

Constructing a Taxonomy of Financial Consumer Protection Policy and Assessing the New Consumer Duty in the UK's Financial Sector

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Introduction: The Consumer Duty and a Framework for Analysis

The UK Financial Conduct Authority (FCA) has heralded the introduction of a new Consumer Duty (Duty)¹ as a significant milestone in meeting its objective of financial consumer protection.² This Duty is a regulatory duty for *conduct* as well as *outcomes* in relation to financial consumers, but not directly enforceable by consumers in civil action. It potentially transcends the limitations of common law duties with regard to protecting economic interests,³ as well as the operation of specific regulatory duties onshored from European legislation.⁴ Its basis, which is a general regulatory principle demanding that financial services firms deliver 'good outcomes' to financial consumers,⁵ is potentially game-changing, as financial regulation only exceptionally intervenes⁶ into consumers' welfare outcomes in financial transactions.

The development of the Duty is in response to recent high-profile scandals of financial consumer losses, as well as the general declining social sentiment towards financial services. The mis-selling of high-risk investment funds, often misrepresented, or inappropriately, to retail investors, has resulted in significant consumer losses.⁷ Further, high risk investment products were often sold by exploiting regulatory flexibility for product choice⁸ or regulatory gaps⁹ by financial firms authorised by the FCA. Although the FCA's own regulatory

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¹ PS22/9: *A new Consumer Duty*, U.K. FIN. CONDUCT AUTH. (Jul. 27, 2022), <https://www.fca.org.uk/publications/policy-statements/ps22-9-new-consumer-duty>.

² Financial Services and Markets Act 2000, c. 8, § 1B (U.K.).

³ See DIANE BUGEJA, REFORMING CORPORATE RETAIL INVESTOR PROTECTION: REGULATING TO AVERT MIS-SELLING (2019); Iris H-Y Chiu & Alan Brener, *Articulating the Gaps in Financial Consumer Protection and Policy Choices for the Financial Conduct Authority- Moving Beyond the Question of Imposing a Duty of Care*, 14 CAP. MKTS. L. J. 217 (2019).

⁴ E.g., Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349-496.

⁵ See PRIN 2.1 *The Principles*, U.K. FIN. CONDUCT AUTH., F.C.A. HANDBOOK, <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html?date=2023-07-31&timeline=True> (last visited Jun. 3, 2023) (Principle 12).

⁶ See Iris H-Y Chiu, *More Paternalism in the Regulation of Consumer Financial Investments?: Private Sector Duties and Public Goods Analysis*, 41 LEGAL STUD. 657-675 (2021).

⁷ See U.K. FIN. CONDUCT AUTH., CONSUMER CREDIT SOURCEBOOK CONC 5A.2 Prohibition from entering into agreements for high-cost short-term credit (2023) <https://www.handbook.fca.org.uk/handbook/CONC.pdf>; Abdul Karim Aldohni, *The UK New Regulatory Framework of High-Cost Short-Term Credit: Is There a Shift Towards a More 'Law and Society' Based Approach?* 40 J. CONSUMER POL'Y 321 (2017).

⁸ Such as regulated investment fund products that allow investments in risky or illiquid assets with up front disclosure, such as the illiquid assets invested by the Undertaking for collective investment in transferable securities (UCITs) managed by Woodford funds.

⁹ See DAME ELIZABETH GLOSTER DBE, REPORT OF THE INDEPENDENT INVESTIGATION INTO THE FINANCIAL CONDUCT AUTHORITY'S REGULATION OF LONDON CAPITAL & FINANCE PLC (2020),

weaknesses were highlighted, such as inadequate enforcement and insufficient coordination between supervisory teams,¹⁰ these scandals were made possible in part by exploitative application of substantive financial regulation. For example, financial regulatory standards focus very much on point-of-sale¹¹ of financial products, to be fairly conducted with customers, but after-sale miscreant behaviour could be undetected¹² or barely within the spirit of compliance.¹³ In this manner, regulatory reform seeks to mitigate consumer harm. Instead of a targeted approach to regulating conduct based on revealed problems, the Duty is much wider and cross-cutting in nature.

In this light, we perceive a broader underpinning for the Consumer Duty, *viz*, the need to restore and reset the social contract between finance and consumers. The social contract perspective is relevant as individuals and households' participation in the market for financial products and services, from seemingly basic bank account facilities,¹⁴ to personal investment products that aim to meet a variety of medium or long term savings needs,¹⁵ is a long-standing trend of 'financialisation'. 'Financialisation' refers to the phenomenon of market provision for private financial welfare as states in capitalist democracies retreat from direct financial welfare provision.¹⁶ Participation in the market for financial products offered by private sector entities reframes society's need for self-care and responsibility,¹⁷ and in this way, consumer protection provides an fundamental framework for a new social contract between the private financial sector and consumers, mediated by regulators as a form of 'regulatory capitalism'.¹⁸ The widespread marketisation of finance has taken place in

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945247/Gloster_Report_FINAL.pdf (discussing products outside of the FCA's regulatory perimeter, such as mini-bonds).

¹⁰ RAJ PARKER, INDEPENDENT REVIEW INTO THE FSA'S AND FCA'S HANDLING OF THE CONNAUGHT INCOME FUND SERIES I AND CONNECTED COMPANIES (2019), <https://www.fca.org.uk/publication/corporate/connaught-independent-review.pdf>.

¹¹ Chiu, *supra* note 3.

¹² See, e.g., Parker, *supra* note 10.

¹³ Such as in relation to the Woodford funds, which is subject to an ongoing review.

¹⁴ See Miguel Ampudia & Michael Ehrmann, *Financial Inclusion: What is it Worth?* (Eur. Central Bank Eurosystem Working Paper No. 1990, 2017), <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1990.en.pdf> (the financial inclusion literature reflects policy-makers encouragement towards financial participation starting at least with being 'banked').

¹⁵ See Paul Langley, *Uncertain Subjects of Anglo-American Financialization*, 65 CULTURAL CRITIQUE 67 (2007).

¹⁶ ISMAIL ERTURK, JULIE FROUD, SUKHDEV JOHAL, ADAM LEAVER & KAREL WILLIAMS, *Financialisation, Coupon Pool and Conjecture*, in FINANCIALIZATION AT WORK: KEY TESTS AND COMMENTARY 1 (2008); Andy Pike & Jane Pollard, *Economic Geographies of Financialization*, 86 ECON. GEOGRAPHY 29 (2010).

¹⁷ Langley, *supra* note 15; Ismail Erturk, Julie Froud, Sukhdev Johal, Adam Leaver & Karel Williams, *The Democratization of Finance? Promises, Outcomes and Conditions*, 14 REV. INT'L POL. ECON. 553 (2007).

¹⁸ PAUL H DEMBINSKI, FINANCE: SERVANT OR DECEIVER (Kevin Cook trans., 2009) (discussing the social contract between finance and society); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. SOC. SCI. 12 (2005) (discussing 'Regulatory capitalism').

Anglo-American jurisdictions¹⁹ and in the EU.²⁰ However, it is arguable that the ‘terms’ of the social contract between consumers and finance have been in flux. Harm perpetuated by authorised financial institutions reflects poor sectoral culture and causes trust erosion on consumers’ part. The Edelman barometer²¹ for example shows that consumer trust in the financial services sector is in negative territory, a similar picture in many financially developed jurisdictions where market choice and liberation have been promoted. Trust erosion not only reflects scepticism regarding consumers’ perception of possible harm, which is counterproductive to their seeking financial welfare solutions in the marketplace, but also scepticism more generally regarding how consumers can best provide for their financial welfare.²² Regulatory policy is often in the position of catching up to market failures and social pressure.

There is uncertainty in terms of what precise achievements in ‘consumer protection’ financial regulation aims to achieve. Are consumers ‘protected’ when they have sufficient choice in the market, or when they have all the information they need for decisions to be made? Are consumers ‘protected’ in procedural and/or substantive justice? Are consumers protected in seeking welfare expectations from financial products? It is uncertain if consumers’ expectations of protection are in step with the extent/s of protection offered by regulatory policy. In this manner, we interrogate what the Consumer Duty achieves by clarifying what levels of financial consumer protection there are.

We argue that it is imperative to provide a taxonomy of consumer protection levels in terms of what substantive protections are enjoyed by financial consumers. A narrow approach for this taxonomy would be to focus only on financial consumer protection, and to analyse what substantive protections consumers enjoy pre and post the introduction of the Duty. Such an approach is arguably incomplete. Although the consumer experience in finance can arguably be a distinct ‘sphere’ in consumer services, hence, protective levels in finance *should* not be compared with other sectors, yet it is highly likely that consumers’ experience of being consumers in every other area of self-care for individual welfare would affect their perceptions and expectations in their financial consumer experiences. Consumers live in a broader context in regard to the rise of marketisation as supporting industrial

¹⁹ Simone Polillo, *Solving the Paradox of Mass Investment: Expertise, Financial Inclusion and Inequality in the Politics of Credit*, 78 REV. SOC. ECON. 53-76 (2020); see Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403 (2020) (discussing more specifically on debt markets).

²⁰ GUIDO COMPARATO, *The Idea of Financial and Social Inclusion* in THE FINANCIALISATION OF THE CITIZEN: SOCIAL AND FINANCIAL INCLUSION THROUGH EUROPEAN PRIVATE LAW 17 (2018).

²¹ EDELMAN, THE EDELMAN TRUST BAROMETER 2022, 24 (2022), https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf; See also, Sonia Rach, *FCA: ‘Trust and loyalty aren’t difficult to get but they can be eroded’*, FTADVISER (Sep. 29, 2022), <https://www.ftadviser.com/fca/2022/09/29/fca-trust-and-loyalty-aren-t-difficult-to-get-but-they-can-be-eroded/>.

²² Chiu, *supra* note 3.

development,²³ and political commitment,²⁴ to the market-economy. Economic organisation in capitalist economies is what shapes the rise of the consumer as an economic and social actor. Consumer protection is both a cross-cutting²⁵ as well as a sectoral development²⁶ for policy thinking. Financial regulation can therefore usefully learn from insights in other sectoral developments.

Hence, in unpacking the taxonomy of ‘protection’ levels for financial consumers, it would be meaningful to survey the ‘protection’ levels there are for consumers in both cross-cutting rules as well as in a selection of other marketized sectors. This helps us to contextualise and compare the ‘protection’ levels and regulatory tools that financial regulation offers. We have selected the following sectors to survey the levels of consumer protection in place: energy, telecommunications services, aviation services, packaged holidays and goods sectors including food, healthcare (ie both services and pharmaceuticals) and e-commerce. We performed desk-based literature reviews of the key regulatory policies in these areas, mainly in the UK and EU, also comparing with the US where relevant, as representative developed capitalist economies where we observe similar consumer protection debates. Our literature reviews have allowed us to construct a cross-cutting taxonomy of levels of consumer protection that are delivered by different policy designs/tools. These regulatory designs/tools that deliver different consumer protection levels also reflect two key ideological or policy positions in the social contract between consumers and the relevant marketized sector. In this manner, the two key ideological/policy premises permeate the sectors we survey and form the basis of our cross-sectoral taxonomy construction. In this manner we can more holistically appraise what the Consumer Duty achieves in terms of

²³ Iain Ramsay, *Consumer Law and the Search for Empowerment*, 19 Can. Bus. L. J. 397 (1991) (on policy encouraging consumption as a social policy supporting capitalist industrialisation).

²⁴ John F. Kennedy Presidential Library and Museum, Special message to Congress on protecting consumer interest, 15 March 1962, (Mar. 15, 1962) <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028> (Kennedy’s consumer protection speech reflecting political commitment); Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1985 O.J. (C 92) 1 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31975Y0425%2801%29>; see also, Bastian Schüller, *The Definition of Consumers in EU Consumer Law*, in EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE 123 (Mel Kenny & James Devenney ed., 2012); see also e.g., *infra* note 27 (international guidelines for consumer protection such as the United Nations Guidelines for Consumer Protection).

²⁵ E.g., Council Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64-88 (transposed into the UK as the Consumer Rights Act 2015); Council Directive 2005/29, of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), 2005 O.J. (L 149) 22-39; Council Directive 93/13, of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29-34; see generally, *Digital fairness – fitness check on EU consumer law*, European Commission, (Feb. 20, 2023), (discussing the above, amongst others, legislations of a cross-cutting nature across sectors).

²⁶ STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* (2nd edn, 2013) (discussing sectoral specifics key to consumer protection).

protective levels for financial consumers, and whether any gaps in financial consumer protection remain.

The selection of the above consumer sectors is based on the following rationales but not in order of weighting and priority:

- (a) the importance of these sectors for the consumer experience, as recognised and specifically mentioned in the UN Guiding Principles for Consumer Protection;²⁷
- (b) a reasonable representation of sectors which are overseen by dedicated regulatory agencies;
- (c) a reasonable representation of service-based sectors where the services to be accessed are not merely optional, and can be staple or essential, since financial services encompass a range of staple and optional services;
- (d) a reasonable representation of service-based sectors where consumers' pre and post-sale needs feature;
- (e) a reasonable representation of goods-based sectors to inform of any particular differences in treatment due to the goods/services distinction; and
- (f) the inclusion of e-commerce generally as an example of cross-cutting regulatory policy, as well as a type of forum via which financial services is increasingly being accessed, ie online or digital finance.

Section A argues that there are two broad ideological premises for consumer protection generally, namely an economically-informed ideological premise and a more sociologically-framed one. Both premises shape consumer protection policy in a cross-cutting manner. We acknowledge that our approach in this Section does not comprehensively discuss all sectoral policy factors that shape consumer protection in each sector. But our approach allows us to distil a key range of consumer protection policy designs/tools aligned with either ideological premise, bearing in mind the interacting qualities between the ideological premises. This Section generates a Taxonomy of consumer protection policies, explaining the level of protection offered by each key regulatory tool and reflecting the ideological influence that shapes the level of protection. This Taxonomy is then used to explain the level/s of consumer protection in the non-financial goods and services sectors we have selected, as a matter of social contract between consumers and the sector concerned.

In Section B, we apply the Taxonomy to the financial sector, to explain the level/s of consumer protection designated in the UK prior to the introduction of the Consumer Duty. This Section then interrogates the changes brought about by the Consumer Duty. We argue that there is potential for substantive changes to consumer protection levels to be recognised but this is not clearly borne out. In particular, consumer protection levels aligned with consumer citizenship/empowerment ideologies seem suggested but not definitely concretised.

²⁷U.N. Conference on Trade and Development, United Nations Guidelines for Consumer Protection, U.N. Doc. UNCTAD/DITC/CPLP/MISC/2016/1 (Jul. 2016) https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf.

Section C highlights the key gaps not filled by the Duty in financial consumer regulation, and interrogates more normative questions in relation to levels of desired financial consumer protection. Section D concludes.

A. The Taxonomy for Consumer Protection Policy

It is arguably necessary for consumer protection to be implemented as regulatory law and not just as private law. There are limitations to whether private contractual contexts can address market failures in various consumer markets, and *ex post* redress may not adequately cater for consumers' needs.²⁸ Our literature reviews of *regulatory* consumer protection in different sectors reveal suites and combinations of different regulatory designs and tools are deployed by regulators, but broadly under two ideological/policy themes.

This type of cross-sectoral mapping exercise has also been carried out in Jackson and Rothstein's article,²⁹ in relation to constructing a Taxonomy for the benefits/objectives sought to be achieved in consumer protection generally. The exercise was intended to tease out the need for empirical data to validate the Taxonomy of purported benefits sought to be achieved by each type of regulatory tool for consumer protection. Our paper agrees that consumer protection and their regulatory tools have cross-sectoral resonance, and although each sector addresses different specific objectives, there are key similarities in underpinning ideologies and policies. In this manner, the regulatory benefit Taxonomy proposed by Jackson and Rothstein can be further enriched by the recognition that every sector seeks to achieve a range of consumer protection levels. The range of protection levels are shaped by policy objectives in relation to efficiency, rights, justice, or other fundamental values, and at a high level, these policy objectives can be classified into two broad camps. These are: 'consumer empowerment' ideologies, focusing on how consumers can be made confident for market participation, therefore also sustaining the economic structures of liberal markets,³⁰ and 'consumer citizenship' ideologies, focusing on other social and normative values³¹ that support consumers' individual socio-economic actorhood, in relation to being treated fairly or justly, meeting welfare needs, as well as distributive outcomes.³² In this manner, we enrich Jackson and Rothstein's taxonomy by relating the range of key cross-sectoral consumer protection levels to their underpinnings in cross-cutting ideologies/policies. We first discuss the two key underpinning ideologies/policies for consumer protection generally before setting out our taxonomy.

i. Consumer Empowerment and Shaping Regulatory Designs/Tools

²⁸ John Goldring, *Consumer Law and Legal Theory: Reflections of a Common Lawyer*, 13 J. CONSUMER POL'Y 113 (1990).

²⁹ Howell Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, (2016) 9 HARV. BUS. L. REV. 199 (2015).

³⁰ Iain Ramsay, *Ordoliberalism and Opportunism? The Making of Consumer Law in the UK*, in THE MAKING OF CONSUMER LAW AND POLICY IN EUROPE 235–274 (Hans-W Micklitz, ed., 2021).

³¹ Hans-W Micklitz, *Norbert Reich, Founder and Pioneer of Consumer Law 1937–2015—Obituary*, 39 J. CONSUMER POL'Y 3 (2016) (Micklitz's characterisation of Reich's thought leadership in this area).

³² See *infra* note 34 and accompanying text.

‘Consumer empowerment’³³ is an important, cross-sectoral ideological principle that influences consumer protection regulation in many sectors, focusing on enabling the consumer to confidently participate in the marketisation of goods and services. This underpinning ideology/policy shapes certain levels of consumer protection through regulatory design. This Section discusses the commonly deployed regulatory tools pursuant to the consumer empowerment objective. These tools aim at correcting market failures, removing impediments to market choice and facilitating the consumer to choose. Other protective regulatory tools not discussed here are categorised, in our view, under the consumer citizenship objective which is discussed shortly.

Although Bourgoignie³⁴ defines the consumer as a ‘taker’ of producers’ goods or services, being unable to tailor-make production for one’s needs, the position of consumer need not be seen as disempowered in an industrialist society and capitalist economy where different producers are compelled to compete for the consumer’s choice. As is consistent with the political ideology that individuals’ welfare outcomes need not be subject to central planning and can be negotiated with autonomy, the empowered consumer can realise her potential in a marketplace that provides choice and in which informed decisions can be made. The political ideology for the empowered consumer supports less need for public-sector based ordering and welfare provision. Welfare decisions are a matter for private choice. Regulatory policy that seeks to promote competitive marketplaces, dismantle anti-competitive practices,³⁵ as well as to break down market failures that impede meaningful or informed choice, reflects the consumer empowerment ideology. Competition regulation is aimed at *protecting consumers at the level of ‘having meaningful choice’* and is an important cross-cutting measure of consumer protection for all marketized sectors.

Protecting consumers in ‘having meaningful choice’ is also furthered by the commonly adopted regulatory policy of mandatory pre-sale disclosure³⁶ for all manners of goods and services. This helps consumers overcome information asymmetry with producers, to make an informed choice. However, as theorists and policy-makers come increasingly to accept the bounded rationality on consumers’ part and their behavioural weaknesses,³⁷ mandatory

³³ Gillian K. Hadfield, Robert Howse & Michael J. Trebilcock, *Information-Based Principles for Rethinking Consumer Protection Policy*, 21 J. CONSUMER POL’Y 131 (1998); see, Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law: Has it Come of Age?*, 28 EUR. L. REV. 370 (2003) (in relation to EU single market policy and regulation, this ideology has been dominant as part of the ‘economic constitution’ of the single market policy); GERAIN HOWELLS, CHRISTIAN TWIGG-FLESNER & THOMAS WILHELMSSON, *Introduction*, in *RETHINKING CONSUMER LAW* ch. 1, (2017) (with an updated discussion); Hans W Micklitz, *European Consumer Law*, in *THE OXFORD HANDBOOK OF THE EUROPEAN UNION* 526-541, ch. 37 (Erik Jones ed., 2012); WEATHERILL, *supra* note 26, at ch. 4.

³⁴ Thierry Bourgoignie, *Characteristics of Consumer Law*, 14 J. CONSUMER POL’Y 293 (1992).

³⁵ Mark Armstrong, *Interactions between Competition and Consumer Policy*, 4 COMPETITION POL’Y INT’L 97 (2008); Christopher Decker, *Concepts of the Consumer In Competition, Regulatory and Consumer Protection Policies*, 13 J. COMPETITION L. ECON. 151 (2017) (discussing how competition law should evolve to meet consumer protection needs as market structures change, such as in platform economies).

³⁶ Hadfield et al., *supra* note 33; Jules Stuyck, *European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?*, 37 COMMON MKT. L. REV. 367 (2000).

³⁷ DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); Vanessa Mak, *The Myth of the ‘Empowered Consumer’. Lessons from Financial Literacy Studies* (TISCO Working Paper Series on Banking, Fin. Serv. No. 03/2012, Tilburg L. Sch. Rsch. Paper No. 03/2013), <http://ssrn.com/abstract=2077539>; Dimity Kingsford-Smith & Olivia Dixon, *The Consumer Interest and Financial Markets*, in *THE OXFORD HANDBOOK*

disclosure regulatory tools are not *per se* sufficient to help consumers make an informed choice.³⁸ Mandatory disclosure can be provided in an unfriendly manner full of legalese or not eminently accessible, therefore allowing producers to discharge their legal risk, but plays little part in ensuring consumers' understanding. Policy-makers have refined regulatory designs/tools to address these features of 'disempowerment' in the consumer choice journey. Many regulatory policies (including in financial regulation) now incorporate behavioural insights into regulating for accessible and understandable mandatory disclosure,³⁹ and regulating the nature of marketing information made at crucial points in time that affect choice. For example, compulsory risk warnings,⁴⁰ regulations against misleading marketing and advertising,⁴¹ including financial promotions regulations that place limits on marketing certain financial products.⁴² Protecting consumers' meaningful choice also extends to forms of proportionate post-sale regulatory intervention where the pre-sale context is insufficient to allow a meaningful choice to be made, such as via distance-selling and online commerce. Regulatory provisions for cooling off rights and post-sale withdrawals of contract⁴³ can be seen in this light. Further, for ongoing contracts, especially for services that are subject to renewal, regulatory policy has been introduced in

OF FINANCIAL REGULATION ch. 23 (Niamh Moloney, Eilis Ferran & Jennifer Payne eds., 2015); THE BEHAVIOURAL FINANCE REVOLUTION: A NEW APPROACH TO FINANCIAL POLICIES AND REGULATION chs. 3, 12, 15 (Riccardo Viale, Shabnam Mousavi, Barbara Alemanni & Umberto Filotto eds., 2018).

³⁸ Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 J. L. Soc'y 349 (2005).

³⁹ *E.g.*, Council Regulation 2017/1129, of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, Art. 7, 2017 O.J. (L 168) 12-82 (EU) (summary document to securities prospectuses); *Proposal for a Regulation of the European Parliament And of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*, COM (2020) 593 final (Oct. 5, 2022) (Markets in Crypto-assets Compromise Text); Regulation 2020/1503, of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, Art. 23, 2020 O.J. (L 347) 1-49 (EU) (online crowdfunding investor disclosure).

⁴⁰ *See e.g.*, Jackson & Rothstein, *supra* note 29 (surveying mandatory health warnings on tobacco products); U.K. FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK COBS 4 Communicating with clients, including financial promotions, COBS 4.7 Direct offer financial promotions (2023), <https://www.handbook.fca.org.uk/handbook/COBS.pdf> (various risk warnings in financial transactions or products, such as 'capital loss' warnings for all investment products regulated in the UK); SARAH BROWN, THE REGULATION OF CONSUMER CREDIT, ch. 6 (2019) (more precise warnings regarding credit).

⁴¹ *See* Directive 2005/29, of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), 2005 O.J. (L 149) 22-39; *see generally*, John Velentzas, Georgia Broni & Elektra Pitoska, *Unfair Commercial Practices on Marketing – Advertising and Consumer Protection in EU Member States*, 1 PROCEDIA ECON. FIN. 411 (2012).

⁴² *See* U.K. FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK COBS 4.12B Promotion of non-mass market investments (2023) <https://www.handbook.fca.org.uk/handbook/COBS.pdf> (on limited promotions of illiquid investments).

⁴³ *See* Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Art. 9, 2011 O.J. (L 304) 64-88 (generally a cross-cutting rule); WEATHERILL, *supra* note 26, at ch. 4; Micklitz, *supra* note 33, at ch. 37 (especially for distance-selling and doorstep selling).

some sectors to facilitate post-sale switching and the removal of impediments for consumers to 'exit' an ongoing service provider.⁴⁴

There is cross-cutting regulatory policy that recognises that standard contractual terms for consumers affect individual autonomy and choice, although they are efficient for consumer markets.⁴⁵ Many regulations allow consumers to challenge these terms in post-sale civil actions. This recognition of unequal bargaining power is on the one hand consistent with the ideology of consumer empowerment but on the other hand can promote consumers' welfare,⁴⁶ as consumers can re-open the question of distributive balance, which may be more consistent with the 'consumer citizenship' framing discussed below. The consumer empowerment ideology inevitably interacts with the consumer citizenship ideology in catering for a range of consumer protection. Where regulation provides accessible out-of-court redress, including those established by public sector institutions,⁴⁷ this can be regarded as empowering for consumer confidence in market participation as well as providing opportunities for consumers to adjust their distributive and welfare consequences.

Regulatory programmes for improving consumer understanding or literacy in any particular sector, such as financial literacy, reflects regulatory support for maintaining the meaningfulness of consumer choice, consistent with the consumer empowerment ideology in developed jurisdictions of the UK, EU and US. However, where financial literacy levels have remained persistently low,⁴⁸ even proponents for consumer empowerment argue that regulators should intervene to disincentivise certain consumer choices,⁴⁹ or indeed to create default enrolments into perceived optimal ones,⁵⁰ a policy tool which Thaler and Sunstein

⁴⁴ See e.g., *Access to and use of energy services*, E.U. (Mar. 14, 2022), https://europa.eu/youreurope/citizens/consumers/energy-supply/access-use-energy-services/index_en.htm; *Switch supplier or energy tariff*, OFGEM, <https://www.ofgem.gov.uk/information-consumers/energy-advice-households/switching-energy-tariff-or-supplier> (last visited Jun. 4, 2023) (in relation to utilities switching in the EU and UK); *How to open, switch or close your bank account*, U.K. MONEY & PENSIONS SERVICE MONEYHELPER, <https://www.moneyhelper.org.uk/en/everyday-money/banking/how-to-open-switch-or-close-your-bank-account#:~:text=Switching%20to%20another%20bank%20or,working%20days%20for%20current%20accounts> (last visited Jun. 4, 2023) (bank account switching in the UK).

⁴⁵ E.g., Council Directive 93/13, of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29-34; (which allows non-individually negotiated standard terms to be challenged for unfairness); see also, Peter Rott, *Unfair Contract Terms*, in RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW 284-335, ch. 13 (Christian Twigg-Flesner ed., 2015); CHRIS WILLET, FAIRNESS IN CONSUMER CONTRACTS (2007) (There is substantial literature on the judicial interpretation, and the scope of application has been extended since 2011, by Art. 8a applying to individual negotiated terms as well as price).

⁴⁶ Norbert Reich, *Diverse Approaches to Consumer Protection Philosophy*, 14 J. CONSUMER POL'Y 257 (1991); Hadfield et al., *supra* note 33.

⁴⁷ Iain Ramsay, *Consumer Law, Regulatory Capitalism and the New Learning in Regulation*, 28 SYDNEY L. REV. 9 (2006) (discussing Financial Ombudsman in the UK, and formerly the UK's Office of Fair Trading); see generally, MEL KENNY & JAMES DEVENNEY, EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE, ch. 22 (2012) (on the lack of out-of-court dispute resolution for e-commerce).

⁴⁸ Leora Klapper & Annamaria Lusardi, *Financial Literacy and Financial Resilience: Evidence from Around the World*, 49 FIN. MGMT. 589 (2020).

⁴⁹ E.g., *supra* note 40 (mandatory risk warnings).

⁵⁰ Such as default enrolments in occupational pensions schemes, or in the UK, the mandatory automatic enrolment under the Pensions Act 2008.

has described as ‘nudge’,⁵¹ ideologically framed as ‘libertarian paternalism’.⁵² These policy tools arguably reflect a mixture of consumer empowerment ideologies as well as cognisance of the ‘citizenship’ needs of consumers. Thaler and Sunstein describe their libertarian paternalistic suggestions as framing consumers’ choice architecture more appropriately for their capacities and needs, but this paternalism nevertheless seeks to deliver on certain welfare benefits for consumers where they are unable to navigate those themselves.

In sum, this Part discusses a key priority in consumer protection across sectors, i.e. protecting consumers’ decision-making towards meaningful choice. Regulatory tools adopted across sectors include: market participation and access, pre-sale ‘equipping’ and removal of impediments or harm, empowerment in terms of post-sale redress to re-open the question of choice, and even positive nudging towards optimal choices. We construct the first part of our Taxonomy, mapping the regulatory designs/tools that are intended to protect consumers’ optimal choice/choice capacity, at different levels, as follows:

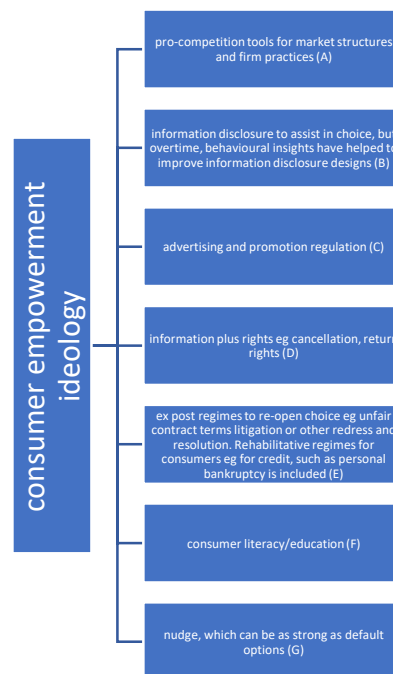


Figure 1: The Taxonomy of Consumer Protection Designs/Tools Shaped by the Consumer Empowerment Ideology

ii. Consumer Citizenship and Shaping Regulatory Designs/Tools

Next, we survey the consumer protection levels that are not focused so much on protecting meaningful choice at the pre-contractual stage, but are based on protecting consumers’ expectations to be treated decently as market citizens or in relation to the outcomes of consumption. Consumers’ *submission* to marketisation structures to navigate and meet their welfare needs⁵³ gives rise to certain expectations in terms of social treatment, welfare and distributive outcomes. Hence, regulation could provide for ‘rights-based’ expectations

⁵¹ RICHARD H THALER & CASS R SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2009).

⁵² Cass R Sunstein & Richard H Thaler, *Libertarian Paternalism is not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

⁵³ Bourgoignie, *supra* note 34.

for consumers,⁵⁴ as well as duties (usually legal or formal) on the part of product or service providers. These protection levels are generally consistent with the 'consumer citizenship' framing of consumers as socio-economic actors/citizens subject to economic and market structures.

For example, rights to access certain products or services that are regarded as staple or essential would be pursuant to the citizenship ideology. There is a patchwork of basic rights to access, for example to telecommunications, postal or energy 'connections'. There is a duty to connect to electricity supply upon request,⁵⁵ but not necessarily a right not to be disconnected. The EU Universal Services Directive provides for basic rights to be connected to a fixed telephone line, to access directory enquiry services and to access public pay phones.⁵⁶ However, as discussed in the sectoral reviews below, this patchwork of rights does not appear holistic, and there is no distinction made in financial services between near-essential services and optional ones. Regulators also seem slow to catch on to newer forms of mass-market needs, such as for internet and mobile services.

Where duties are imposed on product or service providers to conduct business with consumers in certain ways,⁵⁷ such duties can be regarded as giving rise to rights for consumers. These duties are often important to rebalance the principal-agent problems⁵⁸ in consumer relations with providers, where providers wield informational and bargaining power over consumers. Such duties can be 'process-based' or 'outcome-based'. The former pertain to how consumers are treated in processes of market participation, including pre and post-sale situations, while the latter pertain to the welfare outcomes that consumers obtain. Duties imposed on product or service providers to conduct their business with consumers in a fair and honest manner⁵⁹ are 'process-based' in nature, meaning that these duties deal with the way the sale is conducted rather than the outcomes of the product or service sold. At the pre-sale stage, these may include managing or disclosing conflicts of interest,⁶⁰ clarifying the quality of product or level of service provided, clarifying price breakdowns and avoiding hidden charges,⁶¹ and refraining from unfair discrimination.⁶²

⁵⁴ Monika Jagielska & Mariusz Jagielski, *Are Consumer Rights Human Rights?*, in *EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE* 336, ch. 17 (Mel Kenny & James Devenney eds., 2012).

⁵⁵ Electricity Act 1989, c. 29, § 16 (U.K.).

⁵⁶ Directive 2002/22, of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Arts. 4-6, 2002 O.J. (L 108), 51-77.

⁵⁷ Financial Services and Markets Act 2000, c. 8, § 138D (U.K.) (providing a right of private action for breaches of regulatory duties, but only for 'private persons').

⁵⁸ Alessio M Paces, *Financial Intermediation in the Securities Markets Law and Economics of the Conduct of Business Regulation*, 20 INT'L REV. L. ECON. 479 (2000).

⁵⁹ See U.N. Conference on Trade and Development, *supra* note 27, para. 11 (These arguably also overlap with pre-sale disclosure duties that are generally regarded as pursuant to consumer empowerment and informed choice).

⁶⁰ See Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 23, 2014 O.J. (L 173) 349-496 (Especially for financial services).

⁶¹ U.N. Conference on Trade and Development, *supra* note 27, para. 11(c)

⁶² See Jackson & Rothstein, *supra* note 29 (discussing in relation to US credit and rental markets. The UK's cross-cutting Equality Act 2010 arguably prohibits discrimination whether in relation to public or commercial

General legal duties of ‘fairness’,⁶³ acting in ‘good faith’⁶⁴ or the ‘best interests’ of consumers may also be open-ended,⁶⁵ but these provide opportunities for consumers to clarify their individual protection levels if they choose to challenge.

In relation to the post-sale stage, duties may include reasonable expectations of effective customer service, especially for ongoing services,⁶⁶ as well as protection of consumers’ privacy and data.⁶⁷ Indeed the regulatory policies that support removal of impediments to ‘switching’⁶⁸ also sit in the interaction between empowerment and citizenship ideologies.

Next, consumer protection levels can also be provided in relation to expectations of certain welfare outcomes. For example, product or service bans or prohibitions⁶⁹ can be introduced by regulatory fiat to prevent consumers from being harmed. Such regulatory policy is aimed at preventing negative outcomes. These can be regarded as ‘paternalistic’⁷⁰ in relation to reduction of choice available to consumers, but evidence-based approaches could support regulators’ decisions.⁷¹ To a lesser extent, welfare-based regulation can include product or service restrictions or limitations,⁷² such as compelling providers to introduce fewer and ‘plain vanilla’ ranges of products/services with fewer price ranges,⁷³ in order to avert the consumer harm of having ‘too much choice’ which obfuscates optimal decision-making.

service provision, as well as in work or education, discrimination based on one or more of the nine protected characteristics).

⁶³ See *e.g.*, Council Directive 93/13, of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29-34; (relating to ‘fair terms’ in consumer contracts protections).

⁶⁴ See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 MOD. L. REV. 11 (1998); HANS W MICKLITZ, *The reconstruction of good faith in the control of unfair terms in consumer contracts*, in THE POLITICS OF JUDICIAL COOPERATION IN THE EU ch. 4 (2009); Alex Fomcenco, *Good Faith: ‘English Hostility’, Unworkable Obligations for Commerce, or a Healthy Development? What to Expect in Canada?*, 38 Bus. L. Rev. 156 (2017) (subject to extensive discussion).

⁶⁵ See *e.g.*, Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 24, 2014 O.J. (L 173) 349-496.

⁶⁶ See U.N. Conference on Trade and Development, *supra* note 27, para. 11(f) (This relates to complaints-handling).

⁶⁷ See U.N. Conference on Trade and Development, *supra* note 27, para. 14(h).

⁶⁸ See *supra* note 46.

⁶⁹ *E.g.*, Jason S Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundations of Dodd-Frank Mortgage Regulation* (Va. L. Econ. Rsch. Paper No. 10, Va. Pub. L. Legal Theory Rsch. Paper No. 22, 2015) <http://ssrn.com/abstract=2593151> (discuss the US Consumer Financial Protection Bureau’s work in paternalistic interventions); see WEATHERILL, *supra* note 26, at ch. 8 (Bans can be calibrated more specifically in relation to vulnerable or unsophisticated consumers).

⁷⁰ Todd J Zywicki, *Market-reinforcing versus Market-replacing Consumer Finance Regulation*, in REFRAMING FINANCIAL REGULATION: ENHANCING STABILITY AND PROTECTING CONSUMERS 319-341 (Hester Peirce & Benjamin Klutsey eds., 2012) <https://ssrn.com/abstract=2916204>; see also, Johnston, *supra* note 71.

⁷¹ U.K. FIN. CONDUCT AUTH., PRODUCT INTERVENTION AND PRODUCT GOVERNANCE SOURCEBOOK (PROD) PROD 2.4.5 (2023) <https://www.handbook.fca.org.uk/handbook/PROD.pdf> (The FCA is subject to an evidence basis for introducing ‘product intervention’, including product bans).

⁷² See *e.g.*, *supra* note 7 (price caps for high cost credit or credit card charges); see generally, John Y. Campbell, Howell E. Jackson, Brigitte C. Madrian & Peter Tufano, *Consumer Financial Protection*, 25 J. ECON. PERSP. 91 (2011); Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards*, 130 Q. J. ECON. 111 (2015).

⁷³ *E.g.*, Decker, *supra* note 36 (critically discussed simpler but few tariff ranges for energy or utilities); *But cf.*, U.K. HM TREASURY, SERGEANT REVIEW OF SIMPLE FINANCIAL PRODUCTS: FINAL REPORT, (2013),

Other welfare-based regulatory policy may seek to impose strict or near-strict liability⁷⁴ on providers of goods or services in relation to quality standards that should reasonably be seen as forming the ‘social contract’ between consumers and producers. This safeguards the reasonable social expectation of welfare outcomes and is usually supported by regulation that prescribes or governs quality standards,⁷⁵ either directly or by reference to authorised and supervised industry/technological developments.⁷⁶ Liability allocation regulations also perform the role of risk distribution,⁷⁷ so that consumers are generally not made to bear certain risks that may be beyond their control or beyond their capacity to bear risk.⁷⁸ Performance guarantee regulations⁷⁹ are also part of the regulatory toolbox for securing welfare outcomes. These relate to mandating certain reasonably accepted positive outcomes for consumers. For example, mandatory product guarantees for a reasonable length of time; or guarantee regulations can put a floor⁸⁰ on the extent of possible consumer loss, therefore playing a distributive role in terms of consumers’ and producers’ exposures to risk and responsibility.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191721/sergeant_review_simple_products_final_report.pdf (benefits of plain vanilla financial products).

⁷⁴ E.g., Council Directive 85/374, of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 29-33 (product liability for goods in the EU).

⁷⁵ E.g., Consumer Rights Act 2015, c. 15, §§ 9-11 (U.K.) (on goods to be of satisfactory quality, as described and fit for purpose), §§ 34-36 (on the equivalent duties for digital content) (U.K.); see, Peter Cartwright, *Redress Compliance and Choice: Enhanced Consumer Measures and the Retreat from Punishment in the Consumer Rights Act 2015*, 75 Cambridge L. J. 271 (2016) (The positive achievements of Consumer Rights Act 2015, c. 15 (U.K.), but Cartwright warns that consumer protection becomes now firmly a matter of private law redress rather than public law enforcement); cf. Christian Twigg-Flesner, *Consolidation Rather than Codification – or Just Complication? - The UK's Consumer Rights Act 2015*, Zeitschrift für Europäisches Privatecht (ZeuP) 170-201 (2019) (Critique on Consumer Rights Act 2015, c. 15); see Directive 2019/771, of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, Art. 7, 2019 O.J. (L 136) 28-50 (enacts similar quality obligations for sale of consumer goods within the EU).

⁷⁶ E.g., *Guidance CE marking*, U.K. DEP'T FOR BUS. & TRADE & DEP'T FOR BUS., ENERGY & INDUS. STRATEGY (Nov. 14, 2022), <https://www.gov.uk/guidance/ce-marking#products-that-need-ce-marking> (the need for CE marking under precise EU Directives relating to various products, the mark being evidence of having been inspected and passed technical requirements relating to qualities such as health and safety, overseen and approved under regulation); see Directive 2009/48, of the European Parliament and of the Council of 18 June 2009 on the safety of toys, Art. 16, 2019 O.J. (L 170) 213-249.

⁷⁷ Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. (2006) (discussing critically).

⁷⁸ E.g., Directive 2015/2366, of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, Art. 74, O.J. (L 337) 35-127.

⁷⁹ See Directive (EU) 2019/771, Art. 10, 2019 O.J. (L 136) 28-50 (product warranty for a minimum of two years in the EU, Art 10, EU Sale of Goods Directive 2019/771).

⁸⁰ See *supra* note 78; see generally, *FSCS protects you when financial firms fail*, U.K. FIN. SERVS. COMPENSATION SCHEME, <https://www.fscs.org.uk/> (last visited Jun. 4, 2023) (generally the Financial Services Compensation Scheme for bank depositors and users of insurance and investment firm services where insolvency occurs. The financial services compensation guarantee is set at £100,000).

Finally, regulations that provide special protections for vulnerable consumers or disadvantaged consumers also reflect cognisance that such citizens are susceptible to being exploited in marketized processes⁸¹ or suffering unfavourable welfare outcomes.⁸²

At a broader level, consumer protection relates not only to individual transactions but to the collective interests of consumers as market citizens.⁸³ Initiatives supporting consumers' political representation as a 'citizenship' group is consistent with a citizenship ideology that supports consumers' collective voice to be fed into policy processes. This is affirmed at the Treaty level in the EU,⁸⁴ as well as in the UK.⁸⁵ Consumer groups are therefore *politically* treated as stakeholders in policy development and can positively affect policy directions.⁸⁶

We present the second part of our Taxonomy of consumer protection levels in regulatory tools that are consonant with the consumer citizenship ideology below:

⁸¹ U.K. FIN. CONDUCT AUTH., FG21/1: GUIDANCE FOR FIRMS ON THE FAIR TREATMENT OF VULNERABLE CUSTOMERS, p. 9 (2021), <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf> (Recognising in the FCA's issuance of guidance for financial firms dealing with 'vulnerable consumers', but vulnerability is defined only in relation to physical and mental health, change of life circumstances, low resilience or capability); *but see*, Peter Cartwright, *Understanding and Protecting Vulnerable Financial Consumers*, 38 J. CONSUMER POL'Y 119 (2015); Abdul Karim Aldohni, *Loan Sharks v. Short-term Lenders: How Do the Law and Regulators Draw the Line?*, 40 J. L. Soc'y 420 (2014) (critique of this narrow approach).

⁸² E.g., Directive 2009/48, of the European Parliament and of the Council of 18 June 2009 on the safety of toys, 2019 O.J. (L 170) 213-249 (imposing safety standards upon toys marketed in the EU from the perspective of safety to children, therefore bearing in mind their possible behavioural weaknesses, see Art. 10, Annex II for specific design requirements.).

⁸³ Reich, *supra* note 47 (Although recognising consumers' micro-heterogenous preferences).

⁸⁴ Consolidated version of Treaty on the Functioning of the European Union Art. 169, Jun. 7, 2016, O.J. (C 202), 124 [hereinafter TFEU].

⁸⁵ E.g., U.K. FIN. SERVS. CONSUMER PANEL, <https://www.fs-cp.org.uk/> (last visited Jun. 4, 2023) (the Consumer Panel that the FCA must consult); *2021-22 Stakeholder Engagement and Consumer Vulnerability Incentive Panel Report*, U.K. OFGEM (Sep. 30, 2022), <https://www.ofgem.gov.uk/publications/2021-22-stakeholder-engagement-and-consumer-vulnerability-incentive-panel-report> (the UK Ofgem Stakeholder Engagement (and Consumer Vulnerability) Panel); *2021-22 Stakeholder Engagement and Consumer Vulnerability Incentive Panel Report*, U.K. OFGEM (Sep. 30, 2022), <https://www.ofgem.gov.uk/publications/2021-22-stakeholder-engagement-and-consumer-vulnerability-incentive-panel-report> (the UK Ofgem Stakeholder Engagement (and Consumer Vulnerability) Panel); *Communications Consumer Panel (CCP)*, U.K. OFGEM, <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/committees/communications-consumer-panel> (last visited Jun. 4, 2023) (the UK Ofcom Communications Consumer Panel).

⁸⁶ Lisa Kastner, *From Outsiders to Insiders: A Civil Society Perspective on EU Financial Reforms*, 57 J. COMMON MKT. STUD. 223 (2019) [hereinafter Kastner (2019)]; Lisa Kastner, *Tracing Policy Influence of Diffuse Interests: The Post-Crisis Consumer Finance Protection Politics in the US*, 13 J. CIVIL Soc'y 130 (2017) [hereinafter Kastner (2017)].

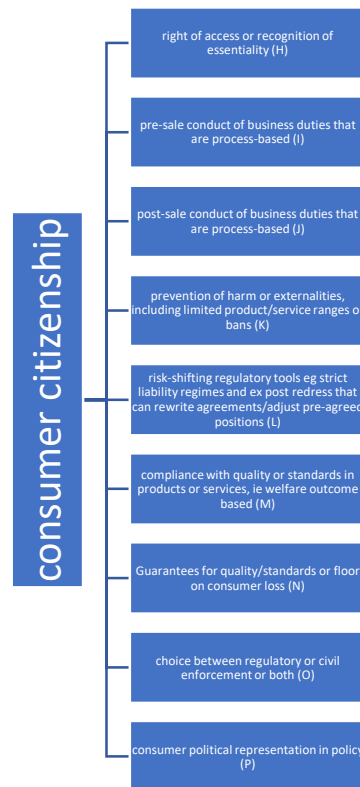


Figure 2: The Taxonomy of Consumer Protection Designs/Tools Shaped by the Consumer Citizenship Ideology

In sum, the regulatory designs/tools discussed as being consonant with the consumer citizenship ideology provide protective levels for consumers in relation to *the manner they are treated as socio-economic actors*, sometimes in an *ongoing and relational way*, *individually*, as well as *in a collective context* in terms of representation of voice in public policy development. Protective levels also relate to the *outcomes* consumers seek to achieve, in terms of *expected welfare* or *avoidance of harm*, as well as *distribution* of risk and responsibility.

Although we classify a range of consumer protection levels broadly under two ideological umbrellas, the ideological principles are not binary in nature and interact with each other. Micklitz argues that consumer protection developments, especially across EU legislation, is primarily meant to support confidence in market participation.⁸⁷ However, empowerment ideologies can contribute to citizenly expectations of welfare, and the latter does not mean restriction of choice. The embrace of both sets of ideologies and their interacting nature is reflected in both the EU’s Treaty provision on consumer policy as well as the UN’s Guidelines for Consumer Protection.

Art 169 of the Treaty for the functioning of the European Union provides for the concurrent recognition of consumer policy as being in consumers’ welfare (such as health and safety) and economic interests. It frames consumer empowerment as fundamental rights to

⁸⁷ Micklitz, supra note 33, at ch. 37.

information and education and recognises consumers’ citizenly rights to political organisation. The UN Guidelines are aimed at protecting consumers’ economic interests as well as ‘rights’ framed in terms of ‘access to non-hazardous products’, as well as ‘just, equitable and sustainable economic and social development and environmental protection’, which resonate with welfare-related and substantive outcomes.⁸⁸ The Guidelines address consumer protection from unfair dealing, as well as harmful outcomes, and welfare protections such as national standards for product safety and quality. The need to embrace both sets of ideological principles is therefore clear. Our full Taxonomy of consumer protection levels integrates Figures 1 and 2 above, and is represented in Figure 3 below.

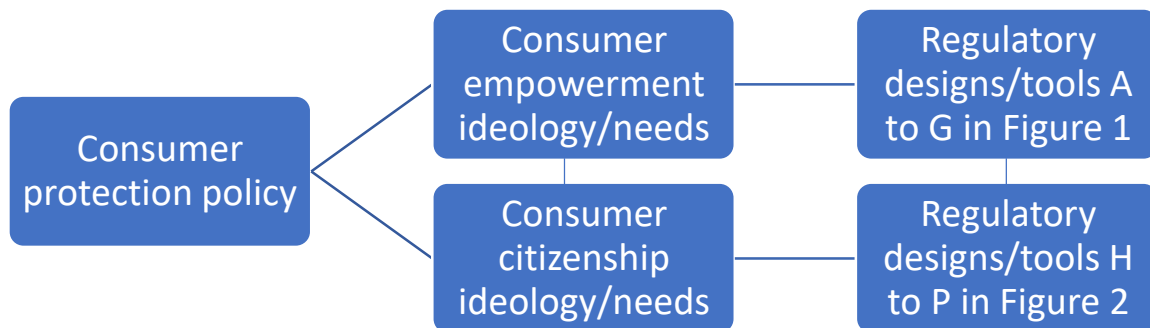


Figure 3: The Ideologically-based Taxonomy for Consumer Protection Policy

iii. Sectoral Reviews and the Taxonomy

In this Section, we provide an overview, unpacking how the sectoral reviews we have conducted are reflected in the Taxonomy above. These are discussed here in order to set the context for the financial sector discussion in Section B.

Protection of Consumer Choice

First, consistent with marketized economies in the West, there is a cross-sectoral prevalence of regulatory designs or tools reflecting the consumer empowerment ideology.⁸⁹ Such prevalence is reflected in even ‘essential’ services sectors such as energy and telecommunications markets⁹⁰ in the UK for example. Regulatory designs/tools facilitate

⁸⁸ U.N. Conference on Trade and Development, *supra* note 27, para. 1.

⁸⁹ Peter Rott & Chris Willett, *Consumers and Services of General Interest*, in RESEARCH HANDBOOK ON INTERNATIONAL CONSUMER LAW ch. 11 (Howells et al. eds, 2nd ed. 2018).

⁹⁰ Patrick Xavier, *Consumer Information Requirements and Telecommunications Regulation*, 24 INFO. SOC’Y 342 (2008).

consumers' exercise of choice by pre-sale disclosure regulation⁹¹ as well as removal of impediments to market discipline, such as inconveniences or disincentives to switch service providers.⁹² These levels of protection are pronounced especially for sectors featuring weak consumer bargaining power for ongoing contracts that can often be subject to automatic renewals or unannounced price increases.⁹³

Protecting consumers to make informed choices does not address the more fundamental question of access to near-essential goods or services. As discussed, the duty to connect to electricity services on request in the UK does not mean that there is a right not to be disconnected if consumers do not pay.⁹⁴ In particular, the issue of poor customers being put on disadvantageous pre-payment energy meters and are susceptible to supplies being terminated is increasingly framed as a 'social justice' issue.⁹⁵ The EU Universal Services Directive which covers landline services has also not caught up with needs for mobile and internet services. This can be compared to more forceful regulation in healthcare where access to medicines has been promoted in view of health and safety interests.⁹⁶

In contrast, where food is concerned, although an essential good to all citizens, regulation is focused on consumer empowerment and protection from harm. Under the EU General Food Law transposed in the UK,⁹⁷ food that is unsafe or injurious to health shall not be put on the market. Indeed, the scope of injury is broad as it relates to long-term and cumulative effects, and covers the health sensitivities of particular groups of consumers.⁹⁸ However, food quality is regulated with consumer empowerment in mind. There is food regulation dealing with integrity in food composition or production,⁹⁹ in order to protect consumer confidence regarding claims made by marketized products. There is generally little or no paternalistic regulatory strategy towards steering consumption of food towards health or

⁹¹ Stephen Littlechild, *Promoting competition and protecting customers? Regulation of the GB retail energy market 2008–2016*, 55 J. REGUL. ECON. 107 (2019) (Predominantly the UK Ofgem's strategy up to 2008).

⁹² Maria Ioannidou, *Effective Paths for Consumer Empowerment and Protection in Retail Energy Markets*, 41 J. CONSUMER POL'Y 135 (2018) (Critically discussed).

⁹³ Christopher Bisping & T. J. Dodsworth, *Consumer Protection and the Regulation of Mobile Phone Contracts: A Study of Automatically Renewable Long-Term Contracts Across Jurisdictions*, 42 J. CONSUMER POL'Y 369 (2019).

⁹⁴ Gordon Walker, *The Right to Energy: Meaning, Specification and the Politics of Definition*, 4(378) L'EUROPE EN FORMATION 26 (2015), <https://www.cairn.info/revue-l-europe-en-formation-2015-4-page-26.htm>.

⁹⁵ Stefan Bouzarovski, *Understanding Energy Poverty, Vulnerability and Justice*, in ENERGY POVERTY 9-39 (Springer, 2017).

⁹⁶ Kwanghyuk Yoo, *Interaction of Human Rights Law and Competition Law: The Right to Access to Medicines and Consumer Welfare in the U.S. Pharmaceutical Sector*, 43 VERMONT L. REV. 123 (2018).

⁹⁷ Regulation No 178/2002, of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Art. 14, 2002 O.J. (L 31) 1-24.

⁹⁸ *Id.*, Art. 14(4).

⁹⁹ H. van den Belt & T. Klompenhouwer, *Regulating Functional Foods in the European Union: Informed Choice Versus Consumer Protection?*, 16 J. AGRIC. & ENV'L ETHICS 555 (2003); Christopher Chen, *Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Product Information*, 47 FOOD AND DRUG L. J. 199 (1992).

sustainability,¹⁰⁰ as obesity or the risk of lung cancer are not regulated paternalistically. The ‘sugar’ tax remains controversial¹⁰¹ and tobacco products are not banned.

Protection of Pre-sale Antecedents

There is generally strong regulatory protection for consumers at the pre-sale stage for goods and services, consistent with the overall embrace of the ideology that consumers should be empowered for market participation. For example, general cross-cutting laws such as regulation against unfair commercial, marketing or selling practices,¹⁰² and mandatory minimum information provision (including in a fair manner) in e-commerce or distance-selling¹⁰³ underpin conduct of business in both goods and services sectors. These regulatory tools address potentially ‘disempowering’ distortions in the market that affect rational and informed choice, but also promotes fair and honest treatment of consumers, avoiding exploitation, which would be consistent with ‘citizenly’ behaviour. In this manner, it is arguably well-accepted by policy-makers that consumer empowerment is highly intertwined with citizenly expectations for how consumers should be treated in the market.

Pre-sale consumer protections that pertain to consumer empowerment do not necessarily overcome structural weaknesses in certain markets for consumer choice. The consumer weaknesses in near-essential services sectors like energy and telecommunications are particularly prominent. Consumers are passive and avoid the inconvenience or hassle of switching,¹⁰⁴ hence, the discipline of exit that comes with choice may not be readily exercised. Further, the availability of choice in near-essential services like energy has backfired as complex tariff structures are often not readily comprehensible and can inflict financial harm upon consumers.¹⁰⁵ The UK Ofgem has now intervened and mandated ‘simpler’ tariffs.¹⁰⁶ The preponderance of consumer protection in empowerment or choice can be criticised where choice is difficult to navigate or not really exercised. Regulators often face a dilemma between tweaking regulatory protection for choice to increase the meaningfulness of marketized choice, or to intervene in other forms of protection for consumers’ expectations of utility or outcomes.

Protection of Consumers’ Expected Utility/Outcomes

Consumer choice does not mean a fuss-free journey into the post-sale stage or in attaining utility or outcomes. Consumer protection levels for after-sales care or in terms of

¹⁰⁰ See *Policy paper: Government Food Strategy*, U.K. SEC’Y OF STATE FOR ENV’T, FOOD & RURAL AFFS., paras. 2.2, 2.3 (Jun. 13, 2022), <https://www.gov.uk/government/publications/government-food-strategy/government-food-strategy> (These remain ‘voluntary’ or in partnership with the industry).

¹⁰¹ Hunt Allcott, Benjamin B. Lockwood & Dmitry Taubinsky, *Should We Tax Sugar-Sweetened Beverages? An Overview of Theory and Evidence*. 33 J. ECON. PERSPS. 202 (2019).

¹⁰² Directive 2005/29, of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), 2005 O.J. (L 149) 22-39.

¹⁰³ Directive 97/7, of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Art. 4, 1997 O.J. (L 144) 19-27.

¹⁰⁴ Ioannidou, *supra* note 94.

¹⁰⁵ Littlechild, *supra* note 93.

¹⁰⁶ *Simpler energy tariffs*, U.K. OFGEM, (Jan. 2, 2014) <https://www.ofgem.gov.uk/publications/simpler-energy-tariffs>.

performance/quality are an important question. There is a cross-cutting rule in the EU for fairness review of contractual terms for consumers, and this allows standardised terms and conduct of business to be reviewed ex post.¹⁰⁷ This provision arguably straddles the consumer empowerment and citizenship ideologies, as such ex post review serves as a market failure correction mechanism for unequal bargaining power, but at the same time it can address distributive outcomes in terms of the distribution of risk and responsibility between consumers and their providers. There is however no cross-cutting rule on the reviewability of price or consideration.¹⁰⁸

There is more marked after-sales protection for consumers in relation to welfare or utility in goods sectors compared to services sectors.¹⁰⁹ This may be because consumers' physical or safety interests are implicated more obviously in goods sectors, compared to services sectors, where failure or disappointment may relate to inconvenience or economic interests. That said, the healthcare sector is an important service sector relating directly to consumers' physical safety and health interests, and consumer protection is generally pitched at being paternalistic, although there is increasing recognition of consumer choice in selecting options for healthcare.¹¹⁰ Paternalistic aspects include regulatory overriding of adverse patient choices¹¹¹ and framing patients' rights¹¹² as a 'rights' category in terms of expected physician duties and conduct.¹¹³ Arguably, healthcare is a unique services sector and this level of paternalism is likely justified on the basis of persistent expertise asymmetry¹¹⁴ between healthcare professionals and patients, generating relationships of trust and reliance. This paradigm is not equally observed in other sectors.

Physical and safety interests are protected by ex ante requirements for safety, such as in general product safety regulation, and toy safety manufacturing in the EU, represented by the mandatory 'CE' marking.¹¹⁵ Ex ante drug approval is arguably the most stringent form of pre-market public sector authorisation and vetting.¹¹⁶ Ex ante regulatory protection also

¹⁰⁷ Council Directive 93/13, of 5 April 1993 on unfair terms in consumer contracts, 1993, Art. 3, O.J. (L 95) 29-34; *see also*, Consumer Rights Act 2015, c. 15, § 62ff.

¹⁰⁸ Consumer Rights Act 2015, c. 15, § 64 (U.K.).

¹⁰⁹ *See cf.*, Consumer Rights Act 2015, c. 15 (U.K.) (for the purposes of 'goods', electricity and water are regarded as 'tangible moveable items' in the UK's Consumer Rights Act 2015, c. 15).

¹¹⁰ Julie Donohue, *A History of Drug Advertising: The Evolving Roles of Consumers and Consumer Protection*, 84 MILBANK Q. 661 (2006); James C Robinson, *Reinvention of Health Insurance in the Consumer Era*, 291(15) JAMA: J. AM. MED. ASS'N 1881 (2004).

¹¹¹ *See* Bård Hobaek & Anne Lie, *Less Is More: Norwegian Drug Regulation, Antibiotic Policy, and the 'Need Clause.'*, 97 MILBANK Q. 763 (2019) (Limits on access to prescription drugs); *see also*, R (Burke) v. General Medical Council (Official Solicitor and Others Intervening) [2005] EWCA Civ 1003 (U.K.).

¹¹² ALEX MOLD, MAKING THE PATIENT-CONSUMER: PATIENT ORGANISATIONS AND HEALTH CONSUMERISM IN BRITAIN 95 (2015) (Including also rights of access to records and right to complain).

¹¹³ Wendy K Mariner, *Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care*, 15 J. CONTEMP. HEALTH L. & POL'Y 12 (1998).

¹¹⁴ *Id.*

¹¹⁵ *See supra* note 82.

¹¹⁶ *See Authorisation of medicines*, EUR. MEDS. AGENCY, <https://www.ema.europa.eu/en/about-us/what-we-do/authorisation-medicines> (last visited Jun. 4, 2023) (the European Medicine Agency in the EU conducts the market authorisation of medicine); *see also*, MHRA Process Licensing: useful information, U.K. MEDS. & HEALTHCARE PRODUCTS REGUL. AGENCY, <https://mhrainspectorate.blog.gov.uk/2019/10/04/mhra-process-licensing->

includes pre-emptive recall actions in view of safety risk, whether it relates to food, toys or products more generally. Consumer protection levels are pitched at prevention of harm, as far as is possible, and this is calibrated according to the importance of physical health and safety interests, often distinctively supported as consumer protection objectives such as in the TFEU¹¹⁷ or the UN Guidelines.¹¹⁸

The performance or quality of goods post-sale is regulated in terms of protecting consumers' expected utility outcomes.¹¹⁹ Where goods are concerned, the UK¹²⁰ and EU¹²¹ provide for sales of goods to meet performance standards in relation to fitness for purpose, and being as described. The UK adopts a 'satisfactory quality' standard for goods and digital content while the EU mandates that goods sold must be sufficiently durable, secure, compatible with ordinary expected use and functional as well as complete with necessary installation and accessories.¹²² Further, there is a minimum guarantee of goods' performance for at least 2 years that must be provided by manufacturers.¹²³ In this manner, consumer protection levels are pitched at the expected utility or performance of the good for at least a reasonable amount of time. Ex post product liability also secures consumer protection in relation to remedies for harm and deterrent protection of consumers' utility and welfare expectations. Product harm is usually actionable as a matter of strict liability in favour of consumers.¹²⁴ This may serve both a deterrent purpose for maintaining high and protective standards in manufacture and design, as well as a remedial purpose for injured consumers. Although it is arguable that what courts regard as a 'defect' could be subject to interpretation,¹²⁵ or whether end-users who use a product in an ordinary way should not be subject to nasty surprises,¹²⁶ product liability protections are pitched at a level of securing consumers' welfare outcomes in relation to expectations of safety and avoidance of harm.

It is arguably an endemic feature in the services sector that consumer protection regulation for after-sales performance and quality are less strong,¹²⁷ subject to some specific interventions discussed below, compared to the goods sectors.

[useful-information/](#) (last visited Jun. 4, 2023) (the Medicine and Health care Products Regulatory Agency deals with the UK equivalent).

¹¹⁷ TFEU art. 169.

¹¹⁸ U.N. Conference on Trade and Development, *supra* note 27, para. 33.

¹¹⁹ See Cynthia Hawes & Christian Twigg-Flesner, *Sales and Guarantees*, in RESEARCH HANDBOOK ON INTERNATIONAL CONSUMER LAW ch. 8 (Howells et al. eds, 2nd ed. 2018) (discussing consumer remedies).

¹²⁰ Consumer Rights Act 2015, c. 15, §§ 9-11 (U.K.); See also, DAVID FOX, RODERICK MUNDAY, BARIS SOYER & ANDREW TETTENBORN, SEALY AND HOOLEY'S COMMERCIAL LAW: TEXT, CASES, AND MATERIALS (2020) (discussing the substantive interpretation of these standards).

¹²¹ Directive (EU) 2019/771, of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, 2019 O.J. (L 136) 28-50..

¹²² See *id.* Art. 7.

¹²³ See *id.* Art. 10.

¹²⁴ Council Directive 85/374, of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Arts. 1, 4, 6, 7, 1985 O.J. (L 210) 29-33 (product liability for goods in the EU).

¹²⁵ See Geraint Howells & David G Owen, *Products Liability Law in America and Europe*, in RESEARCH HANDBOOK ON INTERNATIONAL CONSUMER LAW ch. 9 (Howells et al. eds, 2nd ed. 2018).

¹²⁶ S. Lenze, *German Product Liability Law: Between European Directives, American Restatements and Common Sense*, in PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE ch. 6 (Duncan Fairgrieve ed., 2005).

¹²⁷ Rott & Willett, *supra* note 91.

In England and Wales, consumers of service contracts are entitled to a fair and reasonable standard of care and skill on the part of the service provider.¹²⁸ In comparison to goods, performance standards for services are judged by what is reasonable for the provider rather than consumers' reasonable expectations of utility. This difference means that consumer protection levels are calibrated with less certainty for expected outcomes or utility in the provision of services, as consumers would have to prove negligence in services.¹²⁹ Goods are underpinned by strict liability for defects or a mandatory performance guarantee for at least 2 years.

There are however examples where precise regulatory intervention has been introduced for certain service performance standards. For example, the Postal Services Directive provides for postal services as a universal service with right to access, and a guarantee of one time per working day of postal clearance and delivery to every home.¹³⁰ The Packaged Holidays Directive also guarantees against providers' arbitrary change to agreed package itineraries.¹³¹ Regulated sectors like energy and telecommunications are subject to regulators' prescribed standards, such as in relation to continuity and restoration.¹³² Such performance standards are precise and highly sector-specific. Aviation regulations provide for an ex post measure instead of an ex ante performance standard, so that where passengers for air travel are delayed over 3 hours, they are entitled to reasonable food and lodging care and expenses.¹³³ These precise performance standards reflect the underlying social contract where regulation protects consumer expectations in terms of specific outcomes. But arguably there may be other 'outcomes' or expected utility not so precisely protected in regulation and may have to be the subject of more general contractual

¹²⁸ Consumer Rights Act 2015, c. 15, § 49;

¹²⁹ GERAINT HOWELLS & STEPHEN WEATHERILL, *CONSUMER PROTECTION LAW* ch. 4, (2017). +

¹³⁰ Directive 97/67, of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, Art. 3, 1998 O.J. (L 15) 14-25.

¹³¹ Directive (EU) 2015/2302, of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, Arts. 6, 7, 2015 O.J. (L 326) 1-13.

¹³² See e.g., Quality of Service Guaranteed Standards, OFGEM, <https://www.ofgem.gov.uk/energy-policy-and-regulation/Publications-by-licence-and-licensee/industry-codes-and-standards/standards/quality-service-guaranteed-standards#:~:text=The%20Quality%20of%20Service%20Guaranteed,to%20deliver%20in%20all%20cases> (last visited Jun. 4, 2023); see also, Elizabeth Newman, *Consumer Protection and Telecommunications*, in *TELECOMMUNICATIONS LAW AND REGULATION* p. 497 (Ian Walden ed., 2018).

¹³³ Martine De Serres, *Consumer Protection*, in *ROUTLEDGE HANDBOOK OF PUBLIC AVIATION LAW* ch. 14 (Paul Stephen Dempsey & Ram Jakhu eds., 2017); Erika Maurice & Vincent C. Lesch III, *Recent Developments in Aviation Litigation: Consumer Protection Using European Union Regulations*, *AM. BAR ASS'N* (Jan. 25, 2018), <https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2018/spring2018-0118-recent-developments-in-aviation-litigation-consumer-protection-utilizing-european-union-regulations/>; Laura Pierallini, *Regulation 261/2004 – Passengers' Right to Compensation in Case of Flight Delay. Looking for a Fair Balance of Interests. The Role of the Court of Justice of the EU and the Risk to Waste a Chance for Reform*, in *FROM LOWLANDS TO HIGH SKIES – A MULTILEVEL JURISDICTIONAL APPROACH TOWARDS AIR LAW* p. 120 (2013); Magdalena Kučko, *The Right to Double Compensation Where the Re-Routed Flight Suffers a Long Delay – Upholding High Standards of EU Consumer Protection*, 28 *MAASTRICHT J. EUR. & COMPAR. L.* 145 (2021) (discussing the European court's clarification of these rights).

litigation, such as certain levels of comfort in aviation travel or whether a hotel provided in a package holiday is sufficiently convenient or quiet.

Protection of Consumers' Economic Interests

Further, it is observed that consumer protection seldom intervenes into the question of value or price.¹³⁴ This relates to consumer protection in terms of their economic interests. Economic interests can be framed in two ways: in terms of 'value for money' and in terms of distributive outcomes and economic welfare. The former relates more to a consumer empowerment ideology, that the consumer is able to purchase an economically optimal good or service. The latter is broader in scope in relation to ex post adjustment of welfare outcomes so that consumers' distributive interests are met.

Competitive pricing would be a feature of an optimal, working market, hence, competition regulation plays a significant part in markets for services especially where dominance may exist or where market structures disadvantage the consumer in relation to price.¹³⁵ It is not the norm for consumer regulation to intervene paternalistically into price as such interventions can limit market workings and innovations. Longstanding evidence of abusive market practices however underpin two examples of such regulatory intervention in the EU, namely the limitation of credit card interchange fees which are normally passed onto consumers,¹³⁶ and the price cap on mobile roaming charges.¹³⁷ One can view these measures as addressing market failure rather than being focused on redistribution. The existence of persistent oligopolies due to the network effects in these markets handicap the operation of competitive forces. However, the UK's 'energy price cap'¹³⁸ may be viewed as an unusual distributive measure to ensure affordable access to energy, and this has further culminated into a stronger price guarantee¹³⁹ in light of the extraordinary circumstances surrounding energy price inflation since the outbreak of war in Ukraine.

Distributive Dimension of Consumers' Economic Interests

Consumers' distributive interests are generally protected by ex post redress carried out individually. Such consumer protection is however conditioned upon access to justice, or out of court dispute resolution mechanisms that provide an efficient avenue to consumers. In regulated sectors, out-of-court Ombudsman services such as the energy, communications

¹³⁴ Consumer Rights Act 2015, c. 15, § 64; Directive 98/6, of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, 1998 O.J. (L 80) 27-31 (the Price Indications Directive 98/6/EC, governs conduct of price discounting in order to prevent misleading impressions, amended in 2019/2161).

¹³⁵ See Littlechild, *supra* note 93 (Such as found by Ofgem in relation to the energy market after privatisation and liberalisation).

¹³⁶ Regulation (EU) 2015/751, of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, Art. 3, 2015 O.J. (L 123) 1-15.

¹³⁷ Andreas Bartel et al., *The Interdependence of Competition Policy, Consumer Policy and Regulation in Introducing and Safeguarding Effective Competition in the EU Telecommunications Market*, 19(45) AMFITEATRU ECON. J. 376 (2017).

¹³⁸ See Littlechild, *supra* note 93 (Discussing the cap which is reviewed and set quarterly by Ofgem, based on the Competition and Markets Authority review of the energy sector); see also, S Pront-van Bommel, *A Reasonable Price for Electricity*, 39 J. CONSUMER POL'Y 141 (2016).

¹³⁹ Energy price cap explained, OFGEM, <https://www.ofgem.gov.uk/information-consumers/energy-advice-households/check-if-energy-price-cap-affects-you> (last visited Jun. 4, 2023).

or financial Ombudsmen offices,¹⁴⁰ provide fori that help to realise consumer protection in distributive ways. However, in general sectors, redress provision is relatively weaker¹⁴¹ as complaints handling can be delegated to firms,¹⁴² or left to private civil redress.

Mixed Empowerment and Citizenly Protections for Online Consumers

Finally, it is recognised that consumer contracts for goods or services in an e-commerce context raises particular issues for protection.¹⁴³ The dominant consumer protection paradigm is in relation to empowerment and choice, reflected in comprehensive information provision at the pre-contractual stage.¹⁴⁴ However, the limits of informed choice are recognised in faceless and borderless type transactions where consumers take on higher post-sale risks in relation to their purchases. The right of post-sale withdrawal has thus become an important feature of consumer protection.¹⁴⁵ On the one hand this continues with the empowerment ideology in terms of realising informed choice,¹⁴⁶ but on the other hand, the right to withdraw has distributive consequences for improving consumers' post-sale economic interests.

The e-commerce context also raises particular concerns in relation to privacy of consumers' data, the security of transactions, the rise of online harms and platform governance where multisided platforms may mediate consumer transactions in both a business-consumer as well as consumer-consumer context. In this respect, regulators, particularly in the EU, have instituted cross-cutting rules for electronic and digital commerce. Competition law has been

¹⁴⁰ *We're the Energy Ombudsman.*, U.K. ENERGY OMBUDSMAN, <https://www.ombudsman-services.org/sectors/energy> (last visited Jun. 4, 2023); *We're the Communications Ombudsman.*, U.K. COMMUNICATIONS OMBUDSMAN, <https://www.ombudsman-services.org/sectors/communications> (last visited Jun. 4, 2023).

¹⁴¹ See *cf.*, Regulation (EU) 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), Arts. 20, 21, O.J. (L 277) 1-102 (There is no cross-cutting mandatory complaints handling or out-of-court dispute resolution for sales or e-commerce, but the Digital Services Act does provide internal complaints handling and out-of-court dispute resolution for parties affected by platform providers' decisions to take down what they consider to be illegal content).

¹⁴² Cf. Directive 97/7, of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Art. 5, 1997 O.J. (L 144) 19-27 (Art 5, Distance-selling Directive does not mandate complaints handling or out of court dispute settlement); Directive (EU) 2019/771, of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, Art. 19, 2019 O.J. (L 136) 28-50 (Art 19, EU Sale of Goods Directive 2019 envisages that consumer groups or public bodies can enforce on behalf of consumers, but this is at the volition of these bodies).

¹⁴³ Patrick Quirk & John A. Rothchild, *Consumer Protection and the Internet*, in RESEARCH HANDBOOK ON INTERNATIONAL CONSUMER LAW ch. 12 (Howells et al. eds, 2nd ed. 2018).

¹⁴⁴ Directive 97/7, of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Arts. 4, 5, 1997 O.J. (L 144) 19-27.

¹⁴⁵ J Luzak, *To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers*, 37 J. CONSUMER POL'Y 91 (2014); J Luzak, *Online Consumer Contracts*, 15 ERA-FORUM 382 (2014); Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law* 50 COMMON MKT. L. REV. 17 (2013) (arguing that likely higher cost will be translated into price).

¹⁴⁶ Christian Twigg-Flesner, R Schulze & J Watson, *Protecting Rational Choice: Information and the Right of Withdrawal*, in RESEARCH HANDBOOK ON INTERNATIONAL CONSUMER LAW p. 125 (Howells et al. eds, 2nd ed. 2018).

rejuvenated in relation to preventing practices that impede consumer choice¹⁴⁷ on digital platforms. Significant platforms are in particular prevented from competitive harm by being designated as gatekeepers who have obligations to provide interoperability and third party access.¹⁴⁸ Consumer empowerment ideology continues to underpin the development of consumer protection in the online context, as choice impediments or disempowerments are targeted to be dismantled by regulatory fiat.

These cross-cutting rules also protect consumers in relation to social and citizenly expectations, such as in relation to their personal data and information. Such protection is now reframed as data subjects' rights and data handlers' obligations.¹⁴⁹ Cybersecurity¹⁵⁰ and the monitoring and prevention of online harms¹⁵¹ are regulated in relation to corporate risk management and control, and are framed more as regulatory duties and compliance for providers, reflecting a social licence to operate which is broader than just a consumer protection issue.

Our sectoral reviews reveal many cross-cutting regulatory designs or tools, supporting the predominant ideology of consumer empowerment and choice, but also catering for consumers' citizenly expectations. These are more extensive in good sectors although a patchwork of citizenly protections in terms of access and rights to near-essential services, as well as paternalistic interventions exist in some service sectors.

Against this context, we turn to examine consumer protection levels in the financial sector and discuss if the UK's Consumer Duty makes any distinctive changes.

B. Levels of Consumer Protection in the Financial Sector

i. Overview of UK Financial Consumer Protection Regulation (Pre-Consumer Duty)

¹⁴⁷ Regulation (EU) 2022/1925, of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), O.J. (L 265) 1-66; *see also*, Regulation (EU) 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), Art. 14, O.J. (L 277) 1-102.

¹⁴⁸ Regulation (EU) 2022/1925, of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), Arts. 5-7, O.J. (L 265) 1-66.

¹⁴⁹ Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O. J. (L 119) 1-88; Alaa Altorbaq, Fredrik Blix & Stina Sörman, *Data Subject Rights in the Cloud: A Grounded Study on Data Protection Assurance in the Light of GDPR*, 12TH INT'L CONF. FOR INTERNET TECH. & SECURED TRANSACTIONS (ICITST) 305 (2017) <https://ieeexplore.ieee.org/abstract/document/8356406>; *cf.* Michael Veale, Reuben Binns & Jef Ausloos, *When Data Protection by Design and Data Subjects' Rights Clash*, 8 INT'L DATA PRIV. L. 105 (2018) (discussing the challenges with regard to privacy by design).

¹⁵⁰ *Cyber Resilience Act (EU)*, EUR. COMM'N (Sep. 15, 2022) <https://digital-strategy.ec.europa.eu/en/library/cyber-resilience-act> (proposed EU Cyber Resilience Regulation).

¹⁵¹ Regulation (EU) 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), Arts. 31, 33-37, O.J. (L 277) 1-102; *see also*, Emily Haves, *Online Safety Bill: HL Bill 87 of 2022–23* (HOUSE OF LORDS LIBRARY BRIEFING, 2023) <https://researchbriefings.files.parliament.uk/documents/LLN-2023-0005/LLN-2023-0005.pdf> (UK's impending Online Safety Act 2023).

The financial sector provides a range of payment, credit, insurance and investment products and services to consumers, some of which may be regarded as ‘more staple’ than others. Developed financial jurisdictions such as the UK support privatisation and marketisation of financial services, and consumers are encouraged to navigate choice and engage in self-provision for their financial needs, within the broader context of ‘financialisation’ discussed in Section A. The UK Financial Conduct Authority has explicit objectives to protect consumers and promote competition as a means of doing so (though not exclusively).¹⁵² This is further reflected in the FCA’s institutional framework that supports innovation.¹⁵³ Financial regulation is focused on consumer empowerment and a starting point is the focus on market failure as justification for regulatory intervention.¹⁵⁴ The prevalence of cost-benefit scrutiny for regulatory initiatives in the US,¹⁵⁵ EU (upon the Treaty basis of proportionality)¹⁵⁶ and in the UK¹⁵⁷ underpin the ‘market failure’ basis for financial regulation, including consumer protection regulation.

There is generally heavy deployment of pre-sale mandatory disclosure of information relating to financial products, such as credit,¹⁵⁸ insurance,¹⁵⁹ packaged products,¹⁶⁰

¹⁵² Financial Services and Markets Act 2000, c. 8, § 1B, 1C, 1E (U.K.) (as amended in 2012).

¹⁵³ See e.g., *FCA Innovation Hub*, U.K. FIN. CONDUCT AUTH. <https://www.fca.org.uk/firms/innovation> (last visited Jun. 4, 2023) (the Innovation Hub that hosts various pro-innovation activities like the Regulatory Sandbox and Crypto-Sprint).

¹⁵⁴ *Occasional Paper No. 13: Economics for Effective Regulation*, U.K. FIN. CONDUCT AUTH. (Sep. 2, 2016), <https://www.fca.org.uk/publications/occasional-papers/occasional-paper-no-13-economics-effective-regulation>.

¹⁵⁵ See e.g., Cass R Sunstein, *The Cost-Benefit State* (Coase-Sandor Inst. for L. & Econs. Working Paper No. 39, 1996) <http://ssrn.com/abstract=2593151>; Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369 (2014); CASS R. SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* (2014).

¹⁵⁶ Anne Meuwese & Suren Gomsian, *Regulatory Scrutiny of Subsidiarity and Proportionality*, 22 MAASTRICHT J. EUR. & COMP. L. 483 (2015).

¹⁵⁷ See *supra* note 159; see also, U.K. HM TREASURY, *FINANCIAL SERVICES FUTURE REGULATORY FRAMEWORK REVIEW: PROPOSALS FOR REFORM*, (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032075/FRF_Review_Consultation_2021_-_Final_.pdf (reforms to regulatory accountability for cost/benefit analyses in the Financial Services and Markets Act 2023 which implements the government’s initiative to subject financial regulators to more cost-benefit scrutiny and accountability, reflecting the Conservative government’s dislike to ‘red-tape’).

¹⁵⁸ JONATHAN KIRK, THOMAS SAMUELS, & LEE FINCH, *credit*, in *MIS-SELLING FINANCIAL SERVICES* ch. 3, (2022) (discussing requirements in the EU Consumer Credit Directive 2008/48/EC (Directive 2008/48, of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, O.J. (L 133) 66-92) and Mortgage Credit Directive 2014/17/EU (Directive 2014/17, of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, O.J. (L 60) 34-85)).

¹⁵⁹ Directive (EU) 2016/97, of the European Parliament and of the Council of 20 January 2016 on insurance distribution, Arts. 18-23, O.J. (L 26) 19-59.

¹⁶⁰ Regulation (EU) No 1286/2014, of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), O.J. (L 352) 1-23.

securities products,¹⁶¹ investment fund products¹⁶² as well as online crowdfunding products,¹⁶³ and even crypto-assets to be offered in the EU.¹⁶⁴ Pre-sale disclosure is based on materiality as a cross-cutting standard for all financial products, and is accompanied by summary disclosure documents¹⁶⁵ which are intended to be more accessible and comprehensible by retail consumers. Over time, regulatory adjustments have been made to assist with consumer behavioural weaknesses, reflected in mandatory warnings, investment caps,¹⁶⁶ and specific financial marketing and promotion restrictions.¹⁶⁷

However, regulators continue to observe consumer weaknesses despite the relatively rich choice offered in developed financial markets such as the UK. Consumers are not necessarily able to assess the myriad choices before them, as financial literacy levels are generally low¹⁶⁸ and too much choice makes decision-making more challenging. Consumers may exclude themselves,¹⁶⁹ opt for few or conservative products that need not maximise their economic interests,¹⁷⁰ such as the staple bank deposit account, or make unsuitable choices without help, in response to marketing campaigns. There is little regulatory guidance in terms of which financial products may be near-essential or less optional. In spite of the

¹⁶¹ Council Regulation (EU) 2017/1129, of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, Arts. 6, 7, 2017 O.J. (L 168) 12-82.

¹⁶² See e.g., Directive 2009/65, of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), Art. 85ff, 2010 O.J. (L 176) 1-15 (EU) (UCITs prospectus and continuing disclosure); Directive 2011/61, of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, O.J. (L 174) 1-73 (for hedge and private equity/venture capital funds).

¹⁶³ Regulation 2020/1503, of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, Arts. 19, 20, 23, 24, 2020 O.J. (L 347) 1-49 (EU).

¹⁶⁴ *Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*, COM (2020) 265 final (Sep. 24, 2020) <https://data.consilium.europa.eu/doc/document/ST-13198-2022-INIT/en/pdf> (White paper disclosure for the Markets in Crypto-assets Regulation (MiCAR)2023).

¹⁶⁵ E.g., Council Regulation 2017/1129, of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, 2017 O.J. (L 168) 12-82; Directive 2009/65, of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), 2010 O.J. (L 176) 1-15 (EU); Directive 2009/65, of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), 2010 O.J. (L 176) 1-15 (EU); Regulation (EU) No 1286/2014, of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), O.J. (L 352) 1-23.

¹⁶⁶ the 10% cap for retail investing in less liquid investments such as online peer-to-peer lending.

¹⁶⁷ U.K. FIN. CONDUCT AUTH., PS22/10: STRENGTHENING OUR FINANCIAL PROMOTION RULES FOR HIGH-RISK INVESTMENTS AND FIRMS APPROVING FINANCIAL PROMOTIONS (Aug. 1, 2022), <https://www.fca.org.uk/publication/policy/ps22-10.pdf> (The FCA's mandatory warning notices and digital summaries for high risk investment products).

¹⁶⁸ Klapper & Lusardi, *supra* note 49.

¹⁶⁹ *FCA proposes ways to make financial advice more accessible*, U.K. FIN. CONDUCT AUTH. (Nov 30, 2022), <https://www.fca.org.uk/news/press-releases/fca-proposes-ways-make-financial-advice-more-accessible> (the FCA's survey of retail customers with over £10,000 in savings not actively employing investment choice).

¹⁷⁰ *Id.*

growth in market choice, financial inclusion is a vaguely defined policy, a critique we return to in Section C. Staple financial needs such as a basic bank account are provided by market forces, but they may come with contractual features that pose hazards to unwary consumers. In the UK, many banks have developed ‘free-if-in-credit’ accounts where high profits may be made if accounts are overdrawn and overdrafts accessed. This can require care on customers’ part to manage their finances so as not to accidentally tip into an expensive overdraft, a challenge for the more impecunious customers.¹⁷¹

Further, it is uncertain if consumers appreciate that the nature of some financial products is a double-edged sword.¹⁷² Credit products may on the one hand be empowering for immediate consumption or investment needs, but ex post economic welfare, as discussed below, is not subject to clear regulatory protection. The same can be said for investment products which help to protect the monetary value of savings but can also be subject to market losses during the investment horizon. The protection of consumer choice seems to operate at the level of voluntary access, and given consumers’ general low financial literacy, it is questioned if more regulatory guidance or paternalism is warranted for near-essential financial products. One of us has, in another article, argued that the central bank digital currency project can be aimed towards providing a public good instead of another market product for consumer choice.¹⁷³

We however see some evidence of regulatory paternalism to protect consumers from harm, since the end of the global financial crisis 2008,¹⁷⁴ in relation to ‘product intervention’. This policy responds to the recognition that financial sector culture can result in exploitative and predatory product competition that offers little utility to consumers.¹⁷⁵ In this manner, simplistic assumptions about the unequivocal ‘good’ of choice are questioned by confronting the realities of financial product markets. Product intervention powers can be exercised by regulators in the UK and EU by banning or restricting certain financial products

¹⁷¹ See Office of Fair Trading (Respondents) v. Abbey National plc & others (Appellants) [2009] UKSC 6 (U.K.) (In view of least-capabilised customers incurring expensive overdraft charges, a challenge for fairness was brought by the former Office of Fair Trading in the UK against banks. This challenge did not succeed); cf., U.K. FIN. CONDUCT AUTH., BANKING: CONDUCT OF BUSINESS SOURCEBOOK PROD 2.2 The fair, clear and not misleading rule (2023) <https://www.handbook.fca.org.uk/handbook/BCOBS.pdf> (the regulator has since introduced rules to ensure that an overdraft cannot be unarranged and that customers would have notice of the need to put in place a consented arrangement).

¹⁷² See Iris H-Y Chiu, *The Fallacies Regarding Financial Inclusion and Financial Regulation that is Shaped to Promote this Policy*, in FALLACIES AND MYTHS IN CORPORATE AND FINANCIAL LAW (Alexandra Andhov, Claire Hill & Saule Omarova (eds., forthcoming 2024).

¹⁷³ Iris H-Y Chiu & Christian Hofmann, *Unlimited Central Bank Digital Currency: The Case for a Public Good in the Euro Area and its Regulatory (and Deregulatory) Implications for Modern Finance*, 48 N. C. J. INT’L L. 2 (2023).

¹⁷⁴ Niamh Moloney, *The Legacy Effects of the Financial Crisis upon Regulatory Design*, in THE EU’ IN THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS 111 (Eilis Ferran, Niamh Moloney, Jennifer G Hill & John C Coffee Jnr eds., 2012); Niamh Moloney, *Financial Market Governance and Consumer Protection in the EU*, in FINANCIAL REGULATION: A TRANSATLANTIC PERSPECTIVE ch. 10 (Ester Faia, Andreas Hackethal, Michael Haliassos & Katja Langenbucher eds., 2015), ch10.

¹⁷⁵ Dan Awrey, *Towards a Supply-Side Theory of Financial Innovation*, 41 J. COMPAR. ECONS. 483 (2013).

in order to prevent mis-selling or harm. The EU¹⁷⁶ and UK¹⁷⁷ have issued a number of product intervention bans to preclude consumers from engaging in high risk investments such as binary options, contingent bonds sold by banks or unlisted corporate securities.¹⁷⁸

The EU and UK have also developed a ‘product governance’ regime¹⁷⁹ which mandates financial firms to design products with suitable target markets in mind in order to ensure conforming marketing and distribution. Although this is not the same as vetting for ‘product safety’ as championed by Warren,¹⁸⁰ and *ex ante* product regulation remains elusive, there has been greater concern for consumer welfare by regulators, towards preventing large-scale harms. Product governance regulation is ‘meta-level’ in the sense that it requires firms to institute processes for designing and marketing suitable products, but such processes are left to their own implementation. This can result in a ‘black box’ of internal firm processes not scrutable by consumers. The UK and EU are however increasingly requiring product manufacturers and distributors to show evidence of compliance, such as by testing their product designs as well as by regular reviewing, in order to aid regulators’ supervision in this area. Sufficiently intense supervision is likely to be required to enforce product governance standards¹⁸¹ as market discipline is likely impracticable.

On the whole, product governance regulation continues to allow the financial sector to determine product offerings and quality to consumers, very much in line with maintaining a market for consumer choice. However, as with the limits of food regulation discussed in Section A, regulatory protections pursuant to consumer empowerment fail to connect with

¹⁷⁶ See *Product Intervention*, EUR. SEC. & MKT. AUTH [\(https://www.esma.europa.eu/investor-corner/product-intervention#:~:text=Those%20product%20intervention%20measures%20by,the%20Financial%20Markets%20\(AFMI\)](https://www.esma.europa.eu/investor-corner/product-intervention#:~:text=Those%20product%20intervention%20measures%20by,the%20Financial%20Markets%20(AFMI)) (last visited Jun. 4, 2023) (Such as binary options and contracts for differences in 2018).

¹⁷⁷ See e.g., *FCA bans the sale of crypto-derivatives to retail consumers*, U.K. FIN. CONDUCT AUTH. (Oct. 6, 2020), <https://www.fca.org.uk/news/press-releases/fca-bans-sale-crypto-derivatives-retail-consumers#:~:text=The%20FCA%20has%20published%20final,to%20the%20harm%20they%20pose;FCAconfirms%20speculative%20mini-bond%20mass-marketing%20ban>; *FCA confirms speculative mini-bond mass-marketing ban*, U.K. FIN. CONDUCT AUTH. (Dec. 10, 2020), <https://www.fca.org.uk/news/press-releases/fca-confirms-speculative-mini-bond-mass-marketing-ban>; *FCA confirms permanent ban on the sale of binary options to retail consumers*, U.K. FIN. CONDUCT AUTH. (Mar. 29, 2019), <https://www.fca.org.uk/news/statements/fca-confirms-permanent-ban-sale-binary-options-retail-consumers#:~:text=FCA%20confirms%20permanent%20ban%20on%20the%20sale%20of%20binary%20option%20to%20retail%20consumers,-Statements%20First%20published&text=Following%20consultation%20feedback%2C%20the%20Financial,binary%20options%20to%20retail%20consumers.>

¹⁷⁸ See Johnston, *supra* note 71, (for the US, product bans have also been introduced in relation to mortgages, but see its critique).

¹⁷⁹ Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 24(2), 2014 O.J. (L 173) 349-496; Commission Delegated Directive 2017/593, of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (EU), Arts. 9, 10, 2017 O.J. (L 87) 500-517.

¹⁸⁰ Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market*, in GOVERNMENT AND MARKETS: TOWARDS A NEW THEORY OF REGULATION ch. 12 (Edward J. Balleisen and David A. Mos eds., 2015), ch10.

¹⁸¹ Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 Am. Bus. L. J. 1, 33-32 (2007) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=970130.

consumers' varying or lack of ability to make sense of the optimal qualities they seek in the universe of choice. Financial products can relate to qualities such as safety, risk/return profiles, short, medium or long-termism, sustainability etc, just as food can relate to qualities in terms of cost-effectiveness, health, nutrition, lifestyle compatibility, diversity, sustainability, animal welfare concerns etc. The operations of private producer competition and marketing, even if subject to pre-sale information and marketing regulations, need not help consumers in sense-making their optimal needs. In this manner, it is queried if regulatory protections should meet citizenly needs in relation to basic inclusion for near-essential financial products or services. Quality regulation should also pertain to financial products where there are important characteristics consumers seek, such as reliability of regulated energy or telecommunications services. There is a certain superficiality in protecting consumer choice when consumers may be more concerned about ultimate welfare and outcomes in relation to financial products which are credence goods. This point is revisited in Section C.

There are a few rare examples of financial regulation that aims to protect the *ex ante* economic welfare of certain consumers of financial products, particularly in relation to recognised vulnerable characteristics. One is the price cap on high-cost credit,¹⁸² and the other is the price cap for investment management charges for defined contribution occupational pension schemes.¹⁸³ The former seeks to protect payday borrowers from being excessively exploited although their credit risk means that they have to expect to pay a relatively high charge for credit to reflect the lender's risk. As many payday borrowers are in the most disadvantaged economic communities, the price cap regulation reflects social notions of concern for their vulnerabilities, as well as welfare considerations that mitigate against a purely economic assessment of their credit risk.¹⁸⁴ Next, the UK's provision for elderly consumers to obtain mandatory advice before entering into equity release mortgages also seeks to ensure that welfare needs are assessed by experts, particularly for vulnerable customers.¹⁸⁵ This places legal risk upon advisors to reinforce a good economic outcome for consumers. The price cap on investment management charges for defined contribution occupational pension schemes can also be explained as motivated by policy reasons of a social nature. Since mandatory automatic enrolment into occupational pensions saving has been legislated in the UK, the paternalistic measure should be supported by affordable access to long-term saving that prevents financial services providers from exploiting the captured market.¹⁸⁶ Indeed this measure is a rare regulatory intervention relating to inclusion into a basic financial product viewed as overall optimal. These rare measures reflect financial regulators' embrace of citizenly concerns regarding some financial products. However, financial regulators' oversight of products even in these

¹⁸² *supra* note 7.

¹⁸³ U.K. DEP'T FOR WORK AND PENSIONS, THE CHARGE CAP: GUIDANCE FOR TRUSTEES AND MANAGERS OF OCCUPATIONAL PENSION SCHEMES (2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1045257/charge-cap-guidance.pdf.

¹⁸⁴ Aldohni, *supra* note 7; Paul Heidhues & Botond Kőszegi, *Exploiting Naivete about Self-Control in the Credit Market*, 100 AM. ECON. REV. 1179 (2010).

¹⁸⁵ Louise Overton & Lorna Fox O'Mahony, *Stakeholder Conceptions of Later-Life Consumer Vulnerability in the Financial Services Industry: Beyond Financial Capability?*, 41 J. CONSUMER POL'Y 273 (2018).

¹⁸⁶ *supra* note 52.

cases does not extend to consumers' ultimate welfare. The high-cost credit cap does not mean that the consumer's credit consumption is sustainable or creates mobilising outcomes in overall financial management. There is also no economic guarantee in relation to the long-term outcomes of defined contribution pensions saving.

Financial regulators' preferred approach is to make the protection of consumer choice more meaningful, by developing extensive conduct of business regulation for intermediaries who help consumers navigate choice. Although regulating intermediaries intends to address the principal-agent problems between consumers and their financial intermediaries, such policy contributes overall to 'making markets work'. The corollary effect is the tremendous growth¹⁸⁷ of the financial sector in terms of abundance in product choice and financial intermediation services and chains.¹⁸⁸ Although the EU and UK had a later start in providing conduct of business regulation for consumer protection,¹⁸⁹ as compared with the US,¹⁹⁰ the regulatory regimes are quite similar today in terms of addressing the potential junctures of power and influence financial intermediaries have over consumers.

Consumers generally enjoy proprietary protection over their monies and assets in the custody of financial intermediaries who are regulated stringently to segregate, protect and carry out third party audits of customer monies and assets.¹⁹¹ Financial services providers are subject to an extensive suite of pre-contractual or pre-sale duties to consumers, such as responsible lending for consumer credit¹⁹² based on pre-contractual assessment of affordability, and suitability assessments for investments where advice is provided.¹⁹³ Brokerage services are also held to a 'best execution' standard for customers.¹⁹⁴ Further,

¹⁸⁷ U.K. HOUSE OF COMMONS LIBRARY, FINANCIAL SERVICES: CONTRIBUTION TO THE UK ECONOMY (2022), <https://researchbriefings.files.parliament.uk/documents/SN06193/SN06193.pdf>.

¹⁸⁸ Kathryn Judge, *Intermediary Influence* (University of Chicago Law Review, Columbia Law and Economics Working Paper No. 477, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430163 (on the growth of rent-extracting intermediation chains).

¹⁸⁹ Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349-496 (The first harmonised measure is the Investment Services Directive 1992 superseded by the more detailed Markets in Financial Instruments Directive 2004, then recast in 2014/59/EU. The UK had a self-regulatory framework for investment services until the 1990s).

¹⁹⁰ See *cf.*, Investment Company Act, 15 U.S.C. §§ 80a-1–80a-64 (1940); Investment Advisers Act, 15 U.S.C. §§ 80b-1–80b-21 (1940) (in force since 1940).

¹⁹¹ See *e.g.*, Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 16(8), 2014 O.J. (L 173) 349, (discussed in *In the matter of Lehman Brothers International (Europe) (In Administration)* and *In the matter of the Insolvency Act 1986* [2012] UKSC 6 (U.K.)).

¹⁹² Catharine I Garcia Porras & Willem H van Boom, *Information disclosure in the EU Consumer Credit Directive: Opportunities and Limitations*, in CONSUMER CREDIT, DEBT AND INVESTMENT IN EUROPE ch. 2 (James Devenney & Mel Kenny eds., 2012); Vanessa Mak, *What is Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands*, 38 J. CONSUMER POL'Y 411 (2015); see *cf.*, Olha O. Cherednychenko & Jesse M. Meindertsma, *Irresponsible Lending in the Post-Crisis Era: Is the EU Consumer Credit Directive Fit for Its Purpose?* 42 J. Consumer Pol'y 483 (2019) (critique).

¹⁹³ Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 25, 2014 O.J. (L 173) 349-496.

¹⁹⁴ Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 27, 2014 O.J. (L 173) 349-496.

where new intermediaries have arisen to connect with financial consumers, regulators have been responsive to include them in the regulatory perimeter, so that conduct of business regulation can be applied to protect consumers' expectations of their intermediaries. For example, the FCA regulates all manners of retail credit provided by retailers of goods;¹⁹⁵ price comparison websites are now regulated as insurance distributors;¹⁹⁶ claims management companies for consumers are regulated in their dealings with insurers or financial institutions where there is a dispute;¹⁹⁷ and even pre-paid funeral parlour plans are subject to the FCA's regulation.¹⁹⁸

This has however not prevented egregious conduct to consumers that have led to consumer harm. For example, some financial intermediaries aggressively classify consumers barely over certain thresholds as 'professional' and exclude them from the highest levels of consumer protection in buying risky financial products.¹⁹⁹ Intermediaries are often also incentivised to sell complex but profitable financial products whose ultimate welfare benefits to consumers remain in doubt.²⁰⁰ The notorious London & Capital Finance firm sold risky unregulated products to consumers while benefiting from an authorised status that pertained to other activity.²⁰¹ Financial intermediaries have also built up notoriety in passing to consumers bundled and complex fees, charges and other costs.²⁰² In this market for financial consumer choice, financial intermediaries fuel the variety and complexity in choice

¹⁹⁵ See, U.K. FIN. CONDUCT AUTH., GLOSSARY (2023) <https://www.handbook.fca.org.uk/handbook/BCOBS.pdf> (Inclusion of store credit cards as 'regulated credit agreement' under the UK FCA Handbook).

¹⁹⁶ U.K. FIN. CONDUCT AUTH., FG11/17: A GUIDANCE ON THE SELLING OF GENERAL INSURANCE POLICIES THROUGH PRICE COMPARISON WEBSITES (Oct., 2011), https://www.fca.org.uk/publication/finalised-guidance/fg11_17.pdf.

¹⁹⁷ *Claims management companies: our regulation*, U.K. FIN. CONDUCT AUTH. (Feb. 6, 2023), <https://www.fca.org.uk/firms/claims-management-regulation> (Since 2019).

¹⁹⁸ *FCA regulation boosts consumer protection in the funeral plans market*, U.K. FIN. CONDUCT AUTH. (Feb. 6, 2023), <https://www.fca.org.uk/news/press-releases/fca-regulation-boosts-consumer-protection-funeral-plans-market>.

¹⁹⁹ See e.g., JOHN SWIFT QC, LESSON LEARNED REVIEW COMMISSIONED BY THE NON-EXECUTIVE DIRECTORS OF THE FINANCIAL CONDUCT AUTHORITY INTO THE SUPERVISORY INTERVENTION ON INTEREST RATE HEDGING PRODUCTS (IRHPs): REPORT OF THE INDEPENDENT REVIEWER (Feb. 7, 2022), <https://www.fca.org.uk/publication/corporate/independent-review-of-interest-rate-hedging-products-final-report.pdf> (Such as classifying small business customers as 'professional' for the purposes of selling interest rate hedging swaps before the global financial crisis 2008); see also, DIANE BUGEJA, REFORMING CORPORATE RETAIL INVESTOR PROTECTION: REGULATING TO AVERT MIS-SELLING chs. 1, 3 (2019).

²⁰⁰ See, John Kay, *Bonds designed to leave savers bemused*, FIN. TIMES (Nov. 16, 2010), <https://www.ft.com/content/1912d062-f1ba-11df-bb5a-00144feab49a>; see also, Awrey, *supra* note 177.

²⁰¹ See also, GLOSTER, *supra* note 9 (in relation to the London and Capital Finance scandal).

²⁰² Judge, *supra* note 191; see also, U.K. FIN. CONDUCT AUTH., PS12/3: A DISTRIBUTION OF RETAIL INVESTMENTS: RDR ADVISER CHARGING – TREATMENT OF LEGACY ASSETS FEEDBACK TO CP11/26 AND FINAL GUIDANCE (Feb., 2012), <https://www.fca.org.uk/publication/policy/ps12-03.pdf> (also an issue in the EU and UK, as the UK dealt forcefully with product provider commissions); Commission Delegated Directive 2017/593, of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (EU), Art. 13, 2017 O.J. (L 87) 500-517 (the EU also dealt with dealing commissions in its 2017 reform disallowing dealing commissions to include research payments unless otherwise agreed with clients).

due to competition,²⁰³ and instead of being consumers' guides, there are hazardous signs that they would exploit consumers instead.

Financial regulators catch up to reinforce regulated behaviour, although ex post enforcement is not preferable to ex ante prevention of harm.²⁰⁴ New rules²⁰⁵ have also been introduced to constrain behaviour. For example, the EU has robustly addressed the scale of green or 'ESG' product mis-selling due to the lack of clear regulation for product labelling.²⁰⁶ This is increasingly being tackled in the US and UK.²⁰⁷ However, regulators are still not able to fully outlaw financial intermediaries' conflicts of interests, an area that endemically affects financial intermediaries' conduct of business, as financial intermediation models are inherently open to multi-sides in financial markets.²⁰⁸ Further, increased regulation engenders cost, which hinders consumers' access to financial services such as advice. The UK's FCA attempted to ban product provider commissions to financial advisors so that they can fully serve investors' interests.²⁰⁹ But this has ironically made financial advice expensive for consumers²¹⁰ and resulted in more consumers engaging in financial transactions without advice, at their own peril. Although regulation provides a white list of presumably 'safer' investments that can be sold without advice,²¹¹ such as regulated mutual funds in the EU and UK which must maintain certain standards of portfolio diversification, liquid

²⁰³ Madison Darbyshire, *Asset managers warn too much choice is confusing retail investors*, FIN. TIMES (Mar. 12, 2023), <https://www.ft.com/content/da561eeb-838d-48b6-891a-a87c2dc089e0>.

²⁰⁴ See, U.K. FIN. CONDUCT AUTH., CLIENT ASSETS CASS 1A.2 CASS firm classification, CASS 1A.3 Responsibility for CASS operational oversight (2023) <https://www.handbook.fca.org.uk/handbook/CASS.pdf>; U.K. FIN. CONDUCT AUTH., SUPERVISION, SUP 3.10 Duties of auditors: notification and report on client assets (2023) <https://www.handbook.fca.org.uk/handbook/SUP.pdf> (In relation to protecting client monies and assets, the FCA embarked on preventive measures such as strengthening senior management oversight and accountability and third party audit).

²⁰⁵ See e.g., U.K. HOUSE OF COMMONS LIBRARY, *supra* note 190.

²⁰⁶ Regulation (EU) 2019/2088, of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, O.J. (L 317) 1-16 (the EU Sustainable Financial Disclosure Regulation).

²⁰⁷ Iris H-Y Chiu, *Sustainable Finance Regulation- Authoritative Governance or Market-Based Governance for Fund Management?*, 57 J. FIN. TRANSFORMATION 48 (2023).

²⁰⁸ See Iris H-Y Chiu, *Is there Scope for Reforming the Emaciated Concept of Fiduciary Law in Finance? Critically Discussing the Potential Achievements of Reform in Special Issue: Liber Amicorum- Mads Andenas* 27 EUR. BUS. L. REV. 937 (2017) (discussing the U.K. Law Commission's Fiduciary Duties and Regulatory Rules project in 1995 (Fiduciary Duties and Regulatory Rules, U.K. L. Commission (1995) <https://www.lawcom.gov.uk/project/fiduciary-duties-and-regulatory-rules/>)).

²⁰⁹ See e.g., U.K. FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK COBS 6.1A Adviser charging and remuneration (2023), <https://www.handbook.fca.org.uk/handbook/COBS.pdf> (The Retail Distribution Review was carried out between 2006 and 2012, and culminated in a number of regulatory changes including the introduction of FCA Handbook COBS 6.1A).

²¹⁰ *Evaluation of the impact of the Retail Distribution Review and the Financial Advice Market Review*, U.K. FIN. CONDUCT AUTH., (Dec. 3, 2020) <https://www.fca.org.uk/publications/calls-input/evaluation-rdr-famr>; Carmen Reichman, *Advice gap is expanding, advisers say*, FTADVISER (Dec. 2, 2022), <https://www.ftadviser.com/ftadviser-focus/2022/12/02/advice-gap-is-expanding-advisers-say/>.

²¹¹ See Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 25(4), 2014 O.J. (L 173) 349-496 ('execution-only' financial products).

investments and liquidity management,²¹² as well as listed securities products, the ‘white list’ does not guarantee safety. For example, retail investors were caught by surprise when blue chip companies such as Carillion have become insolvent without much warning in 2019. The Woodford UCITS funds sold to retail investors have, unbeknownst to them, breached portfolio and liquidity constraints and ultimately been liquidated, leaving investors with losses after 4 years.²¹³ Sadly, even consumers who purchase advice need not be particularly well-served as the UK finds a patchy landscape for advice quality.²¹⁴

The regulation of conduct of business is ultimately process-based, and governs conduct in a pre-contractual manner, therefore operating at the point of protecting consumers’ meaningful choice. However, we have argued that the concept of ‘consumer choice’ in finance is riddled with fundamental weaknesses relating to what consumers need, and financial intermediaries have exploited such weaknesses, instead of guiding consumers, in many instances of conduct failure. Is the right way forward more intensive regulation of intermediary conduct? As conduct regulation is focused at point-of-sale, this does not address the nature of financial products as credence goods, whose performance or outcome to a consumer would only become evident over time. Financial intermediaries would continue to be incentivised to sell financial products whose future performance is not their concern.

Consumers may realise what financial needs they wish to meet, as well as how a financial product performs, after a passage of time in the post-sale stage. Consumer protection in terms of ex post welfare or utility outcomes, or adjustment of economic consequences to meet financial needs, are relatively rarer in financial regulation. It may be argued that neither the industry nor regulators can provide guarantees as to how market conditions would change to affect the performance of credence goods. Increases in a central bank’s base rate to fight inflationary pressures would affect long-term credit cost which may not have been fully appreciated/anticipated at the pre-contract stage. Investment products can be affected by changes in market conditions, geopolitical conditions and policy factors which are unlikely to be fully anticipated in relation to consumers’ savings needs. That said, there are limited regulatory avenues for ex post welfare adjustment for consumers.

As a general observation, financial regulation provides minimal loss protections for financial consumers but there are rare instances. These can be explained on the basis of fair risk distribution, as consumers, compared to providers, are less likely able to prevent welfare loss in certain circumstances. Such risk distribution also performs the role of inspiring

²¹² See Directive 2009/65, of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), Art. 85ff, 2010 O.J. (L 176) 1-15 (EU) (UCITS products regulated under the UCITS).

²¹³ *The Liquidity Lessons of Neil Woodford*, MEDIUM (Mar. 27, 2020), <https://matthewfeargrieve.medium.com/matthew-feargrieve-the-liquidity-lessons-of-neil-woodford-60e5c66a8cd7>; see also, Kalyeena Makortoff, *Woodford fund compensation for investors likely to total 77p in the pound*, THE GUARDIAN (Apr. 20, 2023), <https://www.theguardian.com/business/2023/apr/20/woodford-fund-compensation-for-investors-likely-to-total-77p-in-the-pound> (The final settlement proposed by the FCA would result in a significant extent of investor losses).

²¹⁴ Debbie Gupta, *Improving the suitability of financial advice*, U.K. FIN. CONDUCT AUTH., (Sep. 20, 2019), <https://www.fca.org.uk/news/speeches/improving-suitability-financial-advice>.

confidence in financial markets, preventing withdrawal of participation. This is particularly relevant for financial services of a near-essential nature that enjoy a broad social uptake. For example, the EU's provision²¹⁵ for consumers not to bear more than 50 euros loss where unauthorised remittance transfer takes place, as well as the deposit guarantee schemes for bank depositors widely found in most jurisdictions.²¹⁶ The UK has further expanded the deposit guarantee scheme into a financial sector-wide compensation scheme to protect insurance and investment customers as well where their regulated financial intermediary firm goes insolvent.²¹⁷ A guarantee is to an extent also available to defined benefit pension savers if their schemes become insolvent, such as due to the insolvency of the sponsoring employer.²¹⁸ However, the Pensions Regulator's safety net does not extend to a full honouring of the pre-insolvency promise.²¹⁹

At a more micro-level, financial consumers' protection in terms of ex post welfare performance or distributive adjustment is considerably patchier. Online financial consumers enjoy cooling off or withdrawal rights for financial services or products sold via distance,²²⁰ and rights of withdrawal for financial products such as online crowdfunding offers.²²¹ These provide an ex post opportunity for welfare adjustment as consumers are given some post-contract time to decide if the financial service or product would be economically optimal for them. These rights are however exercisable within a very short-term only.

It is possible for consumers to argue for ex post welfare adjustment if financial products have disappointed due to actionable causes such as mis-selling or failures in conduct of business.²²² These welfare adjustment would therefore be based on defects in the pre-sale stage which adversely affected choice, hence attracting recompense. In this respect, the provision of out-of-court dispute resolution, such as by the UK Financial Ombudsman, has

²¹⁵ Directive 2015/2366, of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, Arts. 74-74, O.J. (L 337) 35-127.

²¹⁶ Directive 2014/49, of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, O.J. (L 173) 149-178 (EU Deposit Guarantee Scheme Directive, also the US FDIC's deposit guarantee for up to \$250,000 per customer per institution).

²¹⁷ *FSCS protects you when financial firms fail*, U.K. FIN. SERVS. COMPENSATION SCHEME, <https://www.fscs.org.uk/> (last visited Jun. 4, 2023).

²¹⁸ *The Pension Protection Fund*, U.K. MONEYHELPER, <https://www.moneyhelper.org.uk/en/pensions-and-retirement/pension-problems/the-pension-protection-fund> (last visited Jun. 4, 2023).

²¹⁹ *What we do*, U.K. PENSION PROTECTION FUND, <https://www.ppf.co.uk/about-us/what-we-do> (last visited Jun. 4, 2023).

²²⁰ Directive 97/7, of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, 1997 O.J. (L 144) 19-27; The Financial Services (Distance Marketing) Regulations 2004, No. 2095 (U.K.).

²²¹ Commission Regulation 2020/1503, of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, Art. 22, 2020 O.J. (L 347) 1-49 (EU); *see also*, Martin Ebers & Benedict M Quarch, *EU Consumer Law and the Boundaries of the Crowdfunding Regulation*, in *CROWDFUNDING AND THE LAW* (Pietro Ortolani & Marije Louise eds., 2022) (critique regarding consumer protection on these platforms in relation to the lack of financial services compensation and liability for misdisclosure).

²²² Financial Services and Markets Act 2000, c. 8, § 138D (U.K.).

significantly helped consumers access justice. The cap for recovery is limited to £375,000.²²³ Further, the UK and US have developed significant out-of-court redress powers for consumers, including ordering of consumer redress where industry-wide mis-selling has taken place.²²⁴ Where unauthorised financial services or products have been offered, the UK FCA has also been able to secure contractual avoidance orders resulting in full refunds to customers.²²⁵ Where regulatory rules have been breached in conduct of business that causally relate to harm, regulators have voluntarily sought welfare adjustment outcomes for consumers in mass redress schemes.²²⁶

Generally however, financial product performance and welfare outcomes are not protected under financial regulation.²²⁷ This policy position can be questioned as financial welfare seems assumed to be fundamentally connected to pre-sale choice, but financial products are credence goods whose impact on consumers' welfare outcomes are only discovered post-sale.

For example, a pre-sale affordability assessment for a borrower may not last through a borrower's long-term circumstances, not to mention being affected by sharp rises in central bank base rate. Consumers may need welfare adjustment when circumstances change, a protection not offered in financial regulation.²²⁸ The UK adopts the approach of nudging regulated credit institutions to treat borrowers with forbearance and to explore alternative affordable arrangements that may involve post-contract variations.²²⁹ Such guidance still leaves consumers to deal with their respective banks, unlike the extraordinary intervention undertaken during the height of the coronavirus pandemic.²³⁰ Nevertheless, non-performing loans are a problem for regulated credit institutions in terms of their prudential safety, which is an important objective for financial regulation. Hence, the levels of consumer protection in this area may be affected by potential conflict of regulatory objectives for regulators who need to protect the profitability and stability of credit institutions.²³¹

²²³ *Increase to our award limits*, U.K. FIN. OMBUDSMAN SERVICE (Mar. 18, 2022) <https://www.financial-ombudsman.org.uk/news-events/increase-award-limits#:~:text=From%201%20April%202022%2C%20our,firms%20before%201%20April%202019.>

²²⁴ Financial Services and Markets Act 2000, c. 8, § 404 (U.K.); *see also*, *CFPB to issue \$95 million in redress to consumers harmed by Premier Student Loan Center*, U.S. CONSUMER FIN. PROT. BUREAU (Dec. 13, 2022) <https://www.consumerfinance.gov/about-us/blog/cfpb-to-issue-95-million-redress-to-consumers-harmed-by-premier-student-loan-center/> (CFPB recoveries for consumers).

²²⁵ *See e.g.*, *Asset Land Investment Plc v. The Financial Conduct Authority* [2016] UKSC 17 (U.K.); *FCA v. Capital Alternatives Ltd and Ors* [2014] EWHC 144 (U.K.) (for unauthorised collective investment schemes); JONATHAN KIRK, THOMAS SAMUELS, & LEE FINCH, *credit*, in *MIS-SELLING FINANCIAL SERVICES* ch. 7, (2022).

²²⁶ Financial Services and Markets Act 2000, c. 8, § 404 (U.K.).

²²⁷ Chiu, *supra* note 3.

²²⁸ John Linarelli, *Debt in Just Societies: A General Framework for Regulating Credit*, 14 *REGUL. & GOVERNANCE* 409 (2020); Toni Williams, *Who Wants to Watch - A Comment on the New International Paradigm of Financial Consumer Market Regulation*, 36 *SEATTLE. U. L. REV.* 1217 (2013).

²²⁹ U.K. FIN. CONDUCT AUTH., *FG23/2: GUIDANCE FOR FIRMS SUPPORTING THEIR EXISTING MORTGAGE BORROWERS IMPACTED BY THE RISING COST OF LIVING*, (Mar. 10, 2023), <https://www.fca.org.uk/publication/finalised-guidance/fg23-2.pdf>.

²³⁰ *See* Iris H-Y Chiu, Andreas Kokkinis & Andrea Miglionico, *Debt Expansion as 'Relief and Rescue' at the Time of the Covid-19 Pandemic: Insights from the Legal Theory of Finance*, 28 *IND. J. GLOBAL LEGAL STUD.* 29 (2021).

²³¹ Mehrsa Baradaran, *Banking and the Social Contract*, 89 *NOTRE DAME L. REV.* 1283 (2014).

At a more macro level, high levels of individual and household debt, such as in relation to near-essential goods such as education²³² raise a larger welfare problem in terms of the financial management burdens for consumer ‘citizens’.²³³ Although there is provision for the general ‘fairness’ of credit bargains to be re-opened ex post and challenged in court,²³⁴ there is a lack of litigation in this area to shed light on how far such a legal right addresses, at a more macro level, the effectiveness and sustainability of debt-burdened lives. Is it beyond financial regulators’ remit to examine whether high levels of debt, such as student debt, increase chances for higher employability or wage income?²³⁵ There is a lack of macro-level policy strategy to deal with whether consumers’ mobilisation expectations are really met by choosing certain financial products. Consumers’ overall lives in states of ‘debtfare’²³⁶ is a welfare issue that transcends the micro-level question of choice or conduct in any particular financial transaction.

The level of consumer protection in terms of performance, welfare or outcomes in investment products is even less articulated at the ex post stage compared to credit products. A retail securities investor in the UK is unlikely to be able to mount misdisclosure litigation for securities losses. This is due to the inconveniences of not having a supportive securities litigation framework and industry,²³⁷ and also regulation that protects issuers against only dishonest or reckless misdisclosures.²³⁸ An investment customer in the UK is also unlikely to successfully claim against a financial institution just because of poor product performance in the longer term.²³⁹ Financial regulation can only extend to the quality of investment advice sought at the pre-sale stage, which is as free from conflicts of interest as possible,²⁴⁰ and subject to the quality standard of ‘suitability’ in the UK and EU.²⁴¹ It can potentially be seen as distributively unjust where financial products suffer losses (perhaps

²³² Victoria J. Haneman, *(Re)Framing Student Loan Debt as a Commons*, 84 L. & CONTEMP. PROBS. 153-164 (2021).

²³³ Johnna Montgomerie & Daniela Tepe-Belfrage, *Caring for Debts: How the Household Economy Exposes the Limits of Financialisation*, 43 CRITICAL SOCIO. 653 (2017).

²³⁴ *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (U.K.); *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (U.K.); Sarah Brown, *Consumer Credit Relationships – Protection, Self-Interest/Reliance and Dilemmas in the Fight Against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law*, 36 Legal Stud. 230 (2016).

²³⁵ Jean François Bissonnette, *The Political Rationalities of Indebtedness: Control, Discipline, Sovereignty*, 58 SOC. SCI. INFO. 454 (2019); Tayyab Mahmud, *Neoliberalism, Debt and Discipline*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND THE LAW ch. 5 (Ugo Mattei & John D Haskell eds., 2015).

²³⁶ MARK HORSLEY, *THE DARK SIDE OF PROSPERITY: LATE CAPITALISM’S CULTURE OF INDEBTEDNESS* chs. 3-8 (2015); SUSANNE SOEDERBERG, *DEBTFARE STATES AND THE POVERTY INDUSTRY* chs. 2-3 (2014).

²³⁷ Iris H-Y Chiu, *A Confidence Trick: Ex Ante versus Ex Post Frameworks in Minority Investor Protection in the UK*, 11 EUR. CO. L. 6 (2014).

²³⁸ Financial Services and Markets Act 2000, c. 8, § 90A (U.K.).

²³⁹ *Worthing v. Lloyds Bank* [2015] EWHC 2836 (QB) (U.K.).

²⁴⁰ See e.g., Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 24(7), 2014 O.J. (L 173) 349 (in relation to independent advice, as required in the MiFID 2014 Art 24(7)); see also, *supra*, note 212 (UK’s retail distribution review reforms).

²⁴¹ Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Art. 25, 2014 O.J. (L 173) 349-496.

‘normally’, depending on market vicissitudes) while investment advisers and portfolio managers have earned their sizeable advice or management fees.²⁴²

The lack of ex post accountability or redress for consumers’ performance expectations or welfare outcomes is particularly stark for near-essential investment products like pension saving. Commentators warn of potential ‘time bombs’ in relation to pension welfare shortfalls or even pension poverty related to the inability to predict performance of defined contribution saving schemes.²⁴³ The potential scale of the problem is social in nature. It should be questioned whether taking pension advice twenty years ahead of the maturity of the pension pot is sufficient pre-sale protection for consumers’ ultimate performance expectations and welfare outcomes. There is a fundamental limitation to the protection of consumer choice at the pre-sale stage, if this remains disconnected to the ultimate performance, utility or outcomes consumers reasonably expect.

Mapping against the Taxonomy developed in Section A, financial regulation provides extensive and sophisticated, behaviourally-inspired, tools to protect consumer choice in developed financial markets. These reflect a policy agenda in favour of financialisation and the continued dominant roles of private sector finance in meeting consumers’ varied financial needs.²⁴⁴ Financial regulation hence extensively caters for the consumer empowerment ideology. Private sector financial intermediaries are extensively regulated for conduct, but regulatory duties often strike a balance between keeping the industry’s legal risks manageable while providing a framework for reasonable consumer treatment. For example, fiduciary care is generally not expected of financial intermediaries,²⁴⁵ in comparison to what would be expected of professions such as healthcare. Conduct regulation arguably supports the industry’s growth and legitimacy. Consumer protection relating to citizenly expectations is scarcely catered for in relation to near-essential financial products or services, post-sale quality protection or welfare outcomes. While consumers bear the cost of regulatory burdens, regulation remains in catch-up vis a vis clever regulatory evasions and egregious financial sector culture. Financial consumers live in forced citizenship in the world of marketized finance, despite perverse incentives on the part of financial intermediaries and product providers, and the limitations of a pre-sale choice narrative to meet their ultimate welfare and outcomes needs. Even with extensive enrolment of consumers as stakeholders in policy development in the EU and UK,²⁴⁶ it is

²⁴² See Madison Darbyshire, *Cathie Wood’s flagship Ark fund tops \$300mn in fees despite losses*, FIN. TIMES (Mar. 9, 2023), <https://www.ft.com/content/7930fbf7-d2d6-464c-9ffa-20efcf58e21e>.

²⁴³ Simoney Kyriakou, *Pension poverty warning as DC models found outdated*, FTADVISER (Apr. 28, 2021), <https://www.ftadviser.com/pensions/2021/04/28/pension-poverty-warning-as-dc-models-found-outdated/>.

²⁴⁴ Iain Ramsay & Toni Williams, *Peering Forward, 10 Years After: International Policy and Consumer Credit Regulation*, 43 J. Consumer Pol’y 209 (2020).

²⁴⁵ Chiu (2017), supra note 211.

²⁴⁶ Such as the mandatory consumer panel for the FCA, and the ESMA Stakeholder Panel which includes consumer representatives.

questionable whether their representation countervails against powerful financial industry lobbies²⁴⁷ in shaping the balances of priorities struck in financial regulation.

The regulatory tools deployed in financial regulation are represented in the following figure, applying the Taxonomy created in Section A:

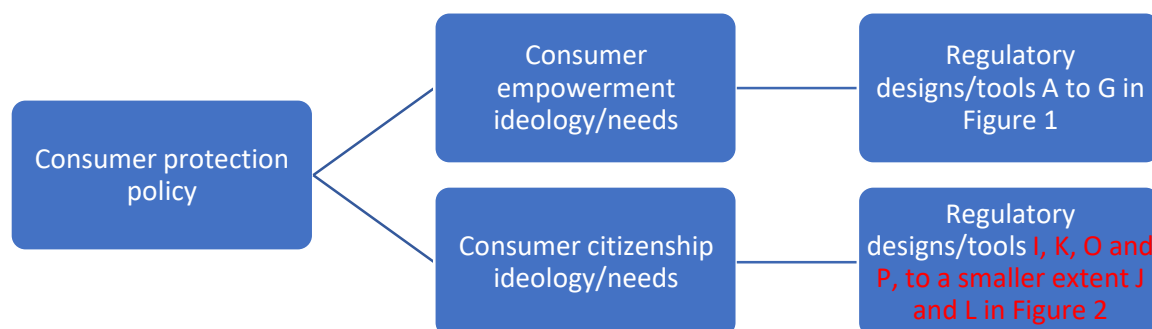


Figure 4: The Taxonomy representation of financial regulation tools

We now turn to discuss to what extent the introduction of the UK's Consumer Duty changes consumer protection levels as discussed.

ii. The UK's Financial Consumer Duty

The Consumer Duty is brought into force in the UK in July 2023, as a regulatory principle imposed on all regulated financial services firms. It is framed in the following terms: 'a firm must act to deliver good outcomes for retail customers'.²⁴⁸ This principle is further explicated in terms of four particular consumer outcomes and three cross-cutting conduct rules.²⁴⁹

²⁴⁷ See e.g., CORP. EUR. OBSERVATORY (CEO), THE AUSTRIAN FED. CHAMBER OF LAB. (ARBEITERKAMMER) AND THE AUSTRIAN TRADE UNION FED'N (ÖGB), THE FIRE POWER OF THE FINANCIAL LOBBY A SURVEY OF THE SIZE OF THE FINANCIAL LOBBY AT THE EU LEVEL, (2014) https://corporateeurope.org/sites/default/files/attachments/financial_lobby_report.pdf.

²⁴⁸ See PRIN 2.1 *The Principles*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html?date=2023-07-31&timeline=True> (last visited Jun. 3, 2023) (Principle 12).

²⁴⁹ PRIN 2A *The Consumer Duty*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2023-07-01> (last visited Jun. 4, 2023).

As a regulatory principle, the Consumer Duty forms the ‘bedrock’ for regulatory rules and enforcement,²⁵⁰ meaning that it can form a basis for future development of precise rules, but can also found a cause for regulatory action. Where there may not be precise rules of conduct that govern a particular matter at hand, the FCA has been able to articulate a cause of action upon its Principles to carry out enforcement against egregious conduct.²⁵¹ Principles-based enforcement was also used against the London inter-bank offered rate manipulation scandal when interest rate benchmarks were not formally regulated.²⁵² Principles-based regulation can potentially fill the gaps of rules-based regulation, and allows the FCA to consider more holistically the needs for governing the financial services industry at any one point in time. However, the Principles are not susceptible to civil enforcement in courts, as they do not give rise to an individual right of action.²⁵³ However, the Financial Ombudsman is able to consider allegations of failures to adhere to Principles in out-of-court redress for consumers.²⁵⁴ In sum, the Consumer Duty is chiefly susceptible to regulatory enforcement, or by consumers before the Ombudsman.

Four Outcomes

At first blush, it can be argued that the reference in the Duty to ‘good outcomes’ seems a radical departure from the account of consumer protection discussed in Section B.i. Does the Duty’s reference to outcomes pertain to consumer citizenship needs such as meeting the performance or welfare expectations of financial products? Unpacking the four precise outcomes of the Duty’s stipulation presents a more nuanced picture. Two of the four outcomes more clearly relate to the pre-contractual stage and to empowering consumer choice. The other two have post-contractual implications for consumers and may potentially provide for their welfare outcomes. However, these are only arguable and it remains to be seen how the FCA, as well as the Upper Tribunal,²⁵⁵ which can be asked to review the FCA’s enforcement decisions, would interpret what these outcomes demand of regulated firms.

Two ‘good’ outcomes relating to protecting the empowerment of consumer choice are the ‘consumer communications’ outcome and the ‘product governance outcome’. The consumer communications outcome is to be achieved by firms providing not only mandatory disclosures to consumers, but firms must ensure that communications are understood by consumers, and that consumers are equipped to make effective decisions.²⁵⁶

²⁵⁰ See *BBA v. FSA* [2011] EWHC 999 (U.K.).

²⁵¹ U.K. Fin. Conduct Auth., Final Notice to Kensington Mortgage Company Limited, (Apr. 12, 2010) <https://www.fca.org.uk/publication/final-notices/kensington.pdf> (FSA’s Enforcement against Kensington Mortgage Co Ltd).

²⁵² U.K. Fin. Conduct Auth., Final Notice to Martin Brokers (UK) Ltd (Martins), (May 15, 2014) <https://www.fca.org.uk/publication/final-notices/kensington.pdf> (FCA’s enforcement against Martin Brokers).

²⁵³ *supra* note 1, ch. 11.

²⁵⁴ Simon Rawle, *A new Consumer Duty – setting a higher standard of care for consumers*, U.K. FIN. OMBUDSMAN SERVICE (Aug. 8, 2022) <https://www.financial-ombudsman.org.uk/data-insight/blogs/new-consumer-duty-setting-higher-standard-care-consumers>.

²⁵⁵ Financial Services and Markets Act 2000, c. 8, §§ 127, 132 (U.K.).

²⁵⁶ See *PRIN 2A.5 Consumer Duty: retail customer outcome on consumer understanding*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023) (PRIN 2A.5.3).

Such communications cover a broad scope, whether pre or post contract,²⁵⁷ and whether related to product disclosure or marketing, and in any medium given to the consumer. In this manner, communications are meant to be purposeful and practically helpful to consumers, rather than for discharging mandatory legal obligations. Although such communications do not deviate from the legal standard for financial promotion, which is the standard of 'fair, clear and not misleading',²⁵⁸ the regulatory expectations can now arguably be framed around 'comprehensibility' and 'helpfulness' for c therefore expected to take proactive steps to check consumer understanding of information given, rather than to 'dump' information onto consumers. The consumer communications outcome principally seeks to support the protection of meaningful choice for consumers, as financial intermediaries are enrolled into more proactive and hands-on roles to assist consumers in sense-making of the financial products or service in question. It is uncertain how far the communications outcome would pertain to sense-making of the financial consumer's needs or her choice universe more broadly. That arguably is the province of financial advice which should be separately contracted for and remunerated.²⁵⁹

Although the communications outcome relates to consumers' pre-contractual stage, it is possible for a consumer to argue that a poor communications outcome is connected to or causal of a poor decision made in purchasing certain financial products or services. In this manner, consumers may have some scope for ex post adjustment of their welfare outcomes. For example, the regulator expects that a firm should, where appropriate, test the quality of its communications in order to remedy deficiencies and adapt them to consumers' needs.²⁶⁰ Where such testing is not carried out or carried out inadequately, such as on a small sample of consumers, procedural defects can contribute to the perception that the firm's communications are defective. In this way, a greater burden needs to be discharged by firms to show that consumers' choices are fully informed, rather than leaving consumers to take responsibility for being fully informed. That said, it is only possible, but not entirely clear, that a defective communications outcome can necessarily result in consumers' welfare or distributive adjustments before the Ombudsman.

The UK FCA also expects firms to engage in 'testing' in relation to their consumer interfaces. This is a broad regulatory expectation across all four outcomes, reflecting the regulators' expectations that firms should provide the evidence basis that they would deliver the outcomes expected in the Consumer Duty. The Duty is essentially a 'meta-level' form of regulation, allowing each firm to design their own implementation of processes and interfaces dealing with consumers. Hence, firms' implementations can be in a 'black box' that is not normally scrutable by regulators. Testing requirements compel firms to provide an ex ante evidence basis that justifies their implementation, as well as continuing implementation after regular review (also a requirement prevalent in the Duty

²⁵⁷ Specified as at suitable points throughout the life cycle of a financial product.

²⁵⁸ U.K. FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK, COBS 4.2.1 (2023), <https://www.handbook.fca.org.uk/handbook/COBS.pdf>.

²⁵⁹ U.K. FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK, COBS 6.1A Adviser charging and remuneration (2023), <https://www.handbook.fca.org.uk/handbook/COBS.pdf> (generally).

²⁶⁰ See *PRIN 2A.5 Consumer Duty: retail customer outcome on consumer understanding*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023) (PRIN 2A.5.10-14).

articulations). In this manner, the consumer communications outcome seeks to protect consumer choice by compelling firms to make greater substantive effort to compensate for consumers' generally weaker understanding and financial literacy. In our view, this level of consumer protection reinforces the same old protection level regarding empowering consumer choice, but compels firms to demonstrate more proactively and clearly that they are offering such protection.

Next, in relation to the 'product governance outcome', this outcome seeks to ensure that financial products are suitably designed and appropriately marketed and distributed to consumers. This aspect of the Duty does not add anything new to the legal standards in product governance regulation discussed earlier. However, precise articulation of regulatory expectations for certain ex ante processes in product governance such as product testing, reviewing and proactively including suitable consumers and excluding unsuitable ones,²⁶¹ could amount to proactive 'sub-duties' for product governance compliance. Compliance with these would provide the evidence basis for firms' implementation of the outcome, which must be provided by firms themselves. It may be argued that the product governance outcome in the Duty would make it highly unlikely that previous scandals, such as the unsuitable marketing of mini-bonds,²⁶² can be carried out to retail investors. How would product manufacturers be able to justify the marketing of mini-bonds to mass market consumers, where perhaps only the consumers with a higher risk appetite may be fairly exposed?

Distributors of financial products are placed in a 'gatekeeping' position against product manufacturers, as they concurrently ensure the suitability of the target market and to also independently review the suitability of marketing practices. Given their close connections and distributors' incentives to please product suppliers, this gatekeeping role may be affected. However, distributors face legal risks in terms of implementing product governance obligations, and they are subject to testing and review processes to provide the evidence basis for their implementation.

The 'product governance outcome' overall supports the protection of consumer choice. It goes some way towards making product providers responsible for only showing consumers choices that are potentially suitable for them,²⁶³ but this continues to neglect real questions regarding consumers' lack of ability to engage in sense-making of their financial needs and the overall universe of choice before them. Each product provider's assessment of potential suitability can be incomparable to consumers in relation to product features and quality. In the absence of ex ante product regulation like in drug approval or product 'CE' markings which unequivocally promises certain qualities, it is uncertain if product governance would provide the necessary clarity and quality framework for consumers' meaningful choice.

²⁶¹ See PRIN 2A.3 *Consumer Duty: retail customer outcome - products and services*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023); see also, U.K. FIN. CONDUCT AUTH., *PRODUCT INTERVENTION AND PRODUCT GOVERNANCE SOURCEBOOK (PROD) PROD 3.2 Manufacture of products (2023)* <https://www.handbook.fca.org.uk/handbook/PROD.pdf>.

²⁶² see, GLOSTER, *supra* note 9.

²⁶³ See EUR. SEC. & MKT. AUTH., *FINAL REPORT: GUIDELINES ON MiFID II PRODUCT GOVERNANCE REQUIREMENTS* (Mar. 27, 2023) <https://www.esma.europa.eu/press-news/esma-news/esma-updates-its-guidance-product-governance> (the EU Guidelines issued by ESMA go along the same lines).

The Consumer Duty has not substantively changed the orientation of the existing product governance regime for consumer protection. This remains a process-based form of regulation for financial intermediaries whose conduct is scrutinised pre-sale and pursuant to consumer empowerment to choose. Product governance regulation in our view remains disconnected with consumers' ultimate welfare expectations or outcomes from product performance.

Next, we turn to two outcomes expressly articulated as post-sale consumer outcomes, viz the 'consumer support' outcome and the 'fair value' outcome. The key question is whether they shift the needle in terms of protecting financial consumers' expectations of performance or welfare, which we earlier critically discussed.

The consumer support outcome envisages pre and post-sale consumer support, whether or not related to any specific product. Such consumer support is not envisaged to 'do more' than what consumers currently enjoy in expected legal or contractual rights, such as switching products, cancelling contracts within stipulated regulatory periods or submitting claims, such as for insurance products. The manner of consumer support however demands firms to ensure that consumers are both given 'appropriate frictions' towards decisions at the pre-sale stage and not to face unreasonable barriers in accessing post-sale assistance.²⁶⁴ Further, favouring or prioritising new customers over existing ones would be regarded as not being consonant with the expectations of the Duty. The Consumer Duty has the potential to catch out firms that adhere legalistically to their regulatory or contractual duties without engaged concern for consumers. Further, specific attention must be given to the needs of vulnerable consumers.

On the one hand, ex post consumer support seems process-based and deals with manners of customer interfaces. For example, firms may have to consider whether automated forms of consumer support such as chatbots are sufficient, and whether they should dismantle undue barriers to seek human assistance. However, an increase in scope for consumers to demand post-sale care can open up the possibilities for requesting adjustment to aspects of their bargains during the lifetime of a credence good. For example, credit consumers could argue for the need to switch or for contractual variation when circumstances change affecting their loan affordability. It is arguable that the expectation that credit institutions would have to support such customers is placed on a firmer regulatory footing, changing from the current situation where regulators could only nudge lenders to treat troubled borrowers with forbearance and understanding. That said, this is very speculative as product providers may insist on their legal rights at post-sale stages, and without post-sale rights as to quality or performance rights for consumers, it may be difficult to re-open questions regarding welfare outcomes.

The 'fair value' outcome demands that product manufacturers and their distributors both engage in fair value assessments to ensure non-exploitation of consumers.²⁶⁵ At first blush,

²⁶⁴ See *PRIN 2A.6 Consumer Duty: retail customer outcome on consumer support*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023).

²⁶⁵ See *PRIN 2A.4 Consumer Duty: retail customer outcome on price and value*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023).

this outcome is also pre-contractual in nature and focused on ex ante harm prevention. Product manufacturers must carry out initial value assessments and review them at stages of product adaptation or product renewal. Such value assessments include assessments of cost to the manufacturer as well as comparative assessments with similar market products, and should take into account both financial and non-financial benefits to consumers. The FCA seems focused on fair value assessments as a key outcome of the four outcomes above, and has issued a special review of processes evidencing such fair value assessment.²⁶⁶ Distributors must also assess fair value before carrying out distribution, based on the characteristics and needs of the target market, distributors' cost, intended benefits to consumers and taking into account their remuneration incentives. Both manufacturers and distributors need to ensure that vulnerable customers are taken care of in order to prevent missing out on fair value. Further, the fair value assessment seems imposed throughout the life cycle of financial products, and both manufacturers and distributors must take steps to avoid or mitigate harm if their reviews raise the finding that fair value is no longer provided.

The fair value outcome is at first blush focused on point-of-sale, and does not expect product manufacturers to assess fair value beyond a reasonable foreseeable future according to the characteristics of a product. However, the life cycle review obligation can be used towards consumers' advantage in terms of adjusting for the performance or welfare outcomes they attain. For example, renewing customers for insurance products should arguably be put on as favourable deals as for new customers, as fair value assessments are triggered at each renewal period. Further, it can be questioned whether open-ended mutual fund investors can ask for post-sale review of fund charges and fees after a quarter or a year of poor performance. The need to consider consumers' 'benefits' can arguably include their ultimate welfare or performance expectations of the financial product they purchase.

Although neither of the consumer support nor fair value outcomes explicitly address consumers' welfare or performance protections, there seems scope for initiated consumers to approach their financial intermediaries for accountability and perhaps welfare or distributive adjustment. However, these are not framed as rights for consumers. Nevertheless, the four outcomes are not strict in nature, and are demanded in combination with three cross-cutting rules of conduct discussed below. We examine these to determine the consumer protection levels really achieved by the Duty.

Three Cross-cutting Rules of Conduct

The four 'good outcomes' are supported by three cross-cutting rules of conduct, viz, regulated firms must act in good faith, avoiding foreseeable harm, and supporting consumers towards their financial objectives.²⁶⁷ First, it is queried if these cross-cutting conduct rules are conditions precedent to any finding of 'poor outcomes' or would 'poor outcomes' shed light on problematic conduct under these rules? The four outcomes are unlikely subject to a form of strict liability, and poor conduct should be the causative factor for liability. This is reflected in the FCA's provision that 'The cross-cutting obligations define

²⁶⁶ *Consumer Duty: Findings from our review of fair value frameworks*, U.K. FIN. CONDUCT AUTH., (MAY 10, 2023) <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01>.

²⁶⁷ See *PRIN 2A.2 Cross-cutting obligations*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023).

how firms should act to deliver good outcomes for retail customers.²⁶⁸ However, the FCA also clarifies that the outcomes help to define what is expected conduct, and ‘do not exhaust those rules’.²⁶⁹ This may mean that poor conduct is itself actionable even in the absence of ‘poor outcomes’ (as yet), and poor outcomes can be a reflection of poor conduct. Poor outcomes do not seem to be per se actionable. Consumers’ economic or financial welfare interests, in the absence of actionable conduct, remain matters for ‘luck egalitarianism’²⁷⁰ or market vicissitudes. In this manner, where a consumer attempts to seek welfare adjustment on the basis of a poor support or fair value outcome, the scope for success may be limited by the operation of conduct rules.

The conduct rules do not require firms to ‘bend over backwards’ to accommodate consumers. The conduct rule of ‘good faith’ is firmly situated within commercial bounds of reasonableness and is explained to mean honest, fair and open dealing, based on the general duty to act in the best interests of customers.²⁷¹ This duty does not prevent firms from meeting their legitimate commercial interests or exposing consumers to product risks that are inherent and understood. Further, ‘good faith’ is not fiduciary in nature in relation to single-minded loyalty,²⁷² as the strict fiduciary standard does not apply generally to the financial services sector whose practices are subject to contractual and regulatory modifications.

Firms cannot exploit customers’ needs or weaknesses, manipulate them or neglect their interests or discriminate amongst customers without a reasonable basis. In this manner, this conduct rule frames outcomes such as communications, product governance or fair value, within a framework focused on fairness and open-ness. The achievement of good outcomes is therefore subject to what is commercially reasonable. However, as good outcomes are framed in terms of pro-active actions like testing, review and proactive remediation, ‘good faith’ extends to the conduct of those actions. Ultimately the standard of care imposed on firms is arguably higher as proactivity and prevention actions are required of firms, and firms need to become more sensitive to what may be considered exploitative, or taking advantage of consumers or vulnerable consumers. Firms may find it harder to justify financial products of dubious utility, such as products with in-built hazards with a huge disparity between teaser rates and mortgage rates applying after the teaser rates end; or insurance products that may unlikely ever be used; or investment products whose return structures are excessively complex. Firms would also unlikely be able to justify using their regulated status for one activity to engage in unregulated and high-risk financial

²⁶⁸ See *PRIN 2A.2 Cross-cutting obligations*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023) (PRIN 2A.2.27).

²⁶⁹ See *PRIN 2A.2 Cross-cutting obligations*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/?date=2099-07-01> (last visited Jun. 4, 2023) (PRIN 2A.2.28).

²⁷⁰ Linarelli, *supra* note 231.

²⁷¹ Commission Delegated Regulation 2017/565, of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, Art. 24, 2017 O.J. (L 87), 1-83.

²⁷² See *supra* note 199;

promotion.²⁷³ In this manner, the ‘good faith’ cross-cutting rule could work towards prevention of harm more generally than precisely regulated, and instil a healthier culture for financial firms.

Next, firms have to avoid foreseeable consumer harm. Firms are not expected to protect consumers from the inherent risks of financial products, but should take steps to ensure that product design and conduct of business avoid causing foreseeable harm, including to vulnerable consumers. The expectation on the part of firms to avoid foreseeable harm is based on generally acceptable short-term standards, but this again imposes proactivity and preventative demands on firms to identify and eradicate such foreseeable harm. Further, in relation to a financial product’s life cycle, it is arguable that the conduct to avoid foreseeable harm ‘renews’ itself at each reviewable juncture. One obvious area for firms is to avoid certain well-known ‘negatives’ such as exorbitant or inscrutable charges for financial products.

Finally, firms must engage in conduct to enable and support consumers’ attainment of their financial objectives. The firm is not expected to go beyond its legal duties in providing execution-only services or in giving investment advice based on the information provided by customers. Such enabling and support also does not go beyond what the firm carries out in terms of marketing, distribution, disclosure and facilitating expected services such as product switching. This conduct expectation is carefully worded in order to focus on firms’ *supportive* roles, not relating to responsibility for the performance or welfare attainments by consumers in relation to their financial products. In this manner, conduct rules are framed proactively against harm but only supportively towards consumers’ attainment of welfare or performance.

We perceive a genuine and innovative effort on the part of the FCA to address the meaningful protection of consumer choice, by requiring firms to proactively make choice comprehensible and not harmful. Whilst the Consumer Duty still focuses on consumer empowerment, the regulator recognises the limits of leaving consumers to be self-responsible and makes demands of the industry in terms of proactive and preventive conduct. One of the key ills of the financial sector is the generation of abundant choice which neither provides clear qualities or justification as to how consumers’ financial needs are met. Financial sectoral culture is also ridden with perverse short-term incentives and conflicts of interest. It is arguably not inordinate to impose more responsibility on the industry to justify the choices they offer. The regulatory stance makes it clear that protecting consumers’ meaningful choice is as much a regulated firm’s responsibility as is the regulator’s mandate. There is however no radical shift towards more intense citizenly protections for financial consumers, such as ensuring that product quality meets consumers’ welfare needs. We have argued that there may be some scope for consumers to initiate conversations with firms about post-sale welfare and performance. This possibility is however not placed on a ‘rights’ basis.

The Duty’s utilisation of proactive measures by firms, such as testing, reviewing and prevention of harm, demonstrate both a heightened standard of care as well as an

²⁷³ Such as occurred with London and Capital Finance.

evidential basis for compliance. There is some potential to compel the industry to become more circumspect in terms of offerings of choice and how they are presented to consumers. Although short of regulating for product quality, performance and welfare outcomes, it is hoped that the industry engages in pre-emptive self-discipline to make consumers' choice universe more navigable and manageable.

The introduction of the Consumer Duty has arguably not changed the focus of financial consumer protection, that is tilted towards protecting choice, almost as an end in itself. We take the view that the consumer protection tools offered in the Consumer Duty makes no difference to the levels of consumer protection represented in the Taxonomy in Figure 4 above.

We argue there is unfinished business in governing the levels of financial consumer protection. In particular, the exclusion of certain consumer citizenship needs reflected in regulatory tools H (right of access), M (welfare and outcomes) and N (guarantees or quality standards) in Figure 2 lack justification. Although the Consumer Duty has expanded the scope of regulatory tool K as firms are enrolled in proactive prevention of harm, the scope of regulatory tool L which caters for consumers' distributive needs remains minimal. We argue below that financial consumer protection remains in need of reform as suggested.

C. How Consumers Should be Protected in the Financial Sector

In this Section, we address the financial consumer protection gaps that remain, and whether the FCA should reform the Duty and facilitate its effective enforcement.

At a high level, we argue that the exclusion of certain levels of consumer protection aligned with consumer citizenship needs cannot be normatively supported by the concept of legitimacy. The enactment of the FCA's Consumer Duty needs to be evaluated through a paradigm of legitimacy, in relation to how effectively the FCA discharges its mandate of 'consumer protection' under legislation.²⁷⁴ Regulators' legitimacy in their reforms and actions can be evaluated by considering their 'input' legitimacy, in terms of what elements of consultation and policy considerations, as well as processes, feed into their policy formation'; 'and 'output' legitimacy, in terms of whether regulatory reforms would effectively meet the social needs of consumer protection.²⁷⁵

The Illegitimacy of Excluding Private Civil Redress and Meeting Consumers' Distributive Needs

First, the exclusion of civil enforcement of the Consumer Duty can affect distributive consequences for consumers where claims exceed the Ombudsman's jurisdiction of £375,000. This is not supported especially by referring to input legitimacy. The FCA's consultation for reform has been extensive, over a period of 5 years starting with a discussion concept paper regarding a duty of care which resulted in no concrete actions until the proposed Consumer Duty. The industry, stakeholders and the general public have

²⁷⁴ Financial Services and Markets Act 2000, c. 8, § 1B (U.K.).

²⁷⁵ See e.g., FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? ch. 1 (1999).

been given many opportunities to input into the policy formation process. In this manner, the influence of consumer group advocates in the UK is noted. Scholars have recognised that civil societies are an important actor in both EU²⁷⁶ and US financial regulation²⁷⁷ though they face considerable resistance from industry groups.

Although the FCA received feedback from the consumer organisations and the Financial Services Consumer Panel, an independent statutory body set up by FCA,²⁷⁸ to its consultation paper regarding the desirability of private enforcement and redress for consumers,²⁷⁹ the FCA persisted with the decision that the Duty is not privately enforceable in court, though it left the door open for future review.²⁸⁰ The marginalisation of this remarkable input from consumer groups is perplexing. This can affect output legitimacy in terms of how effectively consumers can achieve their individual protection under the Duty. Further, discipline by civil enforcement can buttress implementation effectiveness. The industry has already voiced concerns over regulatory burden and costs imposed with the Duty, undermining the competitiveness of the UK.²⁸¹ In January 2023, the FCA published a review on the readiness of the firms to implement the Duty by the deadline of 31 July 2023, and observed that some firms did not regard that the Duty represents a real change and/or have inadequately or only superficially implemented the requirements.²⁸² In light of the industry's mixed readiness and willingness to politically lobby against the Consumer Duty, the FCA's neglect of civil society representations for the civil actionability of the Duty is regrettable.

It is important for consumers to have access to appropriate dispute resolution mechanisms, both internally within financial services providers and externally through independent dispute resolution bodies. More generally, the Consumer Rights Act 2015 was enacted to, among others, provide a right for consumers to bring actions for infringements of competition law.²⁸³ The importance of such access is also recognised by the G20 High-Level Principles on Financial Consumer Protection and the World Bank Good Practices for Financial Consumer Protection. Principle 9 of the G20 Principles states that jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and

²⁷⁶ Kastner (2019), *supra* note 88, 223–241; Kastner (2014), *supra* note 88, 1313–1345.

²⁷⁷ See e.g., John T. Woolley & J. Nicholas Ziegler, *The Two-Tiered Politics of Financial Reform in the United States* (UC Berkeley Working Paper Series No. 111-11, 2011), <https://deliverypdf.ssrn.com/delivery.php?ID=799026031026006028081012091077108111109036021082090052093115021070027013097119098025049022043006054025039120112004102067067008005043060008021011077090089083024066057081036005111105082115123064074103114127104112017092096102112099100096094109084121072&EXT=pdf&INDEX=TRUE>.

²⁷⁸ Financial Services and Markets Act 2000, c. 8, § 1Q (U.K.).

²⁷⁹ See e.g., U.K. FIN. CONDUCT AUTH., PS22/9: A NEW CONSUMER DUTY: FEEDBACK TO CP21/36 AND FINAL RULES para. 1.26 (Jul. 27, 2022), <https://www.fca.org.uk/publication/policy/ps22-9.pdf>.

²⁸⁰ *Id.*, para. 11.00.

²⁸¹ Laura Noonan, George Parker & Ian Smith, *City of London minister attacks flagship regulatory reform*, FIN. TIMES (Feb. 27, 2023), <https://www.ft.com/content/68473f3f-b57c-4e86-aa5f-6a1f7161cf45>.

²⁸² *Consumer Duty implementation plans*, U.K. FIN. CONDUCT AUTH., (Jan. 25, 2023), <https://www.fca.org.uk/publications/multi-firm-reviews/consumer-duty-implementation-plans>.

²⁸³ See, Jessica Simor QC et al., *Private Enforcement*, in UK COMPETITION LAW: THE NEW FRAMEWORK ch. 8 (Ros Kellaway, Rhodri Thompson & Christopher Brown eds., 2016).

efficient. In addition, the International Network of Financial Services Ombudsman Schemes has issued guidelines setting out the fundamental principles for external dispute resolution mechanisms.

The FCA needs to demonstrate that its decision to jettison civil society demands for a civil action based on the Consumer Duty is a reflexive one that can be revisited. In previous work, one of us has argued that the FCA should reconsider its deficiencies in facilitating the spectrum of redress options available to financial customers and consumers.²⁸⁴ The output legitimacy that the FCA needs to demonstrate is that its enforcement is sufficient for the Consumer Duty to be robustly implemented or else the exclusion of individual civil redress would scarcely be justified.

The FCA's enforcement framework for the Consumer Duty is based on its existing framework. First, in its policy statement, the FCA gives content to the Consumer Duty by listing a number of good and bad practices, while acknowledging that they cannot be exhaustive.²⁸⁵ Such policy guidance provides some clarity and thus reduce disputes, and at the same time improve firms' compliance. However, such standardised expectations may not meet individual consumers' distributive or welfare needs. Second, the FCA has committed to looking at quickly identifying firms that fall short of the Duty and using its supervisory powers to prevent future harm through varying or removing permissions for the firms.²⁸⁶ The key is to address the problems as early as possible without having to refer to the Financial Ombudsman or conducting lengthy investigation.²⁸⁷ Third, the Consumer Duty imposes an obligation on firms to pro-actively rectify (including providing redress schemes) to retail customers who have suffered foreseeable harm based on their complaints data, monitoring or other sources.²⁸⁸ The FCA retains the ability to use its powers to require firms to pay restitution under section 384 of FSMA upon regulatory enforcement, though it has stated in other occasions (not specific to the Consumer Duty) that such powers are rarely invoked.²⁸⁹

Individual complainants must also first refer to financial firms' complaint-handling procedures under the FCA's DISP (Dispute Resolution) rules and if they are not satisfied, to move on to the Financial Ombudsman. However, the FCA would not be able to order firms

²⁸⁴ Chiu & Brener, *supra* note 3.

²⁸⁵ U.K. FIN. CONDUCT AUTH., PS22/9: A NEW CONSUMER DUTY: FEEDBACK TO CP21/36 AND FINAL RULES (Jul. 27, 2022), <https://www.fca.org.uk/publication/policy/ps22-9.pdf>.

²⁸⁶ U.K. FIN. CONDUCT AUTH., PS22/36: A NEW CONSUMER DUTY FEEDBACK TO CP21/13 AND FURTHER CONSULTATION ch. 12 (Dec. 7, 2021), <https://www.fca.org.uk/publication/consultation/cp21-36.pdf>.

²⁸⁷ U.K. FIN. CONDUCT AUTH., A OUR STRATEGY 2022 TO 2025 p. 15 (2022), <https://www.fca.org.uk/publication/corporate/our-strategy-2022-25.pdf>.

²⁸⁸ *PRIN Principles for Businesses*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html?date=2023-07-31&timeline=True> (last visited Jun. 3, 2023).

²⁸⁹ U.K. FIN. CONDUCT AUTH., ENFORCEMENT GUIDE EG 11.1 Restitution orders under sections 382, 383 and 384 of the Act: the FCA's general approach (Apr. 12, 2023), <https://www.handbook.fca.org.uk/handbook/EG.pdf>.

to make redress under section 404 of the FSMA which usually relates to larger scale mis-selling by firms.²⁹⁰

Overall, the FCA's stance is not surprising – given the UK's preference for public enforcement rather than private enforcement in other areas involving regulated firms, such as those involving non-disclosure of material information in securities laws.²⁹¹ Even in analogous breaches of competition law, the recent legislative proposals aim at strengthening public enforcement by Competitions and Markets Authority against traders, rather than private enforcement.²⁹²

It remains questionable if individual consumers' distributive needs would be met by relying on regulatory enforcement. Dame Gloster's independent review of the London & Capital mis-selling scandal in the UK pointed out that the FCA was slow to act on consumers' complaints.²⁹³ Further, although the Ombudsman can provide an accessible redress avenue, the Ombudsman's decisions do not provide legal precedent and its value in shaping or deterring firm misconduct remains uncertain.

Lack of Output Legitimacy in Securing Welfare or Performance Outcomes for Consumers- the Need for Redefinition of 'Good Outcomes'

In the context of financialisation, consumers have little choice but to turn to marketized participation to meet their financial needs. In this manner, consumers need protection in relation to ease of access to near-essential or staple financial products. Further, consumers should be able to ask that the performance of financial products actually delivers on the relevant welfare sought, such as funding education, housing, retirement etc. Such performance also needs to sustain over the time horizon of the consumer's financial needs and be resilient. However, we note the prevalent absence of regulatory (right of access), M (welfare and outcomes) and N (guarantees or quality standards) in the taxonomy for consumer financial regulation, which relate to these needs.

The Consumer Duty arguably does not relate to the needs outlined above. As analysed, the Duty continues to support the same regulatory rhetoric of consumer empowerment, with limited delivery of consumer citizenship needs, placing consumers' welfare squarely within consumers' responsibility, or more likely, 'luck' circumstances. The Duty continues to focus

²⁹⁰ U.K. FIN. CONDUCT AUTH., PS22/9: A NEW CONSUMER DUTY: FEEDBACK TO CP21/36 AND FINAL RULES para. 11.08 (Jul. 27, 2022), <https://www.fca.org.uk/publication/policy/ps22-9.pdf>.

²⁹¹ U.K. HM TREASURY, DAVIES REVIEW OF ISSUER LIABILITY, LIABILITY FOR MISSTATEMENTS TO THE MARKET: A DISCUSSION PAPER BY PROFESSOR PAUL DAVIES QC, (2007), <https://www.treasurers.org/ACTmedia/daviesdiscussion260307.pdf>.

²⁹² *Policy paper: Strengthening consumer enforcement and dispute resolution: policy summary briefing*, U.K. DEP'T FOR BUS. & TRADE & U.K. DEP'T FOR SCI., INNOVATION & TECH., (Apr. 25, 2023), <https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/strengthening-consumer-enforcement-and-dispute-resolution-policy-summary-briefing>; see also, Jan Pieter Krahen & Christian Wilde, *Skin-in-the-Game in ABS Transactions: A Critical Review of Policy Options* (SAFE Working Paper No. 46 Eur. Corp. Governance Inst. (ECGI) – Fin. Working Paper No. 549/2018) <https://ssrn.com/abstract=2916633>.

²⁹³ *supra* note 9, para. 4.1.

on processes that firms need to implement, such as testing and reviewing procedures, rather than end-outcomes, that pertain to performance and welfare. The ‘good outcomes’ specified in the Duty are too process-based and remain unconnected to consumers’ real and ultimate needs for their financial products and services to deliver for their expected welfare. This creates a lacuna where ‘expected welfare’ becomes a notion that is defined and manipulable by the financial services industry, which is incentivised to shape ‘outcomes’ for the consumer in a self-serving manner.

We argue that the FCA needs to embrace a concept of ‘good outcomes’ that ultimately connects with consumers’ expected welfare outcomes, which is the very *raison d’être* for their market participation. Further, we also argue that ‘good outcomes’ benefits from a redefinition of a richer nature, as there is an increasing trend in financial products being marketed with hybrid objectives, such as in relation to environmentally-friendly, or socially-mobilising objectives.

At the core, there is a missed opportunity in formulating what a financial citizen needs, which we term “financial wellbeing”. A person’s financial wellbeing is increasingly recognised by policy-makers as an integral part of the wellbeing of a member of society generally, together with her physical and mental health.²⁹⁴ While there may be debates or controversies over what is regarded as financial wellbeing, it can be broadly designed at two levels – both objectively (for the target population) and subjectively (based on the individual), around financial needs, financial freedom, control over finances and financial security.²⁹⁵ In the US, the CFPB regards financial well-being as ‘how much your financial situation and money choices provide you with security and freedom of choice,’ and drills down to ‘[h]av[ing] control over day-to-day, month-to-month finances; [h]av[ing] the capacity to absorb a financial shock; [being] on track to meet your financial goals and [h]av[ing] the financial freedom to make the choices that allow you to enjoy life.’²⁹⁶

In particular, three utility/welfare outcomes are missing from the Duty. One relates to consumer citizenship and fair inclusion, the second relates to financial sustainability or resilience for individual consumers and the third relates to consumers’ holistic needs and preferences in relation to financial products with hybrid objectives.

The Need for Financial Inclusion for Near-essential Financial Products or Services

²⁹⁴Richard G Netemeyer, Dee Warmath, Daniel Fernandes & John G Lynch, Jr., *How am I doing? Perceived financial well-being, its potential antecedents, and its relation to overall well-being*, 45 J. CONSUMER RSCH. 68–89 (2018).

²⁹⁵ Godwin A, Wan WY & Q Yao, *Financial Wellbeing – the Missing Link in Financial Advice under Private Law and Statute*, in INTERMEDIARIES IN COMMERCIAL LAW ch. 15 (Davies, P. S., & Cheng-Han SC, T. eds., 2022).

²⁹⁶ *Why financial well-being?*, U.S. CONSUMER FINANCIAL PROTECTION BUREAU, <https://www.consumerfinance.gov/consumer-tools/financial-well-being/about/#:~:text=At%20the%20CFPB%2C%20we%20work,improve%20your%20financial%20well%2Dbeing> (last visited Jun. 4, 2023).

Despite the explicit references to integrating consumer policies on financial inclusion in the UN Guidelines for Consumer Protection,²⁹⁷ and UN Sustainable Development Goals,²⁹⁸ the Duty does not require FCA to regulate access to near-essential financial products or services. The UK Treasury Select Committee of the Parliament found in 2019 that almost 1.3 million adults in the UK are unbanked,²⁹⁹ meaning that they do not have access to a basic bank account, which is the common channel for accessing other financial services such as payment and consumer credit. These unbanked customers are acknowledged to be those who likely face challenging circumstances such as having no permanent home or are illiterate, suggesting that perhaps it is consumers in the most vulnerable or difficult circumstances that are also marginalised from financial markets. However, the Duty has not gone any further in seeking widening participation on a reasonable basis for marginalised consumers.

In light of rising cost of living and in the wake of the COVID-19 pandemic, the Treasury Committee's First Report recommends that the FCA should explicitly have regard to financial inclusion in its rule-making, though not as one of its (FCA's) objectives. The Committee is concerned that the new Duty may make it more expensive (or even disincentivise) firms from offering services to marginal customers.³⁰⁰ Financial products or services can be designed in a manner that carries fixed costs, hence, firms are not incentivised to service a casual consumer user, such as of a small loan, and may also withdraw such services.³⁰¹ The UK government's (and the FCA's) position is that having explicit regard to financial inclusion may give rise to raising unnecessary expectations given that the FCA has no authority to compel firms to offer services to any class of consumers. Instead, FCA exhorts firms to facilitate access such as to general insurance and cash.³⁰²

We are of the view that the opportunity has been missed for the Consumer Duty to be used as an agenda item to further financial inclusion. While the term "financial inclusion" is often not defined and a consensus may be elusive, increasingly, having access to basic financial services in any advanced economy is recognised as essential,³⁰³ consistent with other

²⁹⁷ *supra* note 27, para. 67.

²⁹⁸ Financial inclusion is referenced in the targets of eight of the 17 UN Sustainable Development Goals (SDGs).

²⁹⁹ *Increasing financial inclusion*, U.K. PARLIAMENT, <https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/1642/164205.htm> (last visited Jun. 4, 2023).

³⁰⁰ U.K. HOUSE OF COMMONS TREASURY COMMITTEE, *FUTURE OF FINANCIAL SERVICES REGULATION: RESPONSES TO THE COMMITTEE'S FIRST REPORT, SECOND SPECIAL REPORT OF SESSION 2022–23*, (Sep. 7, 2022), <https://committees.parliament.uk/publications/28577/documents/172352/default/>.

³⁰¹ Campbell, Jackson, Madrian & Tufano, *supra* note 74; *see also*, Patrick Jenkins, *Poorer people must not be frozen out of the banking system*, FIN. TIMES (May 22, 2023), <https://www.ft.com/content/b3daadb3-4541-4b64-a007-855ffb4974a1>.

³⁰² <https://www.fca.org.uk/news/speeches/keeping-pace-rising-costs-improving-financial-inclusion-consumers>.

³⁰³ U.K. HM TREASURY, *FINANCIAL INCLUSION REPORT 2021-22*, (2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1125329/Financial_Inclusion_Report_002_.pdf.

essential services such as access to energy,³⁰⁴ telecommunications,³⁰⁵ healthcare,³⁰⁶ and pharmaceuticals,³⁰⁷ and it should be treated as such to ensure access and fair pricing. Basic financial services include access to a basic bank account for savings,³⁰⁸ consumer credit and insurance in order to build resilience and financial health.³⁰⁹ Otherwise, marginal groups will be driven to unregulated money lenders or other high-cost shadow credit systems, such as the buy now pay later credit systems which the UK government is now belatedly pushing for legislation.³¹⁰ However, access should not be the only touchstone – even where access is provided, as pointed out in Section B, they could be bundled with products and features by financial service providers that serve as debt-traps for the unwary consumer.³¹¹ In this manner, inclusion should also be regulated in relation to terms of access, quality and performance. Marginalised or vulnerable consumers would need such protective levels even more intensely than more capabilised consumers in the financial markets.

The Need to Ensure Consumer Protection in terms of Financial Well-being

Next, we argue that much more could have been done under the aegis of the Duty to protect consumers in relation to their reasonable welfare or performance expectations of financial products and services. The Duty is carefully worded only to support the consumer's own pursuit of her financial objectives. While financial well-being is difficult to pin down as it relates to not only the present financial affairs of the consumer but also her future, financial well-being includes expected performance of the financial product in a manner that is sustainable and resilient for the consumer. Extant literature broadly refers to being able to cover expenses and emergencies and future goals,³¹² the ability to bounce back from adverse financial events,³¹³ or having the appropriate number of months of expenses in

³⁰⁴ Simone Pront-van Bommel, *A Reasonable Price for Electricity*, 39 J. CONSUMER POL'Y 141-143 (2016).

³⁰⁵ *supra* note 91.

³⁰⁶ *supra* text accompanying note 97.

³⁰⁷ Stacy Clark, *Recent Case Developments in Health Law: Pharmaceutical Price-Fixing and Consumer Protection: Blue Cross & Blue Shield V. AstraZeneca Pharmaceuticals LP*, 38 J. L., MED. & ETHICS 160-168 (2010).

³⁰⁸ Peter Cartwright, *Understanding and Protecting Vulnerable Financial Consumers*, 38 J. CONSUMER POL'Y 119 (2015).

³⁰⁹ A Leyshon, NJ Thrift, *Geographies of financial exclusion: Financial abandonment in Britain and the United States*, 20(3) Transactions Inst. Brit. Geographers 312–341 (1995); Breidbach, C, Culnane, C, Godwin, A, Murawski, C & Sear, C, *FinFuture: The Future of Personal Finance in Australia*, The University of Melbourne, Melbourne, 2019 (the 'FinFuture White Paper'), 32.

³¹⁰ *Regulation of Buy-Now-Pay-Later: Consultation on Draft Legislation*, U.K. HM TREASURY, (Feb. 14, 2023), <https://www.gov.uk/government/publications/government-food-strategy/government-food-strategy>.

³¹¹ *supra* text accompanying note 173.

³¹² Godwin, *supra* note 298, p. 294; ELAINE KEMPSON & CHRISTIAN POPPE, UNDERSTANDING FINANCIAL WELL-BEING AND CAPABILITY – A REVISED MODEL AND COMPREHENSIVE ANALYSIS (2018) <https://www.financialcapability.gov.au/sites/www.financialcapability.gov.au/files/2022-01/understanding-financial-well-being-and-capability-a-revised-model-and-comprehensive-analysis.pdf>.

³¹³ Fanny Salignac, Axelle Marjolin, Rebecca Reeve & Kristy Muir, *Conceptualizing and Measuring Financial Resilience: A Multidimensional Framework*, 145 SOC. INDICATORS RSCH. 17–38 (2019).

savings.³¹⁴ In our view, considerations of well-being must go beyond proactively assessing the product governance outcome or the ‘suitability’ of the product as stipulated in the Consumer Duty.³¹⁵ Instead, regulation should set performance-based standards on the part of regulated firms providing financial products or services to consumers.³¹⁶ Performance-based regulation (often using regulatory tools M (welfare outcome-based) and N (guarantees of quality) in Figure 2) have already been implemented in other sectors, discussed in Section A. Many goods are regulated for safety and quality over a reasonable time horizon of expected use, and some services such as utilities are regulated for both price and a set of performance targets backed by award-penalty mechanisms.³¹⁷

Willis’ vision of performance-based regulation in consumer law requires intense regulatory supervision of what outcomes are achieved through firms’ implementation of regulatory standards, in order to determine if consumers are truly served. Such supervisory insights then feed into adjustments to regulation and/or supervision in order to motivate performance of consumer protection. We argue that this framework should guide the FCA in reforming and supervising the Consumer Duty as implemented by firms, so that the outcomes achieved can be evaluated against what consumers reasonably expect. Shortfalls in the financial well-being of consumers not achieved by what they expect of their products should be evaluated to consider regulatory adjustment and enforcement possibilities. Such performance-based regulation is much-needed, in view of the vast gap between consumers’ expectations of financial well-being and the protective levels currently provided by regulation.

For example, the financial well-being of a consumer of a credit product pertains not only to affordability *ab initio* but also the sustainable affordability and resilience over the time horizon of the product. Further, a consumer’s financial well-being is a holistic matter and the utility or performance of any particular product or service has to be considered against the consumer’s broader economic or financial goals and other financial products that the consumer has purchased.³¹⁸ Taking home mortgages for example, under the FCA's Mortgage Conduct of Business Rules (MCOB), which remains unchanged after the introduction of the Duty, the financial institution must engage in responsible lending and proactively assess affordability for the consumer through a set of metrics that includes committed expenditures and ‘basic essential expenditure and basic quality-of-living costs’.³¹⁹ Yet, the

³¹⁴ COMMONWEALTH BANK OF AUSTRALIA, IMPROVING THE FINANCIAL WELLBEING OF AUSTRALIANS – TOWARD BETTER OUTCOMES OF AUSTRALIANS ... EVERY DAY, RAINY DAY, ONE DAY (Apr., 2019) https://www.commbank.com.au/content/dam/commbank-assets/banking/guidance/2018-06/using-survey-banking-data-to-measure-financial-wellbeing.pdf?ei=things_UniMelbPDF.

³¹⁵ *PRIN Principles for Businesses*, U.K. FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html?date=2023-07-31&timeline=True> (last visited Jun. 3, 2023).

³¹⁶ See e.g., Lauren E. Willis, *Performance-Based Consumer Law*, 82(3) U. CHI. L. REV. 1309–1409 (2015).

³¹⁷ David E.M. Sappington & Dennis L. Weisman, *Designing performance-based regulation to enhance industry performance and consumer welfare*, 34(2) ELECTRICITY J. 106902 <https://doi.org/10.1016/j.tej.2020.106902>.

³¹⁸ See also, Todd H. Baker & Corey Stone, *Making Outcomes Matter: An Immodest Proposal for a New Consumer Financial Regulatory Paradigm*, 4 Bus. & Fin. L. Rev. 1.

³¹⁹ See, U.K. FIN. CONDUCT AUTH., MORTGAGES AND HOME FINANCE: CONDUCT OF BUSINESS SOURCEBOOK MCOB 11.6.5 (Apr. 4, 2023), <https://www.handbook.fca.org.uk/handbook/MCOB.pdf>; see also, Vanessa Mak, *What is*

choice of a mortgage to purchase a home may reduce the lower-income consumer's ability to subscribe for other products that build her children's college funds, while this may not be regarded as 'basic expenditure'. There remains significant work for the Duty to recognise and incorporate performance-based standards that ultimately cater for different consumers' financial well-being needs.

Critics may argue that it is difficult to measure financial well-being outcomes given the fact that consumers are heterogeneous with different individual goals. Hence it is arguably up to them to make a choice within the abundant range offered in the market. Even if they retain financial advisers, they do not necessarily disclose full information to their advisers. However, these difficulties may be overstated. Difficulties in well-being measurement can be alleviated through consumer surveys done by regulators to assess their spending habits,³²⁰ and using proprietary or aggregated data from financial institutions or even integrating datasets. For instance, in improving individual patient outcomes for healthcare, the ability to integrate health and social care records has been underway.³²¹

Financial products and services are credence goods where the outcomes will not be known until much later. The nature of credence goods makes it more important for performance-based regulation of financial product or services, not otherwise. We are not advocating that such regulation removes consumers from all financial risks, rather we argue that in evaluating whether the provision of product or service delivers a 'good outcome', the measure is that of the individual financial consumer's wellbeing, that takes into account her resilience and sustainability, including to bear the risks that may be material to her over time.

The Need to Ensure Consumer Protection in relation to Hybrid Objectives

Next, we argue that 'good outcomes' for consumer financial products include outcomes relating to non-financial objectives that are promoted by financial products, such as in relation to 'ESG' (environmental, social or governance-based), 'responsible' or 'sustainable' investing and loan products. Empirical research has found that many consumers are motivated by prosocial objectives when selecting such financial products,³²² making their objectives 'hybrid' in nature. Some are even willing to sacrifice financial objectives to an extent to achieve the promoted non-financial goals.³²³ Hence, 'good outcomes' for

Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands, (2015) 38 *J Consumer Pol'y* 411.

³²⁰ E.g., Financial well-being survey data, U.S. CONSUMER FINANCIAL PROTECTION BUREAU, <https://www.consumerfinance.gov/data-research/financial-well-being-survey-data/> (last visited Jun. 4, 2023).

³²¹ Eren Waitzman, *Primary and Community Care: Improving Patient Outcomes*, (Aug. 10, 2022) <https://lordslibrary.parliament.uk/primary-and-community-care-improving-patient-outcomes/>.

³²² Charlotte Christiansen, Thomas Jansson, Malene Kallestrup-Lamb and Vicke Noren, 'Who are the Socially Responsible Mutual Fund Investors?' (2019) at <http://ssrn.com/abstract=3128432>.

³²³ Miwa Nakai, Tomonori Honda, Nariaki Nishino & Kenji Takeuchi, 'Psychological Characteristics of Potential SRI Investors and Its Motivation in Japan: An Experimental Approach' (2018) 8 *Journal of Sustainable Finance & Investment* 349; Gunnar Gutsche, Andreas Ziegler, 'Which Private Investors Are Willing to Pay for Sustainable Investments? Empirical Evidence from Stated Choice Experiments' (2019) 102 *Journal of Banking and Finance* 193.

consumers in relation to products promoted with hybrid objectives should include attainment or performance of the relevant financial as well as non-financial objective.

With the rise in market offerings of sustainable finance products, regulators in the US, EU and UK have voiced concerns regarding 'greenwashing' and mis-selling,³²⁴ culminating in reforms introduced in the EU, and in progress in the US and UK.³²⁵ The EU's reforms are particularly remarkable as they require certain sustainably-labelled or ESG-labelled investment products to attain double materiality,³²⁶ i.e. the achievement of financial as well as non-financial objectives represented at the point of sale.³²⁷ The UK FCA is also looking at ensuring that 'green mortgages' are designed to match the claims made in their promotion.³²⁸

In line with the EU's double materiality reforms, it is argued that consumer protection in finance should recognise consumers' needs to secure both financial and non-financial performance of their hybrid financial products over a time horizon. This includes not only the prevention of mis-selling at the point-of-sale (the focus of the US' and UK's reforms³²⁹), which caters for consumer empowerment protection in terms of choice, but also the continued attainment of performance of hybrid objectives. Performance-based regulation should also address hybrid objective trade-offs, transparency and accountability regarding these trade-offs and the involvement of consumer choice and discipline on an ongoing basis. Such performance-based regulation would also need to address the likelihood that non-financial objectives may not be specific to the consumer but relate to broader environmental or social targets, and cater for these accordingly.

Where non-financial performance is concerned, its evaluation is a work in progress. Inspiration can be sourced in relation to practices in impact investing in relation to how specific impact goals may be measured,³³⁰ as well as in the developing sustainability criteria introduced in European regulation.³³¹ Where non-financial performance evaluation may be reliant on third-party ESG rating or analysis providers, it is also imperative to consider how

³²⁴ Christin Nitsche and Michael Schröder, 'Are SRI Funds Conventional Funds in Disguise Or Do They Live Up to Their Name?' in Sabri Boubaker, Douglas Cumming, and Duc Khuong Nguyen (eds), *Research Handbook of Investing in the Triple Bottom Line* (Cheltenham: Edward Elgar, 2018) at ch19; 'EU regulators flag rising greenwashing practices by banks' (Financial Times, June 1, 2023); <https://www.ft.com/content/5d236244-e073-412d-b981-0d2757f60b4b>; 'Investors warned of 'greenwashing' risk as ESG-labelled funds double' (Financial Times, April 24, 2023), <https://www.ft.com/content/79772342-d260-4dd5-b943-5e75bc27878c>.

³²⁵ Chiu (2023), supra note 210.

³²⁶ Iris H-Y Chiu, *The EU Sustainable Finance Agenda- Developing Governance for Double Materiality in Sustainability Metrics* (2022) 23 *European Business Organisation Law Review* 87.

³²⁷ EU Sustainable Financial Disclosure Regulation 2019/2088, also discussed in context in Felix E Mezzanote, 'Recent Law Reforms in EU Sustainable Finance: Regulating Sustainability Risk and Sustainable Investments' *American University Business Law Review*, 2023, forthcoming.

³²⁸ FCA, 'The FCA's view of green mortgages' (April 19, 2023), <https://www.fca.org.uk/news/speeches/fca-view-green-mortgages>.

³²⁹ See Chiu (2023), above note 210.

³³⁰ Jane Reisman, Veronica Olazabal, and Shawna Hoffman, 'Putting the "Impact" in Impact Investing: The Rising Demand for Data and Evidence of Social Outcomes' (2018) 39 *American Journal of Evaluation* 389.

³³¹ These criteria are based on a Taxonomy of sustainable outcomes which are scientifically developed, see Taxonomy Regulation 2020/852 and technical screening criteria developed under it.

this industry may be regulated³³² to secure credibility for consumers of such financial products. As sustainable finance regulation continues to evolve globally, we argue that consumer protection should be integrated into that agenda and not left by the wayside.

Proposals for Performance-based Regulation for Financial Consumers' 'Good' Outcomes

A performance-based regulatory framework for 'good' outcomes for financial consumers may be criticised as allowing consumers' subjectivities to become standard expectations, while objective standards may not necessarily meet the heterogeneous needs of different consumers. A middle way could be introduced as a starting point, that is, the regulator could set as a performance standard for firms, substantive harm prevention or reduction in certain risks of participating in financial services and markets. This standard can also apply to non-financial objectives in relation to there being no substantial failure. In this way, our proposal extends from the Consumer Duty's emphasis on preventing foreseeable harm, as our proposal covers the time horizon of the credence good. This is important as it is hardly useful to consumers to only have harm prevention considered only at the pre-sale stage when the performance of a financial product and/or its hybrid objectives extends across time.

We argue that a time-tested way to incentivise financial firms to reduce harm/risks to consumers is by proper screening (or due diligence) and continued monitoring of consumer outcomes by compelling financial firms to have 'skin in the game' in consumers' well-being and hybrid outcomes. This could be done by a combination of allowing 'carrots' for outperformance of financial products over a time horizon, as well as by 'sticks' that compel firms to disgorge their rewards or to share loss where harms/risks specified in performance-based regulation are incurred. Accordingly, regulatory tools M (welfare-outcomes), N (guarantees of loss) or L (risk-sharing) in the Taxonomy in Figure 2 should be considered.

Mandatory loss-sharing mechanisms can be introduced where harms/risks to financial well-being (specified in performance-based regulation) occur. These are not novel in financial regulation and have been used to combat perverse incentives. For instance, to prevent harm to investors in securitised assets, regulatory tools N and L have been used to align the interests of the securitisers and originators of securities assets (ABS) with those of the investors. The US and the EU require securitisers to retain a minimum (normally 5%) economic risk in the credit of the securitised assets backing the ABS.³³³ Existing peer-to-

³³² 'EU eyes conflicts of interest crackdown in ESG ratings rules' (Financial Times, June 7, 2023), on impending EU legislation to regulate ESG rating providers. The UK maintains a code of conduct for ESG rating providers in soft law, see FCA, 'Code of Conduct for ESG data and ratings providers' (Nov 22, 2022), <https://www.fca.org.uk/news/news-stories/code-conduct-esg-data-and-ratings-providers>. See Michele Siri and Matteo Gargantino, 'Information Intermediaries and Sustainability' in Kern Alexander, Michele Siri and Matteo Gargantini (eds), *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance* (Cambridge University Press, Forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4316820.

³³³ Securities Exchange Act of 1934 15 U.S.C. §§ 78a-78rr (as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. 112-106, § 1376–2223, § 941 (2010) and read with SEC implementation rules (U.S. SEC. & EXCH. COMM'N, IMPLEMENTING THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT <https://www.sec.gov/rules/final/2014/34-73407.pdf>); Regulation (EU) No 575/2013, of the European

peer originators or platforms in the market have skin in the game by volunteering to retain (and to disclose) their position in the loans on the balance sheet or have purchased a slice of the loans; in other words, if the lenders default, they take the loss alongside with the investors.³³⁴ Such loss-sharing mechanisms combat the perverse incentives of poor underwriting of loans. Loss-sharing mechanisms can incentivise financial product providers, especially of investment products, to reduce perverse incentives that focus only on selling and augmenting their market share regardless of ultimate performance of these credence goods.

Critics may argue that skin in the game regulations can be burdensome and exacerbate conflicts of interests; for instance, loan originators who have superior information can still exploit their advantages in other ways³³⁵ and financial firms may find that they are unable to hold out that they can advise on a variety of products.³³⁶ At least for ABS, the experience in the EU which, despite the requirement for retention of risks, allows for securitisers to select various options for retention, has led to risk opacity.³³⁷ Mandatory loss-sharing can result in firms devising strategies to minimise or avoid their exposures or obligations, which would become a new problem for regulators to combat. However, we argue that the problems are not insurmountable. For example, the scope of mandatory loss-sharing can be limited to financial products that are not plain vanilla, so as to reduce the possibilities of compliance avoidance by designing product complexity. Regulators, the industry and stakeholders can work into product governance regulation a set of metrics or benchmarks that outline how financial institutions will share the losses for those consumer products that are not plain-vanilla.³³⁸

Further, voluntary loss-sharing mechanisms have been offered in high-risk consumer investments such as peer-to-peer lending in the UK. The leading UK peer-to-peer lending platform Zopa used to offer a voluntary compensation fund that can be called upon where

Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, O.J. (L 176) 1-337.

³³⁴ Adair Morse, Peer-to-Peer Crowdfunding: Information and the Potential for Disruption in Consumer Lending (Nat'l Bureau Econ. Rsch. (NBER) Working Paper No. 20899, 2015)
https://www.nber.org/system/files/working_papers/w20899/w20899.pdf#:~:text=Peer-to-Peer%20Crowdfunding%3A%20Information%20and%20the%20Potential%20for%20Disruption,at%20least%20some%20borrowers%20and%20investors%20are%20improved%3F.

³³⁵ U.K. FIN. CONDUCT AUTH., PS18/20: LOAN-BASED ('PEER-TO-PEER') AND INVESTMENT-BASED CROWDFUNDING PLATFORMS: FEEDBACK ON OUR POST-IMPLEMENTATION REVIEW AND PROPOSED CHANGES TO THE REGULATORY FRAMEWORK (Jul. 27, 2018), <https://www.fca.org.uk/publication/consultation/cp18-20.pdf> (The FCA has cautioned that this may lead to conflicts of interests on the part of the platform who take advantage of the superior information to sell out early: FCA, Loan-based ('peer-to-peer') and investment-based crowdfunding platforms).

³³⁶ For a firm to hold out as providing independent advice, it must be able to recommend a diverse range of products and not limited to products offered by the firm or closely affiliated firms which bear the risks of compromising independence: FCA, COBS 6.2B.11:
<https://www.handbook.fca.org.uk/handbook/COBS/6/2B.html?date=2023-06-01#D46342>.

³³⁷ Krahen & Wilde, *supra* note 295.

³³⁸ *Id.*

investors have suffered loss due to borrower defaults on the platform,³³⁹ until Zopa become authorised as a bank and now benefits from the deposit guarantee scheme. Such measures incentivise consumer participation, which benefits the financial services provider, especially where investment is optional. As many consumers participate in investment markets to provide for their near-essential saving needs, such markets being dominated by mutual and exchange-traded funds, there is less of an incentive for these product providers to attract participation by voluntary loss-sharing. In this way, some thought can be given to mandatory loss-sharing in order to rebalance the potential loss of performance or welfare over time. Such loss-sharing would occur even if the product provider is a going concern, as the FSCS only protects consumers where the firm has become insolvent. This loss-sharing should be activated upon the failure of performance-based standards in regulation relating to substantive harm, risk materialisation or failure. Such skin-in-the-game regulatory tools serve to meet consumers' financial harm-reduction needs as well as incentivise behavioural change on the part of product providers. There is also a justice and distributive aspect to this, which is not unimportant to the consumer. One potentially good outcome may be the offering of more comprehensible and plain vanilla products. However, the regulator should beware other unintended behavioural consequences on firms' part.

In relation to substantial failure of non-financial objectives in hybrid products, it is arguable that loss-sharing mechanisms need not only be financial distribution to the consumers affected, but could comprise a contribution on the part of the financial firm to make amends for the harm caused, such as to charitable or other responsible agency-led efforts that would mitigate the harm. Such contribution can be the subject of collective agreement or negotiation with all affected consumers, so that consumers with hybrid objectives retain a 'stake' in non-financial actions, even if they benefit third-party beneficiaries.

Our loss-sharing proposal is just a starting point in edging the financial regulator towards greater embrace of the much-needed consumer protective levels aligned with consumer citizenship ideologies. Performance-based regulation in consumer finance would more likely address consumers' expected 'good' outcomes, which underpin the output legitimacy for financial consumer regulation. This would include a fuller exploration of the regulatory tools H (access and its appropriate regulation), M (setting of performance standards and quality) as well as N (guarantees of standards and quality), even at levels of personalisation for consumers.

There remains much to be accomplished in financial consumer protection in the UK, and the FCA's much-vaunted Consumer Duty has unfortunately not broken new ground, although it has firmed up more stringent expectations for the attainment of old, familiar protective levels. Consumers deserve a newer deal.

D. Conclusion

³³⁹ *About Zopa Safeguard*, ZOPA, <https://www.zopa.com/help/article/about-zopa-safeguard> (last visited Jun. 4, 2023).

This article critically evaluates the UK's Consumer Duty reform which is purported to bring in a new era for scaling new levels of consumer financial protection. We are of the view that the achievements of such consumer protection cannot be evaluated in isolation and needs to be contextualised against other regimes of consumer protection such as energy, telecommunications services, aviation services, packaged holidays and goods sectors including food, healthcare (ie both services and pharmaceuticals) and e-commerce. Hence, we offer in this article a new taxonomy for cross-cutting consumer protection levels against which to evaluate the Duty.

Using the taxonomy, we assess that while the Consumer Duty has made improvements, these relate to the same old levels of consumer protection in relation to consumer empowerment and choice. Using the framework of input and output legitimacy, we argue that there are significant gaps remaining in the Consumer Duty that pertain to 'consumer citizenship' needs. First, by excluding private civil redress from the Duty and disregarding the feedback from consumer organisations, much reliance is placed on the FCA on its own enforcement. However, given widespread international recognition that effective enforcement does not only lie with public regulatory enforcement, there is a real risk that consumers may feel that they are outgunned and unable to achieve distributive justice, impacting the output legitimacy of the reforms. Second, there is a lack of output legitimacy in securing performance or welfare outcomes for consumers and the failure to recognise that these are crucial to consumers' expectations for their well-being or their hybrid objectives, the *raison d'être* for purchasing financial services and products. We argue there is a need to develop the Consumer Duty into a performance-based regulatory framework to secure consumer protection in relation to reasonably expected performance and welfare outcomes, utilising regulatory tools that are often ignored in financial regulation but utilised in other sectors. We suggest as a starter that the FCA should embrace a performance-based regulatory standard of harm/failure reduction to consumers, en route to developing in the future a range of more varied quality or performance standards as well as welfare benchmarks for products and services. Our loss-sharing proposal is based on existing examples in financial regulation where skin-in-the-game incentives are introduced.