; PSRs
7.	Deposits	Activity conducted from a UK establishment only	BCOBS 1.1.1R

In some cases – particularly consumer credit and payment services – the territorial scope of the UK regime is sufficiently unclear to leave material doubt over territoriality, which would appear to

leave foreign authorised providers needing to apply the Consumer Duty to incoming services as well as branch activities.



3. Application to firms in temporary permissions regime (TPR) and supervised run-off (SRO)

Paragraph 2.38 of FG 22/5 indicates that the Consumer Duty also applies to firms in the TPR and SRO. This is uncontroversial: but somewhat concerningly, guidance also states that the Consumer Duty applies to temporary permissions firms '*whether these firms are doing regulated business from an establishment in the UK or on a [cross-border] services basis*'.¹ As the role of

guidance is to elaborate on, rather than extend, the scope of the rules we consider that the statement should be read as being subject to the territoriality of the Consumer Duty as discussed above, rather than supplanting it. It remains unclear how the FCA will approach the topic with firms though.

4. Inbound services

As indicated above, in some cases the regime will capture inbound services from outside the UK. It remains unclear what the FCA's expectations

will be of firms in practice in relation to such services.

5. Outbound services

As indicated in the table above, generally speaking outbound services (those provided from the UK to non-UK retail clients) will be within the scope of the requirements.

In PS22/9, the FCA has provided further clarity on its expectations for application of the Consumer Duty to manufacturers conducting business with non-UK customers where the distribution chain includes non-UK distribution firms. The FCA has reiterated that the Consumer Duty as a whole applies based on what is reasonable in

the relevant circumstances and has recognised that where a distribution chain includes non-UK distributors selling to non-UK customers, manufacturers will not be able to gather the same amount of information as when only dealing with UK-based firms. In this case, the FCA expects manufacturers to use any available information to support their work under the Consumer Duty but would not expect them to obtain information from firms that are not subject to the duty.

1. Available at: <https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf>



6. A proportionate approach?

Many international firms have UK *situs* expatriate retail clients serviced from abroad. EU firms applying for authorisation as third-country firms have been put under pressure by the FCA to ensure that there are governance arrangements in place which enable the UK branch to monitor inbound services (including inbound retail services) and raise any regulatory issues with their foreign offices and, if necessary, the FCA.

In some cases they have also been asked to nominate overseas staff as contact points for the FCA in relation to inbound services. Such firms have generally not sought to apply UK conduct requirements to such business, on the

(quite reasonable) basis that it is subject to the conduct protections in place in the jurisdiction from which it is provided and they are not resourced to apply UK regulatory requirements on top of the applicable home-state requirements.

Depending on the FCA's approach to the Consumer Duty in this context, firms could be put under pressure to do more here. Unless and until they are, taking a similar approach to inbound services seems sensible given the disproportionate cost and likely friction associated with seeking to apply the Consumer Duty to overseas operations of foreign firms.