

# **The pros and cons of a private right of action for consumers in light of evidence from other sectors and countries**

**A report for the Financial Services Consumer Panel**

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## **1. Background and aims of the research**

1. The Financial Conduct Authority (FCA) is expected to publish a consultation paper in H2 2020 on a new consumer duty on financial services providers. This follows on from a previous discussion paper on introducing such a duty.<sup>1</sup> The Panel believes that the most important benefit of a new duty would be to address the problem of firms behaving in ways which breach the FCA's Principles but not its detailed rules. It considers that a consumer duty would encourage positive cultural change within the industry, leading to a greater emphasis on prevention and improved outcomes for consumers.
2. One potential aspect of such a consumer duty could be the introduction of a private right of action for consumers against financial services firms, should they fail to comply with the duty. The Panel sees a private right of action as an important aspect of a new consumer duty, but other stakeholders, including financial services firms and trade bodies, are opposed to this for a variety of reasons.
3. The Panel therefore seeks to gather evidence, including consideration of other sectors within the UK and other jurisdictions where such a right already exists, as to the potential benefits and drawbacks of a private right of action. The Panel intends to use the research findings to inform its response to the forthcoming FCA consultation paper and its wider campaigning on the issue.

## **2. Methodology**

4. The primary focus of the research, which was carried out during March and April 2020, was a rapid literature review of a wide range of relevant sources. This was supplemented by informal telephone/skype discussions with two UK legal experts.<sup>2</sup> Attempts were made to arrange discussions with experts in other jurisdictions, but this proved difficult for various reasons.
5. This report considers firstly what a private right of action might look like. It then sets out the arguments for and against introducing a right of action. It goes on to consider evidence about existing private rights of action in other UK sectors, and in other countries which have a duty of care or a 'best interests' rule. It then goes on to analyse the arguments for and against a right of action in light of the available evidence, including that from other sectors and other countries. It then considers possible alternative approaches to achieving the outcomes sought by the Panel. Finally, it sets out some broad conclusions based on the research findings.

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<sup>1</sup> Financial Conduct Authority (2018) [Discussion Paper on a Duty of Care and Potential Alternative Approaches](#)

<sup>2</sup> Cowan Ervine, University of Dundee; Professor Christopher Hodges, University of Oxford

### **3. What might a private right of action look like?**

6. If a new consumer duty were introduced, what form might an accompanying right of action take? This may depend on what form the duty itself takes. One possibility would be a duty set out in statute. At the time of writing, the Financial Services (Duty of Care) Bill<sup>3</sup> was awaiting a date for its second reading. The Bill as introduced would require the FCA to make rules introducing “a duty of care owed by authorised persons to consumers in carrying out regulated activities”. It does not explicitly include a right for consumers to bring private actions against firms for breaches of that duty.
7. The Panel has stated that a statutory duty of care is its long-term aim, but that given the time it would take for legislation, it is keen to look at other options which might be implemented more quickly.<sup>4</sup> It has suggested that Principles 6 (Treating Customers Fairly) and 8 (conflicts of interest) might be strengthened. In particular, it suggested that Principle 6 which currently states: “A firm must pay due regard to the interests of its customers and treat them fairly” should be amended to say: “A firm must act in the best interests of all its customers and treat them fairly”. The Panel proposed that these amended Principles should be actionable by consumers.
8. The clearest way to make any new or amended ‘consumer duty’ or ‘best interests’ Principle actionable would be to set out a private right of action in statute. The existing private rights of action discussed in sections 6 and 7 of this report are generally statutory; consumers may also have other common law or statutory rights, as discussed at section 9.7. Rather than necessarily introducing an entirely new statutory right, it may be possible to extend the existing statutory right of action under section 138D of the Financial Services and Markets Act 2000 (FSMA). This provision empowers the FCA to determine for each of its rules whether a ‘private person’ has a right of action for damages if they suffer loss due to a breach of that rule.<sup>5</sup> A ‘private person’ is currently defined by regulations under FSMA, which broadly include individuals but not businesses.<sup>6</sup> The right of action applies only to a breach of the rules rather than of the Principles<sup>7</sup>, even though the latter are often the basis for FCA enforcement action.
9. At present, a consumer can take action regarding a breach of some of the specific ‘best interests’ rules which currently apply in certain circumstances.<sup>8</sup> The FCA noted in its discussion paper<sup>9</sup> that one potential

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<sup>3</sup> This [private member’s bill](#) was introduced by Lord Sharkey in the House of Lords

<sup>4</sup> [FSCP response to the FCA discussion paper](#)

<sup>5</sup> Subject to some limited exceptions

<sup>6</sup> Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001

<sup>7</sup> PRIN 3.4.4R

<sup>8</sup> E.g. COBS 2.1.1 which states a “A firm must act honestly, fairly and professionally in accordance with the best interests of its client”.

<sup>9</sup> See footnote 1, at pages 18-19

means of introducing a duty of care might be to extend the existing 'best interests' rules to cover all regulated activities, perhaps through amending Principles 6 or 9. The FCA would then need to consider whether a breach of any new duty should give rise to a right of action for damages in court.

10. The original rationale for not allowing rights of action under the Principles when they were first introduced was described in the FCA discussion paper as follows: *"In summary, the rationale is that the risk of civil litigation driving the interpretation and application of the Principles outweighs the benefit to consumers of being able to take action against firms, given that consumers can take action in respect of other, more specific rules."*<sup>10</sup>
11. The Law Commission consulted on extending rights of action for breaches of FCA rules in 2014. It considered both extending the ability of businesses to sue and allowing actions on the basis of breaches of the Principles. Most of those who responded were not in favour of such an extension. It should be noted however that, perhaps due to the technical and largely business-focused nature of the wider consultation, most responses were from the business and legal sectors. There were few if any responses from consumer groups.
12. The Commission concluded that: *"There are arguments to be made both for and against an extension of section 138D. We accept that the effects of the change are uncertain. It could be disruptive and add to costs, while encouraging defensive rather than beneficial behaviour. It is also extremely controversial, with most financial intermediaries opposed to the change. We do not feel able to recommend such a change at this stage."*<sup>11</sup>
13. There is some evidence that there may now be more support for rights of action to be extended. Firstly, both the House of Commons Treasury Committee<sup>12</sup> and the All-Party Parliamentary Group on Fair Business Banking<sup>13</sup> have called for the existing rights under section 138D to be extended to SMEs.
14. Secondly, while the FCA feedback statement noted that only a few respondents specifically commented on whether consumers should have a private right of action based on breaches of the Principles, it is clear from the responses which have been seen that some did support it. Those who support it make clear that they do not envisage that the right would be

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<sup>10</sup> See footnote 1, at page 30

<sup>11</sup> Law Commission (2014) [Fiduciary Duties of Investment Intermediaries](#), at p212

<sup>12</sup> House of Commons Treasury Committee (2018) [Report on SME Finance](#)

<sup>13</sup> All-Party Parliamentary Group on Fair Business Banking (2018) [Fair Business Banking for All](#)

exercised frequently, if at all, given the likely costs and time involved and the other challenges which would be faced by consumers.<sup>14</sup>

15. It would be open to the FCA itself to decide to make the Principles actionable insofar as individual consumers are concerned. Extending the right of action in this way would effectively result in a statutory right of action for individual consumers. It would, however, also give the courts a role in the interpretation and application of the Principles, rather than leaving these entirely within the control of the FCA.

16. Secondary legislation would be required, however, to amend the definition of 'private person' and extend the right of action to businesses. This would bring the UK into line with Ireland, where 'any customer', including business customers, has a statutory private right of action for breaches of statutory duty in financial regulation.<sup>15</sup> New legislation would of course be likely to take some time to be implemented.

### **3.1 Collective/representative actions**

17. Any extension of the right of action by the FCA to include the Principles would only allow individual consumers to take action. One potential difficulty with individual rights of action is that it is not cost effective for the individual involved to raise court proceedings. Were the government to legislate to extend the rights to business, this may in the longer term also provide an opportunity to consider whether provision should be made to permit collective or representative actions to be brought. The previous Labour Government decided that a new collective redress mechanism was needed in the financial services sector,<sup>16</sup> and included provision for this in the Financial Services Bill.<sup>17</sup> The relevant provisions were dropped from the bill shortly before the 2010 general election however, due to parliamentary time and the impending dissolution of parliament.<sup>18</sup>

18. The Panel suggested in its response to the FCA discussion paper that a 'super-complaint' process should be introduced to enable designated consumer groups to challenge breaches of the Principles. Such a process was actually introduced in 2013, allowing designated consumer bodies to

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<sup>14</sup> See responses from the Panel; Citizens Advice; Age UK; StepChange; the Money Charity

<sup>15</sup> Section 144 Central Bank (Supervision and Enforcement) Act 2013. Note: The Irish right of action is discussed further in Corcoran, E. and Breslin, J. 'New Private Right of Action for Damages in Financial Services Litigation' (2015) Dublin University Law Journal 17

<sup>16</sup> HM Treasury (2009) [Reforming Financial Markets](#)

<sup>17</sup> [Clauses 18-25](#)

<sup>18</sup> At around the same time, the Government proposed to appoint a 'Consumer Advocate' who would have the power to take collective actions on behalf of consumers. These proposals also did not make it into legislation: BIS (2009) [Consultation on the Role and Powers of the Consumer Advocate](#)

complain to the FCA *"that a feature, or combination of features, of a market in the United Kingdom for financial services... is, or appears to be, significantly damaging the interests of consumers."*<sup>19</sup> At present, there are four designated consumer bodies<sup>20</sup> under FSMA.<sup>21</sup> The wording of the Act makes clear, however, that super-complaints can only be made about a market, rather than a particular business.

19. It may be that what the Panel in fact had in mind was the possibility of introducing a procedure where consumer organisations can bring representative/collective actions on behalf of consumers. At present, the only UK provision for collective actions is for claims under the Competition Act 1998, as discussed at section 6.2 of this report.

20. Only one collective action has been brought in the UK to date by a consumer organisation: Which? took a competition law action on behalf of a group of consumers in 2007, as discussed in more detail at paragraph 41. Even if such collective actions were introduced for a breach of any new consumer duty, it seems unlikely that they would be used often. Few consumer organisations are likely to have the necessary resources to take such actions. The Panel's own 2013 research found that few consumer bodies specialise in financial services matters, and that staff and financial resources and a lack of technical expertise were barriers to doing so.<sup>22</sup>

21. There is currently no wider provision for class actions in the UK, along the lines of those in the USA and elsewhere. In England and Wales, Group Litigation Orders (GLOs) have been available since 2000, where a number of claims by different claimants 'give rise to common or related issues of fact or law'.<sup>23</sup> Rather than one claim being brought on behalf of all the claimants as in a class action, this procedure requires each litigant to raise their own separate claim. These are then grouped together and a GLO is made by the court, which then considers the cases together. The process has been little used, with only 108 GLOs having been granted to date,<sup>24</sup> although some involve significant numbers of consumers and potentially very large sums. While a few of these have concerned regulatory breaches by financial institutions,<sup>25</sup> most relate to matters such as personal injury, product liability, nuisance claims and employment issues. In Scotland,

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<sup>19</sup> Section 234C Financial Services and Markets Act 2000, as introduced by the Financial Services Act 2012

<sup>20</sup> Which?; Citizens Advice; the Consumer Council for Northern Ireland; and the Federation of Small Businesses

<sup>21</sup> [The Financial Services and Markets Act 2000 \(Designated Consumer Bodies\) Order 2013](#)

<sup>22</sup> [Consumer representation at EU level: A report and recommendations by Financial Services Consumer Panel](#)

<sup>23</sup> Civil Procedure Rules 19.10-19.15

<sup>24</sup> <https://www.gov.uk/guidance/group-litigation-orders> Note: this list was last updated on 6 December 2019

<sup>25</sup> RBS Rights Issue Litigation (17 September 2013) ; Lloyds/HBOS Litigation (6 August 2014); Berkeley Burke SIPP Litigation (23 January 2018)

legislation making provision for multi-party actions was passed in 2018<sup>26</sup>; regulations to bring this into force are currently awaited.

### **3.2 A Financial Services Tribunal?**

22. While at present any new private right of action would need to be exercised in the courts, it has been suggested that a specialist Financial Services Tribunal could be established. The House of Commons Treasury Committee<sup>27</sup> and the All-Party Parliamentary Group on Fair Business Banking<sup>28</sup> have both recommended the establishment of such a tribunal to provide businesses with easier access to a legal resolution.
23. A specialist tribunal would be less formal, cheaper and more accessible than the courts. It may therefore be preferable for both individual and business customers, and it could perhaps be a forum for collective actions along the lines of the Competition Appeal Tribunal, discussed in section 6.2.
24. The Walker review of the ADR landscape for SMEs<sup>29</sup> did not support the establishment of a tribunal, however, for a variety of reasons. These included the cost of setting it up; the need for primary legislation; and the likely imbalance between parties' legal representation. The review's preferred option was to expand the jurisdiction of the Financial Ombudsman Service (FOS) to include SMEs, which was the eventual outcome.

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<sup>26</sup> Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

<sup>27</sup> House of Commons Treasury Committee (2018) [Report on SME Finance](#)

<sup>28</sup> All-Party Parliamentary Group on Fair Business Banking (2018) [Fair Business Banking for All](#)

<sup>29</sup> Walker, S., Hodges, C. and Blackburn, R. (2018) : [Review into the complaints and alternative dispute resolution \(ADR\) Landscape for the UK's SME Market](#)

#### **4. The arguments in favour of introducing a private right of action**

25. The main argument in favour of a right of action, made by the Panel and other consumer organisations, is that the threat of potential legal action would incentivise firms to change their culture and improve their standards of conduct, leading to improved consumer outcomes.<sup>30</sup> The Panel accepts that it is unlikely that the right would be used often, if at all.<sup>31</sup>
26. The Law Commission, while it did not recommend the extension of section 138D, made a similar point: *"Providing a right to sue for a failure to treat customers fairly would underline the importance that the Government attaches to the requirement that all participants in financial markets "should act in the best long-term interests of their clients or beneficiaries."*<sup>32</sup>
27. The House of Commons Treasury Select Committee has also supported the introduction of a private right of action if the FCA is unable to ensure that firms act in their customers' best interests through its existing rules and Principles, stating: *While a legally enforceable duty might still require customers to take their own legal action to seek redress against a provider, its very existence would remind providers of their duty to act in their customers' best interests at all times."*<sup>33</sup>
28. It is also implicit in the responses to the discussion paper from the Panel and other consumer organisations that the private right of action would increase consumer rights and access to justice for those who use financial services. Citizens Advice said that: *"There is a good case that without the ability to enforce a right in court, people don't have that right at all. In the current framework, the Principles are more a guide for the FCA on how to act than a protection for consumers. Giving consumers the ability to enforce a New Duty - whether that was through extending the best interests rules or new legislation - would strengthen the principle."*<sup>34</sup>
29. Other arguments in favour noted by the FCA<sup>35</sup> were:
1. Awards made by FOS have a compensation limit.
  2. FOS decisions are not easily enforced.
  3. Consumers should have as many avenues of redress open to them as possible.

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<sup>30</sup> See Financial Conduct Authority (2019) A duty of care and potential alternative approaches: summary of responses and next steps: Feedback Statement

<sup>31</sup> [FSCP response to the FCA discussion paper](#)

<sup>32</sup> See footnote 11, at p. 213

<sup>33</sup> House of Commons Treasury Select Committee (2019) [Report on Consumers' Access to Financial Services](#), at paragraph 210

<sup>34</sup> Citizens Advice response, at page 3

<sup>35</sup> See footnote 30, at paragraph 3.19

## **5. The arguments against introducing a private right of action**

30. The main arguments which have been made against introducing a private action, by respondents to the FCA consultation,<sup>36</sup> and to the Panel, can be summarised as follows:

1. **Duplication, complexity and confusion** - duplication of existing obligations; legal complexity; and confusion caused by adding an overarching duty on top of the existing framework of principles, detailed rules and guidance.
2. **Risk of a flood of legal actions** - which would add to pressure on the courts, and lead to increased costs for firms.
3. **Litigation is not in consumers' interests** due to: 1) the cost, delay and stress involved; 2) the perceived risk of a litigious environment making firm / consumer relationships too adversarial; 3) the perceived risk of consumers being vulnerable to exploitation by claims management companies; 4) consumer confusion about the best avenue of redress.
4. **Legal uncertainty and delay** – due to the slow pace at which precedent would develop and difficulties of implementation.
5. **Regulatory agility** - the pace at which the courts would interpret a duty of care would hinder the FCA's ability to be flexible and responsive to market change.
6. **Restriction of competition, innovation and access**- the risk of litigation, would make firms behave more cautiously. This may stifle innovation and reduce access to services for some consumers.
7. **Consumers already have other ways to seek redress** - especially FOS, which is free and more consumer-friendly.
8. **Lack of deterrent effect** on firms that already fail to comply with regulatory standards.

31. The Panel has also heard some additional arguments against a private right of action.<sup>37</sup> These include:

- **Moral hazard** - there is a misalignment of consumer and firm responsibility, with the balance tipped too far towards the consumer
- **Conflicts of interest** may arise between different customer groups (i.e. savers vs borrowers) that are difficult to reconcile with the idea of 'best interests'.
- **It is not necessary** as many firms already 'feel' the duty of care and would not change what they do or how they are run –other than bearing the extra cost of new regulation.

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<sup>36</sup> See footnote 30, at paragraphs 3.16- 3.18. Note: the FCA observed that many of these arguments were the same as those made against an actionable statutory duty of care

<sup>37</sup> Information provided by the Panel

## **6. Existing private rights of action in other UK sectors**

### **6.1 Consumer Protection from Unfair Trading Regulations**

32. The Consumer Protection from Unfair Trading Regulations 2008 implemented the EU Unfair Commercial Practices Directive into UK law. They require traders not to behave unfairly towards consumers. The Regulations are enforced by the Competition and Markets Authority (CMA) and local authority trading standards departments, which have the power to bring both criminal proceedings and civil enforcement actions.

33. Initially consumers who had suffered as a result of an unfair commercial practice had no private right of redress against the trader. Following the introduction of the regulations, consumer groups lobbied for the introduction of a private right of action for consumers.<sup>38</sup> These groups provided evidence to the Law Commissions<sup>39</sup> that unfair commercial practices were resulting in significant detriment, while few prosecutions were brought. They argued that enforcement would be more effective if public authorities and consumers “worked in tandem”.<sup>40</sup> Although the existing civil law provided private remedies in some circumstances, there were gaps in coverage. The existing remedies were also overly complex and seldom used in practice.

34. Businesses, however, expressed concerns that introducing a new private right of redress might have unintended consequences. It might encourage consumers to bring small and unfounded actions. This would lead to litigation costs on traders which would ultimately be passed back to consumers. They also expressed concerns that *“whilst they could easily agree to amend a practice that regulators consider unfair, it would be more difficult to react to a multitude of varied consumer claims.”*<sup>41</sup>

35. Following extensive consultation, the Law Commissions recommended the introduction of a new private right of action for consumers who are victims of unfair commercial practices.<sup>42</sup> Consumers were given new rights in October 2014,<sup>43</sup> including a right to damages,<sup>44</sup> where a trader has

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<sup>38</sup> E.g. Consumer Focus (2009) *Waiting to be Heard: Giving Consumers the Right of Redress over Unfair Commercial Practices* (no longer available online)

<sup>39</sup> The Law Commission and Scottish Law Commission (2010) [Unfair Commercial Practices and Private Redress: Feedback from Stakeholders](#)

<sup>40</sup> *Ibid*, at paragraph 1.10

<sup>41</sup> *Ibid*, at paragraph 1.11

<sup>42</sup> The Law Commission and Scottish Law Commission (2014) [Consumer Redress for Misleading and Aggressive Practices](#).

<sup>43</sup> Under the Consumer Protection (Amendment) Regulations 2014, which amended the 2008 regulations

<sup>44</sup> Part 4A of the 2008 regulations as amended by the 2014 regulations. This also gives consumers a right to ‘unwind’ a contract or to a discount in relation to a contract. Note: with the exception of some consumer credit matters, consumers do not have rights to claim redress for breach of the CPRs arising from regulated activities within section 22 of the Financial Services and Markets Act 2000 (s27D of the regulations).

committed a misleading or aggressive practice under the 2008 Regulations. A consumer broadly has the right to damages if they have entered into a contract with a trader and have a) incurred financial loss and/or b) suffered alarm, distress, physical discomfort or inconvenience which they would not have incurred or suffered if the prohibited had not taken place. The regulations do not make provision for collective actions: it was envisaged that consumers would take individual actions in the small claim courts.

36. Prior to their introduction, concerns were expressed that the new rights may not be effective in practice. It was likely that only modest damages would be available for alarm, distress, physical discomfort, or inconvenience, and that the availability of a 'due diligence' defence for traders could deter consumers and leave them unsure as to whether it was worth pursuing damages.<sup>45</sup> Concerns were also expressed that consumers may not be willing or able to make use of the remedies, which would operate alongside existing remedies under the general law, making the law in this area more complex.<sup>46</sup>

37. The Law Commissions acknowledged that it was difficult to estimate how many court cases might be brought under the new law, noting that research showed '*that consumers are extremely reluctant to go to court*'.<sup>47</sup> On the basis of the available evidence, they estimated that there may be an additional 550 -1100 court cases per year issued across England, Wales and Scotland, of which around 30% may be ill-founded.<sup>48</sup>

38. Little literature was found on how the right of action has operated in practice over its first 5 years. It seems unlikely, however, that it has been exercised often.<sup>49</sup> A search found only one reported individual case which referred to section 4a: in that case, the court threw out the claimant's arguments under that section as irrelevant because he had not been acting as a consumer in relation to the contract concerned.<sup>50</sup> A search of GLOs in England and Wales found one ongoing case involving section 4a, which has been raised as just one of a number of high level issues to be decided.<sup>51</sup>

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<sup>45</sup> Clubb, K (2012) [Redressing the Balance?](#) 164 New Law Journal 7596

<sup>46</sup> Devenney, J. and Howells, G, 'Integrating Remedies for Misrepresentation: Co-Ordinating a Coherent and Principled Framework' in R. Merkin and J. Devenney (eds) *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Routledge, 2018)

<sup>47</sup> See footnote 42, at p.159

<sup>48</sup> *Ibid*, pp 159-160. While it is not clearly stated, it is presumed that this is an annual estimate.

<sup>49</sup> Confirmed in conversation with Cowan Ervine, University of Dundee

<sup>50</sup> [Kenneth Ramsden v Santon Highlands Limited \[2015\] CSOH 65](#)

<sup>51</sup> [GLO no. 105. The VW NOx Emissions Group Litigation](#) (High Court of Justice: Queens' Bench Division). Date of Order: 11 May 2018

39. While there may have been other cases in the small claims courts, it is not possible to trace these through court statistics, which are not broken down into this level of detail in either England and Wales or in Scotland.<sup>52</sup> There appears to be little evidence to date to support initial concerns expressed by businesses about a potential flood of litigation. Conversely, there is little evidence available as to whether the right of action has been effective in practice, either in terms of providing effective access to justice for consumers or in deterring traders from employing unfair practices.<sup>53</sup>

## **6.2 Competition law**

40. From 1 October 2015, major reforms to the competition law enforcement regime made it easier for individuals and small businesses to bring a claim for damages under the Competition Act 1998 where they have suffered loss as a result of a relevant infringement of competition law.<sup>54</sup> Following these reforms, a claimant may bring a claim to the specialist Competition Appeal Tribunal (CAT). This is intended to offer a more accessible approach than the courts, with a fast-track procedure for claims made by individuals or SMEs. Both parties are generally legally represented however, often by senior counsel. Claims can be either:

1) follow-on: where a relevant competition authority such as the CMA<sup>55</sup> or European Commission has made a decision that competition law has been infringed, a claimant can rely on that decision as proof of the breach. This generally means that the claimant only needs to prove that they suffered loss as a result of that infringement, or:

2) stand-alone: where the alleged breach of competition law is not already the subject of an infringement decision by the European Commission or other relevant competition authority<sup>56</sup>. The claimant must prove to the court both that the breach of competition law occurred and that they suffered loss as a result of that breach.

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<sup>52</sup> Note: published civil court statistics break down non-family/personal injury civil claims in the county court/sheriff court only into very broad categories such as '[specified money](#)' and '[other unspecified money](#)' claims (England and Wales) and '[damages](#)' and '[debt](#)' claims (Scotland).

<sup>53</sup> This was confirmed during a conversation with Cowan Ervine of Dundee University, who said he was not aware of any evidence about this and suggested that perhaps the best way to confirm whether the right of action had had a deterrent effect would be to speak directly to trading standards officers.

<sup>54</sup> Sections 47A-F Competition Act 1998, as amended by the Consumer Rights Act 2015 section 81 and Schedule 8. Note: while it was previously possible to take a private action under the 1998 Act, there were a number of limitations and difficulties with this in practice- see e.g. [BIS \(2013\) Private Actions in Competition Law: A Consultation on Options for Reform: Government Response](#); Rodger, B. The Consumer Rights Act 2015 and collective redress for competition law infringements in the UK: a class act? (2015) *Journal of Antitrust Enforcement* 2015.3 pp285-286

<sup>55</sup> Or other regulators including the FCA, Ofgem, ORR and Ofwat

<sup>56</sup> Or following an appeal of such a decision

41. While individual claims can be brought, collective actions before the CAT were also introduced in 2015 because it may not be cost effective for a single claimant to bring an action if they have personally suffered only a small loss. Collective proceedings can be brought on behalf of two or more claimants, on either an 'opt-in' or 'opt-out' basis.<sup>57</sup> Prior to the 2015 reforms, the CAT had jurisdiction in opt-in collective proceedings brought by a specified body. Only one such action was brought, by Which? on behalf of 130 consumers who opted in. This follow-on action, which concerned price-fixing of replica football kits<sup>58</sup>, ultimately resulted in a settlement, with each claimant receiving a payment of £20. Which? later indicated that it would not take further actions because as a charitable consumer organisation, the level of resource involved in the opt-in process was not proportionate, and it called for opt-out collective actions to be introduced.<sup>59</sup>
42. Claims are eligible for inclusion in collective proceedings if the CAT considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings. The proceedings can go ahead if the CAT makes a 'collective proceedings order' (CPO), where it authorises the person who brought the proceedings as a representative, if it considers that it is just and reasonable for them to act as a representative in those proceedings. The representative does not need to be a member of the class on whose behalf the proceedings are brought. They could therefore be a consumer organisation or another third-party organisation.
43. The introduction of a private right of action was one aspect of wider reform to make it easier for consumers and businesses to obtain redress in respect of competition law breaches.<sup>60</sup> This included the promotion of ADR, with private actions intended to be a last resort. Powers were given to the CAT to make an order approving a proposed collective settlement where both parties apply for such an order.<sup>61</sup> This was based on the Dutch WCAM

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<sup>57</sup> Section 47B Competition Act 1998. 'Opt-in' collective proceedings are brought on behalf of each class member who opts in by notifying the representative that they want their claim to be included. 'Opt-out' collective proceedings are brought on behalf of each class member except any class member who a) opts out by notifying the representative that their claim should not be included in the collective proceedings, or b) is not domiciled in the UK and does not opt in by notifying the representative that they want their claim to be included.

<sup>58</sup> *The Consumers' Association v JJB Sports plc* (CAT Case 1078/7/9/07)

<sup>59</sup> Higgins, A. 'Driving with the Handbrake On: Competition Class Actions Under the Consumer Rights Act 2015' *The Modern Law Review*, 05/2016, Volume 79, Issue 3

<sup>60</sup> [BIS \(2013\) Private Actions in Competition Law: A Consultation on Options for Reform: Government Response](#);

<sup>61</sup> Sections 49A and 49B Competition Act 1998, as amended

model, which is discussed at paragraph 64. The CMA was also given powers to approve a redress scheme where it has made an infringement decision.<sup>62</sup>

44. When the 2015 reforms were introduced, some experts expressed doubts as to whether they would deliver the intended benefits for those they were designed to assist. One of the main concerns raised was whether funding of such actions was likely to be financially viable.<sup>63</sup> As damages-based agreements are explicitly prohibited,<sup>64</sup> there is little incentive for law firms to take the risks involved in funding these actions. These cases are therefore likely to be funded by independent third-party litigation funders. Claimants face the risk of costs, and even if an action is ultimately successful, they will have to pay the fees of both their lawyers and the litigation funder. They may therefore end up receiving very little in the way of damages at the end of the whole process.

45. To date, all of the individual proceedings under the Act before the CAT appear to involve business to business disputes, as was the case prior to the reforms. At the time of writing, there had been nine collective actions in the CAT since the reforms.<sup>65</sup> Of these, two have involved business to business disputes. Most of the others are follow-on actions. In most of the consumer cases, the authorised representative is a relatively high-profile individual with a consumer or regulatory background. The most high-profile action was taken by the former Financial Ombudsman, Walter Merricks CBE against Mastercard PLC on behalf of 46 million consumers who used Mastercard in a case worth an estimated £14 billion. There are also two separate ongoing collective follow-on actions against several major banks.<sup>66</sup>

46. At the time of writing, all ongoing collective actions have been stayed pending the outcome of an appeal to the Supreme Court by Mastercard against a Court of Appeal decision to allow Mr Merricks' appeal of the CAT's refusal to grant a CPO. The Supreme Court appeal is currently due to be heard in May 2020. The court is expected to set out the legal test for certification of claims as eligible for inclusion in collective proceedings. It will also resolve the correct approach to questions regarding the distribution of an aggregate award at the stage at which party is applying for a CPO.

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<sup>62</sup> Section 49C Competition Act 1998, as amended and Competition Act 1998 (Redress Schemes) Regulations 2015

<sup>63</sup> Hodges, C. 'Fast, Effective and Low Cost Redress: How do Public and Private Enforcement and ADR Compare?' in B. Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (WoltersKluwer, 2014); Rodger, B. (2015) - see footnote 54; Higgins, A (2016) -see footnote 59

<sup>64</sup> Section 47C (8) Competition Act 1998 as amended

<sup>65</sup> Source: CAT website: <https://www.catribunal.org.uk/judgments>

<sup>66</sup> Phillip Evans v Barclays Bank and others; Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others

47.No applications appear to have been made to the CAT for a collective settlement order.<sup>67</sup> While it is difficult to find clear data on the CMA's use of its powers to approve redress schemes, it is understood that these have not been used often.<sup>68</sup>

### **6.3 Insurance law**

48.The Panel has advised that some of those who oppose the introduction of a right of action have cited three insurance law statutes as examples of existing private rights of action. These parties have suggested that consideration should be given to whether and how these have been used in practice.<sup>69</sup> The rights conferred under these statutes, which are discussed below, do not appear to be private rights of action in the same sense as those discussed in sections 6.1 and 6.2; they do not sit so clearly alongside regulatory enforcement powers.

#### **1. Consumer Insurance (Disclosure and Representations) Act 2012**

49.The Act, which came into force on 6th April 2013, modernised the existing outdated law on consumer insurance in line with the practice of FOS in dealing with consumer complaints about non-disclosure and misrepresentation. It replaced the previous duty on consumers to disclose material facts to their insurer with a duty to take reasonable care not to make a misrepresentation.

50.In their review of the previous law, the Law Commissions found that consumers who wished to challenge an insurer's decision to decline a claim on misrepresentation grounds could only obtain justice from FOS, as the courts were required to apply unfair and outdated rules.<sup>70</sup> They found that FOS could not help all those with disputes because there was a financial limit on its awards and that the then FSA rules essentially required FOS to decline cases which required witnesses to be cross-examined.

51.The Commissions noted that following the reforms, most cases would continue to be dealt with by FOS, and that the cases most likely to go to court were those involving a substantial sum in excess of the FOS limit. A search found a total of 9 reported cases under the Act to date.

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<sup>67</sup> [Competition Appeal Tribunal website](#)

<sup>68</sup> Confirmed during discussion with Professor Hodges

<sup>69</sup> Information provided by the Panel

<sup>70</sup> The Law Commission and Scottish Law Commission (2009) [Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation](#)

## 2. Insurance Act 2015

52. This Act came into effect on 12 August 2016. It made a number of changes to UK insurance law designed to make insurance fairer and clearer for consumers. An amendment to the Act<sup>71</sup> introduced from 4 May 2017 a new right to damages for insured parties in respect of any loss incurred as a result of a breach of a new implied term that claims will be paid within a reasonable time.

53. There appear to be very few reported cases involving individual claimants. A search found only two: one Scottish case relating to commercial premises<sup>72</sup>; and an English case brought by a landlord whom the court found was not a consumer.<sup>73</sup>

## 3. The Third Parties (Rights against Insurers) Act 2010

54. The Act, which did not come into force until 1 August 2016, made it easier for a third party to pursue a claim directly against liability insurers if the insured defendant is or becomes insolvent. It allows a claimant to bring proceedings against an insurer without first having to establish liability and quantum against the defendant, although liability and quantum must be established before their rights against the insurer are actually enforced. The claimant can apply to court for declarations as to the defendant's liability to the claimant; and/or the insurer's potential liability to the claimant.

55. While a search found 21 reported cases under the Act, the vast majority of these involved business to business disputes. There were only two reported cases involving individuals.<sup>74</sup>

56. While some of the rights under the three statutes discussed above have only been in force for 3-4 years, there appear to be few reported consumer cases. It seems likely that most consumer insurance disputes are in practice resolved by FOS, particularly given the recent significant increase in its compensation limit. In 2018-2019, a total of 42,346 new complaints received by FOS concerned insurance other than PPI, representing 11% of all new complaints received.<sup>75</sup>

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<sup>71</sup> Part 4A - Section 13A, inserted by the Enterprise Act 2016

<sup>72</sup> [Wayne Stephen Gardner Young V Royal And Sun Alliance Plc \[2019\] CSOH 32 CA75/18](#)

<sup>73</sup> [Ashfaq v International Insurance Company of Hannover Plc \[2017\] EWCA Civ 357 \(12 May 2017\)](#)

<sup>74</sup> [Redman v Zurich Insurance PLC \[2017\] EWHC 1919 \(QB\); BURNETT OR GRANT AGAINST MARCIUS & Ors \[2018\] ScotCS CSOH 34 \(05 April 2018\)](#)

<sup>75</sup> [Financial Ombudsman Service \(2019\) Annual Review 2018/2019](#)

## **7. Other jurisdictions which have a duty of care or 'best interests' rule**

57. The FCA discussion paper identified three examples of other countries which have, or intend to introduce, a duty of care in financial services: the Netherlands; the USA and Australia. The Panel's research brief mentioned that the USA, Australia and Hong Kong were understood to have "best interest" rules for advice. As each country has its own distinct regulatory framework for financial services, it may not be possible to directly extrapolate conclusions from other jurisdictions into the UK context. There may nevertheless be useful lessons to be learned from their experience. Due to the availability of literature, fairly limited evidence was obtained for five jurisdictions: the Netherlands; Australia; USA; Hong Kong; and New Zealand.

### **7.1 The Netherlands**

58. In the Netherlands, financial services providers have been subject to a general statutory duty of care under the Financial Supervision Act (WFT) since 2014.<sup>76</sup> This requires advisers to act in the best interests of their clients, and product providers who do not offer advice must take into account the legitimate interests of consumers.

59. Prior to the duty's introduction, there were a number of sector/product-specific duty of care rules. During the financial crisis, however, it became apparent that financial services providers had developed products and services which fell between these rules. The regulator, the Netherlands Authority for the Financial Markets (AFM), therefore felt that a more generic duty of care rule was required to cover all banking activities and asked the Dutch government to legislate for this. The new generic duty of care was also seen to be 'future proof', as legal rules could often become obsolete as products and services are developed.<sup>77</sup> The regulator can take enforcement action where the duty of care has been breached.

60. There is not much literature available in English about how the duty of care has operated in practice, and despite attempts to contact a representative of the Dutch regulator for interview, this was not possible. There is some evidence that concerns were expressed prior to the introduction of the duty of care that it could increase legal uncertainty in being open to potentially wide interpretation by the regulator.<sup>78</sup> Concern was also expressed that the proposed duty did not take into account consideration of the particular

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<sup>76</sup> The overall duty of care provision is laid down in article 4:24a of WFT, as amended. Under this article, only those financial services are in scope that – broadly – advise, distribute or manufacture/offer financial products other than financial instruments (for instance insurance products and credit products). A separate duty of care article applies to MiFID (Markets in Financial Instruments Directive) regulated activities

<sup>77</sup> Based on meeting notes between representatives of the Panel and the AFM, provided by the Panel

<sup>78</sup> Caria, V. (2012) [An unlimited duty of care of banks?](#)

circumstances of each case, and did not recognise that consumers also have some responsibility when purchasing a financial product, when both matters were taken into account under the civil law regarding a duty of care.<sup>79</sup>

61. While there was also little literature specifically about private rights of action, there does appear to be a right of action for both consumers and businesses in relation to a breach of the duty of care. There is some evidence that it is 'common' for parties to claim that a financial institution has breached its duty of care, and to claim damages,<sup>80</sup> but no further details were found on this, including the numbers involved. One legal source stated in 2019 that: '*A significant number of cases in financial services over the past year concerned the duty of care owed by financial institutions towards their customers.*'<sup>81</sup>

62. There are two types of general collective action available in the Netherlands.<sup>82</sup> Firstly, collective actions can be brought by a representative organisation, which must be a foundation or association that promotes the interests of, and is representative of, the beneficiaries. Before commencing a collective action, the representative organisation must have attempted to settle the matter through negotiation. Representative organisations have to date not been permitted to claim monetary damages in a collective action. Collective actions are therefore used to pursue a declaratory judgement establishing a basis for liability (e.g. that a duty has been breached) and parties can then raise individual proceedings for damages on the basis of that judgement.<sup>83</sup> It was anticipated that the restriction on claiming monetary damages would be removed from 1 January 2020, creating an incentive on parties to reach a class settlement.

63. There is some evidence that a 'significant number' of collective actions are brought every year in various areas of civil law, including financial services.<sup>84</sup> It is not clear however whether, or how often, such collective proceedings and/or related individual claims, have been used in relation to a breach of the duty of care.

64. Secondly, representative bodies can bring actions under the Collective Settlement of Mass Claims Act 2005 (WCAM). Under this process, the Amsterdam Court of Appeals can declare a collective settlement binding on all parties, on an 'opt out' basis. The representative organisation, together

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<sup>79</sup> Allan & Overy (2012) [Proposal for General Duty of Care For the Financial Services Industry](#)

<sup>80</sup> Vrolijk, R. and Rijkers, D. (2019) [Netherlands: Financial Services Disputes 2019](#), ICLG.com, at section 1.1

<sup>81</sup> Ibid, at section 7.3

<sup>82</sup> De Bie Leuveling Tjeenk, J. and Horeman, D. (2019) [Netherlands: Class and Group Actions 2020](#) ICLG.com

<sup>83</sup> De Bie Leuveling Tjeenk, J. and Horeman, D. (2019) [Securities Litigation review- 5<sup>th</sup> edition chapter 13- Netherlands](#), pp167-176

<sup>84</sup> De Bie Leuveling Tjeenk, J. and Horeman, D. (2019) [Netherlands: Class and Group Actions 2020](#) ICLG.com

with the party paying the compensation, can jointly request the court to declare a settlement binding on all parties entitled to compensation. The AFM can also initiate WCAM proceedings.<sup>85</sup> Since 2005, there have been 9 WCAM decisions by the court, 7 of which were in the field of securities and financial services. It is unclear from the information available whether any of these related to a breach of the duty of care under WFT.

65. There is also a specific ADR scheme for financial services, known as Kifid. Although some of the Dutch literature refers to this as a 'Financial Services Complaints Tribunal',<sup>86</sup> Professor Hodges described it as an ombudsman-tribunal hybrid. Under WFT, financial services providers must be affiliated with a dispute resolution scheme. Kifid is the only disputes agency currently recognised by the Dutch government. It was not possible to find any information in English which would indicate whether it deals with many disputes related to the duty of care.

## **7.2 Australia**

66. Since 1 July 2013,<sup>87</sup> financial services advisers in Australia have been required by law to act in the best interests of clients when giving personal advice.<sup>88</sup> Advisers are required to provide advice which is appropriate to the client, and which gives priority to the client's interests over their own. The duty requires them to:

- a. identify the subject matter of the advice;
- b. identify the client's relevant circumstances;
- c. make reasonable inquiries to remedy the deficiency if the information about the client's relevant circumstances appears incomplete or inaccurate;
- d. assess whether the adviser has the required expertise;
- e. conduct a reasonable investigation into the financial products that might achieve the client's objectives and meet the client's needs; and
- f. base all judgments on the client's relevant circumstances.
- g. take any step that would reasonably be regarded as being in the best interests of the client<sup>89</sup>

67. It has been suggested that adopting the Australian 'duty of best interest' might go some way towards meeting the Panel's demands for a duty of care

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<sup>85</sup> See footnote 82

<sup>86</sup> See e.g. footnote 80

<sup>87</sup> The legislation came into effect on 1 July 2012, and compliance was mandatory from 1 July 2013

<sup>88</sup> Part 7.7A (in particular sections 961B (1), 961G and 961J) Corporations Act 2001.

<sup>89</sup> S 961B (2) Corporations Act 2001

to be introduced.<sup>90</sup> The recent Australian Royal Commission into Misconduct in the Financial Services Industry found, however, that there have been low levels of compliance with the duty: *"Those persons and entities obliged to pursue the best interests of clients or members too often sought to strike some compromise between the interests of clients or members and their own interests or the interests of a related third party (such as the person's employer, or the entity's owner). A 'good enough' outcome was pursued instead of the best interests of the relevant clients or members."*<sup>91</sup>

68. It was reported in the media that the regulator, the Australian Securities and Investments Commission (ASIC) told the Royal Commission that an independent review of the quality of financial advice provided by some licensed providers found that in 90% of cases, the advice was not in the client's best interests.<sup>92</sup>

69. Clients who suffer loss or damage as a result of a breach of the best interests duty have a statutory right to take court action to recover compensation.<sup>93</sup> Not much literature was identified relating to how often this right of action has been exercised, or how it has operated in practice. There is some evidence that breaches of the best interest duty are among the most common cases of action in financial services disputes, although it is not entirely clear whether these are private actions or involve regulatory enforcement by the regulator.<sup>94</sup>

70. Class actions are available in Australia - there are several different regimes, including representative actions in the Federal Court of Australia, and class actions processes in several states. Financial services claims are reported to have become the most common category of class action, but it is not clear whether any of these relate to a breach of the best interest duty. The Royal Commission is expected to lead to an increase in cases being brought against financial services providers.<sup>95</sup>

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<sup>90</sup> Chiu, I. and Brener, A. '[Articulating the gaps in financial consumer protection and policy choices for the financial conduct authority - moving beyond the question of imposing a duty of care](#)' *Capital Markets Law Journal*, Volume 14, Issue 2, April 2019, Pp 217–250, at p126

<sup>91</sup> [Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#) Vol.1 (published February 2019), at p.3

<sup>92</sup> [Banking royal commission told 90% of financial advisers ignored clients' best interests](#), The Guardian, 16 April 2018

<sup>93</sup> Section 961M Corporations Act 2001

<sup>94</sup> Emmerig, J. and Legg, M. [Australia: Financial Services Disputes 2019](#), ICLG.com at section 1.1. Note: this section discusses private and regulatory causes of action together as common causes of action relating to rendering services with due care and skill/complying with the 'best interest' obligation, making it difficult to separate these out.

<sup>95</sup> *Ibid*

71. In November 2018, various financial services sector ombudsmen were merged to form the Australian Financial Complaints Authority (AFCA). During its first eight months, the second biggest category of complaints dealt with by the new ombudsman was inappropriate advice/ failure to act in the client's best interests.<sup>96</sup>

### **7.3 The USA**

72. The FCA discussion paper noted that the US Securities and Exchange Commission (SEC) had proposed new rules which aimed to harmonise the standards applicable to investment advisers and broker-dealers. These included a regulation requiring broker-dealers to act in the best interest of their retail customers when making investment recommendations. This new regulation<sup>97</sup> came into force on 10 September 2019, with a compliance date of 30 June 2020, following a transition period.

73. The term "best interest" is not defined in the regulation; compliance will turn on an objective assessment of the facts and circumstances related to how the components of the rule (Disclosure, Care, Conflicts of Interest, and Compliance Obligations) are satisfied at the time a particular recommendation is made to a particular retail customer. The regulation explicitly states, however, that it is not intended to create a new private right of action: *"Furthermore, we do not believe Regulation Best Interest creates any new private right of action or right of rescission, nor do we intend such a result."*<sup>98</sup>

### **7.4 Hong Kong**

74. In Hong Kong, financial services firms licensed or regulated by the Securities and Futures Commission (SFC) are required to meet minimum, principles-based regulatory standards governing the treatment of customers. The principles-based standards governing the relationship between these firms and their customers are mainly set out in the Code of Conduct. Among the general principles set out in the SFC Code of Conduct are 'Honesty and Fairness', which requires licensed or registered persons to act honestly, fairly and in the best interests of their clients; and 'Diligence' which requires them to act with due care, skill and diligence, in the best interests of their clients.<sup>99</sup>

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<sup>96</sup> AFCA [Annual Review 2018-2019](#)

<sup>97</sup> [Regulation Best Interest: The Broker-Dealer Standard of Conduct](#) (Reg BI)

<sup>98</sup> Ibid, at p/ 43

<sup>99</sup> [Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission](#), General Principles 1 and 2

75. Banking organisations authorised by the Hong Kong Monetary Authority (HKMA) are also expected to comply with the voluntary Code of Banking Practice, which was issued by industry associations, and endorsed by the HKMA. One of the general principles in the code provides that "*Institutions and their authorized agents should have as an objective, to work in the best interest of their customers and be responsible for upholding financial consumer protection*".<sup>100</sup>

76. It does not appear from the limited information obtained, however, that there is a general private right of action in respect of regulatory breaches of these provisions. It seems that private rights of action are available in only very limited circumstances, to those who suffer pecuniary loss as a result of another person committing certain market misconduct offences.<sup>101</sup>

## **7.5 New Zealand**

77. Financial advisers in New Zealand have since 2010 had a statutory duty to "*exercise the care, diligence, and skill that a reasonable financial adviser would exercise in the same circumstances*" when providing their services.<sup>102</sup> Those who receive financial adviser services can claim compensation for losses resulting from a breach of this duty.<sup>103</sup> No evidence was found about the number of cases which have been brought in relation to a breach of this duty.

78. The regulator, the Financial Markets Authority, can bring collective or representative proceedings on behalf of financial markets participants where it is in the public interest to do so.<sup>104</sup> All financial service providers who provide services to retail clients are required to be a member of one of four approved dispute resolution schemes.

79. Following the recent banking review in Australia, New Zealand has also undergone a review of the conduct and culture of major banks and insurance companies. This identified weaknesses in the culture of banks and in various other areas. New legislation which will reform the regime for financial advisers is due to come into force in 2020.<sup>105</sup> This will introduce a new duty on financial advisers to give priority to clients' interests.<sup>106</sup>

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<sup>100</sup> [Code of Banking Practice](#) (2015) Principle 2.4 - Responsible Business Conduct and Authorized Agents

<sup>101</sup> Chan, K., Atchley, J. and Chow, J. (2019) Hong Kong in [Financial Services Compliance 2019](#); Davis, Polk and Wardell LLP pp. 36-61

<sup>102</sup> Section 33, Financial Advisers Act 2008. For a detailed discussion of the duty, see Durrant, A. The statutory duty of care, diligence and skill owed by financial advisers. *Auckland University Law Review*, 17, 2011, 142-167.

<sup>103</sup> Standage, J. and Ferrier, M. (2019) [New Zealand: Financial Services Disputes 2019](#); ICLG.com. Note: it is not clear where this right comes from - there is no explicit mention of it in the 2008 Act

<sup>104</sup> Sections 34-43 Financial Markets Authority Act 2011

<sup>105</sup> Financial Services Legislation Amendment Act 2019

<sup>106</sup> Section 431K

## **8. Analysing the arguments in favour of a right of action**

### **8.1 *Incentivising firms to change their culture / improve standards of conduct***

80. While on the face of it, this is a logical argument, there is a question as to whether there is any evidence to support the belief that the threat of legal action will incentivise firms to change their culture. The evidence from Australia, where there has been a right of action for some years, suggests that this has not happened there. When considering the introduction of a private right of action for consumers in relation to unfair commercial practices, the Law Commissions observed that: "*Law reform cannot address all the problems consumers face in attempting to gain redress, but it could be part of a strategy to encourage traders to maintain high standards and provide remedies when things go wrong.*" As noted at paragraph 39, no evidence was found as to whether the right of action has resulted in improved practices by traders.

81. It is worth noting, however, that the right of action in relation to unfair commercial practices applies across a wide range of sectors, making it difficult to determine whether it has made a difference. It is possible that introducing a right of action which applies to one specific industry, such as financial services, would have a more noticeable impact.

82. Professor Hodges expressed a very clear view in discussion that a traditional legalistic approach is not the best way to achieve improvements in culture. He suggested that introducing a right of action may actually make it more difficult to improve culture within the industry, and that there was considerable evidence that deterrence sanctions do not change behaviour in the way desired.<sup>107</sup> In the words of another legal academic: "*Traditional economic analysis of law suggests optimal deterrence will only be realised where individuals (or firms) weigh up (a) what they perceive to be the probability of enforcement action (say, prosecution) and (b) what they perceive to be the likely sanction against (c) the perceived gains.*"<sup>108</sup>

### **8.2 *Increased consumer rights / access to justice***

83. As noted at paragraph 28, there is a strong argument in principle that a private right of action would increase consumer protection and provide an important means of access to justice for consumers of financial services.

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<sup>107</sup> Professor Hodges has written widely on this subject. Most of his writing is contained in books, rather than articles, which it was not possible to obtain for the research. It is however referred to in the policy briefing [Ethical Business Regulation: Growing Empirical Evidence](#), (Foundation for Law, Justice and Society and in the research paper [Science-Based Regulation in Financial Services: From Deterrence to Culture](#) (SSRN)

<sup>108</sup> Cartwright, P. "Regulation and Reputation", in [Transforming Culture in Financial Services](#) (Financial Services Authority, 2018).at p.49

While it seems obvious that a right of action would improve consumer rights, however, those who support it accept that it is unlikely to be used often in practice. It might then be asked what difference such a right will make in practice: if a right will not be taken up, what advantages are there in making provision for it and adding complexity to the landscape?

84. There is considerable evidence from the access to justice literature that consumers perceive the courts as intimidating, formal, complex and costly, and that few of those with civil justice problems take court action to resolve them.<sup>109</sup> Those who are involved in disputes are generally more interested in finding a resolution to their problem, and getting on with their lives, than necessarily enforcing their legal rights.<sup>110</sup>

85. Research has shown that there are high levels of consumer detriment among those who have cause to complain about professional and financial services compared with other consumer markets.<sup>111</sup> Yet while these consumers are less likely to be deterred by a long or complex complaints process than those in other markets, they are significantly less likely to seek compensation because they fear that their claim would not succeed.<sup>112</sup>

86. Benohr observes that barriers such as complexity and the cost and risk involved in litigation are particularly problematic in the financial services sector.<sup>113</sup> Financial products are often complex and the implications and risks can be difficult for consumers to understand, resulting in a power imbalance between the consumer and the provider. Moreover, unlike financial services providers, consumers are generally unable to afford legal representation, exacerbating that power imbalance. The costs of court action can be hugely disproportionate compared to the sum claimed. This was clearly illustrated by the case of *Durkin v. DG Retail Ltd*,<sup>114</sup> which involved the purchase of a faulty laptop and a linked consumer credit agreement. The consumer ultimately won in the Supreme Court. He was awarded £8000 in compensation, but the legal fees amounted to £250,000 and the case took 16 years to be resolved.

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<sup>109</sup> See for example Genn, H. (1999) *Paths to Justice: What People Do and Think About Going to Law*. Oxford – Portland Oregon: Hart Publishing; Ministry of Justice (2017) [Key Findings from the Legal Problem and Resolution Survey, 2014-15](#)

<sup>110</sup> See for example Genn, *ibid*; Consumer Focus Scotland (2012) [Facing up to Legal Problems: towards a preventative approach to addressing disputes and their impact on individuals and society](#)

<sup>111</sup> Office of Fair Trading (2008) [Consumer Detriment](#); Citizens Advice (2016) [Consumer Detriment: Counting the Cost of Consumer Problems](#)

<sup>112</sup> Citizens Advice, *ibid* at p.45

<sup>113</sup> Benohr, I. 'Collective Redress in the Financial Sector and the New EU Deal for Consumers'. *European Review of Private Law*. 6-2019 [1345–1366]

<sup>114</sup> *Durkin v. DSG Retail Ltd* [2014] UKSC 21 [2014] 2 All E.R. 715, referred to by Benohr above

87. Professor Hodges has observed that in addition to the cost and complexity involved, an adversarial model of dispute resolution encourages people to mistrust each other and fight, which does not support social co-operation or integration.<sup>115</sup> Neither of the legal experts interviewed appeared to be convinced that a new right of action was a helpful way forward.

88. Despite the concerns outlined above, however, it can still be argued on the basis of principle that consumers should have a private right of action as a last resort, where they are unable to obtain redress through other means, such as FOS or enforcement by the regulator. There is also an argument that litigation allows the courts to develop the law as to how the duty of care should be interpreted, which may ultimately benefit consumers more widely.<sup>116</sup>

### **8.3 The FOS compensation limit**

89. When the FCA discussion paper was published, the FOS compensation limit was £150,000. On 1 April 2019, the limit was increased substantially to £350,000, in relation to matters which occurred on or after that date. As at that date, the jurisdiction of FOS was also extended to cover SMEs, certain charities and trusts and personal guarantors. FOS also announced its intention to create a ring-fenced, specialist unit to handle complaints from SME customers.

90. The FCA estimated that there were only around 500 FOS complaints each year where FOS decided that fair compensation exceeded the previous £150,000 award limit. It estimated that around three quarters of that number would fall within the new increased limit.<sup>117</sup> This suggests that only a very small number of complaints would not now be covered by FOS. Following the Walker review, the Business Banking Resolution Service (BBRS) was also recently set up to resolve disputes between SMEs and participating banks, where they are not eligible to use FOS.<sup>118</sup> While there may still be a very small number of claims above the new compensation limit, the strength of this argument seems to have diminished significantly since these reforms.

### **8.4 FOS decisions are not easily enforced**

91. There was no reference to this argument in the responses which were provided by the Panel to assist this research, and respondents' details were not published by FCA. It is not clear therefore what the reasoning was

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<sup>115</sup> Hodges, C. [Delivering Dispute Resolution](#) Foundation for Law, Justice and Society, at p.5

<sup>116</sup> This argument is made by Chiu and Brener- see footnote 90, at p249

<sup>117</sup> FCA Policy Statement PS19/8 (2019): [Increasing the Award Limit for the Financial Ombudsman Service](#)

<sup>118</sup> <https://thebbrs.org/>

behind this argument. It seems implicit, however, in both this argument and that relating to the FOS compensation limit at 8.3 above, that FOS would be the preferred form of redress if these concerns did not exist.

92. There appears to be little evidence to support this argument. Even if it is true that FOS decisions are not easily enforced, it is unclear whether this is a problem which has been experienced in practice. In Part 2 of the Walker report, Professor Hodges states: "*The FOS does not actively monitor whether awards are implemented, but non-compliance is believed to be rare, and if a complainant complains to the FOS that a bank has not paid then FOS will follow it up.*"<sup>119</sup> In a conversation as part of the present research, he indicated that although he was not certain, he thought this was still the case.

### **8.5 Consumers should have as many avenues of redress open to them as possible**

93. The considerations here are similar to those discussed in relation to section 8.2 above. One of the internationally recognised consumer principles is choice.<sup>120</sup> There is accordingly an argument that consumers should have a choice of redress paths available to them. It can however equally be argued that ensuring consumers have access to *effective* avenues of redress is more important than how many avenues there are. If a right of redress is to be meaningful, consumers must be aware of it and must also be able to access it. As discussed elsewhere, few consumers take court action because of the barriers they face in doing so.

94. Moreover, if there are too many options available to consumers, this could be confusing. Reviews in both England and Wales have concluded that the civil justice system presents too many barriers and too many different pathways to allow people and businesses to satisfactorily resolve their disputes.<sup>121</sup> Research has also found that overlaps in coverage between consumer ADR schemes can lead to confusion.<sup>122</sup> There is however, as noted at section 8.2, a forceful argument that consumers should have a private right of action as a last resort where necessary.

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<sup>119</sup> Walker Review Report (see footnote 29). Part 2, at p 12.

<sup>120</sup> The consumer principles were set out by the Scottish Legal Complaints Commission Consumer Panel in its 2018 publication [Consumer Principles: Applying the Consumer Principles to Legal Services](#)

<sup>121</sup> Hodges, C. [Delivering Dispute Resolution: Recent Review on the Resolution of Disputes in England and Wales](#), The Foundation for Law, Justice and Society

<sup>122</sup> Gill, C., Creutzfeldt, N., Williams, J., O'Neill, S., Vivian, N., 2017. [Confusion, Gaps and Overlaps; A Consumer Perspective on Alternative Dispute Resolution Between Consumers and Businesses](#). London: Citizens Advice.

## **9. Analysing the arguments against a right of action**

95. The discussion below is focused on the eight main arguments against introducing a right of action, as set out in more detail at paragraph 30. It was difficult to find much empirical evidence to support or negate the additional arguments encountered by the Panel which are set out at paragraph 31.

### ***9.1 Duplication, complexity and confusion***

96. This argument may have some foundation. The financial regulation regime is already very complex, consisting of a raft of Principles, rules and guidance. Introducing a new right of action could potentially make things more complicated for both firms and consumers. It could also be argued that introducing a new right of action, when there are existing rights under other laws, could make the law more complex. As noted at paragraph 36, similar arguments were made when a right of action was introduced under the Consumer Protection from Unfair Trading Regulations. It is not clear, however, whether this has in fact increased complexity. It is worth noting though that if any new right were simply building on an existing right, such as that under section 138D of FSMA, it could perhaps actually make things clearer for consumers.

### ***9.2 Risk of a flood of legal actions***

97. Based on the information provided by the Panel, some of the disquiet about this appears to stem from concerns that there could be a repeat of the large numbers of small claims involving bank overdraft charges in around 2007-2008. It is not entirely clear why so many consumers raised small claims rather than complain to FOS, although significant numbers did take the latter route.<sup>123</sup> It appears, however, that the claims probably resulted from an investigation by the Office of Fair Trading (OFT) into whether these charges were legal, which led to consumer campaigns by Which? and Money Saving Expert. The OFT launched a (ultimately unsuccessful) test case as to whether the charges were legal, and the small claims and FOS complaints were all put on hold pending the outcome. At the time, the banks were reported to have condemned the OFT for inspiring a 'torrent' of refund claims.<sup>124</sup> These claims therefore arose from a particular set of circumstances which seem unlikely to be repeated.

98. The evidence from the other sectors considered, where the right of action has been in place for a number of years, suggests that there have not been floods of claims, despite similar concerns having been raised by business in

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<sup>123</sup> [The Guardian](#) reported that 100,00 consumers had complained to FOS in 6 months, while FOS said in its [2007/8 Annual Review](#) that bank charges had led to a doubling of complaints about banks

<sup>124</sup> ['Banks blame OFT for 'torrent of refund claims''](#) The Guardian (London, 17 January 2008)

some instances. It is possible that there could be a greater incentive to bring an action in financial services claims, as the amounts involved might be greater than in unfair commercial practices or competition actions. Most if not all claims are likely to fall within the FOS compensation limit, however. While there is some evidence that actions have been taken under the duty of care or 'best interests' rule in the Netherlands and Australia, little information was available on the extent of this. It seems likely that apparently low case numbers elsewhere and in other sectors reflect consumers' reluctance to embark on legal action for the reasons discussed at paragraphs 84-86.

99. Moreover, the FCA has stated its belief that only a small number of court actions have been initiated on the basis of a breach of FCA rules where a right of action already exists.<sup>125</sup> As Chiu and Brener point out, were section 138D to be extended, it is unlikely "*that financial firms would be overwhelmed by frivolous floodgates of litigation as causation of loss still needs to be proved in each civil claim and enacting the right is not equivalent to opening the gates to recovery.*"<sup>126</sup>

### **9.3 Litigation is not in consumers' interests**

100. Among the issues raised under this heading was the cost, delay and stress which a right of action might bring for consumers. This was discussed above at section 8.2. Other issues mentioned were the perceived risks of: 1) a litigious environment making firm/consumer relationships too adversarial; and 2) consumers being vulnerable to exploitation by claims management companies.

101. With regard to 1), a review of recent civil court statistics suggests that overall the number of civil claims has been decreasing in recent years in both England and Wales<sup>127</sup> and Scotland.<sup>128</sup> A series of independent reports published between 2004 -2010 concluded that, despite perceptions and media reports to the contrary, the UK does not have a 'compensation culture'.<sup>129</sup> While these reports focused primarily on personal injury cases, the perception that there was a move towards a significant increase in litigation appeared to stem from concerns among potential defendants

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<sup>125</sup> See footnote 1, at p.30

<sup>126</sup> Note: this was in the context of extension to businesses. See footnote 90, at p.249

<sup>127</sup> [Civil Justice Statistics Quarterly: October to December 2019 Tables](#)

<sup>128</sup> [Civil Justice Statistics in Scotland 2018-19](#)

<sup>129</sup> Better Regulation Task Force (2004) *Better Routes to Redress*; House of Commons Constitutional Affairs Committee(2006) [Compensation Culture](#); A report by Lord Young of Graffham to the Prime Minister (2010) [Common Sense Common Safety](#)

about the introduction of conditional fee agreements and what were seen as the aggressive tactics of some claims management companies (CMCs).

102. As one academic commentator concluded, however: *"The idea that defendants are beset by ever increasing numbers of doubtful claims is not proven. Indeed, the 'problem' we started with seems to have come down to this; that whatever may be the actual likelihood of irresponsible litigation, many believe themselves to be at heightened risk of being unfairly sued."*<sup>130</sup>
103. While it may be true that there is a perception of a litigious environment among firms, this perception appears to be incorrect. It is possible, however, that such a perception could lead to firms becoming more adversarial in their approach. It seems unlikely, however, based on the evidence discussed elsewhere in this report, that consumers will do so.
104. Regarding point 2), concerns about exploitation of consumers by CMCs are closely related to concerns about a flood of litigation. Given their recent experience of mass PPI mis-selling complaints, it is perhaps not surprising that financial services providers have concerns about this. Carol Brady's 2016 independent review of claims management regulation<sup>131</sup> found that financial services had become the second largest claims management sector after personal injury. PPI mis-selling complaints and claims for mis-sold packaged bank accounts were found to be major areas of CMC activity.
105. The Brady review noted that both consumers and the financial services sector were concerned that CMCs were fuelling speculative redress claims. It recommended strengthening the regulatory structure to address these issues, resulting in the introduction of regulation of CMCs by the FCA from 1 April 2019. While it may be still too early to tell, this new regulatory regime may help to address the concerns which have been voiced.
106. In any case, it is important to note that at least some redress claims brought by CMCs will be well-founded rather than spurious, as they are often assumed to be. As the review report pointed out, CMCs can bring benefits for consumers: *"It is important to note that CMCs provide access to justice for a wide range of consumers who may be unwilling or unable to bring a claim themselves. A well-functioning CMCs market can also act as a check and balance on the conduct and complaint handling processes of businesses, thereby benefitting the public interest."*<sup>132</sup>

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<sup>130</sup> Williams, K (2005) [State of Fear: Britain's "compensation culture" reviewed](#). Legal Studies, 25 (3), 499-515

<sup>131</sup> Brady, C. (2016) [Independent Review of Claims Management Regulation](#)

<sup>132</sup> Ibid, at p.5

107. The review of rights of action in other sectors and jurisdictions found no specific evidence of activity by CMCs. Experience to date suggests that CMCs are likely to be interested in high volume claims across a whole market, rather than specific individual complaints about a particular provider. As the Walker Review Report noted in the context of SME disputes, litigation funders are generally interested only in high value disputes. Other types of CMC, however *"operate at a much lower level of sums in dispute but on a business model of processing multiple straightforward claims, such as for road traffic, payment protection insurance or holiday sickness claims. It is unlikely that CMCs would be attracted to individual business claims."*<sup>133</sup>

108. Concerns were also expressed under this heading that consumers could be confused about the best avenue of redress. As discussed at paragraph 94, these concerns may be at least partly justified. It seems unlikely, however, that many consumers would go straight to court action for the reasons mentioned elsewhere. As discussed at section 9.7 below, it seems likely that given the choice between FOS and court action, the vast majority of consumers would opt for the former. In any case, financial services providers are required to signpost consumers to FOS once they have reached the end of their complaints process.

#### **9.4 Legal uncertainty and delay**

109. While the development of jurisprudence by the courts is valuable in making the law, only a tiny percentage of court actions actually end up being decided in court.<sup>134</sup> Court action is not generally a quick method of dispute resolution. Precedent would develop very slowly, creating uncertainty for a significant period of time. The Merricks v Mastercard competition action, discussed at paragraphs 45-46, is a useful illustration of this. The original action began in 2016 and is still ongoing. While the awaited Supreme Court judgement will ultimately settle an important legal question, it has taken several years to reach that stage, while other collective actions have also been stayed in anticipation of that judgement. As the IMLA pointed out in its response to the FCA,<sup>135</sup> a lengthy legal process to decide what the new duty means in relation to a specific case may not be in the interests of an individual consumer who simply wants a resolution to their dispute.

#### **9.5 Regulatory agility**

110. As noted above, the pace at which the courts would interpret a duty of care would inevitably be slow; if cases were to go through several appeals, as

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<sup>133</sup> Walker Review Report (see footnote 29) Part 2, at p24

<sup>134</sup> The Walker Review Report (see footnote 29) noted (at p.25) that 95-99% of court cases are settled before being decided by a judge

<sup>135</sup> At p. 3

with the Merricks case, they could take years. It is possible therefore that this could hinder the FCA's ability to be flexible and responsive to market change. If the duty of care took the form of a new actionable Principle, the courts and the FCA could interpret its effects in different ways.

## **9.6 Restriction of competition, innovation and access**

111. This is related to the discussion at section 9.3 above about the perceived risk of litigation. This is largely within the control of firms themselves. The Better Regulation Task Force found that misperception of this risk could reputedly lead to organisations becoming less innovative, diverting resources in unproductive ways, taking unnecessary safety precautions and sometimes abandoning certain activities altogether.<sup>136</sup>

## **9.7 Consumers already have other ways to seek redress**

112. It can be argued that there are other existing routes through which individual consumers and SMEs might be able to secure redress, without adding a further layer of complexity to the system. The primary route available is through FOS. There are also existing routes through which the FCA can provide redress for consumers, as discussed in part 10.

### *(i) FOS*

113. It seems likely that once they have exhausted the financial services provider's complaints procedure, most consumers would choose to take their dispute to FOS rather than the courts. Finding a satisfactory resolution as early and informally as possible is in everyone's interests. In addition to saving people time and money, it can help to avoid stress and related health problems. Research has shown that civil justice problems can impact on people's mental and physical health and wellbeing, and on their confidence, attitudes and life choices.<sup>137</sup>

114. Public awareness of FOS is very high.<sup>138</sup> It is free to the consumer, more informal than court and in most cases, significantly quicker than court. Despite receiving its highest level of complaints for 5 years in 2018-19, 60% of all complaints were resolved by FOS within three months, with 80% resolved within 6 months.<sup>139</sup> In previous years, more than 70% of

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<sup>136</sup> See footnote 131

<sup>137</sup> See e.g. Balmer, N. (2013) [Summary Findings of Wave 2 of the English and Welsh Civil and Social Justice Panel Survey Legal Services Commission](#). Franklyn et al (2017) [Findings from the Legal Problem and Resolution Survey, 2014-15](#), Ministry of Justice. Consumer Focus Scotland (2012) [Facing up to Legal Problems: towards a preventative approach to addressing disputes and their impact on individuals and society](#)

<sup>138</sup> [FOS survey data](#) shows that in 2018/19, 91% of consumers were aware of FOS overall, although this varies among different groups. In particular, awareness is significantly lower among those aged 18-24

<sup>139</sup> [FOS Annual Review 2018-2019: Data in More Depth](#)

complaints were resolved within 3 months, and the end of PPI complaints from late 2019 may lead to future improvements.

115. Research into the resolution of consumer disputes found that 70% of those who had not used ADR before going to court said this was because the business refused to participate in ADR, while a further 5% said it was because they were not aware of the ADR scheme.<sup>140</sup> Neither of these issues should occur with regard to FOS, as regulated financial services providers are required to sign up to FOS, and to signpost consumers to it once their complaints process is exhausted.
116. FOS offers other advantages for consumers over the courts. Rather than being required to make decisions based on the law through an adversarial process, FOS considers all of the information before it and determines complaints on the basis of '*what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case*'.<sup>141</sup> The ombudsman takes into account relevant law and regulations, regulators' rules, guidance and standards, codes of practice and (where appropriate) what is considered to have been good industry practice.<sup>142</sup> The ombudsman can therefore take account of the Principles. They would therefore be able to take into account any new consumer duty in the future, whatever form it might take. The ombudsman's final decision is binding on the firm, but it is only binding on the consumer if they accept it. If the consumer rejects it, they still have the right to go to court.<sup>143</sup>

(ii) Making use of existing consumer law rights

117. Individual consumers already have general rights under the Consumer Rights Act 2015 across sectors, including financial services. Under section 49 of the Act, there is an implied term in every contract to supply a service that the trader must perform that service with reasonable care and skill. This term cannot be excluded by the trader, and a breach is enforceable in the courts by the consumer either under common law or specifically under the Act.<sup>144</sup> The FCA suggested in its discussion paper that the 'reasonable care and skill' requirement could be seen as similar to the requirements of a duty of care."<sup>145</sup> The rights under the 2015 Act apply only to individual consumers however; they do not extend to businesses.<sup>146</sup>

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<sup>140</sup> BEIS (2018) [Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System](#)

<sup>141</sup> Section 228(2) of FSMA and DISP 3.6.1R.

<sup>142</sup> DISP 3.6.4R

<sup>143</sup> DISP 3.6.6R

<sup>144</sup> Section 54 (7) (a) of the Act specifically provides that a consumer has the right to claim damages

<sup>145</sup> See footnote 1, at page 12

<sup>146</sup> Section 2(3) of the Act defines a consumer as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession".

118. Cowan Ervine, a consumer law expert interviewed for this research suggested that one possible reason for introducing a distinct new right of action, when similar statutory rights already exist, could be to raise consumers' awareness of its existence. It would also give consumers a specific right to point to in their discussions with providers. Prior to the introduction of the 2015 Act, consumers already had some of the same rights in relation to goods under the existing case law, but the new Act gave them concrete rights to refer to.
119. In its response to the discussion paper, the Finance and Leasing Association also pointed out that consumers have specific rights of action under the Unfair Relationships provisions in the Consumer Credit Act.<sup>147</sup>
120. As discussed in part 3 of this report, individual consumers also have an existing right of action under section 138D of FSMA where there has been a breach of certain specific FCA rules, but not the Principles.
121. It may also be open to claimants to take action on the basis of the common law duty of care. As Chiu and Brener point out,<sup>148</sup> this is generally employed as a fall-back position where a claimant does not have the protection of regulatory duties- for example, where they cannot rely on section 138D of FSMA as they are not a 'private person.'

### ***9.8 Lack of deterrent effect on firms that already fail to comply with regulatory standards.***

122. As noted at paragraphs 80-82, it is unclear whether introducing a right of action will incentivise firms to comply with the rules. It seems unlikely that it will deter firms which currently fail to comply with the rules from continuing to do so. As noted at paragraph 82, deterrence sanctions are unlikely to result in improved future behaviour. Moreover, the argument that introducing a right of action will improve culture and conduct is accompanied by an acknowledgement that it is unlikely to be used often, if at all. Non-compliant firms which are aware that this is the case are unlikely to be concerned that the right of action poses a potential threat to them. Deterrence sanctions and damages may simply be viewed as a cost to business, rather than as an incentive to comply with standards in the future.<sup>149</sup>

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<sup>147</sup> At page 5

<sup>148</sup> See footnote 90

<sup>149</sup> See footnote 108

## **10. Possible alternative approaches**

123. As noted in section 9.7, consumers already have some other means of redress under the existing law. Other suggestions have been made for alternative and/or additional approaches to introducing a right of action which could deliver the outcomes sought by the Panel, namely to improve standards of conduct within the financial services sector, and achieve better consumer outcomes.
124. Chiu and Brener consider that in consulting only on a private right of action, the FCA discussion paper took a narrow view of redress and should instead have considered how to improve consumer redress across the public-private spectrum. While noting that publicly enforced redress reduces barriers to justice, including cost, they also support extending section 138D of FSMA to provide access to private litigation where publicly led action may not meet the needs of specific claimants.<sup>150</sup>
125. The term 'private right of action' suggests that it should sit alongside public enforcement. Several respondents to the FCA discussion paper which supported a private right of action thought that it would be important for any new right to be accompanied by more frequent FCA enforcement action.<sup>151</sup> Similar arguments have been made in other sectors. While it is not clear whether this was the intention in relation to unfair commercial practices,<sup>152</sup> it has been argued that private competition law actions "*unnecessarily duplicate public enforcement in follow-on compensation claims... if the authority is involved, it is going to be cheaper for the economy, and also far quicker for victims, if the authority can somehow bring about payment of compensation by the infringers.*"<sup>153</sup>
126. Chiu and Brener consider that there is a lack of consistent coupling between FCA enforcement and redress.<sup>154</sup> They suggest that the FCA might follow a similar approach to the US Consumer Financial Protection Bureau by making restitution orders more often alongside enforcement action.<sup>155</sup> They consider that the costs of this would be offset by increasing consumer trust and confidence in financial services markets and a greater deterrent effect within the market. While the FCA has power to make a 'restitution order' to

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<sup>150</sup> See footnote 90

<sup>151</sup> Citizens Advice; The Money Charity; University College London

<sup>152</sup> View expressed by Cowan Ervine in discussion

<sup>153</sup> C Hodges, 'Fast, Effective and Low-Cost Redress: How do Public and Private Enforcement and ADR Compare?' in B. Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (WoltersKluwer, 2014, at p 28

<sup>154</sup> See footnote 90 - at p245

<sup>155</sup> Ibid at p247

require firms to pay compensation to their customers,<sup>156</sup> this appears to have been rarely used.<sup>157</sup>

127. The FCA also has power to establish and operate an industry-wide consumer redress scheme, where it considers that there has been a widespread or regular failure by firms to comply with its rules, as a result of which consumers have suffered (or may suffer) loss or damage in respect of which a remedy would be available to them.<sup>158</sup> It cannot, however, impose such a scheme for a breach of the Principles, as consumers cannot currently obtain a remedy in court in this situation. If section 138D of FSMA were extended to make a breach of the Principles actionable, the FCA would have power to establish such redress schemes where such a breach occurred.
128. The FCA has exercised this redress power more often than it has issued restitution orders. It has been suggested, however, that while the schemes are initiated by the regulator, their operation is largely delegated to firms, leading to mixed experiences for claimants, which may not be in the interests of access to justice.<sup>159</sup>
129. Increasing the use of enforcement follows a traditional legalistic approach, however. As discussed elsewhere, there is evidence to suggest that a deterrence approach based on sanctions does not work. However, other actions such as the publication of enforcement notices, which bring with them the fear of negative publicity, may be a more effective deterrent.<sup>160</sup>
130. Professor Hodges expressed the view that in continuing to focus on deterrence as a means of enforcement, the financial services sector is not in line with the majority of regulatory regimes in other UK sectors. In his view, an 'ethical business regulation' approach would be more effective than a deterrent approach. This is based on behavioural psychology, rather than legal rules. It is focused on 'intervention' rather than 'enforcement' and involves the regulator building relationships with firms to create mutual trust and encourage firms to improve their culture.<sup>161</sup> While this is a long-term approach, it is based on the idea that supporting businesses towards compliance with the rules will ultimately be more effective than deterrent measures.

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<sup>156</sup> Sections 382-384 FSMA

<sup>157</sup> Chiu and Brener say it has only been used twice.

<sup>158</sup> Section 404 FSMA

<sup>159</sup> Chiu and Brener- see footnote 90

<sup>160</sup> Cartwright, P. in *Transforming Culture in Financial Services* (FCA) - see footnote 109.

<sup>161</sup> From discussion with Professor Hodges, who has written numerous books on this subject. Some of the main concepts are set out in his policy briefing [Ethical Business Regulation: Growing Empirical Evidence](#), Foundation for Law, Justice and Society. See also [Science-Based Regulation in Financial Services: From Deterrence to Culture](#) (SSRN)

131. While the FCA has been considering cultural issues and longer-term approaches in recent years,<sup>162</sup> its efforts to improve culture still tend to follow a legalistic, rule-based approach. An example of this is the Senior Managers & Certification Regime (SM&CR),<sup>163</sup> which was recently extended to all FSMA authorised firms and aims to bring significant improvements to firms' culture and accountability. It should be noted, however, that industries where an ethical business regulation approach appears to have been successful, such as civil aviation,<sup>164</sup> may not have experienced the levels of non-compliance and consumer detriment which have occurred in parts of the financial services sector in recent years.
132. Professor Hodges suggested that rather than introducing a right of action, the FCA Principles and the handbook could be strengthened. The FCA could perhaps also use its redress powers more, with the FCA approving schemes where necessary, and FOS administering them. He noted that FOS performs a crucial 'feedback' role in identifying poor practice and systemic issues and reporting this back to the regulator, government and industry. This 'quasi-regulator' role of FOS, through which it works closely with the FCA, is a crucial means of improving practice.
133. As the Walker report noted, court decisions on points of law in individual cases have little impact on changing corporate culture.<sup>165</sup> An ombudsman, however, can capture systemic data, and *'this feedback loop can incentivise positive behaviour and bring changes in organisational culture.'*<sup>166</sup> The report noted that, unlike a court, FOS could therefore act as an 'early warning mechanism', citing as an example the first PPI judgement, which was not publicised until 10 years later, due to a confidentiality clause. Had this been made public at the time, Walker surmised, the PPI scandal would probably not have caused so many difficulties for both banks and consumers.<sup>167</sup>
134. While the regulator has an important role in terms of culture, of course the main responsibility for improving the culture within financial services firms lies within the firms themselves. One way of seeking to achieve this would be to ensure that consumers are put at the heart of their decision-making. This might include appointing consumer representatives to their boards.<sup>168</sup>

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<sup>162</sup> See for example its discussion papers on [Transforming Culture in Financial Services](#) (2018) and [Transforming Culture in Financial Services: Driving Purposeful Cultures](#) (2020). See also [Towards More Effective Stewardship](#) (2019), a joint discussion paper with the Financial Reporting Council

<sup>163</sup> See FCA Discussion paper (footnote 1), at p 13

<sup>164</sup> See footnote 64

<sup>165</sup> Walker Review Report (see footnote 29) Part 2 at p.36

<sup>166</sup> Ibid, Part 1 at p.45

<sup>167</sup> Ibid, Part 1, at p.35

<sup>168</sup> See Brennan, C., Williams, J., O'Neill, S. and Chalmers, S. (2017) [Consumer Representation in Financial Services: Report into consumer representation in the payment sector](#). Edinburgh: Queen Margaret University.

## **11. Conclusions**

135. The evidence obtained from the research is finely balanced; it does not clearly support either the case for introducing a private right of action or the case against. The limited evidence obtained from the experience in other countries was inconclusive. One difficulty with considering the available evidence from other UK sectors and from other jurisdictions was that where private rights of action do currently exist, they have generally only been in place for a few years. This makes it difficult to draw firm conclusions at this stage as to how they have operated in practice.
136. One clear conclusion that can be drawn from the evidence reviewed is that were a right of action to be introduced, very few if any consumers who have grounds to exercise that right would be likely to do so. While this is accepted by the Panel, it is also employed as an argument against a right of action by those opposed to it. However, this contradicts and undermines their argument that a right of action would result in a flood of claims.
137. Were any new duty of care to be breached by a financial services provider, it is likely that many consumers affected would be unaware that the duty existed and / or that they have a right of action against the provider. Even among those consumers who were aware that the duty of care has been breached, it is likely that some would take no action at all. There may be good reasons for this: they may decide that any benefits of doing so are outweighed by their desire to move on with their lives and focus on other priorities. Most of those who did take action would be likely to go to FOS in the first instance (assuming that their complaint was not resolved through the firm's complaints procedure). In the vast majority of cases, the decision made by FOS would be the end of the matter. FOS could then report any poor practice to both the regulator and industry, with a view to ensuring future improvement.
138. There may be a small minority of well informed and determined consumers who would consider taking court action. This could be because their claim exceeds the FOS compensation limit or because they are unhappy with the decision reached by FOS on their complaint. Some may simply wish to seek a legal ruling on whether the duty of care has been breached. Those consumers - unless they have sizeable financial resources - would however face often insurmountable barriers to taking legal action. These include the significant costs and risks involved; the formality and complexity of legal proceedings; the significant length of time which these are likely to take; and the possible toll on their mental and/or physical health. They are also likely to be faced with a very well-resourced opponent with legal representation.

139. The introduction of a specialist Financial Services Tribunal similar to the CAT could help to address some of these issues. Such a tribunal would likely still involve a formal legal process however, and financial services firms would be likely to employ expensive lawyers, as most parties appearing before the CAT do. If a consumer's case had good legal prospects, and the sums involved were sufficiently large, they may be able to obtain funding from an independent litigation funder.<sup>169</sup> Even if their case were successful, they would be likely to end up paying a significant proportion of their damages award to the funder<sup>170</sup> and to their lawyers. If they lost, they would face the risk of significant costs being awarded against them.
140. Another possibility could be a new collective actions procedure, whether in the courts or a specialist tribunal, such as that which exists in the CAT (or the existing Group Litigation Order procedure). Similar issues would arise here in terms of the costs and risks involved. The small number of collective actions raised in the CAT to date demonstrate however that it is possible for sufficiently well informed and well-resourced parties to take collective actions on behalf of often very large groups of consumers. It seems unlikely though, in the light of experience to date, that consumer organisations would be willing or able to take on such collective actions.
141. One of the principal arguments which has been made in favour of a right of action is that the threat of such action would incentivise firms to improve their culture and standards of conduct. Little evidence was found to support this argument, but conversely there is some evidence that legal forms of deterrence, such as sanctions and damages actions, may not have much impact on firms which fail to comply with the law. It may be however that the right of action would encourage changes to culture and conduct within responsible firms which seek to comply with the duty. It is also possible that a right of action which applies to a specific sector such as financial services may be more effective than one right which applies across sectors.
142. The second main argument in favour of a right of action is that it would improve consumer protection and provide access to justice. While it is unlikely that many consumers will make use of the right of action for the reasons discussed elsewhere, perhaps the strongest argument in favour is that a right of action should be available as a last resort where they cannot obtain another remedy, or if a legal ruling on the question is required. It could also be argued that introducing a new right of action would raise

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<sup>169</sup> Or from a legal firm, if damages-based agreements were allowed- these are explicitly excluded in competition cases. The Walker Review Report (see footnote 29) noted that as at 2012, most litigation funders would only accept cases worth at least £100,000, and some had higher limits. (Part 2, at p. 24)

<sup>170</sup> According to the Walker Review report (ibid, Part 2, p.24), litigation funders typically take 30-40% of the damages awarded

consumers' awareness of its existence and give them a specific and concrete right to point to when communicating with their financial services provider.

143. The arguments made by the industry against introducing a right of action suggest that firms view such a proposal as tipping the balance too far in favour of consumers. Some of these arguments are not particularly persuasive. There seems to be little likelihood of a 'flood' of litigation, encouraged by CMCs, or of a more litigious environment. Any restriction of competition, innovation or access to the services offered by firms as a result of a perceived risk of increased litigation is entirely within the control of firms themselves. Firms which are confident that they comply with the duty of care have little to fear, and they may be able to attract new customers by providing the services that more risk averse providers fail to offer.
144. Other arguments against a right of action may carry more weight. It is true that the vast majority of consumer complaints can be dealt with by FOS, which will result in a quicker and much cheaper outcome. As discussed at paragraph 138, there may however be a minority of consumers who have reason to take court action. While it is also true that individual consumers already have similar rights of action under the Consumer Rights Act and section 138D of FSMA, neither of these include business consumers, while the latter is limited in scope and does not apply to a breach of the Principles.
145. There could be some merit in the argument that a right of action would not deter poor behaviour by firms which already fail to comply with regulations. It could however encourage greater efforts elsewhere in the industry to improve behaviour, which may have a knock-on effect among other firms.
146. There may also be some justification for the argument that a right of action would make the law more complex and confusing for both firms and consumers. The financial regulation regime is already very complex and multi-layered. If a duty of care were introduced, however, it may be possible to create the new right by building on an existing right, such as that under section 138D of FSMA, which could actually make things clearer.
147. It is also true that the development of precedent is slow and uncertain; it may not therefore be in the interests of the individual consumer(s) involved. Situations could occasionally arise, however, where a legal ruling would clarify the law and benefit consumers more broadly. A private right of action would however bring with it the possibility that the courts and the FCA could interpret the duty of care in different ways. This may, as those opposed to a right of action have argued, make it more difficult for the FCA to be flexible in its approach and responsive to the market.

148. As discussed in section 10, there are various other approaches which could help to achieve the outcomes sought by the Panel, including greater enforcement by the FCA, establishing industry-wide redress schemes, and/or a more culture-focused approach by the regulator and firms themselves. While these alternatives were not the primary focus of this research, they may be worth exploring. Such avenues and a private right of action are not mutually exclusive. A new private right of action could be one aspect of a wider overall approach by regulators, firms, FOS and consumer organisations with the aim of improving culture and behaviour among financial services providers in the longer term.