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Future Regulatory Framework Review
Financial Services Strategy
1 Horse Guards Road
HM Treasury
London SW1A 2HQ

9 February 2022

By email: FRF.Review@hmtreasury.gov.uk

Dear Sir / Madam,

Financial Services Consumer Panel response to HM Treasury future regulatory framework review: proposals for reform

The Financial Services Consumer Panel is an independent statutory body. We represent the interests of individual and small business consumers in the development of policy and regulation of financial services in the UK. We wish to be clear from the outset that when we refer to 'consumers' in this response, we refer to both individuals and SMEs. Likewise, when we comment on the regulatory framework, we comment on how it applies to both individuals and SMEs.

Our own vision for the future of financial services regulation is set out in our response to HM Treasury's previous consultation¹. We remain of the view that the cornerstone of the future regulatory framework is the new Consumer Duty (NCD). To be truly effective, the NCD needs to be enshrined in a regulatory framework that properly upholds its aims and objectives. This includes enshrining the NCD itself in legislation, as well as making several supporting statutory changes. For example, the consumer responsibility principle (s3B(1)(d) FSMA 2000) should be amended so that consumers are only deemed able to take responsibility for their decisions where firms have met their own obligations under the NCD. We also continue to support calls for the FCA to be required to have regard to financial inclusion.

We welcome HM Treasury's commitment to making the regulatory framework fit for the future. However, we would stress that the framework must work *for consumers* and be flexible enough to ensure their diverse needs can be met. Consumer protection is an ultimate aim of regulation and consumers' ability to navigate and have trust and confidence in the system is vital to reduce harm and ensure market stability. We are concerned that the proposals in this consultation do not take into account sufficiently the interests of consumers and, in some areas, risk creating a framework that could lead to consumer harm. There are already significant and ever-growing power asymmetries between firms and consumers; we believe regulation should level this playing field.

First, we do not support the introduction of a growth and international competitiveness objective even if that objective is secondary to the FCA's strategic objectives. We do not

¹ https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_hmt_frf_review_phase_ii_20210219_v2.pdf

believe the secondary nature of the objective is sufficient to mitigate the risk that consumer protection is traded off against competitiveness and therefore diluted.

Secondly, we are concerned about the cumulative effect of the proposals in this consultation relating to the scrutiny of regulation. Our concerns relate to three main areas: compromising regulatory independence; increasing complexity and cost; and preventing fast and agile regulation.

1. **Regulatory independence.** The proposals in this consultation give HM Treasury, and therefore government, significantly more input into and oversight of regulatory priorities. We are concerned that this undermines regulatory independence, which is critical for the stability of - and consumer confidence in - the overall regulatory system.
2. **Complexity and cost.** We are concerned that the proposals add additional complexity into an already complicated system. The numerous new processes create additional layers of scrutiny and responsibility which make the system more difficult to navigate and understand (for firms and consumers). The additional complexity will also increase the overall cost of regulation and this will ultimately be passed on to consumers.
3. **Speed and agility.** The additional processes proposed in this consultation risk slowing down change in response to new and growing risks. This is unsustainable given the speed of technological change and product innovation. It also runs counter to the FCA's ambition (which we support) to be a faster, more adaptive and more agile regulator that has a greater focus on pre-emptive action. We welcomed the FCA's rapid response to the Covid-19 crisis in early 2020, where urgent changes were made to protect and support consumers and firms without the formal processes required in normal times. It's crucial that such flexibility to act at speed is retained in the system.

It is also important to consider the impact of the proposals on resourcing. Moving onshored EU legislation into the FCA's Handbook will be a significant undertaking for regulators and require resource. But it is not only regulatory resource that will be needed; those who scrutinise regulation, including HM Treasury, Parliament and the Panels, will also face an additional burden. Whilst we fundamentally agree with the FCA being given responsibility for firm-facing onshored EU requirements, and to have the opportunity to adapt them where appropriate, we encourage the government to bear in mind that this is in addition to an already broad (and expanding) remit for the FCA. Without commensurate resource, which will fall chiefly on levy payers, this could create significant operational challenges.

In addition to our concerns about what is in the consultation, we are also concerned about what is missing. Most importantly, we are disappointed not to see more being done to hardwire the consumer voice into every part of the regulatory framework. The proposals in this consultation amplify the voice of HM Treasury and government without a much-needed corresponding amplification of the consumer voice. Without consumer input at the policy-making stage, regulation simply won't work for consumers.

All the above being said, we do welcome the consultation's overall theme of improving transparency around regulation. Transparency is vital in enabling the proper scrutiny of regulation and allowing those with responsibility for policy making and implementation to be held to account. In turn, this improves market and consumer trust in regulation.

Finally, this is the third phase of the Future Regulatory Framework Review and we would encourage HM Treasury to review and evaluate the action resulting from each phase to ensure that it meets the stated aims.

Our responses to the specific questions are included at Annex A below.

Yours sincerely,

Wanda Goldwag
Chair, Financial Services Consumer Panel

ANNEX A – Responses to questions

Question 1: Do you agree with the government’s approach to add new growth and international competitiveness secondary objectives for the PRA and the FCA?

No. We already expressed our concern about the FCA having a growth and international competitiveness objective in our response to the previous consultation. Our concerns are primarily that necessary consumer protections would be diluted in a trade off with competitiveness. Regulators would have to actively pursue an objective (even a secondary one) which would make such trade-offs a normal part of the regulatory process.

We do not believe the risk of growth and international competitiveness being pursued at the expense of consumer protections is wholly mitigated by it being a secondary objective. We struggle to square such an objective with the Government’s position (echoed by many in the industry) that high regulatory standards are a competitive advantage for the UK.

Additionally:

- Other proposals in this consultation give HM Treasury significantly increased influence over regulation. If growth and international competitiveness are a concern, there are ample tools government and Parliament could use to adjust the system, without the need for a regulatory objective.
- The proposals empower regulators to review former EU rules as they are transferred into their rule books. This creates an opportunity to adjust any requirements which do not suit the UK environment.
- There is some consensus that efforts to balance competitiveness and consumer protection drivers led to the “light touch” regulatory approach which contributed to the financial crisis in 2008-09.

Question 2: Do you agree that the regulatory principle for sustainable growth should be updated to reference climate change and a net zero economy?

Yes. We believe this is in line with the FCA’s ESG strategy, which we support. It will be important for regulators to consider sustainability in the round, including but not limited to supporting the government’s commitment to net zero by 2050.

We note that this is the only regulatory principle which the government proposes to amend in the consultation. We previously supported calls for the FCA to be required to have regard to financial inclusion. In this consultation, the government responds to those calls, stating its belief that the FCA’s current initiatives (on issues such as access to cash and vulnerable customers) demonstrate it is already effective in promoting inclusion under its existing objectives and regulatory principles.

Whilst we are supportive of the FCA’s work under the initiatives mentioned, being required to have regard to inclusion would ensure inclusion issues are considered in everything the FCA does. We believe the FCA should encourage the widespread adoption of an inclusive design approach across the entire customer journey, so that products and services are accessible to, and useable by, the greatest number of people with a diverse range of needs and capabilities. This approach will benefit all consumers, not just those who are vulnerable or have been traditionally excluded or disadvantaged. Being required to have regard to inclusion would help the FCA embed this approach across all of its functions, not just in specific projects or policy areas. This should lead to consistently better outcomes for all consumers.

We have also previously called for the consumer responsibility principle (s3B(1)(d) FSMA 2000) to be updated so that it better reflects the ever-growing asymmetries between firms and consumers. We continue to believe this is the case, even more so now the proposals for the NCD have been published. We believe the principle should be updated so that

consumers are only able to take responsibility for their decisions where firms have met their obligations under the NCD. This would help create a statutory framework that supports the aims and objectives of the NCD, which itself should be enshrined in legislation.

Question 3: Do you agree that the proposed power for HM Treasury to require the regulators to review their rules offers an appropriate mechanism to review rules when necessary?

We are pleased to see the government acknowledging the importance of independent, technically-expert regulators throughout the consultation. As we said in our response to the previous consultation, independent regulators are essential for the stability of - and consumer confidence in - the regulatory system.

In order to preserve this independence and consequent stability, there must be appropriate safeguards around the proposed power for HM Treasury to direct rule reviews. For example, new FCA rules must be allowed sufficient time to embed before they are reviewed. Any use of the rule review powers should come after the FCA has undertaken an evaluation of the new rules and the outcome of this evaluation has been published. The government should also be mindful that the desire for certain rules to be reviewed may change with Parliamentary terms. Therefore, controls should be put in place to prevent regulation becoming volatile and unpredictable at points of political change.

Furthermore, HM Treasury would likely come under external pressure to direct the FCA to conduct a rule review. Whilst such calls could come from both industry and consumer groups, it is important to note that industry stakeholders have much more resource available to make their voice heard – both as individual firms and when they come together via trade bodies. Here we refer to the example referenced in our previous response: in 2020, HM Treasury met with dozens of industry stakeholders and very few, if any, consumer groups². Lobbying for particular rules to be reviewed would therefore very likely be unequal. This is a further example of why it is so important to hardwire the consumer voice into the regulatory system.

We also believe the FCA should have reciprocal powers to request that HM Treasury consider changes to the regulatory perimeter where it has identified emerging risk from an unregulated product type or activity. We recognise there are existing mechanisms for this, but they are too slow and cumbersome to be fully effective. For example, the [Woolard Review](#) saw the FCA recommend that buy now pay later products be brought within the regulatory perimeter and yet, a year later, consultation on how to do this is ongoing.

We note the government is still considering further arrangements for regulators to be required to consult HM Treasury on proposed rule changes. We would not support such arrangements as we feel they would impinge on regulatory independence. There is already extensive early engagement between the FCA and HM Treasury and a statutory requirement to 'consult' HM Treasury may, in reality, result in HM Treasury having undue (and un-transparent) influence over the formation of rules. It could also lead to lengthy debates or negotiations which would slow down the overall system. The FCA is a technically-expert regulator and it is this expertise that should shape rule-making.

Overall, we are concerned that the proposed new powers for HM Treasury will amplify its voice in the system without a similar reinforcement of the consumer voice. We continue to believe the consumer voice should be hard-wired into every part of the regulatory framework. Without this, regulation simply won't work for consumers.

² https://www.gov.uk/government/collections/senior-officials-expenses?utm_medium=email&utm_campaign=govuk-notifications&utm_source=36c57e57-f72a-45bb-82d3-f5c430465758&utm_content=daily#2020

Question 4: Do you agree with the proposed approach to resolve the interaction between the regulators' responsibilities under FSMA and the government's overseas arrangements and agreements?

Yes. This will help ensure market stability and facilitate smooth international transactions. The UK financial services industry does not exist in a bubble and it is important it is able to dovetail with international requirements. In the event of clashes between trade agreements (or between trade agreements and regulatory objectives), there should be clear guidance as to how such clashes will be resolved.

Question 5: Do you agree that these measures require the regulators to provide the necessary information on a statutory basis for Parliament to conduct its scrutiny?

We have no concerns about the proposed measures in this area. We agree with the government's view in para 5.7 that the existing Parliamentary scrutiny arrangements are sufficient.

Question 6: Do you agree with the proposals to strengthen the role of the panels in providing important and diverse stakeholder input into the development of policy and regulation?

We welcome the proposals to increase transparency around the work of the Panels. As outlined in our covering letter, transparency is critical to the effective scrutiny of and trust in regulation. We will work with the FCA to ensure it has the information it needs to meet any new requirements resulting from these proposals.

We note the discussion around membership and representation of the Panels. Speaking for the Consumer Panel only, we cover the entire range of the FCA's remit which is extremely broad. Our work is also influenced by external factors, such as areas of emerging harm, market changes and shifting regulatory priorities. We therefore need to maintain a Panel with a wide range of knowledge, expertise and experience. It would not be practicable to maintain a Panel with experts on every issue.

We should also be clear that we represent the interests of consumers and SMEs at a policy level and members are recruited for that specific role. There are other ways in which consumers can and should be represented in the regulatory process: via research and via groups and forums which directly bring specific types of experience to bear on specific issues and areas of policy. The creation of ad hoc advisory panels and task and finish working groups, should also be considered. The Panel remains open to discussion about its role but changing its composition and remit to try and fulfil a number of distinct functions would be unwieldy and ultimately ineffective. This is why it is so important that more is done to expand, resource and hardwire the consumer voice more fully into the system.

We agree with the conclusion of the previous consultation that the statutory Panels work satisfactorily. Our concern however is that the Financial Services Consumer Panel alone is not sufficient to provide the necessary consumer voice in every part of the system. There is also a clear imbalance between consumer and practitioner input (see our comments under Question 3 above).

Therefore, changes the Government might consider include

- Whether HM Treasury and the Prudential Regulation Authority (PRA) should be required to establish statutory independent consumer panels.
- Whether regulators should be required to establish arrangements to bring a diversity of consumer experience to bear on policy making. We are aware that many charities and some businesses operate panels and forums of end consumers

from which they gain 'real life' insight and discuss emerging problems. A similar model could usefully inform regulation.

- Whether FCA and PRA should require firms to establish consumer forums as part of their governance. This would assist them in meeting the requirements of the NCD and draw on experiences from, for example, the water sector.

Question 7: Do you agree that the proposed requirement for regulators to publish and maintain frameworks for CBA provides improved transparency to stakeholders?

Yes, we support the FCA's continued publishing of how it will assess the costs and benefits of its interventions³. We would like to see the FCA taking this opportunity to improve how it conducts cost-benefit analyses (CBAs), in line with the comments we made in our response to the previous consultation. In particular, we note that the costs of proposals are often easier to quantify, and therefore better articulated, than the benefits. Industry has the time, data and resources to provide an assessment of costs, and therefore influence the cost side of the analysis, but consumer groups do not have similar time, data and resources to influence the benefits side. This is a further example of why the consumer voice needs to be strengthened in the system. The FCA must improve its assessment of the benefits in order to provide more accurate CBAs.

Question 8: Should the role of the new CBA Panel be to provide pre-publication comment on CBA, or to provide review of CBA post-publication?

We can see the potential benefits of a new CBA Panel to drive improvements to how the FCA conducts CBAs (such as those we suggest in answer to Question 7 above). However, we share the concerns raised in the consultation about the potential impact of this process on the speed and efficiency of policy-making, particularly if the new CBA Panel was to provide pre-publication comment on CBAs. We welcome the FCA's ambition to be a faster, more agile and more adaptive regulator as part of its Transformation programme and we urge the government to consider the potential impact of new scrutiny arrangements on this ambition. We also supported the FCA's rapid response to the Covid-19 crisis in early 2020, where urgent changes were made to protect and support consumers and firms without the formal processes required in normal times. It's crucial that such flexibility to act at speed is retained in the system.

On balance therefore we think the primary role of a CBA Panel should be to advise FCA on improving its CBA techniques and processes over time, with reference to ex-post reviews of past examples.

Question 9: Do you agree that the proposed requirement for regulators to publish and maintain frameworks for how the regulators review their rules provides improved transparency for stakeholders?

Yes. It is important that government, industry and consumers can understand the impact and effectiveness of regulation. This is vital in maintaining trust in financial services markets.

As set out in our response to the previous consultation, we believe that the FCA can improve its evaluation process. We hope that any requirement to publish a framework would be used as an opportunity to make these improvements.

It is not only the more traditional evaluations that can be improved. We believe the FCA should set out clear outcomes and measurable metrics whenever it exercises its rule-

³ See here: <https://www.fca.org.uk/publication/corporate/how-analyse-costs-benefits-policies.pdf>

making or other policy-making functions. Outcome measures should be SMART, capturing both quantitative and qualitative indicators, and it is expected that some of these may conflict with each other. The FCA has indicated it would like to get better at this as part of its Transformation and a requirement for it to publish and maintain a framework around evaluation and monitoring will help deliver this. Ultimately, it would clarify what the FCA is trying to achieve and how it is progressing.

We agree with the government's conclusions that additional scrutiny arrangements, such as an independent external body or an alternative dispute resolution mechanism, would be overly burdensome, costly and duplicative of existing functions. We believe the proposed requirements and the improvements to evaluation and monitoring outlined above will provide the transparency needed to understand the effectiveness of FCA rules and hold the regulator accountable.

Question 10: Do you agree with the government's proposal to establish a new Designated Activities Regime to regulate certain activities outside the RAO?

We support the overall approach of UK regulators onshoring EU requirements and doing so in such a way that there are not sudden gaps. Gaps in regulation, or confusion amongst firms about which requirements apply and when, could destabilise markets and undermine consumer confidence, ultimately leading to consumer harm. We are concerned that the Designated Activities Regime (DAR) as proposed could exacerbate and perpetuate confusion about the regulatory perimeter and allow firms to benefit from the 'halo effect' which has caused significant consumer harm in the past⁴. We believe the operation and understanding of regulation should be clear, unambiguous and so obvious that consumers cannot be misled. In our view the DAR as proposed does not meet this threshold.

Question 11: Do you agree with the government's proposal for HM Treasury to have the ability to apply "have regards" and to place obligations on the regulators to make rules in relation to specific areas of regulation?

No. From the consultation it appears these activity-specific "have regards" would be used in a narrow set of circumstances. However, there is no guarantee that this would continue to be the case once introduced. As with the competitiveness objective, the government would be fundamentally changing the nature of the regulatory framework by introducing these activity-specific "have regards" and any unintended consequences must be fully considered. For example:

- The number of activity-specific "have regards" could increase significantly in the future, increasing the overall complexity of the system and diluting the impact of existing "have regards".
- New activity-specific "have regards" could be introduced with a much wider scope than the narrow potential uses outlined in the consultation. This could impinge on regulatory independence and have the effect of taking policy-making out of the technically expert hands of the regulators.

⁴ For example, in relation to London Capital and Finance. See the Chapter 6, Section 5 of the Gloster report:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945247/Gloster_Report_FINAL.pdf