

CMS Financial Services Regulation Bitesize Briefings: **Consumer Duty**

Foreseeable Harm, the FOS & Litigation Risk



Elisabeth Bremner | Partner

Kushal Gandhi | Partner

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In this session we are going to cover:

1. Foreseeable Harm
2. Investigate - Assess - Redress
3. Managing Complaints
4. FOS
5. Litigation Risks

Section 01

FCA's expectations on foreseeable harm

The obligation to avoid foreseeable harm

A firm must avoid causing foreseeable harm to retail customers

- By act or omission
- If in a direct relationship with the retail customer; OR
- Even if in an indirect relationship, through the firm's role in the distribution chain – and even if another firm in the chain contributes to the harm

“Foreseeable harm”

- Would a “prudent” firm acting reasonably be able to predict or expect the harmful result of their action or omission
- In essence where fail to meet the obligations under the Duty

When does the obligation arise?

Ongoing relationship with customers:

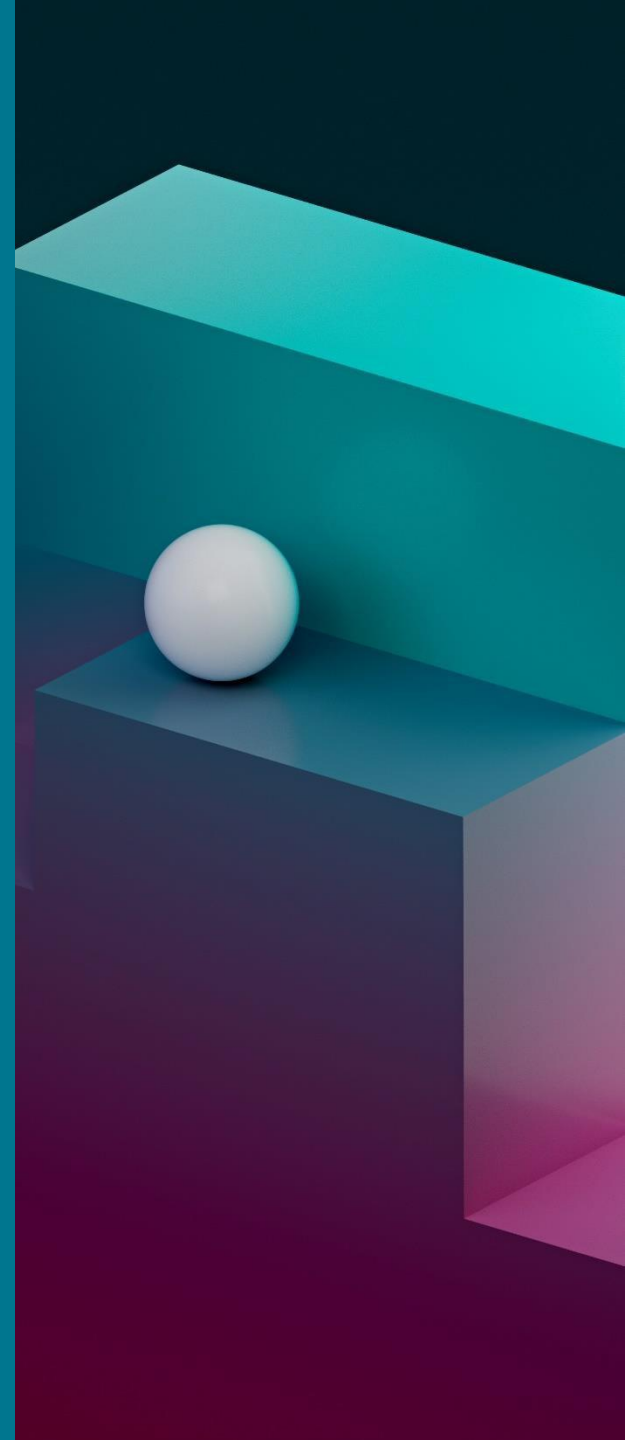
- Must act to avoid foreseeable harm throughout the product lifecycle

No ongoing relationship with customers:

- Do not need to act to avoid causing harm which **only later** becomes foreseeable
- Caution regulator lens of hindsight

Examples of foreseeable harm

- **Cancellation policies:** consumers being unable to cancel products or services due to unclear or difficult firm policies.
- **Inadequate consumer testing:** products and services performing poorly due to inadequate testing of market scenarios to understand consumer impact.
- **Inappropriate distribution strategies:** customers receiving products that are not designed for them and don't meet their needs.
- **Complex product charges:** customers do not understand the charging structure or how it impacts the value of the product.
- **Poor value:** where total investment charges outweigh the expected above-cash returns from investments.
- **Lack of inclusive design and consumer support:** vulnerable customers unable to access and use a product or service properly.



Section 02

**Investigate - Assess -
Redress**

Regular monitoring and reviews

Required to:

- Conduct regular monitoring
- Identify potential for harm
- Respond to emerging trends that identify new sources of harm

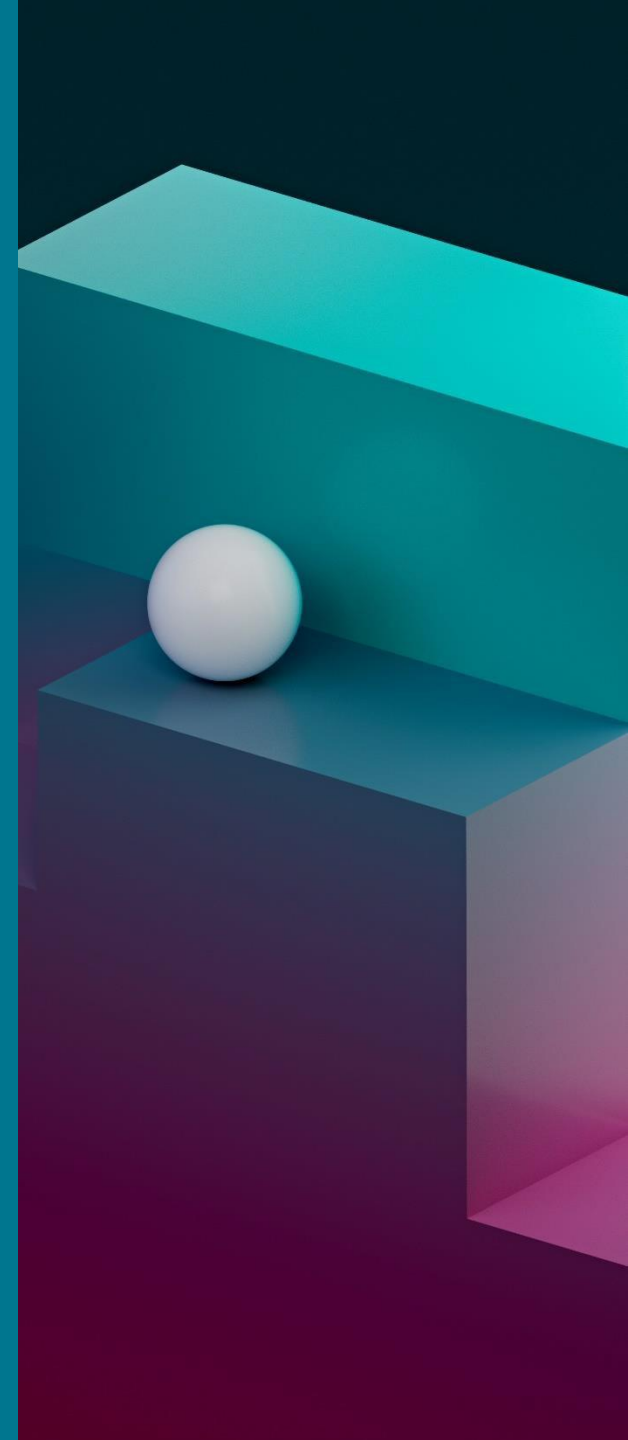
Consider:

- Output of monitoring
- Behavioural insights
- Culture audits / staff feedback
- Sales and P&L data
- Competitor benchmarking
- Customer feedback (even where indirect relationship)
- Distribution chain feedback
- Complaints
- FOS decisions and guidance
- FCA supervisory focus and communications
- Press reports etc.

Assess and remediate

Required to:

- Have in place processes to identify root causes of any failure to deliver good outcomes → foreseeable harm
- Take appropriate action to address
- Includes proactive redress where appropriate – new DISP provisions
- Where no direct customer relationship – obligation to take reasonable steps to notify customers
- If consider another firm responsible (solely or jointly) – must notify promptly and provide appropriate information.



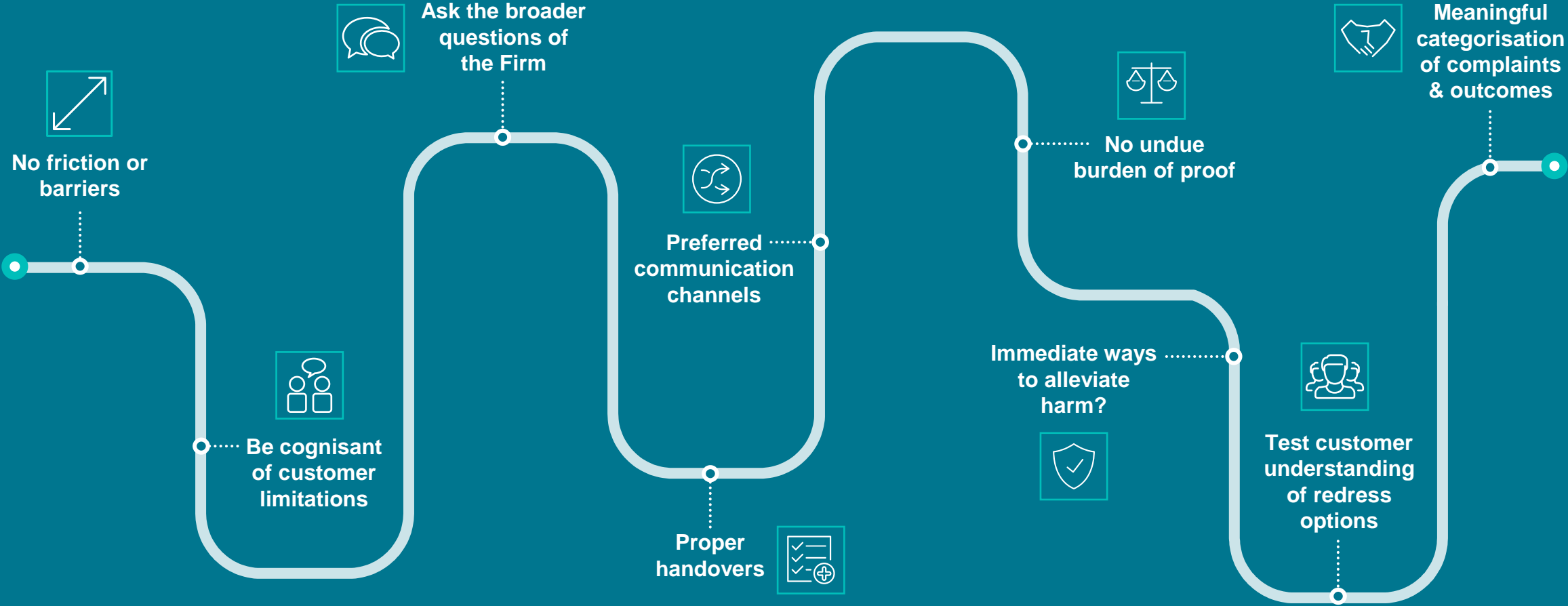


Section 03
**Complaints
handling**

FCA expectations

- FCA has set targets for reduction in complaints → FOS
- Expects firms to take existing decisions and guidance from FOS into account and apply same approach where cases present similar facts.
- Will consider firms to be acting in **bad faith** if delay paying redress where due but instead awaits further FOS decision.
- Expects firms to promptly pay redress in these cases

A few pointers on getting it right



Section 04

FOS and the Consumer Duty

FOS

Theory and practice?

- Outcomes-based regulation inevitably requires **judgment**
- It is **already engaged** with businesses, trade bodies and other stakeholders to hear views and concerns about the duty
- It will **continue to co-operate** with all members of the **Wider Implications Framework** and work throughout implementation to:
 - Ensure a **shared understanding** of the new duty
 - **Identify examples** to help firms understand and embed the duty.

- It will **share with the FCA** any issues identified through its casework
- It has a **renewed emphasis on** communications, policy and engagement with FCA & FSCS
- It will take a **more robust and proactive approach** to preventing complaints arising by working closely with industry, consumer groups, regulators

This is the theory, but will things be different in practice?

- **Past experience** – PPI, SIPPs
- External **pressure on FOS** and its own internal overhaul – TSC Review and FOS Action Plan
- Might **FCA** start taking more **control**?



Section 05
**Litigation
risks**

Litigation impact?

Private Right of Action?

- No Private Right of Action (s138D) on the Consumer Duty 'package' **at this time** but will keep it under review

“We consider that allowing the industry adequate time to embed the Consumer Duty, without the prospect of private action being brought, is important to fully realising the consumer benefits of the cultural and mindset changes the Consumer Duty aims to achieve.”

Existing redress framework

- Existing redress framework appropriate route for most consumers:
 - FOS – increased cap
 - DISP rules
 - Capping of CMC costs
 - Super complaints process

Impact on civil claims?

- Influence on interpretation of specific Handbook rule requirements where s138D PROA available?
- Interpretation of common law duty of care in negligence claims? Effect of heightened industry standards

Any questions? Please contact us...



Elisabeth Bremner | Partner

T +44 20 7367 3356

E elisabeth.bremner@cms.cmno.com



Kushal Gandhi | Partner

T +44 20 7367 2664

E kushal.gandhi@cms.cmno.com



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