

Modernising Consumer Markets - Consumer Green Paper

Response from the Building Societies
Associaton

Restricted
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 **Building Societies**
Association

The Building Societies Association (BSA) represents all 44 UK building societies. Building societies have total assets of over £393 billion and, together with their subsidiaries, hold residential mortgages of over £302 billion, 22% of the total outstanding in the UK. They hold over £271 billion of retail deposits, accounting for 18% of all such deposits in the UK. Building societies account for 36% of all cash ISA balances. They employ approximately 43,000 full and part-time staff and operate through approximately 1,500 branches.

We are pleased to submit our response to the Green Paper “ Modernising consumer markets” published by the Department of Business, Energy & Industrial Skills in April 2018. As an organisation whose members are owned by / focussed on their customers, we particularly welcome the focus on ensuring that the new product and service opportunities created by the rapidly developing digital economy are available to and offer opportunity for all consumers

The Green Paper is wide ranging and not always directly relevant to our sector so we have deliberately chosen not to answer all of the consultation questions.

Executive Summary

- Data portability has great potential for allowing consumers to make informed choices more quickly and easily when selecting service providers and to make managing finances easier by being able to manage all accounts / investments / bills etc. from one service. This could be of particular benefit to consumers who don't have the time or confidence to do so using currently available options.
- Overcoming mistrust of wider access to personal data and in new “digital” technology in general is vital to realising those benefits. Trust issues include concerns about fraud, cyber-attack, IT failure, unauthorised use / sale of personal data and lack of clarity over liability between firms when things go wrong. If particular regulated markets have trust issues already this will be even more of a challenge.
- We strongly support the Government's emphasis on making consumer markets work for all consumers including those in vulnerable circumstances. Trust is the key to engaging these consumers - vulnerability often has a stigma attached and / or the consumer has real or perceived concern that revealing a vulnerability will result in discrimination so it is hard for providers to get consumers to share their circumstances. It is likely to be harder still when the consumer thinks that at a later point this information may be shared.
- The introduction of Open Banking earlier in 2018 chose not to address vulnerability when it launched in January 2018 so certainty for consumers on handling vulnerability data still outstanding in the financial services context – it is likely that both consumers and potential entrants will proceed with caution until these are addressed. We recommend that the introduction of data portability into other regulated markets includes a trust-building framework for vulnerability as part of that introduction and strongly support the proposed “Smart data review” as an opportunity to create suitable frameworks.
- Continuing high levels of digitally-enabled fraud and incidents of high profile cyber-attack or IT failure also affect consumer confidence in data portability and digital markets so should be encompassed in the Government's approach to promoting new digital services.
- In respect of assisting new entrants, the limited experience of Open Banking is that early entrants are not completely new entrants but partnerships or acquisitions that package together an incumbent alongside a new entrant so as to offer the familiarity and

reassurance needed to overcome trust issues with data portability alongside the technical know-how to deliver new services.

- On managing poor performance by publishing data, we would prefer measures that spotlight good as well as poor performance rather than “naming and shaming” which takes the spotlight away from the better performers.
- In respect of unfair terms, we contend that financial services firms are very well aware of the law and regulations on this subject area thanks to continued focus from our regulators. We have reservations that prescribing a “given” level of comprehension with compulsory online testing could foster a compliance-based culture around terms & conditions rather than the customer understanding-driven focus that the Government wants to create. We would prefer a best practice-led approach and so welcome the Behavioural insights Team’s plan to publish a good practice guide for business on terms & conditions and privacy notices online.

Our responses to relevant consultation questions

In which regulated markets does consumer data portability have the most potential to improve customer outcomes and for what reasons?

Data portability has great potential for allowing consumers to make informed choices more quickly and easily when selecting service providers and to make managing finances easier by being able to manage all accounts / investments / bills etc. from one service. It also creates the foundation for service provider firms to apply Artificial Intelligence to customers’ personal data in order to identify patterns in consumers’ behaviour that can be translated into tailored services or bundles of services for the benefit of that consumer.

There appears to be most potential for consumer data portability to deliver value in markets where there are a number of providers competing to offer consumers a service that can be differentiated by cost but where quality of service delivery remains reasonably consistent and where there are minimal barriers to switching provider. Examples of potential markets could be utilities, general insurance, and non-complex legal services and financial services. Telecoms (pay TV, landline, broadband, mobile) also has potential though there are areas of the UK where lack of basic infrastructure prevents any provider from delivering a consistent service offering which still means that for some customers geography would still be the dominant factor in the level of service they receive.

An equally significant factor in assessing potential is the capability to overcome mistrust of wider access to personal data and in new “digital” technology in general. Research commissioned by the BSA has highlighted a range of trust issues that consumers are wary about in respect of Open Banking including fraud, cyber-attack, IT failure, unauthorised use / sale of personal data and lack of clarity over liability between firms when things go wrong. As a real life example, the recent IT problems and subsequent targeting of TSB customers for fraud has had a negative impact on financial services consumers’ trust in all digital financial services. Consumer mistrust will be a significant barrier to successfully introducing data portability into any market so an equal factor in terms of potential to improve consumer outcomes would be the level of trust that a particular regulated market already has with consumers – if there are trust issues already this will be more of a challenge.

How can we ensure that the vulnerable and disengaged benefit from data portability?

Building societies take looking after all their members very seriously and have led the way in providing practical support for account holders who find themselves in vulnerable circumstances and needing extra help - we strongly support the Government's emphasis on making consumer markets work for all consumers. The sector is a leader on sharing best practice on supporting vulnerability with each other, within the wider financial services industry, and with charities and other sectors such as legal services, utilities and insurance. We are keen to contribute to any Regulators' Network projects on more effective collaboration as an example of a sector where collaboration flourishes.

Data portability has the potential of being a force for good in supporting vulnerability - digital comparison tools can help match consumers with the service provider that can best meet their particular needs at a point in time, aggregation can help simplify running finances and use of artificial intelligence can alert providers to behaviour that suggests that the consumer is in difficulties. These could be particularly useful for consumers whose circumstances makes active searching for the most suitable service provider using current options difficult.

However, none of this will be delivered without trust - vulnerability often has a stigma attached and / or the consumer has real or perceived concern that revealing a vulnerability will result in discrimination so it is hard for providers to get consumers to share their circumstances. It is likely to be harder still when the consumer thinks that at a later point this information may be shared. If the customer's circumstances are not shared in full then there will be no vulnerability-related benefit delivered – indeed, without access to crucial personal information a comparison or aggregation service might inadvertently produce recommendations that are not in the consumer's best interest.

Building trust that data portability will not compromise the privacy of consumers who are / have been in vulnerable circumstances is the key measure for ensuring that vulnerable / disengaged consumers won't believe themselves to be outside of data portability. This could be addressed by setting frameworks / standards to address common concerns arising from being / having ben in a position of vulnerability alongside the introduction of new data portability services in the same way the Open banking was launched with common technical standards. For example:

- When the consumer gives permission to share data, is this a blanket permission for access to all data including personal vulnerability data?
- If not, how does the consumer specify what should and should not be shared – and to whom?
- Where does the consumer obtain advice on what personal data they should share in order to get the best from a comparison / aggregation service?
- How can the consumer be confident that the comparison site / aggregator will retain personal vulnerability data only for as long as it is relevant?
- How can the customer be confident that sharing personal vulnerability data won't result in discrimination in the service choices they get offered?
- How do attorneys and other parties managing another person's finances or helping another person engage with the service.

Other practical steps would be the integration of physical and digital channels to help customers who are nervous with new services and would like visible support – building societies and banks already successfully use this model to support launches of digital projects – and enlisting charities specialist in particular vulnerabilities to help educate their particular constituencies.

The introduction of Open Banking earlier in 2018 chose not to address vulnerability when it launched in January 2018 so certainty for consumers on all of the above are still outstanding in the financial services context – it is likely that both consumers and potential entrants will proceed with caution until these are addressed. Open Banking was unique in that the implementation timetable had to fit the requirements of an EU Directive but we would strongly recommend that the introduction of data portability into other regulated markets includes trust-building framework for vulnerability as part of that introduction. The extension of data-sharing between companies and sectors outside of the context of emergency support from utilities could create similar trust concerns if it was not accompanied by a framework clarifying how the above concerns would be addressed.

A longer term issue is the potential change in consumer relationship structure where the aggregation service becomes the customer's primary relationship rather the individual service providers. How do aggregator firms take on identifying and supporting vulnerability and abuse of aggregation facilities for coercive control and financial abuse? The need to support individual consumers impacted by health / mental health problems, destabilising life events low financial resilience, lack of financial confidence and capability and / or targeted for financial abuse is not going to go away however much technology changes.

We strongly support the Government's proposed "Smart data review" which would be a natural opportunity to create suitable frameworks for supporting vulnerability so that reasonable concerns about personal vulnerability data don't turn into significant trust issues preventing vulnerable individuals from having confidence that data portability will work for them. Also for consideration of the role that Open banking providers and providers of similar services in other markets.

How can we ensure these new services develop in a way which encourages new entrants rather than advantaging incumbent suppliers?

Market development may not be a simple case of incumbent versus new entrant. It is likely that entrants into data portability-based services will package together an incumbent alongside a new entrant so as to offer familiarity and reassurance needed to overcome trust issues with data portability alongside the technical know-how to deliver new services. The limited experience of Open Banking is that early entrants are partnerships or acquisitions not completely new entrants.

We agree that it would be anti-competitive for incumbents to deliberately block new entrants or play on consumers' fear of the unknown in a negative fashion. But, if the Government's objective is to generate competition to get the best choice for the consumer, we see no reason why incumbent suppliers should not be allowed to deploy their strengths within their customer proposition for data portability services just as new entrants will. It is entirely right all that entrants should be able to use a hard-earned reputation for trust / service / innovation etc. as a potential competitive advantage.

What is the best way to publish performance data so that it incentivises firms to improve and can be used for consumers when taking decisions? Should firms also offer discounts or compensation for poor performance?

Financial services is one market where comparative performance data on pricing and on complaints has been available to consumers for some time and is now starting to be extended to benchmarking of customer service through the FCA's new requirements on the major current account providers to publish performance comparison on service delivery for particular activities. The FCA's performing initiative is relatively new and so at the moment it is difficult to judge how much influence the information provided has on either consumer engagement or firm's behaviour.

"Naming and shaming" of poor performing firms may well incentivise the firms in question to improve their performance but evidence from financial services is that it doesn't necessarily influence customer decisions – for example, the banks involved in serial mis-selling of PPI have been the subject of repeated naming and shaming but there has been no corresponding exodus of customers.

"Naming and shaming" also takes the spotlight off the better performing firms – ideally, any intervention to address poor performance should also recognise good performance and incentivise better performing firms to go further. The FCA's current account performance metrics highlighted above is a good example of intention to achieve the right balance of spotlighting both good and poor performance.

How can the government support consumers and businesses to fully realise the benefits of data portability across the digital economy?

Helping establish consumer trust is the key to fully realising the benefits of data portability. The Government can help foster higher levels of consumer trust by:

- Helping to address natural concerns about data portability and its implications for privacy, exposure to fraud and cyber-attack and unauthorised use or transfer of their data – these concerns are just as likely to occur around data portability in the public sector as within the private sector.
- In particular, ensure that there are clear policies on supporting vulnerability that regulators, firms, charities and consumer-advocacy organisations can support and promote to reassure these consumers.
- A visible role for the Competition & Markets Authority and other regulators in dealing promptly with uncompetitive practices and / or consumer detriment.
- Continuing to raise levels of digital capability – where we support the Government's work on digital skills training.
- Leading the UK's efforts to tackle digital and digitally-enabled fraud.
- Continuing to encourage firms (and regulators where applicable) to build up operational resilience management capacity and capability so that public confidence in digital technology as a secure, stable channel for data transfer and storage and transactions is maintained.

To elaborate on the last two points:

Fraud

The Green Paper correctly states that “public enforcement of consumer law is an essential element of consumers’ trust in markets” and that fraud and other consumer detriments “can sometimes undermine consumer confidence in an entire sector”. We strongly agree with this statement – one significant constraint to consumers adopting digital services is their concern that they will become targets for fraud. The Government therefore needs to include tackling fraud as an integral part of its strategy for a consumer-supporting economy.

More needs to be done to address the level of fraud targeted at the UK and the concerns that it creates for consumers about the safety of transacting online. We do understand that fraud is one of many priorities for UK law enforcement and that it is particularly difficult to prosecute internet-based fraud scams originating from outside of the UK so building up consumer fraud awareness to make consumers more vigilant about spotting fraud and therefore more confident about using digital services is the most immediately effective option.

The financial services sector and others are already investing significantly in providing fraud awareness for consumers and will continue to do so. However, there is a risk that uncoordinated campaigns with mixed messages will create diminishing returns and that consumers become saturated by information - for example, March 2017 saw the launch of 4 separate fraud education initiatives from UK Finance, National Trading Standards, the FCA and Santander within 10 days of each other and all targeting the same customer base. We would like to see a single body – possibly National Trading Standards – being given a formal role to co-ordinate fraud awareness across the UK. Fraud awareness programmes are also not as effective as they could be because feedback from UK law enforcement on fraud intelligence is erratic and often too reactive. We would like to see more fraud intelligence provided more quickly to fraud education providers so that fraud awareness activity can tackle new types of scam more proactively.

Operational resilience

Incidences of successful cyber-attack or significant IT failure also undermine consumer confidence in digital markets so all providers need to be sufficiently operationally resilient to be able to defend themselves and manage the aftermath of a significant breach or IT failure so that their customers and consumers in general maintain their confidence in the security and sustainability of digital markets. Unfortunately, recent incidents have shown that the affected provider hasn’t always been able to maintain public confidence.

The Government provides very good support for cyber-defence and the work of the National Cyber Security Centre but the main risk area in terms of public confidence is incident management where the best learning is the shared experience of organisations that have gone through incident management themselves. The financial services sector’s regulators are effective advocates of operational resilience planning and this might be a useful additional topic for sharing with other regulators via Regulatory Exchange. The BSA would be willing to share how we support members’ incident management planning with trade bodies in other sectors.

As technology develops, how do we maintain the right balance between supporting innovation in data use in consumer markets while also preserving strong privacy rights?

The introduction of the General Data Protection Regulations in May 2018 should make a significant difference to consumer confidence that use of their personal data by other parties will be circumspect and appropriate and that their personal privacy will be protected. It is much too early to tell the actual impact GDPR has had.

Confidence is again a vital part of convincing consumers that the right balance is in place – high profile misuse of data such as Cambridge Analytics’ misuse of Facebook data will have an effect on whether consumers feel that the Government is succeeding.

What challenges do digital markets pose for effective competition enforcement and what can be done to address them?

We believe that the Competition & Markets Authority is the right organisation to lead on competition enforcement in the UK.

In terms of our own sector, there are currently three regulators involved with overseeing digital financial services markets – the Prudential Regulation Authority (prudential), Financial Conduct Authority (conduct & customer outcomes) and the Payment Services Regulator (infrastructure). Individual regulators are making considerable effort to understand the implications of rapid progress on digitization – for example the FCA’s “delevopment sandbox” – but there have also been instances – for example the introduction of Open Banking – where prudential, conduct and infrastructure regulations for digital markets have not developed in synchronicity. Co-ordinating to cover all of these aspects of regulation will be a challenge for any regulators in any market but is one that must be taken up.

In the longer term, regulation will have to keep pace with developments in technology, for example biases built into artificial intelligence and the use of technology designed to empower consumers to enable crime. Regulated markets will come under increasing pressure from non-regulated businesses competing at the margins of regulated markets and regulation may have to reach across geographies in ways that it has never had to do so before - an example being the challenge of regulation of Bitcoin and other cryptocurrencies.

Preventing use of unfair terms

Paragraphs 132 to 134 of the CP outline some research findings regarding practices in relation to contract terms. Research suggests that 54% of businesses are unfamiliar with the law on unfair terms. CMA enforcements cited in the CP concern a care home, online gambling sites and car hire firms. On the other hand, financial services firms are very well aware of the law and regulations on this subject. In a current consultation on fairness of contract variation terms¹, the financial services regulator the FCA stated –“The day-to-day case work that we do has generally shown that firms’ use of variation terms has been for valid reasons, and the changes made as a result have not gone beyond what was necessary to respond to the particular issue in each case. Further, from cases we have reviewed for unfair terms issues, we do not believe that in most cases firms’ treatment of their customers amounts to mistreatment.”

It is important to note that the statutory provisions material to fairness of terms in consumer contracts have changed little since the relevant legislation first came into force in July 1995 (Directive 93/13/EEC). This is despite the fact that the legislative vehicles have altered from time-to-time (currently, for the UK, the Consumer Rights Act 2015). There have been certain amendments to unfair contract terms law, including a number introduced under the CRA, but the substantive framework is the same as it was in the mid-1990s. If, as the CP suggests, a large percentage of firms are not aware of the provisions, what have they been doing for the last 23 years?

Certain UK and European (CJEU) court judgments have interpreted some of the legal provisions on unfair contract terms. A small number of judgments provided broad assistance on the interpretation of some of the provisions (eg *DGFT v First National Bank plc* [2001] UKHL, which was informative about the nature of the fairness test, and *OFT v Abbey National plc and Others* [2009] UKSC, which provided clarifications about the transparency aspects). However, most tended to be fact-specific, illustrating the application of rules to particular facts.

During the 23 years since the relevant law came into effect, there have been a number of regulators/qualifying bodies responsible either cross-sector or for specific sectors for the subject in the UK, each regulating consumer contract terms and providing (and, in some cases, withdrawing) successive guidance covering the same or similar ground. The Office of Fair Trading in the mid-late 1990s, the FSA in the earlier 2000s, the FCA later in the 2010s and, most recently, the CMA all published guidance or other relevant materials. As noted above, the FCA is now consulting again. The building society sector has fully engaged with all relevant exercises throughout this period.

The relevant law is, of course, ‘horizontal’ so all providers are potentially in scope, not just financial services. During the last two decades or so, UK court and CJEU judgments have found both for and against firms’ contract terms across a wide range of business areas, including contracts relating to gym membership, estate agency, telecommunications, gas supply, public car parks, mobile caravans parks, financial services, and others.

Of course, no sector (including financial services) should ever be complacent – they should keep contract terms and relevant arrangements under review. Between them over time, the financial services regulators (previously the FSA and now the FCA) required over 50 firms to provide undertakings where the regulator took the view that a firm’s individual contract terms were unfair, but we are not aware of the regulators levying any substantial fines or directing significant remediation.

Therefore, the 23-year picture is of certain individual firms, across a range of business areas, having sometimes included unfair terms in their contracts and the regulators or the courts holding them to account. However, during that long period, and with so many diverse regulators and business areas involved, there has been no evidence of sustained, substantial or widespread consumer detriment stemming from breach of the relevant laws.

The FCA’s current guidance consultation paper supports this assessment in respect of financial services, even in the light of circumstances since the financial crash ten years ago – “The evidence of our day-to-day unfair terms casework to date suggests that in general firms’ adaptation to the changing costs of their funding over time has not led to widespread harm to

consumers” (paragraph 2.9). Indeed, some of the most egregious individual examples have been external to the UK and outside financial services; for example, in Hungarian telecoms and German gas supply. In some of those cases, the firms provided their customers with very little, or no, relevant information so not surprisingly the CJEU focused on transparency of information to customers.

Nonetheless, as already noted above, it is crucial that UK businesses (including financial services firms) are not complacent. Consumers are entitled to the full protection of the law regarding their contracts with businesses and, while our members have applied strong due diligence to their contracts with consumers over many years, it is important to review these matters from time-to-time. In order to help, the BSA has liaised closely with the regulators and other relevant bodies and provided a range of detailed guidance to members, and included the subject prominently at numerous seminars and workshops. Again, we are happy to share our experience with trade bodies in other sectors.

Should terms & conditions in some sectors be required to reach a given level of comprehension such as measured by online testing?

Online testing and other behavioural science techniques do have a role to play in helping simplifying terms and conditions and we welcome the Behavioural Insights Teams good practice guide for business on presenting terms & conditions online.

But, given that comprehension of terms & conditions is subjective to the individual’s consumer’s capability to understand and that different types of consumer prefer different written or visual formats it may be difficult to establish minimum “given” levels of comprehension. Also, prescribing a “given” level of comprehension with compulsory online testing could foster a compliance-based culture around terms & conditions rather than the customer understanding-driven focus that the Government wants to create. Instead, we would advocate the development and sharing of best practice – for example the use of video clips to explain key terms & conditions for Nationwide’s new FLEX1 account.

We welcome the Behavioural insights Team’s plan to publish a good practice guide for business on terms & conditions and privacy notices online.

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The Building Societies Association (BSA) is the voice of the UK's building societies and also represents a number of credit unions.

We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our members have total assets of over £387 billion, and account for 22% of the UK mortgage market and 18% of the UK savings market.