

The European dimension of financial services policy:

## **Financial Services Consumer Panel engagement with the EU**

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### **Introduction**

This paper outlines why and how the Financial Services Consumer Panel engages with the EU institutions on European legislation.

*Last updated April 2015*

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## **1. Why does the Panel engage with EU decision-makers?**

### **1.1 EU law overrides UK law**

The status and direct effect of EU law in the UK is a controversial political topic. Under the terms of the 1972 European Communities Act, the UK Government and courts recognise the 'primacy' of EU law, meaning that EU law takes precedence over UK national law where the two conflict.

As such, 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.

The EU's legislative process is much slower and requires cooperation between 28 different countries and various EU-level institutions, so benefits of 'good' legislation are locked in for longer and cannot easily be undone at UK-level unilaterally. Conversely, EU laws that do not work for consumers or which lower protection in the UK are equally difficult to amend.

### **1.2 Passporting requires minimum standards**

One of the principles underpinning EU financial services policy is 'passporting'. Essentially, this allows a financial services firm which is authorised in any European Economic Area country (the EU plus Norway, Iceland and Liechtenstein) to operate in the domestic market of another EEA Member State without requiring separate authorisation in that country (although a registration requirement does apply).

The right to 'passport' applies only for products or services covered by a specific Directive and must be granted explicitly; it is not automatic. In areas where passporting is allowed, which include investment management, deposit-taking and the provision of payment services, a firm from elsewhere in the EEA can therefore deal directly with UK consumers. A pre-condition is that the firm must be authorised by the relevant regulator in their home Member State, and register with the FCA.

Accordingly, the Panel has an interest in ensuring that EU legislation contains minimum conduct and consumer protection standards that are applicable across Europe.

### **1.3 Increasing importance of the European Supervisory Authorities**

At EU-level, financial supervision is the responsibility of the European Supervisory Authorities or ESAs: the European Securities and Markets Agency (ESMA), the European Banking Agency (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA).

The ESAs are to a large extent responsible for the detailed technical rules that underpin implementation of key pieces of legislation such as the Markets in Financial Instruments Directive, the Payment Accounts Directive and the Insurance Mediation Directive. These rules, once formally adopted, are legally binding and therefore set limitations on the freedom of the FCA to set its rules covering the same areas.

They also aim to improve coordination between national supervisory authorities, such as the FCA, and raise standards of national supervision across the EU. In addition, ESMA has direct supervisory responsibilities for credit rating agencies and trade repositories.

The role of the ESAs is currently under review by the European Commission, raising the possibility of changes to their governance, powers, funding and scope. In particular, some European policy-makers want to expand the Authorities' direct supervisory powers.

This makes it important for the Panel to stay aware of the ESA's work and to bring its influence to bear where necessary, for example on the implementation of the Payment Accounts Directive or the second Markets in Financial Instruments Directive.

#### **1.4 Lack of consumer representation at EU-level**

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 groups representing users of financial services.

The Consumer Panel is one of the consumer groups in Europe that engages regularly with the EU institutions and ESAs on financial services policy. This is particularly noticeable when analysing the origin of consultation responses, which are nearly always submitted by a myriad of trade associations.

Without the Panel's interventions, consumer representation at EU-level would drop even further. Well-reasoned and timely interventions by the Panel therefore allow it to argue for changes that benefit consumers in the UK and EU-wide.

For these reasons, it is important for the Panel to engage in a timely and constructive way with European policy-makers so that EU legislation works in the best interest of UK consumers.

## 2. How does the Panel engage with EU decision-makers?

- **Stakeholder groups**

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

- **Consultations**

Public consultations at EU-level originate mostly with the European Commission (on new major policy initiatives) and the ESAs (on technical details for the implementation of legislation that has been agreed). The Panel has a policy of responding to most if not all consultations within its remit, one of the few consumer groups to do so in the area of financial services.

- **Position papers**

During legislative procedures, the Panel can choose to issue detailed position papers that outline its stance on specific provisions or proposed amendments. Such papers are useful for Members of the European Parliament in particular as they can provide at-a-glance information on how the Panel would like them to vote.

- **Meetings**

Face-to-face meetings with decision-makers provide an opportunity to familiarise people in Brussels with the work and objectives of the Panel.

## 3. How does the EU legislative process work?

### 3.1 Competences

The EU operates under the principles of 'conferred powers'. This means it can only legislate in areas where it has been explicitly mandated to do so by the EU Treaties. For example, this system prevents the EU from adopting an EU-wide minimum wage or changing income tax rates because it has not explicitly been given the power to do so.

The EU has a mandate to adopt financial services legislation as part of its objective of establishing a Single Market for the provision of services.

### 3.2 Pre-legislative phase

New EU legislation (including amendments to existing laws) can only be proposed by the [European Commission](#), the EU's executive arm and civil service.

#### 3.2.1 The European Commission

The Commission is headed by 28 Commissioners (one for each Member State) who are political appointees, often former Prime Ministers or other senior politicians.

As an institution, the Commission is made up of a number of directorates-general, which are analogous to UK Government departments. It is in these departments that draft legislation is prepared. For the Panel, the main Directorates-General of interest are Financial Services ('FISMA') and Justice & Consumers.

#### 3.2.2 Right of initiative

The Commission's right of initiative, its ability to table a legislative proposal or refuse to do so, is absolute: it cannot be forced to propose a particular piece of legislation, or conversely be prevented from doing so. However, its proposals can only become law with the consent of the EU's legislature (the European Parliament and the Council, discussed below).

The Commission routinely consults on new policy initiatives, but there is no systematic publication of draft bills before they are formally tabled. Each proposal is also accompanied by an impact assessment.

### 3.3 Legislative procedure

After the Commission tables a legislative proposal, it must be approved by the EU's legislature. EU legislation, like UK legislation, has to be approved by two 'chambers': the [European Parliament](#) and the [Council](#). This is called the ordinary legislative procedure, colloquially also known as the level-1 procedure (to distinguish it from EU statutory instruments or 'level-2 measures', see below).

#### 3.3.1 The European Parliament

The Parliament consists of 751 directly-elected MEPs, of which [73 represent the UK](#). MEPs sit in groups based on their political ideology rather than nationality. Since the Conservative Party established its [own group](#) in 2009, the UK has not been represented on the centre-right [European People's Party](#), the Parliament's largest political group.

### **3.3.2 The Council**

The Council is composed of the governments of the 28 Member States, formally represented by a national Minister. Financial services policy comes within the remit of the Economic & Financial Affairs Council, of which the Chancellor of the Exchequer is a member. However, for practical purposes, the UK will usually be represented by staff from HM Treasury or specialised diplomats based at the UK's permanent representation in Brussels.

The chairmanship, or Presidency, of the Council is held by each Member State in a six-month rotational pattern. The Presidency sets the political priorities for its term in office and drafts agenda for meetings of the Council. The UK is next due to hold the Presidency in the first half of 2017.

### **3.3.3 Legislative scrutiny**

The two chambers of the EU legislature do not consider legislation one after the other, as happens in the UK Parliament. Instead, a legislative proposal is sent to both institutions simultaneously and both the Parliament and Council develop their own position on the legal text separately.

In the Parliament, the lion's share of the work on scrutinising and amending draft legislation is carried out in Committees. Financial services policy falls within the remit of the influential Economic & Monetary Affairs Committee ('ECON').

In the Council, the preparatory work is done in sector-specific working groups by diplomats from the Member States' missions in Brussels, assisted during the early stages by technical experts (e.g. HMT or FCA staff). Once technical matters have been agreed, the working group meetings continue with diplomats only to find a compromise legal text that is acceptable to all or a great majority of Member States.

In most cases, the Council decides on new legislation at the level of the Member States' national ambassadors in Brussels (collectively known as "COREPER") with the consent of their respective national Governments.

This system means that a UK Government Minister does not have to be physically present in Brussels for a decision to be taken. Although formal adoption of legislation does require a formal meeting of Ministers, in practice the actual decision will have been taken prior and the vote is a rubber-stamping exercise.

### **3.3.4 Trilogues**

Usually both Parliament and Council will each propose substantial amendments to the original European Commission proposal.

In the final phase of the legislative process, the Parliament and Council – assisted by the European Commission – engage in "trilogue" negotiations to discuss each other's amendments. During these talks, which take place behind closed doors, the final text of the legislation is agreed.

The purpose of the trilogues is to arrive at a compromise between the positions of the Parliament and Council; this can result in some level of inconsistency, either within a law itself or in relation to other laws that cover similar subject matter<sup>1</sup>.

### **3.3.5 Vote and adoption**

Once the text of the law is agreed during the trilogues, it must be formally voted on. In the European Parliament, a simple majority is sufficient for a proposal to be adopted.

In the Council, a "**qualified majority**" applies: no single EU country can veto a proposal, but more than a simple majority of 15 countries is required before a proposal can be adopted. The vote of larger Member States such as Germany or the UK will carry more weight than the vote of Luxembourg or Malta.<sup>2</sup>

It is rare for any Member State to be outvoted in the Council, as the system has a strong focus on consensus. The UK has voted in favour of virtually all major pieces of EU financial services legislation in recent years, with the notable exception of the 4<sup>th</sup> Capital Requirements Directive (due to concerns over its consistency with the Basel 3 rules and certain the cap on remuneration for bankers)<sup>3</sup>.

## **3. Level-2 measures**

As with UK Acts of Parliament, EU legislation often confers a power to adopt implementation measures or technical rules that ensure consistent application of a law. At EU-level, such statutory instruments are called implementing or delegated acts. More informally, they are known as level-2 measures because they derive their legitimacy from primary (level-1) legislation.

The power to adopt delegated and implementing acts must be explicitly conferred by primary legislation on the European Commission. In the area of financial services, they are usually based on detailed advice provided by the European Supervisory Authorities, who consult on their proposals.

After the European Commission formally adopts a level-2 measures, there is usually a right of veto for the Member States in the Council (and often for the European Parliament as well). Rejection of level-2 measures is rare.

## **4. National implementation**

After legislation is adopted by the European Parliament and Council, it becomes the responsibility of each EU Member State to ensure its implementation and enforcement. Typically, EU laws become applicable 2 to 3 years after their adoption. It is during this implementation period that the level-2 measures as described above are typically adopted.

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<sup>1</sup> For example, the lack of alignment between MiFID 2 and the second Insurance Mediation Directive, which apply to similar products (non-insurance and insurance-based investment products) but contain different requirements for distributors.

<sup>2</sup> A notable exception is in the field of taxation policy, where each EU Member State has a veto.

<sup>3</sup> <http://data.consilium.europa.eu/doc/document/ST-11515-2013-INIT/en/pdf>

The precise form of implementation in the UK and other Member States varies on a case-by-case basis, and is in part driven by the specific legal instrument of the level-1 measure. EU legislation typically takes the form of either a "Directive" or a "Regulation".

#### **4.1 Regulations**

EU Regulations are directly binding and can, for example, be relied upon by consumers in court even if there are no equivalent provisions in UK domestic law.<sup>4</sup>

#### **4.2 Directives**

Directives establish certain objectives but leave some measure of flexibility for individual countries to decide how these should be achieved. The vast majority of EU financial services legislation has taken the form of Directives.

The process of implementing EU Directives is called 'transposition'. Although the UK Government has outlined it prefers to use non-legislative measures for transposition whenever possible<sup>5</sup>, Directives usually require either an Act of Parliament or statutory instruments to be given effect in the UK. For example, both the Data Protection Act and the Consumer Credit Act are based on EU Directives.

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<sup>4</sup> Case C-253/00 Munoz [20002] ECR I-7289 para. 27.

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf)



## 4. What has been the impact of EU legislation on UK consumers?

The table below lists a number of examples where EU legislation has had a direct impact on consumer protection in the UK.

EU Initiative	Impact in the UK
<b>Alternative Dispute Resolution Directive</b>	Consumers may get more time to bring a complaint to the FOS (from 6 months to 1 year)
<b>Consumer Credit Directive</b>	Introduced creditworthiness assessment requirements, use of representative APR in advertisement and provision of pre-contractual information. Also created a right of withdrawal and made it easier to settle debts early
<b>Consumer Rights Directive</b>	Cancellation window extended from 7 to 14 days; for online purchases, tick boxes for optional extras cannot be 'pre-ticked'
<b>Deposit Guarantee Schemes Directive</b>	The Directive requires the FSCS to introduce protection for temporary high balances. The FSCS will also be funded through an industry levy
<b>Insurance Mediation Directive 2<sup>6</sup></b>	Possibly mandatory disclosure of commission and restrictions on tying insurance products. New information and conduct requirements for ancillary insurers
<b>Markets in Financial Instruments Directive</b>	Substantial changes to cost disclosure and permissibility of non-monetary benefits
<b>Mortgage Credit Directive</b>	A new 'European Standardised Information Sheet' will be introduced, replacing the current UK information document for mortgages.
<b>Multilateral Interchange Fees Regulation</b>	The Regulation is expected to lead to a substantial reduction (50% or more) in credit card fees in the UK
<b>Packaged Retail Investment Products Regulation</b>	Introduces new requirement for investment product manufacturers to provide key information document during pre-contractual phase, which includes information on costs and risks of an investment
<b>Payment Accounts Directive</b>	Requires the UK to establish a legal right to a basic bank account
<b>Unfair Commercial Practices Directive</b>	Introduced for the first time into UK law a general duty on all businesses not to trade unfairly with consumers.
<b>Unfair Consumer Contract Terms Directive</b>	The Directive enabled consumers and enforcement bodies, such as the CMA, to challenge non-negotiated contract terms on the ground that they are unfair.

<sup>6</sup> This Directive is still being negotiated.

## 5. Quick guide to EU jargon

Term	Short for...	Explanation
<b>(DG) FISMA</b>	(Directorate-General) Financial Stability, Financial Services and Capital Markets Union	The European Commission department responsible for financial services policy
<b>(DG) MARKT</b>	(Directorate-General) Single Market	The former European Commission department for Single Market policy, including financial services. No longer exists.
<b>Acquis</b>	-	The entire body of EU law
<b>Delegated Act</b>	-	A type of statutory instrument at EU-level, adopted by the European Commission
<b>Directive</b>	-	EU legislation that must be implemented via national law before it becomes effective
<b>EBA</b>	European Banking Authority	-
<b>ECOFIN</b>	Economic & Financial Affairs Council	The formal term for the meeting of EU Finance Ministers
<b>ECON</b>	Economic & Monetary Affairs Committee	The European Parliament Committee responsible for financial services policy
<b>EIOPA</b>	European Insurance & Occupational Pensions Authority	-
<b>ESAs</b>	European Supervisory Authorities	The three EU agencies responsible for supervision in the area of financial services
<b>ESMA</b>	European Securities & Markets Authority	-
<b>Implementing Act</b>	-	A type of statutory instrument at EU-level, adopted by the European Commission
<b>Presidency</b>	-	The EU country that holds the rotating six-monthly chairmanship of the Council, chairing meetings and drafting agendas
<b>Rapporteur</b>	-	The lead drafts(wo)man on a particular piece of legislation in the European Parliament
<b>Regulation</b>	-	EU legislation that is directly binding and enforceable even without implementing national law
<b>Trilogues</b>	-	The final stage of the EU legislative process, during which MEPs and national governments meet behind closed doors to decide on the text of EU legislation