Financial Services Consumer Panel

The implications of Brexit for UK consumers of financial services: a think-piece.

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1. Summary

1.1. The Financial Services Consumer Panel commissioned this "think piece" to inform and influence the debate, as seen from the consumer protection perspective, about the future framework of the UK's financial services regulation following the UK's impending withdrawal from the European Union ("Brexit").

1.2. Uncertainty remains about the relationship the UK will have with the EU after Brexit. Although the UK would like to retain access to the single market for financial services (which means the UK would continue to be bound by EU Directives) there are political difficulties involved. An alternative option for Brexit cannot be ruled out under which the UK takes back control of its financial services legislation.

1.3. A long-standing problem for consumer bodies is that they are inadequately resourced, compared with the financial services industry, to respond to consultations. If the UK retains access to the single market it will be "business as usual" for the Panel in trying to influence EU measures but that task is likely to be harder as influence in the EU could diminish as a result of Brexit. If, on the other hand, the UK takes some or complete control of its financial services legislation there is both a threat and an opportunity for consumer protection. The threat is that EU measures which protect consumers may be diluted or revoked if they are characterised as "Brussels red tape". The opportunity is that the Panel may be able to address shortcomings in EU measures and help mould a regulatory regime which delivers better outcomes for UK consumers.

1.4. As a generalisation, EU regulation might be considered a positive factor for UK consumer protection in the sense that since 1999 the EU has had an overarching plan for the regulation of financial services in contrast to the UK where the extension of regulation has been incremental and piecemeal. The potential benefits of the EU's overall plan have, however, been undermined in the past by the fact that individual Directives have been developed on a sectoral basis by the Commission and the inconsistencies which have emerged do not make sense from the consumer perspective. Similarly, a weakness of the EU has been a lack of adequate supervision across Member States. More recently, since the formation of the European Supervisory Authorities (ESAs), there has been evidence of convergence in EU regulation. In particular, this convergence has been facilitated by the Joint Committee of the ESAs. In addition, the ESAs are now addressing the issue of consistency in supervision. However, the ESAs can only seek to ensure consistency of regulatory approach for consumers within the framework of a Directive and if the Commission continues to develop policy in different "silos" there is a continuing risk that future regulatory measures may also lack coherence. There is also a continuing risk of consumer protection taking a back seat in the

development of policy by the Commission, for example with the Capital Markets Union Green Paper. Over the years there has been convergence between the EU's regulatory requirements and those of the UK (probably a reflection of the significant influence the UK has hitherto had on EU policy) but there remain areas where EU consumer protection falls short of that provided by the UK regime, notably in the areas of dispute resolution and compensation and the failure to introduce a total ban on inducements for all firms.

1.5. The single market in retail financial services is insignificant at present as respects UK consumers accessing products from other Member States. There are major obstacles to the achievement of a single market for retail financial services in the future. Nonetheless, the EU has recently sought views on how the single market might be facilitated. Whether or not UK consumers will be able to take advantage of the single market, should the EU's efforts bear fruit, will depend on the precise relationship between the UK and the EU in the future.

1.6. UK financial services regulation and that originating from the EU have been closely intertwined over the years such that it is often difficult to identify who is the progenitor of a particular measure. There is no doubt that some aspects of recent EU measures yet to be implemented could enhance consumer protection and competition but equally there are other aspects of those measures about which consumer bodies have had reservations. Many of the EU measures come into force from the end of 2016 through to 2018, when the UK's exit from the EU may be imminent. Once the current block of Directives have been implemented it is likely to result in a period of "planning blight" with the industry being able to make a reasonable case that it should not be subject to the costs of further regulatory change so soon after the major task of implementation of the Directives. The Panel therefore believes that it is timely to question whether or not the EU measures currently in force or in the process of implementation deliver the consumer protections the Panel would wish to see post-Brexit.

1.7. The table below is in two parts. The first part is in the form of a "heat map" of EU and UK measures. Text in red indicates areas where actual or proposed EU (or UK) measures raise consumer protection concerns. Text in green indicates those areas where the consumer protection outcome is broadly satisfactory. Text in amber indicates measures where there are some specific consumer protection concerns but where on balance the outcome is satisfactory. The second part of the table looks at matters from a horizontal perspective and suggests a possible checklist which might be used to assess the consumer protection merits of regulation in the future regardless of whether that regulation originates from the EU or UK. The checklist has been derived from points the Panel has made in its Annual Reports or responses to consultations.

Which measures offer stronger consumer protection?

EU-wide measures	UK measures	
	What is in place	*Does the UK go further than EU?*
Compensation and redress		
Alternative Dispute Resolution Directive (ADR Directive).	The Financial Ombudsman Service (FOS) is a model ADR scheme. Significant improvement needed in EU arrangements to go as far as the UK.	**Yes** The FOS preceded the ADR Directive and before the FOS there were a number of UK ADR schemes e.g. Insurance Ombudsman.
Deposit Guarantee Scheme Directive (DGS Directive).	The Financial Services Compensation Scheme (FSCS) limit for deposits has been reduced because of exchange rate movement with the DGS which is denominated in Euros.	**No** In the UK protection for deposits existed before the DGS Directive e.g. the Building Societies Investor Protection Scheme created by the Building Societies Act 1986.
Investor Compensation Scheme Directive - the EU has failed to review the Scheme	The current UK limit for compensation is £50,000 compared with the limit set by the Directive of 20,000 Euros.	**Yes** UK arrangements existed before those of the EU. The Financial Services Act 1986 created an Investors' Compensation Scheme.
Insurance Guarantee Scheme - the EU has failed to introduce a scheme.	The FSCS covers insurance company defaults.	**Yes** Before the FSCS covered insurance defaults there was compensation available to UK consumers through the Policyholders' Protection Act 1975.
Payments		
	What is in place	*Does the UK go further than EU?*
Payment Accounts Directive (PAD).	UK implementation gives legal right to a basic bank account.	**No** Prior to PAD the UK Government had reached a voluntary agreement with the banking industry

		covering many of the matters covered by PAD - transparency of fees and charges, creation of a 7 day account switching service, and a basic bank account offer.
Payment Services Directive 2 (PSD2). A potentially mould breaking measure that could transform competition in retail banking.	Overlaps with the Competition and Markets Authority study of retail banking.	**No** The CMA remedies are less ambitious than PSD2.
	Funds	
	What is in place	*Does the UK go further than EU?*
Undertakings for Collective Investment in Transferable Securities Directive (UCITS Directive).	UK rules implement UCITS. The FCA's Policy Statement PS16/2 said the FCA had decided not to set additional requirements, or maintain existing ones, on top of what is required by UCITS except in the prudential treatment of depositaries. There are Panel reservations about the governance of funds and transparency of their costs as set out by UCITS.	**No** Prior to the implementation of UCITS there were UK regulations made under the Prevention of Fraud (Investments) Act 1958 which governed some matters relating to the investment and borrowing powers, and pricing, of unit trusts.
	Disclosure/governance	
	What is in place	*Does the UK go further than EU?*
Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs).Introduces Key Information Document	Analogous to the UK's Key Features regime. But PRIIPs does not cover pensions nor all types of deposit. Concern that the KID may be over-	**No** Rules under the Financial Services Act 1986 provided for information to be disclosed to consumers originally in the form of

(KID).	ambitious and seen as a panacea for all consumer protection problems.	"Product Particulars". Subsequently the "Key Features" regime was devised and implemented in 1994.
Insurance Distribution Directive (IDD). EIOPA has yet to finalise its Technical Guidance. Some UK reservations over lack of remuneration controls, aspects of product governance, and aspects of suitability for unit-linked investment contracts.	Investment insurance already covered by FCA rules. General insurance outcome will depend on outcomes of EIOPA and FCA consultations	**Yes** UK had regulation before IDD. General insurance was regulated under the Insurance Brokers (Registration) Act 1977 before it became regulated by the FSA in 2004. Investment- based insurance was subject to the rules under the Financial Services Act 1986.
Multilateral Interchange Fees Regulation.	May lead to reduction in fees on credit cards in UK.	**Yes**
	Treating Customers Fairly	
	What is in place	*Does the UK go further than EU?*
Mortgage Credit Directive (MCD).	UK had comparable rules prior to MCD.	**No**
Consumer Credit Directive (CCD).	UK had consumer credit regulation operated by Office of Fair Trading prior to CCD.	**No** Prior to the CCD the UK had a consumer credit regime governed by the Consumer Credit Act 1974 and administered by the Office of Fair Trading.
Distance Marketing Directive (DMD)	UK had comparable rules prior to DMD.	**No** Conduct of business rules under the Financial Services Act 1986 already covered most aspects of the DMD.
General Data Protection Regulation. Introduces significant consumer protections.	UK legislation reflects EU requirements.	**No** UK data protection legislation pre-dates that of the EU.
Unfair Contract Terms Directive.	FCA has power (under Consumer Rights Act 2015) to challenge unfair	**No**

	terms.	
Unfair Commercial Practices Directive.	UK already had rules to tackle unfair practices.	**No** Rules made under the Financial Services Act 1986 already covered the matters contained in the Directive.
Shareholder Rights Directive (SRD2).	UK company law has been enhanced by SRD.	**No - EU offers better level of protection**
Markets		
	What is in place	*Does the UK go further ?*
Markets in Financial Instruments Directive (MiFID II). Markets in Financial Instruments Regulation (MiFIR).	UK has long-standing requirements on conduct of investment business which MiFID II reflects. FCA proposes to go further than EU on prohibiting inducements. The FCA already has product intervention powers comparable to MiFIR.	**Yes** The UK had extensive conduct of business rules under the Financial Services Act 1986 governing the conduct of investment business. **No**
E Money Directive (EMD2). Review has been delayed, should have been co-ordinated with PSD2.	Implemented by E-money Regulations.	**No** When implementing the 2000 and 2009 Directives the UK took advantage of various derogations/waivers to reduce or disapply the requirements for small firms.
Anti-Money Laundering Directive 4 (AML4).	AML needs to be risk-based to guard against increasing financial exclusion (e.g. credit unions).	**No** Prior to implementation of the EU's First AML Directive there was some pre-existing UK legislation. For England and Wales the Criminal Justice Act 1988 (as amended by the Criminal Justices Act 1993) was

		relevant.
Future initiatives		
	What is in place	*Does the UK go further ?*
Capital Markets Union (CMU).	The Panel and BEUC have expressed concerns that consumer protection is taking a back seat in the EU's plans to push forward the Capital Markets Union.	Dependent on the specific measures to emerge from the CMU Green Paper there could be potential for UK protections to be strengthened or clawed back.
Green Paper Retail Financial Services.	Panel has pointed to shortcomings in authorisation/supervision, compensation, and complaints handling as matters to be addressed. Panel has urged case for simple products. Panel has pointed to risk of digital services and the uses of Big Data.	Dependent on the specific measures to emerge from the Retail Financial Services Green Paper there could be potential for UK protections to be strengthened or clawed back.
Horizontal issue	**Possible action**	
The authorisation and supervision of firms should be robust to instil consumer confidence and safeguard against consumer detriment.	If the UK retains access to the single market press for the European Supervisory Authorities to tackle shortcomings on the part of national regulators. In the absence of consistent authorisation and supervision UK consumers cannot have confidence in the single market.	
The Panel's view is that consumer protection is best served by a regulator with a consumer	If the UK remains in the single market continue to press for structural reforms of regulation - prudential and conduct of business regulation to be separated; a	

protection objective and which is focussed on conduct of business rather than prudential regulation.	possible merger of the European Supervisory Authorities to form a single conduct of business regulator for the EU; national financial services regulators to have a consumer protection objective or the relevant national consumer protection agency to have a role in the governance of the European Supervisory Authorities.
The Panel's view is that financial service firms should be under a duty of care when dealing with consumers.	As a minimum, retain the provision in some Directives placing an obligation on firms to act *"honestly, fairly and professionally in accordance with the best interests of its clients"*. Press for all firms to have a duty of care (whether their relationship with consumers is direct or indirect.)
Regulators should view regulation from the consumer perspective and should not create inconsistencies or leave gaps in regulation.	Regardless of the UK's position post-Brexit there is a need for a horizontal review of regulation to address inconsistencies, gaps, or unintended effects.
Regulators should recognise that individual consumers are not the only ones needing protection and that small businesses may be equally unsophisticated and need the same protections.	Regardless of the UK's position post-Brexit there is a need for a horizontal review of regulation to ensure that, where appropriate, small businesses are afforded the same protections as individual consumers.
The financial services market should be inclusive so that consumers have access to the products and services they need.	Continue to press for a range of simple products which could meet the needs of most consumers. Safeguard against measures (Big Data, Anti Money Laundering) which could be used to sideline some consumers when it comes to access to financial products.
Consumers should get timely, accurate and understandable information both about any financial services firm with which they deal but also about any product they buy. Regulators should consumer test disclosures they mandate and should seek to ensure consumers do not get conflicting information.	Regardless of the UK's position post-Brexit there is a need for a horizontal review of the disclosures which consumers get at various stages when using financial service firms or buying their products to ensure that consumers get information in a form they can understand, at the time they need it, and with which they can engage.
Consumers should have a	Retain rights conferred by Directives.

right to cancel, cool-off, or pay back early a financial product without suffering any unfair financial penalties.	
Consumers should not be subject to any unfair contract terms or unfair commercial practices	Retain existing provisions.
Consumers have a right to expect that a firm will assess the affordability, appropriateness, or suitability (as appropriate) of any financial product which the firm recommends or sells.	Regardless of the UK's position post-Brexit, press the regulators to regularly and thoroughly monitor the performance of firms as to the suitability etc requirements as these are fundamental to ensuring that consumers get the products they need and do not get sold unsuitable products.
Regulators should ensure there are strict controls on inducements for firms and that firms themselves have in place remuneration policies for their own staff which safeguard against poor outcomes for consumers.	If the UK remains in the single market press for a ban on inducements for all firms.
There needs to be greater transparency about all the costs and charges (explicit and implicit) a consumer may face and the effect these charges will have.	Regardless of the UK's position post-Brexit continue to press for the effective disclosure of all costs and charges.
The portability of financial products should be facilitated.	Regardless of the UK's position post-Brexit support measures which allow consumers who purchase a product (e.g. health insurance) in one country to be used in another country.
Product intervention. Consumers should be confident that supervisors will not hesitate to intervene against firms, individuals, or products should it prove necessary.	The UK already has an intervention powers and the EU regulators are due to obtain one, press the regulators to use the powers they have been given.
There should be an independent body for resolving disputes between consumers and	Promote the UK's Financial Ombudsman Service as a model for any future enhancement of the Alternative Dispute Resolution Directive so far as it bears on financial services.

firms and the decisions of that dispute resolution body should be binding on firms.	
There should be arrangements for the payment of prompt and adequate compensation to consumers of firms which default and that compensation to be funded by the industry.	If the UK leaves the single market press for restoration to its previous level the compensation available for deposits. If the UK remains in the single market press for a review of the investor compensation arrangements and the introduction of an insurance guarantee scheme.

2.The Brief

2.1. This report was commissioned by the Financial Services Consumer Panel ("the Panel"). The Panel was set up under the Financial Services and Markets Act 2000 and it is independent of the Financial Conduct Authority (FCA).

2.2. The decision to withdraw from the European Union could have major consequences for financial services regulation. At present much of the UK's regulation derives from EU Directives and there are a number of new EU measures which will be implemented over the course of the next two years. Against this background the Panel considers that it is time to take stock of what consumers have gained or lost from EU financial services legislation and what it is the Panel would like to see retailed or changed once the UK has left the EU. As a contribution to this assessment the Panel decided to commission a "think piece" providing an overview of the impact of EU membership on UK consumers of financial services.

2.3. The Panel said the think piece should address the following key questions:

. *What are the main benefits that EU membership has brought for UK consumers of financial services?*
. *What have been the main downsides of EU membership for UK consumers of financial services?*

The think-piece should come from a consumer protection and consumer policy perspective and look at the overall impact on UK consumers of membership with reference to key EU legislation. The Panel does not want a detailed examination of every piece of legislation or a purely legalistic view".

3. Methodology and coverage

3.1. This "think piece" is founded mainly on desk-based research among published sources. The views of a few stakeholders were also obtained as background.

3.2. There are some preliminary comments on the nature of the relationship the UK might have with the EU in the future, the possible limitations to changes in regulation should the UK have a free hand over its rules, and some brief context about the development of UK and EU regulation.

3.3. An important issue is the extent to which consumer representatives have been able to influence EU measures in the past and what the consequences of Brexit mean for consumer representation in the future.

3.4. Turning to the regulatory requirements themselves, the main emphasis in the research is on conduct of business requirements and on those requirements touching on complaints handling and compensation as these requirements are the ones which impinge most directly on UK consumers. The report is not confined to financial services measures as there are some other cross-cutting, consumer protection measures, such as those governing data protection which also assume importance in the financial services context.

3.5. Historically the main emphasis of the EU has been on legislative measures. Rules do not protect consumers unless they are adequately supervised and enforced. Since the financial crisis European Supervisory Agencies have been established and there has been more focus on supervisory approaches. So there is also some brief coverage of supervision.

3.6. Finally, the EU is meant to be about a single market so there is a discussion of the extent to which such a single market currently exists for UK consumers of financial services and the prospects for that market developing in the future.

3.7. Three exclusions to note. The report does not attempt to deal with any added complications posed by the position of Scotland and Northern Ireland. Although the outcome of the Brexit negotiations is clearly of major importance to consumers in both countries the possible permutations of outcome are too many to attempt to address in this report. Secondly, prudential regulation is not covered. Prudential regulation is of importance to consumers because it seeks to ensure the financial soundness of firms so they do not fail.(It can have other linkages with the outcome for consumers. For example, as the BBA pointed out, improved counterparty appetite based on recalibrated capital requirements facilitates the wider distribution of financial instruments and in turn may result in more fixed rate mortgages being made available to consumers.) However, prudential regulation does not feature in the day-to-day dealings which consumers have with financial service firms and for that reason is excluded. Thirdly, there may be issues around the financial stability and resilience of the UK depending on which Brexit option is adopted. For example, the Financial Inclusion Centre pointed out that if the UK needs to chase business from other parts of the global financial system the integrity of such capital may be questionable. This may not create new conduct risks but could threaten the resilience of the UK financial system.

3.8. A word on terminology. The single market for financial services consists not only of the European Economic Area(EEA) countries (they being the countries of the European Union plus Iceland, Liechtenstein and Norway) but also Switzerland(which is neither an EU nor EEA country). For convenience the term "EU" is used in most of this report.

4. Which Brexit model?

4.1. At this stage it is not clear which model the UK Government will seek in its future relations with the EU after Brexit. Nor is it known what the EU will be prepared to offer to the UK. At one extreme the UK could retain access to the single market in financial services and that would almost certainly mean the UK would have to continue to abide by relevant EU Directives and Regulations. Continued access to the single market seems desirable given its importance to financial services businesses (rather than to consumers).

4.2. A political problem with some approaches to retaining access to the single market is that they could also entail the UK having to accept the free movement of labour and the continuation of contributions to the EU budget. These were key factors for "Leave" voters in the Referendum and so may present an insuperable obstacle to some Brexit options. It is therefore possible that, due to these factors, the UK could adopt an approach under which, in theory, the UK would be free to scrap, modify, or keep EU measures already enshrined in UK law or which are directly applicable to the UK through EU Regulations.

4.3 At the moment there are a number of significant items of EU retail financial services regulation which have just come into force or which are due to be implemented not very long before the UK could leave the EU. At present the plan is that the UK should continue with implementation of these measures. The problem could be if, in a post-Brexit UK, it is decided that the UK would have done things differently from the EU (or not at all). If at that time the EU measures have already been implemented it is bound to impose a "planning blight" for many years as the financial services industry would reasonably argue that it should not be put to the cost of modification or removal of measures it had only just implemented. The Panel therefore believes that it is timely to question whether or not the EU measures currently in force or in the process of implementation deliver the consumer protections the Panel would wish to see post-Brexit.

5. Limitations to reform

5.1. During the Referendum a call from the Leave campaign was for the UK to *"take back control"* so that the UK would no longer have much of its legislation determined in Brussels. As indicated above, it cannot be ruled out that the UK will seek some solution for Brexit which gives the UK control over its own financial services legislation. What if this happens? Is it probable that the UK would then make changes to consumer protection rules after Brexit?

5.2. There are four factors which suggest that there may not be too much change from current UK rules.

5.2.1. The first factor is that the UK belongs to international organisations which set high-level standards for various aspects of financial services regulation. These include the G20, IOSCO etc. No matter what the form of the UK's exit from the EU it is inconceivable that the UK would also abandon membership of these organisations and their standards.

5.2.2. The second factor is that the UK has sometimes been an instigator or key influencer of new EU regulatory measures so Brexit is not likely to lead to the UK resiling on measures which it has had a hand in instigating unless, that is, there is a significant shift in the UK Government's approach to financial services regulation.

5.2.3. The third factor is that the UK has historically had a strong emphasis on conduct of business regulation. It is difficult to see Brexit, of itself, changing this. The Financial Services Act 1986 and the White Paper preceding it were principally concerned with conduct of business regulation. So, the UK has had over 30 years of being in the forefront of this aspect of regulation.

5.2.4. The fourth factor is that the UK may still have to accept EU measures, or have ones of its own which are equivalent to those of the EU, if the UK should go down the route of having bilateral agreements with the EU for any particular financial services sector.

5.2.6. Against these four factors there is a potential countervailing risk which is that the UK and the EU (urged on by those Member States with significant financial centres) could engage in significant competitive de-regulation in order to attract business post-Brexit. This risk might be regarded as unlikely in the near future given the financial crisis and the widespread view that regulation of financial services needed to be tightened across the board. Moreover, such competitive deregulation seems more likely, if it happens, to be focussed on wholesale business. Others, however, disagree. The New Economics Foundation said before the Referendum:

"As Britain goes to the polls to vote in a historic referendum on EU membership, the Vote Leave campaign's slogan has been 'Take Back Control'. But behind the scenes, the spectre of Brexit has actually seen us hand control from our democratically elected representatives in Brussels to corporate lobbyists. A report released last week by the Corporate Europe Observatory revealed how the threat of Brexit has already been used to secure a string of concessions to big City firms. From watering down proposals to break-up mega banks, to a review of whether new rules put in place since the financial crisis in 2008 are unduly 'burdensome'. If Britain votes to leave, this deregulatory agenda will be pushed forward."[1]

The Financial Inclusion Centre shares the concerns of NEF:

"We note with growing concern the regular scaremongering about regulatory 'burdens' and 'red tape' stifling innovation and competitiveness. In our experience, this is code for attempts to deregulate and reduce important consumer protection and other social protection measures. This, of course, would suit big business and the UK financial sector in the short term. But, it is a misguided approach and could increase the risk of consumers being ripped off and being exposed to risky products and services. Ultimately, this would harm consumer confidence and trust in the single market and actually hurt industry in the long term."[2]

6. The changing approach in EU regulation.

6.1. The UK joined the European Economic Community in 1973. At that stage there was very little EU regulation of financial services compared with what exists now. For many years EU regulation tended to be oriented towards a particular product (for example, the UCITS Directive covering collective investment schemes) or was more concerned with prudential and passporting matters (the Third Life Directive). In contrast, the UK enacted the Financial Services Act 1986 which in very broad terms led to the creation of a number of regulatory bodies (for example, the Securities and Investments Board, the Life Assurance and Unit Trust

[1] http://neweconomics.org/blog/entry/take-back-control-the-untold-story-of-the-eu-referendum.
[2] http://inclusioncentre.co.uk/wordpress29/blog/what-has-the-eu-ever-done-for-us-the-eu-referendum-and-uk-consumers

Regulatory Authority, the Financial Intermediaries and Managers Regulatory Authority) whose principal concern was with conduct of business regulation. Prudential regulation at that time remained the preserve principally of the Department of Trade and Industry, the Bank of England and the Building Societies Commission.

6.2. In 1999, however, the initiative passed to the EU. In that year the Financial Services Action Plan (FSAP) was adopted. The Plan was designed to open up a single market for financial services and comprised measures designed to harmonise rules on securities, banking, insurance, mortgages, pensions and other forms of financial transactions. Commenting on the FSAP, the House of Lords European Union Committee has said:

"While the 1999–2005 Financial Services Action Plan reforms had ensured that detailed harmonised rules governed much of the EU financial system, there remained: a number of non-regulated sectors; silo-based divergences in how rules applied to functionally-similar participants, services, and products; minimum standards which caused implementation difficulties; and dangers of divergence at national level with consequent regulatory and supervisory risks."[3]

In spite of this criticism the fact is that the EU had put forward an overarching plan for regulation of the financial services sector at a time when regulation of the retail financial services sector in the UK was fragmented or not subject to statutory regulation at all.

6.3. In December 2005 the Commission introduced its " Financial Services Policy 2005–2010" policy paper on financial services which explored the best ways to consolidate progress on the FSAP and deliver further benefits of financial integration to industry and consumers alike. Commenting on the paper the Internal Market Commissioner said:

"European financial integration has really moved forward in the last five years. The challenge now is to consolidate progress and work together on applying the better regulatory disciplines... It means creating real, tangible benefits for the citizens and businesses of Europe through lower capital costs, better pensions, and cheaper, safer retail financial products... Only in a few, targeted areas are new initiatives foreseen."[4]

The Commission also said of the paper:

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[3] *"The post-crisis EU financial regulatory framework: do the pieces fit?"*, House of Lords, European Union Committee, 2 February 2015.
[4] http://europa.eu/rapid/press-release_IP-05-1529_en.htm

"Furthermore, while the FSAP focused mainly on the wholesale market, retail integration will become more important over the next period. Barriers associated with the use of bank accounts will be examined, with a view to enabling consumers to shop around all over Europe for the best savings plans, mortgages, insurance and pensions, with clear information so that products can be compared"[5]

6.4. As evidence of this change in focus the EU produced in 2007 its first Green Paper on how to make a reality of the single market in retail financial services.

6.5. Although the 2005 Policy Statement from the EU envisaged only a few new initiatives going forward that undertaking was soon made a nonsense by the post-2008 financial crisis. The House of Lords European Union Committee said of this crisis that it:

"was the most severe in living memory, and its effect is still being felt today. The ramifications for the EU have been particularly acute. Its response, encapsulated in a set of some 40 legislative proposals, has brought about a radical transformation in the EU financial sector regulatory framework."[6]

6.6. A general question, though is whether this raft of new measures show more of a consumer protection focus than in the past. Opinions on this differ. Europe Economics argue:

" that prior to the Eurozone crisis, the general thrust of EU financial services measures reflected the UK's traditions of liberalisation, competition and the encouragement of trade. This was particularly so in the ways EU-level financial regulation affected other Member States much more than it affected the UK, because EU rules mirrored pre-existing UK rules." [7]

In other words competitive market forces could be relied on to deliver adequate consumer protection. In contrast the Financial Inclusion Centre views matters differently:

"Other major EU member states seem to attach more importance to the principles of social justice, the rights of citizens and the belief that markets should serve society – in contrast to the dominant ideology in the UK which puts the market first. "[8]

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[5] http://europa.eu/rapid/press-release_IP-05-1529_en.htm

[6] *"The post-crisis EU financial regulatory framework: do the pieces fit?"*, House of Lords, European Union Committee, 2 February 2015.

[7] *"EU Financial Regulation: A Report for Business for Britain"*, June 2014.

[8] http://inclusioncentre.co.uk/wordpress29/blog/what-has-the-eu-ever-done-for-us-the-eu-referendum-and-uk-consumers

6.7. Since 2008 some detect a change in the EU's approach. Europe Economics again:

"Both in the UK and in the rest of the EU, there has been a significant change in the spirit and thrust of regulation since 2008. But whereas in the UK the change has been towards increasing quality of supervision and strengthening market incentives, at EU level the focus has been much more upon extending scope of regulation, curbing specific behaviours, and protecting the integrity of the Euro zone."[9]

6.8. The European Parliament in its report "Consumer protection in financial services" has said:

"the financial crisis clearly showed that consumer protection in some financial markets was highly deficient in the run-up to financial crisis of 2007/2008. There is now a general consensus among policy-makers that stronger consumer protection, together with better financial education, is an essential pillar of well-functioning financial markets. Financial education, while important, alone is insufficient to protect consumers and empower them. The overarching recommendation of the present study is that consumer protection in the area of financial services should be strengthened and consumers' financial capabilities should be raised. Considering the significant potential detriment that financial services can cause to individual consumers and to the Single Market, consumer protection policy needs to properly focus on these services."[10]

6.9. Most recently there have been a number of developments which I think illustrate that the EU, like the UK, sometimes exhibits a contradictory approach between the needs of business and the protection of consumers. On the one hand we have had from the Commission its proposal for a "Capital Markets Union" which has attracted criticism from both BEUC and the Panel for its failure to put consumer protection at its core. BEUC said:

" we heartily welcomed ... statements about turning the telescope round and looking at retail financial services from the point of view of the consumer. We were enthusiastic about ... bringing financial services back to the people they serve. However, we are concerned that in the flagship project ... , the Capital Markets Union, these objectives have thus far not been addressed. The explicit

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[9] *"EU Financial Regulation: A Report for Business for Britain",* June 2014.

[10] *"Consumer Protection Aspects of Financial Services",* European Parliament, 2014.

ambition to tap into people's saving pools and boost retail investment is not matched by an equivalent focus on raising the bar for investor protection".[11]

The Panel said of the CMU that it:

" accepts that many of the measures being contemplated could indeed unlock investment to boost Europe's economy. However, we are concerned that no evident attempt has been made at balancing the need to raise capital for businesses in the EU with the need for an adequate level of consumer protection for retail investors, where appropriate. In particular, it is important that any reforms proposed by the Commission as part of the CMU are based on and informed by thorough consumer research".[12]

6.10. The Commission has also launched a Better Regulation agenda which carries a risk of consumer protections being diluted. A Better Regulation Watchdog (a group of European consumer organisations) was formed in 2015 and it commented:

"We are united in our concern that the European Commission's 'Better Regulation' agenda does not further public interest, but rather aims to weaken or neglect essential regulations protecting workers, consumers ....The focus of EU decision making should be on improving regulation, not deregulation".[13]

6.11. On the other hand two documents have emerged from the EU which might, depending on one's viewpoint, be regarded as having more of a consumer focus:

. a second Green Paper on Retail Financial Services;

. a Joint Discussion Paper on Automated Financial Advice.

A more cynical view is that both these papers, like the CMU, are as much to do with trying to drum up more business for financial services firms than they are to do with consumers benefiting from a genuinely competitive market.

6.12. The signals coming out of the EU as to the tone of its future approach to financial services regulation are therefore ambiguous. In one respect at least it could be argued that the UK's membership of the EU has in the past been a positive for consumer protection. This because increasingly since 1999 the EU has adopted a planned and comprehensive approach to financial services legislation (thus seeking to tackle potential areas of consumer detriment before they arise). In contrast, the UK has occasionally "rearranged the deckchairs" of regulatory bodies

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[11] *"Bringing Financial Services Back To The People They Serve"*, BEUC, 2015.

[12] *"Financial Services Consumer Panel response to the Capital Markets Union Green Paper"*, 2015.

[13] http://www.betterregwatch.eu/

but has also tended to be reactive and waits for consumer detriment to occur before it considers a regulatory response.

6.13. One potential downside to EU regulation, again depending on one's viewpoint, is its increasing use of Regulations (which are directly applicable to Member States) and Directives which are "maximum harmonisation" (that is, they leave no discretion to Member States about how a Directive is implemented) as a means of legislating, although it is true that the examples so far are mainly with prudential rather than conduct of business regulation. A maximum harmonisation approach means that the UK cannot introduce additional or tighter rules where it believes it is in the interests of consumer protection to do so. One example here is the Unfair Commercial Practices Directive which was originally conceived as a maximum harmonisation Directive. In this case the UK was successful in seeking a change from the maximum harmonisation status of the Directive so that the UK could impose requirements which were more restrictive or prescriptive. On the other hand, Directives which are "minimum harmonisation" might be regarded as "lowest common denominator" measures as they may allow some countries to maintain standards which the UK might regard as too low.

6.14. A brief mention might also be made of the European Court which could be seen as a positive for consumer protection. In the financial services area the Court ruled in 2012 that insurers could no longer charge different premiums to men and women because of their gender.

7. Role of the Panel and other consumer bodies

7.1. One of the G20 high-level principles on financial consumer protection concerns its place in regulation and the role of consumer organisations:
"Financial consumer protection should be an integral part of the legal, regulatory and supervisory framework ... Relevant non-governmental stakeholders - including ...consumer organisations ... - should be consulted when policies related to consumer protection and education are developed. Access of relevant stakeholders and in particular consumer organisations to such processes should be facilitated and enhanced."[14]

7.2. A notable feature of the UK financial services regulatory regime is that consumers have had a long-standing voice within the regime but independent of the regulators. It was the Personal Investment Authority (a self-regulatory organisation under the 1986 Act) which first voluntarily established in1994 an independent PIA Consumer Panel. When there was regulatory reform in the UK in the late 1990s the PIA Panel was transformed in 1998 into the Financial Services

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[14] *"G20 High-Level Principles on Financial Consumer Protection",* OECD, October 2011.

Consumer Panel. It was then able to provide preparatory advice to the Financial Services Authority as it was being formed out of the previous regulatory bodies. Eventually when the Financial Services and Markets Act 2000 received Royal Assent the Panel was put on a statutory footing and so it has remained to this day.

7.3. The Panel explained in its 2015 report "Financial Services Consumer Panel Engagement with the EU" why and how it engages with the EU. In brief:

"UK financial services and consumer protection legislation has been greatly influenced by EU law, and will continue to do so. Even in the event of a British exit from the European Union, guaranteed access to the Single Market would likely require the UK to implement most if not all EU financial services and consumer legislation. Well-reasoned and timely interventions by the Panel therefore allow it to argue for changes that benefit consumers in the UK and EU-wide." [15]

7.4. The important role of the Panel is performed on a shoestring. In its last Annual Report the Panel reported that in the financial year 2015/2016 it had spent just £492K. A comparable figure for industry expenditure that year is not available but an investigation by the Bureau of Investigative Journalism, reported in the Guardian, suggested that in 2012 the UK financial services industry had spent at least £92 million on lobbying. The Panel itself has drawn attention to this discrepancy in resourcing in its 2015 report:

" Research carried out for the Panel in 2013 provided evidence of a significant imbalance between industry and consumer representation in Brussels. It concluded that the financial services industry had the equivalent of 700 full-time lobbyists engaging with the EU institutions, compared to 1 for consumer group representing users of financial services." [16]

7.5. The Panel is of course not alone in monitoring the EU and responding to consultations. As the Panel explained in its 2015 report:

"The European Commission and the ESAs operate stakeholder groups that are similar to the Panel, although with the exception of the Financial Services User Group (FSUG) they are composed of both industry and consumer representatives. These groups provide advice to their host organisations during the development of policy or regulation. They are typically less well-resourced than the FSCP. The

[15] *"Financial Services Consumer Panel Engagement with the EU"*, April 2015.
[16] *"Financial Services Consumer Panel Engagement with the EU"*, April 2015.

Panel is represented on a number of EU-level stakeholder groups in the area of financial services." [17]

Since the Panel's report it has become known that the FSUG will cease to function from October 2016 as the EU will stop its funding.

7.6. Another important body is BEUC (Bureau Européen des Unions de Consommateurs) which was established in 1962. BEUC acts as the umbrella group in Brussels for its member consumer bodies (the Panel being an affiliate member). Its main task is to represent them at European level and defend the interests of all Europe's consumers. It therefore covers the entire range of business sectors. However, one of BEUC's special areas of focus is financial services.

7.7. More recently two other bodies "Finance Watch" (established 2010) and "Better Finance" (established 2009) have appeared on the scene and it is possible that as specialist public interest bodies they may play an increasing role in influencing the EU on financial services matters.

7.8. Although the Panel will continue to engage with the EU (on the assumption that the UK will want to retain access to the single market in financial services and so will have to accept the EU regulation that goes with that) there is a risk of a diminution in the Panel's influence, along with that of the industry and UK Government, as a result of the financial crisis and Brexit. Europe Economics said:

"Since the financial crisis of 2008 and especially since the Eurozone crisis of 2010 onwards, the UK's influence on EU-level financial services regulation has declined markedly. In many parts of the EU the financial crisis and thus the Eurozone crisis are blamed upon "light touch" regulation failing to discipline the activities of "Anglo-Saxon" financiers in the US and UK. For many in the EU, the UK's pre-crisis influence upon financial regulation is seen as malign."[18]

The House of Lords European Union Committee also said, before the Referendum result was known:

"We believe and regret that the UK's influence over the EU financial services agenda continues to diminish. The UK Government and other UK authorities must take urgent steps to correct this, and to enhance the UK's engagement with our European partners."[19]

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[17] *"Financial Services Consumer Panel Engagement with the EU",* April 2015.

[18] *"EU Financial Regulation: A Report for Business for Britain",* June 2014.

[19] *"The post-crisis EU financial regulatory framework: do the pieces fit?",* House of Lords, European Union Committee, 2 February 2015.

7.9. In terms of meeting the first IOSCO principle the UK's membership of the EU may be counted as a "downside" for consumers. Consumer bodies remain inadequately resourced to deal with the output from the EU; they do not have a bespoke consumer presence within the regulatory structure (unlike the Panel within the FCA) but are simply another stakeholder; EU measures sometimes lack a consumer dimension (no consumer research or testing, no impact assessment on how consumers will be affected), and in some countries the regulatory body lacks any consumer protection remit.

8. The benefits and downsides of the EU for UK consumers - general comments.

8.1. A natural starting point for looking at the benefits and downsides for UK consumers of financial services was to see if anybody had attempted to quantify the benefits and costs from EU financial services regulation. No such study exists. Reports by CRA International and Europe Economics were examined but, as will be seen below, neither yielded robust and quantitative evidence on the effect of EU regulation on UK consumers of financial services.

8.2. The lack of quantitative evidence are confirmed by a House of Commons Research Briefing published in 2013:

"There is no definitive study of the economic impact of the UK's EU membership, or equivalently, the costs and benefits of withdrawal. Framing the aggregate impact in terms of a single number, or even irrefutably demonstrating that the net effects are positive or negative, is a formidably difficult exercise. This is partly because many of the costs and benefits are, in certain respects, subjective, diffuse or intangible; and partly because a host of assumptions must be made about the terms on which the UK would depart the EU, and how Government would fill the policy vacuum left in areas where the EU currently has competence. Any estimate of the effects of withdrawal will be highly sensitive to such assumptions, and can thus be embedded with varying degrees of optimism. This perhaps helps to explain why the wide range of estimates from the EU cost-benefit 'literature' can appear influenced by the prior convictions of those conducting the analysis."[20]

8.3. In consequence, what is said about the overall benefits or downsides of UK membership of the EU is qualitative in nature. It starts with some views on the merits or otherwise to UK consumers of EU financial services regulation and then considers some specific areas.

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[20] *"The economic impact of EU membership on the UK"*, House of Commons Library, 17 September 2013.

8.4.1. In the view of the Financial Inclusion Centre:

"UK citizens have gained much from a huge range of consumer and social protection measures introduced through, or influenced by, EU legislation and regulations. Consumer protection measures can be found across a wide range of markets including financial services. The measures were introduced to make products and markets safer, give us access to a wider choice of better value products and services, and enforceable rights and redress if things go wrong. It is only fair to point out that the UK may well have introduced consumer protection measures in these markets even if the UK wasn't a member of the EU. But, experience tells us that the degree of protection available to UK consumers is higher in key areas because of UK membership (of the EU). *Put bluntly, the EU has had a 'civilizing' effect on the UK."*[21]

8.4.2. Mick McAteer of the Financial Inclusion Centre has also pointed out that:

"the Europeans are more willing to apply social justice regulation as opposed to the consumer rights approach we have. They seem more open to the idea of mandating markets to provide services rather than the UK approach which is about letting the market decide and regulating the interaction between provider and consumer. (As examples of the EU approach) *the Payment Accounts Directive which gives consumers a legal right of access to a basic bank account. Or the gender ruling on insurance."*[22]

8.5. CRA International carried out in 2009 an evaluation of the economic impacts of the FSAP for the European Commission. The study is therefore out of date. The study looked at three sectors and its assessment of the impacts relate to consumers in all Member States of the EU, not just the UK. In banking it found a positive impact through a reduction in the cost of cross-border payments and a higher number of lending institutions signed up to the Code of Conduct on pre-contractual information for home loans. In insurance it found more professional intermediaries and an increase in the quality of advice. There were some positive impacts in securities but most appear to have been in the wholesale area, although improved availability of comparable information on listed companies and a reduction in trading costs may have been of benefit to consumers.

8.6. Europe Economics carried out a study in 2014 for the Department of Business, Innovation and Skills ("Measuring the Benefits to UK Consumers from the Creation of the European Single Market: Feasibility Study and Test Case") of the benefits of

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[21] http://inclusioncentre.co.uk/wordpress29/blog/what-has-the-eu-ever-done-for-us-the-eu-referendum-and-uk-consumers

[22] Email exchange September 2016.

the EU to consumers. This was only a feasibility study and the only test case to be used in the financial services area, on home insurance, came up with inconclusive results.

8.7. The Financial Services User Group (FSUG) produced a paper "Retail Financial Market Integration" in 2015 which provides some valuable data on the continuing variations between different Community countries which raises questions about how effective various Directives have been so far in delivering better value products to consumers across the Community. It found that on a typical mortgage loan interest rates could vary from 1.7% in one Member State to 6.2% in another for the same loan amount and loan period. Interest rates on a typical consumer credit loan were found to vary from 13.49% in one country to 43% in another. In the area of retails funds, the FSUG found 32,350 collective investment schemes in the EU for which consumers were paying an average management charge of 175 bps, this compares with only 7,886 mutual funds in the USA where consumers are charged a very much lower 74 bps per fund.

8.8. At a general level, therefore, membership of the EU does not appear to have been a startling success for UK consumers of financial services. However, as is evident from the previous paragraphs the evidence one way or the other is very scant.

9. The benefits and downsides of EU regulation for UK consumers - getting specific.

Moving on from the general to the particular, there are various ways in which one might look at the benefits and downsides to UK consumers of EU regulation of financial services. The approach below looks at what consumers' expectations might reasonably be as they journey through financial services and assesses whether the EU's regulatory measures satisfy or detract from those expectations.

10. Is it safe for me to deal with a firm?

10.1.This question may be looked at from two aspects. Is a financial services firm considered fit and proper to be authorised to do business? And once the firm is carrying on business is there sufficient oversight of it by the regulators?

10.2. The starting point for the single market in financial services is that a firm can be authorised to do business in one EEA State and by virtue of that authorisation it can "passport" and do business in other EEA States. The activities that are 'passportable' are set out in the relevant EU single market directives. A common feature of the single market directives is that financial services firms must be regulated and quite often there are requirements as to the competence of firms or individuals, as is the case, for example, with the Consumer Credit, Mortgage Credit and Insurance Distribution Directives. (For example, in the last named, insurance intermediaries are required to be qualified and registered and, as a minimum, they have to demonstrate knowledge of the terms and conditions of the insurance policy they sell, the applicable law, knowledge of the insurance market, minimum financial knowledge and complaints and claims handling).

10.3. The financial services firm which is passporting can either set up a branch in other EEA States to carry on business or it can conduct its business from its home state by providing "services" into other EEA States, so that in the latter case the firm does not require a physical presence. In addition to seeking authorisation from its home state a financial services firm continues to be supervised as to its compliance with conduct of business rules by the regulator in its home state if it is providing "services" in other EEA States. If it establishes a branch in another EEA State, however, that branch is subject to supervision by the host state in which it is situated as respects the firm's compliance with conduct of business rules.
A firm wishing to carry on business in the UK using the passport in one of the Directives has to notify the appropriate UK regulator (the PRA or the FCA). Although the UK regulator will seek information and assess a firm passporting into the UK there is no right of veto to the firm doing business with consumers in the UK . As the PRA puts it:

"In some cases, the PRA may judge that an EEA firm notifying the PRA of its intention to passport into the United Kingdom poses risks to its objectives, but does meet the requirements set out by the relevant EU Directives, and therefore has the right to conduct business in the United Kingdom. In such cases, the PRA will carefully consider the tools available to it as a host regulator, acting in cooperation with the home regulator, to mitigate the resulting risks."[23]

A blunt paraphrase of this might be "we don't have a choice but to let the firm in, we can only look to see how we can limit any damage the firm may do to UK consumers".

10.4. Passporting is clearly an advantage to firms and potentially it could be an advantage to consumers if they are thereby able to access better products from a country other than the one in which they live. Passporting is founded on the assumption, however, that there is an acceptable standard of authorisation and supervision in each EEA State. The question is whether or not UK consumers can place reliance on a foreign firm being authorised and supervised to the same

[23] http://www.bankofengland.co.uk/pra/Pages/authorisations/passporting/default.aspx

standard as a UK firm? And is there any entity which actually checks on whether national regulators are adopting an acceptable approach to supervision?

10.5.. As to the approach to authorisation, the Panel has expressed concerns that the stringency of the authorisation process varies leading to the risk that less scrupulous firms seek authorisation in a country where the process is less strict and then use it to passport into other countries where they would not have obtained authorisation. The Panel has suggested that a wholesale review of passporting is needed to determine the extent to which firms are using passporting to circumvent proper scrutiny before being authorised. Recently ESMA has produced Technical Guidance on authorisation which may ensure greater consistency in approach in this area in the future.

10.6.1. There are widespread concerns about variations in the approach to supervision by different countries. In its response to the EU Green Paper on Retail Financial Services the FCA said:

"Inconsistent application and enforcement of standards persists across the EU, with detrimental effects on firm and consumer confidence. Ongoing work within the European Supervisory Authorities (ESAs) to achieve convergence of supervisory outcomes should help to tackle this uncertainty". [24]

Similarly BEUC has said:

"While many investor protection rules have been established, there is a blatant lack of enforcement of these rules. Many member states lack institutions that have sufficient consumer protection mandates that could e.g. ban unsuitable products from the market".[25]

10.6.2. The Panel has commented, in its response to the Green Paper on the CMU:

"Consistency across Member States is crucial. It is clear that many investors are nervous about investing in other markets because of the concern that regulation and protection may not be as robust as in their home state".[26]

10.6.3. Gerard Caprio, in his report "Financial Regulation After the Crisis", although having a principal focus on prudential regulation, also had some pithy comments on supervision:

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[24] *"The Financial Conduct Authority's Response to the European Commission's call for Evidence on the EU Regulatory Framework for Financial Services",* February 2016.
[25] *"Bringing Financial Services Back to The People They Serve",* BEUC, 2015.
[26] *Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.

"Rules without enforcement are tantamount to no rules at all ...The general phenomenon that characterized crisis countries was the failure by the regulatory authorities to enforce the powers that they had, notwithstanding the ludicrous risk taking that was occurring".[27]

10.6.4. Important evidence of supervisory failings emerged earlier this year when ESMA published its "MiFID Suitability Requirements Peer Review Report". The issue of suitability requirements is central to whether or not consumers receive good investment advice. In its report ESMA found only limited work by some national supervisors in some areas and also a marked reluctance by some to take enforcement action.

10.7. One of the downsides for UK consumers therefore is that to the extent that they do deal with financial firms in other EEA countries they cannot rely on either the system of authorisation or supervision operated in those countries being as robust as it might be. In particular, the Panel has recommended that all Member States' financial services regulators should have a consumer protection objective.

10.8.1. As a result of the financial crisis the EU carried out a review of the European system of regulation and supervision. Among the measures it took to strengthen supervision was the establishment of three European Supervisory Authorities (ESAs): the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA). These three bodies started work in 2011 so their track record is limited. In time they may have an effect on supervisory convergence among different countries. At present, however, and notwithstanding some good work, there are some consumer concerns about the ESAs. BEUC has said:

"European Supervisory Authorities should be strengthened so that they can fulfil their mandates, particularly in the light of consumer protection. Interaction with consumer representatives should be streamlined, e.g. when working on Level 2 legislation".[28]

10.8.2. Similarly in its response to the CMU Green paper the Panel has said:

"We are also concerned that the ESA's work on consumer protection is being jeopardised by the reductions to their respective budgets in 2015, for ESMA in particular. Despite its increased responsibilities under MiFID 2 and the PRIIPs

[27] *"Financial Regulation After the Crisis: How did We Get Here, and How Do We Get Out?"*, LSE Financial Markets Group Special Paper 26, November 2013.
[28] *"Bringing Financial Services Back to The People They Serve"*, BEUC, 2015.

Regulation, its resources have been cut significantly compared to the previous year. Internal resources at the ESA appear to be overwhelmingly devoted to prudential supervision; indeed, EIOPA has explicitly stated that the cuts to its budget lead directly to the "de-prioritisation" of certain work streams, including consumer protection. It is difficult to see how the ESAs could effectively meet their consumer protection objectives under such circumstances. The Panel is especially concerned that ESMA will not be equipped to provide the necessary supervision if future measures to encourage uptake of UCITS and ELTIFs by retail investors are implemented."[29]

10.9. The concern about the ESAs being able to deliver on their consumer protection objectives also extends to questions about the regulatory structure of the ESAs. The Panel again, in its CMU response:

"The current supervisory structure separates regulation by sector and obliges each regulator to monitor both the prudential and conduct aspects of the sectors it regulates. In practice, we are concerned that this may lead to neglect of conduct supervision because prudential considerations either take precedence or are seen as sufficient to protect consumers through overall market stability. The European Commission has announced that it will review the possibility of adopting the UK's 'twin peak' approach by splitting the ESAs into separate authorities responsible for conduct and prudential regulation. We would encourage it to give further consideration to the potential merits of this approach, although we recognise this type of structural reform is a long-term option only. A dedicated conduct regulator appears to be making a difference to consumer protection in the UK, although the tensions with prudential regulation remain".[30]

10.10. The House of Lords European Union Committee has commented on the ESAs:

"One of the key planks of the new framework was the establishment of the new European Supervisory Agencies (ESAs). These bodies have endured a baptism of fire since their inception in 2011 and have been responsible for much good work. Yet they are hampered by several fundamental weaknesses, including a lack of authority, insufficient independence, marginal influence over the shape of primary legislation, insufficient flexibility in the correction of legislative errors, and inadequate funding and resources". [31]

10.11. So, another possible downside to UK consumers is that supervision at the EU level is split among three ESA regulators which not only are sectoral in nature (with the attendant risk that there will not be a joined up approach to consumer

[29] *Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.
[30] "*Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.
[31] *"The post-crisis EU financial regulatory framework: do the pieces fit?",* House of Lords, European Union Committee, 2 February 2015.

protection issues) but also combine both prudential and conduct of business regulation so there is a risk they may not give sufficient attention to consumer protection matters. The first of these risks may be addressed through the Joint Committee of the ESAs but even then there is a problem that it has to operate within the framework of Directives developed by the Commission, and the Commission sometimes adopts a silo approach to policy formulation.

11. Will a firm recognise my inexperience in financial matters and treat me accordingly?

11.1. A feature of financial services regulation is that it requires firms to put their clients into different categories and different regulatory protections then attach to those categories. As an example, the Financial Services Authority had conduct of business rules governing investment business. There were three categories of client under those rules intended to reflect their knowledge, expertise and experience:

. Private customers were less sophisticated investors who were accordingly afforded the greatest degree of regulatory protection.

. Intermediate customers were more experienced investors who it was reckoned would generally either have appropriate expertise in-house or would have the means to pay for professional advice when needed.

. Market counterparties were experienced in financial products and markets such that they were subject to a 'light-touch' regime without the application of regulatory protections.

11.2. Directives such as MiFID also introduced a system of client classification similar to that of the UK, as follows:

. Retail clients are afforded the most regulatory protection.

. Professional clients are considered to be more experienced, knowledgeable and sophisticated and able to assess their own risk and are afforded fewer regulatory protections.

. Eligible Counterparties ('ECP') are businesses like investment firms and get least protection.

11.3. In addition, MiFID introduced new quantitative thresholds for 'large undertakings' and a quantitative test for retail clients requesting treatment as a professional client. As these thresholds were higher than those in the existing UK rules the FSA expected there to be more clients categorised as retail under MiFID than as private customers under the existing UK rules. So, it could be argued that a benefit of the EU is that in some respects it has extended "private customer" protections to a greater number of clients than had previously been the case in the UK.

11.4. However, investment business is the exception out of the range of financial services. In 2015 the FCA published a discussion paper[32] on its treatment of SMEs which included a comparative table of how different sizes of small firm were treated for five different business sectors (deposits, insurance, credit, mortgages and investment) and also as respects three different areas (dispute resolution, compensation and cancellation and distance marketing). This showed clearly that there were some sectors, such as credit and mortgages, where many smaller firms do not have protections available to individual consumers and other areas, such as compensation, where protections apply but are substantially different to those available to individual consumers. The Panel has called for these disparities to be addressed:

"The Panel will also argue for consumer protection legislation to be extended to cover smaller businesses as consumers of financial services. Micro businesses in particular often have the same low levels of financial sophistication as do retail consumers, but do not enjoy the same protection or access to redress. In many instances, the smallest SMEs are effectively retail consumers of financial services, for example using a personal current account for business purposes. The regulatory system treats SMEs as 'sophisticated' consumers, which generally means that fewer consumer protections apply (although this varies by product). The Panel believes that the current definition is unsatisfactory as it automatically classifies smaller businesses as 'sophisticated' even when they act like retail consumers, and have similar low levels of financial capability".[33]

11.5. In the investment business area MiFID may be counted a small positive to come out of the EU as it extended private customer protections to a greater number (including small businesses) than before but that same system of client classification does not apply across all sectors so, as noted, in the case of small businesses protections may vary or not exist.

12. Will I have access to financial products (and services) which meet my needs?

Proliferation of products.

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[32] *"Our approach to SMEs as users of financial services"*, FCA, November 2015.
[33] *"Annual Report 2014/2015"*, Financial Services Consumer Panel, 2015.

12.1. It sounds odd to pose the question as to whether consumers have access to the products they need when even within the UK there is a vast number of financial products available to consumers. In a research report (*"Safer Products"*[34]) for the Panel it was noted that collective investment schemes and their sub-funds numbered over 7,000 in the UK, that there were over 4,500 unit-linked funds, and that was just looking at two product areas. As noted earlier, the FSUG painted a similar picture in the rest of the EU with, for example, nearly 33,000 UCITS funds available in the EU (and the number would presumably have been higher had sub-funds been counted). However, product development is in the hands of firms and there are sometimes types of consumer whose needs are overlooked when it comes to product development because they simply do not feature in the target markets for products. More broadly, firms often seek to differentiate their products from those of other firms in ways that do not necessarily add value to consumers but are simply a marketing ploy.

Banking

12.2. One example where the EU has made progress in ensuring that there are not pockets of unmet consumer needs is the introduction of the Payment Accounts Directive which was adopted in 2014 and the UK measures to implement the Directive come into force in September 2016. Among other things the Directive ensures access to basic bank accounts so that all consumers legally resident in the EU have access to basic banking services, whatever their financial situation, to reduce financial and social exclusion. The Panel said of the PAD:

"We are pleased that implementation of the Directive will give consumers a clear legal right of access to a basic bank account, and a route to challenge firms' decisions before a court of they do not grant access."[35]

As the Directive has only just come into force it is too early to judge how much of a benefit to UK consumers it may be considered.

Simple products.

12.3. Both the Panel and BEUC believe that the EU could go further in the area of product simplification. BEUC has pointed to the problem of product proliferation and the reliance on disclosure to solve the problem of choice for consumers. It said:

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[34] *"Safer Products"*, Research report by David Severn for the Financial Services Consumer Panel, September 2010.

[35] *"Implementation of the EU payment accounts directive"*, Financial Services Consumer Panel, July 2015.

"Pursuing investor protection solely by imposing disclosure and selling rules has proven insufficient in delivering good market outcomes. Mis-selling practices and overly costly products continue to erode investors' trust. Fixing the retail investment market will require more regulatory action, including product intervention".[36]

12.4. BEUC would like to see the EU promote the development and distribution of simple and standardised investment products:

"Easy access to simple retail investment products would spark real competition and bring prices and charges down for retail investors. Particularly in the personal pensions market, outcomes for consumers urgently need to be improved. Boosting retail participation in UCITS has to go hand in hand with a reduction in the sale of Alternative Investment Funds (AIFs), which have much lower investor protection standards, to retail investors."[37]

12.5. The Panel, in its response to the CMU Green Paper has also urged the concept of simple products and has suggested the Commission look at previous UK initiatives in this area:

"We u*rge the Commission to draw on the outcome of these UK reviews and the resulting initiatives when formulating a pan-European approach to simple investment products. In principle, the Panel supports the extension of the UK's simple products initiative to cover retail investment products, and we would welcome a coordinated European approach to investigate the characteristics and limitations of simple products across all financial services. However, it is clear from the UK experience that it is difficult to persuade firms to develop simpler products, even though the success of any simple product initiative relies entirely on the willingness of the industry to participate in the process. The Panel has concerns that parts of the asset management industry are keen to maintain complex and opaque products, as these are often more profitable."* [38]

12.6. A further issue with simple products is that the industry (at least in the UK) usually wants a price to be paid for introducing simple products by being granted a simpler advice process to sell them, but both the Panel and BEUC have pointed out that consumers needs and preferences cannot be ignored even with simple products:

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[36] *"Bringing Financial Services Back to The People They Serve",* BEUC, 2015.

[37] *"Bringing Financial Services Back to The People They Serve",* BEUC, 2015.

[38] "*Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.

"Retail investment cannot by any means be regarded as a substitute for household savings held in bank accounts. Both cater for completely different consumer needs".[39]

"investors rightly see UCITS in a different light to savings accounts. UCITS carry more risk of losing capital, are opaque in their charging structure and are suitable only for longer-term investing".[40]

Insurance and credit.

12.7. There are other factors that indirectly could lead to consumers not getting the products they need. The Panel has pointed to the use of "Big Data" gathered online potentially causing detriment in general insurance:

"The use of personal data, including that harvested online, will potentially lead to a demutualisation of risk in insurance and credit markets. This may result in better prices for some people, but also risks excluding others, and opens up the possibility of discriminating against groups of consumers".[41]

The Joint Committee of the ESAs has taken this point up at a general level and as part of its work programme for 2016 it will be examining the uses of Big Data by the financial services sectors.

Collective investments.

12.8. One EU Directive which stands out from others, because it deals with the regulation of a particular product in considerable detail, is the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive. It is convenient to deal with Directive here because it relates to product regulation and therefore links with BEUC's comment quoted above suggesting more product intervention is needed. UCITS is one of the oldest Directives the original version having been introduced in 1985. There have been a number of modification to the Directive over the years such that the latest version is UCITS V.

12.9. UCITS are regulated investment funds that can be sold to the general public throughout the EU, so it is important for them to have common standards of investor protection. The original UCITS Directive set out the main characteristics of funds :

[39] *"Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.

[40] *"Green Paper Building a Capital Markets Union",* BEUC, May 2015.

[41] *"Call for Inputs: Big Date in retail general insurance",* January 2016.

. they can only invest in eligible assets – the original Directive was restrictive in scope and effectively allowed only equity and fixed income assets.

. they must operate on a principle of risk spreading – restrictions exist to limit the spread of investments, leverage and exposure.

. they must be open-ended, i.e. units in the fund may be redeemed on demand by investors. UCITS must also be liquid, i.e. its underlying investments must be liquid enough to support redemptions in the fund on at least a fortnightly basis.

. their assets must be entrusted to an independent custodian or depositary and held in a segregated account on behalf of the investor.

12.10. The original Directive has undergone a number of changes such as expanding the type and range of financial instruments in which a UCITS fund can invest, tightening up risk management frameworks, and increasing managers' capitalisation. In 2009 UCITS IV was adopted which encouraged increased transparency by introducing the concept of Key Investor Information (KII) documents (dealt with below).The latest amendment, UCITS V, implemented into UK law in March 2016 aims to increase the level of protection already offered to investors by enhancing the rules on the responsibilities of depositaries and by introducing remuneration policy requirements for UCITS fund managers.

12.11. Although the UCITS Directive provides product safeguards (dealing with such matters as diversification and pricing) this still leaves many features of the funds which have attracted consumer criticism. Earlier, mention was made of the FSUG study which showed that consumers were paying substantially more for such funds than are US investors in equivalent funds. Later we will see that the Panel has expressed strong reservations about the governance of funds and also concern about a significant lack of transparency in costs. Linking this back to BEUC's comments, it seems that it might be necessary for regulators to go even further with product intervention than is the case with UCITS in order to deliver the simple retail products the Panel and BEUC have in mind.

Bespoke EU products.

12.12. A concept which has been floated by the EU is that of "*29th regime*" or "*opt in*" products. In essence, the EU would be side-stepping the need to achieve harmonisation to encourage the greater cross-border take-up of products by offering a standardised alternative product for consumers across the EU and an accompanying regulatory regime. One example is the idea of a pan-European

Personal Pension. There are considerable obstacles to the introduction of such a regime such as the fact that financial products are often closely meshed with tax incentives at national level, as is the case with pensions, or other local variations, such as the securing and registering of charges for mortgages.

Payment services.

12.13.1. Turning to services, the Payment Services Directive (PSD) was implemented in 2009 and it harmonised the way payments are made across Europe, making them easier, faster and more transparent for the customer. The PSD covers payments made with cards such as credit and debit cards and transactions such as credit transfers, direct debits and money remittance. It does not cover things like cheques.

12.13.2. The EU has reviewed the original Directive which it no longer considers adequate. In addition to some inconsistencies in implementation it was considered that the Directive did not do enough to stimulate innovation and competition. In particular, PSD has not kept pace with FinTech and the rise of payment system providers outside the scope of PSD. The EU has now revised the Directive and PSD2 is due for implementation in the UK in January 2018.

12.13.3. The picture on payment services is made more complicated by the fact that in parallel with the development of PSD2 the UK's Competition and Market's Authority (CMA) has been undertaking a long-running investigation of the retail banking sector and published its final report on proposed remedies (along parallel lines to those of PSD2) in August 2016.One of the remedies is for the major retail banks to adopt open application programming interfaces (APIs) and share current account transactions data with intermediaries. The requirement to adopt common API standards is regarded as the single measure which has the greatest potential to transform competition in retail banking markets. Consumers can consent to share their data with intermediaries who, through the open API standards, can access information about banks' services, prices and service quality and develop services for consumers to compare different banks' offerings. The measures also open the way for the development of new business models offering innovative services to consumers. An open API has to be available no later than January 2018, when the PSD2 takes effect.

12.13.4. There are both opportunities and threats to consumers with PSD2. The Directive introduces radical changes to the way payment systems work and could result in cost savings for merchants which, if passed on, could mean, lower prices for consumers. It also allows so called "third party providers", with the consumer's consent, to access data held by banks and then use that data to offer the consumer better deals. It also aims to enhance the security of the payments system. Although there are potential benefits to consumers there are clear concerns about data privacy and it also remains to be seen if cost savings get passed on to consumers.

12.13.4. Alongside PSD2 it is also appropriate to consider E-money, basically a digital equivalent of cash stored on an electronic device or remotely at a server. The original Directive on Electronic Money dates from 2000 but a revised Directive (EMD2) was adopted in 2009 and implemented in 2011. EMD2 introduced lower prudential requirements for firms to lower the barrier to entry to the market and aligned regulation with that for payment service providers. In terms of consumer protection EMD2 clarified consumers rights to redeem funds at par value and at any moment, and introduced arrangements for protecting consumers' funds from the insolvency of an e-money issuer. EMD2 was due to be reviewed to assess its effectiveness but this review has been delayed. This is unfortunate as any revisions to EMD2 should dovetail with the implementation of PSD2.

13. Will I get timely, clear and fair information from firms?

13.1. The provision of timely, clear and fair information both about firms and products plays a key role in conduct of business regulation. Indeed, at times there seems to be an attitude that addressing information asymmetries between consumers and firms will of itself be enough to protect consumers and to make markets work in their favour. The provision of information to consumers is a cross-cutting theme for many of the EU Directives. For information to be conveyed as effectively as possible it needs to be consumer tested. Particular care is needed over the presentation of numeric information as it has significant scope to mislead (for example, if it fails to take account of important costs to consumers) or to confuse (for example, if it presents too many figures, or uses percentages when a cash figure would be preferable). There is a general rubric the EU uses when dealing with communications (this version taken from MiFID):

"All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such".[42]

13.2. The Panel has emphasised the importance it attaches to disclosure in its response to the CMU Green Paper:

" The Panel values disclosure of investment product features, in particular the associated costs, risks and returns, as a powerful way of making sure consumers

[42] *" Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance".*

can make informed choices about where and how to invest. However, disclosure is only effective if those to whom the details are provided can understand and act on the information; overly complex disclosure to consumers is counterproductive in many cases".[43]

Banking.

13.3. One of the Directives which places significant reliance on transparency as a regulatory tool is the Payment Accounts Directive (PAD) which was adopted in 2014 and the UK measures to implement it come into force in September 2016. The Directive aims to improve transparency and comparability of fee information about payment accounts to make consumers more aware of the fees and charges applied by account providers such as banks. It is also intended to make it easier for consumers to compare account offerings and thus encourage more switching of payment accounts so that consumers get better deals. In its response to the Treasury consultation to implement the Directive the Panel noted a significant rise in the number of complaints about packaged bank accounts. It therefore disagreed with the Treasury that information about the cost of accounts should be confined to new customers only. It argued that payment service providers should be required to disclose information to existing customers, at any time on request, and with their annual statement to make switching more attractive to existing customers. As this measure has yet to come into force in the UK it is too early to say whether or not it can be regarded as effective in its purpose and therefore a benefit to UK consumers .

Investments.

13.4.1. Another EU measure where disclosure is the regulatory tool is the Packaged Retail and Insurance-based Investment Products Regulation (PRIIPS) which comes into force on 31 December 2016. As a Regulation it is directly applicable to UK firms and therefore does not offer the FCA scope to modify it in any way.

13.4.2. PRIIPS introduces a "Key Information Document" (KID) for a wide range of retail investment products such as investment funds, insurance-based investments and retail structured products. The purpose of the KID is to help retail investors understand, compare and use information that is made available to them about different investment products. Pensions and deposits (other than structured deposits) are not, however, covered. Importantly, as explained later, UCITS will not be covered for a temporary period.

[43] "*Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.

13.4.3. The KID is intended to be a short, plain-speaking, consumer-friendly document which provides information on the investment product's main features, as well as the risks and costs associated with the investment. It will make clear whether or not a consumer could lose money with a certain product and how complex the product is. The KID will follow a common standard as regards structure, content, and presentation to help consumers use the document to compare different investment products and choose the product that best suits their needs.

13.4.4. The KID will have to be provided to consumers by any firm that advises them or distributes products to them. This includes sales at a distance where the KID either has to be supplied in advance or the customer can delay the transaction until they have received the KID document and have had a chance to study it.

13.4.5. This is a case where the EU carried out some consumer testing of the KID. The Panel, however, has reservations about the document :

"There appears to be a significant danger that a document which was originally intended to be a straightforward, standardised guide to the main features of a product is becoming regarded as a panacea for all consumer protection problems, as more and more features are being added to it."[44]

13.4.6. It seems the Panel has not been alone in its concern about the KID. On 21 September 2016 the European Parliament rejected on a number of grounds the technical standards which the ESAs had devised for the KID. The implementation of PRIIPS may have to be delayed to allow time for the technical standards to be revised.

Collective investments.

13.5. Some years before the PRIIPS Regulation the EU adopted in 2009 an amendment to the UCITS Directive (already discussed above) which governs collective investment schemes. This particular amendment encouraged increased transparency by introducing the concept of a Key Investor Information (KII) document. Like PRIIPS, this KII document was intended to give clearer and more understandable information to potential investors. As a consistent approach to KII documents is used across Member States it was hoped consumers would be better able to draw direct comparisons between UCITS funds. There is a clear example here of how the EU can sometimes fail to adopt a joined-up approach to regulation. From the consumer perspective, if they have an investment need it could be covered by a product subject to PRIIPS, which means the consumer gets a

[44] *"Consumer Panel Position Paper on PRIPS"*, 2013.

KID document, or it could be met by a UCITS scheme, which is subject to the KII requirement. The EU has at least recognised that this does not make sense from the consumer's perspective but it is leaving it until 1 January 2020 before UCITS have to comply with the PRIIPS information requirements. In the meantime consumers will get different documents depending on the product at issue.

Consumer credit.

13.6. The Consumer Credit Directive also uses information requirements as part of its regulatory tools. It stipulates that a comprehensible set of information should be given to consumers in good time, before the contract is concluded and also as part of the credit agreement. Creditors have to provide pre-contractual information in a standardised form (Standard European Consumer Credit Information) which is intended to allow consumers to compare more easily the various offers. Consumers also get an indication of the total cost of credit through the Annual Percentage Rate of Charge ("APRC"), which is a single figure, harmonised at EU level.

Mortgage credit.

13.7. Similarly, the Mortgage Credit Directive also has consumer information requirements with the introduction of the European Standardised Information Sheet, intended to allow consumers to compare products and shop around. As part of the information provided to consumers they are also told the APRC. Although the Panel supported the idea of applying the APRC calculation across all forms of mortgage lending it thought the requirement for a second APRC for variable rate loans could mislead consumers :

"*Whilst we do understand that this proposal is a requirement set out in the Directive, we do not believe the information will provide any benefit to consumers*".[45]

General insurance.

13.8.1. General insurance is another area where the EU has introduced significant disclosure requirements. The EU introduced an Insurance Mediation Directive (IMD) in 2005 which regulated selling practices for all insurance products, from general insurance products such as motor and household insurance to those containing investment elements.

13.8.2. A review of the IMD found a patchwork of national regulations, with some governments gold-plating the measures and others implementing the bare

[45] *"CP14/20 - Implementation of the Mortgage Credit Directive and the new regime for second charge mortgages",* December 2014.

minimum necessary for compliance. In order to address these shortcomings the EU has adopted a new Insurance Distribution Directive which has to be implemented by 2018. Given the fact that one reason for the new Directive was uneven implementation of the IMD one would have expected the IDD to be a maximum harmonisation measure. The IDD is, however, a minimum harmonisation Directive again because of the difficulty on reaching agreement among Member States. The aim of the new Directive is to upgrade consumer protection in the insurance sector by creating common standards across insurance sales and ensuring proper advice. In terms of scope the IDD now covers distribution by insurance undertakings, which was not covered by the IMD which was confined to insurance intermediaries. Those who sell insurance on an ancillary basis are also covered by a "lighter touch" regime, although such ancillary intermediaries were already covered by the existing UK regime for general insurance. The IDD also covers price comparison websites and those involved in claims management activities. The IDD also provides for certain ancillary intermediaries to be exempt from the provisions of the IDD's and in the view of the Panel this exemption is too broad in its scope.

13.8.3. Part of the disclosure requirements relate to the firm itself. Before the conclusion of an insurance contract, all insurance distributors, whether intermediaries or not, have to disclose their identity, whether they provide advice, the basis of remuneration, the complaints procedure, as well as information on potential conflicts of interests.

13.8.4. The other disclosure requirements are directed at improved product transparency. An Insurance Product Information Document (IPID) will be introduced and a standardised format for the document is being developed by EIOPA. This is intended to be a simple document designed to give customers basic information about the type of non-life insurance, the obligations of the parties, claims handling and a summary of cover so that before buying consumers can familiarise themselves with the product and will be able to compare it with others.

13.8.5. It is too early to say if the IPID will represent an improvement over current UK disclosure requirements. The present FCA rules prescribe the content of the information that must be given to consumers. Firms have the option of providing the information in a policy summary or a Key Features Document but the rules do not prescribe the format of the information. In contrast, the IPID will be in a standard format and EIOPA issued in August 2016 a consultation document setting out its proposed technical standards for the document. It will not be until those standards have been finalised that a comparison can be made with current UK disclosures.

Investment firms.

13.9. MiFID II also introduces various information requirements. For example, investment firms are required to explain in a clear and concise way whether their investment advice is independent or not, the type and nature of any restrictions that apply, and the range of financial instruments that may be recommended. It also has to explain if the firm carries out a periodic suitability assessment for the consumer and with what frequency. These measures basically follow those which have been in force in the UK for many years and which have recently been reinforced by the RDR.

The adequacy of information mandated by the EU.

13.10. A general issue with EU legislation in the area of transparency is that there has sometimes been a lack of consistency across sectors. The original PRIIPS proposal was narrower in scope than that finally adopted although, as noted, it still does not cover pensions. But seen from the consumer perspective there ought to be similar information given to them regardless of the product type if the product is intended to meet the same consumer need. BEUC has argued both in relation to disclosure, and more generally, that the EU needs to improve and harmonise investor protection rules for all saving and investment products, including pension products and individual shares and bonds:

"The recent failure to align investor protection rules for insurance-based investment products with MiFID II only added to a patchy legal framework conducive to regulatory arbitrage. Investor trust cannot be regained with diverging rules under, inter alia, IDD, MiFID II, UCITS, KID and IORP".[46]

Since the formation of the ESAs, however, there has been more evidence of a joined-up approach to disclosure with a joint consultation document from the three ESAs on implementation of PRIIPS across deposits, securities and investment-linked insurance.

13.12. The PRIIPS KID and UCITS KII may not add much to UK consumer protection. As long ago as 1994 the UK implemented a Key Features document regime for life assurance and unit trusts and these documents too were intended as short, standardised, consumer-friendly documents which it was hoped would help consumers compare different products. Certainly the scope of PRIIPS is now wider in some respects, but as PRIIPS does not cover personal pension contracts it is narrower than the UK regime. Moreover, the effectiveness or otherwise of the IPID, KID and KII documents will not be known for some time.

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[46] *"Bringing Financial Services Back To The People They Serve"*, BEUC, 2015.

13.13. The key problem with the disclosure requirements under the various Directives remains that of the lack of an holistic approach by the EU and consideration of the impact of different disclosures at different times on consumers. The FCA has commented on this and effectively set out a post-Brexit approach to reviewing disclosure material:

"Rather than the sectoral approach to requiring different disclosures, we see significant benefit in considering the interaction of the different information consumers receive. A rationalisation of the disclosures, and ensuring that these are provided when they are most likely to influence consumers' decision making, could ultimately benefit consumers. Therefore we would encourage a comprehensive review of the consumer purchasing process, including advised and non-advised channels, to consider consumers' information needs and the impact of current disclosures. The Commission could consider initiating a cross-cutting work stream (possibly led by the three ESAs) that considers disclosure across all substitutable products, as required by different sectorial legislation, to rationalise the information consumers receive".[47]

14. Can I change my mind about buying a product, or can I repay it early, and will there be any financial penalties?

14. One consumer protection which features in a number of Directives is the ability given to consumers to change their mind if they have second thoughts about a purchase. For example, the Mortgage Credit Directive provides for a guaranteed period of time before a consumer is bound by a mortgage agreement through a period of reflection, a right of withdrawal, or both. Similarly, the Consumer Credit Directive allows a consumer to withdraw from the credit agreement without giving any reason within a period of 14 days after the conclusion of the contract. The Consumer Credit Directive also provides the option for a consumer to repay their credit early at any time and in such case the creditor can ask for a fair and objectively justified compensation. The Distance Marketing Directive also introduced a right for a consumer to withdraw from a contract made at a distance during a cooling-off period (although for investment business the UK already had cancellation or cooling-off provisions introduced under the Financial Services Act 1986). The cancellation or cooling-off rights conferred by various Directives are one feature the UK would wish to retain.

15.1. Will I be treated fairly?

[47] *"The Financial Conduct Authority's Response to the European Commission's call for Evidence on the EU Regulatory Framework for Financial Services",* February 2016.

15.1. A number of aspects of the fair treatment of consumers in financial services come from cross-cutting EU Directives rather than ones which are specific to financial services.

Unfair contract terms.

15.2. One such cross-cutting Directive is the Unfair Consumer Contract Terms Directive. The Directive requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers. It also introduced a notion of "good faith" in order to prevent significant imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. This general requirement is supplemented by a list of examples of terms that may be regarded as unfair. Terms that are found unfair under the Directive are not binding for consumers. So far as the UK is concerned the FCA has powers (under the Consumer Rights Act 2015) to challenge unfair terms in financial services contracts.

Unfair commercial practices.

15.3. Another cross-cutting directive is the Directive on Unfair Commercial Practices, implemented in 2007, to curb a broad range of unfair business practices, such as providing untruthful information to consumers or using aggressive marketing techniques to influence their choices. As far as financial services were concerned the Financial Services Authority (FSA) expressed itself satisfied that its rules already addressed issues of unfair practice in financial services.

Distance marketing.

15.4. A third Directive which is specific to financial services but which cuts across all sectors is the Distance Marketing Directive (DMD) which had to be implemented by October 2004. The aim of the DMD was to boost consumer confidence in the distance marketing techniques - and in particular in internet transactions across borders - by laying down fundamental rights for consumers:

. an obligation to provide consumers with comprehensive information before a contract is concluded;

. a consumer right to withdraw from the contract during a cooling-off period;

. a ban on abusive marketing practices seeking to oblige consumers to buy a service they have not solicited ("inertia selling");

. rules to restrict other practices such as unsolicited phone calls and e-mails ("cold calling" and "spamming").

15.5. The Financial Services Authority (FSA) was responsible for implementation of the DMD in the UK in respect of most financial services with the exception of consumer credit which at the time was the responsibility of the Department of Trade and Industry. The FSA was satisfied that its conduct of business rules for designated investment already covered most of the matters in the Directive but it did have to extend the right to cancel to certain investment management, stock broking, and investment advice services. At the time the FSA was consulting separately on both general insurance and mortgage credit, the regulation of which it was in the process of taking on and so the DMD requirements were extended to those business areas. Also, the DMD applied to deposit taking and e-money and at that stage the FSA relied on changes being made to the Banking Code to implement the DMD. The DMD introduced some new consumer protections to UK consumers areas, such as deposit taking so may be regarded as a benefit.

15.6. As far as the above three Directives are concerned the UK already had in place provisions covering most matters but to the extent that the Directives added new protections (such as extending cancellation rights to investment advice services concluded at a distance) the UK would wish to retain those protections.

Data protection.

15.7.1. An important cross-cutting protection for consumers is protection of their personal data. Data protection is currently governed by the European Data Protection Directive introduced in 1995 and implemented in the UK by the Data Protection Act 1998. Thus, current regulation was devised before the explosion in the use of digital technology by consumers and the widespread use of personal data by firms and others.

15.7.2. The EU published in May 2016 its Data Protection Regulation which comes into force in the UK in May 2018. The Regulation is significantly more prescriptive than the Directive. It introduces widespread changes to protect consumers' personal data as well as greatly increased financial sanctions for non-compliance by businesses. The Regulation is designed to ensure that consumers receive clear and understandable information when their personal data is processed. Whenever a consumer's consent is required it will have to be given by means of clear affirmative action before a company can process personal data. There will be a stronger "right to be forgotten" so that personal data will be deleted. It will also seek to ensure easier access for consumers to their own personal data and a right to transfer personal data from one service provider to another. Businesses will need to inform consumers about data breaches that could adversely affect them without undue delay. They will also have to inform the relevant data protection supervisory authority.

15.7.3. The collection and handling of personal data is a key issue for financial services firms as they use it for such matters as fraud prevention, marketing, underwriting, pricing, and claims management.

15.7.4. On 19 April 2016 the Information Commissioners Office issued a statement on the implications of Brexit stating that:

"The UK will continue to need clear and effective data protection law, whether or not the country remains part of the EU.
The UK has a history of providing legal protection to consumers around their personal data. Our data protection laws precede EU legislation by more than a decade, and go beyond the current requirements set out by the EU ... Having clear laws with safeguards in place is more important than ever given the growing digital economy".[48]

Against this background it seems likely that post-Brexit the UK would maintain data protection measures to protect consumers, and ensure their fair treatment, comparable to those contained in the Regulation.

Anti-money laundering

15.8. Another cross-cutting area of EU policy affecting consumers is anti-money laundering. An updated Anti-Money Laundering Directive (AMLD4) was adopted in 2015 and the current plan is for it be implemented in June 2017. AMLD4 illustrates how there can sometimes be unintended side effects and a lack of joined-up thinking on Directives. On the latter point, there is an interaction between AMLD4 and the Payment Services Directive 2 (PSD", mentioned elsewhere) as respects virtual currencies and the European Banking Authority has recommended that virtual currencies be removed from the scope of PSD2 to allow an eventual orderly implementation of the two Directives as they bear on virtual currencies. On the former point, the European Network of Credit Unions has pointed out that credit unions serve consumers who generally have a low risk profile and who are part of a defined community. It has argued that some consumers could be excluded from access to bank accounts unless the ESAs develop guidance on a risk-based approach to what constitutes acceptable evidence for AML purposes for those consumers who cannot produce standard documentation.

Other aspects of fairness.

15.9. Other Directives specific to individual financial service sectors cover matters of fair dealing in a number of ways. Some are concerned with the interface

[48] https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2016/04/statement-on-the-implications-of-brexit-for-data-protection/

between the consumer and the firm, for example to ensure that investment advice is suitable to what a firm knows about a customer's circumstances and experience while other aspects might be termed "back office", such as product governance, yet others may be considered to cover both areas, such as avoidance of conflicts of interest and where they cannot be avoided the disclosure of their existence to customers. These different aspects of fairness are dealt with below under a number of different headings.

16.Affordability, suitability and appropriateness

16.1. A number of Directives seek to ensure that intermediaries and distributors of financial products take steps to ensure that an individual consumer's circumstances are taken into account in some way before recommending or selling a product to that consumer.

Consumer and mortgage credit.

16.2. The Consumer Credit Directive requires creditors to assess the consumer's creditworthiness before the conclusion of the credit agreement and before any significant increase in credit. Similarly, the Mortgage Credit Directive introduced Europe-wide standards for assessing the credit worthiness of mortgage applicants to ensure that consumers aren't offered mortgages they won't be able to repay. Although supportive of stricter affordability checks the Panel has pointed out that in some cases there can unintended consequences for some consumers, including older people and the self-employed. There are particular problems for some consumers if they want to switch to a new provider, as stricter affordability checks means that they effectively become "mortgage prisoners" at the mercy of their current provider and any future changes to the variable interest rate on their contract. The FCA has, however, issued statements on the intent of affordability checks to ensure that lenders are not using affordability as an excuse on its own to prevent consumers moving to better products.

Investments.

16.3. In the investment business area an Investment Services Directive was adopted in 1993 (to a large extent this replicated protections already available to UK consumers through rules made under the Financial Services Act 1986) which was then replaced in November 2007 by the original Markets in Financial Instruments Directive (MiFID). Among the aims of the original MiFID was to ensure a high degree of harmonised protection for investors in financial instruments, such as shares, bonds, derivatives and various structured products. Most recently the Commission has undertaken a major revision of the requirements in a new Directive called MiFID II, mentioned earlier. Two aspects of consumer protection covered by MiFID II are "appropriateness" and "suitability".

16.4. MIFID II has toughened the "appropriateness test" which applies to the selling of certain financial products. The aim of the test is to prevent products which are complex from being sold on an "execution -only" basis to retail clients who have neither the expertise nor the experience to understand the risks involved with such products. This test is currently applied to products which are regarded as "complex" such as contracts for difference, spread bets, and bonds that embed derivatives – products where it is unlikely the average investor would understand the potential risks. MiFID II treats more products as ‘complex’, including all non-UCITS collective investment schemes (which are often known as NURS in the UK) – for example, property funds. The appropriateness test means that firms wishing to sell such complex products to the general public have to obtain information about an individual consumer's knowledge and competence before they can assess whether or not it is appropriate to sell such a complex product to that consumer. In its recently issued consultation paper (CP16/29) the FCA proposes copying out the MiFID II changes on appropriateness so that the requirements apply only to those complex products subject to the Directive. There is a risk for UK consumers here of complex products being devised which are not subject to MiFID II and so could be sold to the public without an appropriateness test.

16.5.1. A long-standing feature of the regulation of investment advice in the UK (dating back to the implementation of the Financial Services Act 1986) is a requirement on those advising consumers to make suitable recommendations based on what they know, or ought reasonably be expected to know, about the personal and financial circumstances of individual consumer being advised. The suitability requirement has been nuanced over the years but the fundamentals are the same. The requirement was reflected in the Investment Services Directive (ISD) and the first version of MiFID which replaced the ISD. The assessment of suitability is one of the most relevant obligations for investor protection. MiFID II applies it to the provision of any type of investment advice and portfolio management and requires a firm to provide suitable personal recommendations to clients (or make suitable investment decisions on their behalf) based on information the firm has obtained regarding the client's knowledge and experience in the investment field relevant to the specific type of product or service, that person’s financial situation including his ability to bear losses, and his investment objectives including his risk tolerance. When providing investment advice to a retail client, MiFID II introduces a new requirement for investment firms to provide the client with a suitability report specifying how the advice given meets the retail client’s circumstances and needs (although in the UK this has been a long-standing requirement). MiFID II is also seeking to further buttress suitability through its introduction of more specific requirements for firms to conduct due diligence and ensure the products they recommend are suitable for their clients. Firms will be required to have policies and procedures in place to ensure they understand the nature and features of the products they select for their clients, and they will be required to assess whether alternatives are available that would better meet their client's objectives.

16.5.2. In its consultation paper on MiFID II (CP16/29, September 2016) the FCA proposes to update its current suitability rules with the changes required by MiFID II except that, for the present at least, it is leaving unchanged the requirements applying to insurance-based investments and pensions until there is clarity from the EU on the implementing measures for the IDD. There is the potential here for consumers to be treated differently depending on the type of product they are being advised to buy depending on the final Technical Standards issued by EIOPA for implementation of the IDD.

General insurance.

16.6. In relation to insurance products the IDD also lays down a universal requirement on firms to assess whether the insurance product meets the demands and needs of the customer. Due to the potentially increased risk that insurance-based investment products represent to consumers, the IDD seeks to bring consumer protection to a similar level as that of clients of investment products regulated under MiFID II, so that a firm also has to assess whether the customer's knowledge in the investment field is appropriate, and whether the recommended insurance-based investment product is suitable for that customer.

The adequacy of EU measures.

16.7. In general terms the requirements around suitability and affordability is an area where the UK has taken the lead and has had a significant influence on measures adopted by the EU. As one of the keystones of consumer protection the UK would wish to retain provisions on affordability, suitability and appropriateness.

17. Do I risk being mis-sold a product because of the financial incentives for firms and their staff?

17.1. Remuneration and inducements have long been key areas for regulatory attention in view of their capacity to adversely affect outcomes for consumers. There is a complex interaction here between the UK and the EU situations. In the UK there is a large number of intermediary firms which advise on or distribute financial products whereas in many EU countries distribution tends to be much more concentrated, often in the hands of banks. Directives may have unintended consequences if they do not take account of this UK difference. Also, the UK has tried as far as possible to maintain a level playing field among firms when it comes to remuneration and incentives on like products, so current UK rules on investment advice lump together products subject to, variously, MiFID, the IDD and UCITS when it comes to remuneration and inducements because in the UK view the products are substitutable when it comes to consumer needs.

Investments.

17.2.1. The differences mentioned above become important in the context of MiFID II which is introducing changes in the area of inducements and remuneration. In the UK the FCA undertook a Retail Distribution Review (RDR) one aspect of which was to address the problem of inducements to firms creating bias in the advice given to consumers. As a result of the RDR a prohibition on firms paying or receiving commissions in relation to investment business advice was introduced. Now in the UK all investment advisers (both independent and restricted) can only be remunerated for personal recommendations on retail investment products through "adviser charges". Adviser charges are charges payable by the client and agreed between the client and the adviser in advance of advice being provided.

17.2.2. For other firms (including discretionary investment managers and for investment advisers when they are not advising in relation to retail investment products), there is an FCA general inducement rule which states that the receipt of a benefit is permitted where the benefit:

. does not impair compliance with the firm's duty to act honestly, fairly and professionally in accordance with the client's best interests;

. is disclosed to the client; and

. is designed to enhance the quality of the service to the client.

17.2.3. MiFID II is now addressing the area of inducements and remuneration and although the RDR is one factor which influenced the EU approach MiFID II diverges when it comes to treating independent and restricted advisers on the same footing. MiFID II is placing a ban on the receipt of monetary and non-monetary benefits from third parties (other than "minor non-monetary benefits") for both independent advisers and discretionary investment managers. This ban applies in relation to investment services carried on for both retail and professional clients. The "minor non-monetary benefits", will include:

. generic information relating to a product or service;

. participation in conferences and training events on the benefits of a particular product or service; and

. hospitality of a reasonable de minimis value (e.g. food or drink during a business meeting).

17.2.4. Other types of firm (which in the UK will include "restricted" intermediary firms) will not be subject to the MiFID II ban so as things stand they would be subject instead to the FCA's general inducement described earlier.

17.2.5. It is possible that MiFID II could have unintended and perverse effects in the UK, much depending on how the FCA is going to resolve the conflict between its present rules and the new MiFID II provisions. In the consultation paper on MiFID II implementation (CP16/29) which the FCA has just published it proposes to extend the MiFID II ban on inducements not just to independent advisers but also to restricted ones. If the FCA goes ahead with this proposal it will align the position with its current rules introduced as a result of the RDR (the inclusion of discretionary investment managers would still be new for the UK) but it would be inconsistent with implementation of MiFID II in the rest of Europe where many countries may well apply the ban only to independent (and not restricted) advisers. If this is the case, it is likely that European advisers will define themselves as "restricted" in order to maintain their commission stream. There could then be a risk that firms based elsewhere in Europe and remunerated by commission may seek to provide services to UK consumers with an attendant risk of consumer detriment because of commission biased sales. If, on the other hand, the FCA decides not to proceed with its current proposal and instead to confine the MiFID II ban on inducements to just independent advisers there is a different risk which is that some UK independent firms may choose to go restricted in order to avoid the ban. A reduction in the independent sector which would not be in the best interests of UK consumers.

17.2.6. Another conflict between UK and EU requirements concerns the fact that MiFID II allows third party benefits to be accepted by discretionary investment managers if they are rebated back to the client. In contrast the FCA's view is that there would still be a bias to accept commission-paying products, as the commission gives the impression of a discounted charge when it is rebated back to the client.

17.3. In addition to dealing with inducements to firms MiFID II also deals with the remuneration of front-line staff. It introduces requirements designed to ensure that firms:

. do not create remuneration policies that could incentivise staff to recommend a particular financial instrument when it is inappropriate for the client;

. have remuneration policies that encourage fair treatment of clients and avoid conflicts of interest and that these policies are approved by the firm's management body; and

. prevent or manage conflicts of interest caused by their own remuneration structures.

General insurance.

17.4.1. Turning to insurance, in its review of the IMD the Commission found a lack of transparency around remuneration resulting in too many commission-driven conflicts of interest in the market. The Panel had argued that the IDD should ban types of commission that present inherent conflicts of interest and that there should be disclosure of the amount of commission. The IDD is, however, taking a much softer approach and will allow Member States to keep their existing systems of remuneration and disclosure will be confined to firms giving information about the source and the nature of their remuneration. The Directive prescribes the way in which these disclosures are to be made. In the view of the FCA the EU has lost the opportunity for greater alignment between the IDD and MiFID:

"there is scope for even greater consistency between the IDD and MiFID II requirements, for insurance-based investment products, than has so far been achieved. Examples of this are the requirements for managing conflicts of interest and the rules around inducements. Greater consistency would aid compliance by firms undertaking both MiFID and IDD business, and help consumers who are considering competing products from advisers and other intermediaries".[49]

17.4.2. In its recent consultation on draft Technical Advice EIOPA has acted to meet some of these concerns about alignment between the IDD and MiFID II. The Panel has supported EIOPA's proposed high-level principle to determine whether an inducement has a detrimental effect on the service to the customer. The Panel has suggested that EIOPA also needs to consider the inclusion of internal remuneration packages as an addition to the list of practices which could have a detrimental effect.

The adequacy of EU measures.

17.5. Both under MiFID II and IDD there are shortcomings in the EU approach to inducements suggesting that if the UK remains in the single market for financial services the UK will "gold plate" the provisions of the Directives so as to retain its current approach to inducements. The recently issued consultation paper (CP16/29) from the FCA does propose, in the case of MiFID II, that the UK go further than the EU and retain a ban on inducements for both independent and restricted advisers. In the case of the IDD the concerns of the Panel may yet be met in the final guidance issued by EIOPA.

[49] *"The Financial Conduct Authority's Response to the European Commission's call for Evidence on the EU Regulatory Framework for Financial Services",* February 2016.

18. Will a firm put its interests before mine?

18.1. A long-standing feature of both UK and EU regulation are measures that attempt to deal with conflicts of interest which have the potential to cause detriment to consumers. These measures overlap with those dealing with, for example, inducements and remuneration. The general approach has always been that firms should seek to avoid conflicts of interest but where they cannot do so they should disclose the conflict to clients.

18.2. MiFID II , for example, will require investment firms *"to take all appropriate steps to identify and to prevent or manage conflicts of interest between themselves, their clients (or between one client and another) that arise in the course of providing any investment services, including those caused by the receipt of inducements from third parties, or by the investment firm's own remuneration and other incentive structures".*[50]

Where these steps are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the investment firm will have to clearly disclose to the client the general nature of the conflicts of interest and the steps taken to mitigate those risks before undertaking business on the client's behalf.

18.3. The Commission has made clear that the MiFID II disclosure should only be *"a measure of last resort and not a means for managing conflicts"* so that going forward one can expect supervisory bodies to scrutinise very closely whether or not firms have indeed taken all reasonable steps to ensure that conflicts do not arise in the first place. ESMA has indicated that for some retail clients, in particular those who are less sophisticated, the disclosure obligation under MiFID II may be too high-level and therefore ineffective. It has therefore put forward stronger disclosure requirements to help retail clients understand the risks associated with the conflicts of interest.

18.4. As noted above, the IDD has similar requirements to deal with conflicts of interest but in the view of the FCA the IDD and MiFID II could have been better aligned. So this is an area where the UK should seek convergence of requirements between the different sectors

19. Could I be sold more products than I need?

19.1. A potential area of consumer detriment is cross selling. This is where a consumer is sold two financial products as part of a single package and the consumer does not need one of those products, or feels that they have no choice

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[50] *"Final Report: ESMA's Technical Advice to the Commission on MiFID II and MiFIR",* ESMA, December 2014.

but to accept both products, or the cost of the package is greater than if they had bought the two products separately, or quite simply the consumer was not made aware that two products were being sold. Cross selling does not automatically cause detriment: a consumer may need both products and getting them together as a package may save them money. ESMA has issued guidelines under MiFID which are aimed at providing a number of protections to consumers:

. consumers needs to be told in good time and in a prominent way both the price of the package and the price of its component parts if bought separately;

. similarly, they need to be told about non-price features and risks of the respective products (and how the risks might be modified if both products are bought as part of a package);

. consumers need to be told if they can buy the components of a package separately;

. there are safeguards regarding the training of staff selling packages and the way they are remunerated;

. cooling-off or cancellation rights continue to apply to the elements of a package.

19.2. In the case of the IDD the Panel had argued for a ban on tying-in of products but this is another area where the EU has taken a softer approach. The IDD only requires firms to disclose that the different components of a package can be bought separately by the consumer and what the prices would be. Ancillary intermediaries have to allow customers to buy an insurance add-on separately from the main product.

19.3. There needs to be a consistent approach to cross-selling post- Brexit. The tying-in of products should be prohibited but consumers should have the opportunity to purchase a package where they have a clear need for the components of the package and it is in their interests to buy those components as part of a package.

20. Does a financial service owe me a duty of care?

20.1. Since the Financial Services Act 1986 a key principle of regulation is that firms should act with integrity and treat their customers fairly. Over the years the UK regulators have articulated the general principle in more detail, in particular by the Financial Services Authority and its "Treating Customers Fairly" approach. The Panel believes that ‘Treating Customers Fairly’, has been weakened by the ‘consumer responsibility’ principle in the Financial Services and Markets Act 2000, and that in consequence the legislation is not giving consumers the protection that Parliament intended. The Panel had sought an amendment to the Act to impose a formal duty of care by financial services firms towards their customers and more recently sought to improve the legal duties of firms towards their customers during the passage of the Consumer Rights Bill, in both cases without success.

20.2. The Panel is not proposing that a full fiduciary duty should govern the relationship between firms and their customers which would impose an obligation on firms to act in the best interest of customers to the exclusion of their own interests and those of third parties. Explaining its concept the Panel has said that

" a duty of care covers relationships where one person acts on behalf of, or for the benefit of, another with a discretion or power that affects the interests of the other. In a financial services context, this means:
. no conflict of interest;
. no profit at the expense of the customer without their knowledge and consent;
. loyalty to the customer; and
. a duty of confidentiality, preventing firms from taking advantage of information gained from the customer.
The duty would cover both direct customer-firm relationships, and also more complex or indirect relationships, for example where an investment fund manager had no direct interaction with an individual consumer, but acted for their benefit". [51]

20.3. The Panel has pointed to a number of EU Directives - MiFID II, IDD and MCD - all of which place an obligation on firms to act *"honestly, fairly and professionally in accordance with the best interests of its clients"*. The Panel has suggested that this core principle should be embedded across all measures which apply to intermediaries. If this suggestion was adopted it might possibly meet the Panel's concerns so far as intermediaries are concerned but it would not address the position of those firms with an indirect relationship with consumers (or intermediaries not subject to MiFID II, IDD or MCD). Post-Brexit the Panel might continue to push for a duty of care for all firms regardless of whether their relationship with consumers id direct or indirect.

21. Does anyone make sure this financial product meets consumer needs?

21.1. One aspect of matching financial products to individual consumers is the suitability (or other tests) mentioned above. Another aspect is the design of products to ensure they meet certain consumer needs, and the distribution of products appropriate to particular types of consumer. An increasing focus of regulation both at the EU level and in the UK has been on these aspects within firms, generally referred to as governance. In effect governance is a form of internal regulation which seeks to avoid consumer detriment before it can occur.

[51] *"Incorporating a Duty of Care into the Financial Services & Markets Act",* June 2015.

Although approving the EU's approach the Panel has indicated that it sometimes lacks consistency and does not go far enough:

"The EU's approach to product governance is evolving but there is a lack of consistency across the Proposals which currently deal with this (PRIPS/MiFID/MiFIR). The Panel recommends that efforts be made during negotiations to ensure that similar provisions are addressed at the same time, to the extent possible".[52]

Investments.

21.2.1. MiFID II introduces extensive product governance requirements on both manufacturers and distributors of investment products. MiFID II will codify product governance requirements into rules for the first time and impose new requirements that will mean Boards need to get involved in product approval, the selection of target markets and the ongoing review of how products are distributed.The scope of the governance rules is wide and applies to shares and bonds, and other investment products. However, ESMA has also suggested that the Commission should align the relevant UCITS and AIFMD articles with the MiFID II product governance obligations for manufacturers, although it's not clear if the Commission will accept this recommendation and, if it does, on what timeline this work would be done.

21.2.2. The overall intention of the MiFID II requirements is that investment products are designed to meet the needs of an identified target market of consumers and that those distributing products have a strategy that is compatible with the target market for the product.

21.2.3. So far as manufacturers are concerned they will need to identify, and take reasonable steps to distribute to, a target market of consumers. In order to do this they will need a product approval process which ensures that there is:

. proper management of conflicts of interest (including those related to remuneration) as part of the product design and development ;

. effective oversight and control over the product design and manufacture process;

. assessment of the potential target market for products to limit the risk of them being sold to investors that are not compatible with their characteristics, needs and objectives;

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[52] *"European Parliament Committee on Economic and Monetary Affairs, Public Consultation",* Financial Services Consumer Panel response, 2014.

. assessment of the risks of poor investor outcomes posed by products and the circumstances that may cause these outcomes to occur;

. consideration of the charging structure proposed for products, and the extent to which this can impact the outcomes for the target market;

. regular review of products, taking into account any event that could materially affect the potential risk to the identified target market, to assess at least whether the product remains consistent with the needs of the identified target market and whether the intended distribution strategy remains appropriate.

21.2.4. Similarly, distributors will need to understand manufacturers' products and product approval processes so as to identify and sell to their own target market. Distributors will need:

. product governance processes to ensure that the products and services are compatible with the characteristics, objectives and needs of their own target market. This process needs to take account of such factors as whether a product has features that are difficult to explain to the target market and how it may need to adapt its sales processes as a result;

. to carry out periodic review of product governance arrangements to ensure that they remain robust and fit for purpose;

. involve the compliance function in the development and periodic review of product governance arrangements, in order to detect any shortcomings;

. to get the endorsement of the management body to range of investment products and services that will be offered and their respective target markets, and the provision of information to senior management in the compliance function's periodic reports to the management body.

21.2.5. MiFID II has a number of measures designed to support product governance in specific areas. For example, it deals with products manufactured by third-country firms and places an obligation on distributors to take all reasonable steps to ensure that product information obtained from such a manufacturer is of a reliable and adequate standard to ensure that products will be distributed in accordance with the characteristics of the target market. It also deals with situations where there is more than one distributor and imposes a responsibility on the final distributor in the chain to meet the product governance obligations.

21.2.6. The Directive also stresses the importance of information sharing among the various parties - manufacturer, final distributor, intermediate distributor - to adequately meet the product governance requirements.

General insurance.

21.3. One area where product governance had been aligned with MiFID is the IDD. This, too, imposes requirements on insurance undertakings to ensure that there are product approval processes in place before putting a product on the market and that the product is designed for a specific market. Although the Panel has expressed itself as broadly content with the draft Technical Advice issued by EIOPA on product governance arrangements it has raised concerns on two points. The Panel would like to see an obligation on firms to make their product oversight and governance arrangements public to allow for greater scrutiny. It has also raised concerns about periodic reviews being conducted entirely internally within each firm rather than independently.

Collective investments.

21.4. There has been a long-standing form of product governance in one product area which derives from the UCITS Directive of 1985 and that is in the form of the depositary in collective investments schemes. However, the Panel, in its response to the CMU Green Paper, has been particularly critical of governance in the asset management industry. Referring to research it commissioned it said that it had:

" found persistent weak governance in the asset management industry. Governance is frequently contracted out to commercial organisations, which are unlikely to criticise the investment manager who appointed them. Governance can also be provided by an associated group company, which shares the same ultimate owner, creating similar conflicts of interest. Well-governed funds are more likely to provide consumers with value for money by reviewing the quality of investment management and costs on a continuing basis. Poor governance can lead to investor detriment due to the use of inadequate or excessively risky investment strategies, or unnecessarily high costs"[53]

The Panel's suggestion is that these serious shortcomings need to be addressed by introducing for depositaries powers and duties analogous to those the UK has given to Independent Governance Committees. This would mean depositaries would, for example, be able to make public statements on fund performance and value for money, and as a last resort, replace investment managers.

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[53] "*Financial Services Consumer Panel response to the Capital Markets Union Green Paper*", 2015.

Shares.

21.5.1. Another form of governance might be considered that exercised by shareholders. Here the EU introduced a Shareholder Rights Directive (SRD), implemented in the UK in 2009, the purpose of which is to ensure that shareholders in publicly traded companies are able to exercise their voting rights and can hold companies to account by placing items of business on the meeting agenda, or asking questions. In 2014 the Commission put forward proposals for a revision of the SRD which would make it easier for shareholders to use their existing rights and to enhance those rights. Importantly, the proposed changes would introduce a European "say on pay". The proposals would oblige companies to disclose clear, comparable and comprehensive information on their remuneration policies and each company would have to put its remuneration policy to a binding shareholder vote. The policy would need to include a maximum level for executive pay. It would also need to explain how it contributes to the long-term interests and sustainability of the company. It would also need to explain how the pay and employment conditions of employees of the company were taken into account when setting the policy including explaining the ratio between average employees and executive pay. The revisions to the SRD are yet to be implemented.

21.5.2. The SRD implemented in 2009 brought about some improvements in UK company law. It extended the notice period for AGMs and required additional information to be provided to shareholders in Notices of meetings and on company websites. It gave shareholders the right to ask for other matters to be included in the business dealt with at an AGM and it placed an obligation on companies to answer any questions asked by shareholders at a meeting. Post-Brexit these existing rights should be retained and the proposed "say on pay" should be introduced.

22. What will it cost?

22.1. Cost is one of the most important factors in determining the outcome for consumers in relation to investments, pensions and savings. Quoting a study by the Department of Work and Pensions, the Panel illustrated that the difference between a 0.5% charge on funds under management and a 1.5% charge could mean over a 25% difference in a consumer's pension income. It might be thought that such an important aspect to consumer outcomes would have been adequately addressed by the regulators (both UK and EU) by now. Yet measures such as the annual management charge (AMC) and Total Expense Ratio (TER) appear not to be well understood by consumers and those measures may seriously understate the true cost of investment. Research carried out in 2014 for the Panel suggested that the true cost of investment could be double the quoted annual management charge. This is because there are not only explicit costs disclosed to investors but also implicit costs which are not disclosed. Moreover, the research showed that because the implicit costs are charged to funds there is no incentive for firms to attempt to control the costs and in some cases they do not even know what the costs are. The Panel's suggestion is that there needs to be a single charge for products which encapsulates all the elements:

" Part of the rationale for a single charge was that it would introduce the 'right' kind of competition into asset management. The single charge would almost definitely be considerably higher than the currently quoted AMCs, TERs or OCFs. However, it would be transparent and provide investors and their advisers with a genuine view of costs and a more meaningful method of comparison, driving competition that worked in consumers' interests. A single charge regime would also place investment managers at risk for the decisions they make and strengthen accountability, not only to the investor but also to the firms and pension schemes that employ them. Investment managers would be incentivised to look for the best deal for the myriad of services that they currently just charge to the fund, and so don't need to think about as the investor pays. Many in the industry continue to argue that a single charge is not feasible. We do not underestimate the scale of the challenge needed, but believe the barriers can be overcome, and a single charge remains our long-term goal".[54]

In fact, the research conducted for the Panel suggested there might even be a case to go further and put a cap on costs:

" Ultimately fee capping of the full costs (TER plus other implicit and explicit costs) may be an option, and indeed given the lack of consumer knowledge may be necessary, particularly for situations where the consumer has little control or understanding of the purchase decision". [55]

22.2 . MiFID II does make sure that the total charges and costs of investment are disclosed but it will not be until 2018 that this happens. MiFID II is going to require firms to disclose in good time all the costs and related charges for those products covered by the Directive. This information:

" must include information relating to both investment and ancillary services, including the cost of advice, where relevant, the cost of the (product) recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments. The information about all costs and charges, including costs and charges in connection with the investment service and the (product), which are not caused by the occurrence of underlying market risk, shall be aggregated to allow the client to understand the

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[54] *"Discussion Paper: Investment costs and charges - where are we now?",* Financial Services Consumer Panel, March 2016.
[55] *"Discussion Paper: Investment costs and charges - where are we now?",* Financial Services Consumer Panel, March 2016.

overall cost as well as the cumulative effect on return of the investment, and where the client so requests, an itemised breakdown. Where applicable, such information shall be provided to the client on a regular basis, at least annually, during the life of the investment".[56]

22.3. Similarly, the PRIIPs regulation requires the KID for a financial product to contain a section headed *"What are the costs?"* and this will include summary cost indicators which will include all direct, indirect and one-off and recurring costs (shown in monetary and percentage terms), and will show the compound effects of total costs.

22.4. Although progress is thus being made on transparency over costs and charges there is scope for further work and recently the EU has announced that it is going to investigate the performance and fees of investment funds and that this could pave the way for future regulation. If the UK leaves the single market it could miss out on this investigation - although the FCA has been undertaking a study of asset management and it is possible that the results of that study, expected soon, could address issues of transparency of costs.

23. Is my financial product portable?

23.1. An issue for some consumers is whether or not a financial product they have purchased is portable. In the main this concerns consumers who travel or work outside their home state.

23.2. One example is health insurance where a policy taken out in one Member State may be valueless if a claim on the policy has to be made in another state. Another example is pensions where one EU proposal, mentioned earlier in relation to "29th" regimes, is the possibility of a pan-European Personal Pension which would be portable across borders.

23.3. As yet the EU has not introduced any significant measures in this area. It has introduced a Pensions Portability Directive which has to be transposed into UK law by May 2018 (so implementation would likely be after Brexit). The Directive has been criticised because of its exceptions and the fact that it has more to do with the acquisition and preservation of pension rights than their portability. The Directive is not thought to involve any significant departure from current UK practice. The Commission's Retail Financial Services Green Paper has raised portability as an issue.

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[56] *"Final Report: ESMA's Technical Advice to the Commission on MiFID II and MiFIR",* ESMA, December 2014.

24. Will the regulators protect me from dangerous products or excessive charges

24.1. Direct intervention in the market generally runs against the grain of both EU and UK regulation. The general approach is that firms can charge consumers what they like so long as they disclose clearly how much they are charging. Similarly, there is a reluctance to ban products although as we have seen in the case of complex products the EU has been prepared to introduce additional safeguards to ensure such products are not sold on an execution only basis to retail investors. But there are two respects in which the general approach has changed.

Credit and debit cards.

24.2. First, the EU has introduced a Multilateral Interchange Fess Regulation which will prohibit surcharging and impose a cap on interchange fees of 0.2% for debit cards and 0.3% for credit cards. The cap will initially apply to cross-border payments transactions from when the Interchange Fee Regulation is implemented and 22 months later to domestic transactions. The Commission expects this to result in significant cost-savings for merchants and, due to the prohibition on surcharging, cheaper goods and services for consumers. In the UK this will not have an impact on debit cards as interchange fees are already below the limit. But it may lead to a reduction of about a fifth on credit card interchange fees.

Investments.

24.3.1. Secondly, alongside MiFID II a Markets in Financial Instruments Regulation (MiFIR) has been introduced and this permits regulators to ban or restrict the marketing, distribution or sale of certain financial products, or to intervene in relation to certain financial activities (in the UK the FCA has had an intervention power for a while). This Regulation comes into force in January 2018. So far as consumer protection is concerned the three conditions for intervention are:

. the existence of a significant investor protection concern;

. the absence of EU regulatory requirements to address the threat; and

. (in the case of the ESMA and the EBA) the failure by a national regulator or regulators to address the threat.

24.3.2. These conditions for intervention are supported by a number of criteria set out by ESMA, and so far as consumer protection is concerned these are:

. the degree of complexity of a financial instrument or structured deposit and the relation to the type of client to whom it is marketed, distributed or sold;

. the degree of innovation of a financial instrument or structured deposit, an activity or a practice;

. the leverage a financial instrument or structured deposit or practice provides.

24.3.3. On the face of it MiFIR could be a very powerful consumer protection measure - in particular it gives two of the ESAs powers to intervene if a national regulator has failed to address a consumer protection threat - but the test will be how cautious or otherwise the regulators will be in exercising the new powers. A positive sign is that in advance of the implementation of MiFIR ESMA has been willing to issue warnings, as it did earlier this year to caution against the sale of contracts for differences, binary options, and other speculative products to retail investors.

25. How do I complain if something goes wrong?

25.1. The UK has a long-standing record in providing a dispute resolution service where consumers feel that they have not received a satisfactory answer to their complaint from the firm with whom they were dealing. Before 2000 the arrangements were fragmented with the principal bodies concerned being the Insurance Ombudsman Service, the PIA Ombudsman (the main body for investment business) and the Bank and Building Societies Ombudsman. These bodies were merged into a new Financial Ombudsman Service (FOS) in 2000 and the FOS gained its powers when the Financial Services and Markets Act 2000 was passed in 2001.

25.2. In the area of dispute resolution the EU lags well behind the UK. It was not until 2013 that it published an Alternative Dispute Resolution Directive (ADR). The ADR came into effect in July 2015 and it gives all traders across Europe voluntary access to an ADR entity which meets a set of minimum standards. The ADR is a horizontal Directive covering different business sectors. It is another example where the EU has not adopted a fully joined-up approach with other measures specific to financial service sector as the FCA has pointed out:

"that once such an EU ADR framework is agreed, subsequent sectoral measures should recognise this and not seek to introduce their own variations with slightly different requirements, particularly since a number of financial services firms operate in more than one sector. For example, MiFID II requires firms to explain in final response letters that the consumer can refer their complaint to an ADR entity and that they may also be able to go to court. Telling consumers they can

also go to court could cause confusion – consumers may be better off using an ADR entity in the first instance because it is free for consumers".[57]

25.3. Alongside the ADR the EU published an Online Dispute Resolution Regulation the key feature of which is the creation of an Online Dispute Resolution platform (ODR platform). This is a web-based platform developed by the European Commission and which has been available since February 2016. Its objective is to help consumers resolve their disputes about online purchases of goods and services out-of-court at a low cost in a simple and fast way. It allows consumers to submit their disputes online in any of the 23 official languages of the European Union. The ODR platform transmits the disputes only to the dispute resolution bodies communicated by Member States.

25.4. The Department for Business, Innovation and Skills was responsible for implementation of the ADR in the UK. It published a consultation paper in 2014. It noted in this the long-standing ADR mechanism in the UK for financial services in the shape of the Financial Ombudsman Service.

25.5. During the EU's consultation on the ADR in 2009 the Panel noted that it had:

" *previously raised concerns about fragmentation of cross-border ADR and therefore we very much welcome this initiative ... We believe that this should be a priority area for action by the Commission so that rights to provide financial services cross-border are accompanied by obligations and mechanisms to deal with complaints from consumers when problems arise".* [58]

25.6. In the area of dispute resolution UK consumers have gained nothing from the EU. The FOS has power to issue binding decisions in favour of consumers and the FOS is free of charge to consumers. In many EU countries decisions of the ADR are not binding and compensation can only be awarded with the agreement of the firm concerned. However, the ODR is a positive for UK consumers, even though few of them actually purchase financial products cross-border (the FOS say that thus far it had not received any complaints through the ODR).

25.7. One of the items in the Joint Committee of the ESAs' work programme for 2016 is to focus on how firms have implemented complaints handling guidelines previously issued by individual ESAs with the aim of achieving standard application across the EU.

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[57] *"The Financial Conduct Authority's Response to the European Commission's call for Evidence on the EU Regulatory Framework for Financial Services",* February 2016.

[58] *"Consumer Panel response to DG Markt consultation document: Alternative Dispute Resolution in the area of financial services",* 2009.

26. Will I get compensated if a firm fails?

26.1. Turning to the issue of compensation for consumers, there is a mixed picture as regards the UK and the EU. Prior to 2000 the UK had a number of compensation schemes: the Depositors Protection Scheme; the Building Societies Investor Protection Scheme; the Investors Compensation Scheme; the policyholders Protection Scheme and the Friendly Societies Protection Scheme. In 2000 these were merged into the Financial Services Compensation Scheme (FSCS), which like the Financial Ombudsman Service, took on its powers once the Financial Services and Markets Act was passed. Although a single scheme differences remained in the extent of compensation cover among various sectors.

26.2. Looking to the EU, compensation arrangements here also developed on a sectoral basis and it is an area where there is still unfinished business. The first area to be addressed by the EU was deposit taking. A Deposit Guarantee Schemes Directive was adopted in 1994 and required Member States to provide a deposit guarantee scheme to protect certain types of deposit up to €100 000 per deposit. This Directive was recast and implemented in July 2015. So far as the main compensation limit was concerned this was kept at €100 000 per deposit. This limit applies to all aggregated accounts at the same bank. Should a bank operate under different brand names, the sum of all deposits by the same depositor at the bank is covered under one limit of €100 000. For this reason, depositors must be informed that deposits held under different brand names of the same bank are not covered separately.

26.3. There were important changes in other areas. So-called ‘temporary high balance’ deposits enjoy higher coverage. This applies to deposits relating to real estate transactions (e.g. the sale of a house) as well as those related to specific life events (such as marriage, divorce, retirement, etc.). However, such coverage is limited in time (up to a maximum of 12 months, to be determined by each member state).

26.4. Under the old directive, depositors had to be able to access their funds within 20 working days after a bank failure. The deadline for repayments has been reduced from 20 to 7 working days.

26.5. The new Directive also introduced changes to the funding of schemes (so that consumers do not have to wait a long time before a scheme has sufficient funds to pay them out) and also ensures that for branches established in other Member States, repayment to depositors of those branches is made by the DGS of the host Member State under the instructions of the DGS of the home Member State.

26.6. Finally, there are information requirements to ensure banks tell their customers at least once a year about compensation cover.

26.7. There are a number of positives to the new Directive but also one inadvertent negative which the UK regulator, the PRA, could have addressed had it wished. The normal compensation limit in the Directive is denominated in Euros. The UK does not belong to the Euro zone. As exchange rates have changed the sterling equivalent of the Directive limit has reduced. The PRA could have kept the FSCS compensation limit for deposits at £85,000. Instead it used the opportunity to reduce the compensation level for consumers to £75,000. It is to credit of the banking industry spokes body, the BBA, that it opposed this reduction:

"It is disappointing that this protection has been reduced from £85,000. It had become well known and recognised by customers and banks alike".[59]

26.8. The second area where the EU introduced compensation arrangements (again long after the UK) is for investment business. The Investor Compensation Scheme Directive (ICSD) has since 1997 protected investors who use investment services in Europe by providing compensation in cases where an investment firm fails. In 2010 the EU put forward proposals for improving the ICSD. In particular, increasing the level of compensation for investors from € 20 000 to € 50 000 per investor. There were also other improvements suggested similar to those for the DGS: faster payouts; better funding; more information for consumers. The EU has, however, shelved these plans. In its response to the CMU Green Paper, the Panel expressed:

" it's disappointment at the Commission's decision to formally withdraw its proposal for a revised ICSD. A concerted effort by the EU to encourage consumers to invest would have provided the ideal background for modernising the ICSD, including a higher level of minimum compensation and more effective signposting requirements to ensure consumers are aware of the level of protection they enjoy."[60]

26.9. As noted earlier, the UK has long had compensation arrangements for insurance, starting with the Policyholders' Protection Scheme. The EU had proposed in 2010 the introduction of an Insurance Guarantee Schemes Directive to provide last-resort protection to consumers when insurers are unable to fulfil their contract commitment, offering protection against the risk that claims will not be met if an insurance company is closed down. This is another proposal EU has not pursued.

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[59] https://www.bba.org.uk/news/press-releases/bba-response-to-changes-to-depositor-protection-limits/#.V_sK7bmQLcs
[60] *"Financial Services Consumer Panel response to the Capital Markets Union Green Paper",* 2015.

26.10. Taken as a whole, there does not seem much that the EU has done for UK consumers in the area of dispute handling and compensation notwithstanding improvement in some areas, such as cover for temporary high deposits. The UK's Financial Ombudsman Service remains probably the best ADR in Europe and UK depositors, policyholders and investors continue to get compensation coverage from the FSCS. On the downside, the fact that the DGS is denominated in Euros has led to a reduction in UK compensation coverage for depositors. UK consumers lost money depositing savings in Icelandic banks and buying car insurance sold through Irish providers and did not receive the level of compensation that they would have got if the providers had been based in the UK. If the EU is to create a single market for retail financial services it must as a priority improve the arrangements for handling consumer complaints and compensating consumers when firms default.

27. Single Market for retail financial services

27.1. There is little point in EU Directives and Regulations seeking to harmonise financial services regulation across Europe unless that regulation is accompanied by the transaction of significant cross-border business. In the absence of such cross-border business EU regulation is basically Brussels making rules to govern the business UK firms do with UK consumers. All the indications are that at present UK consumers make little use of the single market. Even if the UK had remained part of the EU there is little to suggest UK consumer usage of the single market would have changed any time soon.

27.2.1. In theory, the single market is a "good idea" as the Panel has recognised:

"... the tangible benefits that consumers of financial services may derive from greater competition across national borders within the Single Market, widening access and exposing established national providers to increased competitive pressures to increase quality or lower their prices".[61]

27.2.2. Even consumers, according to YouGov, could themselves see the theoretical benefits:

"Qualitative evidence showed that while consumers accepted that purchasing from providers outside the UK may provide a cheaper offering or a better product they would not proceed as their concerns over emotional issues such as dispute resolution and language outweighed the potential benefits".[62]

[61] *"Green Paper on retail financial services",* 17 March 2016.
[62] *"Consumer Appetite for Cross-border Shopping in Financial Services: A Report Prepared for the FSA",* April 2010.

27.3. A simple increase in the number of products sold cross-border would not of itself indicate that the single market was working properly for consumers as the FSUG has pointed out:

"An increase in cross border selling/ buying of financial products and services does not per se mean that financial markets are integrating in a way that improves the financial welfare of citizens. There is a very big difference between an increase in market activity and effective integration ... Moreover, more choice per se is not the same thing as better quality choice ...Therefore, if the Retail Market Integration is to be effective it should mean: more citizens getting access to better value, truly innovative products and services provided by more efficient, accountable markets that behave with integrity, and firms that treat consumers fairly; more citizens having access to effective redress schemes; and a significant improvement in consumer confidence and trust in financial services". [63]

27.4. The Panel has also expressed caution about reliance on competition to help create a single market. In its response to the Green Paper on retail financial services it said:

"Consumers cannot drive competition as they can in some other markets. There are missing signals about quality in some products (like insurance) or pricing in others (current accounts)that skew the market and create barriers to entry for new players. The large information asymmetries mean that mis-selling is an ever present risk. Cognitive overload and human bias mean competition within domestic markets is already a challenge. Initiatives to increase cross-border sales must improve consumer outcomes, rather than complicate them".[64]

27.5. In its report the FSUG highlighted barriers to an effective single market within each of the specific product sectors it has examined but it then went on to suggest that the Commission might get better results by tackling some of these cross-cutting barriers which the FSUG categorised under three broad groups:

. *Demand side factors (sometimes known as 'pull' factors): demand side factors can inhibit the ability of financial users to exercise positive influence on provider/ intermediary behaviour and market efficiency. These factors include consumer preferences and behavioural biases, consumer awareness, confidence and trust, language barriers and cultural issues;*

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[63] *"FSUG Retail Financial Markets Integration"*, October 2015.
[64] *"Green Paper on retail financial services"*, 17 March 2016.

. Market/ supply side/ structural factors: these relate to market structures, business models, distribution models, the behaviours and practices of financial providers and intermediaries, and product design;

. Public policy/ legislative/ regulatory factors: these relate to measures aimed at promoting the interests of local providers; legislation or regulation in specific member states which may unreasonably inhibit cross border activity by affecting the ability and willingness of firms to operate on a cross-border basis; or the inconsistent application and enforcement of EU legislation and regulation.[65]

27.6. One significant piece of evidence on the extent of cross-border trade was a report by YouGov (and commissioned by the FSA) , "Consumer Appetite for Cross-border Shopping in Financial Services" published on 2010. It reported that:

"Current levels of cross border transactions for financial services remain modest with less than 1% of consumers having bought a financial product at a distance from a company situated in another member state Removing perceived hard barriers to cross border shopping, for example by working towards common regulatory frameworks and dispute resolution procedures, is seen as a necessary precondition that consumers expect policy makers to address. However, such actions are by no means sufficient to change consumer attitudes. Cross border purchase of financial products is seen to carry a degree of risk over and above that involved in buying products from UK based providers and these risks outweigh any potential benefit to be gained from buying cross border. In addition there exist powerful underlying attitudinal barriers which play a critical role in shaping the mindset of consumers. These cannot be overcome through regulatory policy intervention. The evidence suggests that the vast majority of UK consumers are in practice currently unlikely to take up the 'benefits' of a more open market in financial services even if that market can be created".[66]

27.7. Another piece of evidence comes from a special Eurobarometer survey on retail financial services published in 2012.This reported that:

" the level of cross-border activity in this area is extremely small – 94% of respondents say they have never bought a financial product in another Member State and 80% say that they would not consider doing this in the future. The reasons why citizens do not buy financial products in other countries tend not to be tangible barriers such as language or consumer rights, rather it is the lack of perceived need or the perception that everything can be purchased at home.

[65] *"Green Paper on retail financial services",* 17 March 2016.

[66] *"Consumer Appetite for Cross-border Shopping in Financial Services: A Report Prepared for the FSA",* April 2010.

Given the strong levels of consumer inertia seen in the retail financial sector even at a national level, communicating to people the benefits of cross-border purchasing will be a considerable challenge".[67]

28. Conclusion

28.1. UK financial services regulation and that originating from the EU have been closely intertwined over the years such that it is often difficult to identify who is the progenitor of a particular measure. There is no doubt that some aspects of recent EU measures yet to be implemented could enhance consumer protection and competition but equally there are other aspects of those measures about which consumer bodies have had reservations. Many of the EU measures come into force from the end of 2016 through to 2018, when the UK's exit from the EU may be imminent. Once the current block of Directives have been implemented it is likely to result in a period of "planning blight" with the industry being able to make a reasonable case that it should not be subject to the costs of further regulatory change so soon after the major task of implementation of the Directives.

28.2. If the UK remains in the single market opportunities to reshape regulation present themselves as Directives come up for review. For example, there should be an opportunity in 2018 for a comprehensive review of the various Directives affecting the retail investment market. The Commission has said it will:

"undertake a comprehensive assessment of European markets for retail investment products, including distribution channels and investment advice ... The assessment will identify ways to improve the policy framework and intermediation channels so that retail investors can access suitable products on cost-effective and fair terms. The assessment will examine how the policy framework should evolve to benefit from the new possibilities offered by online based services and fintech."[68]

There will also be opportunities to influence the regulation of retail financial services as the EU Commission follows up on its Green Papers on the Capital Markets Union and on Retail Financial Services. The work of the ESAs and of their Joint Committee will also provide a channel through which the Panel can influence regulation and supervision at a more detailed level.

29. Thanks.

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[67] *"Retail Financial Services - Special Eurobarometer 373"*, 2012.
[68] *"Action Plan on Building a Capital Markets Union", September 2015.*

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