



## **Minutes of the Financial Services User Group (FSUG) meeting**

**23 – 24 May 2019**

### **Adoption of the agenda and approval of the minutes of the previous meeting**

The minutes of the previous meeting were approved, and the agenda of the meeting was adopted.

### **Information about the call for application and update on the FSUG 2019 external meeting**

The Continuous open call for expression of interest to select additional FSUG members was published on 27 March 2019 and 10 applications were received so far. Assessment of the applications received will be performed in June.

The 2019 external meeting of the FSUG will take place in Rome (Italy) on 12 and 13 September. Bank of Italy, Consob and the FITD (the Italian Deposit Guarantee Scheme) will deliver presentations on, respectively: i) the Italian banking ADR scheme; ii) the Italian financial services ADR scheme; iii) the functioning of the Deposit Guarantee Scheme. Additional presentations from public authorities and consumer associations might be confirmed later.

As for the venue, the meeting will either take place in the European Commission Representation in Rome, or in the Italian Banking Association premises. Both venues are in the centre of Rome, near Piazza Venezia. FSUG members will be kept informed.

### **Tour de table**

Members gave an update on issues and risks for consumers in Member States and presented activities of FSUG interest.

#### *Updates from Member States*

- In DE, the debate on the transposition of MiFID II and MiFIR is still ongoing. The issue of information to investors was discussed at a public hearing organised by the German Ministry of Finance.
- In PT, there is a debate on whether the decree-law that forbids charging fees for using debit cards to perform withdrawals and payments using ATMs should be removed. However, the government holds still. The Occupational Retirement Provisions Directive (IORP 2) is being transposed and the text would impose capped fees. A consultation with stakeholders is ongoing.

- In UK, there was a sharp rise in complaints to the financial ombudsman on payday lending that consumers are not able to repay. Some consumers have 10-15 payday loans outstanding. The problem is that current rules are very difficult to enforce because of lack of resources and capabilities of MS authorities. Moreover, when credit providers are not banks, supervision becomes much more complex. An idea could be to ask investors to invest responsibly and not in payday lending companies. The 200 euros threshold of the CCD should be removed.

The FCA has published its business plan for 2019-2020, outlining key priorities and planned activities. One of the cross-sector priorities is “Innovation, data and data ethics”.

Some of the main concerns for consumer protection in financial services are on insurances using third party proxy data that end up discriminating for ethnicity, on the rise of high-risk guarantor loans, on Fintech low profitability and business models harming consumers, on bank branches closure, and on banks charging for overdraft some categories of people twice as much than others.

The London Capital & Finance collapsed in January, having lost millions of pounds of investors' money. This raises the issue of redefining the perimeter of regulated products in financial services, but also the question of responsible investment.

- In DK, not only there is a problem with money laundering, but also with payday lending. The social democrats, who are likely to lead the next government, proposed to introduce an APR cap and rules on payday lending.
- In LT, a first administrative fine (61.500 €) was imposed to MisterTango UAB – an electronic payment company - for breaching the GDPR as it improperly processed personal data in screenshots (SS), made personal data publicly available and failed to report the personal data breach to the personal data protection supervisory authority.
- In BG, there is a new platform bringing together industry stakeholders (including banks but also payday lenders) with an interest in Financial Technologies, the “Bulgarian Fintech Association”.
- In IT, Consob – the market supervision authority – just published a [paper](#) emphasising the importance of financial education and proposing an educational model on financial education with operational guidelines for secondary schools.
- In PT, the Court of First Instance decided in favour of the bank in a class action against “coercive tied packaging” concerning mortgages and payment accounts. The plaintiffs have appealed to the Portuguese Supreme Court of Justice and asked for the suspension of the procedure in order to ask the European Court of Justice for a preliminary ruling in relation to this issue. DG COMP has also received a complaint on this issue and it is examining it.
- In Norway, Forbrukerrådet (BEUC member) won an appeal against the Norwegian banking group DNB, whose asset management arm had overcharged fund investors. DNB must compensate around 180.000 customers.

### *Developments at EU level*

- In December 2018, EIOPA published a first report on costs and past performances of insurance-based investment products. The work on costs and past performances is still ongoing. In May, EIOPA launched a call for candidates to join an Expert Panel on the Pan-European Personal Pension Product (PEPP) Regulation (now closed).

- As regards the Ecolabel for financial services, an ad-hoc Working Group Meeting took place on 4 April in Sevilla. The consultation on the draft technical background documents was closed on 6 May.
- In February, the International Organisation of Securities Commissions (IOSCO) published a consultation report on sustainable finance in emerging markets and the role of securities regulators.
- The European Data Protection Board is analysing the interplay between the GDPR and the Payment Services Directive (PSD2). Draft guidelines should be soon published for an open public consultation.
- In May, Finance Watch has published a report on "[Making Finance Serve Nature](#)". They also launched an online tool to allow citizens to check the financial reform proposals of all political groups ahead of the European elections.
- In May, Better Finance published a research paper on "[Efficient Portfolio Management Techniques: Attribution of profits derived from Securities Lending by UCITS Exchange-Traded Funds](#)".
- The EESC is preparing an opinion on the CCD. In this context, it contacted several consumer associations throughout EU MS (e.g. the Bulgarian one).
- In general, there are problems with creditworthiness assessment on peer-to-peer lending crowdfunding platforms and with payday lending, which put consumers (and in the case of peer-to-peer platforms even investors) at risk.

### **FSUG Reflection Paper on Crypto-assets**

The sub-group leader presented the revised draft of the reflection paper on Crypto-assets, which presents the blockchain technology, mentioning different regulatory approaches and explaining the challenges this new technology brings. The paper already included previous comments that FSUG members had sent prior to the meeting, especially on GDPR aspects. The main point made in the paper addresses the issue of enforcement, namely that that legislators should ensure that any regulation passed can be enforceable. The sub-group did not include ICOs in the paper because they consider them niche products, without significant impact on the safety of markets.

The group made further suggestions on the structure of the paper and advised to group the recommendations and put them upfront. Additional comments by FSUG members should be sent to the sub-group leader by end of May.

### **Discussion with Commission services on the FSUG recommendations (Christoph Emsbach, DG FISMA B1 - Daniela Gariboldi and Ulrike Kohl, DG FISMA C4 - Marco La Marca, DG FISMA B3 - Ondrej Vondracek - DG JUST A1)**

The list of FSUG recommendations for the Commission 2019-2024 had been discussed in previous FSUG meetings with the relevant Heads of Units from DG JUST and DG FISMA and with Director Mario Nava responsible for "Horizontal Policies" in DG FISMA. Building on previous discussions, a new exchange took place, this time with desk officers, at a more technical level. The topics selected for discussion were the following:

- Capping the costs of investment funds (from FSUG Recommendations, CMU cluster - cluster I, point 1);
- EU framework on simple portable, easy to understand and safe retail investment products (from FSUG Recommendations, Retail investors issues cluster – cluster II, point 1);

- Eliminating inconsistencies between existing investor protection rules and harmonising the pre-contractual key information documents (from FSUG Recommendations, Retail investors issues cluster – cluster II, point 3);
- EU regime for personal insolvency (from FSUG Recommendations, Better regulation and supervision issues cluster – cluster III, point 1).

During the discussion, FSUG members provided background information, details and examples to illustrate the user perspective. FSUG members discussed several points with the Commission representatives:

- Aggressive sales practices, with the example of UK and the Netherlands, where a ban exists on such procedures;
- Alternative advisory systems with a brainstorming on possible features of such system;
- Creation of a framework in which product advice is separated from sales;
- Products that are detrimental for consumers (especially with regards to retail investments, MiFID);
- Extent to which simplification of products can prove beneficial to consumers; importance of harmonisation of pre-contractual information to enhance comparison;
- Specificities of financial services markets in which multiple products generate an increase in prices; FSUG members reasserted their belief of the importance of price caps and price interventions, citing the positive developments in the cross border payments regulation.

FSUG members also received a presentation on the features of the provisional agreement between the co-legislators on “Preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures”. The proposed directive aims to provide a second chance for insolvent, honest entrepreneurs, and to facilitate the access of viable enterprises in financial difficulty to effective national preventive restructuring frameworks that enable them to continue operating. However, MS can decide to apply some of its provisions – discharge of debt, preventive restructuring - to consumers. For instance, in recital 21 is stated: “Consumer over-indebtedness is a matter of great economic and social concern [...] although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for MS to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt”. The Directive also includes provisions on consolidation of proceedings regarding professional and personal debts.

### **Criteria development process for the EU Ecolabel for Financial Products – update and state of play (Ulrike Kohl, DG FISMA C4)**

DG FISMA presented an update on the criteria development process for the EU Ecolabel for financial products. Since the last update, work continued through bilateral interviews, market analysis of retail financial products, and research for the Preliminary Report and Technical Report sub-tasks. The work of the Sustainable Finance Technical Expert Groups, particularly regarding Green Bond Standard, Taxonomy, and Disclosures, was also very beneficial. The use of Ecolabels in MS is quite jeopardised, for instance there are 56 ecolabelled hotels in Spain, while only three in Poland. Currently there are 73.000 ecolabelled goods and services, but most of them are goods.

At the request of one FSUG member, it was clarified that distributors/intermediaries cannot ask for ecolabels. On the issue of thresholds, FSUG members consider that thresholds should not be lowered only to allow a wider use of ecolabels, because this could lead to “greenwashing”, especially since "sustainability" is more and more used as a marketing strategy. FSUG also pointed out the issue of unbalanced representation in expert groups. Despite the fact that expert groups are open to different stakeholder categories, consumer organisations are underrepresented because of funding issues.

Next steps on the criteria development process will include the EUEB meeting in June 2019 and the second ad-hoc Working Group Meeting in October 2019.

### **Presentation of the [Algo Aware project](#) (Diana Vlad-Calcić, DG CNECT F2 – Quentin Liger, Optimity Advisors)**

The Algo Aware study was procured by the European Commission to support its analysis of the opportunities and challenges emerging where algorithmic decisions have a significant bearing on citizens, where they produce societal or economic effects which need public attention. The study aims at understanding the role of algorithms in the context of online platforms, identifying problems and designing solutions. One of the case studies of the study regards the use of algorithms in the context of consumer credit scoring. To obtain a clearer understanding of what the current practices are relating to the use of algorithmic decision-making systems the contractor is mapping them, and detailing the interactions of the stakeholders involved in the credit scoring process. Traditional and new providers are examined.

FSUG members stressed the difference between credit scoring and creditworthiness and the importance of reflecting concerns on transparency and accountability regarding credit scoring practices. They also raised the issue of potential discrimination linked to the use of inferred data.

FSUG can send further comments to the Contractor performing the study.

### **Feedback from the Commission on the replies to the CCD public consultation (DG JUST)**

The CCD public consultation, one of the consultation strands of the CCD evaluation, ran between 14 January and 8 April 2019. A [summary report of the public consultation](#) replies was published in May. The public consultation received 234 overall responses, the majority of which came from EU citizens (108), followed by business associations and companies/business organisations. Other respondents included public authorities, consumer organisations, and NGOs.

Considering the replies from the [general public](#), the vast majority of respondents find the provisions of the CCD beneficial. However, almost half of the respondents felt that consumer credit advertisements did not contain enough information and 41% of them received the Standard European Consumer Credit Information (SECCI) form only right before the signature of the contract.

As regards the [responses from stakeholders](#), a great majority of respondents assessed positively the relevance of the CCD, especially concerning the obligation to perform creditworthiness assessments, the rights of early repayment and withdrawal, and the APR. A majority of respondents consider the CCD to be effective and efficient in relation

to its main features, with the exception of the information provided to consumers in advertising, and to a lesser extent pre-contractual information and creditworthiness assessment.

The Commission is co-organising an event to discuss the interim findings of the study together with CEPS/ECRI. The event will take place on 18 June. The CCD evaluation should be finalised by the end of the year.

### **Mortgage Credit Directive in the context of coercive tied selling (Paulo Silva, DG FISMA B3)**

One member of FSUG presented an important consumer issue in Portugal, linked to mortgage loans. The main issue for consumers is the case of mortgage loans acquired with a bank, for which the consumers were required to keep a basic transaction bank account for paying the loan instalments. Subsequently, the bank repeatedly increased the management cost of the basic transaction bank account (up to more than 500%). The bank denied the consumer's request to close the transaction bank account and to pay the instalments from another bank account, in cash or by transfer. Moreover, the bank continued to charge and increase the management fees for that basic transaction account. This is the subject of a Class Action which runs in Portuguese Courts and on which the Court of First Instance (in Portugal) decided in favour of the bank. Now, the plaintiffs have appealed to the Portuguese Supreme Court of Justice and asked for the suspended of the procedure in order to ask the European Court of Justice (ECJ) for a preliminary ruling in relation to the "coercive tied packaging".

The FSUG member also submitted a formal complaint to DG COMP, on behalf of the Portuguese Investors' Association, regarding the coercive tied selling practices of this Portuguese bank. The Portuguese Investors' Association considers that the Portuguese bank implements a commercial strategy to suppress competition, exploit tied packages and create illegal barriers to the rights to terminate a contract or to switch to another product or another bank.

In this context, a discussion with Commission services took place, to clarify the terms and definitions from the Mortgage Credit Directive (MCD), in particular "tying practice" and "bundling practice" and the interlinkages with the provisions of the Payments Account Directive (PAD). The discussion was mainly focused on whether this practice represents an infringement to the provisions of the PAD and to the freedom to switching current accounts.

The Commission provided details about a similar case in France, where the ECJ was asked for a ruling also on the interpretation of the tying practices in relation to payment accounts, and in particular with reference to Art. 12.3 of MCD, which allows tying practices if they result in clear benefits to the consumers. For the Portuguese case, one important aspect is the transposition of MCD in national legislation. Thus, articles 12.1 and 12.2.(a) of MCD prohibit tying practices, but create an exception where banks can request consumers to open a payment or savings account with the only purpose to accumulate capital to repay the credit. In fact, the Portuguese legislation does not mention that the only purpose of the payment account is to serve the mortgage, which is a conformity issue of the Portuguese transposition. MCD allows tying practices to take place as an exception, only if the purpose of the payment account is to serve the mortgage, as confirmed by the recital 25 of MCD. Another important aspect is the practice of several Portuguese banks and their interpretation of the transposed MCD. FSUG members agreed that the complexity of the case derives from specificities of

transposition of both Directives in Portugal. In addition, minimum services accounts had existed in Portugal already before the implementation of PAD, thus limiting the pricing enforcement possibilities by authorities. FISMA representative recalled that the purpose of the basic payment account is to ensure financial inclusion.

In general, an additional difficulty in the interpretation of both MCD and PAD regards the purpose of the current account. Recital 12 of the PAD excludes current accounts opened with the sole purpose of repaying a mortgage. Distinguishing between the purposes of using accounts in practice proves to be difficult.

Finally, FSUG members shared examples of other issues related to basic accounts or mortgage related accounts from other countries, as well (Slovakia, Belgium).

### **Instant payments (Roxane Romme, DG FISMA B3)**

DG FISMA provided an overview of the state of play on instant payments in the EU, presenting the opportunities and risks/barriers related to them. An EU Payment Service Provider that wishes to offer/receive instant payments domestically or at EU level should take three steps: adhere to the European Payment Council SEPA Instant Payments scheme, connect to an adequate infrastructure in order to ensure clearing and settlement of the instant payments and, obviously, design instant payments market solutions for its customers. On each of these three steps, the state of play was detailed. On step one, as of today, a bit more than 50% of all EU Payment Service Provider adhered to the scheme, which is in line with the estimations. On infrastructure, Payment Service Providers must join either a local automated clearing house or a European infrastructure (RT1 or TIPS) for cross-border instant payments. Regarding market solutions, there are considerable differences between countries as regards the way instant payments are offered – e.g. as the new norm, as a premium services or some other way. Pricing is a business decision, but the Commission welcomes the fact that there are MS that offer instant payments as the new norm. Instant payments translate in numerous benefits for consumers (replacement of cash transactions between consumers, peer-to-peer payments) and for businesses (e.g., the merchant, in e-commerce transactions, can be assured in quasi real time that the payment has been credited to his account and can thus ship the ordered good immediately).

FSUG members asked about the costs of transactions and Commission replied that efforts are done to increase transparency in this area, which remains challenging. FSUG members recalled that benefits will flow mostly to traders and merchants since ECB made available TIPS at a very low cost, which does not justify pricing instant payments as premium services. One FSUG member described the situation in Portugal, where fees for instant payments are excessive. Thus, a limit is required, with the possibility for revision in the future and becoming indicative, based on the risk management models of banks.

Regarding fraud or mistakes, the speed of instant payments proves to be a real concern. The need of harmonising consumer protection provisions for various means of payment was restated by FSUG.

Finally, FSUG members recalled that accessibility issues for vulnerable categories of consumers must be also taken into account in the work of the group on instant payments.

FSUG demanded further updates to be provided when available and stated the Group intention to take the topic up with the ERPB.

## **Combating fraud and counterfeiting of non-cash means of payment**

Due to the increasing number of online purchases with counterfeited means of payment, the Commission decided to act by proposing a Directive on Combating fraud and counterfeiting of non-cash means of payment. It identifies the category, proposes penalties and increases the police cooperation at international level to tackle this issue. Indeed, since these fraudulent activities usually finance criminal and terrorist groups, the usual means of dispute resolution are not sufficient and criminal law applies.

The ECB 5<sup>th</sup> report on card fraud issued in September 2018 shows that non-cash payment fraud, in particular online fraud, is increasing. Cross-border fraud is much larger than domestic fraud. Fraud generated economic losses for both businesses and consumers; it is a threat to security and an obstacle to the digital single market.

While taking stock of the current situation, three sets of problems were identified, linked to:

- The legal framework, which is not adapted to fighting fraud today;
- The operational obstacles, which hamper investigation and prosecution;
- Prevention, which could be improved.

The new Directive proposes updates on definitions (for instance, the new definition of means of payment will include digital means of exchange, which refer to cryptocurrencies), penalties, jurisdiction, cross-border operational cooperation, cooperation with the private sector, prevention and assistance to victims.

## **NPLs and consumer protection: discussion on the study to be outsourced**

Following a discussion with Commission services, the scope of the study on NPLs and the impact on consumer protection will be reworked. Sub-group members and sub-group leader will redraft the study Terms of Reference.

DG FISMA will provide more information on the work they are performing on the same topic to avoid duplications. Commission services will give feedback on the revised draft ToR, once re-submitted by FSUG.

To be able to use this year budget, the final ToR should be submitted to the EC by mid-June.

## **Presentation on Better Finance report on “Attribution of profits derived from Securities Lending by UCITS Exchange-Traded Funds” (Better Finance)**

Better Finance study analyses the “split” of revenue achieved from securities lending transactions and the divergences between the ten largest ETF providers in the EU. The findings show that the “split” in costs ranges from 5% to 49%, that only two providers (on the ten analysed) use an external Securities Lending Agent, and that only two providers disclose the “split” in the KIID.

Better Finance advises ESMA: (i) to investigate why costs of securities lending can potentially vary from 5% to 49% of revenues from one fund manager to the other; (ii) to clarify in their guidelines the obligation of UCITS Management Companies to disclose in the KIID whether securities lending transactions are employed and to what limit of the



portfolio; and (iii) to cap the level of costs at 5%, requiring providers to comply or explain the level of direct and indirect operational costs.

## **Risk Outlook**

The Risk Outlook will be kept on hold. Next year, the Group might decide to prepare a new version of the Risk Outlook, focused on the topics addressed by the FSUG Recommendations.

## **Internal discussion on FSUG reply to the public consultation on DMFSD**

FSUG members decided in favour of replying to this public consultation. A coordinator was appointed to organise the work and to upload the reply to the [DMFSD public consultation](#) (deadline 2 July).

## **Wrap-up session on subgroups' discussions**

- Digitalisation of financial services – conduct of business and big data: the subgroup is working on the basis of the second draft of the scoping paper.
- Digitalisation of financial services - accessibility issues: subgroup is working to finalise their paper, which will address accessibility issues focusing on vulnerable categories of users, to avoid overlapping with the other subgroup on digitalisation.
- ADR – subgroup meeting was postponed. Their work will continue via email.

## **Topics for next meeting(s)**

FSUG members would like to receive updates from the Commission on:

- Interim findings of the public consultation on CCD
- Algo:aware project
- Update on the negotiations on the representative actions proposal
- Update on the Commission work on cryptoassets

## **AOB**

The meeting dates for 2020 will be sent via email to FSUG members ahead of the next meeting.