Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

Financial Services Consumer Panel Evidence for the Joint Committee on the draft Financial Services Bill

Summary

The Consumer Panel welcomes the opportunity to comment on the draft Financial Services Bill, and would be happy to give further evidence to the Committee. It has commented in detail on many of the questions, but in summary its views are:

1. The Panel welcomes change that leads to more effective regulation, but work needs to be done on the detail to ensure that the changes do not lead to an ineffective and inefficient version of the current FSA.
2. If consumers are to take responsibility for their decisions, this would be more realistic if the authorised firms with which they deal have a fiduciary duty towards them and if all matters relevant to the conduct of such firms are disclosed.
3. The Panel has carried out international research which shows that in the area of regulatory transparency the existing FSA is at the more transparent end of the spectrum, but there are areas where its approach could be improved in future.
4. In order to achieve its objectives, the FPC should have a duty to consider representations made to it by the Consumer Panel. Any macro-prudential instruments considered by the FPC must be subject to rigorous cost benefit analysis which takes account of the goals of both financial stability and consumer welfare.
5. The Consumer Panel must retain its function for the PRA, in order to advise on prudential matters in general and the interests of with-profits policyholders in particular.
6. The PRA should have a specific 'have regard' to the need to minimise the adverse affects on competition that may arise from anything done in the discharge of its function.
7. Relying on increased disclosure of information is not sufficient to ensure consumer protection and the FCA must be mindful not to rely on this in carrying out its consumer protection obligations.
8. Relating to competition powers, the proposals are excessively complex. The starting point should be the assumption that the FCA is the lead on competition issues in financial services. It should refer to the Competition Commission only if structural change needs to be considered.
9. The proposed new powers relating to financial promotions are welcome. In conjunction with the product intervention power this will assist the FCA in preventing inappropriate products reaching the market. The Panel believes there should be a presumption in favour of publication of action in the case of misleading promotions. Additionally, the FCA should have the ability to publish information of disciplinary action without consultation with the firms involved, where it considers there is a risk of serious consumer detriment.
10. The FCA should have the ability to publish information received for the purposes of its functions under FSMA, where it considers this appropriate.
11. The FCA's third operational objective should be amended to 'promoting efficiency, *access* and choice in the market for certain types of services'.

Responses to Questions

1. Is the separation of prudential and conduct regulation into a "twin peaks" system the right approach?

The Panel welcomes change that leads to more effective regulation, but believes work needs to done on the detail to ensure that the changes do not lead to an ineffective and inefficient version of the current FSA. The need for legislation to implement the twin peaks structure gives us an opportunity to look again at the Financial Services and Markets Act (FSMA) to make sure it works.

In particular, the FCA needs to get conduct supervision right to help the financial services industry rebuild trust. There is still some way to go before it will become clear whether the benefits of the transition to 'twin peaks' will be realised in practice. The Panel has responded separately to the FCA's approach document, which it believes is a step in the right direction, and is pleased that the FSA is already starting to put consumers at the centre of its thinking. But it still wants evidence that the FCA will be different to the FSA, with an appetite to use its new powers, a willingness to intervene before problems get serious and a recognition that the root causes of detriment need addressing as well as the symptoms.

The Panel has concerns that the issues of coordination and authority in the way the FPC, PRA and FCA work together may simply replace the multiple objectives that caused confusion in the current structure. These processes and responsibilities must be clarified and resolved. This is discussed further in the response to question 4. The cost and effort of moving to twin peaks needs to provide something better for consumers.

2. What lessons can be learnt from the approach of other countries to regulation of the financial sector?

The Panel has published research into the specific area of transparency as a regulatory tool, which is relevant to a number of the areas addressed by the Bill. Its objectives were to benchmark the performance of the FSA and to identify the most interesting international examples of the use of transparency as a regulatory tool. Seven countries were reviewed - Australia, Canada, France, Germany, Japan, Sweden and the United States.

The research found that in some areas the FSA's arrangements place them at the more transparent end of the spectrum, although there are areas for potential improvement.

Relevant points from the research include:

The transparency of regulators' governance procedures
The FSA emerges as above average, but certainly not the leader, in terms of the transparency of its governance processes. It provides somewhat anodyne summaries of its board minutes and details the attendance record of board members. The only other countries where board minutes are released are

Sweden and the US. In both these cases the level of detail provided appears to be greater, and more insightful, than that provided by the FSA, especially in the US. Easily the most extensive initiatives in transparent governance are from the US, largely under the influence of the many so-called 'Government in the Sunshine' Acts at state and federal level. Examples include the prior release of board agendas and non-confidential board papers and the holding of open board/commission meetings including the live and archived web-casting of such meetings.

Publication of complaints data
The publication of firm-specific complaints data makes the FSA one of the more transparent regulators, but examples were found that provide considerably more detail and analysis of complaints. A particularly important consideration is the extent to which information is truly helpful to consumers unless it is provided alongside market share or similar data to put it in to context. The decision of the FSA not to insist on directly comparable context data is a weakness in this area.

Disclosure of information during the enforcement process
Although in some respects the FSA is not currently out of line with international practice, the enforcement process in the UK is different to other countries. This leaves more scope for extending information disclosure across the process. A limited number of instances of information being released before the end of enforcement processes were found. Some organisations release details of those sanctioned once the regulator's own processes are complete but before the respondent has decided whether to appeal. This is discussed further in the answer to question 17.

Disclosure of complaints data about financial promotions
The Panel recommends stronger action in this area by the new regulators (see also the answer to question 17). Internationally, there is considerable diversity in the methods used by regulators to enforce compliance of financial promotions, ranging from purely reactive to very proactive approaches. The most proactive methods used to enforce compliance were found in the US.

Further details of this research are available on the Panel's website[1].

3. Is it appropriate to make such major changes to the regulatory system by way of amending legislation, rather than starting afresh?

No comment

4. Are the accountability and governance arrangements for the Bank of England, FPC, PRA and FCA satisfactory?

Financial Policy Committee
The Panel has concerns about the structure and functioning of the FPC as currently conceived, and in particular the lack of diversity in the membership, in that the majority of members are directly connected to the Bank of England.

[1] [1] *Transparency as a regulatory tool: a international literature review*, by John Leston for the Consumer Panel, October 2010

A more robust structure would include a wider range of experience, with the majority of members not from the Bank, in combination with an adequately resourced independent secretariat.

The FPC will seek to achieve its main objective by identifying, monitoring and taking action to remove or reduce systemic risks. These systemic risks include in particular unsustainable levels of leverage, debt, or credit growth, where 'credit growth' is defined as the growth in lending by the financial sector to individuals and businesses in the UK, and 'debt' is debt owed to the financial sector by individuals and businesses in the UK.

As part of its concerns about the breadth of knowledge and experience of the FPC, the Panel believes it should have adequate information from a consumer perspective on factors which may be influencing the levels of debt and credit growth and which contribute to the sustainability of these levels.

As it stands, there is no direct consumer representation on the FPC. This could be resolved by requiring it to consider representations made by a body such as the Consumer Panel, in the same way the FCA will be required to do.

It proposes the following section to be inserted into the Bank of England Act:

'The FPC must consider representations that are made to it by the Consumer Panel in accordance with arrangements made under section 2J of FSMA section.

The FPC must from time to time publish in such manner as it thinks fit responses to the representations'

The Panel has a breadth of experience in the areas of consumer debt and credit. It has in the past carried out its own research into, for example, mortgage arrears[2] and the experiences of consumers with overdrafts[3], as well as providing input and advice to the FSA and others on the consumer credit regime, mortgages, insolvency, banking services, credit and store cards.

Prudential Regulation Authority (PRA)

The Consumer Panel believes its function should be retained for the PRA. The justification given for its removal is that PRA will be taking decisions on prudential matters, and that the PRA will be required to consult the FCA to take advantage of its expertise on consumer issues.

The Panel believes this reasoning is wrong on two counts. First, it believes prudential matters are as valid a subject for direct consumer input as conduct of business issues. This is particularly the case given that the PRA will have sole responsibility for insurance and for securing an appropriate degree of protection for with-profits policyholders.

Additionally, although the FCA will have consumer expertise, in its relationship with the PRA it will inevitably be balancing a number of different viewpoints,

[2] *Mortgage Arrears*, Financial Services Consumer Panel, June 2009
[3] *Overdraft Complaints,* Financial Services Consumer Panel, June 2008

including industry as well as consumer. There is serious risk that the consumer interest will not be given proper consideration.

The PRA will have a statutory duty to put into place arrangements for engaging with practitioners (although what form this will take has still to be decided) – to delegate responsibility for consumer input to the FCA is to place the interests of consumers on a lower footing than that of the industry.

The Panel has in the past been acknowledged as a credible, authoritative and constructive body advising the FSA on prudential as well as conduct of business issues. It is currently in a unique position in that it can represent consumer issues while regulation is being developed, before that regulation reaches the public domain. To discontinue a relationship which already exists is to leave a gap in the regulatory jigsaw.

Financial Conduct Authority (FCA)
The Consumer Panel regards its continuing input to the regulatory process as a key aspect of the new regime, and is content that the wording of section 1L is a sound foundation for such input to the FCA.

The Panel is in favour of a drive towards greater transparency of regulation, and as such supports new section 1M(2) requiring the FCA to publish a response to representations received, regardless of whether it is in favour of such representations.

However, as noted elsewhere, it believes that a similar duty for the PRA and the FPC should be an integral part of the regulatory process.

Coordination processes
The Panel is concerned that there is little detailed information on coordinating the activities of the PRA and the FCA with the European Supervisory Authorities – in particular to ensure the PRA has input to and receives information from ESMA and the FCA input and information regarding the EBA and EIOPA. Details of structures and communication strategies need to be included in the MOU covering international cooperation.

Cost benefit analysis
The Panel agrees that there should be no significant reductions to the existing FSMA requirements to consult on rules. It is appropriate that regulators will continue to conduct cost benefit analysis of rules originating from Europe, on the basis that there are in practice few, if any, instances where there is absolutely no discretion or room for interpretation when implementing such rules.

The Panel strongly believes that the existing FSMA requirement to conduct a cost benefit analysis, where this is defined as an estimate of the costs together with an analysis of the benefits that will arise from a new rule, is a sounder foundation for regulation than the proposals for an analysis of costs and benefits, which may well lead to less quantification and worse decision making. At the very least, the existing definition of cost benefit analysis should be retained.

Our preference would be for a statutory requirement for the PRA and FCA to estimate both the costs and benefits of proposed new rules: the new legislation should be taken as an opportunity to improve rather than water down the evidence base used in consultations.

The Panel's view is partly informed by its experience of the FSA's current Mortgage Market Review. The statutory requirement on the FSA to estimate costs, which it had failed fully to do in its July 2010 consultation, puts the Panel in a far stronger position to press the FSA for a "robust and credible CBA", a request to which the FSA has now responded.

5. Are the FPC's objectives the right ones? Is the concept of financial stability adequately understood for the FPC to be able to perform against its objectives?
and
6. Should the FPC be limited in the actions it can take which might affect the growth of the financial sector?

The relatively narrow objective of the FPC, focusing on financial stability, should not restrict its ability take account of the wider impact on the economy and society of its actions.

The Panel proposes that the FSA should pro-actively engage with the interim FPC to subject each macro-prudential instrument to a rigorous cost benefit analysis which takes account of the goals of financial stability and consumers' welfare. This preparatory exercise would facilitate the selection of preferred macro-prudential tools that would contribute most to financial stability while inflicting least direct damage on consumers, judged in terms of the impact on the availability and cost of financial services, including mortgages. Except in circumstances of immediate crisis, we would also expect the FPC, once fully operational, to consider in consultation with the FCA the consumer welfare implications of macro-prudential interventions.

7. How will the interaction between macro-prudential and monetary policies be handled by the FPC and the MPC?

No comment

8. Has the right balance been struck between the powers of the FPC and the powers of the Treasury?

The Panel is concerned about lack of diversity in the membership of the FPC. It will be a sub-committee of the Court of the Bank, chaired by the Governor of the Bank. In addition, a majority of the members and the Chairman will be drawn from the executive management of the Bank, with one non-voting representative from the Treasury. In our view this does not provide the necessary checks on the decisions taken by the Bank's executive management. For further details of the Panel's views, please see its

submission to the Treasury Committee Inquiry into the Accountability of the Bank of England[4].

9. Can Parliament take an informed decision about the proposals for the FPC without details of the macro-prudential tools at its disposal?

It is difficult to comment without further details of the macro-prudential tools. As outlined in the response to questions 5 and 6, any macro-prudential tools should be subject to cost benefit analysis which takes account of the goals of financial stability and consumer welfare.

10. Does the draft Bill adequately deal with the risks posed by the shadow banking system?

No comment

11. Are the PRA's objectives clear and appropriate?

Insurance objective
The Panel welcomes the proposals that the PRA's objectives will now make specific reference to its responsibilities with regard to insurers.

This reflects the different priorities, timescales and business models of the insurance industry when compared to the banking industry. It particularly welcomes the requirement to secure an appropriate degree of protection for those consumers who are or may become policyholders.

Regarding the PRA's objective to regulate policyholder reasonable expectations (PREs) for with-profits policies, the Panel has in the past been broadly supportive of the FSA's approach to protecting the interests of with-profits policyholders[5]. However, the reference to the term 'policyholder reasonable expectations', is unhelpful in this context. There is no universally accepted definition of the term, and its use could lead to potential confusion. We would recommend that section 3F(1) refer only to 'an appropriate degree of protection for policyholders'.

Competition
The Panel agrees that competition should not be a primary objective for the PRA, but does have concerns that its actions could potentially have a damaging effect on competition and consumer welfare. It is important that issues such as barriers to entry are considered, as well as the concerns of large institutions. Therefore it proposes that the PRA's regulatory principles should include:

"The PRA must have regard to the need to minimise the adverse effects on competition that may arise from anything done in the discharge of its functions".

[4] Consumer Panel Response to the Treasury Committee Inquiry into the Accountability of the Bank of England, March 2011
[5] We have previously commented on this area in our response to CP11/5*** '*Protecting with-profits policyholders*' http://www.fs-cp.org.uk/publications/pdf/cp115_with_profits_final.pdf

12. Are there any risks in the Government's proposed 'judgement-based' regulation?

The Panel supports judgement-based intervention if it leads to action before actual crystallisation of consumer detriment, and particularly if it leads to an increase in the cases where the spirit as well as the letter of the rule has been applied (thus increasing the effectiveness of regulation and decreasing the resource necessary to enforce it).

13. Is the Government's proposed approach to 'orderly' firm failure satisfactory?

Currently the guarantee provided for depositors through the Financial Services Compensation Scheme is directly linked to the authorised institution within the group providing the account, rather than to the account brand – it is limited per authorised firm. For example, Smile, Britannia and Unity Trust Bank are all part of the Co-Operative Bank plc group and in order to ensure that all their deposits were covered in full by the FSCS, customers with accounts at more than one of these banks would have to know that this was the case, and ensure that the total monies held did not collectively exceed the current limit of £85,000.

It would be far more logical and sensible from a consumer perspective for the compensation limit to be applied per brand or per company within a group. That is how accounts are sold and the basis on which customers buy them. It would also make for clearer statements about the level of consumer protection in the event of a future bank failure. The resistance to this is largely due to the "moral hazard" introduced by encouraging proliferation of brands under a single authorised entity. The way to resolve this is to require all banking brands to be separately authorised, something those outside the industry would expect to be happening already.

We would also support measures to speed up the process of honouring claims. Progress which has already been made by some firms to ensure that the depositors of a deposit-taker in default will have access to at least a proportion of their funds within seven days is welcome, but this could be even faster, as is the case in other countries.

14. Given that the PRA and the FCA will inherit FSA staff does the draft Bill do enough to ensure a new regulatory culture and a more proactive approach to regulation? Will these two new bodies have staff with the appropriate skill and expertise?

The Panel is concerned that the FCA and PRA will need considerable investment in staff resources to deal with its supervisory responsibilities. It is not clear that the funding envisaged for the FSA and PRA will be sufficient to discharge these functions, and it is important that they should be allowed to raise a realistic budget.

As well as the amount of resource, the Panel is concerned about the balance of skills. To achieve its objectives, the FCA in particular will need not only staff

with consumer and policy expertise and experience of financial services, but also economists. Getting this balance right matters both at Board level and also throughout the entire organisation. It is essential not just to the work of the organisation, but also to address the potential problem of regulatory capture, which is a failing the FSA has been accused of in the past.

15. Are the FCA's primary objectives appropriate? Is significant emphasis given to the promotion of competition?

Consumer protection objective

The consumer protection objective is of particular relevance to the Panel. It agrees with the requirements for the FCA to have regard to risk issues, experience and expertise. It particularly welcomes the requirement to have regard to consumers' needs for advice and accurate information, but would point out that information disclosure in itself is not sufficient to ensure consumer protection. Information must be supplied in a format, and quantity, that consumers need and can use to make informed decisions.

We would not argue with the need for consumers to read key information and answer questions honestly, but there is an unacceptable view in some sectors of the industry that complex and potentially detrimental products can be widely promoted, provided they are transparent through good disclosure. This is accompanied by an expectation that consumers can, and should, acquire the skills, knowledge and understanding required to deal with this complexity and choice, which places an unreasonable burden on the consumer and is not an approach adopted by other industry sectors.

There is evidence indicating that providing more information can be counterproductive. The FSA's 2008 report on behavioural economics[6] suggests that 'attention is a scarce resource and processing power is limited' and makes reference to research that indicates that introducing additional information, even if accurate, may lead to worse decision-making outcomes. Further evidence[7] suggests that 'information overload' can lead to procrastination and poor decisions. Therefore the Panel would strongly recommend rigorous testing of any initiatives involving consumer-facing information to ensure it achieves its desired outcomes.

The Panel welcomes the requirement that the FCA must have regard to information supplied by the consumer financial education body (Money Advice Service (MAS)) in the exercise of the consumer financial education function. In support of this it recommends that the Financial Capability Baseline Survey[8] be rerun, either by the MAS or the FCA. However, the presence of the MAS should not absolve the FCA from responsibility in improving the financial understanding of consumers and helping them to engage with the market.

[6] *Financial Capability: A Behavioural Economics Perspective*, FSA July 2008

[7] *Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective*, Decision Technology Ltd for European Commission October 2010

[8] *Financial Capability in the UK: Establishing a Baseline*, FSA March 2006

Competition objective
The Panel has previously stated that it believes the FCA should have an objective to promote effective competition that improves consumer outcomes in retail and wholesale markets. We have concerns that section 1B(4), requiring the FCA only to discharge its general functions in a way which promotes competition, when this is compatible with its other objectives, is not a strong enough obligation.

In order to exercise a competition function effectively the FCA's powers and authority have to be equivalent to those of the sector regulators. The fact that this will not be the case, or the potential for there not to be a super-complaint process, seems a retrograde step, inconsistent with a strong competition mandate. The case for the FCA to have concurrent powers, as do other industry regulators, is to use its expertise to carry out market investigations, with reference to the Competition Commission only if structural change needs to be considered.

The Panel believes that the proposals for competition are overly complex, particularly when compared with other sectors. It recommends a more straightforward framework for the competition environment which should include the following elements:

1. The starting point should be that the FCA should (in line with its duty to discharge its general functions in such a way which promotes competition), be the lead on competition issues in financial services. Like other industry regulators it has the expertise and information derived from supervision, and can utilise this information to make informed judgements.
2. The FCA should refer competition issues to the OFT/ Competition Commission when rules cannot be made to solve a problem and structural changes may be needed.
3. It should be possible to address supercomplaints regarding financial services to the FCA, with consumer bodies, including the Panel, able to apply for designated status.

16. Are the responsibilities of the FCA towards the regulation of markets appropriate?

The efficiency and competitiveness of wholesale markets are critical for people with savings and pension funds invested in them. In particular, the proportionality of costs is important as higher transaction costs in these markets mean higher charges for consumers which have an adverse impact, especially when compounded over a lifetime of savings. The Panel has previously stated that the FCA needs the power to intervene to drive down these transaction costs, and remains concerned that it will still lack sufficient tools to do this.

17. Does the draft Bill strike the right balance between the responsibilities of consumers and firms? Are the FCA's new powers in the area of consumer protection appropriate?

Fiduciary duty

The Regulatory Principles in clause 3B of the Bill include 'the general principle that consumers should take responsibility for their decisions'. It is recognised that different consumers have differing degrees of experience and expertise (clause 1C(2)(b)). Given this, it would help consumers take responsibility if authorised persons had an explicit fiduciary duty towards their clients.

A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. Fiduciary duty implies a stricter standard of behaviour than the comparable duty of care at common law. The fiduciary has a duty not to be in a situation where personal interests and fiduciary duty conflict, a duty not to be in a situation where his fiduciary duty conflicts with another fiduciary duty, and a duty not to profit from his fiduciary position without express knowledge and consent. A fiduciary cannot have a conflict of interest.

The recent US Dodd-Frank Act[9] provides authority for the Securities and Exchange Commission to impose regulations requiring "fiduciary duty" by broker-dealers and investment advisers to their customers. Although the Act does not create such a duty immediately, the Act authorises the SEC to establish such a standard and requires that the SEC study the standards of care which broker-dealers and investment advisers apply to their customers and report to Congress on the results within 6 months. The SEC is due to propose rules later this year.

For consumers with limited experience and expertise, dealing with a provider of financial services which has a fiduciary duty would reduce the chances of detrimental outcomes when such consumers take responsibility for their decisions. It would be desirable to extend this approach to the generality of relationships between consumers and authorised persons.

An important outcome of the FSA's Retail Distribution Review is that independent financial advisers will no longer be able to take commission from product providers but will be paid a fee agreed by their clients, so that the adviser acts clearly as agent for the client. It would be desirable to extend this approach to the generality of relationships between consumers and authorised persons.

Therefore the Panel proposes that a further sub clause be added to clause 3B(1):

'the principle that, where appropriate, authorised persons should have a fiduciary duty towards the consumers who are their clients'.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010

The reference to 'where appropriate' allows the fiduciary duty principle to be disapplied in certain cases if, after consideration, it were to be judged by the FCA to be inappropriate, for example on account of unintended consequences.

Product intervention power

In its response[10] to the FSA's recent discussion paper, the Panel set out the consumer outcomes we would like to see from a system of regulatory product intervention:

1. Consumers should be able to buy straightforward outcome products that deliver what they promise including value for money, through all distribution channels including execution only.
2. Those unable or unwilling to pay for a full independent advice service should have access to a process for delivering simplified advice with appropriate levels of consumer protection.
3. Consumers should have access to a wide range of financial products that meet a diverse set of needs and aspirations, that have been subject to appropriate internal and regulatory scrutiny both at the design stage and during subsequent product development, such that regrets and complaints to FOS are minimal.
4. Consumers should have access to fair redress and compensation if things go wrong.

The Panel notes that any FCA actions will need to avoid conflict with those of the European Supervisory Authorities, which also have product intervention powers, and recommends that details of arrangements to avoid such conflict are detailed in the MOU between the UK bodies outlining the approach to international coordination.

The Panel has responded separately to the FCA approach document. It has concerns in some areas – in particular that the FCA regulatory toolkit will be restricted and will not cover areas such as product kitemarking, product approval, and product authorisation other than for those products authorised under the current FSA regime. This seems contrary to the desire to take full advantage of the opportunity to develop a new approach to conduct regulation.

New financial promotions power

The new provisions to give the FCA powers to take action in the case of misleading financial promotions, and to have a duty to publish the fact that it has done so, are a significant move towards improving regulatory transparency and enabling early action to prevent detriment. The Panel supports this. It believes that the regulation of financial products should be no different in this respect to the regulation of other products, and that the FCA's powers should be increased in line with regulators in other sectors. Early publication of action would encourage good consumer outcomes within the market and act as deterrent to poor behaviour.

[10] Financial Services Consumer Panel Response to DP11/1: Product Intervention, April 2011

A presumption in favour of publication of specific and identifiable action in the case of misleading promotions should be included in the Bill, with appropriate timescales.

Early publication of disciplinary action
The Panel supports the new power to enable the regulators to disclose the fact that a warning notice has been issued in relation to proposed disciplinary action. It is important that the wording of this power, as outlined in Schedule 8, paragraph 24 ('after consulting the persons to whom the notice is given'), does not imply that consent must be obtained to publish information from the party under investigation.

It is also a cocnern that the requirement to consult, and to allow firms to make representations, could slow the process and allow consumers to continue making potentially irreversible decisions based on unsuitable or misleading information. We therefore propose there should be a mechanism for the FCA to initiate, and publish details of, immediate regulatory action without consultation with the firms involved, where it considers there is risk of serious consumer detriment.

In addition, the FCA should be able to use information collected in pursuit of its regulatory objectives, (such as complaints data) where appropriate, to inform consumers and promote good behaviour. Section 348 of FSMA currently restricts the FSA's ability to publicly disclose confidential information which is not already lawfully publicly available, relates to the business or affairs of any person and is received by the FSA for the purposes of its functions under FSMA. Currently a person who contravenes s.348 can be fined or imprisoned for a period of up to two years.

The Panel believes the threat of such action acts as an excessive restraint on publication of information which should be in the public domain, and conflicts with the new principle of openness and disclosure. It is difficult to see how this principle can be exercised while the existing s.348 exists, therefore while publication should still be subject to rigorous safeguards, the punishment for infringing s.348 should be reduced to a civil penalty.

Additionally, the Panel seeks assurance that regulations could be made under s.349(1), in the light of the principle of transparency, that would allow the FCA to publish information it considers would assist consumers to accept responsibility for their actions and would encourage firms to avoid misconduct for fear of disclosure and reputational damage.

18. Are the prudential regulatory responsibilities of the FCA towards FCA-only regulated firms given sufficient emphasis and detail?

No comment

19. Will the new regulatory arrangements reduce the risk and cost of dealing with miss-selling of financial products?

The Panel very much hopes that the new regulatory arrangements will substantially reduce the risk and cost of miss-selling. Past major miss-selling episodes, most recently of payment protection insurance, are an indictment of both the industry and the regulatory regime. Failure to eliminate such miss-selling in the future would indicate a design fault in the new arrangements. It will be important to ensure no weakening of the FCA's powers during passage of the Bill, in particular of the presumption of transparency, since early exposure of shortcomings of authorised firms will both help consumers take responsibility for their decisions and induce good behaviour by firms. It will also be important for the new FCA to take full opportunity to use its powers to nip miss-selling in the bud.

20. Are the proposals for co-ordination between the PRA and FCA clear and adequate? What would be the advantages and disadvantages of having a Single Point of Contact and/or a joint rule book for dual-regulated firms?

The Panel has particular concerns about the coordination processes between the FCA and PRA in relation to the European supervisory authorities, and wishes to see concrete proposals for coordination in this area.

21. How do the proposals in the draft Bill fit within the new European regulatory regime? What freedoms and constraints will the UK have to operate within that regime?

The proposed new structure does not fit well with the European regulatory structure, where all three European supervisory authorities have responsibility for both prudential and conduct of business issues. A possible solution to this issue would be to have a joint European/international team which operates and communicates with both the FCA and PRA. There is a precedent for such a structure at European level, where directorates-general have been split in the past, and the new regulators could learn from these experiences.

22. Does the draft Bill contain any proposals or omissions, not covered by the questions above, which cause concern?

Access to financial services

It is no longer possible to function outside the financial services system, not only in relation to transactional services but increasingly in pensions and insurance, as responsibilities in these areas pass from the Government to consumers. Access to financial services is a precondition of functioning in society and needs to be intermediated. The Panel believes that the FCA's third operational objective should be amended to:

'promoting efficiency, *access* and choice in the market for certain types of services'

The FCA will be well placed to drive real progress in this area.

Appendix - the Consumer Panel

The Consumer Panel is a statutory body under the Financial Services and Markets Act 2000 and was initially established by the Financial Services Authority in December 1998. The Panel advises the FSA Board on the interests and concerns of consumers and reports on the FSA's performance in meeting its objectives.

The emphasis of the Panel's work is on activities that are regulated by the FSA, although it may also look at the impact on consumers of activities outside but related to the FSA's remit. More information about the Panel's work is available on its website at http://www.fs-cp.org.uk/ .

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