



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus evidence to Joint Committee on the Draft Financial Services Bill**

**September 2011**

# About Consumer Focus

---

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy and have statutory powers, granted to us by Parliament in 2008, to tackle consumer detriment and represent the interests of UK consumers.

## Contents

---

Executive summary	3
Introduction	4
Our evidence	5
Q1. The twin peaks system of regulation	5
Q3. The use of amending legislation	5
Q4 & Q8. Accountability and Governance arrangements	6
Q5 & Q11. FPC and PRA objectives	7
Q12. Risks in ‘judgement based’ regulation	7
Q14. Regulatory staff and culture	8
Q15. FCA’s primary objectives	8
Q17. Balance between responsibilities of consumers and firms	10
Q17. Consumer protection powers for the FCA	11
Q19. Impact of new regulatory arrangements on the risk and cost of misselling	13
Q22. Other areas of concern	14

# Executive summary

---

The impetus for this legislation is not only the financial crisis and its attendant affects, but also the waves of misselling by financial institutions which have caused hardship and wasted the money of so many consumers. Financial products are essential to society. We need people to save and invest, to use credit wisely and to take out insurance so they and their families are protected if things go wrong. To do all these things consumers need to know that their money is safe and that the products they buy are useful and offer good value for money. This then is crucial legislation and Parliament has a once in a generation opportunity to get it right.

Since the Financial Services and Markets Act 2000 (FSMA) was enacted we have experienced pensions misselling; endowment mortgage misselling; the failure of Equitable Life; split capital investment trust misselling; unfair credit card terms; unfair unauthorised overdraft charges; policy protection insurance misselling; and a major banking crisis. The new regime must be more effective at 'upstream' prevention. The Financial Services Authority (FSA) itself has learnt many lessons since FSMA was passed and strengthening the regime would benefit both consumers and the financial services sector.

The Financial Conduct Authority (FCA) will have a wide range of responsibilities and, if the consumer credit regime moves from the Office of Fair Trading (OFT), a huge number of firms to regulate. The challenges are significant.

It is worth noting that any regulatory structure can be made to work given the right powers, tools, wider stakeholder engagement, and culture. What is crucial however is getting the statutory framework right, particularly in terms of statutory objectives, as this drives regulatory behaviour and approach. We argue for more transparency and accountability of the new regulatory bodies and against a veto by the Prudential Regulation Authority (PRA) on the actions of the FCA.

Regulatory frameworks in other sectors place consumer interests at the heart of their regimes. We consider there to be a strong case for the consumer interest in the new framework to be strengthened if we are to avoid further crises and damage to confidence and a sustainable financial system. We make the case for a change to the definition of the consumer so that it is clear who the FCA is protecting.

While stability is an important overall objective, it is surely not the only one for any public body. There must also be a concern for access to, and value of, financial services as they provide the oil on which the engine of the economy runs. It must be recognised that stability has an 'opportunity cost'. If a regulator only looks at stability it can too easily place restrictions on the supply, and cost of, credit to the wider economy. This could reduce access to essential financial services and push up prices. We are concerned that there is nothing in the statutory framework to limit the Bank or the FPC's discretion in this regard.

In light of these tensions we recommend changes to the objectives and 'have regards' of the FCA to make it focus on the outcomes that will benefit consumers and recognise their behaviour. In particular we challenge the arguments behind the concept of consumer responsibility in financial services.

We also feel strongly that promoting effective competition needs to be more central in the new regime. Competition will be more effective at delivering many consumer benefits, in the longer term, than regulation.

We welcome the work of the Joint Committee and look forward to a thorough scrutiny of the draft legislation before its introduction to Parliament.

# Introduction

---

Consumer Focus welcomes the draft Bill and Government's commitment to improve the regulatory framework for financial services to prevent many of the financial and consumer crises we have seen in recent times.

It is critical that the statutory objectives set by Parliament for each body within the new regulatory architecture are well defined and understood, and that the institutions have the right mix of over-arching objectives, duties and powers to provide them with the tools and capacity to deliver. The relationship between the new bodies and the Treasury also needs to be clear.

**We have only answered those questions that have a direct bearing on the interests of consumers**, and have focused especially on questions 15, 17 and 19. We also have wider concerns about issues not specifically raised by the list of questions, which we have covered in our response to question 22.

The numbering of sections in the rest of this document follows the numbering set out in the Joint Committee's Call for Evidence.

# Our evidence

---

## 1. The twin peaks system of regulation

There is some evidence from countries such as the Netherlands and Australia that the twin peaks approach can improve the focus of regulation and thereby its effectiveness. But this potential improvement will only be achieved if the right mix of statutory objectives, duties and powers is set out in the framing legislation for the new regulatory bodies and if they are then successful in delivering an appropriate culture within their organisations.

Achieving the right regulatory culture in the new bodies – the FCA, the PRA and the FPC – will largely depend on the effectiveness of their governance and accountability frameworks. But it will equally be heavily influenced by their appetite for risk, and the extent to which it is understood and accepted that there are significant risks and trade-offs in regulation. How these risks and trade-offs are managed should be openly debated and consulted on ‘ex ante’<sup>1</sup>. This would help achieve as wide a public understanding as possible about the relative trade-offs between the different public policy objectives. These include increased stability; enhanced confidence in UK markets; stronger consumer protection; more effective competition; access to affordable loans, mortgages and other financial products; and so on.

## 3. The use of amending legislation

While the use of amending legislation may be more convenient for draftsmen and help ensure continuity and an easier transition, it makes it less easy to consider financial services from a first principles perspective. Much of FSMA was itself a revision of the earlier Financial Services legislation of the late 1980s and did not therefore represent a fundamental overhaul of the regulatory framework. This is why, for example, the definition of ‘consumer’ in financial services legislation is so out of step with legislation in other markets (we suggest changes to this definition below).

In our view it would have been preferable to start out again from first principles and produce new legislation. This would also have made it easier for stakeholders to engage with the consultation process in what is highly technical material, further confused by the process of amendment. We recognise however that this could have lengthened the legislative process, that transitional problems could be greater and that there could be a higher risk of inadvertently losing some good features of the old regime.

Once passage has been completed, we suggest that the Law Commission be asked to prepare a consolidated text.

---

<sup>1</sup> Before the event

## 4 and 8. Accountability and Governance arrangements

We do not believe the accountability arrangements set out in the draft Bill are adequate, particularly for the Bank of England Group. The new Bank of England (BoE) and its constituent parts will have an unprecedented suite of policy responsibilities and powers: monetary policy; financial stability; prudential regulation of banks and other credit institutions, insurers and major investment firms; resolution authority for banks and other major institutions; oversight of payments and clearing systems; and provider of special liquidity including lender of last resort.

The way in which the Bank and its subordinate bodies choose to discharge this cluster of important functions could have significant implications for the UK economy and the welfare of citizens and consumers, but there is no inbuilt public accountability mechanism for the Bank overall nor for large parts of its activity, other than retrospective reporting.

In terms of the FPC, there will need to be open and public debate about the extent to which greater stability on the one hand and economic growth and jobs on the other should be balanced. Ultimately democratically elected Ministers should be accountable for such trade-offs, yet the draft Bill leaves too much discretion in the hands of the FPC. The FPC currently has no obligation in the draft Bill to consult on its plans – reflecting the culture of central bank history where business is typically conducted behind closed doors. We believe that the FPC must become more transparent and accountable than is set out in the draft Bill. This should include being required to consult publicly on how it plans to exercise its powers and the criteria and analysis upon which it will base its decisions to act.

The constitution of the FPC is not acceptable, with inadequate independent public interest representation (as proposed it comprises the governor, five senior bank executives, four independent directors and the FCA CEO). At least one of the FPC members should have relevant expertise in representing the consumer interest, and there should be a majority of independent directors with relevant expertise.

In terms of the PRA and the FPC, we are very disappointed to note that while the good 'process disciplines' imposed by Parliament on the FSA under FSMA have by and large been carried through into the new regime for the FCA, a number are singularly absent for the PRA. The PRA will have significant prudential powers and these will impact consumers and the economy more widely. It should not be allowed unfettered exercise of discretion without a proper set of public accountability checks and balances. We see no reason why the PRA should not, for example, be required to consult the Financial Services Consumer Panel on matters affecting consumers (for example, appropriate protection of insurance policy holders). We also believe the PRA should be required to consult publicly, as the FSA does, on its general policy approach to the discharge of its functions.

We are keen to ensure a proper 'balance of power' between the constituent parts of the new regime, and note the experience of Dutch regulators in this regard. Their advice is to ensure that the two parts of any 'twin peaks' system have equal weight. To this end we are very concerned by the proposed PRA veto power over the FPC. Whether this is used or not, it shifts the power balance in the new system and will affect regulatory culture and status. It could also lead to the FPC not acting effectively in the interests of consumers. We do not believe it is necessary in view of the other safeguards built into the new system to ensure co-ordination and appropriate stability.

The FCA's own strategic objective – protecting and enhancing confidence in the UK's financial system – means the FCA could be 'ultra vires'<sup>2</sup> if it takes action that threatens confidence in UK markets or major UK institutions or threatens their stability.

There are also provisions in place to ensure effective consultation between the PRA and the FCA before key decisions are made.

## 5 and 11. FPC and PRA objectives

We do not believe the PRA or FPC's objectives are satisfactory. While both the PRA and FPC's primary objective should clearly be appropriate stability, there is nothing in the draft Bill that ensures they take into account the consumer interest – or indeed the fair and efficient functioning of the market as a whole – when making decisions. In particular, the PRA has no duty to have regard to the FCA objectives, most notably on consumer protection and promoting competition. The formulation of the Bank and the FPC's stability goal is silent on these issues.

Stability and competition are seen by some to fit poorly together. There may be an 'opportunity cost' to a focus solely on stability. We fear stability in the financial service markets will be pursued at the cost of genuine consumer-led competition and choice. Pursuit of effective competition may in occasional circumstances make maintaining stability a harder challenge. Yet from the consumer (and wider economic) perspective, effective and meaningful competition brings large efficiency gains, innovation, and better value products.

Excessive capital and liquidity requirements to make banks 'safe' serve to decrease the availability and increase the price of credit for consumers and small businesses. In addition, the takeover of HBOS by Lloyds TSB at the height of the banking crisis was allowed on financial stability grounds despite breaching normal competition law requirements. Both these examples demonstrate how policies to ensure stability may lead to consumer detriment. The potential tension between the policy goals of competition and stability needs to be recognised and resolved in the new regime.

## 12. Risks in 'judgement based' regulation

We agree with the '*judgement based*' regulatory approach as set out in the White Paper, and as set out in greater detail by the FSA in its '*FCA: Approach to Regulation*' document. The FCA paper sets out a clear case why stronger, more pro-active regulation is needed and its intention to intervene earlier, stronger and more robustly. Fundamentally, it recognises financial markets are inherently poor at guaranteeing consumer value even where there is strong competition since behavioural biases mean firms may be incentivised to produce complex and misleading products.

Financial services regulators, whether PRA or FCA will need to have the level of skills and experience necessary to move away from a 'box ticking' reactive approach to a more proactive preventative modus operandi. This will require higher level skills, analysis, stakeholder engagement and sound judgement.

Quite clearly however, judgements require a differing skill set than a compliance led Conduct of Business style approach to regulation. This will need more staff with wider skills including a better comprehension of consumer behaviour.

The FCA has the opportunity to instil a culture that is less excessively risk averse when challenging unfair practices than has previously been the case<sup>3</sup>.

---

<sup>2</sup> Acting without proper authority or rules.

<sup>3</sup> Consumer Focus, *Rating Regulators*, 2009

Conduct regulation is not, and can never be, a risk free activity, and it is important that the over-arching framework does not discourage necessary actions in support of consumer protection even where there may be some scope for successful challenge.

## 14. Regulatory staff and culture

We commend the recent steps taken by the FSA to enhance the calibre and competence of regulatory staff and would like to see this developed further. It is important that further experience is not lost in the transfer to the new regime but equally there is scope and significant potential benefit to be gained from injections of new talent, including more people with consumer policy and research expertise and more practitioner expertise.

The culture of an organisation tends to be led from the top and we applaud the Consumer Protection Strategy that has been initiated at the FSA since March 2010. Getting governance structures right, with an appropriate mix of independent directors with the confidence, style and ability to get on top of complex issues and constructively challenge in an effective way, will be crucial. Consumer interests should be effectively represented at Board level, in the PRA and FPC as well of course as the FCA.

A key early task for the new Boards should be to set the organisation's appetite for risk. We agree the new regime should not be a zero failure regime. Mistakes are always made and avoiding a blame culture will encourage regulatory staff to take responsibility and exercise their powers fully rather than holding back. But this needs careful stakeholder engagement and handling skills.

## 15. FCA's primary objectives

### What is a consumer?

We have a number of significant concerns over the general framework of objectives and principles for the FCA that is embodied in the current version of the Bill. But before discussing these concerns it is necessary to determine who the FCA is there to protect. The draft Bill falls into the same trap as FSMA in defining 'consumer' too widely. The definition includes not only ordinary consumers but also commercial entities whose professional role includes the purchase of or dealing in financial products. Because the definition is so wide and includes professionals there has been a need for clauses such as the general principle that 'consumers should take responsibility for their own decisions' 3B (1)(c), to which we have strong objections given that individual and SME consumers lack the knowledge, experience and expertise to fully do so in many financial services markets.

We believe the definition of consumer in 1 (c)(3) of Clause 5 is far too broad. We see no reason why the definition of a consumer in financial services legislation should differ from those widely used in other UK legislation for example, as under Ofgem or Ofcom's remit. A potential definition of a consumer could be drawn from the current draft of the European Commission's Consumer Rights Directive where consumer means 'any natural person who [in purchasing financial products and services] is acting for purposes which are outside his trade, business, craft or profession'.

Such an approach would help the new FCA focus its consumer protection responsibilities on the right consumers and the right markets. It would also allow it to have clearer focus on its other main jobs, namely to ensure that wholesale financial markets function with integrity and to act as an effective micro-prudential regulator for the 26,000 or so firms for whom it will have prudential responsibility. As the FCA Approach document makes clear there is an ambitious remit for the new body.

## Objectives

First, the wording of the single strategic objective is not strong enough to give the new FCA appropriate guidance as to its regulatory approach. We would like the FCA's strategic objective in 1B (2) to be:

'protecting and enhancing *sustained* confidence in the UK financial system'.

Without this amendment there is a significant risk that the new regulator will promote policies that promote short term confidence even where this is not properly grounded. Customers of Equitable Life and Northern Rock no doubt had plenty of confidence in the system until it was too late. Adding the word 'sustained' will ensure the regulator never has the imperative to hide problems in the face of a drain of confidence. Sustained confidence also places equal weight to distant events thus reinforcing the importance of '*horizon scanning*'. The addition of *sustained* will ensure unambiguously that the regulator must think longer term and ensure it sees off problems before they become serious and that it is never tempted to hide problems to ensure confidence in the present.

## Have regards to

Second, there is a need for additional 'have regards to'. With the Bill as drafted, it would be possible for the FCA to proceed on the basis of advancing one of the two operational objectives not expressly concerned with consumer protection – promoting efficiency and choice in the market for financial services; and protecting and enhancing the integrity of the UK financial system. But with either of these, there needs to be a clear guide to ensure these are accomplished with the consumer interest in mind. Most notably reasonable access to financial services, fairness in the way markets operate and value for money must be ensured.

Thus, we think there is a need to add a 'have regards to' that requires the FCA to take on board in any of its activities '*the longer term interest of consumers*'. This could be included in 1(b) (5) proposed within Clause 5 of the Bill.

We favour a strong competition objective for the FCA for reasons set out earlier in this response. We recommend clause 1B (4) of the Bill be amended however to read

'The FCA must, so far as is *reasonably* compatible with its strategic and operational objectives, discharge its general functions in a way which promotes *effective* competition'.

Addition of the word 'reasonably' provides the FCA with more discretion about how to trade-off its various objectives. The term 'effective competition' is generally preferred over 'competition' in other statutory frameworks because it is a broader concept, recognising the fact that for competition to work properly for consumers the demand side as well as the supply side of the market needs to work well. In financial services complexity, intangibility of products, information asymmetries, behavioural biases and lengthy terms of many products present significant challenges to a properly functioning demand side, and where these problems persist then regulatory interventions beyond enhancing competition to protect consumers will remain necessary.

## The new regime must adequately protect all consumers

Consumers are not homogenous in their needs for products and services nor in how they are able to access, use and understand financial services and products. People can face barriers in the market place for a variety of reasons both temporary and permanent. The regulator must have regards for these differences.

This should involve looking not only at individuals' characteristics and other risk factors which might put consumers at a disadvantage but also the nature of markets and situations in which consumers find themselves, and the extent to which some services are more essential than others. We also need to consider the effects of multiple disadvantages.

We strongly believe that there is a need for the FCA to have an additional 'have regard to' to take account of the differences between consumers. We suggest that parts of OFCOM's objectives would be suitable for this purpose:

*'OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances –*

*(h) the vulnerability [of those] whose circumstances appear to OFCOM to put them in need of special protection*

*(i) the needs of persons with disabilities, of the elderly and of those on low incomes*

*(l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas'*

## **17. Balance between responsibilities of consumers and firms**

We are concerned about the way in which the draft Bill seeks to strike a balance between the responsibility of firms and consumers. In general, we believe the emphasis is still too geared to an unrealistic concept of consumer responsibility. Few would dispute the notion that consumers have a duty to act as responsible citizens – acting within the law and giving truthful answers to questions, for example. But it is another thing entirely to suggest that there should be any kind of legal requirement on consumers as a whole to avoid making unwise financial decisions – the implication being that where any consumer has acted 'irresponsibly' regulatory protection should in some way be reduced.

### **Are we savvy consumers?**

It is too easy, in this context, to make unrealistic assumptions about consumers' level of knowledge and financial sophistication. Consumers in UK are among those most likely to describe themselves as '*knowledgeable*' in theoretical market research polls but research show that they are among those least likely to know their rights across a range of markets<sup>4</sup>. Meanwhile levels of financial capability, functional literacy and numeracy remain extremely poor. It is estimated that over 5.2 million UK adults lack the basic day to day competencies of functional literacy and 6.8 million lack functional numeracy. More than 20 per cent of adults, asked to choose between receiving £30 or 10 per cent of £350, opt for the lower figure. A recent FSA survey asked the question: 'if the inflation rate is 5 per cent and the interest rate you get on your savings is 3 per cent, will your savings be worth as much in a year's time?' – one in five gave the wrong answer<sup>5</sup>.

Compounding this lack of basic understanding is the complex nature of many financial product contracts despite years of effort by regulators to improve disclosure. For example, the consumer document from a major high street bank for a personal loan requires degree level education to understand; the standard text describing a PPI product requires PhD level education to comprehend. It takes 55 minutes to read a standard consumer credit agreement, let alone understand it.<sup>6</sup>

---

<sup>4</sup> <http://bit.ly/oq0eOZ>

<sup>5</sup> <http://bit.ly/r3Ydnc>

<sup>6</sup> *Warning: Too Much Information Can Harm*, Better Regulation Executive/NCC <http://bit.ly/oUP3lj>

It would therefore be unreasonable to argue that where a consumer has failed to fully read through and fully understand a complete set of terms and conditions they should automatically receive a lower level of protection. Problems of this kind were for example behind the recent Payment Protection Insurance scandal.

### Remove the have regard for consumer responsibility

We can and should invest in financial education and we very much welcome the aims and work of the Money Advice Service (MAS). But we must be realistic about not only the timeframe for improving personal capability but also about how far education can realistically go in making us experts in markets and products that seem to continually get more complex.

We believe the weight of responsibility to ensure the design, distribution and management of appropriate products, and information about them, lies with the firm. Products and services should be designed to prevent toxicity or detriment occurring based on empirical research of the likely consequences of product designs. Firms should ensure the products or services offered are appropriate for the consumer in terms of meeting their needs, accessibility and reasonable value for money.

We fear as drafted, the Bill could legitimise and even exacerbate the current approach of some firms, of providing reams of documents for each product as a means of discharging disclosure requirements, in the hope that thereafter responsibility is transferred to consumers, as they *'should have read'* these documents.

In our opinion there are strong arguments for the deletion from the bill of:

*'the general principle that consumers should take responsibility for their decisions'*.

In its place, we would like to see a general principle instead that the firm ensures, so far as is reasonable, the *'appropriateness of each product to the needs of the consumer'*, embedding what is already in The FSA's Treating Customers Fairly principles (principle 6) which states: *'a firm must pay due regard to the interests of its customers and treat them fairly'*.

## 17. Consumer protection powers for the FCA

In terms of consumer protection powers available, we support the enhanced powers the FCA will have to meet its operational objective of ensuring an appropriate degree of consumer protection. In particular, we strongly support extended powers to ban or place conditions on products, ban misleading advertisements, and publish warning notices. We also support the revised FCA approach which will look at margins, pricing and ancillary charges with the possibility of capping (as it has already done for mortgages on default charges) where it judges charges excessive.

But we think the proposed powers could, and should, be enhanced further still.

### Ruling on what is fair

We believe the FCA should also have full powers to exercise consumer protection rules of fairness under Consumer Protection Legislation. The FCA should have clear powers to deal with generic product terms and pricing that it deems unfair. This would allow the FCA to tackle such issues as ancillary charges in current accounts.

## Competition issues

We would like greater clarity on the face of the Bill about the boundary between the regulatory scope of the FCA and that of the OFT or new CMA. The FCA should have a statutory duty placed upon it to require it to investigate and respond to super-complaints from designated consumer bodies about practices causing consumer detriment in financial services markets. It should have clear powers to undertake market studies where it does not believe markets are functioning in the consumer interest or where effective competition could be improved. Just as it has the 'duty' under the proposed legislation to promote competition, so the FCA should have the powers to act quickly, decisively and effectively if there are barriers preventing competition from being effective. If, following its evaluations, the issue requires a full Market Investigation then the FCA should make a formal competition reference to the OFT/new CMA.

## Transparency

We believe more needs to be done to ensure the regulatory principles on openness and disclosure and transparency are achieved. The regulatory principles applied to PRA and FCA are:

- the desirability in appropriate cases of each regulator making information relating to authorised persons or recognised investment exchanges available to the public, or requiring authorised persons to publish information, as a means of contributing to the advancement by each regulator of its strategic and operational objectives and
- the principle that the regulators should exercise their functions as transparently as possible

The disclosure is still limited and it is unusual for principles to be qualified by 'as appropriate' and 'as possible'. S.348 limits the regulator's ability to publish firm specific information in their regulatory duties without the consent of the firm affected. The current S.349 under FSMA still provides for disclosure of confidential information for the purpose of facilitating the carrying out of a public function. The new regulatory principles might bolster the case for regulations under this provision. However, while S.348 remains it is unlikely that the interpretation will change.

We believe that the FSA should be given the power to name firms at the commencement of the disciplinary process where it has been established that the firm has a case to answer, a presumption that a warning notice will be published and finally earlier publication of decision notices *once* the decision has been made rather than after all appeals have been exhausted. The proposed changes stop short of this, are qualified, and are likely to be subject to the same legal arguments from industry. We call for amendments to S.348 and the definition of '*confidential information*' to allow the new regulatory principles to empower the regulator to use transparency as a regulatory tool.

## Why we need greater transparency

There are strong justifications for a more transparent approach which would deliver stronger incentives for firms to behave responsibly, send helpful signals to other market participants about what is and is not acceptable, provide useful information to consumers and consumer advocates and advisers, and enhance public trust in the regulatory process. We believe amendment to FSMA should allow the FCA, like Ofgem, OFCOM and the ASA, to publish the initiation of enforcement proceedings. This would allow it to demonstrate it is delivering on its statutory duty on 'enhancing *sustained* confidence in the UK financial system'.

In energy markets, Ofgem announces on its website when it is investigating firms for breaches to the licence.<sup>7</sup> It also openly reports after nine months what has happened to the investigation. Equally, the Advertising Standards Authority (ASA) publishes on its website when a complaint has been made that they are investigating. OFCOM also announces which firms it is investigating. We see no reason why financial services firms should be granted greater dispensation from public disclosure as will still be the case in the draft Bill.

Such an approach would allow the regulator to better deliver its operational objective 'appropriate consumer protection' and comply with the draft regulatory principles 5 'openness and disclosure' and 6 on 'transparency'.

Firms may argue that financial firms are sensitive to market fluctuations if they are unfairly accused, but the reality is the regulatory resources are so stretched it is extremely unlikely the FCA will pursue speculative cases. Indeed, the danger remains that enforcement action remains so difficult to prove and so resource intensive that firms will still escape enforcement action. If we are to move to a 'judgement based regulatory approach' then the future regulator must have sufficient, easy to use tools, including publicity, to ensure that it keeps markets clean and fair.

Parliament must give the future FCA the regulatory tools to enable enforcement action to be quicker, less costly and less onerous on regulatory resources. We are aware of the difficulty the FSA has experienced – even with key techniques such as mystery shopping – in gathering sufficient evidence of a robust enough nature to proceed with enforcement action. To support the FCA's new intensive supervisory approach, we favour a change to place financial services enforcement action within a civil rather than a criminal regime, and subject to a balance of probabilities test. This should allow the FCA to accept wider notions of evidence than in the past, and allow enforcement action to be quicker with a lower threshold to prove regulatory breaches. It would be a strong incentive for firms to avoid consumer detriment and 'gaming' the regulator and its enforcement procedure if future enforcement action was quicker, more robust and made public.

### Transparency can help fuel competition

Finally, under transparency and public disclosure, the regulator also needs to be able to ask for, and publicly disclose, market share in order for complaints data be shown against market share, allowing consumers to better judge firms' commitment to fair treatment and preventing future complaints from occurring. The FOS and FSA have tried before to gain this information but under the current regulations useable data has proved elusive.

## 19. Impact of new regulatory arrangements on the risk and cost of misselling

We hope the enhanced powers proposed in the Bill, alongside the revised FCA approach of which we strongly support, will go some way to preventing detriment. But for the reasons stated elsewhere in our response there are real concerns about whether the powers, tools and objectives in the draft Bill are sufficient to prevent the many forms of detriment consumers have suffered in financial services markets.

The list below summarises the areas where we believe stronger or clearer FCA powers could further reduce the chance of consumer detriment eg through misselling and poorly designed products:

- The ability to apply a lighter touch regime for specified products which meet agreed minimum standards (which could be pre-approved and / or kitemarked)

---

<sup>7</sup> Ofgem, *Enforcement Guidelines on Complaints and Investigations*, 232/07

- Stronger powers on disclosure of enforcement action
- A wider duty on authorised firms to ensure the appropriateness of products
- The removal of the regulatory principle of consumer responsibility which attempts to transfer responsibility from firms to consumers
- A refined definition of '*consumer*' to focus much more on domestic consumers
- An additional 'have regard to' for consumers who are vulnerable and/or at a disadvantage

In terms of consumer detriment, we believe it is vital that the current arrangements under the 2002 Enterprise Act for super-complaints are extended to give designated consumer bodies the powers to refer super-complaints about financial services direct to the FCA rather than to the OFT as at present. The FCA would have a commensurate statutory responsibility to investigate and respond to the super-complaint in a timely fashion. Super-complaints have proved an effective policing and influencing tool for the retail market as organisations such as ourselves, Which? and Citizens Advice have been able to raise cases of significant detriment with the OFT for priority action. We strongly urge these powers to be clear on the face of the Bill. At the moment the draft Bill only refers to '*referral powers*', including from other bodies funded from the levy (MAS and FOS).

Our super-complaint on cash ISAs, which resulted in the maximum time of transfer being cut to 15 days from 23 days and interest should be paid on every day of the transfer is estimated to have saved consumers up to £14.5 million.<sup>2</sup> Equally, it was a super-complaint from Citizens Advice that eventually lead to PPI compensation. The ability to refer such super-complaints direct to the FCA with its detailed knowledge of the market and its wide range of powers to take any necessary action would improve regulatory efficiency and effectiveness.

The extra '*referral powers*' for MAS and FOS are welcome if they find the regulator slow to act, but one would hope the new co-ordination committee as set out in March under FS11/2 should ensure FOS complaints data and MAS intelligence is fed back to the regulator.

## 22. Other areas of concern

### Scope

We would like the FCA to be an effective regulator for the whole of the consumer financial services market. We therefore favour the transfer of responsibility for the regulation of unsecured credit from the OFT to the FCA, and would like this to be completed in time for the start of the new regime so the FCA can build it into its workprogramme and approach from the outset. It is important that any enabling legislation needed for this transfer is built into this Bill to ensure that the process can be expedited.

We also consider that this is therefore an opportunity to look again at whether the current split of regulatory responsibilities for defined contribution pensions between the FSA and the Pensions Regulator is helpful for consumers. We suspect that the split will prove increasingly dysfunctional, in which case the current opportunity to rationalise the regime should be taken.

## Oversight of payment systems

The BoE was recently given statutory oversight of payment systems under the Banking Act 2009 including inter-bank payment schemes. The Bank's oversight is largely in the context of financial stability, recognising the crucial need to maintain the integrity of payment systems in the event of failure of a major bank or other institution. There are important consumer and competition issues with respect to the UK's payment systems however, as the recent controversy around the phasing out of cheques has shown. We therefore suggest that the FCA be charged with a statutory responsibility for the consumer protection and competition elements of payment systems, and that both the FCA and the Bank be given duties to co-operate with each other on Payment system regulation.



**Consumer  
Focus**  
Campaigning for a fair deal

## **Consumer Focus response to Joint Committee on the Financial Services Regulatory bill**

For more information contact Sarah Brooks on 020 7799 7928 or email  
[sarah.brooks@consumerfocus.org.uk](mailto:sarah.brooks@consumerfocus.org.uk)

[www.consumerfocus.org.uk](http://www.consumerfocus.org.uk)  
Copyright: Consumer Focus

Published: September 2011

If you require this publication in Braille, large print or on audio CD please contact us.

For the deaf, hard of hearing or speech impaired, contact Consumer Focus via Text  
Relay:

From a textphone, call 18001 020 7799 7900

From a telephone, call 18002 020 7799 7900

### **Consumer Focus**

Fleetbank House  
Salisbury Square  
London EC4Y 8JX

t 020 7799 7900

f 020 7799 7901

e [contact@consumerfocus.org.uk](mailto:contact@consumerfocus.org.uk)

Media Team: 020 7799 8004 / 8005 / 8006

For regular updates from Consumer Focus, sign up to our monthly e-newsletter by  
emailing [enews@consumerfocus.org.uk](mailto:enews@consumerfocus.org.uk)