

**Financial Supervision in the EU**  
**A consumer perspective**

Submitted to

BEUC, the European Consumers' Organisation

by

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## Executive Summary

1. The **financial crisis** has largely been attributed to a failure in effective bank supervision. Consumers may be seen as the true victims of the crisis, in that they have been burdened with irresponsible credit, they lost their money through bad advice and inappropriate investment products and then, as taxpayers, had to help rescue the banking system. This has created a new awareness of the role of consumer protection in financial services and of the role of the state in financial supervision.

The European Consumers' Organisation **BEUC** has commissioned the institute for financial services (*iff*) 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.

The present study is based on **official statements, literature and an empirical survey** of financial supervisors and consumer organisations in all EU Member States. Its findings have taken the form of a Main Report and an Annex document called "Country Reports" containing details on national financial supervision structures and activities. The research shows that all consumer organisations and most supervisors, whether motivated by the imperatives of their own statutory function or by own commitment, see consumer protection as an integral part of a future strengthened supervisory regime

Overall, existing supervisory practice is seen as unsatisfactory at both national and international level. This is partly attributed to existing conflicts of interests within the supervisory framework itself, and partly to lack of competence or adequate means of intervention, including the unequal distribution of supervisory resources.

2. A lack of clarity in the **definition of consumer protection** generates a wide range of opinions and proposals. Some identify consumer with (general) investor protection in financial services or focus solely on securities and assets, placing less emphasis on credit, insurance and payment services, and working on the assumption that improved prudential supervision would suffice to safeguard consumer protection. Where consumers are seen purely as the users of products available in the market, the protection of the market and the provision of information to consumers, together with consumer education, are seen as the remedies needed.

Consumer protection is focussed onto the legal aspects of consumer policy including the protection against conflicts of interest and mis-selling as well as consumer information and consumer education, to the extent that it entails a legal right to information. The enforcement of consumer rights to transparency and information, as well as to legal minimum standards in products and servicing, should therefore be central to financial supervision in the future as it relates to consumer protection.

The institutional design of consumer-related financial supervision needs to be adapted to national diversity in terms of population size, the resources available and the prevailing legal and ethical traditions.

3. Clearly defined consumer protection in financial services must address **conflicts of interest** between prudential regulation and central bank functions, as well as those existing between consumer protection and prudential regulation.

A significant number of countries now favour a separation of prudential supervision from supervision in the form of rules setting appropriate market behaviour on the part of banks, including consumer protection rules. This is in line with the growing importance of conduct-of-business supervision in areas of finance beyond the securities sector, in which those rules were originally conceived.

However, alongside the potential need for greater convergence in conduct-of-business supervision in Europe, there is a need to develop concepts and techniques applicable to the supervision of commercial practices in order to address potential unfairness and for supervisors to assist financial regulators through the identification of potential problem areas in the markets for financial products.

The report does not prescribe an institutional design; it instead calls for the creation of firewalls to ensure effective supervisory outcomes in terms of consumer protection, the supervision of the money supply and the safety of financial institutions.

4. In order to address the problems which arise when **public administrations intervene in matters of private law**, the report examines a number of examples where “private attorney general” functions, public inquiries and research into malpractice and its social consequences (e.g. overindebtedness, foreclosures, poverty in old age), the law is enforced and financial information is provided by:

- Establishing an active role for financial supervision in general consumer information and education;
- Providing public agencies with adequate powers enabling them to enforce private law; and
- Rendering compliance with private consumer rights a public duty.

5. The report proposes a **three-peak supervisory model**, distinguishing between central bank functions in the money market and the money system, micro-prudential supervision to achieve the safety of financial institutions, and behavioural supervision, which we refer to as customer protection. This last pillar of the model comprises the supervision of consumer protection and forms the basis of the report’s proposal that Financial Consumer Protection Agencies (FCCA) should be established.

Three pillar system of supervision

Central Bank	Prudential Supervision	Customer Protection
Money supply	Safety and soundness	Fair competition
Currency stability	Minimum capital requirements	Conduct of business rules
International	Documentation	Compliance
Interest rates	Risk assessment	Fair marketing practices
State debt		<b>Consumer protection</b>

Furthermore, this proposal is in line with the general features of well-functioning regulatory and supervisory structures established by the IMF. It thus takes account of the need to ensure that all objectives (i.e. consumer protection goals) are assigned to a specific agency, that there is an internally consistent set of objectives (so that synergies can be achieved and internal conflicts avoided or kept transparent), and that there should be formal mechanisms to deal with any conflicts that arise.

6. A **Financial Consumer Protection Agency (FCPA)** should

- be created in each country,
- be co-ordinated at EU-level,
- be solely responsible for consumer protection,
- have at least two subdivisions: banking and insurance.
- include all “banking and insurance businesses”, irrespective of whether they qualify as banks or insurance companies.
- oversee all financial services offered within the market they supervise, irrespective of whether they originate from a national or a supplier based outside their jurisdiction
- focus on the social effects of financial services in retail banking and insurance.
- have an integrated supervisory function to cover linked products.
- form part of a three-peaks system of supervision and create firewalls both to avoid internal conflicts of interest and to exclude any form of inappropriate intervention by providers.
- be staffed and equipped in proportion to market size, level of complaints and the providers within that market.
- be effectively evaluated.
- have effective enforcement mechanisms under both administrative and private law, as appropriate.
- have specific authority to deal with empirically verifiable consumer problems.
- work to inspire confidence among existing consumer networks operating in the area of financial services by supporting their work and benefiting from their knowledge of and expertise in problems involving financial services for consumers.

It would fall to the FCPAs to enforce consumer rights under both administrative and private law. They would have a duty to accomplish the supervision of the sale and subsequent servicing of financial

products to enforce consumer rights through administrative, individual and collective mechanisms, to conduct inquiries and research, to advise on financial regulation and to provide and co-ordinate best practice in financial information and education based on close links with consumers and knowledge of the problems they are encountering in this area. The FCPA thus calls for financial supervision to involve close collaboration with consumer organisations. The financial crisis has dramatically highlighted the need for information flow and for dialogue between stakeholders in financial services (financial market authorities, consumer organisations and other relevant market participants), and has demonstrated the need for supervisors within the EU to cooperate more closely. The FCPAs would be a major element of this new institutional dialogue and provide a national and international forum for the exchange of information between stakeholders. Its existence would benefit all organisations dedicated to consumer protection.

## Introduction

The financial crisis has largely been attributed to a failure in effective bank supervision. It has also been held that consumers are the true victims of the crisis in that in some countries they were burdened with irresponsible credit in the form of mortgage loans and credit card debt ("subprime"), lost their money through bad advice and inappropriate investment products and had to help rescue banks as taxpayers. "One silver lining of the global financial crisis is that more attention is being paid to financial consumer protection. Debates in the legislatures and central banks of countries with sophisticated financial markets are highlighting the link between protecting financial consumers and stable, efficient markets."<sup>1</sup>

### 1 Which "consumer protection" should be taken care of by financial supervision?<sup>2</sup>

The purpose of this study is to promote consumer protection in the European Union through financial supervision. There are three basic concepts of financial consumer protection.

Although consumer protection is a widely shared principle, denoting in particular a significant body of national consumer law, there is no unanimity as to its precise significance. The interpretation of what consumer protection means varies widely. It is seen by some as merely a form of market protection or compliance, by others as analogous to food and health supervision; some consider consumer protection as a remedy for informational asymmetry in the markets or as a means of enabling access to goods and services available in the market; some see it as a means of providing goods and services of first necessity or minimum standards in terms of the quality and functionality of the products. The evaluation of existing or envisaged financial supervision is problematic as long as there is no consensus about the meaning and purpose of consumer protection in financial services.

#### 1.1 "Consumer protection" in the actual reform debate

Numerous studies conducted by government agencies, private banks, international consultancies and consumer organisations have been dedicated to the question of consumer protection in relation to financial supervision.<sup>3</sup> Many more have examined this issue in more general studies concerning the overall reform of financial supervision.<sup>4</sup>

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<sup>1</sup> See Brix and McKee, Consumer Protection Regulation in Low-Access Environments- Opportunities to Promote Responsible Finance, World Bank CGAP 2010.

<sup>2</sup> See Reifner, Niemi-Kiesiläinen, Huls, Springeneer, Overindebtedness in European Consumer Law - Principles from 15 European States, Norderstedt 2010 pp 54 ff.

<sup>3</sup> Thorun, Chr: Verbraucherorientierte Finanzaufsicht. 2010; vzbv: Verbraucherschutz Finanzmarktregulierung. 2010; ConPolicy Verbraucherorientierte Finanzaufsicht: Lehren aus britischen und irischen Erfahrungen. (mandated by the German Consumer Federation vzbv 2009; World Bank CGAP: Consumer Protection Regulation in Low-Access Environments. 2010; Keßler, J; Micklitz, H-W.; Reich, N.: Darstellung der Arbeitsweise von Finanzaufsichtsbehörden in ausgewählten Ländern und deren Verbraucherorientierung. 2009 (mandated by the German Consumer federation vzbv); Reifner, U: Bank safety and soundness - The Bergamo Report. Hamburg: institute für Finanzdienstleistungen, 1996.

<sup>4</sup> Deletré, B. Rapport de la mission de réflexion et de propositions sur l'organisation et le fonctionnement de la Supervision des activités financières en France, French



Keßler et al.<sup>5</sup> argues on behalf of German consumer organisations that, according to both the European Treaty and the German constitution, it is the “task of bank supervision to enforce the rules of consumer protection which serve a well-informed consumer.” ConPolicy, in their study of the situation in the UK and Ireland, conclude that consumer protection is an integral part of bank supervision and has proven itself to be very significant – a remarkable statement in view of the situation of consumers in these countries following the financial crisis. The World Bank (ECSPF) states that “the importance of consumer protection and financial literacy for the long-term stability of the financial sector [certainly the core goal of bank supervision *iff*] has been highlighted by the recent turmoil in financial markets worldwide.” Since we do not share the optimism as to financial education, consumer protection as legal protection certainly has significantly greater weight for the welfare of consumers.

It distinguishes between the traditional task of bank supervision, which is to guarantee *safety and soundness* and *conduct of business rules* which represent the area of consumer protection.

*“Financial regulation is also designed to protect customers and investors through business conduct rules. Particularly in cases where transparency requirements alone are insufficient, investors are protected by rules that mandate fair treatment and high standards of business conduct by intermediaries. Conduct-of-business rules ultimately lead to greater confidence in the financial system and therefore potentially greater market participation. Business conduct regulation has a quite different focus from safety and soundness oversight. Its emphasis is on transparency, disclosure, suitability, and investor protection. It is designed to ensure fair dealing. Such standards have been widely adopted in securities regulation for several decades. The sale of risk products to individuals traditionally was viewed as an appropriate area for substantive conduct regulation. Classic examples of business conduct rules include conflict-of-interest rules, advertising restrictions, and suitability standards. Some observers claim that business conduct rules per se were less common in the banking sector, although fiduciary principles applied.*

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Government Inspection générale des Finances N°2008-M-069-02 Paris January 2009; Deloitte, Center for Banking Solutions, The Structure of Financial Supervision – Approaches and Challenges in a Global Marketplace, mandated by the Group of Thirty inc. October 6, 2008; Armin, J.: Supervision and Regulation of Financial Institutions in Europe. 2006; Lanno, K; Casey, JP; Sutton, A: EU financial regulation and supervision beyond 2005. Brussels: Centre for European Policy Studies, 2005; Lastra, Rosa M.: The governance structure for financial regulation and supervision in Europe. London: London School of Economics, 2003; Martin-Aceana, P; Tortella, T.: Regulation and supervision. State and financial systems in Europe and the USA. 2010, p.139-148; Masciandaro, D; Quintyn, M: Institutions matter: financial supervision architecture, central bank and path-dependence. In: South-Eastern Europe journal of economics 8 (2010) Nr. 1, S. 7-53; Netherlands Bank DNB: The Supervision of Banks in Europe: The Case for a Tailor-made Setup. 2008; Ohler, C.: International regulation and supervision of financial markets after the crisis. European yearbook of international economic law. 2010, S. 3-31; Stolz, S.: Banking supervision in integrated financial markets. Munich: CESifo, 2002.

<sup>5</sup> Keßler, J; Micklitz, H-W.; Reich, N.: Darstellung der Arbeitsweise von Finanzaufsichtsbehörden in ausgewählten Ländern und deren Verbraucherorientierung. 2009.

*As banks have ventured further from their original business models and have become more active purveyors of risk-based products and services, particularly to retail customers, banking regulators are applying business conduct restrictions more broadly.”*

At EU level, the existing system of financial regulation and supervision (ESFS) now tries to coordinate and unify the newly created coordinating bodies of bank (EBA), insurance and occupational pension (EIOPA) and securities supervision (ESMA).<sup>6</sup>

There is no direct reference to consumer protection in the legal texts, although the *need for the protection of depositors, investors and consumers across the Union* is acknowledged. (Recital 22) of the regulations on the specific regulations. One Article in each regulation cites consumer protection in its heading, however its transposition in the first paragraph refers only to fact-finding and education.<sup>7</sup>

Although there is therefore no doubt in the regulatory context that consumer protection is seen as a future goal of bank supervision, there is a lack of political and scientific understanding of the failure of the financial system in the near past and the visible and practical effects of this new emphasis.

Institutionally, the newly created American consumer protection authority in financial services<sup>8</sup> may be the leading example of the incorporation of consumer protection into financial services supervision, although the scope of its activities was strongly limited during parliamentary discussions and its proposed budget by the Obama administration is currently coming under pressure to be reduced.

Most authors approve of the development of a separate unit for consumer protection in the area of financial supervision. Where this could be situated varies according to national tradition and culture. A strong central bank close to the political class, as in France, views itself as a natural place to defend consumer interests. In the UK, where there is a vast private financial market, agencies like the Office of Fair Trading have been preferred. In Germany, the existence of strong state-subsidised consumer organisations allows for the proposition that civil society is capable of taking over the functions of financial supervision.

This consensus as to the general idea of consumer protection and the need for an institution capable of advocating by representing this idea however lacks momentum in its translation into practice.

Are we really talking about the same things when consumer protection is evoked? The legislator has left the notion of consumer protection to the public. Although it is cited widely as a general goal, other language is deployed where defined measures are at stake.

The existing proposals begin with consumers or investors, users or stakeholders. Their aim is to improve consumer information or even

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<sup>6</sup> Regulation (EU) No 1092-1095/2010; see also the proposal of September 23, 2009 COM(2009) 501 final. Accessible from here: [http://ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm](http://ec.europa.eu/internal_market/finances/committees/index_en.htm).

<sup>7</sup> See below under Section 3.1.3.1 (p.2) and Annex for extracts of legal texts.

<sup>8</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173): Title X: Bureau of Consumer Financial Protection.

to educate both consumers and suppliers, or to collect data and guarantee consulting from the consumer side.

In this context, the World Bank defines consumer protection as market enforcement including consumer education measures: "(1) consumer disclosure should be simple, easy to understand and comparable; (2) abusive business practices by financial service providers should be prohibited; (3) consumers should have an easy, inexpensive and speedy method of resolving disputes with financial institutions; and (4) financial education should be available to consumers so that they can understand financial services and products and make informed decisions."<sup>9</sup>

Some argue that a stable financial system as such protects consumers and therefore fulfils the goals of consumer protection. This confuses the question what is good for consumers with the question of what consumers need (i.e. the "general interest"). Since financial stability is part of the general infrastructure of society, any group of citizens and market participants will profit from traditional bank supervision with its focus on bank safety and soundness. This is why consumer protection could at the same time be called workers' as well as employers' protection, be part of protection for tenants and landlords and protect suppliers' and commercial investors, who would thus be identified with consumers.

One of the tasks of this study will be to clarify where consumer protection starts and what it makes distinct from general financial supervision in order to define how the existing infrastructure could be used for the kind of consumer protection promoted by BEUC.

BEUC has mandated the institute for financial services, a Hamburg-based not-for-profit research association, to provide insight into the potential within existing financial supervisory structures in Europe for the promotion of consumer protection in financial services. This fact-finding mission is also required to provide the basis for comprehensive recommendations for a harmonised structure and minimum requirements for financial supervision and consumer protection at both national and EU level:

*The overall objective of the study is to investigate the existing financial supervision systems in the EU Member States in order to reveal to what extent consumer interests are really taken into account by national supervisory authorities. Based on findings, recommendations will be provided on how to better ensure consumer protection. This work will be broken down into 3 tasks:*

- *Task 1: Categorisation of EU supervisory models and extent of consumer protection objectives*
- *Task 2: Consumer protection in practice – Resources and measurement of activity*

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<sup>9</sup> Rutledge, S.; Nagavalli, A.; Lester, R. & R. Symonds (2010): Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A Diagnostic Tool, The World Bank ECSPP - Finance and Private Sector Department Working Paper 001, August 2010 p I.

- *Task 3: Recommendations on how to improve supervision as regards consumer protection in the financial services area.*

For this purpose, iff has developed a questionnaire which has been co-ordinated with BEUC and sent it out to financial supervisors in Europe.

Due to limited resources in terms of time and money, the fact-finding aspect of this project depended largely on voluntary contributions from state agencies and consumer organisations. The banking and financial markets supervisory authorities within the major European states have responded to the research questionnaire, and only the smaller supervisors or those not or less concerned with consumer protection preferred to provide either oral responses by telephone or to abstain from giving any response at all.<sup>10</sup>

Within the context of this report, it was not realistic to commission specific studies by national experts. However, in recent years, iff has carried out a number of research studies in the area of financial services, in which issues of bank supervision played a subsidiary role. This material offers a source of information relevant to the present study and provides an overview of financial supervision in the EU.<sup>11</sup>

The focus of the study is supervisory regulation and its effects on consumer protection seen from both the regulatory and the consumer perspective. Other activities on the part of the banking authorities have not been examined.

In the first part, the report will clarify what may be understood by 'consumer protection' in the context of financial services. The second part will examine existing systems of financial supervision in Europe (task 1). It will consider the various models the different tasks allocated to these models and the divergent effects on consumer interests, including what may be seen as the potential conflict between bank safety and soundness as the core of bank supervision on the one hand, and consumer protection on the other.

The third part will address the general potential of existing consumer protection practice at EU level, and at national level, using practical examples of activities carried out by the supervisors in the area of consumer protection (task 2), while the fourth part will provide the required recommendations for a consumer policy approach (task 3).

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<sup>10</sup> Österreichische Nationalbank; Banque Nationale de Belgique; Central Bank of Cyprus; Czech National Bank; Danish Financial Authority (Finanstilsynet); Consumer Protection Board of Estonia; Bank of Estonia; National Bank of Hungary; Bank of Lithuania; Banque centrale du Luxembourg; Financial and Capital Market Commission (FCMC); Central Bank of Malta; De Nederlandsche Bank; National Bank of Romania; Swedish Financial Supervisory Authority; Sveriges Riksbank.

<sup>11</sup> See past iff reports by Reifner et al. for the European Commission: Costs and benefits of policy options for Mortgage Credit (consumer surveys and focus groups, DG MARKT, publication pending 2011); Study on interest rate restrictions in the EU (DG MARKT, 2010); Equity Release Schemes in the EU (DG MARKT, 2008); Legal study on the Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border financial service contracts between professionals and consumers (DG SANCO, 2008); Study of the legislation relating to consumer over-Indebtedness in all EU Member States (DG SANCO, 2003); Monitoring the uptake and the effectiveness of the Voluntary Code of Conduct on Pre-contractual Information for Home Loans (DG SANCO, 2003).

## 1.2 “Consumer protection” as an issue for consumer organisations

### 1.2.1 Which “Consumers” need protection?

The main goal of consumer protection is to defend and promote the interest of “consumers”. BEUC refers to “general interests of consumers” and “consumer organisations” in its statutes which exclude “state, industrial, commercial, party political and trade union interests”, and therefore distinguishes its target group from other more general notions of market participants like “clients”, “users” or “(retail) customers”. In other words, it includes all individuals and institutions or organisations which may be affected by products in the market.

It therefore shares the approaches taken by the EU Consumer Directives, which are summarised in part in Article 2 (1) of the Commission’s Proposal for an EU Directive on Consumer Rights of October 8, 2008<sup>12</sup> which defines ‘consumer’ as “any natural person ... acting for purposes which are outside his trade, business, craft or profession”. A similar definition may be found in the Consumer Credit Directive 2008/48/EC Article 3 (a) where “consumer” is “a natural person who, ..., is acting for purposes which are outside his trade, business or profession”<sup>13</sup>.

Some national legislation broadens the scope of the definition by including small businesses and self-employed persons. However, these concepts apply legal fictions in order to be able to provide protection to other groups of society through the use of legal analogy. This is also true where national jurisprudence includes the acquisition of goods and services which are of dual use into their concept of consumer protection. On the other hand, restrictions which render consumer directives inapplicable to certain goods or to certain groups of consumers (e.g. mortgage loans in the CCD) do not challenge the general classifications.

From a sociological point of view, and with reference to “the general interests of consumers” as mentioned in the BEUC statutes, the American legal definition would appear to have advantages. It takes a positive approach by referring directly to consumption. Thus, in the context of consumer credit protection, the money borrowed by consumers is defined as serving “primarily for personal, family, or household purposes”<sup>14</sup>.

As far as consumer protection is concerned, many proposals for implementation in financial supervision identify consumers as savers and investors. From a consumer viewpoint, however, clear distinctions are required here. Savers use financial services because they want to have their money somewhere safe and administered in a conservative fashion. They have a clear goal to use this money in the future either for specific consumption purposes or to cover unforeseen risks and events. Although the authors would like to stress that there are distinct categories of investors deserving a differentiated

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<sup>12</sup> COM(2008) 614 final.

<sup>13</sup> EU Consumer Credit Directive (‘CCD 2008’, Directive 2008/48/EC) - Directive on credit agreements for consumers. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF>.

<sup>14</sup> See §103 (h) Consumer Credit Protection Act.

focus on their level of protection, the term 'retail investor' is used, somewhat reluctantly, to refer to consumers of financial investment services and saving products, because it is the more widely used terminology at the European level and includes both savers and those who invest their money in long-term products for their retirement.<sup>15</sup>

In countries where no limits are set, by consumer credit legislation, to the amount of credit which is protected under consumer protection legislation, courts have used a "professionalism" approach to exclude commercial investors from consumer protection. If a credit has been taken out with respect to a fortune, i.e. for its management needs in terms of professional skills and third party expertise, such borrowers would not fall under the notion of "non-commercial" consumers as defined in the consumer directives. Confusing commercial with consumer investors is dangerous for consumer protection since both groups do not share the same concern. There is certainly a need to protect all investors including both consumer investors with authentic savings intentions as well as commercial investors who only want to maximise their assets. However, there are specific consumer interests that require a different and more fundamental protection from the State because they concern human needs, lives and the well-being of families. Such consumer investors should be entitled to receive the same protection as shorter-term savers, borrowers for personal use, consumers who take out policies covering risks such as life, accident or health insurance, or those consumers who use the payment systems to allocate their monthly income where they need it. If policy-makers are able to distinguish between retail consumers who need their money and individuals who want to make money through the search for higher yields, this will assist the development of more appropriate policies focussed on delivering the outcomes desired by market participants.

If a person is a commercial investor seeking returns, freedom to place one's funds where one sees the highest yields becomes the overriding priority, whereas a consumer investor saving for retirement will place a greater emphasis on protection and thus justifies the need for a dedicated authority with the requisite mandate<sup>16</sup>.

Since the primary goal of this expertise is consumer protection we will use the word "saver" not only for those buying saving products but also for such investors whose primary concern is to secure future

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<sup>15</sup> Although the distinction we make may at first sight appear to be analogous to the identification of a "sophisticated investor" who knows a lot about investments, takes more risks and could be more wealthy, it is fundamentally different in the sense that the distinction is based on "purpose" or "motivation" of the "retail investor". E.g. while certain savers may be investors when they choose products which provide an increased amount of money in the future which is generally linked to a certain risk of losing some of this money (risk-return trade-off), such investors are "consumers" when the amount of the investment and the primary goal remains connected to consumption. Institutional investors are already, by definition, not consumers. Furthermore, though not treated conceptually as such by all observers, personal investors can be seen as having specific interests which are different from consumer interests when they invest a significant sum of money with the sole intention of increasing the value of the capital in the future for yet further financial investments.

<sup>16</sup> This is irrespective of the exact details of regulation monitored by the authority e.g. in Sweden, where pension funds for old-age pension savings may not guarantee the amount of the starting capital.

consumption and to allocate present income where it is needed in the future. When we use the word "investor" without further specification we assume that commercial investment is at least included therein.

### **1.2.2 Which problems require management?**

In its working paper<sup>17</sup>, the World Bank has identified a number of problems which it attributes to the financial crisis. However, its analysis is difficult to apply since it reduces consumer protection to a fairly limited set of tools, a perspective which is shared neither by national legislation nor by consumer organisations in Europe.

In its *Ljubljana Declaration* on "Consumers and Financial Services: Towards financial security for all consumers", BEUC provided an analysis of the role of consumer protection with regard to the financial crisis. It blames (1) the lack of regulation and (2) the ineffectiveness of existing supervision, which does not take into account the whole life cycle of a product, (3) the mis-selling of financial products and the creation of unsafe services, (4) insufficient and inappropriate financial advice and (5) the exclusion of vulnerable consumers. It is obvious that, given the remedies proposed by the World Bank for more consumer protection in financial services, its recommendations do not share the same analysis.

In this respect, the public debate seems lean towards the BEUC analysis when it declares that the crisis is a "subprime crisis" in which debtors were exploited by irresponsible lending practices or as a crisis for savers who lost part of their wealth in the investment markets.

The following table identifies more closely some of the problems which call for greater consumer protection.

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<sup>17</sup> See FN 9.

**Table 1: Examples of consumer problems in financial services**

<b>Categories</b>	<b>Examples</b>
<b>Cross-cutting consumer protection concerns</b>	
<b>Product transparency: Consumers do not understand the service's total cost</b>	Deceptive advertisements, excessive small print, complicated terms, inadequately trained staff, etc.
<b>Overcharging</b>	Unauthorised additional fees and commissions
<b>Sales practices</b>	Aggressive sales techniques as part of door-to-door solicitations or limited-time offers.
<b>Inadequate documentation</b>	Consumers do not receive copies of contracts, receipts, etc.
<b>Privacy, security, permission to share with third parties</b>	Personal data is not treated appropriately
<b>Recourse</b>	Consumers do not know that they have the right to complain or get errors resolved; they may know they have this right, but do not know how and where to complain; they know how and where to complain, but fail to receive appropriate redress.
<b>Product-specific concerns</b>	
<b>Deposit products/ Pensions/ Securities</b>	Consumers' savings are eroded by hidden fees or deposits are lost to fraud. Including mis-selling and biased advice, inability to understand risks, complexity of products.
<b>Credit</b>	Consumers do not understand the terms and conditions of their loan agreement, e.g., what happens in the event of delinquency or default; in case of credit in foreign currency (see Latvia and Hungary) or the impact of non-capped variable rates (unsuitable credit); they pay a high price; they take on too much debt; they are exposed to loan officers who ask for a "gift" to complete the loan process, to recommend a larger loan, or to expedite loan approval; they are subject to intimidation, abuse, or humiliation by collection staff/agents.
<b>Payments services</b>	Consumers lose their personal identification number, have it intercepted electronically by a fraudster, or simply face excessive surcharges by some sellers (see Ryanair).
<b>Insurance</b>	Consumers do not understand, or they fail to receive, policy benefits (e.g., they do not receive the full benefit when a family member dies); they do not realise that the loan price includes credit life insurance, and so are paying more than expected and failing to benefit from the insurance.

In conclusion, consumer protection should be about consumer problems. The enormous number of proposals as to how to address consumer problems and the lack of corresponding analysis about the problems actually endured by consumers as a result of the crisis encourages the suspicion that consumer problems are often defined by the remedies that the interested parties want to sell. If, for example, extended prudential regulation is seen as a genuine element of consumer protection, consumer interest loses its quality as a legitimate special collective interest which only transforms into a general interest within a democratic decision making process (legalisation) where they compete for the general good with interests for market stability, internationally competitive power of European financial institutions, stability of the currency, professional ethics, effective employment and protected labour etc. They are in its genesis already reduced to



what is permissible under prudential goals. Where there interest is already turned into legal rights it is even illegal to subsume them to other goals than those defined by the law.

Consumers are of course natural persons and citizens. As such they may exercise the profession of a banker or be employers. But consumer protection only addresses their specific interests where they use goods and services for personal consumption. Whether a certain requirement for safe and sound banking is suitable for them can only be judged from this perspective and not imputed in general. With regard to the second pillar of banking supervision, namely "rules of fair business conduct", such rules may overlap with direct consumer protection but they concern consumer problems only where consumer interests are directly undermined. Providing a better financial system is an important public goal but not in itself consumer protection.

Consumer problems should be distinguished from the problems caused by poor business conduct and the problems which could arise through insolvency.

Consumer problems during the financial crisis may be split into the two elements of financial contracts, which are an identical feature of both sides of the contract, namely that both the service and the price are expressed in money terms.

At the level of price, subprime interest, low yields, high premiums, additional fees all damage consumer interests. At the capital level, part may be withheld through disagio, agio, it can be lost where nominal and real value deviate and it can be turned into negative debt capital where cost elements are financed and debited.

Such problems can be dealt with directly by the law. Regulation or supervision in this context concerns the design of the product, its marketing, servicing and enforcement. For example, savings products in general require permission to enter the market in France. Pension products require approval in Germany if they want to benefit from tax exemptions. Most traditional consumer protection rules under national law regulate the product directly in the form of the rules creating interest rate restrictions on credit, and rules concerning the investments made by funds.

These problems can also be addressed indirectly where market forces are seen as the dominant actor in addressing consumer problems. In these cases, rights are attributed to consumers which reinforce their role as active market participants.

**Table 2: Examples of consumer problems in kind and in choice**

	<b>Credit</b>	<b>Savings/ Pensions</b>	<b>Insurance</b>	<b>Payment</b>
<b>Consumer Product</b>				
<b>Price</b>	Usury, extra fees, kick-back provisions	Fees, provisions, churning	Fees, provisions, churning	High and opaque fees
<b>Capital</b>	Financed fees, premiums, refinancing deductions	Deductions, spread between nominal and real value, losses from risky investments	Negative initial value,	
<b>Liquidity</b>	Early termination, revolving	Frozen assets, high losses for early termination, "just-out-of-time"	no risk coverage, exemption clauses, unnecessary	Extended time for transfer
<b>Access</b>	Denied or risk based pricing	Minimum requirements, threatening fees	Black listing	Intimidating fees and interest for low income
<b>Enforcement</b>	Foreclosure, debt collection, black listing			
<b>Consumer Choice</b>				
<b>Competition</b>	Cartel, fair competition			
<b>Information</b>	Transparency, APRC, yield, prospects, changes etc.			
<b>Advice</b>	Explanation, documentation, liability			

**1.2.3 What kind of "Protection" is required?**

Consumer protection is interpreted in a number of ways in EU policies. While the Commission has increasingly used the term "consumer advantages" to describe its understanding of consumer protection within the EU single market, consumer organisations have focussed on the promotion of the "general consumer interest". The differences have a significant impact on the analysis. While arguments of consumer advantage reduce consumer interest to money interests, consumer protection targets the whole process of consumption.

For example, the Cecchini report<sup>18</sup> and the European Court of Justice<sup>19</sup> have argued that a common internal market is in itself an ad-

<sup>18</sup> Europe 1992: The Overall Challenge [Cecchini Report]. SEC (88) 524 final, 13 April 1988.

<sup>19</sup> ECJ 13.5.1997, Rs C-233/94 (No 48): "In that regard it suffices to point out that, although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. .... however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State. The reduction in the level of protection which may thereby result in certain cases .... does not call into question the general result which the Directive seeks to achieve, namely a considerable improvement in the protection of depositors within the Community."

vantage for consumers, as it has provided increased choice and competition, which is said to reduce prices for consumers. Using that definition, it would suffice to demonstrate that financial supervision ensures that financial markets function well. Consumers and users would thus share the same interests. Bank supervision designed to create safe and sound banking could then be called consumer protection.

In its papers concerning the management of the financial crisis, the OECD<sup>20</sup> defines consumer protection in a similar way to the World Bank<sup>21</sup>, taking a market fairness approach and protecting both consumers *and* investors. It says:

“The objective of consumer protection is not well defined. If regulation is correctly designed and properly enforced, it sustains consumer and investor confidence, which is necessary if the financial system is to attract capital and function efficiently. Market confidence and consumer protection are undermined if the financial system is not adequately protected from abuses. Economic exchange, in general, and financial transactions in particular rely importantly on trust and confidence. Financial transactors must have some assurance that financial markets and institutions are safe and sound, and operate according to rules and procedures that are fair, transparent, and free from conflicts of interest and other agency problems.”

This statement contrasts significantly with its assessment of the reasons for consumer problems:

“It is not a great oversimplification to suggest that the issue of financial innovation and consumer protection is mostly about access and suitability. Access refers to a situation in which affordable, mainstream financial products are available to all segments of the population across the range of income levels and demographic characteristics. Suitability addresses the appropriateness of the products for particular consumer groups. That is, what products may safely be sold to retail financial consumers? By whom? Who decides? And whose fault is it if something goes wrong?”

But instead its focus on *access, suitability, safety, suppliers, deciders and fault* when analysing the problems of the crisis OECD returns to a well-functioning market where primarily “asymmetric information” could be cured by “fair behaviour”.<sup>22</sup>

In the second chapter of its “Consumer Policy Toolkit” 2010, the OECD gives broader insight into its philosophy of consumer protection where it describes the sources of its view, namely the neo-classical approach tempered by “behavioural economics”. Needs orientation in consumer protection as required by law and researched in consumer sociology is still kept outside the realm of a purely economic definition of consumer protection.<sup>23</sup> The implicit identification of “consumer policy” with its first two parts (“information”), substituting its third

<sup>20</sup> Lumpkin, S. Consumer Protection and Financial Innovation: A few basic propositions, OECD Journal: financial Market Trends 2010 – vo. 1 p 5 f (Principal Administrator in the Financial Affairs Division of the OECD Directorate for Financial and Enterprise Affairs.)

<sup>21</sup> See below at FN 9.

<sup>22</sup> Op. cit. 6 ff.

<sup>23</sup> See subsequent sections of this report.

part “consumer protection”<sup>24</sup> with a consumer policy approach defined in this way creates a contradiction in itself.<sup>25</sup>

While information is manifestly a core element of consumer policy and plays a pre-eminent role in consumer information and consumer education, legal consumer protection must compensate for the loop-holes in a system where knowledge about the irresponsible behaviour of suppliers, as experienced during the financial crisis, is not sufficient to protect consumers from the consequences of such behaviour. The 2009 report of the French government on financial supervision does not identify prudential regulation and investors’ protection with consumer protection as such when it says:

« *Ils proviennent des possibilités d’arbitrage réglementaire que ce système génère s’agissant des dispositions relatives à la protection du consommateur de services financiers et aux obligations professionnelles à l’égard de la clientèle.* »<sup>26</sup>

In fact this attitude deviates significantly from existing national legal principles. Under its general principle of shelter for the weak, the law seeks to protect consumers from the adverse effects of financial services on their life circumstances. This is done either in a demand-driven approach by providing information for self-help or in an offer-driven approach, protecting “consumer needs” directly through substantive regulation.

The latest EU rules governing consumer investment and consumer credit have acknowledged this twin approach within national consumer protection. The focus is now on the “suitability” and “responsibility” of financial services<sup>27</sup> along with “transparency” and “fairness”. While the financial crisis has revealed that even highly sophisticated and skilled bankers were victims of irresponsible products, with the result that their institutions had to be rescued by the public, the neo-classical informational approach has undergone some questioning.

National case-law has already implemented this kind of consumer protection, which regulates the product itself, as opposed merely to how it appears in the form of public information, by defining the prevention of damage to consumer interests as a goal of consumer protection law.<sup>28</sup>

<sup>24</sup> While the text always refers to consumer policy, it suddenly states that “those responsible for consumer protection must quickly respond to a rapidly changing and highly sophisticated marketplace.” Op.cit. Ch. 1.

<sup>25</sup> Chapter 5 of the consumer policy toolkit hides “prohibition” under a pile of informational tools: “Consumer awareness and education, Information provision and disclosure, Contract-term regulation, Cooling-off periods, Moral suasion, Codes of conduct, Standards, Licensing and accreditation, Prohibitions, Dispute-resolution and redress mechanisms, Enforcement strategies”.

<sup>26</sup> Deletré, B. Rapport de la Mission de Réflexion et de Propositions sur l’Organisation et le Fonctionnement de la Supervision des Activités Financières en France, French Government, Inspection générale des Finances N°2008-M-069-02 Paris January 2009 p3.

<sup>27</sup> See Art. 19 (4) Dir. 2004/39/EC (MIFID): “knowledge and experience in the investment field relevant to the specific product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments **that are suitable for him.**” For consumer credit see Recital (26) Directive 2008/48/EEC “Member States should take appropriate measures to promote **responsible practices** during all phases of the credit relationship, taking into account the specific features of their credit market.”

<sup>28</sup> For Germany see Schwintowski, Die Grundsätze der anleger- und objektgerechten Beratung im Lichte des Geeignetheitstests (§31 Abs-4 WpHG), in Festschrift Hopt 2010 S. 2507 ff.

BEUC uses a more focussed definition of consumer protection when it states that it will “promote, defend and represent the interests of European consumers” in Article 2 of its statutes. On its website it makes a clear distinction between consumer protection and bank supervision when it claims that “the crisis has shown that financial supervision authorities were not capable of detecting the risks of ever-more complex products correctly and of imposing the necessary measures to avoid this crisis” and aspires to “strengthen regulation and supervision of the Internal Market for retail financial services in order to reinforce consumer confidence in the Internal Market”.

In BEUC's 8 Priorities for the Hungarian Presidency<sup>29</sup>, its 10<sup>th</sup> point on financial services: “Enhance financial supervision” makes a distinction between prudential supervision and consumer protection when it says:

“In many Member States, national supervising authorities have been incapable of correctly detecting risks and imposing the necessary safety measures. If national supervisors are not doing their job properly, consumers are at risk. At EU level, the new European Systemic Risk Board (ESRB) and the three financial supervisory committees transformed into the new European Supervisory Authorities (EBA, EIOPA and ESMA) should start operating in 2011. This new architecture is focused on prudential supervision and does not take due account of the conduct-of-business side of supervision, despite the fact that links between prudential supervision and consumer protection in the financial services area are so obvious.”

In its concrete demands<sup>30</sup>, it requests that for “consumers’ needs” be addressed.

In its ten principles of consumer protection<sup>31</sup>, the EU Commission declares EU law to be “promoting consumers’ rights, prosperity and wellbeing”. It is not, however, a general declaration of consumer policy which includes consumer information and consumer education alongside consumer protection. This position is aligned with the general theory on consumer policy.<sup>32</sup> Consumer protection is the legal part of consumer policy, so that citing only legal rights gives the correct insight that consumer protection is the enforcement of a law protecting consumers in the marketplace.

Consumer organisations therefore need their own definition of consumer protection covering all of their achievements in the form of the existing law on consumer protection. It concerns “consumers” and not “clients” or “investors”, which does not differentiate between an investment for consumption and an investment for commercial purposes. It further concerns legal protection in all its forms including the regulation of products and information on the demand side.

#### **1.2.4 Which remedies are appropriate - rights or information?**

Consumer rights derive from consumer legislation which has been passed in many member states in a special body of “Consumer Pro-

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<sup>29</sup> See [www.beuc.eu](http://www.beuc.eu).

<sup>30</sup> See below at p 2.

<sup>31</sup> Consumer Protection in the European Union: Ten Basic Principles. European Commission, [ec.europa.eu/consumers/cons\\_info/10principles/en.pdf](http://ec.europa.eu/consumers/cons_info/10principles/en.pdf).

<sup>32</sup> See references below in FN 36 ff.

tection Acts."<sup>33</sup> Since the Kennedy Declaration of 15 March 1962, the four original basic consumer rights have been expanded into eight consumer rights.<sup>34</sup> While Kennedy focussed (with the exception of Right 1 to safety) on rights to a fair chance in the market, such as Right 2 - to be informed, Right 3 - to choose and Right 4 - to be heard, Consumer International added more substantial rights, such as the Right 5 - to the satisfaction of basic needs, Right 6 - to redress, Right 7 - to education and Right 8 - to a healthy environment.

Furthermore, Article 169 of the consolidated version of the Treaty on the functioning of the European Union specified the role of the EU in consumer protection.<sup>35</sup>

This distinction in consumer rights underlies most national legislation and follows two distinct models of consumer protection.<sup>36</sup> The "liberal model", founded by Adam Smith, lies at the root of "homo oeconomicus" as the model consumer.<sup>37</sup> Homo oeconomicus has access to full knowledge of his own needs, of all available means of satisfying them, of maximising the use of resources, and he has unlimited scope for processing information. He has no preferences as to brand, time or place and makes decisions without being influenced by people or experiences. In other words, he is perfectly rational.<sup>38</sup>

This liberal approach does, however, acknowledge that this homo oeconomicus does not exist in a pure form, because complete information (on grounds of the sheer time and cost required, let alone intellectual capacity<sup>39</sup>) does not exist anymore than does spatial independence, because the perfect market upon which the model is

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<sup>33</sup> For example France and Italy in general while specifically for financial services many more use the notion "consumer" especially in credit law.

<sup>34</sup> World Consumer Rights Day - 15th March 2010 Theme of this year: Our money, our rights at [www.consumersinternational.org](http://www.consumersinternational.org).

<sup>35</sup> 1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

<sup>36</sup> The comments by Mitropoulos address this subject in greater depth in: Mitropoulos, S.: Verbraucherpolitik in der Marktwirtschaft: Konzeptionen und internationale Erfahrungen, Duncker & Humblot: Berlin 1987, p 4-98; cf. Hart/Köck: Zum Stand der Verbraucherrechtsentwicklung, ZRP 1991, p 61 ff (64).

<sup>37</sup> Cf. Kind, S.: Die Grenzen des Verbraucherschutzes durch Information - aufgezeigt am Teilzeitwohnrechtgesetz [Limits of Consumer Protection through Information], Duncker & Humblot: Berlin 1998, p 42; cf. Hering, F.-J.: Informationsbelastung in Entscheidungsprozessen: Experimentaluntersuchung zum Verhalten in komplexen Situationen, Lang: Frankfurt a.M. 1986, p 15; Leisner: Der mündige Verbraucher in der Rechtsprechung des EuGH, EuZW 1991, p 498 ff.

<sup>38</sup> Kuhlmann, E.: Verbraucherpolitik: Grundzüge ihrer Theorie und Praxis, Vahlen: München 1990, p 30; Kind, S.: cf. footnote<sup>37</sup>, p 43; Böcker, F.: Marketing, Lucius: Stuttgart 1996, p 41.

<sup>39</sup> Strassner, S.: Verbraucherinformationsrecht - rechtliche Grundlagen und rechtsökonomische Aspekte, ÖR.-Verl.: Saarbrücken 1992, p 128 f.

based does not exist. It instead forms the basis for a free and responsible model consumer<sup>40</sup>, who will digest the information and will then be in a position to take responsible decisions<sup>41</sup>.

Judgments of the European Court of Justice in relation to misleading advertising<sup>42</sup> also demonstrate a clear tendency towards this responsible consumer model. This model also underlies European legislation and this is most clearly expressed in the focus of European consumer protection rights on legislation making the provision of information to consumers compulsory.<sup>43</sup>

From this perspective, any information improves the position of the consumer, who is thus enabled to come to rational decisions.

On the other hand, in contrast to the liberal model, the "social" model is based on a presumption of the hasty and needy consumer, forced into contractual relations by social circumstances he cannot control, someone lacking in concentration and in need of protection.<sup>44</sup> Using this approach, the State has a duty to protect consumers by controlling the market.<sup>45</sup>

Obligations to provide information must take into account that the mere availability of information is not enough.<sup>46</sup> Financially sane decisions presuppose above all the capacity to make transactions in rela-

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<sup>40</sup> Kind, S.: cf. footnote 37, p 44; Dauner-Lieb, B.: Verbraucherschutz bei verbundenen Geschäften, Wertpapier Mitteilungen 1991 p 144.

<sup>41</sup> Cf. Blaurock: Verbraucherkredit und Verbraucherleitbild in der europäischen Union, JZ 1999 p 801 (802); Dreher: Der Verbraucher – Das Phantom in den opera des europäischen und deutschen Rechts?, JZ 1997 p 167 (171); Heiss, C.: Formvorschriften als Instrument europäischen Verbraucherschutzes, in: Internationales Verbraucherschutzrecht - Erfahrungen und Entwicklungen in Deutschland, Liechtenstein, Österreich und der Schweiz, Referate und Diskussionsberichte des Kolloquiums zu Ehren von Fritz Reichert-Facilides, Tübingen 1995, p 90; Mitropoulos, S.: cf. footnote 36, p 26.

<sup>42</sup> Traub: Das Verbraucherleitbild in rechtsvergleichender Sicht, Baden-Baden 1997, p 19-22 with further examples; ECJ GRUR Int. 1990 p 955; Blaurock: cf. footnote 41, p 802; ECJ judgment of 7.3.1990, EuZW 1990 p 222 (224); ECJ judgment of 6.7.1995, EuZW 1995 p 611 (612); Dreher: cf. footnote 41, p 171.

<sup>43</sup> Cf. Verbraucherpolitische Strategie der Europäischen Kommission 2002-2006, 3.3.2.1. and 3.3.2.2; Blaurock: cf. footnote 41, p 802 f.; Dreher: cf. footnote 41, p 171; Heiss, C.: cf. footnote 41; Mörner, in: Cartwright, P.: Consumer Protection in Financial Services, SMU Institute of International Banking and Finance, Kluwer: Dallas (Texas), Den Haag 1999, p 28; Wilhelmsson, T.: Information Duties as a Means of Protecting Insurance Consumers, AJuris 1998 p 71.

<sup>44</sup> Traub: cf. footnote 42, p 31, 32; Tilman, in: Festschrift für Henning Piper, Beck: München 1996, p 481; Köck/Hart: cf. footnote 36, p 63; Reich, N.: Schuldrechtliche Informationspflichten gegenüber Endverbrauchern, Neue Juristische Wochenschrift 1978 p 513 (519); Reich, N./Micklitz, H.-W.: Verbraucherschutzrecht in der Bundesrepublik Deutschland, Van Nostrand Reinhold: New York 1980, marginnote 3; Reich, N./Tonner, K./Wegener, H.: Verbraucher und Recht: Überholte Konzeptionen, Lücken und Mängel in wichtigen Verbrauchergesetzen und die Praxis der Rechtsprechung, Schwartz: Göttingen 1976, p 74; BGH GRUR 1991 p 850 (851) and OLG Hamburg GRUR 1992 p 126 - both judgments in relation to misleading advertising; Baumbach/Hefermehl: Wettbewerbsrecht, 8th edn. 1995, art. 3 UWG marginnote 33.

<sup>45</sup> Reich, N./Tonner, K./Wegener, H.: l.c., preface, p I; Bartsch, ZRP 1973 p 13 ff; Reich, N./Micklitz, H.W.: l.c., marginnote 5; Damm, JZ 1978 p. 173 (179); Köck/Hart: cf. footnote 36, p 63; Biervert, B./Fischer-Winkelmann, W.F./Rock, R.: Grundlagen der Verbraucherpolitik, Rowohlt: Reinbeck 1977, p 178.

<sup>46</sup> Breidenbach: Die Voraussetzungen von Informationspflichten beim Vertragsschluss, p 11; Kemper, R.: Verbraucherschutzinstrumente, Nomos: Baden-Baden 1994, p 205.

tion to an actual social and financial situation.<sup>47</sup>To that end, the first requirement is that consumers make use of the available information.<sup>48</sup>The consumer's own response is a pre-condition for this. However, the manner and scope of responses relating to information depend on a number of factors<sup>49</sup>, not all of which will be affected by information, but which instead adapt this information. This must be taken into account in order for it to have any effect.<sup>50</sup> The main influences are as follows:

- Characteristics of the information materials available to the consumer, such as content and completeness of information, its form, and acceptance of the source of the information.
- Personal characteristics and attitude of the consumer, e.g. general level of education<sup>51</sup>, basic knowledge of the product<sup>52</sup>, needs.
- External circumstances surrounding distribution of the information, including the manner of distribution of the information and the time when the information was distributed.
- Human needs which, especially in relation to credit and debt, do not only impede rational behaviour but also substantially exclude consumer choice (credit crunch, risk-based pricing).
- Complexity of financial products offered on the market, including disguise, and incentives to sell dysfunctional financial products.
- Role of intermediaries (e.g. fees vs. commissions).

The information approach is particularly difficult in the area of financial services which give consumers access to an instrument rather than directly to the object of the desire behind the intended consumer purchase decision (e.g. the object being financed, or being saved for). This lies in the unique nature of financial transactions. Money is unique and necessitates a translation of the original need into the language of the market.<sup>53</sup> Credit can give money but also takes away money. This calculation makes the purchasing decision particularly difficult for consumers because consequences over time need to be taken into account and uncertainty will play a role in the equation.

Whereas regulation is increasingly taking into account various findings from the field of behavioural economics, and the European

<sup>47</sup> Reifner, U.: *Finanzielle Allgemeinbildung – Bildung als Mittel der Armutsprävention in der Kreditgesellschaft*, Nomos: Baden-Baden 2003, p 76. On the concept of capacity, see Bootz/Hartmann: *Kompetenzentwicklung statt Weiterbildung?*

<sup>48</sup> Kemper, R.: cf. footnote 46, p 218.

<sup>49</sup> Cf. Simitis, K.: *Verbraucherschutz. Schlagwort oder Rechtsprinzip?*, Nomos: Baden-Baden 1976, p 111; Biervert, B./Fischer-Winkelmann, W.F./Rock, R.: cf. footnote 45, p 177, 178.

<sup>50</sup> Cf. Biervert, B./Fischer-Winkelmann, W.F./Rock, R.: cf. footnote 45, p 177; Whitford, W.C.: *The Functions of Disclosure Regulation in Consumer Transactions*, Institute for Research on Poverty, University of Wisconsin-Madison 1973, p 220 (239).

<sup>51</sup> Simitis, K.: cf. FN 49, p 111; Biervert, B./Fischer-Winkelmann, W.F./Rock, R.: cf. FN 45, p 155.

<sup>52</sup> Vahrenkamp, K.: *Verbraucherschutz bei asymmetrischer Information: informationsökonomische Analysen verbraucherpolitischer Maßnahmen*, VVF: München 1991, p 37.

<sup>53</sup> The nature of money and related concepts in the money society are covered in detail in the recent publication: Reifner, *Die Geldgesellschaft - aus der Finanzkrisen lernen*. Wiesbaden: VS-Verlag, 2010.



Commission has itself mandated a report on the subject with regard to retail investor decision making<sup>54</sup>, it would nevertheless be imprudent to believe that these insights can alone deliver consumer outcomes free of detriment within the information approach.

The substantive approach involves mandatory rules prescribing what is and is not allowed, rather than simply providing a duty to inform the consumer. These are often seen as more intrusive into markets and are therefore criticised by many economists who strongly believe that the free-market mechanism is the only solution to efficient economic outcomes. However, when market failures exist, and systematically repeat themselves irrespective of national cultural and institutional settings, the state must be able to remedy these market failures with the most appropriate tools at its disposal.

As found in the recent EU Study on interest rate restrictions<sup>55</sup>, even policy measures as extreme as 'price controls' can be implemented in such a way as to treat the problematic while limiting the unintended consequences as much as possible.

Both models are necessary. Some areas already testify to the need to incorporate the two distinct approaches. The responsible credit movement for example shows that a two pronged approach is perhaps best suited for policy makers and legislators.

With regard to financial supervision, the only form of supervision which serves consumer protection is one in which all consumer rights are taken into account and effective enforcement is guaranteed.

### **1.2.5 Why do “financial services” need special supervision?**

The notion of “financial services” represents a modern approach to services related to the transfer of money across time and space. Historically, the language of credit, savings and insurance was used. All these activities, however, have two elements in common, namely the acquisition of “money” (“finance”) at a certain time (present in credit, future in savings and investment), and the fact that they all provide transportation of this money as a “service”. But since these services are offered by institutions with either a long (banks and insurance companies) or a relatively recent history (investment companies and payment service providers), the fourfold system of financial services is in practice divided in a traditional two peak system of banks and insurance companies which cross these functional borders.

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<sup>54</sup> See: Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, DG SANCO, 2010 at [http://ec.europa.eu/consumers/strategy/docs/final\\_report\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/final_report_en.pdf).

<sup>55</sup> See: [http://ec.europa.eu/internal\\_market/finservices-retail/credit/mortgage\\_en.htm#studies](http://ec.europa.eu/internal_market/finservices-retail/credit/mortgage_en.htm#studies).

**Table 3: Financial Institutions and Financial Services**

	<b>Banks</b>	<b>Investment Companies</b>	<b>Credit Card Companies</b>	<b>Insurance Companies</b>
<b>Savings/ Investment</b>	Savings book/Com. Papers etc.	Commercial Papers		Capital Life and Pensions
<b>Credit</b>	Consumer credit	Money lenders/payday loans	Credit card credit	
<b>Payment services</b>	Bank Account	e.g. Merrill Lynch	American Express	
<b>Insurance</b>	Futures, Options			Risk insurance

This definition underlies Article 2 (b) Directive 2002/65/EC on the Distant Marketing of Financial Services, where financial services are defined as “any service of a banking, credit, insurance, personal pension, investment or payment nature”.

This definition is much broader than the definitions in supervisory legislation, and in particular the Banking, Insurance and Investment Directive, which targets banks, insurance and investment or credit card companies if their involvement in financial services goes beyond a certain level. Already this exclusion of smaller entities in itself reveals that, because it is not decisive for the consumer whether the product is acquired from a bank or a moneylender, the driving force between bank supervision is not consumer protection but the protection of the money system in general, for which banks and insurance companies are of supreme importance.

For example, the Banking Supervisory Directive 2006/48/EC defines the scope of banking supervision by defining banks as “credit institutions” and “electronic money institutions” (Article 4 (1)) and puts other “financial institutions” (Article 4 (5)) under less intensive financial supervision. Directive 2006/49/EC adds “investment firms” to those subject to this ‘light’ form of supervision. (Article 3 (1) (b)). The core element of supervision is the requirement that the institution be permitted to carry out the financial activities enumerated in the Directive. (Article 6 Directive 2006/48/EC)

This institutional approach to financial supervision is confronted with a functional approach to consumer protection.

Consumers need to be protected with regard to all forms of financial services offered in a private marketplace. It is thus broader than the supervisory approach, in which the only financial services subject to supervision are those within a specific group of “institutions”. This has a significant impact on the ability to promote consumer protection.

The Banking Directives as well as national supervisory law seek to protect banks as institutions, and their safety and soundness for society as a whole. In second place they aim to protect banks and insurance companies as important professions in a society which operates on the basis of the exercise of certain skills and the application of ethical commitments. This area is covered by the "conduct of business" and "fair competition" rules in marketing and "commercialisation".

Consumer protection requires instead a focus on financial services as a system, with effect where those services are distributed, but especially where they directly affect the lives of consumers. Consumer protection therefore differentiates neither by institution nor by product. In consumer protection the different categories and social functions of retail financial services require a different level of protection according to the importance of the consumer needs and interests affected. For example, investment services have been seen as more risky than savings, pension schemes have desirable social effects while shareholding is seen as less critical, consumer credit has different implications from mortgage loans or payment services, insurance contracts vary in regulation as to whether they concern vital interests such as health, old age or car accidents, while risk insurance information rights are seen collectively as sufficient to guarantee the adequacy of the offer.<sup>56</sup>

In the discussion of bank supervisory reform, the special nature of financial services is often based on the assumption that financial services are so complex that special institutions and supervision are required. This argument can often be turned around whereby an existing offer, although not adequate to help people substantively, is presented as a solution by redefining the problem in its own terms. A psychologist being asked for help with aches may thus argue that the person's physical pain seems to be only an imaginary one, thereby making his services adequate, although they may not be so in substance. Because consumer information and advice is part of what can be offered, the problems of consumers must to be defined in terms of asymmetric information. Without any empirical evidence, this becomes a self-fulfilling prophecy in which a sociological insight becomes true. Thus, any existing institution offering a certain form of solutions creates certain problems defined by its potential clients<sup>57</sup>, or at least politicians who want to achieve such definitions for the problems of the target group.

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<sup>56</sup> Reifner, U. Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border financial service contracts between professionals and consumers, EU Project No. SANCO/2006/B4/034, Final Report Part I: General Analysis p. 11.

<sup>57</sup> See for this relation the analysis of problems and institutions in Blankenburg/Reifner, *Rechtsberatung – Soziale Definition von Rechtsproblemen durch Rechtsberatungsangebote* (The social definition of legal problems by legal advice institutions), Luchterhand: Neuwied 1982 pp 17 ff; 133 ff and the practical use of this insight in an action research project concerning the transformation of a consumer organisation into a financial advice institutions in: Reifner/Volkmer, *Neue Formen der Verbraucherrechtsberatung*, Nomos: Baden-Baden 1981.

From a consumer perspective, it is arguable that financial products are not complex at all. Because a consumer either receives or pays money at a certain time ("cash flow"), the basic structure of all products is easy to understand. This is also very easy to evaluate, since the APRC can be based ex post facto on the cash flow the financial product has created up to a certain time.

The problem of financial products lies in the uncertainty of future cash flow at the time when the consumer concludes the contract and has to estimate its future effect. Economic contract theory has shown that all long-term contracts (especially in labour law) suffer from the false assumptions underlying a sales economy with spot contracts, where the essential terms of a contract should be defined at the beginning.<sup>58</sup> Since only repeat players, who deal with thousands of similar contracts, have the statistical evidence as to the decisive underlying conditions, the supplier side alone is in a position to predict the possible outcome of this contract. Consumers can reduce the risks through a better informed decision with the help of test and consumer associations. But they will never be able to achieve the same level of sophistication as the supplier side. This is why the legislator has for hundreds of years framed this sector with special rules governing usury and default, keeping the possible outcomes of the transaction within certain limits and enabling consumers to take the risks involved. This is true for all types of long-term contracts in the fields of consumption, labour and public services.

Financial services are, however, abstract and their content are defined mostly by relatively abstract legal rights and duties in accordance with the contents of the contract and its fine print. Suppliers are tempted in these circumstances to create a veil over simple payments and risks. This artificial complexity is visible through the various denominations of prices and risks and cannot be cured by information rights. This would create an infinite recourse and a vicious circle in which ever more information rights lead to ever more unnecessarily complex products and product appearances.

Consumer protection in financial services does not therefore differ in principle from consumer protection in general. Consumers want affordable products and services which are adequate for their needs. They need the same protection in this area as they do in relation to all the other goods and services they need. As far as an artificially created complexity is concerned, it is the task of bank supervision to reduce it either to a necessary and manageable level or to take over certain functions on behalf of consumers and provide state approved and adequate products.

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<sup>58</sup> Bolton, P./Dewatripont, Contract Theory, ; Geest, Gerrit de: Contract law and economics. Cheltenham 2<sup>nd</sup> Elgar, 2011.

## 2 What kind of “financial supervision” is available?

Financial supervision (bank and financial markets) has received much attention in recent years following major changes in the financial services market in its conversion from a b2b market to a b2c market.<sup>59</sup> This has resulted in the progressive integration of banking and payment systems (Banks/Credit Card Companies), insurance (Insurance Companies) and investment (Banks/Companies) in both distribution (cross-selling) and product function (interest caps), which had historically been kept institutionally separate. While insurance, for example, took over the functions of pensions and savings (capital life insurance), banks covered risks through futures, options, and caps, payment companies offered savings and credit through credit cards, and insurance companies went into pensions and mortgage credit markets.

In the 1980s there was still a strong belief that the merger of banks and insurance companies in the form of “All-Finanz” institutions was imminent<sup>60</sup>. This has not happened. The philosophies of banking and investment (individual savings) and insurance (collective risk coverage) have kept differences alive, so that the regulatory body for both has remained quite distinct. No unified financial services law has yet replaced existing bank and insurance legislation. It is only in the area of investment banking that the traditional American separation of investment services and general banking services has been lifted.

Although “financial services” have formed a widely used category in retail banking and insurance, the distinctions between insurance, banking and investment services have not been abolished in either supervision or in consumer law. Despite much cross-selling between these two major sectors, servicing and product design are still rooted in quite different groups of providers with different philosophies (solidarity versus individualism), marketing practices (door-to-door versus outlets), education (legal versus economic), terms (long-term versus short-term) and attitudes. This also requires quite distinct supervisory methods and institutions. In the long term, these differences will certainly be replaced by a merely functional approach, in which financial institutions may offer all functions and services under the same roof. However, the tendency towards a unified supervisory structure following the example of the UK, where an integrated Financial Services Authority gradually took on the supervision of all financial services (which is now being reformed), hides the continuing functional separations inside these institutions.

### 2.1 Structure of financial supervision

Conducting business in a market economy is not possible without fulfilling preconditions for qualification. While in pre-market economies, entry into a business depended on birth or nomination and was contingent on the rules and restrictions set down by the relevant

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<sup>59</sup> See references above at FN 4.

<sup>60</sup> The dividing line between banking and insurance business became increasingly blurred within the context of bank-insurance groups (“bancassurance”) with both directly being involved in the securities business e.g. asset management.

guild, corporatist rules have largely been lifted in the market economy and replaced by the principle of the freedom of trade (Gewerbe-freiheit, liberté du commerce et de l'industrie), guaranteeing free admission to and the free exercise of any profession.<sup>61</sup> These are principles which emphasise the new elements of the economy. In reality the state has continued to observe its responsibility to protect the common good against the exercise of such freedoms.

### 2.1.1 Definition and purpose of financial supervision

The term "regulation" essentially refers to rulemaking, while "super-vision" deals with applying the rules to specific circumstances. In practice, the dividing line between these two activities is not altogether clear, as supervision can often imply regulation, while regula-tion may also refer to policing conduct.<sup>62</sup>

Ultimately, the rationale for financial regulation rests on two objec-tives: the desire to mitigate systemic risk (protecting the system) and the desire to deliver sustainable market outcomes (protecting con-sumers/investors). The former, whether focused on macro or micro systemic risk, is a narrower objective than that of consumer protec-tion which, as we have seen in Chapter 1 of this report, can apply to consumers, depositors, investors, and retail or wholesale markets.

Regulation of the financial sector involves prudential regulation, reso-lution tools, oversight of the clearing and settlement systems and conduct of business regulation. Unlike regulation in many other eco-nomic sectors, financial regulation is particularly concerned with in-fluencing or controlling the behaviour of certain classes of participants in the financial system in order to ensure prudence, safety, integrity, and transparency of the core actors, institutions, systems, and mar-kets of the financial system. According to the OECD two elements of regulation are<sup>63</sup>:

- **Compulsion:** Financial regulation will, in most cases, have the force of law or be backed up by the threat of state sanction and, in respect of regulation aimed at affecting behaviour, have penalties for non-compliance. Administrative penalties and sanctions may be complemented by civil law provisions in legislation as well as by criminal code provisions. At a mini-mum, there is an expectation that there will be legal or repu-tational consequences from noncompliance.
- **Supervision:** Where financial regulation is specifically di-rected toward behaviour and actions as opposed to dictating specific fixed outcomes, there is typically a level of supervision to ensure compliance. Therefore, financial regulation tends to imply state monitoring.

<sup>61</sup> Constitution de 1791 Titre Premier (Déclaration des droits de l'homme et du Ci-toyen du 26 août 1789) 1° Quetous les citoyens sont admissibles aux places et em-plois, sans autre distinction que celle des vertus et des talents.

<sup>62</sup> See Wymeersch, E., *The Structure of Financial Supervision in Europe*, 2008.

<sup>63</sup> See Lumpkin, *Consumer Protection and Financial Innovation: A few basic proposi-tions*, OECD Financial Market Trends 2010.

We define supervision as: the act of overseeing the performance or operation of a person or group. Financial supervision is concerned with the monitoring and enforcement of the regulations governing financial services markets, whether in relation to products, services, or financial institutions. Supervision is one of the main pillars of oversight, along with regulation (the rule book), governance and market discipline.

Financial supervision relates on the one hand to the supervision of the institution, the firm itself, and of its activities, the transactions in which the institution is engaging. In terms of the types of supervision exercised over financial business, there is a traditional distinction between prudential supervision, which aims to safeguard the solvency of financial institutions (and, by extension, their ability to honour their promises to depositors or policyholders), and conduct of business supervision, which aims to ensure honest dealings both in the markets and in individual contracts with consumers/investors. This is often pursued by requiring adequate disclosure in relation to the nature of the proposed products or transactions, or by prescribing protective contract clauses and, increasingly, by imposing specific conduct.<sup>64</sup> In addition, a third type of monitoring relates to the "oversight" function of the central banks, aimed at safeguarding the smooth functioning of payment systems and, more generally, overall financial stability.

The questionnaire used for the research clearly stressed that the study was interested in **non-prudential supervision**, defined as concerning the enforcement of regulations and the monitoring of financial institutions and markets. The research is NOT intended to address prudential issues, which broadly fall into the following categories:

- Micro-prudential supervision has as its main objective to supervise and limit the risk of distress in individual financial institutions. By preventing the failure of individual financial institutions, micro-prudential supervision attempts to protect the clients of the institutions and prevent (or at least mitigate) the risk of contagion and the subsequent negative externalities in terms of confidence in the overall financial system.
- Macro-prudential supervision focuses on limiting risks to the financial system as a whole that may arise from broad developments in the economy (e.g. excessive domestic credit expansion). While risks to the financial system can in principle arise from the failure of one financial institution alone if it is large enough in relation to the country concerned and/or with multiple branches/subsidiaries in other countries, the much more important systemic risk arises from the common exposure of many financial institutions to the same risk factors.<sup>65</sup>

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<sup>64</sup> See Wymeersch, E., *The Structure of Financial Supervision in Europe*, 2008.

<sup>65</sup> Analysis therefore must pay particular attention to common or correlated shocks and to shocks to those parts of the financial system that trigger contagious knock-on or feedback effects. Obviously it should also focus on any other contagion mechanisms that could be a source of systemic risk, such as inter-linkages between financial institutions and overreactions provoked by imperfect information.

Therefore, when communicating for the purposes of this study with contributing supervisors, we applied the following **definition of consumer protection**, based on the concept of conduct-of-business:<sup>66</sup>

*"The focus of consumer protection is on the relationship and interaction between a retail customer and a financial institution. Consumer protection regulation is sometimes referred to as business conduct regulation to help distinguish it from prudential regulation, which has an element of indirect consumer protection through the bank deposits it is aiming to protect when providing for solvent financial institutions. It concerns information as well as strict protection."*

The extent to which conduct of business supervision can equate to consumer protection will depend on whether it significantly affects the retail markets. Often, the regulation/supervision of trading activity and products offered in financial markets is seen more broadly from the point of view of investor protection, and thus is preoccupied with wholesale markets (e.g. rules requiring the disclosure of information in the prospectuses for securities, discouraging insider trading, detecting fraud that can generate losses such as Ponzi schemes etc.).

Despite an increasingly wide spectrum of policy objectives for financial regulators, the overarching policy objective may be identified as the overall stability of the financial system, a central element aimed at the development of public confidence, in the absence of which no financial system can function or survive. Consumer protection is therefore only one of many intermediate secondary objectives below or above other goals, such as the solvency of the institutions themselves. In the words of Eddy Wymeersch, ex-Chairman of the securities committee CESR:<sup>67</sup>

*"The ultimate aim consists of ensuring financial stability as a core 'public good'. As evidenced by repeated financial crises, this public good obviously cannot be delivered by the markets on their own: there has to be some form of involvement of the public authorities, of guidance restricting business activity to safeguard overall stability. Financial regulation is therefore usually considered mandatory, or, as this idea is referred to in the European tradition, as belonging to the "public order": the rules are enforced by public bodies, violations would be sanctioned by criminal or civil sanctions, incompatible contract clauses will be declared null and void."*

Supervision should ensure that a bank or financial institution subject to regulation follows the rules correctly and uniformly, that they adequately manage their risks and that they adhere to certain minimum standards. As already mentioned, it should also examine the system of banks and financial institutions as a whole, in order to detect risks affecting the entire system.

The work of a supervisory body usually consists of four separate roles, only one of which (enforcement) is of specific interest to this

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<sup>66</sup> The questionnaire used for this research is reproduced in the Annex.

<sup>67</sup> See Wymeersch, E., *The Structure of Financial Supervision in Europe*, 2008.



study. Those roles are Licensing (the granting of permission for a financial institution to operate within its jurisdiction), Oversight (the monitoring of asset quality, capital adequacy, liquidity, internal controls and earnings), Enforcement (the application of monetary fines or other penalties to those institutions which do not adhere to the regulatory regime) and Crisis Management (e.g. deposit insurance schemes, lender of last resort assistance and insolvency proceedings).

In the securities field, which is more transaction-oriented, the supervision is different because rules are less solvency-based and more an attempt to enable investors to make informed investment decisions, while ensuring that markets are organised in a fair and orderly way. Conduct of business rules are increasingly finding their way from the securities area to that of banking, insurance, and other financial activities as well. For example, disclosure is imposed to deal with conflicting duties and contract clauses in a movement that aims to increase fairness in retail banking and insurance transactions.

In the box below, we explain what is generally understood under the term "conduct-of-business". This may help the reader to understand how this concept differs to that of consumer protection as referred to later on in the report (e.g. in Table 9 on page 40). The main distinguishing feature between 'conduct-of-business' regulation and consumer protection as we have defined it, is that it is primarily motivated by market considerations rather than the consumer directly (i.e. it targets the promotion of the smooth operation of the market and the confidence of investors first). This distinction is made despite the fact that in the field of retail investments, conduct of business rules are partly investor protection rules.

**Table 4: What is conduct-of-business?**

<p><b>Conduct of business</b></p> <p><b>Definition:</b> Rules which govern the activities of providers of financial services and which by setting high standards of business practice have the objective of protecting the interests of their customers and the integrity of the markets. These rules which can apply to firms, their employees and their representatives, are generally about processes and are distinct from other business practice financial adequacy rules (e.g. capital requirements and liquidity and debt ratios that are devised to promote market security). In addition, such rules of business conduct often reflect the realities of today's markets by differentiating between professional and non-professional market participants. The term conduct of business has received greater acceptance than the term 'ethical conduct' because of the moral standards involved and what some see as its less pragmatic objective.</p> <p><b>Examples:</b> These rules fall under different dimensions and supervision will involve oversight and monitoring if in conducting its business activities, a firm is: acting honestly and fairly in the best interests of its customers (e.g. obligation to avoid misleading and deceptive acts); acting with due skill, care and diligence (e.g. duty of best execution); has the required capabilities for the proper performance of its business activities (e.g. rules and internal procedures for its employees); seeking information from its customers about their financial situation, experience, objectives etc. (e.g. obligation to "know one's customer" and fulfil suitability requirements); making adequate disclosure of relevant material information in its dealings with its customers (e.g. obligations to inform about risks or to provide timely and accurate reports to the customer about business undertaken); avoiding or managing conflicts of interest; complying with all regulatory requirements applicable to the conduct of its business activities.</p>
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**Not just about consumers:** While such rules usually focus on financial intermediaries (brokers, banks, portfolio managers, financial analysts, investment advisers etc.), its market integrity objective means that all market participants and not just one’s own customers are to be taken into consideration.

**Other observations:** It is often necessary to distinguish conduct of business provisions from those which address market conduct and practice on matters such as insider trading, market manipulation or fraud, as these offences are usually defined in legislation and may be interpreted further through case law. They cover all participants in the markets, both private investors and professionals and may be backed by criminal sanctions. Conduct of business rules however are frequently determined by the professionals themselves, may be applied only to them and may lead only to professional or civil sanctions. The objective of such rules is the smooth running of an activity that is relatively well defined. They should not to be confused with codes of conduct which are formal statements of the values and business practices of a firm. Conduct of business rules can be implemented by various actors in a variety of ways: laws; regulations; internal rules within a company or institution; unwritten principles and customs; case law.

A number of studies in the wake of the financial crisis have analysed the system of supervision and have used the following categories to describe the diversity of existing supervisory institutions in the EU member states.

**Table 5: Terms, concepts, categories used in recent studies**

Author	Categories				
<i>Deloitte, G30 2008</i>	Safety	Soundness		Conduct-of-business	
<i>KeBler, Micklitz, Reich 2009</i>			Market supervision		Consumer protection (quality, price respectability, transparency)
<i>World Bank CGAP 2010</i>	Safety and soundness	Mitigation of systemic risk	Fairness and efficiency of markets		Protection of Customers and Investors
<i>ConPolicy 2010</i>		Market confidence	Market stability	Compliance	Consumer protection
<i>EU Regulation 1094-6/2010</i>			Fairness Simplicity Transparency		
<i>French Ministry of Finance 2009</i>	Monetary policy	Prudential regulation	Market supervision	Fair market-ing practices	Professional codes to protect consumers

The distinctions most used to describe the different supervisory structures are those used by Deloitte/G30, in which institutions are categorised according to the two traditional elements of bank supervision:

money stability and bank safety on the one hand, and the question on the other of whether it provides financial services itself or markets credit, investment, insurance and payment services through separate institutions. Before investigating the exact nature of consumer protection within the national financial supervision structures, the following pages first outline the four basic model options available to the organisation of financial supervision.

**Sectoral:** Also termed the Institutional Approach. This is a model in which a firm's legal status (for example, a bank, broker-dealer, or insurance company) determines which regulator is tasked with oversight of its activities from both a safety and soundness and a business-conduct perspective.

**Integrated:** The Integrated Approach is one in which a single universal supervisor conducts both safety and soundness oversight as well as conduct-of-business regulation for all the financial services business sectors. The main Member State known to use this approach was the UK. However, it is reforming its supervisory structure towards the separation of prudential and business conduct supervision (see twin-peaks below).

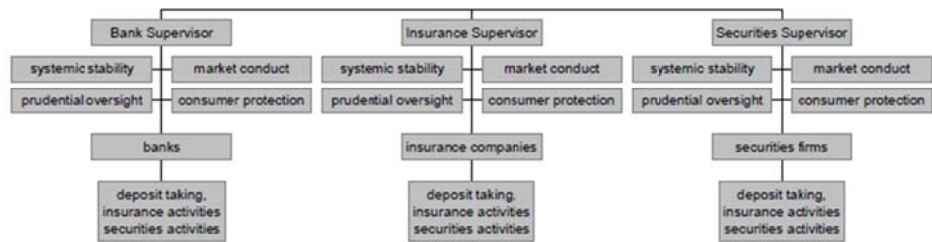
**Functional:** The Functional Approach is one in which supervisory oversight is determined by the business that is being transacted by the entity, without regard to its legal status. Each business may have its own functional regulator. The main countries reviewed that use the Functional Approach include France, Italy, and Spain (this model will be treated together with the next one)

**Twin Peaks:** The Twin Peaks Approach, a form of regulation **by objective**, is one in which there is a separation of regulatory/supervisory functions between two regulators: one that performs the safety and soundness supervision function and the other that focuses on conduct-of-business supervision. The country most closely associated to the use of the Twin Peaks Approach in the EU is the Netherlands. A number of other jurisdictions are engaged in debates over adopting this type of approach. These include: France and Belgium.

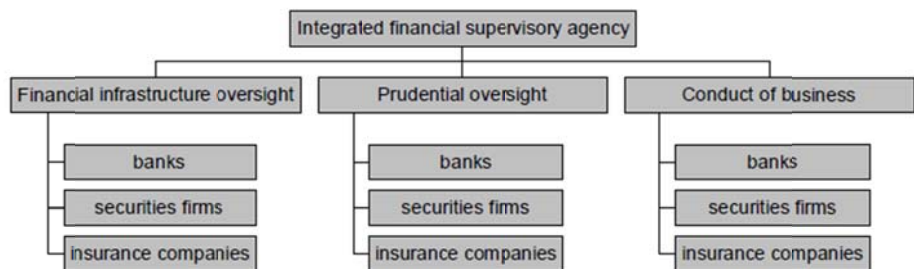
The models can simplistically be graphically represented in the following way:

**Table 6: Different Structures of financial supervision by sector**

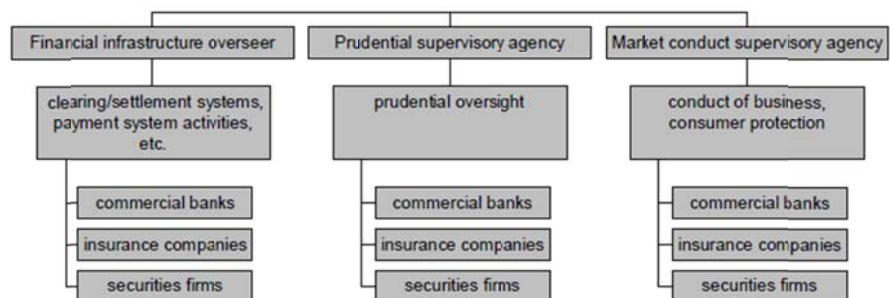
**Stylised Structure of Financial Supervision by Sector**



**Stylised “Fully Integrated” Structure of Financial Supervision**



**Stylised Structure of Financial Supervision by Objectives**



Source: OECD

The single integrated supervisor model was established in many countries in response to changes in the financial sector. Until the mid-1990s, regulation and supervision were generally organised along institutional (sectoral) lines. Separate licensing and regulatory regimes were in place for the banking, insurance, and securities industries, with central banks often taking the role of the regulator of commercial banks. However, since then and until the recent crisis, there was a trend towards consolidation of the regulatory structure with a view to reducing the number of agencies involved in regulation of the financial sector.

This integrated model merges supervisors for the securities markets, pension and mutual fund markets, insurance and banks into one entity that is distinct from the central bank (which has only monetary policy and financial stability functions, and no prudential ones). The model was often adopted to accommodate a trend towards financial conglomerates that combine banking business with other financial

business, such as investment banking, asset management, and insurance. The main benefit of this model is driven by cost considerations and the advantages, primarily serving the interests of providers, of a single point of regulatory contact for all firms, saving them compliance costs (i.e. an integrated supervisor for all financial institutions, "one stop supervision"). As opposed to the twin-peaks model described below, the single integrated regulator model assembles the two sets of tools, prudential regulation and conduct of business regulation, within one body.

The Table below gives an overview of existing models in EU Member States. After the symbolic date of 1998, when the UK adopted the integrated model, the number of unified supervisory agencies in the EU, which had previously only existed in Scandinavian countries, grew. Chronologically, the single integrated model was adopted by Norway (1985); Denmark (1988); Sweden (1991); the U.K. (1997); Hungary (2000); Latvia (2001); Austria (2002); Germany (2002 – with joint responsibility on the part of BaFin and the Bundesbank for the prudential supervision of banks); Finland (2003 with full integration of the FIN-FSA including insurance achieved only in 2009); Belgium (2004); and Poland (2008). The national examples above all assigned the task of supervising the entire financial system to a single authority separate from the central bank. However, while all supervisory powers were concentrated in a single authority, in Ireland (2003), the Czech Republic (2006) and Slovakia (2006) the supervisory responsibilities were concentrated in the hands of the central bank<sup>68</sup>. One reason why this model has fallen out of favour recently is linked to the risk that there may be an imbalance between priorities given to the various objectives (see next section on conflicts of interest).

The models used in the different EU Member States are shown below:

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<sup>68</sup> See Masciandaro and Quintyn, *Regulating the regulators: The Changing face of financial supervision architectures before and after the crisis*, 2010.

**Table 7: EU Member State models of financial supervision****Integrated model**Integrated within the central bank

Czech Republic: *CeskaNarodni Banka (CNB)\**

Finland: *Finnish Financial Supervision Authority (FIN-FSA)*

Ireland: *Central Bank of Ireland (ex: Irish Financial Services Regulatory Authority) (CBI)*

Slovakia: *Národná Banka Slovenska (NBS)*

Integrated with a unique supervisor close to the central bank

Belgium: *Commission bancaire, financière et des assurances (CBFA)* (subject to change in 2011)

Estonia: *Finantsinspektsioon (Fi)* (autonomous structure within the central bank)

Integrated with a unique supervisor distinct from the central bank

Austria: *Finanzmarktaufsichtsbehörde (FMA)*

Denmark: *Finanstilsynet (Finet)\**

Germany: *Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)*

Hungary: *Hungarian Financial Supervisory Authority (PSZAF)*

Latvia: *Financial and Capital market Commission (FCC)\**

Malta: *Malta Financial Services Authority (MFSA)*

Poland: *Polish Financial Supervision Authority (KNF)*

Sweden: *Finansinspektionen (FI)\**

UK: *Financial Services Authority (FSA)* (subject to change in 2011)

**Sectoral model**

Bulgaria: *Bulgarian Central bank\*, Financial Supervision Commission (FSC)*

Cyprus: *Central Bank of Cyprus (CBC)\*, Cooperative Societies Supervision and Development Authority (CCSDA), Insurance Companies Control Services (ICCS)\*; Cyprus Securities and Exchange Commission (CySEC)\**

France: *Banque de France\*; Autorité de Contrôle Prudentiel (ACP); Autorité des marchés financiers (AMF)\**

Greece: *Bank of Greece; Capital markets Commission (CMC); Private Insurance Supervision Commission*

Italy: *Bancad'Italia (BI); Commissione nazionale per le società e la borsa (Consob); Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (ISVAP)\*; Commissione di vigilanza sui fondi pensione (COVIP)\**

Lithuania: *Central bank of Lithuania\*, Commission of insurance supervision (DPK), Commission of exchange transactions\**

Luxembourg: *Commission de surveillance du secteur financier (CCSF), Commissariat aux assurances\**

Portugal: *Banco de Portugal\*; Comissão do Mercado de Valores Mobiliários (CNVM), Instituto de Seguros de Portugal (ISP)\**

Romania: *National Bank of Romania\*, National Securities Commission (CNVM)\*, Insurance Supervisory Commission\**

Slovenia: *Central Bank of Slovenia; Financial Markets Agency (ATVP)\*, Insurance Supervisory Agency (AZN)*

Spain: *Banco de España (BDE), Comisión Nacional del Mercado de Valores (CNMV), Dirección General de Seguros y Fondos de Pensiones (DGSFP)*

**Twin-peaks model**

Netherlands: *De Nederlandsche Bank (DNB)\*; Autoriteit Financiële Markten (AFM)*

\* The views of these supervisors were not included in this study through a written response to our research questionnaire.

Historically, EU supervision has been structured along sectoral lines<sup>69</sup> but more recently the approach has been functional (i.e. supervision by objective), in particular distinguishing between prudential (control of risk) and conduct-of-business (with respect to both investor and consumer protection) supervision.

For the purpose of assessing the potential of consumer protection for financial supervision, it is important to state that the above supervisory “goals” in the financial sector, which correspond to certain public goods, should be acknowledged and made visible in the different institutional arrangements.

Since the choice of such institutional arrangements depends to a large extent on factors other than the promotion of certain goals, such as consumer protection, it is important in the following chapter to define the function to which consumer protection could be best attached, as well as which functions are problematic because they create conflicts of interest within the supervisory structure.

These categories merely reflect the special position of financial institutions in the market economy, which is seen as of fundamental significance. This is why there is an overarching aspect of supervision which other sectors of the economy do not share to the same extent: **stability.**

This public concern for the stability of the financial system is divided into three areas:

- Macroeconomic stability
- Financial system stability
- Market stability/sustainability

Consumer protection based on the consumer interest as a specific goal in the market economy does not fit into this system. The consumer interest is focussed on individual households and its specific stability with regard to the provision of goods and services for consumption.

### **2.1.2 Models of financial supervision**

The financial system links investors and borrowers of money in a risky money system. From a consumer perspective, money is a means to satisfy needs and not a need in itself. As such, markets for money or other financial services target consumers within these markets, and a special category of consumer protection becomes necessary as a result.

With regard to the defined common goods, member states have developed five institutional answers to the core problems of financial services: Central Banks, Financial Services Authorities, Competition Agencies and Consumer Agencies. All are centred on the purpose of stability.

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<sup>69</sup> i.e. a supervisor of the banks, a supervisor of the insurance companies, a supervisor of the investment services firms.

**Table 8: Supervision and its functions – The 3 Pillars**

<b>Core purpose Objective</b>	<b>Macroeconomic stability</b>	<b>Financial system stability</b>	<b>Market stability/sustainability (consumer protection)</b>
<b>Subject</b>	Currency safety	Bank safety	Stakeholder safety (consumer safety/social protection)
<b>Stakeholder</b>	Public	Commercial/consumer investors/Savers	Consumers
<b>Raison d'être</b>	Keep money safe	Keep sound intermediation	Keep sound market outcomes
<b>Basic tool</b>	Monetary policy		Market regulation and responsible actors
<b>Institution</b>	Central Bank	Prudential supervisor	Financial non-prudential supervisor, market representatives
<b>Area</b>	Political (Social)	Financial	Economical
<b>Social dimension</b>	Social unrest, political instability	Economic catalyst, job creation	Economic inequality, Social unrest, political instability
<b>Economic unit</b>	Citizens	Producer	Consumer
<b>Basle terms</b>		Financial Safety Net	Integrity
		Soundness/profitability (international competitiveness)	Fairness/Responsibility/comparability
<b>Priority</b>		Investor (freedom to invest)	Consumer/Saver (safety for old-age pension)
<b>Type of regulation</b>	Prudential	Prudential	Non-prudential (social protection)

In the following table these institutions are grouped schematically in terms of the requirements placed on them. In practice, there may either be many more institutions sharing the same responsibilities with respect to different groups, as is especially the case in financial supervision in the USA, where about seven agencies have similar functions but target different financial institutions. This is also true in Europe, where the traditional separation between banking, insurance and investment is still apparent in different institutions.

On the other hand, small countries in particular do not have the resources to provide for specialist institutions with the required specialist knowledge. This is why in many small countries, as well as in France, the central bank brings together many of those tasks, whereas in the UK they are allocated to different institutions, such as its central bank, the Financial Services Authority and the Office of Fair Trading.<sup>70</sup>

<sup>70</sup> For more information see the accompanying "Annex: Country Reports" under 'Institutional structure and objectives' section of respective country supervisor.



**Table 9: Matrix of supervisory goals and institutions**

<b>Goals</b>	<b>Institutions</b>	<b>Financial Authority</b>	<b>Cartel of- fice/Fair Trade</b>	<b>Central Bank</b>	<b>Consumer Agency</b>
<b>Safety and Soundness</b>					
<b>Business conduct</b>					
<b>Money Supply/Prices</b>					
<b>Consumer Protection</b>					
<b>Competition</b>					

This matrix could be completed for each country using the information provided in the "Annex: Country Reports".<sup>71</sup>

We present four typical examples, one in which each function has its own distinct institution as the UK, one in which they are coordinated by one institution as in France, one in which there are two specialist agencies, as in Germany and the Netherlands.

**Table 10: UK –Supervisory Structure**

<b>Goals</b>	<b>Institutions</b>	<b>Financial Authority</b>	<b>Cartel of- fice/Fair Trade</b>	<b>Central Bank</b>	<b>Consumer Agency</b>
<b>Safety and Soundness</b>		Financial Service Authority		Bank of England (2012)	
<b>Business conduct</b>		Financial Service Authority	Office of Fair Trading (OFT)		Financial Conduct Authority, FCA (2012)
<b>Money Supply/Prices</b>				Bank of England	
<b>Consumer Protection</b>		FSA	Office of Fair Trading (OFT)		Financial Conduct Authority, FCA (2012)
<b>Competition</b>			OFT, Competition Commission		

The UK will adopt a new regulatory architecture next year and the famous FSA integrated model of supervision would appear to have failed overall. Although numerous aspects of its work were positive in terms of consumer protection, the government has decided to break up the single regulator into 3 new agencies for various reasons, one

<sup>71</sup> In some cases, it may be difficult to generalise the matrix for all kinds of financial services, e.g. regarding retail investments, the financial authority (as opposed to the fair trade office for say credit) will often be the body in charge of enforcement of conduct of business rules (duty to establish the clients profile and to advise a suitable investment).

being linked to issues of conflicts of interest between mandates (explored below).

The UK Treasury 2011 White Paper, produced after consultation, details the scope of the new Prudential Regulatory Authority (PRA), the Bank of England Financial Policy Committee (FPC) and the Financial Conduct Authority (FCA, renamed at the last minute instead of the former proposal to call it the Consumer Protection and Markets Authority). The move to rename the Consumer Protection and Markets Authority the Financial Conduct Authority is seen as a bid to placate parliamentarians, who in January 2011 deemed attempts to dub it a consumer champion "inappropriate, confusing and potentially dangerous".

Furthermore, in December 2010 the UK Government launched a consultation paper on its plans to transfer the regulation of consumer credit from the Office of Fair Trading (OFT) to the new Financial Conduct Authority. It sees bringing consumer credit into the same regulatory regime as other retail financial services under the CPMA as an important step in strengthening and simplifying consumer protection and creating a more responsive regime and remove unnecessary regulatory duplication and burdens on business.

**Table 11: French Supervisory Structure**

<b>Goals</b>	<b>Institutions</b>	<b>Financial Authority</b>	<b>Cartel office/Fair Trade</b>	<b>Central Bank</b>	<b>Consumer Agency</b>
<b>Safety and Soundness</b>				Banque de France - Autorité de contrôle prudentiel (ACP)	
<b>Business conduct</b>		Autorité des Marché financier (AMF)		Banque de France - Autorité de contrôle prudentiel (ACP)	
<b>Money Supply/Prices</b>				Banque de France	
<b>Consumer Protection</b>			DGCCRF	Banque de France - Autorité de contrôle prudentiel (ACP)	Private ombudsman
<b>Competition</b>			Autorité de la Concurrence		

The French government launched a study on financial supervision in 2008, which resulted in a report published in January 2009 outlining proposals for developments in France<sup>72</sup>. Not all recommendations were followed, however it did lead to the merger of 4 previously independent bodies into one called the Prudential Control Authority

<sup>72</sup> Deletré, Bruno, Rapport de la mission de réflexion et de propositions sur l'organisation et le fonctionnement de la supervision des activités financières en France- Inspection générale des Finances, Rapport N°2008-M-069-022009.

(ACP). This has brought together what were separate licensing and supervision authorities for banks and insurance. This move away from a sectoral model did not, however, go as far as the report suggested in terms of setting up a model based on supervision by objectives. Such a twin-peaks model (in which prudential supervision is distinct from conduct-of-business supervision) would have given the financial markets authority (AMF) the responsibility for the marketing and the business conduct of the entire financial sector (not just for financial markets and investments). It was, however, preferred to keep the micro-prudential activity together with the conduct of business supervision within the newly formed ACP.

Nevertheless, the reform in 2010 has brought the French supervisory system close to that of the twin-peaks model used by the Netherlands, with the exception that in France the financial markets authority does not have sole responsibility for conduct of business as this has been assigned to the new prudential authority instead. One reason why the French may have decided to keep both prudential and conduct of business supervision in one agency is the strong links between poor business practices and higher prudential risk e.g. if an intermediary can be called upon to cover the prejudice to his client, the prudential supervisor will logically be forced to require the intermediary entity to make provision for this risk. The fear that a legal or simply reputational risk could constitute a significant prudential risk is what lies behind the US phenomenon of compliance (i.e. prevention management calls on the supervisor to be interested and focused on market conduct). This fear however, does raise the question, already alluded to elsewhere in the report, of what other obligations the supervisor should monitor on prudential grounds because they could pose a contingency risk on the solvency of the financial institution in question.<sup>73</sup>

**Table 12: German Supervisory Structure**

<b>Institutions</b>	<b>Financial Authority</b>	<b>Cartel office/Fair Trade</b>	<b>Central Bank</b>	<b>Consumer Agencies</b>
<b>Goals</b>				
<b>Safety and Soundness</b>	Bundesanstalt für Finanzdienstleistungen (BaFin)			
<b>Business conduct</b>	BaFin			
<b>Money Supply/Prices</b>			Bundesbank	
<b>Consumer Protection</b>				Verbraucherzentralen
<b>Competition</b>		Bundeskartellamt		

Currently, Germany's financial system is overseen by two bodies, the Bundesbank and the Financial Services Authority (BaFin). BaFin was

<sup>73</sup> Examples of such additional obligations might be tax law or employment law, or stock-exchange rules for publicly listed companies. However, there is no doubt a need to limit the expansion of the supervisory perimeter.

founded in 2002 as an integrated supervisor for the entire financial sector, then replacing several national supervisory bodies for banking, insurance and securities trading. Although the Bundesbank has recently expressed an interest in taking over oversight of the insurance industry, the insurance companies themselves have already complained that the Bundesbank, which has mostly supervised day-to-day banking transactions, does not have the necessary expertise to monitor them.

**Table 13: Dutch Supervisory Structure**

<b>Institutions</b>	<b>Financial Authority</b>	<b>Cartel office/Fair Trade</b>	<b>Central Bank</b>	<b>Consumer Agency</b>
<b>Goals</b>				
<b>Safety and Soundness</b>			DNB	
<b>Business conduct</b>	AFM			
<b>Money Supply/Prices</b>			DNB	
<b>Consumer Protection</b>	AFM			
<b>Competition</b>		Kifid		

Under the Dutch Twin Peaks cross-sectoral supervisory model, the central bank, the DNB, is responsible for prudential supervision and the financial markets authority (AFM) for conduct-of-business supervision.<sup>74</sup>

The arguments in favour of the twin peaks model are that different approaches or supervisory cultures are needed between activities of prudential supervision and those of conduct-of-business supervision, and that as conflicts can be externalised, that power can be concentrated, and that reputational risk can be reduced.

One of the current inconveniences of the twin peaks model based on objectives, alongside the duplication of supervisors for firms, the need for the clear delimitation of responsibilities and cooperation channels is that this architecture is not entirely compatible with the European structure based on a clear sectoral division between authorities. The advantages are nevertheless very convincing, as testified by moves on the part of a number of Member States in this direction, namely: clearer mandate not subject to conflict of interest, less risk of regulatory arbitrage between sectors, greater scrutiny of banking markets from a user perspective, a more homogenous application of controls across sectors, a better coverage of intermediary activities within the supervisory scope, and greater propensity to be adapted to future European and international architectures<sup>75</sup>.

Partly for these reasons and as a result of recent experiences, several countries have taken their cue from Twin Peaks and are also adopting this model. In Belgium, Germany, France, Ireland, Italy, Portugal, Spain, the United Kingdom and Sweden, sector-specific supervisors are being merged into cross-sector supervisors, or the ties between

<sup>74</sup> See "Annex: Country Reports".

<sup>75</sup> If, say, certain supervisory functions will be carried out at the EU level, this is more likely to be prudential in view of the likelihood that still larger transnational financial groups will emerge.

the central bank and the (banking) supervisor are being strengthened.

### **2.1.3 Conflicts of interests**

The different functions of financial supervision may conflict with each other. For the purposes of this study, we will simply adopt the assessment in the proposals by the French Ministry of Finance for the reform of financial supervision in France in 2009, because it articulates the widely used arguments for the separation of prudential regulation from the rules sometimes known as rules of fair competition, rules for business conduct, customer or investors' protection, as well as consumer protection.<sup>76</sup>

After this we will focus on the potential lessons for consumer protection when or where integrated into bank supervision.

#### **2.1.3.1 Prudential regulation, money system and codes of conduct**

In addition, there exist potential conflicts of interest between areas of each function. If we subdivide the Consumer Market function into the regulations belonging to the "Information Model" and those belonging to the "Market Compensation/Social Protection Model", we can see that potential conflicts of interest arise.

#### **Financial supervision and the central bank**

The existing literature on the subject highlights the potential conflicts of interest between monetary policy on the one hand and management of financial supervision on the other. Given the impact which monetary policy decisions may have on the balance sheets of banks, there may be significant risk in the assignment to the central bank of responsibility for banking supervision, because price stability may come in second place on the grounds that banks would be otherwise driven into difficulties. An excessively loose monetary policy may be the result of this conflict (p.17).

While on the one hand the Central Bank may operate daily bank refinancing through the open market operations of the European Central Bank (ECB), its remit on the other hand for banking supervision calls for controls over the behaviour of single banks. Through its prerogative to demand access to information and to have this transmitted regularly and upon request, and to dispatch on-site monitoring teams, this advantage is nevertheless useful in times of crisis (where very short information channels can respond almost instantaneously), while representing a potential conflict of interest. While adequate internal procedures, such as Chinese walls, may help mitigate this risk, the current crisis has shown that this is nevertheless positive in urgent situations (p.17).

However, contrary to the received wisdom that emphasised potential conflicts between prudential and monetary policy, the lessons that are now being drawn from the crisis point to potential synergies between monetary policy and financial regulation. These complementarities may come into sharper relief as both monetary and prudential

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<sup>76</sup> See Chapter 1 above.

policies are revised to take greater account of the need to mitigate systemic risk<sup>77</sup>.

The potentially conflicting goals of prudential supervision and the oversight of financial markets is another area. The risk may be illustrated as follows: While the financial market supervisor is primarily concerned with control of the transparency of financial information, i.e. to ensure that the quality of communications by issuers of securities is sufficient to enable investors to receive the relevant information and make a meaningful assessment of the value of the investment and its future prospects; the prudential supervisor will be primarily focused on concerns of solvency of the institutions for which it has the responsibility of oversight. The goal will be to prevent movements of panic that might destabilise those institutions further. This will mean that supervisors may want this information to be kept confidential, because disclosure may trigger a panic. For example, if the financial institution is itself a listed company, which of the two objectives will win out: that of transparency or that of safety (p.20)?

In terms of insurance supervision, a potential conflict of interest may exist between the objective of keeping the entity solvent and protecting the interests of a specific group of insured consumers. Likewise, a conflict between prudential supervision and control of marketing practices can explain why in some Member States the banking supervisor will not want to have the responsibility for controlling the rules on the fair marketing of products and services. While this differs for a number of countries, the nuances can be observed from one country to another by taking into account the characteristics of the central banks that do have this supervision task (p.74).

### **Transparency versus prudential secrecy**

Supervisors in all three sectors (banking, insurance and securities) must take into account the balance of advantage in making public any supervisory action that has been taken to prevent or remedy problems in supervised firms. This leads banking supervisors in many jurisdictions to avoid or postpone public disclosure of banks' problems because of the importance of maintaining confidence in the banking system. Public confidence is essential to ensure stable funding. Loss of confidence in the banking sector can create financial instability by resulting in a run on banks by depositors, with a subsequent systemic drain on liquidity.

A further conflict of interest can arise between the goals of consumer protection and those of the mitigation of systemic risk, e.g. measures that are intended to protect depositors, such as requiring higher levels of bank capital, can reduce the availability of credit in the economy.

While in the majority of cases consumer protection priorities lose out to the more traditional conservative banking regulator roles of prudential supervision, in the UK the FSA has acknowledged that its "balance between conduct of business regulation and prudential regulation ... now appears [to have been] biased towards the former"<sup>78</sup>

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<sup>77</sup> For more details on the potential expanded role for central banks in financial regulation/supervision, see Nier, Erlend Walter, *Financial Stability Frameworks and the Role of Central Banks- Lessons from the Crisis*, IMF WP/09/702009.

<sup>78</sup> Turner, Adair, *The Turner Review: a regulatory response to the global banking crisis- FSA, 2009*, p.87.

In the early period of the financial crisis, among the countries that were operating the integrated model of supervision, rescues of individual institutions were a common occurrence as compared with Member States where a separate prudential supervisor model prevailed<sup>79</sup>.

One argument for the separation of conduct-of-business supervision from prudential supervision is linked to the observation that conduct-of-business regulation is often more publicly visible and politically popular than prudential regulation and that this may lead to greater management time and resources being spent in this more media visible sector. This however may be changing with the widespread reporting on Basle III and capital requirements in the media.

Competition policy is another field of friction between regulatory objectives. Competition is an essential ingredient of public policy and in the financial sector it protects the consumers' interests by allowing prices to move alongside market conditions. However, too fierce competition might endanger the solvency of the institutions involved, and hence urge the supervisor to draw the firms' attention to predatory pricing or unfair conduct.

Using the same previous 3 categories, the tables below summarise and show where some of these conflicts of interest may arise e.g. those between functional objectives (and thus between institutions generally).

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<sup>79</sup> E.g. U.K. (Northern Rock, Bradford & Bingley, HBOS, RBS); Denmark (Roskilde); Belgium (Dexia and Fortis); but also non-EU countries with an integrated supervisory model e.g. Switzerland (UBS) and Iceland (Glitnir, Landsbanki, Kaupthing).

**Table 14: Summary table: Two main conflicts of interests**

<p><b>Field 1: the conflict between prudential objectives and market disclosure</b></p> <p>If the bank is making losses, or is less profitable, disclosing its results, which is necessary for the correct functioning of the market, might lead to a withdrawal of deposits, and hence may jeopardize the bank. Similarly, for securities supervisors, will the agency allow a bank to issue subordinated debt to small investors, when it knows that its solvency has come under threat or it is being restructured?</p>
<p><b>Field 2: conflicting objectives due to increased attention given to “consumer” protection regulation</b></p> <p>As bank regulation follows the lead of insurance regulation, which has always paid more attention to the client (policy subscriber) and the contract between the insurer and the consumer, preserving the overall solvency of the supervised institution, while still the ultimate goal, is increasingly having to make room for the contractual considerations called for by new rules as between a financial institution and its clients.</p>

**Table 15: Conflicts of Interest**

Macroeconomic stability	Financial system stability	Market stability/sustainability
	Strong prudential capital adequacy rules vs. Good credit perspective (responsible lending)	
Encourage consumption via the wealth effect vs. Conservative lending on the basis of lower LTVs (equity release)		
	Provider information secrecy vs. Market information distribution	
	Financial sector competitiveness vs. strong sustainability	

**2.1.3.2 Conflicts of interest with regard to consumer protection**

Following the English and American example of supervisory reform after the crisis, and also with regard to the proposals of the French Government report, consumer protection should at least be given a place in financial supervision which is clearly separate and independent from prudential supervision. This is in line with the reservations expressed with regard to the compatibility of the supervision of banks’ market behaviour, where professional rules (business conduct), compliance and fair competition are jointly exercised with the supervision of prudential regulations, since legal and informational consumer protection have much in common with these rules.

- Behavioural supervision looks at individual banks and not the system, consumer protection looks at individuals and their interests.
- Stability of a provider is an important goal in prudential supervision but not in consumer protection since bankruptcy can be seen as a healthy threat (and punishment) for suppliers whose behaviour has led to their customers’ “exit” or “voice” creating either losses or additional cost.
- Keeping bad banks alive distorts the market mechanism to the detriment of consumers, so badly managed banks should not be protected from themselves.



- High profits may be good for healthy banks but may show that consumers have paid too much for services or received too little in the form of quality.
- Prudential supervision prefers a calm environment and for talks between supervisor and financial institution to take place behind closed doors in order to prevent a run on a bank or a mass exit, whereas consumer protection needs public awareness about the misbehaviour of financial suppliers as early as possible in order to warn other consumers, mobilise the exit functions of the market and force suppliers to change.
- Consumer protection is part of civil society, which is based on democratic participation of social organisations, while prudential oversight requires rational and responsible behaviour of state agencies.

There are also a number of other incompatibilities in terms of target group, the necessary skills, the different philosophies and the available enforcement mechanisms and sanctions, which make it difficult for prudential supervisors to take on the tasks of consumer protection.

**Table 16: Conceptual differences between prudential supervision and consumer protection**

	<b>Prudential Supervision</b>	<b>Consumer Protection</b>
<b>Legal</b>	Public/admin. Law	private law
<b>Target</b>	State/Community	Individuals
<b>Purpose</b>	Safety of the System	Personal needs
<b>Enforcement</b>	Administration	Courts (supplemented by administrations)
<b>Protected</b>	Bank	Consumer
<b>Bank failure</b>	intolerable	Necessary
<b>Sanctions</b>	Fines	Damages (supplemented by fines)
<b>Skills</b>	Bank management and accountancy, legal requirements for tier capital	Consumer law and sociological insight in consumer needs and behaviour
<b>Supervisory culture</b>	Cooperative, behind closed doors	Public, demanding

## 2.2 Administrations and financial institutions

### 2.2.1 Who supervises?

The list of supervisors who contributed to the research is available in the Annex: "National country reports". The characteristics of the 32 agencies that contributed written answers can however be summarised as follows:

**Table 17: Supervisory respondents by agency status**

Type of Supervisory authority	No. of Respondents (MS)
General consumer protection authority	4 (LT, SK, UK, FR)
National Central Bank	6 (SI, GR, ES, SK, IE, IT)
Other	4 (FR, IT, DK, ES)
Stand-alone insurance supervisor	2 (SI, LT)
Stand-alone integrated financial supervisor	12 (AT, BE, BG, DE, EE, FI, HU, LU, MT, PL, UK) + NO
Stand-alone securities supervisor	4 (NL, PT, GR, ES)

### 2.2.1.1 Central banks

Central banks have a number of tasks and tools beyond those concerning price stability and controlling inflation or the growth of the money supply. Beyond monetary policy, they will generally have a role in ensuring financial stability and the provision of systemic liquidity, being the lender of last resort, responsible for the resolution of failing institutions, and the sole entity in charge of oversight of payment and settlement systems. None of these roles are strictly undertaken to protect consumers per se, but to protect the “system” of which the consumer is just one small, dependent part.

At the level of **supervision**, the central bank may have responsibility (Italy, Portugal), with lending restricted to institutions licensed by the bank, by a licensing authority (such as a Ministry as in the case of Belgium or a specialist agency in the UK, France, Netherlands, Estonia, Germany), by a consumer protection authority (Ireland, Bulgaria, Latvia), by a Market Inspectorate (Slovenia), by a Consumer Ombudsman or by a Financial Authority as in Finland.

There are other countries in which a central bank has sole responsibility for financial oversight. France is one such. And then there are those, like the United Kingdom, where these duties are shared.

Meanwhile the national central banks have been losing power for some time due to the growing influence and competencies of the European Central Bank.

Integrated models in which the central bank plays the main supervisory role over financial services are found in Ireland (Central Bank of Ireland), the Czech Republic (CNB), Slovakia (NBS) and also Finland (through the central bank linked supervisory authority FIN-FSA). Central banks operating from within a sectoral model which also play a strong role in financial supervision include Spain’s Banco de España and Italy’s Banca d’Italia.

Stated preferences with respect to national supervisory architectures often stem from political considerations (such as politicians fearing that independent central banks in charge of supervision would prevent politicians from keeping or having any influence on financial sector developments). In the case of the Member States listed above, central banks were able to throw their weight into the discussion and

managed to secure (or expand) their supervisory powers. At the EU level, regarding the position of the central bank, on the one hand the European Central Bank (ECB) is formally outside the ESFS, but on the other hand the newly created ESRC is chaired by the ECB President.

In terms of consumer protection objectives, explored in further chapters of this report, the Cyprus National Bank and the Swedish Riksbank do not deal with consumer protection as it is not included in their mandate in any way. Both have therefore declined to respond to the questionnaire. Similarly, in Malta, all responsibilities for consumer protection within the financial services sector fall by law within the remit of the Malta Financial Services Authority as the single regulator for the financial sector. As such therefore the Central Bank of Malta had no basis for completing the questionnaire. Likewise, the National Bank of Romania has no jurisdiction in the field of consumer protection. Such competences are assigned to a specialist body, namely the National Authority for Consumer Protection.

In Austria too, the central bankers at the OeNB do not deal with consumer protection and said that our request should be sent to the specialist financial regulator "the Financial Market Authority does some work in this area". The Banque Centrale du Luxembourg (BCL) has a clear mandate for the supervision of banks, but this mandate is centred around liquidity supervision in particular. The BCL clearly reported that they do not have any explicit responsibilities in the field of consumer protection. This explicit responsibility and mandate lies with the national supervisory agency, the Commission de Surveillance du Secteur Financier (CSSF) which nevertheless did not respond to our questionnaire.

In the twin-peaks Dutch model, prudential supervision of the entire financial system is located within the central bank, and conduct of business supervision in a separate organisation, outside the central bank. In the Irish model, both functions are located in the central bank. In Australia, prudential and conduct-of-business supervision are located in separate organisations, both separate from the central bank.

Traditionally, central banks as institutions are not very willing to conduct monitoring activities too far-removed from those of prudential control. As a result, such agencies are not usually the institution best-placed to carry out controls of a different nature as required for a consumer protection or control of business mandate. This in some way explains why some Member States have resorted to a sectoral model of supervision.

A further simple reason why conduct-of-business supervision is less of a banking supervisor specialty is that consumer protection provisions are more related to unfair competition rules especially with regard to securities. Furthermore, the multitude of mandates e.g. the primacy of financial stability and the systematic priority of prudential concerns over the other objectives in the hierarchy, means that only a few central banks have viably taken on the role of conduct-of-business supervision (the exceptions being relatively small financial markets such as the one in Slovakia). These conflicts of interest notwithstanding, some central banks, notably the French central bank, can still carry out activities promoting consumer protection e.g.

through the overindebtedness commissions or as secretariat for the consultative committee of financial sector users (CCSF), as well as presidency of the banking mediation committee.

### **2.2.1.2 Financial Services Authority**

The Financial Services Authority in the United Kingdom was, formed as an independent agency in 1997 out of several pre-existing supervisory bodies, and typifies this type of supervisory entity. Its remit includes a wide range of supervisory matters in the financial sector, such the supervision of deposit taking institutions, of insurance and investment business, mortgage lending (though not consumer credit which belongs to the remit of the OFT), advisors, and insurance intermediaries. Most types of financial regulation have been concentrated in the hands of the FSA and as a result of this high concentration of competences, the FSA has evolved into Europe's most important regulator, with the widest expertise, and the most powerful think tank in terms of policy and regulation. However, the blow of the financial crisis has led the government to reform its regulatory architecture and will be breaking up the parts of the FSA into a prudential control agency (within the Bank of England) and a business conduct supervisor, which will have a strong consumer protection mandate without having the word consumer in its title (the Financial Conduct Authority - previously referred to as the Consumer Protection and Markets Agency).

The United Kingdom and its world famous FSA was not the first integrated financial supervisory agency. The Nordic countries, Norway, Sweden, Denmark, Iceland and to a lesser extent Finland all concentrated their financial supervision in the hands of a single government agency. One marked difference from the UK FSA is that these supervisors are more clearly embedded in the general structure of government administration and furthermore, none of these countries rely on the central bank for supervision.

The Norwegian Kredittilsynet is among the oldest integrated supervisors and has a very wide remit including occupational pension funds, finance companies, estate agencies and their lawyers, debt collection agencies, external accountants and auditors. It has only last year been allocated a consumer protection objective. In Sweden, banking supervision conducted by the Finansinspektionen is a public authority in charge of banking, insurance and securities, while in Finland, the Financial Supervision Authority, an independent decision-making body, functioning "in connection with the bank of Finland" and controls the entire credit institution sector, the securities markets and, only recently, the insurance sector as well. The Danish Financial Supervisory Authority also has a wide remit and is in charge of the supervision of banks, securities business including investment funds, mortgage credit, insurance companies and pension funds.

Germany is also associated with use of a powerful financial supervisor in the form of the Bundesaufsichtsamt für Finanzdienstleistungen (BaFin) which, in 2002, brought together the three supervisory bodies within the existing sectoral model. As such, the BaFin is in charge of the supervision of banks, insurance companies and pension funds, as

well as money laundering in relation to the supervised institutions. The central bank maintains its involvement in on-going supervision of banks and financial institutions, while audits are undertaken with the involvement of Bafin staff. Some further necessary clarification of tasks and responsibilities between them is likely to take place. The French government report also gives details of supervisory traditions and cultures that may differ between agencies.

While other Member States also have strong financial services authorities, many of these are heavily focused on the securities sector. This is true even of the Dutch AFM, which specialises in conduct-of-business supervision across the entire financial sector. However, not all securities supervisors have a remit over the conduct of business. This was for example the case last year in France where, despite other proposals in a government report, the French Financial Markets Authority (AMF) was not charged with conduct-of-business supervision following the reform. Nevertheless, the AMF, in line with the experience of its peers in countries elsewhere, is generally the agency which has the strongest culture with regard to supervision of marketing issues. Often, a consumer protection mandate will not represent a contradictory objective to the other objectives of a financial market supervisor, which are generally geared to investor protection. In fact, using the example of France again, the AMF was the only supervisor that has put in place a mediation service for consumers of non-insurance savings products (the previous insurance supervisor ACAM, now operating within the new ACP, did not mediate despite receiving and registering complaints).

### **2.2.1.3 Special Consumer Protection Agencies**

In some of the recent EU Member States, financial supervision outside the central bank functions of price and financial stability, rest on general consumer protection bodies that may or may not have a sufficiently developed financial sector division. In the Baltic states of Latvia, Lithuania and Romania, there exists a state agency with a broad consumer protection mandate which also attends to financial products and services. The weakness of this institutional setting is that the system will lack the specialisation and clout of a strong regulator, and will often not have the resources to match its very wide remit to seize opportunities to identify problem spots in the market. Furthermore, there is likely to be a weaker ability and political will to enforce sanctions. Also part of this group is the UK's Office of Fair Trading (OFT) which has both a consumer protection mandate and a market-based mandate involving taking into account outcomes and levels of competition on behalf of consumers. Here again, financial services is only one division of the agency and, while it has published a number of market studies, thematic reviews and guidance such as the ones on irresponsible lending, it has often been criticized for reacting a little late and for being dependant on external pressure before addressing a problematic situation for consumers of financial services. It has, however, been heavier handed of late with fines and bans in areas ranging from debt management companies, sale and lease back schemes, payment protection insurance etc. In terms of enforcement, where the OFT identifies non-compliance with the law

and/or businesses failing to have regard to relevant OFT guidance, it will decide on the appropriate regulatory response in the light of the facts and circumstances of the individual case. The type of OFT action taken is guided by the level of actual or potential harm to borrowers and by the scale or frequency of identified misconduct. For example, it can impose 'requirements' on a business where it is dissatisfied with any matter in connection with the operation of the licensed business. Failure to comply with such a requirement can lead to the imposition of a financial penalty of up to £50,000 per instance of non-compliance. It may also compulsorily vary a licence, for instance to limit the activities for which a trader is licensed, or limit the life of the licence. In serious cases, where there is evidence tending to show that a person is unfit to hold a consumer credit licence, the OFT can take action with a view to refusing or revoking the credit licence of the person concerned.

Also in this group of supervisor agencies are the Scandinavian models of the Ombudsmen. One of which, the Finish Consumer Agency, *Ku-luttajavirasto*, safeguards and strengthens the position of the consumer in society by monitoring several acts that were enacted to protect consumers. In addition, it can help consumers to protect their rights in special cases. Here again, the ombudsman is not a specialist agency for the consumers of financial services. Nevertheless, they represent an effective model which should be more closely researched for potential areas of best practice.

#### **2.2.1.4 Fair Trade and Competition Authorities**

Competition authorities exist in all Member States. In most jurisdictions, however, financial firms are not subject to special competition rules, and the normal regime applies and is administered by the general competition authorities, whether the national or the European ones. While the coupling of a consumer protection mandate with one based on analysis of competition in the market within a single agency could be an interesting avenue for the future, although there is currently no prudential authority involved in reviewing the competition aspects of decisions made by financial firms. As mentioned above, the Office for Fair Trading in the UK does have a remit in this sense, but the future of the OFT is unclear at present.

In Germany for example, for a long time Article 102 GWB excluded banks from the supervision through the German Cartel Office. This exemption has been removed but there is still a certain belief that mergers and acquisitions in banking and insurance should not only be judged with regard to competition but should also be seen in a more favourable light if prudential supervision goals are included. Already in the 1920s, German legislation favoured mergers in which insurance companies got the right to merge and transfer all insurance contracts to the new entity without the consent prescribed by civil law (Art. 415 Civil Code). This same right is now given to banks with regard to credit contracts, and also to investment companies who can merge funds without the consent of their creditors. In 2005, the Constitutional court (26. July 2005 – 1 BvR 782/94 & 1 BvR 957/96) criticised this prerogative for mergers and acquisitions over the right of con-

sumers to keep the providers of their choice, and set certain minimum standards of consumer protection, which in this case, were obviously not in the interest of prudential regulation.

Although merger decisions are often subject to the prudential supervisor's authorisation, these are taken only from the angle of sound and efficient banking, not from the angle of the competitive consequences. In Italy there have been changes recently with regard to the Competition Authority arising from a failure to observe free competition rules within the EU (e.g. takeovers or mergers, having been blocked by national prudential supervisors, have been heavily criticised both on competition grounds, and on the grounds of freedom of establishment.

### **2.2.2 Who is supervised?**

From a consumer perspective, financial services are equal if they have the same results in their lives. It is not important who provides these services to them. An instalment loan may be obtained from a bank or a money lender in the UK. The consumer wants the same quality and protection. This is why private law and the relevant EU Directives do not differentiate according to the form of the supplier but only according to products.

Financial supervision is instead structured as outlined above according to sectors of the economy. From a consumer perspective, the division in financial supervision between supervised and unsupervised entities is detrimental to consumer interests. As the following chapters show, this problem is very significant because, in some countries, in accordance with EU rules, there are many institutions which are not covered by the supervisory regulations but which serve the same purposes. If, for example, money-lenders are regulated while banks are exempted and vice versa, there are specialist and effective supervisory agencies for banks only, and not for money-lenders with the potential result that markets are distorted and the protection of consumer may be arbitrary. This may well then lead to a concentration of vulnerable consumers in segments of the market where little legal and administrative control is exercised.

#### **2.2.2.1 Banks, insurance companies, payment services and investment**

A majority of 78% of the regulators questioned replied that credit institutions belong to the institutions that they monitor. Moreover, 70% reported that they supervise investment firms, and the same proportion replied that financial brokers are monitored. The table below gives an overview of all other institutions and the share of the regulators supervising them.

"Others" include for example auditors, stock exchanges, accountants, debt collectors, social insurance companies, mutual guarantee and re-guarantee companies, payment institutions and pension companies.

**Table 18: Overview of supervised entities**

Type of institutions supervised	(%)
Credit institutions	77.8
Investment firms	70.4
Financial intermediaries/brokers	70.4
Insurance firms	66.7
Providers of money transmission services	59.3
Financial advisers	59.3
Providers of credit and store cards	55.6
Foreign financial institution representative offices	55.6
Providers of currency exchange services	48.1
Real estate agents	14.8
Credit referencing agencies	14.8
Other	55.6

Of the three main types of supervision recognised in the literature, namely macro-prudential, micro-prudential and conduct-of-business, the only EU supervisors surveyed that did not include micro-prudential supervision as an area of their responsibility were those in Lithuania, UK OFT, Italian Consob and the Netherlands.

Six member state supervisors do not supervise conduct-of-business (Austria, Slovakia, Slovenia, Lithuania, Greece, and the UK OFT). Of those remaining that do, all except for Italian Consob and the Netherlands supervise with a micro-prudential mandate, and the majority also has a macro-prudential mandate except for France, Finland, Belgium, Estonia, Spain, Malta, Italy and the Netherlands which do not (the Bank of Spain being the only central bank within this group).

In addition, two member state supervisors point to another type of supervision beyond the classical three above, namely Hungary (HFSA), where consumer protection was identified as a separate form of supervision, and Italy, where the Consob insisted on the aspect of transparency and fairness in the provision of investment services (as distinct from conduct-of-business per se) and the Bank of Italy stressed its additional supervision of the smooth functioning of payment systems (as distinct from macroeconomic stability).

The following table summarises the share of EU regulators including each of the different types of supervision into the area of their responsibility.

**Table 19: Overview of areas of supervision**

Areas of supervision	(%)
Micro-prudential	85.2
Macro-prudential	55.6
Conduct-of-business	70.4
Other	25.9



37% of regulators are controlled by a governmental body. Mostly, they are controlled by the Ministry of Finance. In some cases, they are controlled by the Ministry of Justice, the Ministry of Economic Affairs or by another governmental authority. Consequently, 63% of supervisors are not controlled by a governmental body and are therefore independent.

**Table 20: Supervisor independence**

<b>Independence</b>	<b>(%)</b>
Supervisor independence (not directly controlled by a governmental body)	63.0

The transparency of transactions was a remit for the majority of supervisors. Only six member states (Slovakia, Germany, Slovenia, Hungary, Netherlands and Norway) did not have a mandate to ensure this. This may be a relatively low number of supervisors, but it is nonetheless a surprise considering the importance placed on information and consumer choice.

#### **2.2.2.2 Financial institutions outside the financial supervisory system (Q46 LF)**

Although all types of financial institutions mentioned are supervised by a number of different regulators (at least four), there are for each regulator financial institutions that do *not* belong to the group of institutions monitored. However, the present data do not suffice to show that particular financial institutions are not covered by financial supervisory at all, as there may be regulators in these countries monitoring the institutions concerned that have not responded. Still, it is evident that a considerable part of the economy is not included in financial supervisory regime. As an example, the Dutch AFM only supervises investment firms, financial brokers and financial advisers. All other sectors of the economy are excluded.

### **3 What kind of “consumer protection” exists within financial supervision?**

#### **3.1 “Consumer protection” and consumer-related supervisory objectives as a legal task in supervision in current regulation**

##### **3.1.1 EU Law**

Existing EU financial Services Directives make clear distinctions between consumer protection and bank supervision. While consumer interests are cited in the private law sections of the “Consumer Directives”, for example in the Consumer Credit Directive 2008/48/EC, the Distant Marketing in Financial Services Directive, the Payment Directive or the e-commerce Directive, the parts of the directive which address issues of public law and supervision refrain from making any reference to consumer protection. The recent UCIT Directive 2009/65/EC on investments is typical as it does not refer to “consumer protection” but uses the word “consumer” to qualify organisations, legal action (Article 107) and certain disputes (Art. 100).

In the umbrella regulation on the new ESFS described above<sup>80</sup>, there is no direct reference to consumer protection. According to Article 12 (1), (5) of Regulation 1092/2010 *consumers* (as well as producers) of *financial services* will be represented in its central scientific advisory body. Similar representation is foreseen in Article 37 (2) of the banking (and the other sectoral) supervisory regulations 1093/2010 for the newly created stakeholder group. In recital (22) of this regulation the *need for the protection of depositors, investors and consumers across the Union* is acknowledged. Recital (48) enumerates consumers among other “users” of financial services including SMEs, businesses, institutional investors, trade unions etc. Article 8 (2) (i) of this Directive adds consumer protection to the goals of developing “common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on consumer protection”. Finally, Article 9 of the Regulation addresses consumer protection directly in its heading “Tasks related to consumer protection and financial activities”. However, only the first paragraph takes up this issue and makes no direct reference to “consumer protection”, merely defining certain limited measures with respect to data collection, education and rules of disclosure.<sup>81</sup> Identical rules exist in the insurance and investment regulations.

### 3.1.2 National Law

#### 3.1.2.1 Consumer protection as an explicit legal task

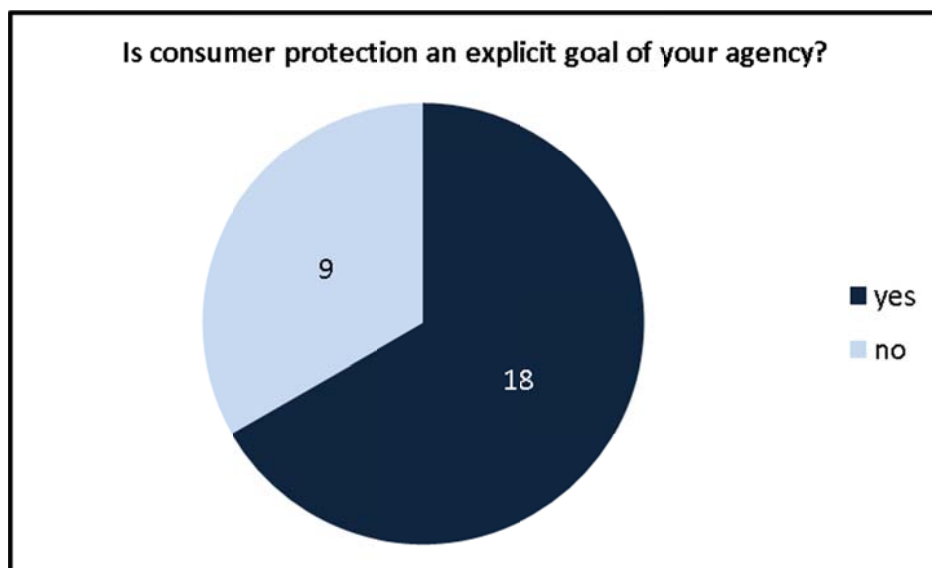
Under national law it is possible to distinguish between states which have a fairly strict firewall between consumer protection and bank supervision (like Germany), those which integrate consumer protection as a goal (like Sweden) and those who have special administrative institutions for the supervision of compliance with consumer protection rules as defined above. The last two groups form 18 out of 27 Member States. Two-thirds of the experts confirmed that consumer protection was an explicit legal goal of their agencies. Among those were experts from Poland, Portugal, Slovakia, France, Bulgaria, Denmark, Lithuania, United Kingdom, Slovakia, Slovenia, Malta, Hungary, Ireland, Italy, The Netherlands, Norway (since 2010) and Spain<sup>82</sup>. Belgium is changing the supervisory mandate for its new conduct-of-business supervisor, which will contain a consumer protection objective.

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<sup>80</sup> See at p 2 ff.

<sup>81</sup> “The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by: (a) collecting, analysing and reporting on consumer trends; (b) reviewing and coordinating financial literacy and education initiatives by the competent authorities; (c) developing training standards for the industry; and (d) contributing to the development of common disclosure rules”.

<sup>82</sup> Spain: response from Dirección General de Seguros y Fondos de Pensiones.

**Table 21: Consumer protection as an explicit goal of supervision**

Nevertheless, the experts of **the remaining 9 countries** excluding or not mentioning private consumer protection (Slovenia, Finland, Germany, Greece, Belgium, Spain<sup>83</sup>, Austria and Estonia) often reported that the interests of consumers were indirectly protected through other goals and tools of their supervision, such as market-supervision, conduct of business, solvency and compliance rules. The experts therefore often distinguished between "classical" or "direct" and "indirect" or "unintended" consumer protection as illustrated in the following examples:

In **Slovenia** the Insurance Supervision Agency's expert reported that the goal of the Insurance Supervision Agency was the supervision of the insurance market. However, because the stability of the insurance market is indirectly in the interest of consumers (the insured), their interests were protected. In **Belgium** the expert from the Banking, Finance and Insurance Commission (CBFA) reported that the CBFA currently did not have a fully-fledged statutory consumer/investor protection objective in respect of financial services. However, the Law of 2 August 2002 on the supervision of the financial sector, establishing the CBFA and defining its competencies, would have a protective effect on consumers through compliance-observation.<sup>84</sup> The aims of

<sup>83</sup> Spain: response from Banco de Espana.

<sup>84</sup> The Law of 2 August 2002 on the supervision of the financial sector lists amongst the CBFA's missions: - to ensure compliance with the rules aimed at protecting the interests of the investor in transactions in financial instruments, - to contribute towards compliance with the rules aimed at protecting savers and investors against the illegal offer or supply of financial products and services, - to ensure supervision of compliance with the provisions of the Law of 25 June 1992 on the insurance policy, in particular the verification of compliance by insurance companies with the provisions in the law that regulate (life and non-life) insurance contracts, - to ensure supervision of operations by mortgage credit institutions, as referred to in the Law of 4 August 1992 concerning mortgage credit, - to ensure supervision of compliance with the provisions of the Law of 27 March 1995 on (re)insurance brokers and the Law of 21 March 2006 on banking and investment services brokers, in particular as regards the information to be provided to clients and the identification of clients' needs, - to ensure supervision of compliance with the provisions of Title II, Chapter I, Section 4, of the Programme Law (I) of 24

these provisions were the protection of the consumers of financial services. Furthermore, Articles 27 to 28bis of the Law of 2 August 2002 introduce conduct of business rules and client information obligations that apply in connection with the provision of investment (or ancillary) services (those Articles transpose in Belgian Law Article 19 (mainly) of the MiFID). By virtue of Article 28ter, a Royal Decree (to be taken) can apply the provisions of Articles 27 to 28bis to other categories of financial brokers (in particular insurance brokers and banking/investment services brokers). FPS Economy is responsible as regards the Law on market practices. The expert from **Spain's** Banco de Espana pointed out that the agency supervises compliance with banking regulations, which included not only prudential regulation but also customer protection regulation, among others. The **Austrian** expert does not consider the Financial Market Authority (FMA) to be a consumer protection organization in the traditional sense. Its contribution to consumer protection would lie only in the supervision of solvency, the market and conduct. In this sense the FMA would protect the consumer only on a general basis, but it does not help the individual consumer to enforce any potential damages claims or claims against supervised companies as these are civil court matters. Even in **Finland**, where consumer protection is not an explicit goal, the text of the legislation nevertheless quite clearly implies by use of the term 'customer protection' that the protection extends to both business and consumer customers. According to the **Estonian** Financial Supervision Authority there is no explicit rule or other "high-level" general provision for the protection of consumers of financial services, but the existing explicit goals of the supervision (enhancement of the stability, reliability, transparency and efficiency of the financial sector) all had the objective of protecting the interests of clients and investors by safeguarding their financial resources. **Germany** is an example of a strict separation between public supervision and private consumer protection. § 6 Abs. 2 of the Bank Law (KWG) limits the task of the bank authorities to problems which "threaten the safety of assets entrusted to these institutions, the orderly business of banking and financial services or create significant disadvantages for the National economy." Consumers are mentioned only to qualify products ("consumer credit") or organisations to whom the law intends to refer.

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December 2002, relating to supplementary pensions for the self-employed, - to ensure supervision of compliance with the provisions of the Law on supplementary pensions and on tax regulations applicable to such pensions and to certain additional social-security benefits.

### 3.1.2.2 Other consumer protection issues

While

- **(CP)** consumer protection

is not always an explicit legal task allocated to the agency **(Ag)**, a number of experts consider “classical” consumer protection issues like

- **(Acc)** Promoting access to banking services (e.g. by low income individuals)
- **(Prt)** Protecting clients from misconduct and/or bad business practices,
- **(Uds)** Fostering an understanding of financial services and related issues,
- **(Mtr)** Monitoring and evaluating trends and emerging issues

to be a goal **(++)** or at least partly (“not fully”) a goal **(+)** of their agencies. The same is true for the broader issues of customer protection like

- **(Cpl)** Ensuring compliance with consumer protection measures,
- **(Cnd)** Monitoring, if financial institutions follow their own voluntary codes of conduct
- **(Cpt)** Promoting Competition.

In only 25 per cent of all cases (48 out of 189) the expert responded that the consumer protection issue (classical or “broader”) would not be a goal **(0)** of the organisation, as illustrated in table below.

**Table 22: Overview of Supervisor consumer protection mandates**

MS	Ag	CP	Acc	Prt	Uds	Mtr	Cpl	Cnd	Cpt
AT	IFS	no	0	+	+	+	+	+	0
BE	IFS	no	0	++	++	++	++	++	0
BG	IFS	yes	0	++	++	++	++	+	++
DE	IFS	no	0	0	+	++	+	0	0
DK	Oth	yes	++	++	++	++	++	0	0
EE	IFS	no	0	++	++	++	++	++	+
ES	CB	no	0	++	0	0	++	0	0
ES	Oth	yes	0	++	++	++	++	+	++
FI	IFS	no	+	++	++	++	++	++	0
FR	Oth	yes	0	++	+	++	++	++	0
GR	CB	no	0	0	++	++	++	0	0
HU	IFS	yes	+	++	++	++	++	++	0
IE	CB	yes	++	++	0	++	++	0	0
IT	CB	yes	+	+	++	+	++	+	++
IT	Oth	yes	+	++	++	++	++	++	++
LT	CPA	yes	++	++	++	++	++	0	0
MT	IFS	yes	0	++	++	++	++	++	++
NL	Oth	yes	++	++	++	++	++	0	+
NO	IFS	yes	++	++	++	++	++	0	0
PL	IFS	yes	+	++	++	+	++	++	0
PT	Oth	yes	0	++	++	++	++	++	++
SI	CB	no	0	+	++	++	++	0	0
SI	Oth	no	+	+	+	0	+	+	+
SK	CB	yes	0	++	0	0	++	++	++
SK	CPA	yes	0	++	++	0	++	++	0
UK	IFS	yes	0	++	+	++	++	++	+
UK	CPA	yes	+	++	+	+	++	+	+
"Consumer protection" is explicit legal goal		67%							
			<b>Acc</b>	<b>Prt</b>	<b>Uds</b>	<b>Mtr</b>	<b>Cpl</b>	<b>Cnd</b>	<b>Cpt</b>
Supervisory objective is not fully a Goal			26%	15%	22%	15%	11%	22%	19%
Supervisory objective is fully a Goal			19%	78%	67%	70%	89%	44%	26%
Supervisory objective is <u>at least</u> not fully a Goal			44%	93%	89%	85%	100%	67%	44%

The table below shows the most prevalent definitions of consumer protection accepted by supervisors in another way (shown in descending order):

**Table 23: Overview of Supervisor consumer protection definitions**

Definition: consumer protection...	Overall	Important	Less important	Didn't answer
provides transparent, exhaustive and correct information to consumers to be able to make their own informed decisions.	High	DE, ES, EE, PL, PT, SK, NO, BG, DK, LT, MT, HU, NL, ES, GR (all most important, "1")	SI, SK, UK, UK, IE, IT, LT (Importance of <1)	AT, BE, FR
secures fair competition and functioning markets in financial services.	Medium	EE, PL, IE, PT, NO, BG, SK, HU, ES, GR, UK, MT, IT, NL, IT	SK, UK, ES, SI, DK	DE, BE, AT, FR, LT, LT
regulates products and marketing strategies to prevent unsafe and damaging effects to consumers in financial markets.	Medium	DE, PT, UK, ES, GR, SI, EE, PL, SK, DK, LT, MT, SK, UK, IE, NL	ES, NO, HU, BG, IT	BE, AT, FR, LT
guarantees a general framework in which others can provide individual consumer protection	Low	NO, DE, ES, SI, NL	BG, HU, ES, PL, DK, LT, SK, IT, EE, PT, SK, UK, UK, GR	BE, AT, FR, MT, IE, LT
provides equal opportunities to all consumers especially to the poor.	Low	SK, BG, DK, LT, UK, NL, IT	IT, GR, SI, SK, EE, PT, HU, ES, PL, NO, ES	DE, BE, AT, FR, UK, MT, IE, LT
limits economic power with regard to consumer needs	Low	ES, HU, NL, IT	GR, DK, UK, IT, PL, SK, NO, BG, ES, SI, EE, PT, SK	DE, BE, AT, FR, LT, UK, MT, IE, LT

Note: Supervisors in Belgium, Austria and France preferred not to give a ranking of the different definitions, and the additional definition suggested of "prevents over-indebtedness, exclusion, old age poverty" was not seen as a significant definition of consumer protection by any of the 29 supervisors in the research.

*Ensuring compliance, protecting consumers from misconduct, fostering understanding and monitoring trends* are most frequently elements or partly elements of the legal mandate of European agencies participating in this survey:

All experts (with no exception) answered that ensuring compliance with consumer protection measures was a legal goal of their agency, regardless of whether their agency was a stand-alone integrated financial supervisor (**IFS**), a Central Bank (**CB**), a General Consumer

Protection Authority (**CPA**) or another agency (**Oth**). Nearly nine out of ten experts even said that this would be a main objective of their agency. Protecting clients from misconduct and/or bad business practices is (at least partly) part of the mandate of 93 per cent of the agencies asked. Only the Greek Central Bank (Bank of Greece) and the German stand-alone integrated financial supervisor (BaFin) do not have this task. Though the majority of 89 per cent of all agencies is mandated to foster an understanding of financial services and related issues, there are remarkable differences with regard to type of institution: while there is no exception with general consumer protection authorities and integrated financial supervisors, 50 per cent (three out of six) of the experts from Central Banks stated that fostering an understanding was not even partly a legal goal.

On the other hand, *promoting access to banking services, promoting competition and monitoring, if financial institutions follow their own voluntary codes of conduct* are less often the objective of the financial supervision agencies.

In particular promoting access to banking services, e.g. for low-income individuals, is in deficit. Only 12 out of the 27 experts reported this issue to be a legal goal, of these only seven said it was "fully" an element of their mandate: Finanstilsynet, the financial supervisory authority of Norway reports that such regulations are contained in the Financial Contract Act 1999.06.25 #46. In Italy, the 2009 regulation (Bank of Italy regulation 29.7.2009 (section III, par. 4)) introduced a standard current account, named "Conto corrente semplice", tailored to the basic financial needs of consumers. The Danish Mortgage Credit Complaint Board refers to the Financial Business Act, the Lithuanian State Consumer Rights Protection Board refers to the Law on Consumer Protection, Law on Consumer credit, and Law on Payments. Also the Central Bank of Ireland and the Dutch AFM seem to be mandated to promote access to banking services, without reporting the exact source of their mandate. Two-thirds of all agencies must monitor whether financial institutions follow their own voluntary codes of conduct, but only one-third of the central banks. In contrast, for 82 per cent of the stand-alone integrated financial supervisors, promoting access is a legal goal. Finally, promoting competition (as another broader consumer protection issue) is the supervisory objective of only 44 per cent of the agencies questioned.

### **3.1.2.3 Examples from Member States where consumer protection is an explicit legal task**

**The UK** provides for a **diverse system** of regulatory bodies. Consumer protection is a mandated task for both the Financial Services Authority and the Office of Fair Trading (as well as for the UK's Consumer Financial Education Body (CFEB – pending a name change) and the unclear role of the Trading Standards Institute). It provides a clear task of consumer protection to its Financial Services Authority in sec. 2 (2) Financial Services and Markets Act. "Consumer Protection", along with "confidence in financial markets" and the reduction of criminal behaviour are also cited. Sec. 5 (1) FSA ask for a guarantee of adequate standards of consumer protection. According



to the Financial Services and Markets Act 2000 and the "FSA Handbook", the FSA must ensure compliance with consumer protection measures, promote the adoption by financial institutions of policies and procedures designed to implement consumer protection measures, protect clients from misconduct and/or bad business practices. According to the expert, consumer protection is also a legal task for the Office of Fair Trading, the general consumer protection authority. The central objective of this agency is the Consumer Credit Act 1974 (CCA 74), which provides the basis of OFT's regulation of financial services.

Although promoting access to banking services (e.g. by low-income individuals) is not a statutory task for the UK institutions mentioned above, the OFT reports that some of their work, particularly with regard to market studies (e.g. into high-cost credit) and some of their information campaigns seek to provide consumers with greater awareness of credit and other financial products and to influence policy debates around such issues. Promoting consumer awareness of the obligations of financial institutions is furthermore partly transferred to the UK's Consumer Financial Education Body (CFEB).

**Italy** has a similar supervisory structure to that of Germany, where the National Commission Consob supervises banks, though according to Art. 23 L. 262/2005 savings should be protected "in the interest of consumers and investors" under Article 5 of the Financial Services Law (TUF). Supervision of financial intermediaries is split between Consob (as regards the transparency and correctness of behaviours) and the Bank of Italy (as regards prudential supervision). The Consob expert reported that, according to Legislative Decree No. 58 of 24 February 1998, Consob is entitled to ensure compliance with consumer protection measures, to protect clients from misconduct, to monitor whether financial institutions follow their own voluntary codes of conduct, to foster an understanding of financial services and to monitor trends. Furthermore, the Bank of Italy provides for consumer issues such as the basic bank account (see above 0), misconduct protection (the Bank of Italy does not provide clients with individual protection against misconduct, but can impose administrative sanctions on financial institutions in cases of significant breaches) and monitor whether financial institutions follow their own voluntary codes of conduct.

The **Hungarian** Financial Supervisory Authority (HFSA) is an example of a **stand-alone integrated financial supervisor** with explicit recipient (with consumers as a sub-group) protection. Act CLVIII of 2010 on HFSA declares the protection of the recipients of services provided by financial organizations to be one of the main purposes of the HFSA. According to the Hungarian expert, without citing legal sources, the HFSA approach is preventive and protective at the same time. HFSA deals with financial literacy issues and seeks to increase financial literacy in order to reduce the asymmetry between consumers and providers in the financial market, monitors the market for early warnings, but at the same time it deals with consumer complaints of breaches of consumer protection laws. Further, the **Bulgarian** Financial Supervision Commission is a stand-alone

integrated financial supervisor. According to the Financial Supervision Commission Act, it is entitled to handle all consumer-related issues as elaborated in the table above except for promoting access to banking services. As of 2010, consumer protection is also defined as a main objective of **Norway's** stand-alone integrated financial supervisor Finanstilsynet (which is regulated by the financial Supervision Act 1956.12.07 #1; § 3).

Consumer protection is an explicit goal of the **Central Bank of Ireland**. On 1 May 2003 the Central Bank & Financial Services Authority of Ireland Act 2003 split the Central Bank of Ireland into two component entities: the Central Bank and the Irish Financial Services Regulatory Authority (the Financial Regulator). The Financial Regulator had responsibility for financial sector regulation and consumer protection and education/information. Under the Central Bank Reform Act 2010 the two entities were remerged into one organisation, the Central Bank of Ireland. Section 5A of the Central Bank Reform Act 2010 states -'The Bank has the following functions:(f) the function of monitoring the provision of financial services to consumers of those services to the extent that the Bank considers appropriate, for the purposes of protecting the public interest and the interests of consumers.' Where previously the Financial Regulator had a role in consumer education/information functions, these were transferred to a separate agency, the National Consumer Agency, under the 2010 Act.

For the Autorité de contrôle prudentiel (ACP), the **French Banking and insurance supervisor**, under the umbrella of the French central bank (Banque de France), the protection of clients (with consumers as a sub-group) is also an explicit objective. According to Article L612-1 of the French Monetary and financial code, 'The ACP ensures that the financial system remains stable and that clients, insured persons and beneficiaries are protected.' Under the Monetary and Financial Code, the ACP must ensure that bodies under its supervision (banks, insurance undertakings and brokers) comply with consumer protection rules and that they have the necessary internal procedures in place in this respect (Article L612-1 of our Monetary and financial code).

### **3.1.3 Recent reform**

#### **3.1.3.1 "EU macro-prudential oversight of the financial system and Systemic Risk Board"**

At EU level the existing system of financial regulation and supervision (ESFS) is now transposed into a network of coordinated and unified bodies supervising banks (EBA), insurance and occupational pensions (EIOPA) and investment services (ESMA).<sup>85</sup>

There is no direct reference to consumer protection in the umbrella regulation on the ESFS. According to Article 12 (1), (5) of Regulation 1092/2010, *consumers* (as well as producers) of *financial services* will be represented in its central scientific advisory body. Similar

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<sup>85</sup> Regulation (EU) No 1092-1095/2010; see also the proposal of September 23, 2009 COM(2009) 501 final.

representation is foreseen in Article 37 (2) of the banking (and the other sectoral) supervisory regulations 1093/2010 for the newly created stakeholder group. In recital (22) of this regulation the *need for the protection of depositors, investors and consumers across the Union* is acknowledged. Recital (48) enumerates consumers among other “users” of financial services including SMEs, businesses, institutional investors, trade unions etc.. Article 8 (2) (i) of this Directive adds consumer protection to the goals of developing “common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on consumer protection”. Finally, as eluded to in the initial sections of this report and shown in the Annex, Article 9 of the EU Regulation establishing ESA addresses consumer protection directly through the title of it section heading “Tasks related to consumer protection and financial activities” where it says:

*1. The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by:*

- (a) collecting, analysing and reporting on consumer trends;*
- (b) reviewing and coordinating financial literacy and education initiatives by the competent authorities;*
- (c) developing training standards for the industry; and*
- (d) contributing to the development of common disclosure rules.*

Identical rules exist in the banking, insurance and investment regulations. The whole legislative package on financial regulation and supervision of financial markets has been published in the Official Journal.<sup>86</sup>

In its progress report on the legislative package on Financial Regulation and Supervision of February 2011<sup>87</sup>, the Commission underlines the effects of this reform for “better supervision and cooperation between supervisors”. Its focus is the effectiveness of existing supervision at national level. “Consumer protection” does not appear as a new item of supervision at EU level. Education of supervisors, supervision of rating agencies and the monitoring of systemic developments are enumerated: “the ESRB will monitor systemic developments, and issue warnings or recommendations to Member States or to supervisors; these will have a “comply or explain” obligation attached to them, and in cases of non-compliance and unsatisfactory explanation, the ESRB will have the option of publishing the warnings or recommendations”.

While financial supervision is not the core element of greater consumer protection, the Commission refers to “greater consumer and investor protection in order in particular to restore confidence in the financial sector” (1) as one of its four priorities: “Restoring the confidence of consumers in the financial sector and the single market

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<sup>86</sup> EU Legislative Package on Financial Regulation and Supervision Published Posted on December 15, 2010 by ВихърГеоргиев <https://eulaw.wordpress.com/tag/european-banking-authority/>.

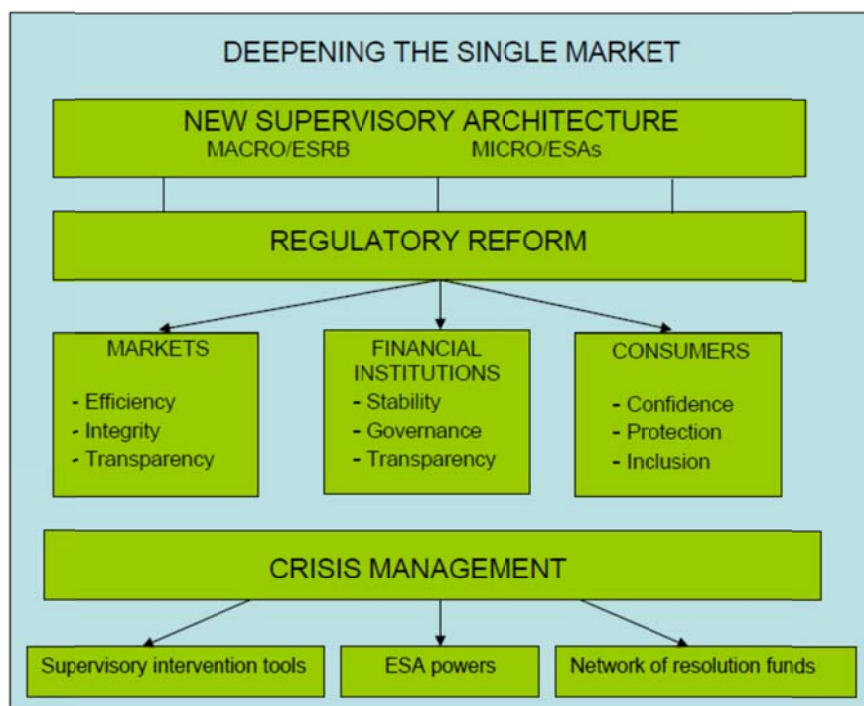
<sup>87</sup> General Department Internal Market of the EU-Commission, Regulating financial services for sustainable growth A progress report – February 2011 p 8 ff.

- and making sure this confidence is based on strong and sound foundations - is an essential element if the Commission’s reform programme is to be successful. Partly this will be brought about by improvements in the internal working of financial institutions, including remuneration policy, and partly by measures directly aimed at consumers” which will be put into practice with proposals to reform Deposit Guarantee Schemes (DGS) and Investor Compensation Schemes (ICS), on fair practices relating to mortgage lending and for packaged retail investment products (PRIPs).

An interesting scheme is reproduced in Annex 2 of the agenda. The graph distinguishes three areas of policy initiatives similar to our own system of bank supervision which could easily be applied, namely markets, financial institutions and consumers.

**Table 24: Schematic representation of European Commission policy initiatives**

Annex 2 – schematic representation of policy initiatives



**3.1.3.2 The Bureau of Consumer Financial Protection (USA)**

One of the most controversial and necessary results of the sweeping US financial regulatory reforms under the Dodd Frank Act was the creation of a separate consumer protection agency for consumers of financial services.<sup>88</sup> While financial institutions were totally opposed to the establishment of this Bureau, and strongly resisted the nomination of individuals to oversee the setting up and resourcing of

<sup>88</sup> Two new authorities were proposed in 2009: a new National Bank Supervisor will incorporate two existing authorities: the Office of Thrift Supervision and the Office of the Comptroller of the Currency; and the Consumer Financial Protection Agency will protect consumers across the financial sector from unfair and abusive practices.

the new agency, the industry did succeed in limiting the scope of its activities in the final version of the draft by excluding auto-title loans, a form of secured lending that has a questionable track record in serving consumers well.

Title X establishes the Bureau of Consumer Financial Protection [154] within the Federal Reserve (Fed). The new Bureau regulates consumer financial products and services in compliance with federal law [30]. The Bureau is headed by a director who is appointed by the President, with the advice and consent of the Senate, for a term of five years [30]. The Bureau is subject to financial audit by the GAO, and must report to the Senate Banking Committee and the House Financial Services Committee bi-annually. The Financial Stability Oversight Council may issue a "stay" to the Bureau with an appealable 2/3 vote. Even though the Bureau is placed within the Fed, it operates independently [155]. The Fed is prohibited from interfering with matters before the Director, directing any employee of the Bureau, modifying the functions and responsibilities of the Bureau or impeding an order of the Bureau [30]. The Bureau is separated into five units[30]:

- Research
- Community Affairs
- Complaint Tracking and Collection
- Office of Fair Lending and Equal Opportunity - ensuring equitable access to credit
- Office of Financial Literacy - promoting financial literacy among consumers

Within the Bureau, a new Consumer Advisory Board assists the Bureau and informs it of emerging market trends[30]. This Board is appointed by the Director of the Bureau, with at least six members recommended by regional Fed Presidents[30].

Below is a Table showing the functional units being operationalized at the moment by Prof. Warren.

**Table 25: US CFPB proposed functional units**

<b>The CFPB's Functional Units</b>	
<p><b>Collect, track and monitor complaints</b></p> <ul style="list-style-type: none"> <li>The CFPB is mandated to provide a single free phone number for people to report complaints and to work with State authorities and other regulatory agencies to ensure that these are dealt with, monitored, and reported to Congress.</li> </ul>	<p>informed financial decisions' and is required to develop and implement a strategy which includes providing consumers with the opportunity to access financial counselling, including community based counselling, services as well as activities that will help them reduce debt, develop long term savings strategies, and build wealth.</p>
<p><b>Office of Fair Lending and Equal Opportunity</b></p> <ul style="list-style-type: none"> <li>The Office will provide oversight and enforcement of Federal laws designed to ensure the 'fair, equitable, and non-discriminatory' access to credit for both individuals and communities, including provisions of the Equal Credit Opportunity Act 1974, which prohibits the charging of higher interest rates solely on the grounds of race, colour, religion, national origin, sex, marital status, age or because the applicant receives public assistance.</li> <li>The Office is required to co-ordinate the 'fair lending' efforts of other agencies and to work with private industry, fair lending, civil rights, consumer and community advocates on the promotion of compliance and education.</li> </ul>	<ul style="list-style-type: none"> <li>The Office will work with the Financial Literacy and Education Commission, established in 2003, which is chaired by the Treasury Secretary and has overall responsibility for the US strategy to improve financial capability. The Dodd-Frank Act also requires a study to be conducted of financial education programs within one year in order to inform possible moves to introduce standards for provision as well as to help develop technological resources to assist with the future evaluation of services.</li> </ul>
<p><b>Office for Community Affairs</b></p> <ul style="list-style-type: none"> <li>To help expand access to credit, the CFPB is required to establish an Office for Community Affairs which will provide information, guidance, and technical assistance regarding the offering of products and services to underserved consumers and communities.</li> </ul>	<p><b>Office of Service Member Affairs</b></p> <ul style="list-style-type: none"> <li>A specific office is to be established to bring together initiatives for members of the armed forces, including the co-ordination of financial education programmes, handling of complaints, and consumer protection rules.</li> </ul>
<p><b>Office of Financial Education</b></p> <ul style="list-style-type: none"> <li>The Office is provided with the responsibility for 'developing and implementing initiatives intended to educate and empower consumers to make better</li> </ul>	<p><b>Office of Financial Protection for Older Americans</b></p> <ul style="list-style-type: none"> <li>A further dedicated office is to be established to protect older Americans (aged 62 or over) from 'unfair, deceptive, and abusive practices' and to help improve future financial choices. The Office will be responsible for providing information materials and one to one financial counselling including 'personal consumer credit advocacy' to respond to consumer problems.</li> </ul>

Source: Extracted from the Journal of the UK Centre for Responsible Credit, October 2010 from the article "Redesigning Consumer Financial Protection: how will the UK compare with the U.S?"

**3.1.3.3 Member States**

**3.1.3.3.1 The United Kingdom**

The UK Treasury has recently set out further details of its proposed new regulatory framework for financial services in a consultation document<sup>89</sup> which provides further information concerning the objectives of the Financial Policy Committee in the Bank of England (for reduction of systemic risk), those of the Prudential Regulation Authority (the 'PRA'), which will be an operationally independent subsidiary of the Bank of England, responsible for the 'micro-regulation' of significant financial institutions and the new specialist regulator, the Financial Conduct Authority (the 'FCA', previously referred to as the Consumer Protection and Markets Agency). The

<sup>89</sup> The full consultation document 'A new approach to financial regulation: building a stronger system' which also provides details of the implications of the proposed changes for the Financial Ombudsman Service and the Consumer Financial Education Body, which will be renamed as The Money Advice Service, is available here: [http://www.hm-treasury.gov.uk/d/consult\\_newfinancial\\_regulation170211.pdf](http://www.hm-treasury.gov.uk/d/consult_newfinancial_regulation170211.pdf). The consultation period runs to 14th April 2011, following which Government will issue a White Paper and draft Bill for pre-legislative scrutiny. The Bill is expected to be presented to Parliament in mid-2011 and to receive Royal Assent in mid-2012.

document indicates that the FCA will have responsibility for conduct issues across the entire range of financial services, and that it will build on the recent work of the FSA to provide (p.5) 'more intensive, issues-based supervision, earlier and more proactive intervention, and credible deterrence through enforcement'.

Both the PRA and the FCA will be subject to a set of regulatory principles, specifically:

- Efficiency and proportionality, to ensure that due regard is paid to value-for-money and cost-effectiveness considerations;
- The principle that senior managers (and not regulators) are ultimately responsible for managing their firms in a way that is compliant with the regulatory framework;
- The principle that consumers of financial services are ultimately responsible for their own decisions; and
- Principles relating to openness and transparency, highlighting the importance of openness and disclosure as a regulatory tool in promoting market discipline, and
- The desirability of transparency of process to support trust in the judgements and decisions made by the regulators.

The document also sets out the proposed strategic and operational objectives of the FCA as:

"The FCA's strategic objective is: protecting and enhancing confidence in the UK financial system. The FCA's operational objectives are: facilitating efficiency and choice in the market for financial services; securing an appropriate degree of protection for consumers; and protecting and enhancing the integrity of the UK financial system."

Government also indicates that the legislation will place the FCA under a duty to advance its operational objectives, where appropriate, by promoting competition. However, Government states that it has now 'ruled out' requiring the FCA to have regard to financial inclusion. The consultation document indicates that although financial exclusion is an important issue that needs to be addressed, the FCA's efficiency and choice objective and the proportionality regulatory principle provide the mandate for the regulator to engage in this agenda but a more formal 'have regard would be inappropriate as this is a matter of social rather than regulatory policy and therefore should fall to Government.'

More positively, the document indicates that the FCA will be able to make rules to place requirements on products or product features; mandate minimum product standards; or restrict the sale of a product to a certain class of consumers, and that Government will also legislate to provide the FCA with the power to ban products or specific product features where it identifies a serious problem. However, the FCA will be required to publish and consult on a set of principles governing the circumstances under which it will use this new power.

The Government will also legislate to enable the FCA to make provision on the unenforceability of contracts made in breach of its product intervention rules, temporary or permanent. This will allow the FCA to make rules stipulating, for example, that any contract made in breach of a specific product ban will be void and the consumer will be entitled to recover any payment made under it. The

FCA will also be provided with a new power to direct firms to withdraw or amend misleading advertisements and Government is also considering ways in which the FCA could be given an enhanced role in dealing with competition issues, with a more detailed consultation paper expected shortly.

It may be worth pointing out that a number of possible structural options for the FCA appear to have been ruled out from the start. Decisions have already been made to maintain the Financial Ombudsman Service and Consumer Financial Education Body as independent agencies rather than to bring these, as in the US model, together within a single organisation. The decision to maintain a separate Ombudsman services could appear particularly problematic, given the need to use complaints data to inform effective rule-making, but the creation of the FCA also presents an opportunity for one agency to determine the relative value (and resourcing) of consumer protection and consumer education approaches to achieving its stated objectives (issues which we cover later in this report).

### **3.1.3.3.2 France and Belgium – Towards a Twin-peaks model**

In France, 2010 saw the creation of a new unified body of bank supervision called the ACP at the Central Bank. The way was prepared by a report which discussed the introduction of consumer protection into bank supervision.<sup>90</sup> The Commission concluded that there is a number of rules in France with regard to savings products in particular, whereby a product must meet consumer protection criteria before it is allowed to enter the market. Such rules are no longer in force in insurance and investment or credit. In these areas, the MIFID Directive has triggered duties to provide certain information, which supervised institutions are required to observe. The report doubts, however, that the risks which have become apparent during the financial crisis are specific to consumer protection.

« Contrairement à une idée souvent émise, ces risques ne se limitent pas au consommateur personne physique. Les consommateurs institutionnels, lorsqu'ils ne développent pas eux-mêmes d'activité financière propre, sont susceptibles de rencontrer les mêmes difficultés. Dans ce domaine également, les exemples sont nombreux, tant en France qu'à l'étranger. Bien entendu, il paraît souhaitable d'adapter le niveau de protection au profil des clients et de ne pas exiger les mêmes précautions de vente pour une clientèle de particuliers dans un réseau de très grande distribution ou pour une clientèle institutionnelle par exemple. Il n'en demeure pas moins que, dans chaque cas, le respect de certains principes et règles de commercialisation apparaît nécessaire, afin de prévenir les risques de dérive. »<sup>91</sup>

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<sup>90</sup> Deletré, B. Rapport de la Mission de Réflexion et de Propositions sur l'Organisation et le Fonctionnement de la Supervision des Activités Financières en France, French Government Inspection générale des Finances N°2008-M-069-02 Paris January 2009 pp 71 ff « IV.2. Le contrôle du respect des obligations professionnelles à l'égard de la clientèle pour assurer la protection du consommateur de services financiers ou d'assurance ».

<sup>91</sup> Op.cit. p 72.



In Belgium, a draft royal decree is currently aimed at implementing the Law of 2 July 2010 amending the Law of 2 August 2002 on the supervision of the financial sector and financial services. The Law of 2 July 2010 lays down principles for the development of the Belgian financial supervisory structures using a 'twin-peaks'-type model, under which the Banque Nationale de Belgique (NBB) will become the sole authority responsible for the financial sector's micro- and macro-prudential stability.

In order to implement the planned supervisory model, the draft royal decree will, on the one hand, extend the NBB's responsibilities to the prudential supervision of financial institutions, including the specific supervisory tasks relating to system-relevant financial institutions. These new micro-prudential supervisory tasks will be in addition to the NBB's existing task of contributing to the stability of the financial system. On the other hand, the responsibilities of the current Banking, Finance and Insurance Commission (BFIC or CBFA) will cover the supervision of all aspects related to financial markets, including the adherence to the rules of conduct, and the supervision of certain entities that are not subject to the NBB's prudential supervision. The BFIC's name will be changed to the Financial Services and Market Authority (FSMA) to reflect its new mandate.

Under the draft royal decree, the future FSMA will be empowered, as part of its remit, to supervise compliance with the rules of conduct, to take measures against certain individual financial institutions that are subject to the NBB's prudential supervision. Where a financial institution seriously breaches the rules of conduct, the future FSMA will inform the NBB of the alleged breach and may under specific conditions take the following measures against this institution: (i) prohibiting or suspending (in whole or in part) the activities of the institution concerned; or (ii) ordering the replacement of its management.

Supervision in Belgium is therefore moving towards a Twin Peaks model. Within that model, the new CBFA (the name will be modified) will receive new competences focusing more on financial consumer protection (with regard to investment products in general: financial instruments, insurance products, etc.). More especially, the CBFA will be in charge of the following tasks (amongst others): 1) ensuring compliance with the rules aimed at protecting the interests of the financial consumers/investors in transactions in financial instruments, 2) contributing towards compliance with the rules aimed at protecting savers and financial consumers/investors against the illegal offer or supply of financial products and services, 3) contributing to the financial education of investors/financial consumers, 4) contributing to the development of rules dedicated to ensuring honest, fair and professional treatment of financial consumers/investors (such as rules regarding information to clients/consumers, due diligence requirements towards financial consumers/investors, rules about marketing communications,...). The CBFA will also have the power to prohibit or restrict the marketing of retail investment products.

### **3.1.3.3.3 Other Member States**

Partly as a result of recent experiences, several countries have taken their cue from the Twin Peaks approach and are also adopting this model. In Belgium, Germany, France, Ireland, Italy, Portugal, Spain, the United Kingdom and Sweden, sector-specific supervisors are

being merged into cross-sector supervisors or the ties between the central bank and the (banking) supervisor are being strengthened.

The Dutch central bank, the DNB, is of the opinion that the credit crisis has shown the added value of a combined central bank-prudential supervisor, including information and expertise on supervision, payments, financial markets, macroeconomics and financial stability, all being present under one roof. Even in normal circumstances, however, it is useful to harness the full power of this combination.

Before the crisis, political authorities in Italy and Spain had expressed their intention to reorganize their supervisory architecture. In Italy, the Parliament discussed the “hybrid” supervisory institutional setting in 2005, introduced a marginal reform of the antitrust responsibilities, reduced central bank involvement in supervision and shortened the Governor’s term of office. In Spain, the government announced in 2004 its intention to reform the architecture of financial supervision separating financial stability and business conduct supervision. Finland adopted a unified structure in 2009. In 2008, Austria – where supervision is shared between the Financial Market Authority and the Austrian Central Bank - undertook a reassessment of the supervisory setting, shifting more responsibilities for on-site supervision to the central bank and strengthening coordination and cooperation between the two authorities.

Some see the issue of architectural restructuring as being mainly an issue for authorities that had been performing their tasks outside the central bank structure. In those countries, there was talk of returning some of the tasks to the banking supervisor. Countries like Cyprus, where banking supervision had always remained within the remit of the sole central bank, did not feel the need to revise their structure.

Other supervisors, such as the Hungarian HFSA, where inspections for consumer protection have operationally been separated from prudential inspections since January 2010, have seen a reinforcement of their consumer protection powers, or have actually seen the introduction of a new remit, such as that created for Norway’s financial supervisor.

In Malta for example<sup>92</sup>, the Government is currently considering some amendments to the laws setting up and regulating the competent consumer authorities and it is envisaged that in the not-too-distant future the landscape may change radically.

Among all the countries that have sustained losses as a result of the U.S. subprime crisis, it would appear that countries where the central banks are the banking regulator (Italy; Netherlands; and France)—twin-peaks in this context—have fared relatively better than countries that had adopted the integrated regulator model (Belgium, and the U.K.) as regards total subprime losses sustained in this phase of the crisis.

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<sup>92</sup> See section 3.3 of this report as well as the Annex: Country Reports.

In Germany, subprime-related losses (e.g. at Landesbanken, such as Sachsen LB and WestLB, as well as at IKB and Hypo Real), have given rise to debate on the supervisory framework and the effectiveness of the existing banking framework. The Bundesbank and BaFin have long shared a joint responsibility for banking supervision, but there had been a perception that the division of labour had lacked clarity and transparency, leading to potential duplication of effort, undue bureaucratic delay, and the danger that problems might fall through the cracks. A Memorandum of Understanding issued in Feb 2008, was intended to clarify the responsibilities of the two agencies and to improve inter-agency cooperation.

### 3.2 Consumer protection by financial supervisors in practice

#### 3.2.1 Resources (funding, staff, competencies)

For the majority of supervisors (74%), the financial institutions that they monitor represent one of their sources of funding for consumer protection activities. The financial institutions provide funding according to the extent of the supervision to which they are subject. Supervisors charge the financial institutions fixed or variable fees for services provided. As an example, the Portuguese CMVM can charge a monthly fee to provide on-going supervision for operators of payment settlement systems of operations carried out in a regulated market or central depositaries or a fee for granting or refusing initial registration. In 52% of cases, consumer protection activities are funded by the government, including the central bank. Where the financial institutions monitored, together with government, represent sources of funding, the greater part of the resources is usually drawn from the financial institutions.

**Table 26: Overview of supervisor funding**

<b>Operational capacity - funding by...</b>	<b>(%)</b>
Financial Institutions monitored	74.1
Government (incl. Central bank)	51.9

Among the supervisors participating in this study, the finances available for all operations in the year 2009 range from EUR 2.5 million to EUR 160 million. Finances that were available only for consumer protection operations were not specified in most cases because the relevant data was not available. The two supervisors (in Ireland and UK) that provided figures for this estimated that the share of supervisory finance allocated to consumer protection was approximately one-fifth. According to the German BaFin, the amount cannot be calculated because consumer protection is an inseparable part of all supervisory activity.

The number of staff members of the supervisors varies from 30 (Slovenian Insurance Supervision Agency) to 7,500 (Bank of Italy). The proportion of staff concerned with consumer protection varies considerably, ranging from 3% (Polish FSA) to 82% (Italian Consob). However, some supervisors emphasize that all of their employees do consumer protection-related work, directly or indirectly, because

financial supervision is carried out in the interest of consumers generally.

According to most supervisors, employees concerned with consumer protection are mainly lawyers and economists. They also include mathematicians, information scientists and statisticians. Their qualifications are mostly in the area of financial services, compliance, business studies, accountancy, legal studies and experience in financial institutions.

Some of the supervisors questioned provide advanced training to their employees on a regular basis. The issues covered in the sessions include, among others, legal and regulatory issues on securities, consumer protection issues in the field of financial services (money savings, loans, consumer credit, retail financial services, indebtedness) and legal changes concerning financial services (e.g. the implementation of the consumer credit directive).

The number of employees in operational units dealing exclusively with consumer complaints relating to *credit* services ranges from one (Estonian FSA) to 24 (Slovak Trade Inspection), whereas in the case of consumer complaints relating to *insurance* services, the number of employees ranges from one (Estonian FSA) to 12 (German BaFin).

Some supervisors, such as the Bank of Slovenia, have no operational unit dealing exclusively with consumer complaints. These cases are handled by existing departments not specifically orientated to consumer protection (i.e. the legal department, banking supervision, payment services and systems), within which, however, some employees are more exposed to handling consumer complaints than others.

### **3.2.2 Information: complaints**

All supervisors participating in this study confirmed that they take enquiries or complaints from consumers. The total number of enquiries and complaints addressed to the Bank of Spain's Complaints Service in 2009 was 57,000. German BaFin receives approximately 20,000 enquiries and complaints a year. Consumers mainly contact the supervisors by telephone, by email and in writing. The main subjects of the enquiries and complaints include banking products and services (loans, mortgages, deposits, bank accounts, credit and debit cards, money transfers, etc.) provided by credit institutions. At the Danish Mortgage Credit Complaint Board, complaints mostly refer to business conduct. At the Spanish Dirección General de Seguros y Fondos de Pensiones, the main subjects are multi-risk residential insurance, health insurance and life insurance.

96% of the supervisors questioned have established a structure for responses to consumer complaints about a provider, and only the Bank of Slovenia has not done this. Many supervisors (among others supervisors in Poland, the UK, Belgium and Germany) refer them to arbitration boards and ombudsmen which are responsible for both banking or insurance issues and consumer complaints. The UK FSA sets complaints handling requirements for the firms that they regulate and supervise, but does not investigate individual

complaints. The French ACP does not intervene in the complaints themselves (except in case of obvious legal breaches), merely advising as to the appropriate institution to which the complaint should be addressed.

A minority of supervisors (30%) considers itself able to make binding decisions in relation to consumer complaints, while 70% of the supervisors cannot. These decisions, however, relate only to certain consumer complaints and specific remedies. The Hungarian FSA may for example a) order the cessation of the infringement, b) prohibit any further infringement, c) order the service provider in breach to address the problem within a prescribed time limit, and to notify the authority of the measures carried out, d) ban, restrict or impose conditions on the pursuit of the activity or the supply of the services involved until the infringement is eliminated, or e) impose a consumer protection fine. The decisions of some supervisors, such as the Bank of Greece, are taken for supervisory purposes only. It does not have jurisdiction to resolve the disagreement between the financial institution and the consumer. The Bank of Spain's Complaints Service can make decisions that are not binding, but that are highly respected by institutions and tribunals when the cases come to court. The Finnish FSA does not give an opinion on individual cases; their aim is collective customer protection.

An overview of the different ways supervisors handle consumer complaints is shown below:

**Table 27: Overview of supervisor powers in responding to complaints**

<b>Consumer complaints - ability to...</b>	<b>(%)</b>
make binding decisions for any of the parties involved	29.6
register/record them	88.9
respond to them	85.2
publish statistics on them	70.4
indirectly assist in resolution by passing complaints on to the respective authorities	66.7
directly assist in resolution of complaints	37.0

### **3.2.3 Information: statistics and market surveillance**

One basic element of transparency and accountability of a supervisor's operations is an annual report of its operations and activities. The table below shows the overall use of annual reports for reporting and publishing statistics on the supervisor's activities and the complaints received.

**Table 28: Overview of content in annual reports**

<b>Publication of an annual report - reports on</b>	<b>(%)</b>
Supervisor activities	92.6
Supervisor operations	81.5
Number and nature of complaints brought to its attention	77.8
Legislative framework for consumer protection	44.4
Procedures that financial institutions have in place for	22.2

dealing with complaints	
Performance of financial institutions in complying with consumer protection provisions	18.5
Other	22.2
<i>Plus: A business plan exists and outlines future actions/initiatives for consumer protection</i>	66.7

Only supervisor agencies in Slovenia and Greece do not publish an annual report. All of those that do, make them available to the public.

**Table 29: Quantitative data on supervisor activities in 2009**

Specific activity	Northern Europe	Southern Europe	Central & Eastern Europe	Comments
<b>Onsite inspections</b>	IE (12); UK OFT (132)	GR (4); IT Consob (13); IT BoI (577); ES MEH (15); MT (64); PT (12)	BG (16); SIAZN(10); SK SOI (53)	Onsite inspections can be related to the supervisor's assessment of the likely risk of consumer detriment (e.g. UK) however, inevitably such an intensive approach to supervision will be limited by resource constraints. The 2009 figures from the Bank of Italy are based on its annual program where performed inspections took place in: 443 branches of 100 banks; and 134 branches of 60 non-bank financial institutions.
Tests on the accuracy, simplicity, comparability of pre-contractual information ( <b>ex-ante</b> )	FI (2); IE (1); UK OFT (50)*	PT (4); GR (92); IT Consob (134)*	SK, SOI, (20);	In the UK's OFT it is standard aspect of its investigatory/applications work. * IT and UK numbers not broken down between categories.
Tests on the accuracy, simplicity, comparability of information after purchase ( <b>ex-post</b> )	UK OFT (50)*	PT (5); GR (89); IT Consob (134)*	PL (95); SK SOI (20)	The AFM in the Netherlands did not report on numbers. On an on-going risk based approach basis. E.g. 1. self-assessments, 2. investigations on financial advice. The AFM assessed a large number of assurance reports internally and provided feedback where necessary. We also review the self-assessments of investment firms (market intermediaries).
<b>Mystery shopping exercises</b>	IE (1); UK OFT (1)			In Ireland, these tests were carried out in conjunction with theme on the suitability of investment products sold to the elderly by banks (15 banks visited). In Malta, these details are confidential.

Checks for compliance with fair, non-misleading <b>advertising</b> practices	IE (223); UK OFT (100)	IT (134)*; PT (106)	SK SOI (20); PL (12)	In Portugal, authorization of advertising campaigns were on highly complex structured products (from which 4 related to bank products, and 16 to unit linked) and from the 106 analysed campaigns the CMVM solicited amendments in 76 of these. Note that the Dutch AFM assesses approximately 15 to 20 communications on investments every week, of which approximately 5 are related to collective investment schemes (fund managers). Furthermore, those communications which are harmful are prioritized for action.
Checks for compliance with fair, non-coercive and reasonable <b>selling practices</b>	UK OFT (50)	IT Consob (134)*; PT (4)	SK SOI (1); PL (2)	SK SOI (10) was the only supervisor to report testing correct APR disclosure.
Tests of <b>suitability requirements</b> when advice or recommendations are offered	FI (1); IE (4); UK OFT (10)	IT Consob (134)*; PT (3)		E.g. for the Consob, compliance with suitability requirements has been one of the main focus of its oversight activity. At the Central Bank of Ireland, tests were on suitability of Financial Instruments sold to Older Clients by MiFID Firms (9 MiFID firms inspected). Suitability of Investment Products sold to Older Consumers by Credit Institutions (9 banks inspected), Suitability of mortgages referred to subprime lenders by mortgage intermediaries (20 intermediaries inspected). Suitability of Insurance Products sold to Older Customers (6 life insurance firms inspected).
Checks for <b>responsible lending</b> practices (i.e. analysis of repayment capacity in the extension of credit)	UK OFT (100)		PL (15)	

<b>Market studies</b> in relation to consumer protection issues		IT Consob (2); ES MEH (1);		In relation to credit, OFT launched its study into the high cost credit market and a review of the debt management sector. Though no quantification, the AFM undertakes market studies to educate the market and consumers e.g. its HFT rapport (high frequency trading).
<b>Thematic consultations</b>	IE (1)	PT (3); IT Consob (3)	BG (2)	E.g. The Bank of Greece led a consultation for the integration of Directive 2008/48/EC on credit agreements for consumers and a Consultation with Ministry of Development on the issue of law for firms, responsible for the information of borrowers; Consob issued two feedback statements with respect to the consultations conducted on the topics covered by the two communications referenced in the answer to the previous question. In addition, Consob issued a consultation paper regarding the regulation of financial advisors; The Bank of Ireland visited 3 firms to hear Telephone Records and Electronic Communications under MiFID rules. Again, it is noteworthy that the AFM while selecting themes on the basis of market analysis does not have a formal consultation process in place.



Own agency <b>policy statements</b> and opinions	UK OFT (10)	GR (1); IT Consob (2); IT BoI (1); ES MEH (25); MT (1); PT (2)	SK NBS (1); PL (95)	E.g. Consob issued 2 recommendations (raccomandazioni), one on "The intermediary's duty of correct and transparent conduct in the distribution of illiquid financial products" (2 March 2009), and the other one on "The investment research in the relationship between broker and individual portfolio manager" (14 January 2009). Can include guidelines and press releases. In Malta, this was for its 'Guidelines for the Promotion of Good Practice in the Funds Sector' intended to assist Collective Investment Schemes in complying with their obligations under the Data Protection Act and protecting client information held by funds or their services providers.
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It is also important to note that the choice of agency for the supervision of a specific consumer protection issue, be it conduct of business or market supervision, will also depend on the infrastructure that already exists e.g. in France, the DGCCRF has a wide regional network of offices all over the country which makes it the ideal agent for carrying out on-site controls such as mystery shopping, especially compared with an agency like the AMF, whose resources are concentrated in Paris.

**3.2.3.1 The ability to influence regulation**

A significant proportion of national financial supervisors is involved in the drafting of new regulations and in commenting on drafts of legally binding acts (e.g. BE, SK SOI). Some supervisors have been active in drafting codes of conduct<sup>93</sup>, such as in Hungary where the HFSA has elaborated principles of fair conduct by financial organizations engaged in retail lending. The OFT in the UK has published guidance on Irresponsible Lending and on Second Charge lending, setting out minimum standards of behaviour and practice for lenders. Likewise, the FSA has taken too many such initiatives to list here; some of the most significant include the implementation of its conduct of business regime for retail banking and payments in November 2009, the launch of a new Consumer Protection Strategy in March 2010 and the range of consumer information that it has continued to publish.

While many supervisors say that when drafting new financial law or regulation they ensure that the consumer’s point of view has been taken into account (e.g. Finland FSA), other supervisors were able to cite specific legal acts which they were involved in drafting e.g. Latvia

<sup>93</sup> Codes of conduct and other self-regulating measures ('soft law') are nevertheless not efficient forms of regulation in many countries especially in those where providers totally ignore these codes of conduct.

VVTAT (new Law on Payments, new Law on Consumer protection), Spain MEH (the Insurance Contract Law, Insurance Supervision Law, Sustainable Economy Law).

For the Central Bank of **Spain** however, legal and regulatory changes affecting consumers are a function of Parliament and the Government, and the supervisory agency can only develop these further when explicitly empowered to do so. In the past two years, the only "regulatory" development has been banking circular 6/2010, developing the new regime for the advertising of banking products, for which the agency provided the general principles for the minimum contents and the format of advertisements for banking products.

In **Ireland**, the supervisors have also led regulatory activities in the past two years. The Central Bank has introduced the following binding regulatory requirements applicable to regulated entities when providing services to consumers or SMEs: i) Code of Conduct on Mortgage Arrears - effective since 27 February 2009, ii) Code of Conduct for Business Lending to Small & Medium Enterprises - effective since 13 March 2009, iii) Code of Conduct on the Switching of Current Accounts with Credit Institutions - effective since 1 October 2010, iv) Consumer Protection Code for Licensed Moneylenders - fully effective since 1 September 2009.

In **Italy**, the Consob cited, among other examples, problems arising from rebates in portfolio management activities. Roughly all operators discontinued this practice in Italy. Following publication of Consob's communication on illiquid products, a significant number of brokers has ceased selling illiquid products with a short holding period to retail clients. Likewise the Bank of Italy was involved in 1) overall reform of regulation on transparency and fairness in the area of banking services; 2) the alternative dispute resolution system for banking services (Arbitro Bancario Finanziario, ABF); 3) transposition of the Payment Services Directive and of the Consumer Credit Directive.

Whereas some supervisors have the power to introduce major regulatory provisions, the Bank of **Greece**, for example, could only intervene through the Circular sent by its Regulator to all credit institutions referring to their obligation to report any major changes to the Bank of Greece, in particular with regard to procedures, the content of information and the manner of its provision to customers, under the Governor's Act 2501/2002.

In the **Netherlands**, the AFM confirmed that amending the law or regulatory powers remains with the Ministry of Finance. An important task for the legislator is constantly to bring the rules and regulations in line with changing market conditions (for example new business models and launching of new products). Since 2010, the AFM has the power formally to advise the Ministry to amend laws or regulations. One recent example that has affected consumers is that all financial enterprises are obligated to display a fixed warning sign in credit advertisements on the website of the AFM. This warning sign states: Watch out! Borrowing costs money.

In **Denmark**, the following are examples of regulation undertaken by supervisors:

- Advice regarding structured bank deposits (guidelines). Banks are prohibited from offering loan finance when selling their own shares or guarantee certificates (amendment of the Financial Business Act). Furthermore guidelines have been issued covering such sales in general.
- Openness regarding 1) decisions from the Security Council and the Financial Business Council *onndsrådets* and 2) the consumer targeted supervision of the FSA (amendment of the Financial Business Act).
- Authority for the Consumer Ombudsman 1) to initiate civil legal actions in respect of consumer claims in relation to non-compliance with good business practice and 2) to negotiate with financial service providers in order to reach a settlement of a specific court case (amendment to the Financial Business Act).
- The FSA is under a duty to notify the Consumer Ombudsman if the FSA becomes aware of a situation in which a consumer may have suffered a loss related to non-compliance with good business practice (amendment to the Financial Business Act).
- Authority for the Minister to issue an executive order on a mandatory risk classification of investment products (amendment to the Financial Business Act).
- A similar authority has recently been given regarding loans and mortgages.

### 3.2.3.2 Research

Research, whether conducted in-house or through a mandate given to third parties, is a crucial element to any overall supervisory regime. Consumer research has been a part of the activities of several financial supervisors (such as the UK FSA through its thematic reviews and detailed distribution studies) and is of great added value in enabling the supervisors and regulators to obtain a meaningful and accurate understanding of the financial services in their country, upon which decisions can be based.

Whether research is on the market or specific market processes or products or its effects on private households, it will enable supervisors to better monitor actual outcomes and assess quality of products and services which consumer are being offered. This is a significant part of the mandate which the new US consumer protection agency.<sup>94</sup> Research is also a part of the workload of many supervisors in the EU.

For example, the new ACP body in France has been asked by the Finance Minister to carry out further research in 2011 to establish

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<sup>94</sup> See section 3.1.3.2 on the Consumer Financial Protection Bureau (p.2) or visit the newly created CFPB website under <http://www.consumerfinance.gov>. Details of its activities are also available in a recent letter from its current head Elizabeth Warren responding to a Congressman's inquiry on the work of the CFPB [http://www.nafcu.org/Content/ContentGroups/Todays\\_News/February\\_2011/ElizabethWarren\\_Letter\\_1-31-11.pdf](http://www.nafcu.org/Content/ContentGroups/Todays_News/February_2011/ElizabethWarren_Letter_1-31-11.pdf).

whether banks are complying with their commitments with respect to bank mobility. This study will be a full audit to be submitted in July 2011. Under the Law on Financial Regulation of 22 October 2010, the Ministry of Economy and Finance may compel the ACP to monitor compliance with commitments made by the industry within the framework of agreements reached at the Comité Consultatif du Secteur Financier (CCSF).

While market surveillance is necessary, it is still a term mainly used in the securities sector e.g. where supervisors monitor trading in listed securities to determine whether there is evidence of securities law violations. Among the recommendations featured in the next Chapter of this report is room for this research element in a model where consumer protection is provided together with monitoring of unfair commercial practices, codes of conduct, competition etc. in a "behavioural part" of supervision.<sup>95</sup>

The general formula for an effective supervision is that it is necessary to have exhaustive and up-to-date information. This applies whether the mandate is prudential supervision, conduct of business supervision or market supervision with regard to consumer protection. The role which consumer associations can play in this regard should not be left out of whatever supervisory structure is developed in the future, whether nationally even eventually at the EU level. Supervision of conduct of business is important but control of marketing and sales methods (market surveillance) is nevertheless a separate task to that of controlling for abiding to professional obligations (conduct of business).

The object of supervision is too often the money market. For example, in the area of statistics, governmental institutions and state entities often let their dedicated statistics departments deal with data issues. This may not be in the best interest of consumers. Intelligence gathered from the collection and analysis of statistics should ideally take place within a specialist unit in charge of consumer protection. In France, statistics on overindebtedness are produced by the central bank<sup>96</sup>

#### **3.2.4 Sanctions**

With regard to institutional powers, most regulators have the power to initiate and conduct investigations (89%). Many have the power to refer a complaint to another agency (78%), to fine organisations in breach (70%) and to address a complaint to the firm (67%). Only 41% of the regulators questioned said that they have the power to address a complaint themselves and to initiate criminal procedure.

The Bank of Slovenia does not have the power to initiate criminal proceedings, but can press criminal charges. The Bulgarian Financial Supervision Commission forwards notification letters to the interested

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<sup>95</sup> See Chapter 0 starting on p.2.

<sup>96</sup> See the quarterly publication of the "overindebtedness barometer" presenting the main quantitative trends in private overindebtedness; at [http://www.banque-france.fr/fr/instit/protection\\_consommateur/secretariat\\_des\\_commissions\\_de\\_sur\\_endettement\\_barometre.htm](http://www.banque-france.fr/fr/instit/protection_consommateur/secretariat_des_commissions_de_sur_endettement_barometre.htm).

parties / government authorities which in turn have jurisdiction to take proceedings in order to protect the rights and the interests of the claimant. However, the Danish FSA has the power to draw consumers' attention to misconduct by publishing the decision or its findings during a survey or an inspection. The consumer ombudsman may issue a court action.

Some regulators, such as the Lithuanian State Consumer Rights Protection Board and the Finnish FSA, reported that they have the power to request that the organisations under supervision submit explanations when a complaint is made. German BaFin has the power to initiate criminal proceedings concerning unauthorised financial services, insider trading and market manipulation. It can impose administrative fines for infringements of supervisory legislation, the amount of which is, in many cases, set by law.

**Table 30: Overview of supervisor powers**

<b>Powers - ability to...</b>	<b>(%)</b>
initiate and execute investigations	88.9
refer a complaint to another agency	77.8
fine delinquents	70.4
address a complaint to the firm	66.7
start a legal action in court	40.7
address a complaint to the complainant	40.7
initiate criminal procedures	37.0

In the event of non-compliance with consumer protection legislation and rules, a large proportion of the regulators surveyed has the ability to notify the firm of a violation (89%), impose a financial penalty (89%), withdraw the license of the supervised organisation (74%), prohibit certain professional activities (70%) or seek a remedial commitment from the firm (67%).

The Slovenian Insurance Supervision Agency takes action when banking or banking-related regulations are violated. In relation to consumers, there have been only three cases in the last year, one concerning ATMs, one concerning disallowed withdrawals and one concerning the Effective Annual Rate of Interest, but none resulted in withdrawal of a license.

The Lithuanian State Consumer Rights Protection Board has the right to impose a financial penalty if a firm breaches the Law on Payments. If the breach is the first one, the penalty will be lower, but if there are aggravating circumstances, the penalty will be greater.

The Finnish FSA issues notices to financial firms at least weekly, while other sanctions are used less often. They frequently urge an insurance company to expedite their decision-making process in relation to insurance claims.

German BaFin emphasises that, where a grievance has been notified, the appropriate and necessary measures are taken having regard to the principle of proportionality.

The sanctions most frequently imposed in respect of non-compliance with consumer protection regulations by the Bank of Spain are financial penalties.

In the case of the Slovenian Insurance Supervision Agency, most violations related to the obligations and responsibilities arising from insurance undertakings, and to the provision by agents of information in the context of consumer protection prior to the conclusion of the insurance contract. When insurance brokers do not comply with these obligations, the ISA may withdraw their licence and / or impose a pecuniary sanction.

At the Hungarian FSA, the available actions are a) to order the cessation of the breach, b) to prohibit any further breach, c) to order

the service provider to terminate the breach within a prescribed time limit, and to notify the authority concerning of measures undertaken to eliminate any deficiencies and disparities, d) to ban, restrict or impose conditions on the pursuit of the activity in question or the supply of services involved in the breach, until the breach is remedied, and e) to impose a consumer protection fine.

For the Central Bank of Ireland, the action taken, such as increased supervisory scrutiny, directions, financial penalties, disqualification, will depend on the seriousness of the breaches identified, whilst also taking into account factors such as the severity and frequency of the problem.

The Dutch AFM uses a variety of measures, both formal and informal. If it considers it appropriate, the AFM may use informal methods, such as the encouragement of certain initiatives in the market. One example of an informal supervisory measure is the general dissemination of standards. Naturally, the AFM also continues to use formal supervisory measures such as orders with a penalty for non-compliance, and fines.

The Bank of Italy has the power to impose financial penalties for major breaches of consumer protection rules. When irregularities come to light, it may prevent financial institutions from undertaking or continuing certain activities, as well as order them to take specific actions. The withdrawal of the license (or, rather, deletion from the register) may occur when an intermediary commits a serious or a repeated breach of his duties.

**Table 31: Supervisor sanctioning powers**

Specific sanctions available	(%)
Notify the firm of a violation	88.9
Impose a financial penalty	88.9
Withdrawal of the license	74.1
Prohibition of certain professional activities	70.4
Seek a remedial commitment from the firm	66.7
Demand withdrawal of director	44.4
Orders to institute directors	40.7
Other actions	22.2
Impose criminal sanctions	11.1

According to the Danish regulator, withdrawal of a license or of directors and prohibition of certain professional activities are far more severe for the service provider than fines or financial penalties. As they are so severe, the sanctions are only applied in very severe cases, as this would otherwise undermine confidence in the industry as a whole. Even though these sanctions cannot be used often, they still have preventive qualities. The sanctions typically have a direct economic impact on the provider or the director. Some of the same arguments regarding severity may apply to the publication of

decisions, which involves naming providers. However sanctions are, according to the regulator, a necessary and effective way of communicating what is considered to be proper behaviour. The sanction has an impact on the reputation of the provider and potentially on the industry as a whole.

In general, when BaFin notifies a breach, financial firms are willing to comply with the law. In the more recent past, it has therefore not been necessary to take further action.

According to Bank of Spain, it appears that, the greater the penalty, the greater its effectiveness in terms of either consumer protection or the enforcement of other regulations. However, the appropriateness of any sanction should always be assessed on a case-by-case basis, taking into account all the circumstances of the case. If, the level of the financial penalty is determined by the authority within a broad range, it will probably suffice in most cases without the need for additional (non-pecuniary) measures.

In the experience of the Hungarian FSA, the fine has a real preventive role in relation to further infringements and also affects the correct functioning of the market as a whole. The provisional prohibition is important where the procedure takes long time but consumers' interests are very likely to be damaged.

A majority (52%) of regulators questioned systematically publicise sanctions and complaints. 30% replied that they make them public in some cases only, while 15% replied that they do not make them public at all. 44% publish sanctions and complaints together with the name of the organisation concerned. One regulator (UK FSA) publishes sanctions and complaints both with and without naming providers. No regulator reported that sanctions and complaints are made public without ever naming providers. Approximately two-thirds of regulators systematically make sanctions and complaints public and name providers.

The Slovak Trade Inspection publishes all its decisions on its websites, while ensuring that trade secrets remain protected. The Norwegian FSA publishes all reports following inspections on site.

In principle, sanctions are made public by the French ACP following their monetary and financial code. If, however, this may have overly detrimental effects on the financial markets or on the person concerned, the ACP may decide against publication.

The Lithuanian State Consumer Rights Protection Board provides information on its webpage if a service provider breaches the Law on Payments. Notifications in relation to the failure to implement decisions and settlement agreements must be published on the authorities in accordance with the Law on Consumer Protection.

Where there an imminent risk to other consumers is apparent, BaFin may publicise its actions.

The Bank of Greece may publish its decisions, provided that it judges that publication is not linked to its legal supervisory requirements and not likely to create any risk of serious disturbance to financial markets or of disproportionate loss to the parties concerned.



The majority of enforcement actions taken by the UK OFT are made public (once all appeal mechanisms have been exhausted) by means of their public register or, in some instances, via press announcements.

The Hungarian FSA publishes all decisions relating to breaches, together with the name of the financial organisation concerned and giving a detailed statement of facts and reasons, but must always ensure bank and business confidentiality.

In Estonia, the FSA has the right to disclose, in full or in part, a decision, administrative act or contract under public law as of the date of issue if this is necessary for the protection of investors, clients or the general public, or to ensure the lawful or regular functioning of the financial markets.

**Table 32: Supervisor communication of sanctions**

<b>Ways in which sanctions and/or complaints are made public</b>	<b>(%)</b>
Systematically	51.9
On a named basis	44.4
In some cases only	29.6
Not at all	14.8
Without naming providers	3.7

The maximum fine the agencies surveyed may to impose in respect of breach of consumer protection rules usually depends on 1) the severity of the misconduct, 2) the type of supervision (investment, insurance etc.) and 3) the frequency of the breach. In this survey, fines ranged from relatively small amounts such as EUR 25,000 (Slovenian Insurance Supervision Agency) and EUR 32,000 (Estonian FSA) to large sums, such as EUR 20,000,000 (Bank of Greece) and even EUR 100,000,000 (French ACP). The UK FSA's power to impose fines for breach of consumer protection rules has no financial limit.

17 out of the 27 regulators surveyed replied that wrongdoing by staff employed by a financial institution may be punishable on a personal basis. For example, the Slovak NBS may impose a fine on a board member of a bank, the chief executive officer of a branch office or his deputy. The Consob in Italy stated that persons who perform administrative or management functions in companies and employees of companies and authorised entities may be subject to an administrative fine. The same sanction applies to those who perform supervisory functions. The remaining ten regulators reported that such penalties are mainly imposed on financial institutions, brokers and other providers.

Sanctions relating to breach of consumer protection rules were imposed by regulators in 2009 on less than 10 occasions in many cases. However, the Bulgarian Financial Supervision Commission imposed sanctions on 485 occasions and the Dutch AFM on 454 occasions. Most of the penalties imposed were financial. The lowest fine (EUR 100) was imposed by the Bulgarian Financial Supervision

Commission, the highest (EUR 825,500) by the Italian Consob. Most sanctions were published.

Of the non-financial penalties imposed by regulators, the most severe include withdrawal of an insurance broker's licence to conduct insurance business (Slovenian Insurance Supervision Agency), revocation of consumer credit licences (UK OFT), disqualification of directors (Central Bank of Ireland) and disqualification of finance brokers from the register (Italian Consob).

Regulators in Poland, Denmark, Greece and Italy stated that they have both a public and a private ombudsman system. Eight regulators responded that the ombudsman service is private only while 12 regulators stated is the ombudsman system is public. In Bulgaria, Malta and Hungary there is no financial ombudsman system at all.

**Table 33: Member State financial ombudsman systems**

<b>Financial ombudsman system</b>	<b>(%)</b>
Public	59.3
Private	44.4
no financial ombudsman system	11.1

### 3.2.5 Consumer representation

Consumer representation forms part of the regulatory function in a variety of ways, as is reflected in the table below:

**Table 34: Supervision and consumer representation**

<b>Integration of consumer representation in the workings of the agency - via...</b>	<b>(%)</b>
direct consultation with consumer organisations	44.4
an advisory council	29.6
direct consultation with individual consumers	29.6
not represented	22.2
a board of directors	11.1
a supervisory council	11.1
Other	7.4

The Dutch AFM's advisory panel of representative organisations includes consumer organisations. The Dutch Consumers' Association (Consumentenbond), The National Association of House Owners (VEH) and the Dutch Association of Shareholders (VEB) are important stakeholders of the AFM and all three participate actively in the policy debate in their respective areas of competence.

In Denmark, three councils have consumer representation. These are the Financial Business Council, which is the supreme decision-maker in supervisory matters of principle or comprehensive significance, the Danish Securities Council, which enforces compliance by companies

listed or traded on the stock exchange or traded on an authorised market with the current accounting regulations in their annual and interim reports, and the Money and Pension Panel, whose aim is to foster better knowledge of and interest in financial matters among consumers. Members of the consumer representation are nominated by the Danish Consumer Council or the Danish Shareholders Association.

The consultative commission of the French ACP on selling practices is chaired by two members of the board and consists of representatives of users, of financial institutions, of brokers, of trade unions, of the press, together with one academic.

### **3.3 Ideas and proposals from consumer organisations and national supervisors**

#### **3.3.1 BEUC**

In its 8 Priorities for the Hungarian Presidency BEUC has expressed a number of claims for improved financial supervision cited below:

- “Make national supervisors all over Europe more powerful and independent.
- Reflection on the need to separate prudential supervision on the one hand and the control of marketing methods and professional compliance on the other hand, is needed.
- A clear definition of corresponding responsibilities of both supervisors is also needed, so as to avoid any conflict of interests;
- Ensure that, in order to provide better protection to consumers, national supervisory bodies fulfil the following functions:
  - participate in advertising control,
  - control of financial information,
  - control of unfair practices (bundled and tied products, conditional and aggressive sales practices),
  - control the distribution of financial products (for example in the area of consumer credit) and
  - take charge of an early warning system (inform consumers about the risks/risk category of various financial products on the basis of continuous enquiries);
  - Ensure effective consumer representation on the boards of financial supervisors.
  - To this end, consumer representatives should be provided with necessary means, e.g. sufficient financial resources;
- Strengthen the cooperation between national supervisors and regulators:
  - create a binding network between them (see e.g. the Regulation on Consumer Protection Cooperation);
  - Adopt binding rules at EU level so that all Member States are obliged to comply with them.
  - Soft law has shown its limits especially in the area of financial services. The regulatory gaps must be closed.”

### 3.3.2 A selection of consumer views

The national examples provided in this section, highlight the shortcomings of financial supervision as reported by consumer associations in 3 EU Member States.

In **Bulgaria**, while on the face of it, consumer protection in financial services appears to be embedded in the law, it is however next to lacking due to non-enforcement of the law and ineffective supervision. Consumer advocates have voiced strong dissatisfaction with the existing supervisory regime. With regard to the observance and protection of consumer rights, the Banking Supervision Department at the Central Bank (BNB) is seen as exercising only a superficial formal control over the complaints of users and not thoroughly examining the issues of an appeal e.g. by making the necessary checks in the bank's documentation, and by placing too much trust in the sole written explanations and statements from these banks. Shortcomings of Bulgarian financial supervision are also felt within the work of the Authority for the Protection of Consumer Rights (called the Commission for Consumer Protection). It is not seen to be able to provide expertise and to end unfair bank practices, and judging from experience with complaints to both these entities, consumer associations feel that a strong banking lobby is not being controlled by the agencies in place.

Bulgaria may indeed lack expert staff at supervisory authority in the field of financial services and this is one of the key dimensions to obtaining an overall effective supervision structure able to assist consumers. Although a recent World Bank report recommended that the country immediately create a body such as a financial ombudsman, this has yet to be implemented or discussed by the Bulgarian authorities.

For example, there have been cases in which consumers have complained about financial services providers' abuses, even violation of the law, for months without achieving any resolution. In one particular case a consumer, complaining about a unilateral change of the method of calculating her variable interest rate on a mortgage, has been in contact with all responsible agencies for over 18 months without having obtained a clear response, let alone a settlement of her case. This situation is made possible because the consumer protection and non-prudential supervision is split between several agencies such as the Bulgarian National Bank, the Financial Supervision Commission and the Consumer Protection Commission. Each takes the opportunity to shed responsibility, interpret their mandate narrowly and refer a complaint to the other, ultimately advising consumers to go to court.

One of the solutions being put forward is for Bulgaria to be subjected to a detailed review conducted by an external organisation who will do an independent audit and who will recommend immediate measures required to overcome the existing deficits.

In **Malta**, the consumer perspective is that the current level of supervision is not satisfactory. On paper Malta may have public

regulatory bodies which should between them provide a fairly comprehensive effective regulatory structure, however, in practice in some instances – for example in the wake of 2008 international crash many consumers were left without any effective redress. On general lines the Malta Financial Services Authority ('MFSA') does publish some useful material by way of guides and have a small unit dealing exclusively with consumer complaints relating to financial and/or investment services issues. In practice however the redress schemes are either non-existent or poorly published amongst the general public. In addition, the Consumer and Competition Division that exists (a Government department) has a dual role responsible for competition and consumer issues in general – in particular with a remit to deal with unfair commercial practices, misleading advertising, use of unfair terms and also consumer credit issues. However, this office does not dedicate enough resources to deal with complaints by consumers relating to the financial sector. There are no specialized courts/tribunals with deal exclusively with consumer complaints relating to financial/investment services. There are no industry funded self-regulatory redress mechanisms.

Following on from this, a consumer advocacy recommendation would be to suggest implementation of the following:

Because of the evident lack of effective, inexpensive and quick means of redress with regard to complaints concerning financial services (possibly because of the country's size and lack of specialised resources), no specialised for a where consumers can go to for help, and lack of parity of arms (on the one hand well organised and strong financial institutions versus individual and poorly organised consumers), the following measures could be implemented to address matters and improve the situation for consumers:

- The introduction of collective redress in Malta. The Maltese Government this week announced that it intends to start working on the introduction of group action.
- A specialised tribunal dealing expressly with financial investment consumer issues – the tribunal should be composed of persons well versed with the sector – and expenses for consumer should be kept to a minimum. One may also consider requiring banks, financial service providers etc. to notify and adequately publish with consumers the existence of such means of redress.
- Self-regulation may be another option – though Government together with consumer representatives should be involved to ensure that the system is effectively independent of industry.
- The present situation of having a small consumer unit with MFSA to advise consumers is not really leading anywhere and in cases where consumers were severally impacted this unit has not been able to do much. A review of its role ensuring that it has truly effective tools should be undertaken.

A third Member State that has experienced consumer detriment and dissatisfaction over the past years is Spain. Consumer associations such as ADICAE consider supervision of financial services in its

country to be below the ideal level of supervision to reach an appropriate level of consumer protection. Concretely, some of the problems are highlighted here by sector:

- Credit Markets: The inclusion of abusive clauses in mortgage contracts, as I explain later, is the biggest problem that consumers face. The problems with fast credit and with credit grouping have almost disappeared, due to the restriction of credit we've faced in the last two years.
- Savings: We consider that the MiFID has no effects at all regarding the protection of small savers and investors; Spanish Banks and Savings Banks sell investment products to consumer without taking into account the adequacy of each kind of investment product (high risk, low risk) to each kind of investor (willing to accept risk, avoiding risks). They just ask the investor to sign all the papers, which are usually long and not clear, and they include clauses to avoid any responsibilities
- Capital Investment and Securities: Advertising of complex financial products like warrants and swaps which are presented as "easy", "clear", etc. is everywhere (similar to above).
- Pensions: The problems with private pensions. Consumers aren't usually fully aware of all the mechanism of a private pension fund. They usually take their decisions depending of the present the bank makes to subscribe that financial product (DVD, television) and don't pay attention its characteristics. This is a problem of financial education, and shows that before taking any steps in the direction of privatisation of pension schemes there is still much left to do.
- Insurance: The lack of financial education leads the consumers to contract insurances that don't fit their needs. We find so many consumers who believe they're insured against some kind of damages, but in reality that damage is not covered in the contract. There are also cases where the consumer has damages which are legally covered by the insurance, but the company refuses to pay. Then, he can only do and out-of-court complaint first to the company and later to the General Direction for Insurances and Securities, highly conservative and whose opinions are not binding to the company. So, we sometimes find that consumers who should be legally covered aren't when the risk under the insurance occurs. The only solution left would be going to court.
- Payment systems (including bank accounts): The implementation of the Payment Services Directive from 2007, resulting in the Law for Payment Services of 2009, has brought substantial changes in this area. These changes correspond, especially, to the liability in case of fraud and the costs of payment services. Almost all the Banks have adopted the limit of €150 of responsibility for the user in case of fraud, something which wasn't common on contracts back from 2008 or earlier.

Tighter supervision of the National Bank of Spain, could deliver a solution to these and any potentially similar problems, and this means that this major supervisor should be empowered to revise the contracts offered to consumers.

### **3.3.3 Responses from national financial supervisors**

#### **3.3.3.1 Views on the supervisory structure generally**

Only 4 supervisors questioned characterised their supervisory regime as very satisfactory (France, Italy, Bulgaria and Poland) and only 1 as unsatisfactory (Slovakia). Overall, 63% of the supervisors surveyed responded that they were satisfied with their own country's level of supervision with respect to consumer protection.

In the Netherlands, there is currently a debate that deals with whether the AFM should have a role in the settlement of consumer complaints and whether the AFM should have the legal instruments to make sure financial institutions meet their obligations in settling disputes in cases of the mistreatment of consumers/investors.

**Table 35: Overview of EU supervisor views**

<b>Supervisor views - agreement with the following statements:(b=banking &amp; credit; i=investments/insurance)</b>	<b>% agree</b>
<b>The supervisory body for consumer protection...</b>	
...exists and performs well (i)	88.9
...exists and performs well (b)	80.0
...lacks sufficient practical impact(b)	22.2
...lacks sufficient practical impact(i)	11.8
<b>Consumer protection should...</b>	
...be used to collect information and signals from complaining consumers for prudential supervision(i)	94.7
...be used to collect information and signals from complaining consumers for prudential supervision (b)	85.0
...be made more effective to help attaining prudential goals (i)	76.5
...have better regulation to get better enforcement (b)	73.7
...have better regulation to get better enforcement (i)	72.2
...be made more effective to help attaining prudential goals(b)	70.6
...be better advertised to the public as being part of your area of supervision (b)	70.6
...be better advertised to the public as being part of your area of supervision (i)	70.6
...needs a specialised forum (b)	62.5
...needs a specialised forum (i)	58.8
...be separated from prudential supervision (b)	50.0
...be separated from prudential supervision (i)	43.8
<b>Obstacles for better consumer protection supervision are...</b>	
...the lack of an explicit and clear mandate (b)	50.0
...the lack of an explicit and clear mandate (i)	47.4
...the duty to keep names of providers secret (b)	40.0
...the duty to keep names of providers secret (i)	40.0
...too little effective sanctions especially with regard to large firms(b)	37.5
...too little effective sanctions especially with regard to large firms (i)	37.5
...the multiplicity of agencies involved (b)	31.3
...the multiplicity of agencies involved (i)	31.3
...liability of your agency to individual consumers (b)	30.8
...liability of your agency to individual consumers (i)	23.1



### **3.3.3.2 Talks or initiatives on the separation of prudential supervision from consumer protection tasks**

In countries such as Portugal, Slovakia, Denmark, Latvia, Finland, Austria there are no current initiatives at all on the separation of prudential supervision from consumer protection tasks. In Estonia, the EFSA has a 2-pillar supervisory approach (prudential and business-conduct, and market supervision)<sup>97</sup>, and there are no other talks on separating prudential supervision from consumer protection (e.g. by establishing 2 different authorities). Norway also belongs to this group and, although the Finanstilsynet does plan to increase resources for consumer protection, there are no plans for separation. In other countries, such as Poland and Greece, the assessment of the discussion in this respect is unclear. The current proposals in the UK suggest a separation of prudential regulation and consumer protection for firms which pose a systemic risk to financial stability. For smaller firms, which present little or no systemic risk, prudential and consumer protection regulation are likely to be undertaken by a single regulatory body. In Malta, the MFSA is even suggesting the opposite and that there may be scope for consideration of integrating a consumer protection orientation into risk-based prudential supervision by the MFSA.

Member states that already have a separation of roles include Hungary, where HFSA inspections for consumer protection purposes have operationally been separated from prudential inspections since January 2010; the Central Bank of Ireland, which currently separates prudential supervision from consumer protection tasks into two distinct areas and where there are no proposals to change this approach; in Italy, where prudential supervision is already separated; in the Netherlands, where the separation of prudential supervision from market behaviour was affected to give greater emphasis to consumer protection.

The Bank of Slovenia acknowledges that prudential supervision should be separated from consumer protection to avoid the risk of conflicts of interest. Other countries where there are discussions of the merits of a move towards a twin-peaks model include Bulgaria, Germany<sup>98</sup>, Belgium, and Spain. In Spain a Government initiative was postponed for political reasons, first because of proximity of general elections, and then due to the financial and economic crisis. In Belgium, on the other hand, supervision is actively moving towards a Twin Peaks model. Within that model, the new CBFA (the name will be modified) will be given new responsibilities, which will focus more on financial consumer protection (with regard to investment products in general, including financial instruments and insurance products). The CBFA will be in charge of the following tasks (among others): 1) ensuring compliance with the rules aimed at protecting the interests of the financial consumers / investors in transactions in financial

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<sup>97</sup> See <http://www.fi.ee/index.php?id=760>.

<sup>98</sup> For information on current discussion on a possible new structure of financial supervision in Germany, see: <http://www.handelsblatt.com/politik/deutschland/reform-der-finanzaufsicht-10-punkte-plan-im-ueberblick;2714281>.

instruments, 2) contributing to compliance with the rules aimed at protecting savers and financial consumers / investors against the illegal offer or supply of financial products and services, 3) contributing to the financial education of investors / financial consumers, 4) contributing to the development of rules ensuring honest, fair and professional treatment of financial consumers / investors (such as rules regarding information to clients / consumers, due diligence requirements towards financial consumers / investors, rules about marketing communication,...). The CBFA will also have the power to prohibit or restrict the marketing of retail investment products.

**Table 36: Powers and Perspectives for Consumer Protection**

<b>Respondent</b>	<b>Additional powers necessary?</b>	<b>Fields for improvement?</b>
AT: Austrian Financial Market Authority	explicit and clear mandate	
BG: Financial Supervision Commission		Consumer literacy/rights/ defence own interest.
DE: Bundesanstalt für Finanzdienstleistungsaufsicht	legal basis for consumer protection	
EE: Estonian Financial Supervision Authority	More competence for host country financial supervision in consumer affair.	
ES: Dirección General de Seguros y Fondos de Pensiones		Understand their investments and be fairly treated Product and risk supervision.
ES: BANCO DE ESPAÑA	No need of additional powers	Financial education and pre-contractual information for retail products
FI: The Financial Supervisory Authority (Finanssivalvonta)	No imminent need for new powers.	No specific field
HU: Hungarian Financial Supervisory Authority	Financial education.	financial literacy
IE: Central Bank of Ireland		Consumer Ombuds: Transparency of remuneration, suitability of mortgage

<b>Respondent</b>	<b>Additional powers necessary?</b>	<b>Fields for improvement?</b>
		credit, responsibilities on product manufacturers to identify the target market of products, risk rating of products.
IT : Commissione Nazionale per le Società e la Borsa (CONSOB)		Financial literacy.
LT: State Consumer Rights Protection Board	Consumer protection also for complaints in insurance and investment.	Insurance and investment.
MT: Malta Financial Services Authority	Enforcement of recommendations by the Consumer Complaints Manager on licence holders. Independent Financial Ombudsman.	More resources in 2011 for speedier resolution of complaints and more consumer education.
NL: AFM Financial Supervisor Netherlands	Rulemaking power, right to require more information	Mortgage lending and pensions
NO: Finanstilsynet, FSA	More specific regulation in the consumer protection area	Supervisory codes of conduct
PL: Polish FSA	Mystery shopping. Control of banking contracts	
PT: Comissão do Mercado de Valores Mobiliários (CMVM)	Existing powers are enhanced.	Transparency particularly on complex financial instruments.
SI: Insurance Supervision Agency	Consumer protection is not (directly) within competencies	Adequate because other authorities in place.
SK: Slovak Trade Inspection		Non-banking providers
SK: Narodna banka Slovenija	Changes in legislation	All
UK: Office of Fair Trading	Powers to suspend a consumer credit licence.	Partly greater levels of intervention would be helpful.



### 3.3.3.3 Collective Redress/Group Action

European consumer advocates and the BEUC have since long militated for a more efficient instrument for enforcing consumer rights especially on the initiative of consumer organisations who do not have the same limitations to action as may have public administrations as has been seen in the past: "A Group Action procedure is the answer to situations where many people are harmed or suffer loss. It would enable European consumers to be represented together, as one, by a consumer organisation who would seek fair compensation in court. Group Actions can be used in many different scenarios, whether it would be systematic overcharging for mobile phone bills, environmental damage affecting many people, negligent financial advice etc."<sup>99</sup>

The results of our study survey shows that especially in finance this idea would need further promotion. The Polish FSA gave its opinion on the draft of the legal act related to this issue. In Finland, there is little discussion of this because the legislation for group actions has come into force and the Consumer Agency, the authority responsible for group actions, is using it. This is similarly the case in Estonia, where the group action lawsuits are the responsibility and the power of the Estonian Consumer Protection Board, and in Hungary, where the HFSA initiates public actions in cases of unfair terms and conditions in contracts with financial institutions. This contrasts with Latvia, where discussions are at only an early stage, and is the opposite to the UK, where the UK Parliament in 2010 failed to pass legislative proposals for group actions in financial services cases. We are unaware of any current initiative to reintroduce such proposals.

In Portugal, pursuant to Article 31 of the Portuguese Securities Code, the legal framework for group actions is as follows: 1. The following have the right to group action for the protection of the individual or the collective interests of retail investors in financial instruments: a) Non-qualified investors, b) Associations for the defence of investors, c) Foundations that have as an objective the protection of investors in financial instruments. 2. The judgment should nominate the body to deal with the receipt and management of the damages due to shareholders not individually identified, and specify, according to the circumstances, sinking funds, associations for the defence of investors or one or more shareholders identified in the action. 3. Damages that are not paid as a result of the impossibility of identifying the share-holders concerned, should revert to: a) The sinking fund relating to the activity giving rise to the indemnity, b) In the absence of the sinking fund, the investors' compensation system. CMVM acknowledges that there has been one group action lawsuit.<sup>100</sup>

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<sup>99</sup> <http://www.beuc.eu>

<sup>100</sup> As described within CMVM 2009 Annual Report, p.273.

**Table 37: Supervisor views on group actions and financial groups**

<b>Level of discussion by the agency in the area of group action lawsuits</b>	<b>%</b>
Non-Existent	45.0
Low	40.0
High	15.0
<b>Supervising groups with cross-sector and cross-border operations</b>	
Seen as a relevant issue for consumer protection	81.8

### 3.3.3.4 Supervising financial groups

The majority of supervisors felt that supervising financial groups for cross-sector and cross-border operations along the value chain from production to servicing and distribution was relevant to consumer protection.

A number of reasons were given for this, including the need to avoid regulatory arbitrage: with the increasing availability of financial services across borders, there is a corresponding need to ensure consumer protection measures also operate effectively across borders. In addition, the agency supervises firms that provide services into the country on a cross-border basis for conduct of business purposes (e.g. the Central Bank of Ireland). Other supervisors were more concerned with the need to remove discrepancies between the roles of home and host supervisors (Belgium). Others, such as Bafin, said that catching rogue traders in a single Member State of the EU can be almost impossible when they are based in another country and that cooperation between national authorities is often the only way to ensure that these rogue traders are sanctioned. This was cited as a reason why BaFin takes part in the CPCS - the Consumer Protection Cooperation System of the European Commission.

The Wft (Financial Act on Supervision) in the Netherlands regulates all financial services across the sectors. Thus the requirements for brokers are in most respects identical to those for other distribution channels such as bank branches and direct distribution. This creates a level playing field between distribution channels. Further international harmonization of provisions between several areas is needed.

In Portugal, the CMVM provides information on its website regarding the interaction of cross-sector and cross-border operations, which it sees as key for consumer protection<sup>101</sup>.

While the Bank of Spain does not see the relevance of cross-border supervision, as each jurisdiction has its own consumer protection

<sup>101</sup> For details on cross-sector operational coordination, see: <http://www.cmvm.pt/EN/Cooperacao%20Nacional/Acordos/Pages/acordos.aspx> and for cross-border operational coordination, see: <http://www.cmvm.pt/EN/Cooperacao%20Internacional/Acordos/Pages/acordos.aspx>.

rules (EU being considered as a single jurisdiction in most aspects of consumer protection), it does however see it as an important issue in terms of cross-sector supervision, where there are no cross-sectoral consumer protection rules or harmonised sectoral rules (there can also be problems due to the existence of sectoral supervisors, instead of an integrated supervisor).

### 3.3.4 The Sentinel

An interesting proposal has also been made by Levine (2010)<sup>102</sup> who proposes an Expert Group called the *Sentinel* which could:

“act as the public’s sentry over financial policies and thereby improve the governance of financial regulation. Its sole power would be to demand any information necessary for evaluating the state of financial regulation. Its sole responsibility would be to continuously assess and comment on financial policies, delivering a formal report to the legislative and executive branches of government annually. Critically, and uniquely, the Sentinel would be both politically independent and independent of financial markets. Senior members would be appointed for staggered terms to limit political influence. To shield it from market influences, senior staff would be prohibited from receiving compensation from the financial sector after completing public services for a timely period. The goal is to create an institution in which the personal motives, ambitions, and prestige of its employees are inextricably connected to accurately assessing the impact of financial regulations on the public.

The Sentinel would improve the entire apparatus for writing, enacting, adapting and implementing financial regulations. As an extra group of informed, prying eyes, it would reduce the ability of regulators to obfuscate regulatory actions and would instead make regulators more accountable for the societal repercussions of their actions. As an additional group of experts reviewing and reporting on financial regulations, it would reduce the probability and costliness of regulatory mistakes and supervisory failures. As a prominent institution, the Sentinel’s reports to legislators would help reduce the influence of special interests on the public’s representatives. As an entity whose sole objective is to evaluate the state of financial regulation from the perspective of the public, it would help inform the public and thereby augment public influence over financial regulation.”

While we share the opinion that “no other existing entity currently has the incentives, power, or capabilities to perform the role of a public sentry over the full constellation of financial sector policies” we are afraid that such a sentinel is only formula which leaves are questions unanswered. Who should name these experts, why should they be dedicated to consumer protection? Where have the problems

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<sup>102</sup> Levine, R; The governance of financial regulation: reform lessons from the recent crisis, BIS Working Papers No 329, 2010.

been reflected that a total view on financial services meets a number of conflicts of interests which have to be solved preferably in a democratic and dialectical way? We also have doubts whether the concern for financial regulation should be a priority for a consumer agency because in a democracy, rule-making should be primarily attributed to democratically legitimated institutions while expert groups like in the Lamfalussy process are no guarantee, especially for socially responsible developments.

### **3.4 Conclusion**

There is a widespread move in Europe to separate prudential supervision from supervision of rules concerning appropriate behaviour of banks in the market including consumer protection rules. How this separation is done either within a given institution, by creating additional institutions or through a specialist financial consumer agency depends on the national institutional arrangements.

In the following recommendations we develop a three-peaks system which underpins the general opinion that prudential regulation should be separated from consumer protection but not necessarily from the supervision of all kinds of required behaviour in financial services. Our recommendations also follow the general opinion that the institutional arrangements should be left to the specifics of each member state. An EU-Directive on Financial Consumer Protection Supervision could harmonise goals, requirements for an independent structure and effective performance.



## 4 Recommendation: Financial Consumer Protection Agencies (FCPAs)

There is a need to develop an independent Financial Consumer Protection Agency in financial services which brings together the necessary skills for banking and finance with the skills for consumer rights and consumer problems, which is independent from the supplier side. Such a Financial Consumer Protection Agency (FCPA) should exist in every EU Member State and will represent an entity that will be alert to actual and potential consumer problems at the national level. The principles behind the work of these agencies at the EU level and the cooperation between them would be the responsibility of the new European Authorities for the supervision of financial activities. While the European authorities should ensure regular contact exists with the FCPAs, a national agency's preferred model and operating details should be determined by circumstances and priorities at national level. The possibility would remain open to create a European FCPA with time should the situation for consumers of financial services require such a supranational body, however, there is currently no demonstrated necessity to do so at the present time.

### 4.1 System: Consumer protection and state supervision

If the goal of consumer protection is integrated into financial supervision, a broader view is required beyond financial services and its specificities. On the assumption that consumer protection in financial services is first and foremost an approach which shares its structures and interests with other areas of consumer interest, a focus on supervision alone, solely concerned with banking and finance, would neither cover all existing financial supervision nor provide an adequate response to the question of where consumer protection could best be allocated.<sup>103</sup>

The following objectives of market monitoring, representing different perspectives on similar situations, should be extended to financial supervision:

- 1 Money supply:** Banks are of special importance in the money supply chain, which was routed traditionally through central banks. These in turn refinanced the qualified credit of private banks. Today, the supply of money is to a large extent guaranteed by different private mechanisms more indirectly influenced by the central banks.
- 2 Safety:** In order to guarantee the money supply and especially the provision of savings for credit, the state takes responsibility for the existence of financial institutions, their safety and soundness, and shelters them from inappropriate risks. Capital requirements and the rescue of banks and insurance companies ("too big/interconnected to fail", "systemic banks")

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<sup>103</sup> See above at p 2 ff.

- 3 **Fair Competition:** Since the freedom of trade is based on functioning competition, the state has taken over the responsibility for ensuring that markets function properly. (unfair competition and cartels)
- 4 **Professionalism:** Some goods and services are directly related to certain private as well as public goods where errors and malpractice are irremediable, so that a number of barriers to access to the profession as well as professional codes of conduct are regulated. This objective of professionalism should also imply notions of responsible lending, independent advice, and training of staff etc.
- 5 **Compliance:** Since the exercise of a profession presupposes certain general rules, including criminal law, as well as ethical rules, there is constant supervision to ensure that these rules are observed.
- 6 **Public supply and access:** A number of goods and services are vital for society to function and necessary to fulfil the basic needs of its citizens. This is why in some areas (for example water, electricity) special rules are in force to guarantee sufficient supply, equal access, affordability and consistency, as well as a minimum level of quality.
- 7 **Consumer protection:** All above mentioned viewpoints represent consumer interest. Safety as well as public and equal supply are core elements of consumer protection. Professional behaviour creates responsibility towards consumers. In so far one could add consumer protection as a public good and a general legal principle.

All these public goods can be assigned to public institutions like Cartel Commissions and Agencies, standard setting boards, police and attorney general's offices, energy and telecommunication offices, business inspectorates and in some countries special consumer administrations.

These general institutions for safeguarding common goods are not seen as sufficient where certain goods and services are of first necessity to serve basic needs. In these sectors special agencies have been created which have much more power and provide stricter rules than in general market supervision. But much more important is perhaps the increased expertise needed in some areas to exercise supervision effectively (such as health, the legal professions, and telecommunications).

In both respects, financial services can be seen as an outstanding example of specialist state regulation, although they do not have the status of satisfying basic needs. The Finnish presidency of the EU in 1999 has already called for national legislation, which suggests that financial services are seen as of almost the same fundamental importance as basic needs and that, because of the level of sophistication of the sector, there is a need for special institutions with increased powers. But even more important is the high sophistication of this sector which requires special knowledge.

### 4.2 Model: Three peaks system

The protective consumer approach is different from the stability approach. In order to allocate it to the different functions one should ask how the system could be redefined as a protective system rather than supervision.

In this respect, six potential elements of supervision can be distinguished.

**Table 38: The six elements of the three peaks model**

State Agency	Target	Goal	Stakeholder
Central Bank	Money systems	Functioning	State
Prudential supervision	Financial institutions	Solvency	Economic system
Fair trade supervision	Markets	Competition	Competitors/ customers/ consumers
Attorney general	Legal system	Compliance	
Chambers/guilds	Professionalism	Business conduct	Customers (users)
Consumer ombudsman	Consumption	Well-being	Consumers

Prudential regulation and money supply are specific to financial services, as only in financial services are there systemic suppliers whose failure would threaten the whole network. These functions do not normally arise in other areas of the economy. This is why both elements have been present in financial supervision from the very beginning. As money supply and prudential regulation have different institutions, targets, goals and stakeholders in financial supervision, they need to be kept apart from the other more general functions exercised by the state in a market economy with regard to goods and services.

Whereas some Member States may have a good experience with having one institution (the central bank) responsible for both ensuring macroeconomic stability and prudential stability of the financial sector, there is evidence to suggest that potential conflicts of interest may exist in the reaching of these objectives, especially with the increasing importance that supervisors ensure systemic financial stability. As prudential tools adjust to strengthen the resilience of the financial system and mitigate systemic risk there will be greater potential tension between competing priorities which could lead to policy conflict. Though difficult to delineate in practice, the proposed model seeks a clear separation of supervisory duties between “micro” (policies aimed at addressing idiosyncratic risk and depositor protection

e.g. by forcing banks to internalise losses on their assets) and “macro” (policies aimed at containing system-wide risks e.g. by controlling the social costs of a generalized reduction of assets in the financial system) prudential regulation.<sup>104</sup>

Fair trade and fair competition, compliance, and professionalism are public goods in the same way as the welfare of consumers. These last four aspects target private goals. They are rooted in general private or criminal law and all target the individual behaviour of financial institutions with regard to their customers.<sup>105</sup> There may be even among these functions some conflicts of interest where individual consumers are confronted with the interests of competitors or rules on professionalism exist which impede certain behaviour a customer would like to see. But in general the conflicts of interest within this group are limited.

**Table 39: Three pillar system of supervision**

<b>Central Banking</b>	<b>Prudential Supervision</b>	<b>Customer Protection</b>
Money supply	Safety and soundness	Fair competition
Currency stability	Minimum capital requirements	Professional rules, codes of conduct
International	Documentation	Compliance
Interest rates	Risk assessment	Fair marketing practices
State debt		<b>Consumer protection</b>

<sup>104</sup> The third peak of the suggested model allows the supervisory structure to address macro-economic management and macro-prudential supervision separately from the micro-prudential supervision. While outside the scope of this study, the following citation from the IMF, *Macroprudential Policy: An Organizing Framework*, March 2011, p. 43 suggests that the separation of these two aspects is worthwhile: “Cooperation between macro and microprudential policy is most important but also most challenging, given that their core instruments have the same roots. In addition, what matters for the efficiency of both policies is its combined impact. One key difficulty is that prudential policy has multiple objectives (depositor protection and mitigation of systemic risk). When this gives rise to conflicts, a need may arise to establish a clearer hierarchy of policy objectives: mitigation of systemic risk on the one hand, and depositor (investor) protection on the other. A further challenge is how to better align the goals of the macroprudential authority and the microprudential regulator, while preserving the operational independence of the latter—a topic requiring more in-depth analysis.”

<sup>105</sup> These aspects of consumer protection in the wider sense could also accordingly be described using the umbrella term of “customer orientation in financial supervision concerned with financial institutions’ behaviour”.

An integration of the five functions listed in the consumer protection column (fair competition; professional rules; compliance; fair marketing practices; and consumer protection) could

- create synergies in skills, market overview, investigation and prosecution, since all sub-departments require intensive contacts with bank and insurance customers,
- lead to closer contact with customers than with the financial institution itself,
- create increased trust in its links with the supplier side,
- conduct market studies relevant to all of its sub-departments,
- choose where to intervene if problems arise,
- use existing instruments and sanctions in a co-ordinated and effective manner,

Whether these integration of these five functions should be done under one roof or kept as a separate institution depends on a number of national conditions.

- Small countries will find it difficult to provide sufficiently skilled staff for different institutions so that independence and quality may conflict.
- Larger organisations can use economies of scale in their administration.
- Special knowledge of banking and finance may outweigh institutional independency.
- Central banks may have more weight and reputation for banks.

These questions are, however, more of a technical and cultural nature and would in any case have to be resolved where conflicts of interest between prudential regulation and conduct of business arise. The problem is not unique to consumer protection but occurs also in labour or tenants' as well as in environmental protection.

More attention should be paid to the question of **how consumer protection could fit into an administrative body.**

In the financial area, consumer protection is mostly derived from private law, where courts can award damages in individual cases, while financial supervision is based in administrative law, whereby special administrations have the power to license and fine service providers in the public interest.<sup>106</sup> There are accordingly only three ways of making public administration effective with regard to consumer rights:

- (1) Establishing an active role in general consumer information and education;

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<sup>106</sup> There are big differences between the common law model and the civil law models. In unfair competition and unfair terms civil law countries the courts are in charge. Administrations may have the right to sue but it is still the court who decides. This is different in the UK where the Office of Fair Trading has administrative powers in unfair competition like this is the case only for cartel law in all other states. Even in Scandinavia where the ombuds is a public authority this institution has to go for example to the Swedish market court.

- (2) Providing agencies with powers to enforce private law; and
- (3) Making compliance with private consumer rights a public duty which can be enforced using the appropriate sanctions.

Options exist in different countries.

- (1) Where private law jurisdiction exists, many administrations have been mandated with the creation of product information, leaflets or financial education necessary for compliance with certain information duties under private law. The new investment and consumer credit directives provide for such forms to be created by public authorities. Many financial authorities are directly involved in gathering market data or supervising agencies which collect such data. In addition, certain financial supervisors are active in general financial information provision by supporting the production and distribution of leaflets, books or by providing information on the internet which is targeted at consumers.
- (2) The US Attorney-General's Office has the power to initiate group actions and to join existing litigation to assist consumers also in private law matters whereas in Europe this is possible only where consumer protection is safeguarded by criminality. Many financial authorities have a complaints service for consumers, assessing the impact of the complaint and intervening on the complainant's behalf. Scandinavian consumer ombudsman institutions have a double role in administrative and private law. While they are government agencies, they also have the role of monitoring the general behaviour of suppliers with regard to consumers. In this respect, the website of the Finnish consumer ombudsman is an interesting model for a public administration engaged in delivering consumer protection through the power it has to bargain with the service provider on behalf of consumers. In Sweden, the consumer ombudsman has the additional right to sue on behalf of consumers in the courts.
- (3) The duty to provide adequate advice inherent in the MIFID directive, and the duty to inquire into the solvency of consumers in consumer credit in the Consumer Credit Directive has been implemented in some countries as public law. On the other hand, the same duties also arise from private law either as a general obligation of good faith or through the assumption of a specific contractual obligation. This is why courts use administrative rules to assess the contractual duties of financial institutions. On the other hand, bank supervision has the opportunity to use public law sanctions and its instruments of investigation to specific consumer rights, especially where it is difficult in individual litigation to prove a certain systematic misbehaviour.

Such tendencies towards a more public approach to consumer protection can be seen in the further development of collective redress or group action in fair competition and standard contract term law. The strengthening of collective elements in consumer litigation through the right of consumer association to assist consumers in their litigation, or to get their claims assigned in order to litigate for them, will further provide opportunities for such institutions to support private consumer protection with public means.

### 4.3 Tasks and Powers

EU Member States have the following state supervisory institutions which may be distinct from each other either by branch or by function or, as far as banking is concerned, integrated into one central bank or, in a functional approach, integrated into one Financial Services Authority:

- (1) **Central Bank** in charge of money supply either as a branch of the ECB or with its own currency, providing market overview and systemic risk analysis (statistics), expertise for the government and the ECB, and certain clearing house functions.
- (2) **Financial Services Authority** providing prudential supervision to safeguard the safety and soundness of banking, which may be split internally into the following branches, which in turn could also act independently
  - **Bank Supervision** including credit extension and payment services with credit cards or clearing houses.
  - **Insurance Supervision** for risk insurance as well as capital life and pension plans
  - **Investment Supervision** including pension funds and the issuance of commercial papers (which may again be integrated into Bank Supervision)
- (3) **(Behavioural Supervision)** including conduct-of-business rules, compliance, fair competition and partly consumer rights and complaints. These functions should normally be allocated to one of the institutions mentioned above or to institutions which are not specific to financial services.

A **consumer protection agency in financial services** would have to enforce consumer rights in administrative as well as in private law and have the following requirements:

- **Legal expertise**
  - with administrative rules (prudential, codes of conduct, competition) which have a direct impact on individual consumer protection
  - with strict rules in private law protecting consumers (whether employed, unemployed or self-employed) or savers (including consumer investors and pensions) and debtors in financial services (credit, investment, payment and insurance)
  - with strict rules requiring true, fair, complete and understandable information to the above mentioned groups.
  - with data protection rules
- **Product supervision**
  - Monitoring products and assessing their impact on consumers
  - Warnings against dangerous products
  - Intervention for safety
  - Proposals of basic products
- **Inquiry**
  - Market surveys and investigations (attorney general functions)

- Collection and evaluation of consumer complaints
  - Directly from consumers
  - Indirectly via consumer organisations
  - Incidentally by offering arbitration services to consumers
- Supervision of private ombudsman schemes provided unilaterally by the supplier side
- **Enforcement**
  - Fines for systematic and especially administrative breaches of the law
  - Prosecutions jointly with the Attorney-General's Office in criminal matters
  - Participation in private consumer litigation where appropriate and in accordance with the consumer concerned.
  - Facilitating collective redress between consumer and supplier organisations
- **Financial Information**
  - Setting standards for forms, layout and accessibility of information
  - Providing leaflets helping consumers to understand, choose the right products and to exercise their rights before, during and after financial services have been used.
  - Providing a public, easily accessible database on the Internet which includes
    - all standard contract terms in Financial Services,
    - prosecuted infringements of suppliers
    - rules it has issued
    - codes of conduct from general agreements or unilaterally issued by financial institutions with regard to consumer protection.
    - consumer law
    - financial education schemes
- **Financial Education**
  - Financing research on financial education, its effects and contents from a long-term perspective for young people, adults and old people.
  - Supervising all kinds of private financial education for the public on the basis of a code of ethics
  - Organising exchange of best practice

#### **4.4 Requirements for an effective FCPA**

Unity in diversity is the option for the European Union to which financial services also contribute. From a consumer perspective, there is more at stake than the business of money, which follows management rules for greater effectiveness, liquidity, security and return. For consumers, credit is linked to debt and a culture of the productive use of credit. Savings are part of national ethics and religious beliefs and insurance belongs to a system of solidarity and mutuality which has developed quite different rules in the various Member States, which must be protected. Diversity is a resource for the future, which will need the ingenuity of many people and cultures as new problems arise.



#### 4.4.1 Goals

##### **(1)(Consumer Protection) FCPAs should be solely responsible for consumer protection.**

Although an FCPA is compatible with the other functions of behavioural supervision, consumer protection (including its sub-goals) must be its only objective. It is especially dangerous to assume that certain instruments necessarily lead to consumer protection or even consumer advantages and need no further justification.

- Fairness and responsibility are two leading principles of treating the consumer interest in the economy.
- Consumers should be protected from suffering damage, loss of assets and patrimony as well as from overindebtedness.
- Consumer information and consumer protection should be goals on an equal footing to safeguard consumers' opportunities in financial markets as well as consumers' wellbeing in society.

#### 4.4.2 Structure

Organisational questions need to be solved differently on a country by country basis. A number of factors could help the authorities determine the most appropriate structure, including the size of the markets, the level of innovation and sophistication of the markets, the business characteristics of the financial institutions active in the markets, the role played by the judicial system.

##### **(2)(Institutional Approach) The FCPA must have at least two subdivisions: banking and insurance.**

The four functions of financial services (investment / savings, credit, payment services and insurance) refer to at least two different markets with separate institutions: banks and insurance companies.

- Banks who still sell their products on their premises and on the Internet in an individualised automated way, in which one "buys" a service (credit, investment product, bank account) and pays the market price for it.
- Insurance companies who offer their services through brokers door-to-door or automated at point of sale with a participatory ideology in which consumers with fewer opportunities to take rational decisions "contribute to a system."
- Payment services are mostly sold by banks and should therefore be supervised in the banking department.
- Investment services are sold by both banks and insurance companies. They should be supervised in a joint project group of both departments which combines the specific knowledge necessary for such products with the different marketing forms employed by the two actors.

##### **(3)(Functional Approach) FCPA should include all "banking and insurance businesses" irrespective of whether they qualify as banks or insurance companies.**

A growing market of brokers in credit, investment and insurance needs its own, effective supervision because its incentive structure has created enormous threats to consumers in the form of payday loans, retirement investment and credit card services.

- Distributional channels with more than 100,000 agents, presence on the Internet and the broker's own outlets have partly reversed the traditional power relationship between principal and agent. The agent dictates product design, pricing and servicing for the principal when he offers his distribution channel and requires products designed for which allow for a maximum of commissions, and are easy to mis-sell.
- In some countries (UK, Ireland) loans are to a large extent sold by non-banks. This market needs a form of unified functional supervision which does not allow for less well-supervised small providers.

**(4)(Consumer Home Country Approach) FCPAs should oversee all Financial Services offered in the market they have to supervise, irrespective of whether it originates from a national or a foreign supplier.**

While prudential supervision follows the single passport (suppliers' home country) approach, according to the Rome II Treaty, consumer law and consumer protection is related to the domicile of the consumer. Supervision must take this approach where national law is applicable. To the extent that administrative rules must be observed, FCPAs should act as an active informant of the supervisory agency responsible for the supplier concerned and condemn supervision evasion through the arbitrary location of head offices.

**(5)(Consumer Approach) FCPA should focus on the social effects of financial services in retail banking and insurance.**

Confusing commercial investor protection with consumer protection, protecting speculators using leverage effects by financing risky investments in the same way as borrowers using credit for personal consumption imposes unnecessary restrictions on consumer protection. It is true that wealth contributes to solving consumer problems. But this does not turn the necessary protection of market opportunities for all into consumer protection. The focus should therefore be on

- Savings and Investments where future consumption is a priority: savings, investment and insurance products used for education, the acquisition of a home, the purchase of a car, or to provide secure income in old-age. Large investments are in themselves a supply of financial services to others, and should not be treated as requiring consumer protection. (Courts distinguish consumer credit from investment credit by its size and by whether the finance amount requires professional administration)
- Consumer Credit: e.g. personal loans, car loans, credit cards, payday loans, overdrafts, housing loans and "financed savings"

- Bank accounts and other payment services including all kinds of money transfers by migrants to their home countries.
- Retail insurance, irrespective of whether linked to other financial services (savings, credit or payment services)

**(6)(Integration) Integrated supervision is necessary to cover linked products.**

More and more products integrate, cross-sell or link products with another function.

- The supervisor for the main function should be responsible for its effects, while the help of the supervisor for the dependent function provides the professional skills.
- Cross-selling partly follows consumer needs to transport money across time and place and to cover certain risks combined in each financial service. But it also provides opportunities for lack of transparency, mis-selling and coercion, where the flexibility in one product is inhibited by the other.

**(7)(Independence) A three peaks system of supervision should create firewalls to avoid internal conflicts of interest and the exclusion of suppliers from any form of intervention.**

Conflicts of interest and dependency on suppliers' expertise and money restrict effective supervision.

- Conflicts of interest hinder prudential supervision where central bank functions dominate.
- The same occurs for individual bank behaviour where fair competition, ethics, professional rules *and* consumer protection are at stake. A second firewall is needed to protect such supervision from the other two peaks.
- The third peak, and its consumer protection department in particular, should be financed through taxes which may be levied from providers, but should benefit from the independence of the tax authorities in order to exclude undue influence and false ideologies.

#### **4.4.3 Performance**

**(8)(Equipment) FCPAs should be staffed and equipped in relation to market size, complaints and suppliers.**

Just to label existing institutions, councils and 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. Declarations, White Books and Green Papers are not enough.

**(9)(Effectiveness) FCPAs should be effectively evaluated.**

The present situation as outlined in the third chapter provides evidence for an important rhetorical recourse to consumer protection. But the financial crisis has revealed that financial supervision had an insignificant effect in terms of preventing consumer detriment.

- The existence of councils, advisory boards, expert groups, user groups etc. and even papers, expertise and statements does not prove that consumer protection is an active part of bank supervision. It is only if such expertise is embedded into an FCPA, whose link to consumer organisations and activists guarantees permanent pressure to monitor the financial system with regard to these stakeholders makes increased awareness of the consumer interest feasible.
- In assessing the quality of supervision with regard to consumer protection measures, the following grid helps with the assessment of supervisory effectiveness and analysis of better and worse examples from the Member States.

Favourable	Shortcomings
Fast collection and dissemination of information on consumer problems	Negative effects are allowed to persist for long periods of time
Authorities react promptly with sanctions	Liability for Supervisor mistakes can lead to personal prosecution
Authorities react promptly with legal or regulatory solutions	

**(10) (Efficiency and Power) The FCPA should have effective enforcement mechanisms which cover administrative as well as private law.**

Special legal consumer procedures (comparable to labour law), which are low-cost and easy to access, which include mediation as well as group actions, would lead to efficient and powerful representation of the consumer interest. While such initiatives could be initiated and substantively supported by FCPAs (with evidence and expertise), the involvement of consumer associations in any such efforts would ideally be necessary.

- Law enforcement comprises (a) public sanctions such as punishment for criminal behaviour, denial or withdrawal of a necessary licence, administrative fines for misbehaviour, orders to change behaviour, or (b) private sanctions such as strict liability for misbehaviour, voiding of contracts and consumer obligations (usury, forced errors, misrepresentation) as well as injunctions either through group actions, public (private attorney general approach) or individual court or mediation procedures.
- Because consumers, including consumer organisations, should be involved to safeguard effectiveness, the enforcement system should be easy to access, low-cost for the consumer side and produce tangible gains for these stakeholders.
- This favours specific procedures under private law starting at a low-cost informal level (mediation, consumer ombudsman)

and leading to formalised procedures with group actions and individual gains.

**(11) (Consumer competence) FCPAs should have specific authority to deal with empirically verifiable consumer problems.**

FCPAs should know the entire supplier – consumer relationship through investigation, data collection, consumer complaints and research.

- FCPAs should be able to mandate investigations 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.
- The effect of products, marketing practices and legal rules on vulnerable consumers with difficulties in representing their own interests should be monitored with special attention. Prevention of overindebtedness and poverty should be made an explicit goal of FCPAs.
- Empirical consumer research should be obligatory at the request of consumer organisations, the courts and government.
- A permanent household survey and infrastructure similar to the Dutch Nibud system should be able to assess instantly what effects certain proposed state measures, new marketing methods and products would have on different types of consumer households. It would help deputies in parliament to assess the cost of deregulation or reregulation for society.
- Research should be focused on understanding and mitigating misaligned incentives with regard to the interests of the end-consumer of the transaction.

**(12) (Networking & EU Coordination) The FCPAs should actively seek the confidence of existing consumer networks in financial services by supporting their work and benefiting from their knowledge and expertise in problems involving consumer financial services. Their efforts should be subject to coordinated action at EU level.**

Any administrative body is as good as it is embedded into the existing control and enforcement structures. Such structures should be actively supported and built up through the FCPAs also within civil societies.

- The FCPAs must collaborate closely firstly within their own department for behavioural supervision, which in turn will cooperate with prudential supervision and the central bank.
- The FCPAs should create advisory boards, where the most important stakeholder groups have a qualified right to propose action and can exercise controls comparable to a board of trustees.
- The EU Member State 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 the supervision of financial activities. Together with

the two points above, key stakeholder involvement should be facilitated. Such groups are:

- The Financial Consumer Protection Network (FINCONET), formerly known as the International Forum for Financial Consumers.<sup>107</sup> FinCoNet has between 20 and 40 national members, operates an email system for sharing information and holds occasional meetings.
- BEUC the European Consumer Organisation.
- The Coalition for responsible credit/BankWatch
- Money advice associations, welfare and debt advice organisations
- Banking trade unions
- Independent consumer research institutes

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<sup>107</sup> <http://www.consumersinternational.org/media/505426/financial%20services%20briefing%205%20-%20international%20cooperation.pdf>.

**Table 40: Summary box of the 12 recommendations/features of a FCPA**

<p><b>Consumer Protection</b></p>	<p><u>Goals</u> (1) FCPAs should be solely responsible for consumer protection.</p>
<p><b>Institutional Approach</b></p>	<p><u>Structure</u> (2) The FCPA must have at least two sub-divisions: banking and insurance.</p>
<p><b>Functional Approach</b></p>	<p>(3) FCPA should include all “banking and insurance businesses” irrespective of whether they qualify as banks or insurance companies.</p>
<p><b>Consumer Home Country Approach</b></p>	<p>(4) FCPAs should oversee all Financial Services offered in the market they have to supervise, irrespective of whether it originates from a national or a foreign supplier</p>
<p><b>Consumer Approach</b></p>	<p>(5) FCPA should focus on the social effects of financial services in retail banking and insurance.</p>
<p><b>Integration</b></p>	<p>(6) Integrated supervision is necessary to cover linked products.</p>
<p><b>Independence</b></p>	<p>(7) A three peaks system of Supervision should create firewalls to avoid internal Conflicts of Interest and the exclusion of suppliers from any form of intervention.</p>
<p><b>Equipment</b></p>	<p><u>Performance</u> (8) FCPAs should be staffed and equipped in relation to market size, complaints and suppliers.</p>
<p><b>Effectiveness</b></p>	<p>(9) FCPAs should be effectively evaluated.</p>
<p><b>Efficiency &amp; Power</b></p>	<p>(10)The FCPA should have effective enforcement mechanisms which cover administrative as well as private law.</p>
<p><b>Consumer Competence</b></p>	<p>(11)FCPAs should have specific authority to deal with empirically verifiable consumer problems.</p>
<p><b>Networking &amp; EU Coordination</b></p>	<p>(12) The FCPA should actively seek the confidence of existing consumer networks in financial services by supporting their work and benefiting from their knowledge and expertise in problems involving consumer financial services.</p>

## **5 Annex**

### **5.1 Separate document "Annex: Country Reports"**

Please refer to the separate Annex report (of about 200 pages) for details on the EU Member States, country by country. The information contained in the "Annex: Country Reports" is primarily compiled from answers received from national supervision authorities who kindly participated in the research. Their answers will reflect their perspective on the subject of this study and qualitative statements in the document may be a subjective view reflecting their interpretation of their country and their own supervisory efficiency with respect to consumer protection. Such an auto-evaluation in the form of a questionnaire does not necessarily provide an assessment in line with the views of other stakeholders in that country such as the consumer organisations themselves.

### **5.2 Methodology**

The timing of this study coincides with the work of regulators and supervisors to complete transposition and work on prudential regulations before the end of 2010. As a result, responses were not always forthcoming due to this busy regulatory period concerning national and EU initiatives e.g. capital requirements, covered bonds, consumer credit and banking law amendments etc. With this in mind, we would like to especially thank all those financial supervisors that took the time to contribute to our study, which was conducted between November 2010 and February 2011.

In this section is a short description of the method used for this research.

Iff maintained contact with BEUC throughout the research. BEUC was involved in the initial phase of the study in contacting consumer associations for their initial views on the subject.

A short email with 5 general questions was sent to various consumer bodies in all of the EU member states. The aim was to collect the initial impressions and general views on financial supervision from consumer representatives. These included:

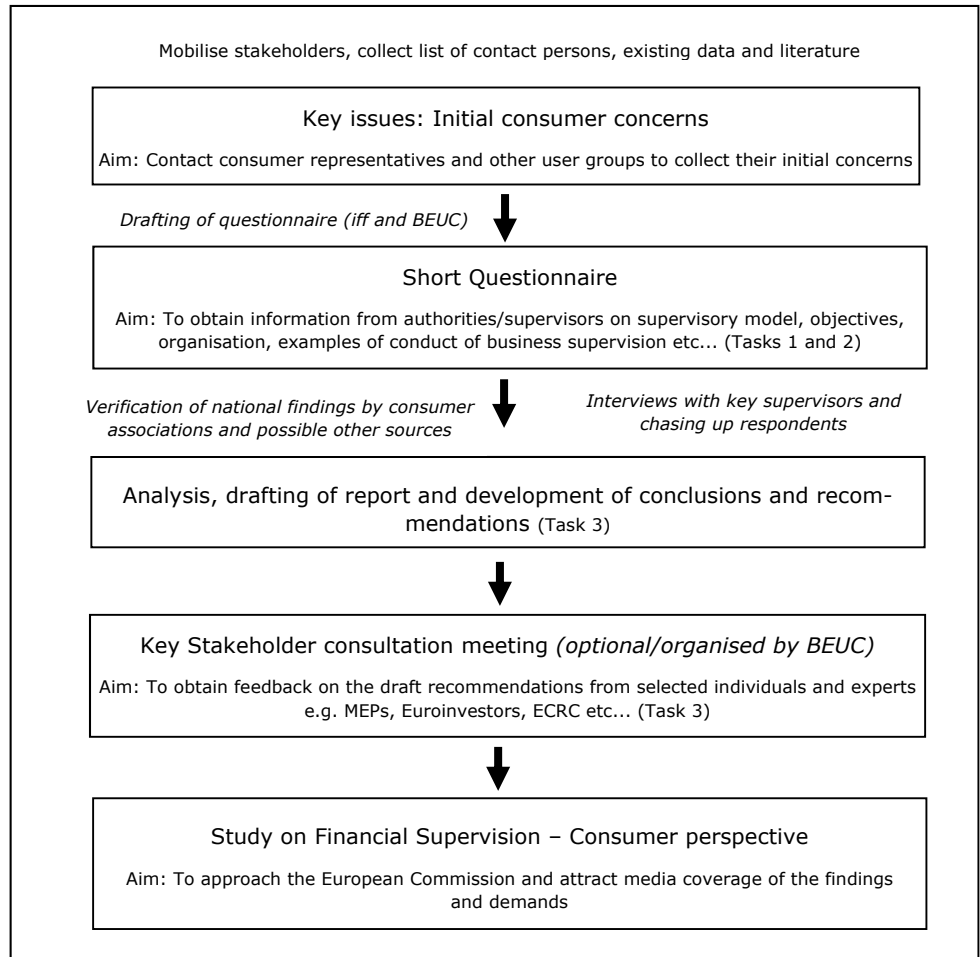
- 1) Is there sufficient supervision of financial services for consumers in your country?
- 2) In 2009, what problems with financial services did you observe (please give examples of these problems, and indicate where possible the number of persons affected by these problems)
- 3) Does your organisation have an opinion on ways to improve the situation for consumers with regard to supervision? (please give examples of what does and does not work and where supervisory action is missing)
- 4) Other views you would like to share for the study:

The preliminary results led to the drafting of the research questionnaire for the supervisors, which did not include government officials and other relevant but not directly concerned stakeholders.



The design of the questionnaire survey for national supervisors can be seen in the next item in the Annex.

Member States (MS) that the study aimed to look at particularly closely at the outset were: the UK, France, Germany, the Netherlands as well as a Scandinavian Member States. However, the final country coverage was widened to include an almost full EU wide representation. The flow chart on the following page shows the initial plan which included the idea of involving the organisation of a feedback meeting on the draft recommendations with key stakeholders and experts.



### 5.3 Questionnaire for Supervisors

#### Study on Financial Supervision and consumer protection

##### Survey for supervisors

**Purpose:** BEUC is the main European consumer umbrella organisation. It advises the European Commission on consumer issues. *iff*, an independent non-for-profit research institute linked to the University of Hamburg has been mandated by BEUC to provide a report to help understand the variations in financial supervision (of a non-prudential nature) across EU countries with regard to consumer issues. BEUC is interested in models of supervision and will use your answers for best practices of tasks and structures for enforcement of consumer protection in financial services.

**Contractors:** Institute for financial services e.V., Hamburg (Prof. Udo Reifner and Sebastien Clerc-Renaud).

##### Basic guide to the Questionnaire

<b>Replies</b>	Please return the completed questionnaire before <b>7 January 2011</b> by email to <a href="mailto:sebastien.clerc@iff-hamburg.de">sebastien.clerc@iff-hamburg.de</a> . For queries call +49 040 30 96 91 24 at the institut für finanzdienstleistungen e.V., Rödingsmarkt 31/33, D-20459 Hamburg.
<b>Extent of the survey</b>	With this survey, your participation will help inform us on the following areas: providing an overview of common supervisory models, objectives and powers with regard to consumer protection and conduct-of-business supervision; analysing any difference in practical implementation of supervisory tasks by the different supervisory authorities; highlighting the differences in Member States with regard to their resources and monitoring activities. The study is concerned with the monitoring and enforcement of the regulations pertaining to the interaction between the financial institution and their customers. When answering, please remember that we are neither concerned with details of your agency's work with regards to solvency and liquidity issues, nor with the subject of control over risk management with the exception of reputational risk arising from perceived or real detrimental treatment of consumers.
<b>Structure of questions</b>	<ul style="list-style-type: none"> <li>• <b>Part A: Institutional structure and objectives</b> (Qu.1-9): description of what objectives have been explicitly given to your authority and your consumer protection mandates;</li> <li>• <b>Part B: Activities and supervision in the practice</b> (Qu.10-16): description of your activities, policies and practices with regard to consumer protection. The frequency of your investigations, market research studies and other measures undertaken to ensure adequate market outcomes for consumers of financial services;</li> <li>• <b>Part C: Institutional powers</b> (Qu.17-26): description of the ability and usage of your agency's sanctioning powers and other powers exercised in your jurisdiction;</li> <li>• <b>Part D: Operational capacity</b> (Qu.27-35): description of your resources, staffing, and consumer representation;</li> <li>• <b>Part E: Views and ideas</b> (Qu.36-42): your assessment and opinions on possible improvements to the existing supervisory structure;</li> <li>• <b>Part F: Your details as respondent</b> (Qu.43-48): information on your authority with regards to its status and the institutions supervised.</li> </ul>
<b>Thank you</b>	We appreciate your valuable contribution to the study and will include you in our list of contributors in our report. Please include links to material and sources; give answers in English (attachments can be in your native language); remember to specify the scope in your answers (e.g. for a given financial sector); and let us know if you wish part of your response to remain confidential.

## Definitions and examples

<b>Supervision (Oversight)</b>	Defined as the act of overseeing the performance or operation of a person or group. Financial supervision is concerned with the monitoring and enforcement of regulations of financial services markets, whether on products, services, or financial institutions. Supervision is one of the main pillars of oversight, along with: regulation (the rule book), governance and market discipline. Also referred to as inspection, superintendence or oversight, related words include: accountability, administration, conduct, direction, discipline, governance, political organisation, polity, regime, regulation, responsibility, rule, surveillance, system of government.
<b>Consumer protection (conduct-of-business)</b>	The focus of consumer protection is on the relationship and interaction between a retail customer and a financial institution. Consumer protection regulation is sometimes referred to as business conduct regulation to help distinguish it from prudential regulation, which has an element of indirect consumer protection through the bank deposits it is aiming to protect when providing for solvent financial institutions. It concerns information as well as strict protection.
<b>Financial Standards in consumer protection</b>	Though the scope of this survey has no established equivalent in terms of regulatory principles, based on the IMF's four-component framework the area of greatest relevance is "Financial Integrity and Safety Net" covering i) Markets (integrity and financial crime); ii) customer protection; iii) Information, disclosure and transparency. Thus including the following core principles: BCP 15 and 21; ICP 11 and 16; IOP 14,15,16,19,24,26,28 and 30.
<b>Non-prudential!</b>	<b>Non-prudential supervision</b> is by definition concerned with enforcement of regulation and monitoring of financial institutions and markets that is NOT related to: <u>Micro-prudential supervision</u> has as main objective to supervise and limit the risk of distress in individual financial institutions. By preventing the failure of individual financial institutions, micro-prudential supervision attempts to protect the clients of the institutions and prevent (or at least mitigate) the risk of contagion and the subsequent negative externalities in terms of confidence in the overall financial system. <u>Macro-prudential supervision</u> focuses on limiting risks to the financial system as a whole that may arise from broad developments in the economy (e.g., excessive domestic credit expansion). While risks to the financial system can in principle arise from the failure of one financial institution alone if it is large enough in relation to the country concerned and/or with multiple branches/subsidiaries in other countries, the much more important systemic risk arises from a common exposure of many financial institutions to the same risk factors. Analysis therefore must pay particular attention to common or correlated shocks and to shocks to those parts of the financial system that trigger contagious knock-on or feedback effects. Obviously it should also focus on any other contagion mechanisms that could be a source of systemic risk, like inter-linkages between financial institutions and overreactions provoked by imperfect information.
<b>Legal texts</b>	When answering the questions, you are invited to bear in mind the relevant EU directives regulating your areas of supervision (CCD, UCPD, MiFID etc.) and specifying the exercise of your supervisory powers.
<b>Organisational units</b>	When first defining your institution, please indicate your preferred term used to refer to your organisation and operational units dealing with consumer issues: e.g. office, unit, department, agency, body etc.
<b>Institutional types</b>	Monitoring and enforcement can be conducted by any of the following: Financial supervisory agency, consumer protection agency, the finance ministry, the ministry of economy, central bank, members of parliament, the president's office, professional associations, chambers of commerce, non-governmental consumer organisations, civil courts, consumer courts, consumer ombudsmen (official or private), police, fair trading offices, cartel offices, general enterprise supervision, attorney general etc.
<b>Financial sectors</b>	Credit markets (mortgage credit, non-mortgage credit), savings, capital investment and securities, pensions, insurance, payment systems including bank accounts.

PART A: Institutional Structure and Objectives			
1.	Is consumer protection an <b>explicit goal</b> of your agency (i.e. part of your authorising legislation)?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please give details: <input type="text"/>	
2.	How would you <b>define consumer protection</b> in general (1) and in the light of your supervisory functions (2)? (Please provide a ranking for each of the 7 arguments indicating the order of importance: 1, 2, 3 etc.)	(1) Own definition: <input type="text"/> (2) Consumer protection... <input type="checkbox"/> <b>Select</b> ...provides transparent, exhaustive and correct information to consumers to be able to make their own informed decisions. <input type="checkbox"/> <b>Select</b> ...regulates products and marketing strategies to prevent unsafe and damaging effects to consumers in financial markets. <input type="checkbox"/> <b>Select</b> ...provides equal opportunities to all consumers especially to the poor. <input type="checkbox"/> <b>Select</b> ...prevents over-indebtedness, exclusion, old age poverty. <input type="checkbox"/> <b>Select</b> ...secures for fair competition and functioning markets in financial services. <input type="checkbox"/> <b>Select</b> ...limits economic power with regard to consumer needs. <input type="checkbox"/> <b>Select</b> ...guarantees a general framework in which others can provide individual consumer protection. <input type="checkbox"/> <b>Select</b> Other definition (please specify): <input type="text"/>	
3.	Please describe your <b>supervisory approach</b> in consumer protection	<input type="text"/>	
4.	Is your exclusive role <b>monitoring compliance</b> ?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please give details (e.g. any regulatory work): <input type="text"/>	
5.	Please indicate your <b>supervisory objectives</b> from the table below: by (i) ticking the boxes where the statement represents an explicit mandate for your authority; and (ii) identifying the source for each. If the source is not law or regulation, please specify in the last column whether it is binding or not.		
	<b>Elements of your mandate</b>	<b>Yes</b> <b>No</b> <b>Not fully</b>	<b>Legal Source</b> <b>Specify/Explain</b>
	Ensuring <b>compliance</b> with consumer protection measures	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>
	Promoting the <b>adoption by financial institutions</b> of policies and procedures designed to implement consumer protection measures	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>
	Protecting clients from <b>misconduct</b> and/or bad business practices	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>
	Ensuring <b>institutional participation</b> of consumer organisations in your decision making or advice received	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>
	Ensuring comprehensive transparency of official decision making processes and <b>access to documents</b>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>
	Promoting <b>access</b> to banking services (e.g. by low income individuals)	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>
	Promoting supervisory <b>cooperation</b> and convergence of EU supervisory practices	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="text"/> <input type="text"/>



	Monitoring if financial institutions follow their own voluntary <b>codes of conduct</b> and respect public commitments they have made to protect the interests of consumers	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Promoting consumer <b>awareness</b> of the obligations of financial institutions	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Fostering an <b>understanding</b> of financial services and related issues	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Monitoring and evaluating <b>trends</b> and emerging issues that may have an impact on consumers of financial services	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Promoting <b>competition</b>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Other mandates: <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Other mandates (please specify and also indicate the reasons): <input type="checkbox"/> Maintaining financial stability <input type="checkbox"/> Ensuring compliance with banking regulation <input type="checkbox"/> Ensuring compliance with securities regulation <input type="checkbox"/> Preventing financial crime including anti-money laundering/combating financing of terrorism Please elaborate on your answers here: <input type="checkbox"/>			
6.	What <b>particular remit</b> does your agency have with regard to consumer protection?	<input type="checkbox"/> Professional compliance to fair commercial practices <input type="checkbox"/> Professional compliance to use of fair contract terms <input type="checkbox"/> Controls of methods of marketing (e.g. misleading advertising) <input type="checkbox"/> Transaction transparency <input type="checkbox"/> Consumer credit issues <input type="checkbox"/> Retail investment issues <input type="checkbox"/> Personal integrity of personnel <input type="checkbox"/> Prevention of criminal behaviour Please elaborate: <input type="checkbox"/>		
7.	Do you receive <b>enquiries/complaints</b> from consumers?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please give numbers per year and dominating subjects: <input type="checkbox"/>		
8.	Do you have an established <b>structure to respond to consumers</b> with an answer when they complain about a provider?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please list other organisations that are in charge of consumer complaints: <input type="checkbox"/>		
9.	Can you make binding decisions for any of the parties involved in case of <b>consumer complaints</b> ?	<input type="checkbox"/> Yes <input type="checkbox"/> Yes, for all <input type="checkbox"/> No <input type="checkbox"/> Don't know Please give details (including its effects): <input type="checkbox"/>		
<b>PART B: Activities and supervision in practice</b>				
10.	Please provide <b>numerical data</b> for the specific activities and market intelligence gathering initiatives your agency has conducted in the year <b>2009</b> (monitoring markets, field work, research, priorities etc. whether conducted directly or through a third-party): Be aware that the next question deals with concrete examples, only answer quantity questions here!			
	<b>How many...</b>	<b>Quantity</b>	<b>Details of the breakdown (specific field, scope etc.)</b>	
	<i>[illustrative answer to help respondent]</i>	2	1 Bank accounts (20 tests); 1 Financial advice for long-term investment decisions (50 tests);	

	Tests on the accuracy, simplicity, comparability of pre-contractual information ( <b>ex-ante</b> )	<input type="checkbox"/>	<input type="checkbox"/>
	Tests on the accuracy, simplicity, comparability of information after purchase ( <b>ex-post</b> )	<input type="checkbox"/>	<input type="checkbox"/>
	Checks for compliance with fair, non-misleading <b>advertising practices</b>	<input type="checkbox"/>	<input type="checkbox"/>
	Checks for compliance with fair, non-coercive and reasonable <b>selling practices</b>	<input type="checkbox"/>	<input type="checkbox"/>
	Checks for <b>responsible lending practices</b> (i.e. analysis of repayment capacity in the extension of credit)	<input type="checkbox"/>	<input type="checkbox"/>
	Tests of <b>suitability requirements</b> when advice or recommendations are offered	<input type="checkbox"/>	<input type="checkbox"/>
	<b>Onsite inspections</b> (please also indicate if there was a manifested need to make more inspections)	<input type="checkbox"/>	<input type="checkbox"/>
	<b>Mystery shopping</b> exercises	<input type="checkbox"/>	<input type="checkbox"/>
	<b>Market studies</b> in relation to consumer protection issues	<input type="checkbox"/>	<input type="checkbox"/>
	Own agency <b>policy statements</b> and opinions	<input type="checkbox"/>	<input type="checkbox"/>
	Thematic <b>consultations</b>	<input type="checkbox"/>	<input type="checkbox"/>
	Tests of correct <b>APR</b> calculation in disclosure	<input type="checkbox"/>	<input type="checkbox"/>
	Cases of disputes over entries in <b>credit registers</b>	<input type="checkbox"/>	<input type="checkbox"/>
	Please elaborate on each of your answers here: <input type="checkbox"/>		
<b>11.</b>	Please provide <b>concrete examples</b> for each of the following activities which your agency has been responsible for in the year <b>2009</b> : (please specify sector the example is from e.g. banking, credit, investments etc.)		
	<b>Examples of functions fulfilled</b>	<b>Examples: Description, details, links etc.</b>	
	<i>[illustrative answer to help respondent]</i>	1) Results of mystery shopping tests conducted with 50 providers revealed that x was not being adhered to as stipulated by law. See: <a href="http://www.example.eu/...">www.example.eu/...</a> For copy of the report. Press interest led to y which caused z to open a consultation on the issue 2) etc..	
	<b>Compliance</b> with consumer protection laws and regulations	<input type="checkbox"/>	
	Monitoring financial institution compliance with voluntary <b>codes of conduct</b> (and their own public commitments)	<input type="checkbox"/>	
	<b>Product transparency</b> : e.g. deceptive advertisements, unfair contract terms, excessive small print, complicated terms, inadequately trained staff etc.	<input type="checkbox"/>	
	<b>Overcharging</b> : e.g. extra fees and commissions, hidden fees on bank accounts etc.	<input type="checkbox"/>	
	<b>Sales practices</b> : e.g. aggressive sales techniques (door-to-door solicitations or limited-time offers)	<input type="checkbox"/>	
<b>Wrong advice</b> : e.g. misselling of investment products	<input type="checkbox"/>		

	<b>Consumer education</b> in the financial sector: e.g. materials published by your agency (guides/tools to help consumers understand and shop around)	<input type="checkbox"/>
	<b>Recourse:</b> e.g. informing consumers about their rights to complain, how and where to complain and receive appropriate redress	<input type="checkbox"/>
	<b>Data privacy:</b> e.g. mistreatment of personal data	<input type="checkbox"/>
	<b>Initiatives</b> that have helped to improve the balance of power in the relationship between financial institutions and consumers	<input type="checkbox"/>
	<b>Qualitative assessments</b> on regulatory issues e.g. on mitigating conflicts of interest in mandates	<input type="checkbox"/>
	Fast <b>collection and dissemination</b> of information on consumer problems	<input type="checkbox"/>
	Other: e.g. inadequate documentation (no copies of contracts), abusive debt collection etc.	<input type="checkbox"/>
	Please give any other examples and elaborate on each of your answers here: <input type="checkbox"/>	
12.	What does your agency do with consumer <b>complaints</b> ?	<input type="checkbox"/> Register/record them <input type="checkbox"/> Respond to them <input type="checkbox"/> Directly assist in resolution of complaints <input type="checkbox"/> Indirectly assist in resolution by passing complaints on to the respective authorities <input type="checkbox"/> Publish statistics on them Please explain: <input type="checkbox"/>
13.	What concrete main <b>legal or regulatory changes</b> affecting consumers have you been responsible for in the past 2 years?	<input type="checkbox"/>
14.	Do you issue an <b>annual report</b> ?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know If yes, for whom? <input type="checkbox"/> and is it available to the public? <input type="checkbox"/> Yes <input type="checkbox"/> No Link (in English if possible): <input type="checkbox"/>
15.	What do you report on in your <b>annual report</b> ?	<input type="checkbox"/> Our activities <input type="checkbox"/> Our operations <input type="checkbox"/> Legislative framework for consumer protection <input type="checkbox"/> Performance of financial institutions in complying with consumer protection provisions <input type="checkbox"/> Procedures that financial institutions have in place for dealing with complaints <input type="checkbox"/> Number and nature of complaints that have been brought to your attention <input type="checkbox"/> Other <input type="checkbox"/> No report published Please give details: <input type="checkbox"/>
16.	Does your agency produce a <b>business plan</b> outlining how it will develop and implement new initiatives to further strengthen its framework for consumer protection?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please explain: <input type="checkbox"/>

PART C: Institutional powers and their use		
17.	Which of the following <b>powers</b> does your agency have? The ability to...	<input type="checkbox"/> ...address a complaint to the complainant <input type="checkbox"/> ...address a complaint to the firm <input type="checkbox"/> ...refer a complaint to another agency <input type="checkbox"/> ...start a legal action in court <input type="checkbox"/> ...initiate criminal procedures <input type="checkbox"/> ...fine delinquents <input type="checkbox"/> ...initiate and execute investigations Please elaborate: <input type="text"/>
18.	In case of <b>non-compliance</b> with consumer protection legislation and rules, which of the following actions can you take to <b>impose sanctions</b> ?	<input type="checkbox"/> Notify the firm of a violation <input type="checkbox"/> Seek a remedial commitment from the firm <input type="checkbox"/> Impose criminal sanctions <input type="checkbox"/> Orders for institute directors <input type="checkbox"/> Withdrawal of the license <input type="checkbox"/> Demand withdrawal of director <input type="checkbox"/> Prohibition of certain professional activities <input type="checkbox"/> Impose a pecuniary sanction (monetary penalty) <input type="checkbox"/> Other actions Please specify when these actions are taken and provide a recent example (e.g. if based on the severity and frequency of the problem): <input type="text"/> <input type="checkbox"/> We are unable to take any actions (please identify which body has the power to take sanctions): <input type="text"/>
19.	List the 3 <b>most effective sanctions</b> in consumer protection?	1) <input type="text"/> 2) <input type="text"/> 3) <input type="text"/> Please elaborate: <input type="text"/>
20.	How are <b>sanctions</b> and/or <b>complaints made public</b> ?	<input type="checkbox"/> In some cases only <input type="checkbox"/> Systematically <input type="checkbox"/> On a named basis <input type="checkbox"/> Without naming providers <input type="checkbox"/> Not at all <input type="checkbox"/> Don't know Please elaborate on the legal or administrative procedures/practices underpinning publication of sanctions (e.g. obligation of professional secrecy, disclosure on anonymous basis in Annual Report): <input type="text"/>
21.	What is the <b>maximum amount</b> for a pecuniary sanction that your agency is allowed to impose for breach of consumer protection rules (in EUR)?	<input type="text"/>
22.	Can staff at a financial institution be punishable on a <b>personal basis</b> following a case of wrong-doing?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please explain: <input type="text"/>
23.	Data on recent sanctions which your agency has imposed on providers:	
		<b>2008</b> <b>2009</b>
	<b>Number of sanctions</b> , relating to a breach of consumer protection related rules, that have been taken	<input type="text"/> <input type="text"/>



	Among those sanctions, how many were <b>pecuniary sanctions</b> (i.e. fines)?		
	What have been the <b>lowest</b> and <b>highest</b> pecuniary sanctions (in EUR or equivalent EUR) taken by your institution? (Please indicate the motivations behind them e.g. non-compliance with which legal provisions)		
	What is the <b>ratio of sanctions disclosed</b> to the public over the total number of sanctions?		
	What have been the more penalising <b>non-pecuniary</b> sanctions taken by your institution?		
<b>24.</b>	By whom and how are the following powers exercised in your country?		
	<b>Does your agency have the power to:</b>	Yes <input type="checkbox"/> No <input type="checkbox"/> Not fully <input type="checkbox"/>	Directly/by delegation of task/by delegation of responsibility D DoT DoR
	Which other body has this power within your jurisdiction?		Under what circumstances can this power be exercised/measure be taken?
	Make rules directly affecting consumer protection	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Make any other rules	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Issue guidance	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Allow for a range of swift regulatory responses to on-going situations	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Allow for a range of swift regulatory responses to emergent situations	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Mount and fund substantial legal actions	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Give individual advice to consumers	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
	Please elaborate on each of your answers here: <input type="text"/>		
<b>25.</b>	In your country, if appropriate, please describe your financial <b>ombudsman system</b>	<input type="checkbox"/> Private exists <input type="checkbox"/> Public <input type="checkbox"/> No such agency exists	Please explain: <input type="text"/>
<b>26.</b>	In your country, which <b>public agencies</b> other than your own look after consumer protection in the area of financial services?	<input type="text"/>	
<b>PART D: Operational capacity</b>			
<b>27.</b>	What is the <b>source</b> of your agency's <b>funding for consumer protection activities</b> ?	<input type="checkbox"/> The financial institutions that you monitor <input type="checkbox"/> Government <input type="checkbox"/> Other	Please explain criteria for financing: <input type="text"/>
<b>28.</b>	How large are the <b>finances available</b> for your agency to carry out these operations in the field of consumer protection (in 2009 in Euros)	All operations: <input type="text"/> Consumer protection operations: <input type="text"/>	Please explain: <input type="text"/>
<b>29.</b>	Approximately how many <b>members of staff</b> (number/percentage) does your agency employ to conduct supervision of consumer protection?	All operations: <input type="text"/> Operations linked to consumer protection: <input type="text"/> Consumer protection operations only: <input type="text"/>	Please explain: <input type="text"/>

30.	What is the broad distribution of these employees in terms of <b>qualifications</b> ?	[Lawyers, economists, social scientists, administrative staff, no specific qualification, experience in consumer advice, experience in financial institutions etc.] [Redacted] Specialists (i.e. hired because of their experience or specific skill-set): [Redacted]
31.	How much <b>advanced training</b> in the field of consumer protection has the staff of your agency received in the year 2009?	Number of trainings (hours/days): [Redacted] Number of people trained: [Redacted] Issues covered in the sessions: [Redacted]
32.	How large in terms of staff is the operational unit dealing exclusively with <b>consumer complaints</b> relating to financial and/or investment services issues?	All operations: [Redacted] Consumer protection operations (credit): [Redacted] Consumer protection operations (investment): [Redacted] Please explain: [Redacted]
33.	How does your agency's reporting structure <b>mitigate risk of conflicts of interest</b> ? Please provide us with an organisational chart showing the departments within your agency.	[Please take the following items into account: exclusion of staff linked to the supplier side; has worked with suppliers, return to supplier side, links to consumer organisations, special careers, training through consumer advocates, etc.] [Redacted]
34.	How does <b>consumer representation</b> feature in the workings of your agency? Via...	<input type="checkbox"/> ...the board of directors <input type="checkbox"/> ...an advisory council <input type="checkbox"/> ...a supervisory council <input type="checkbox"/> ...direct consultation with consumer organisations <input type="checkbox"/> ...direct consultation with individual consumers <input type="checkbox"/> Not represented <input type="checkbox"/> Don't know <input type="checkbox"/> Other Please specify who exactly and describe the composition of board/council: [Redacted]
35.	Has your agency staff taken part in <b>international network meetings</b> on consumer protection issues in 2009?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please specify how these are useful: [Redacted]
<b>PART E: Views and Ideas</b>		
36.	How do you <b>assess</b> the current level of supervision with respect to consumer protection in your country?	Scale: 1 (not satisfactory) to 3 (very satisfactory): <b>Select</b> If less than satisfactory, please give examples of instances where consumers were not served in an optimal way, and indicate if and what measures are being considered to improve the situation: [Redacted]
37.	Are there talks or initiatives of <b>separating</b> prudential supervision from consumer protection tasks?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please explain: [Redacted]
38.	Which <b>additional powers</b> could help you improve consumer protection?	[Redacted]
39.	Please describe the level of <b>discussion</b> by your agency in the area of <b>class action</b> lawsuits?	<input type="checkbox"/> High <input type="checkbox"/> low <input type="checkbox"/> Non-existent <input type="checkbox"/> Don't know Please elaborate on the extent that provider considerations are taken into account in such discussions on facilitating the initiation of such class actions: [Redacted]
40.	Which <b>fields</b> of consumer protection <b>should be more extensively covered</b> by the authorities in the future?	Please indicate if you would need additional resources to deal with supervision and complaints by consumers of the financial sector: [Redacted]

<b>41.</b>	Is the issue of <b>supervising groups</b> with cross-sector and cross-border operations relevant with regard to consumer protection?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know Please explain: <input style="width: 50px;" type="text"/>	
<b>42.</b>	Please say if you agree or disagree with following statements:		
		<b>for banking and credit</b> Agree Disagree	<b>for investments insurance etc.</b> Agree Disagree
<b>The regulatory/supervisory body for consumer protection ...</b>			
	...exists and performs well	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...lacks sufficient practical impact	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
<b>Consumer protection should ...</b>			
	...be used to collect information and signals from complaining consumers for prudential supervision	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...be made more effective to help attaining prudential goals	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...be separated from prudential supervision	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...have better regulation to get better enforcement	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...be better advertised to the public as being part of your area of supervision	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...needs a specialised forum	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
<b>Obstacles for more and better consumer protection supervision are...</b>			
	...liability of your agency to individual consumers	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...the duty to keep names of providers secret	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...the lack of an explicit and clear mandate	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...the multiplicity of agencies involved	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	...too little effective sanctions especially with regard to large firms	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	Please elaborate on your answers: <input style="width: 100px;" type="text"/>		

**PART F: Your details as Respondent**

<b>43.</b>	Your country	<input type="checkbox"/> Country A-K <input type="checkbox"/> Country L-Z	
<b>44.</b>	Supervisory authority's name Your name, position, contact details	<input style="width: 100px;" type="text"/>	
<b>45.</b>	Status of your supervisory authority	Please select from the dropdown menu Other: <input style="width: 50px;" type="text"/>	
<b>46.</b>	Type of institutions supervised	<input type="checkbox"/> Credit institutions <input type="checkbox"/> Investment firms <input type="checkbox"/> Providers of credit and store cards <input type="checkbox"/> Providers of money transmission services <input type="checkbox"/> Providers of currency exchange services <input type="checkbox"/> Foreign financial institution representative offices <input type="checkbox"/> Insurance firms <input type="checkbox"/> Financial intermediaries <input type="checkbox"/> Financial advisers <input type="checkbox"/> Real estate agents <input type="checkbox"/> Credit referencing agencies <input type="checkbox"/> Others (please specify): <input style="width: 50px;" type="text"/>	

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<b>47.</b>	Areas of supervision	<input type="checkbox"/> Macro-prudential <input type="checkbox"/> Micro-prudential <input type="checkbox"/> Conduct-of-business <input type="checkbox"/> Other Please give detail: <input style="width: 50px;" type="text"/>	
<b>48.</b>	Are you controlled by a governmental body?	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, please give the full name of the Ministry or institution: <input style="width: 100px;" type="text"/>	

**Thank you for your time!**

## 5.4 Bibliography

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## 5.5 List of acronyms used in the report

BCFP	Bureau of Consumer Financial Protection (US)
ACP	Autorité de Contrôle Prudentiel (prudential supervisor France)
AFM	Autoriteit Financiële Markten (Financial Markets Authority, Netherlands)
AMF	Autorité des Marchés Financiers (Financial Markets Authority, France)
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Agency for Financial Services Supervision, Germany)
CBFA	Commission bancaire, financière et des assurances (Belgium)
CNMV	Comisión Nacional del Mercado de Valores (Spain)
CNVM	Comissão do Mercado de Valores Mobiliários (Portugal)
Consob	Commissione Nazionale per le Società e la Borsa (Italy)
DGCCRF	Direction générale de la concurrence, de la consommation et de la répression des fraudes (Consumer and competition body, France)
DGSFP	Dirección General de Seguros y Fondos de Pensiones (Spain)
DNB	De Nederlandsche Bank (central bank of the Netherlands)
FCA	Financial Conduct Authority (UK, was temporarily called CPMA)
FIN-FSA	Finnish Financial Supervision Authority (Finland)
FMA	Finanzmarktaufsichtsbehörde (Austria)
FPC	Financial Policy Committee (UK)
FSA	Financial Services Authority (UK)
HFSA	Hungarian Financial Supervisory Authority (or PSZAF)
MiFID	Markets in Financial Instruments Directive (European Union)
OFT	Office of Fair Trading (UK)
PRA	Prudential Regulatory Authority (UK)

### 5.6 European financial supervision system - Extracts from EU legislative texts (December 2010)

The table below juxtaposes the details of the legal texts of REGULATION (EU) No 1092-1094/2010 from the Official Journal of the European Union 15.12.2010 establishing a European Supervisory Authority (European Banking Authority, European Insurance and Occupational Pensions Authority, European Securities and Markets Authority).<sup>108</sup>

EBA Reg 1093 (OJE L 331/12)	EIOPA Reg 1094 (OJE L 331/48)	ESMA Reg 1095 (OJE L 331/84)
<b>Recitals</b>		
<p>(11) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions. The Authority should protect public values such as the <b>stability</b> of the financial system, the transparency of markets and financial products, and <b>the protection of depositors and investors</b>. The Authority should also prevent regulatory arbitrage and guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, <b>consumers</b> and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the areas of <u>banking, payments, e-money regulation and supervision, and related corporate governance, auditing and financial reporting issues</u>. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.</p>	<p>(10) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions. The Authority should protect public values such as the <b>stability</b> of the financial system, the transparency of markets and financial products, and <b>the protection of policyholders, pension scheme members and beneficiaries</b>. The Authority should also prevent regulatory arbitrage, guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, <b>consumers</b> and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the area of <u>insurance, reinsurance and occupational retirement provision regulation and supervision, and related corporate governance, auditing and financial reporting issues</u>. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.</p>	<p>(11) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial <u>market participants</u>. The Authority should protect public values such as the <b>integrity and stability</b> of the financial system, the transparency of markets and financial products and the <b>protection of investors</b>. The Authority should also prevent regulatory arbitrage and guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, consumers and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the areas of <u>its responsibility</u>. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.</p>

<sup>108</sup> See European Commission webpage: [http://ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm](http://ec.europa.eu/internal_market/finances/committees/index_en.htm).

<p>(22) There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of <b>depositors, investors and consumers</b> across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices.</p>	<p>(21) There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of <b>policyholders, pension scheme members and other beneficiaries</b> across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices. [no mention of “consumer”]</p>	<p>(22) There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of <b>investors and consumers</b> across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices.</p>
<p>(48) The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, a Banking Stakeholder Group should be used for that purpose, and should represent, in balanced proportions, Union credit and investment institutions, representing the diverse models and sizes of financial institutions and businesses, including, as appropriate, institutional investors and other financial institutions which themselves use financial services; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; and other retail users of banking services. The Banking Stakeholder Group should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation.</p>	<p>(47) The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, an Insurance and Reinsurance Stakeholder Group and an Occupational Pensions Stakeholder Group should be used for that purpose and should represent, in balanced proportions and respectively, the relevant financial institutions operating in the Union, representing the diverse business models and sizes of financial institutions and businesses; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; other retail users of those financial institutions; and representatives of relevant professional associations. Those stakeholder groups should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation.</p>	<p>(48) The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, a Securities and Markets Stakeholder Group should be used for that purpose, and should represent, in balanced proportions, financial market participants, small and medium-sized enterprises (SMEs), academics and consumers and other retail users of financial services. The Securities and Markets Stakeholder Group should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation.</p>

<p><b>Article 8</b>  <b>Tasks and powers of the Authority</b></p>		
<p>2 (i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on <b>consumer protection</b>;</p>	<p>(i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on <b>consumer protection</b>;</p>	<p>(i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of <u>financial market participants</u> and on <b>consumer protection</b>;</p>
<p><i>(Identical):</i>  <b>Article 9</b>  <b>Tasks related to consumer protection and financial activities</b></p> <p>1. The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by: (a) collecting, analysing and reporting on consumer trends;(b) reviewing and coordinating financial literacy and education initiatives by the competent authorities; (c) developing training standards for the industry; and (d) contributing to the development of common disclosure rules.</p> <p>2. The Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice.</p> <p>3. The Authority may also issue warnings in the event that a financial activity poses a serious threat to the objectives laid down in Article 1(5).</p> <p>4. The Authority shall establish, as an integral part of the Authority, a Committee on financial innovation, which brings together all relevant competent national supervisory authorities with a view to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice for the Authority to present to the European Parliament, the Council and the Commission.</p> <p>5. The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or, if so required, in the case of an emergency situation in accordance with and under the conditions laid down in Article 18.</p> <p>The Authority shall review the decision referred to in the first subparagraph at appropriate intervals and at least every 3 months. If the decision is not renewed after a 3-month period, it shall automatically expire.</p> <p>A Member State may request the Authority to reconsider its decision. In that case, the Authority shall decide, in accordance with the procedure set out in the second subparagraph of Article 44(1), whether it maintains its decision. The Authority may also assess the need to prohibit or restrict certain types of financial activity and, where there is such a need, inform the Commission in order to facilitate the adoption of any such prohibition or restriction.</p>		
<p><b>Article 37</b></p>		
<p><b>Banking Stakeholder Group</b></p>	<p><b>Insurance and Reinsurance Stakeholder Group and Occupational Pensions Stakeholder Group</b></p>	<p><b>Securities and Markets Stakeholder Group</b></p>
<p>2.The Banking Stakeholder Group shall be composed of 30 members, representing in balanced proportions credit and investment institutions operating in the Union, their employees' representatives as well as consumers, users of banking services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial institutions, three of whom shall represent cooperative and savings</p>	<p>2. The Insurance and Reinsurance Stakeholder Group shall be composed of 30 members, representing in balanced proportions insurance and reinsurance undertakings and insurance intermediaries operating in the Union, and their employees' representatives, as well as consumers, users of insurance and reinsurance services, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-</p>	<p>2. The Securities and Markets Stakeholder Group shall be composed of 30 members, representing in balanced proportions financial market participants operating in the Union, their employees' representatives as well as consumers, users of financial services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial market participants.</p>

banks.	ranking academics. Ten of its members shall represent insurance undertakings, reinsurance undertakings or insurance intermediaries, three of whom shall represent cooperative and mutual insurers or reinsurers.	
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Note: DIRECTIVE 2010/78/EU also refers to consumers under (36): "Since the objectives of this Directive, namely improving the functioning of the internal market by means of ensuring a high, effective and consistent level of prudential regulation and supervision, protecting depositors, investors and beneficiaries and thereby businesses and consumers, protecting the integrity, efficiency and orderly functioning of financial markets, maintaining the stability and sustainability of the financial system, preserving the real economy, safeguarding public finances and strengthening international supervisory coordination, cannot be sufficiently achieved by the Member States and can, therefore, by reason of their scale, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives."