



PROTECTING CONSUMER INTERESTS IN THE RETAIL FINANCIAL SERVICES AREA:

NEED FOR INDEPENDENT AND EFFICIENT NATIONAL SUPERVISORS EVERYWHERE IN THE EU

BEUC Requests

Contact: Anne Fily & Farid Aliyev – financialservices@beuc.eu

Ref.: X/2011/111 - 28 /10/11

BEUC, the European Consumers' Organisation

80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

 EC register for interest representatives: identification number 9505781573-45 

Summary

Having good legislation protecting consumers is not sufficient to ensure a high level of consumer protection: it is essential to ensure that legislation is properly enforced everywhere in the EU. However, national supervisory activities vary a lot from one Member State to another leading to poor consumer protection in some Member States. BEUC's recent study "Financial supervision in the EU – A consumer perspective" shows that consumer protection supervision is often neglected at national level to the advantage of prudential supervision.

Even if it is well justified on the grounds of efficiency to conduct consumer protection supervision at national rather than EU level, the activity of national supervision necessitates a certain minimum degree of harmonisation to ensure an effective high level of public enforcement for the benefit of all EU consumers. Therefore, BEUC calls on EU policymakers to adopt the necessary measures to ensure that powerful and independent Financial Consumer Protection Authorities (FCPAs) exist in every Member State and that following aspects are covered:

- Goals pursued by FCPAs;
- Scope of activity of FCPAs;
- Expertise of FCPAs;
- Powers and sanctions;
- Performance and effectiveness of FCPAs;
- Networking and EU coordination;
- Governance;
- Requirement to consult consumers.

A case for action at EU level

BEUC has been asking for consumer interests to be taken care of by financial supervisory authorities without success so far.¹ At European level, this aspect of supervision was the missing element in the Commission Communication on “European Financial Supervision” in May 2009 which was aiming at tackling the issues revealed and/or aggravated by the major financial turmoil. Since then, the new European supervisory authorities were created in order to strengthen macro and micro-prudential supervision at EU level but with a very limited role as regards consumer protection.

Even though from a consumer perspective we are still far from achieving a single market in financial services², there is a clear trend towards an increase of EU legislation in the retail financial services area. However, having good legislation protecting consumers is not sufficient to ensure a high level of consumer protection; it is also essential to ensure that legislation is properly enforced everywhere in the EU. In other consumer domains, this is the role usually assigned to national authorities for consumer protection: they are in charge of controlling whether professionals apply legislation properly and impose sanctions if it is not the case. For reasons that nowadays seem incomprehensible, retail financial services have never been treated as products and consumer services like the others. But the consumers of these services are also confronted with unfair commercial practices, unfair terms, lack of information on key elements of financial products, high-risk and toxic products, lack of appropriate remedies, etc.

This question of enforcement has never been treated at the European level, hardly even considered, except through a recent Commission’s consultation on “Reinforcing sanctioning regimes in the financial services sector” that can be considered a first step in the right direction.

As a result the supervisory activity varies a lot from one Member State to another leading to poor consumer protection in some Member States. For example in Germany, there is no public body in charge of consumer problems in the financial services area; in many other Member States consumer protection does not constitute a priority for the supervisory authorities. While the conduct of this aspect of financial supervision at national rather than EU level is well justified on the grounds of the principles of subsidiarity and proportionality, ***the activity of national supervisors necessitates a certain minimum degree of harmonisation*** to ensure an effective high level of public enforcement for the benefit of all EU consumers.³

Currently, existing national Financial Supervisory Authorities (FSAs) are primarily in charge of prudential supervision and control of market stability, while prudential supervision and consumer protection are often closely interdependent. If prudential measures fail, it would be rather difficult to protect consumers who make deposits, borrow money, plan financially for their future, etc. In the same vein, poor business practices, wrong incentives and high-risk products cause major problems to consumer interests and can at the same time represent a significant prudential risk. There is concern in the UK, for example, that within the proposed new ‘twin peaks’ structure there may be insufficient input on consumer issues to the new Prudential

¹ See BEUC position paper “*Financial supervision in Europe: Consumer perspective*”, July 2009 at www.beuc.eu

² At cross border level, it is still impossible for a consumer to open a bank account or a savings account, get a loan or an insurance or invest his money in another EU Member State if he is not a resident of that country

³ EC consultation on “*Reinforcing sanctioning regimes in the financial services sector*”, December 2010: http://ec.europa.eu/internal_market/consultations/2010/sanctions_en.htm

Regulatory Authority. Nevertheless, ***the objectives of prudential supervision and consumer protection are not identical and may be subject to conflict of interests.***

In order to analyse further the situation of consumer protection supervision in the EU, BEUC commissioned a study to assess existing consumer protection through the law and practice of financial supervision and to provide ideas and recommendations for an improved representation of consumer interests in the future.⁴ The results of the BEUC study "*Financial supervision in the EU - A consumer perspective*" show that:

- For some FSAs, consumer protection does not constitute a statutory objective and those having this role perform a limited number of tasks only;
- Several national FSAs have a limited number of staff in charge of consumer protection supervision and not all FSAs have staff members dealing exclusively with consumer protection;
- The on-site inspection capacity of many FSAs is limited;
- 70% of the FSAs surveyed consider themselves unable to make binding decisions in relation to consumer complaints. In most cases, they merely send notification letters to interested parties/government authorities;
- Several FSAs do not publicise sanctions and consumer complaints. In many cases, conflicts of interests are a barrier to such publications (i.e. concerns over the detrimental effects on the financial markets). Additionally, there can be legal obstacles (including criminal penalties) to publication, or publication at an early stage. Although safeguards should remain to ensure that publication is appropriate, there should be a presumption of transparency in regulatory and supervisory activity;
- In the overwhelming majority of cases, consumers cannot get redress;
- Funding of some FSAs is done by financial service providers which can be a potential source for conflict of interests.

BEUC Requests

BEUC calls on EU policymakers to adopt the necessary measures⁵, as described below, to ensure effective enforcement of financial legislation and better protection of consumers of financial services.

Independence of Financial Consumer Protection Authorities

- More powerful and independent Financial Consumer Protection Authorities (FCPAs) are needed in every Member State. Firewalls should be created to avoid conflicts of interest between prudential supervision and consumer protection supervision in the case this task is performed by the same financial supervisor. On the other hand, firewalls should not impede cooperation and information exchange between supervisors.

⁴ BEUC study "*Financial supervision in the EU – A consumer perspective*", May 2011: <http://www.beuc.org/Content/Default.asp?PageID=2143>

⁵ As an example, see the Directive for a common regulatory framework for electronic communications networks and services, [Directive 2002/21](#). Article 3 requires member states to establish national telecoms regulators and sets out obligations on features such as independence

- Depending on the national situation, the FCPA may be established as a completely separate body (e.g. the US Consumer Financial Protection Bureau) or be a division within the supervisory authority provided that conflicts of interests are ruled out. In the UK, for example, the proposed regulatory reforms introduce a competence for the prudential regulator (the PRA) to veto a decision by the conduct of business regulator (the FCA) leaving room for both conflicts of interests and moral hazard on behalf of 'too-big-to-fail' financial institutions⁶;
- The FCPA should be financed through fees which may be levied from providers, but should benefit from the independence of the tax authorities in order to exclude undue political influence.

Goals pursued by FCPAs

- Ensure fair and responsible treatment of consumers by financial service providers;
- Protect consumers from suffering damage, loss of assets and patrimony as well as from over-indebtedness;
- Promote effective competition, efficiency, access and choice in financial services markets.

Scope of activity of FCPAs

- FCPAs should cover the whole area of retail financial services, including investment/savings, credit, insurance protection, payment services, pensions (both accumulation and decumulation phases) and all financial service providers (banking and non-banking);
- FCPAs should cover linked products to avoid loopholes and regulatory arbitrage;
- FCPAs should supervise practices and training standards of selling personnel, including intermediaries, as well as payment inducement systems.

Expertise of FCPAs

FCPAs should have effective enforcement mechanisms and have legal expertise in:

- Administrative rules (prudential, codes of conduct, competition) which have a direct impact on individual consumer protection;
- Strict rules in private law protecting consumers (whether employed, unemployed or self-employed) including transversal rules applying to all products and services and specific rules in the financial services area or savers (including consumer investors and pensions) and debtors in financial services (credit, investment, payment and insurance);
- Strict rules requiring true, fair, complete, timely and understandable information to the above mentioned groups in a form that consumers can use;
- Data protection rules.

⁶ This is particularly an issue given that the proposals as currently drafted do not have provision for a statutory Consumer Panel for the PRA as well as one for the FCA.

Powers assigned to FCPAs

FCPAs should perform at least the following tasks:⁷

- *Product supervision:*
 - Monitor products and assess their impact on consumers. This should preferably be done proactively to tackle poor products or incentive structures before they are brought to the market;
 - Have product intervention powers to enable the regulator to take timely action against poor products or product features;
 - Issue warnings against dangerous products;
 - Intervene for safety purposes to promote competition or to control ancillary charges, and publish when action has been taken against companies or products;
 - Promote development of basic products with straightforward outcomes.
- *Consumer competence and inquiry:*
 - Collect and evaluate consumer complaints a) directly from consumers; b) indirectly via consumer organisations (e.g. the UK 'super-complaints' system); c) incidentally by offering arbitration services to consumers;
 - Mandate surveys, mystery shopping and investigations, including with regard to practices of which they become aware through their consumer network, public or individual complaints at the supplier's place of business, having recourse to the investigative powers of prudential supervision;
 - Monitor the effect of products, marketing practices and legal rules on consumers;
 - Run empirical consumer research proactively and at the request of consumer organisations and government;
 - Instantly assess the impact of new marketing methods and products on different types of consumer households (e.g. the Dutch Nibud system);
 - Focus its research on understanding and mitigating misaligned incentives with regard to the interests of the end consumer of the transaction.
- *Enforcement:*⁸
 - Impose public sanctions such as punishment for criminal behaviour, denial or withdrawal of a necessary license, administrative fines for misbehaviour, orders to change behaviour.

⁷ In this connection, please see BEUC amendment proposals to the proposed Directive on credit agreements relating to residential property, September 2011:

<http://www.beuc.eu/Content/Default.asp?PageID=2143>

⁸ Please also see BEUC response to the EC consultation on "Reinforcing sanctioning regimes in the financial services sector", February 2011:

<http://www.beuc.eu/Content/Default.asp?PageID=2143>

- Impose private sanctions such as strict liability for misbehaviour, voiding of contracts and consumer obligations (usury, forced errors, misrepresentation). Needless to say that sanctions should be set at a level to act as a 'credible deterrent' against poor practice;
 - Intervene to amend or ban products and publicise that this action has been taken;
 - Publicise the sanctions on a regular basis;
 - Set up independent and balanced ADR schemes and supervise private ADR schemes.
 - Provide support to consumer organisations in their collective redress proceedings.
- *Financial Information:*
 - Set standards for forms, layout and accessibility of information;
 - Publish regulatory information wherever possible to protect consumers or to improve the incentive for firms to treat customers fairly. This could include information such as complaints data, the results of mystery shopping and thematic reviews to occasions where the regulator has identified a misleading financial promotion;
 - Provide information tools helping consumers to understand and to choose the right products as well as exercise their rights before, during and after financial services have been used;
 - Provide a public, easily accessible database on the Internet which includes:
 - consumer law;
 - all standard contract terms in financial services;
 - prosecuted infringements of suppliers;
 - rules it has issued;
 - codes of conduct from general agreements⁹.
 - *Financial Education:*
 - Finance independent and impartial projects of financial education helping people to get and /or increase their budget skills;
 - Organise exchange of best practices with NGOs working in this area.

Performance and effectiveness of FCPAs

- FCPAs should be staffed and equipped in relation to market size, complaints and suppliers. Just renaming existing institutions, councils or expert groups as consumer institutions does not improve consumer protection. The EU has to evaluate whether such institutions are sufficiently equipped and active to use consumer problems and complaints as a basis for their activities.

⁹ Not codes of conduct unilaterally issued by financial institutions with regard to consumer protection.

- FCPAs should be effectively evaluated to see if they effectively perform their duties in relation to consumer protection, e.g. the speed of collection and dissemination of information on consumer problems, enforcement of sanctions, legal or regulatory solutions brought to consumer problems.
- FCPAs should each year publish an annual report available on their web site and report to their national parliament.

Networking and EU coordination

- The FCPAs will need to rely on some form of coordination at the EU level especially in terms of facilitating a good level of cooperation between national FCPAs. This competence could be assigned to the new European Authorities for supervision of financial services or the European Commission.
- Together with the two points above, key stakeholder involvement should be facilitated, including consumer organisations, trade unions, independent consumer research institutes, money advice associations, and welfare and debt advice organisations.
- As regards supervision of cross-border delivery of financial services, ongoing activities of financial service providers should be supervised by the host state FCPAs, i.e. the principle of a 'European driving licence' rather than a 'European Passport' should apply.¹⁰
- The European Commission should review the restrictions the Directives place on the amount of information able to be disclosed by the FCPAs and whether changes could be made to enhance the ability of the FCPAs to disclose regulatory information to protect and benefit consumers.

Governance

- The FCPAs should create advisory boards, where notably consumer organisations have a qualified right to propose action and can exercise controls comparable to a board of trustees.

Requirement to consult consumers

- FCPAs should have a requirement to consult consumers, which could include the establishment of independent financial services panels at the national level.

END

¹⁰ Please also see BEUC amendment proposals to the proposed Directive on credit agreements relating to residential property, September 2011