Report

International Seminar

17 March 2021

Performance-based Regulation & Financial Consumer Protection

Foreword and Acknowledgements

This document sets out the Agenda, Summary Report and Speaker Biographies for the joint G20/OECD Task Force on Financial Consumer Protection and FinCoNet International Seminar on Performance-based Regulation & Financial Consumer Protection, held on 17 March 2021.

The G20/OECD Task Force on Financial Consumer Protection and FinCoNet would like to acknowledge and thank everyone who organised and participated in the Seminar, and particularly all Speakers, Panellists and Moderators for their valuable contribution to the discussion.

About the G20/OECD Task Force on Financial Consumer Protection

The G20/OECD Task Force on Financial Consumer Protection ("the Task Force") was established in 2010 in response to the financial crisis and in recognition of the fact that an appropriate level of financial consumer protection is an essential requirement to ensuring consumer trust and confidence in the market. The Task Force is the leading international forum for the development of financial consumer protection policy and acts as a forum for the exchange of information and expertise relating to policy developments and emerging issues across jurisdictions. The Task Force is responsible for is the High-Level Principles on Financial Consumer Protection ("the Principles") that have been endorsed by G20 Leaders and adopted by the OECD Council, and are included in the Financial Stability Board Compendium of Standards.

About FinCoNet

In November 2013, International Financial Consumer Protection Organisation (FinCoNet), was formally established as an international organisation of market conduct supervisory authorities with responsibility for financial consumer protection. FinCoNet is recognised by the Financial Stability Board and the G20. The goal of FinCoNet is to promote sound market conduct and enhance financial consumer protection through efficient and effective financial market conduct supervision, with a focus on banking and credit. FinCoNet Members see the organisation as a valuable forum for sharing information on supervisory tools and best practices. By sharing best practices and by promoting fair and transparent market practices, FinCoNet aims to strengthen consumer confidence and reduce systemic consumer risk.

Disclaimer

The opinions expressed in this document do not necessarily reflect the official views of Taskforce or FinCoNet member organisations.

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AGENDA

Performance-based Regulation & Financial Consumer Protection

Setting the scene	**Welcome & Opening Remarks**
12.00-12.05	Richard Monks, Chair of the G20/OECD Task Force on Financial Consumer Protection. Flore-Anne Messy, Head of the Consumer Finance, Insurance and Pensions Division, OECD.
Keynote Presentation	**Performance-based Consumer Law: bringing consumer transactions in line with consumer expectations**
12.05-13.00	Speaker: Professor Lauren E Willis, Associate Dean for Research, Professor of Law, William M. Rains Fellow, Loyola Marymount University, Los Angeles (USA). Moderator for Q&A: Miles Larbey, Head of Financial Consumer Protection, OECD.
Presentation & Panel discussion	**Current and proposed approaches towards promoting good outcomes for consumers**
13.00-14.25	The Panel discussion will explore current and proposed thinking and approaches towards promoting good outcomes for consumers from regulation and supervision of financial products and services. Moderator: Flore-Anne Messy, Head of Consumer Finance, Insurance and Pensions Division, OECD. Panellists: Katherine Gibson, Member of Transitional Management Committee, Financial Sector Conduct Authority, South Africa. Sze Gin Low, Director and Head, Market Conduct Policy Division, Markets Policy & Infrastructure Department, Monetary Authority of Singapore. Alexander Smith, Head of Strategic and Cross-cutting Policy, Financial Conduct Authority, United Kingdom.
14.25-14.30	**Closing Remarks** Maria Lúcia Leitão, Chair of FinCoNet.

SUMMARY REPORT – INTERNATIONAL SEMINAR

Performance-based Regulation & Financial Consumer Protection

17 March 2021, 12.00-14.30 CET

Setting the Scene: Welcome & Opening Remarks

Mr Richard Monks, Chair of the Task Force, opened the International Seminar on Performance-based Regulation & Financial Consumer Protection, and welcomed all attendees on behalf of the Task Force, the leading international forum for the development of financial consumer protection policy, and FinCoNet, a network of market conduct supervisors from around the world dedicated to financial consumer protection. Mr Monks noted that he was looking forward to an interesting Seminar with insights into how regulators can do better in the future in relation to this challenging topic.

Ms Flore-Anne Messy, Head of the Consumer Finance, Insurance & Pensions Division of the OECD, thanked everyone for joining and shared similar excitement to Mr Monks about the Seminar on Performance-based Regulation & Financial Consumer Protection. Ms Messy began by setting the scene to provide some background and context for the Seminar noting that:

- Performance-based regulation, which may also be known as outcomes-based regulation, has been defined differently in different contexts. The Panellists for the Seminar are from three diverse and leading jurisdictions who will discuss how they understand this concept, how they have applied this approach in their markets and how they measure the success of the approach. The Panel session will be complemented by a presentation from Professor Willis who will share her research about how performance-based consumer law can incentivise firm innovation and expertise to meet consumer needs and expectations.
- In simple terms, performance-based regulation means focussing on outcomes or objectives, rather than the means by which they must be achieved. And, importantly, it means measuring the performance of regulated entities against those outcomes, rather than — or in addition to — measuring their performance against regulation based on conduct requirements.
- The subject of performance-based regulation was selected for this Seminar because it is topical and of interest to policy makers and oversight authorities in a wide range of jurisdictions, including the members of the Task Force and FinCoNet. In addition, it is relevant to the strategic Review of the G20/OECD High Level Principles on Financial Consumer Protection ("the Principles"), the international standard on consumer protection frameworks adopted by many countries around the world.
- The OECD Secretariat is currently undertaking a strategic Review of the Principles, ten years after the endorsement of the Principles by the G20 and the OECD in 2011-12. The Review will assess the implementation of the Principles in jurisdictions and explore policy areas that could be reflected in an updated and revised version of the Principles.

- As such, it is an opportune moment to take a closer look at emerging approaches to financial consumer protection, including performance-based regulation, and explore implications for the future of the Principles.

Keynote Presentation: Performance-based Consumer Law: bringing consumer transactions in line with consumer expectations

Professor Lauren E. Willis, Associate Dean for Research, Professor of Law, William M. Rains Fellow, Loyola Marymount University, Los Angeles (USA), gave an insightful presentation on Performance-Based Consumer Law: Incentivizing Firm Innovation to Meet Consumer Needs & Expectations. The key points were as follows:

- Performance-based consumer law is about incentivising firm innovation and expertise to meet consumer needs and expectations.
- Traditional regulatory interventions, such as mandated disclosure, mandated nudges and product design regulation often fail, because firms can outmanoeuvre the regulation in various ways. To support this, various examples were given:
  - There are numerous examples showing that mandated disclosure is very easy for firms to sabotage, such as the print size being too small, not readable on a mobile device or a large amount of information presented in a way that is not easy for a customer to understand.
  - An example of an ineffective nudge is the mandatory default position of no bank overdraft fees, intended to decrease the use of overdraft facilities in the US. Firms could outmanoeuvre the regulatory device by confusing consumers about the default position and flipping decision biases such as loss aversion with urgent messages pressuring consumers to 'stay protected' by opting-in to the non-default overdraft facility.
  - Product design regulation can be good for consumers, but it has two main problems. It can be over-inclusive, which stymies innovation and eliminates some good transactions, or it can be under-inclusive and promote 'shapeshifting'. For example, payday lenders can circumvent price caps by offering loans that just exceed the size or duration of what the law defines as a "payday loan."
- Performance-based consumer law, on the other hand, is Prof. Willis' solution that leverages the fact than firms are better suited than regulators to inform consumers and achieve consumer understanding, to simplify and innovate products and pricing, to channel consumers to suitable products and to determine whether to dispel confusion or eliminate poor consequences. This is because firms can access customers easily, experiment, segment and personalise in real time and adapt quickly. It allows the firm to decide how to meet the standard in the most cost efficient way.
- When firms want to communicate with customers or want to prevent poor customer outcomes, firms are very skilled at doing this. For example, through messaging/marketing (contests, jingles, spokespersons etc.), framing, nudging, conditioning, design of product and purchase processes, channelling consumers to specific products, personalised, real time targeted marketing and iterative testing of all of these methods.

- In consumer law, the goal of performance-based regulation is that the customer is not confused about key aspects of the transactions in which they engage, or nonetheless do not suffer poor consequences from the transaction. The policy instrument could be 'customer confusion caps' (customer comprehension) and/or 'customer consequences caps' (good consumer outcomes). The firm must demonstrate that it has met these caps through, for example, third party auditing of samples of the firm's customers or records. Confusion and consequences caps enlist firms to utilise marketing, product design, sales interfaces, etc. in the service of the aims of consumer law and gives firms both flexibility and responsibility in meeting those aims.
- The mechanics of setting the confusion and consequences caps (e.g. to match the results of lab testing of disclosures or to meet, at baseline, industry medians for consumer understanding of key facts about the type of product or service), audits (e.g. third party expert auditors who are themselves audited by regulators) and deployment (e.g. caps imposed as sanctions for misconduct or applied to all firms as an affirmative duty) were explained. A potential difficulty is that firms may be reluctant to give auditors access to customers and records.
- Several examples were given about how performance-based regulation could work in the consumer finance area, including:
    - In relation to insurance products, the goal could be that insureds either: know their deductibles and the limitations on benefits provided by their policies; or nonetheless buy policies that cover the risks they face with a deductible they can afford. The policy instrument to achieve this would be 'customer confusion caps', with safe harbours for policies with affordable deductibles that cover reasonably anticipated risks that the insureds face.
    - In relation to credit card costs, setting up a 'customer confusion audit' to demonstrate that customers know how much they will pay to transfer their balance to the new card, including fees and interest.
    - To address barriers to switching, setting up a 'customer consequences audit' to demonstrate that it takes customers no longer to quit the service than to sign up for it.
- The benefits of performance-based regulation include:
    - It aligns the interests of firms and consumers, by removing the incentives to obfuscate, exploit, and mis-sell;
    - Rather than disclosure, it moves measures closer to regulatory goals, as it is a better fit and more difficult to outmanoeuvre;
    - It potentially increases competition over key product and service facts;
    - It increases consumer autonomy by bringing consumers' transactions into line with their expectations;
    - It increases market accountability as it moves unshopped features from firm to regulatory control; and
    - Importantly, it improves consumer outcomes directly.
- Big data and machine learning can also be harnessed to allow for real time personalisation for customers. Firms are currently using it for advertising but they

could use it to channel consumers to suitable products as part of a performance-based regulation framework.

Question & answer session

Mr Miles Larbey, Head of Financial Consumer Protection, OECD, thanked Prof. Willis for her presentation. Mr Larbey moderated a Q&A session with Prof. Willis where the following questions were raised:

Q. How would a performance-based regulation approach work in an enforcement contextthat is predicated on supervision, investigation and litigation?

Prof. Willis noted:

- The enforcement of performance-based regulation can be done in a variety of ways, for example, simply testing customer outcomes, rather than waiting for complaints to come to the regulator. In the US, complaints data can be skewed as complaints tend to come from consumers that are better off socioeconomically, while poorer consumers are less likely to complain. Regulators testing customer outcomes would thus increase fairness in assisting with deciding what products should be further investigated.
- Another way to add to the current enforcement toolbox for performance-based regulation, is to resolve an enforcement proceeding with an agreement by the firm to meet certain customer confusion or consequences caps. Instead of the firm just promising not to engage in the specific problematic practice, there must be a robust way for the firm to show that they are not doing it. This is frequently how environmental law cases, for example, are resolved. It has been done in one consumer deception case in the US, but usually these matters are settled with fines. However, a more forward looking approach to stop firm misbehaviour would be customer confusion and consequences caps and audits to ensure that firms have changed their practices.

Q: In relation to confusion caps and confusion audits, how can we adapt that notion in the context of investment decisions, where confusion on behalf of the retail investor may also be led by their subjective perceptions of what may be a reasonable expectation of that investment.

Prof. Willis noted:

- There are various aspects in the investments space that need to be thought about. For example, costs are an incredible driver of returns. Ensuring that customers understand costs is key to them being able to shop around different offerings. Currently in the US, firms often market products with carefully constructed graphs that show great returns for products and the information about costs may be hidden. Mandating specific cost disclosures does not focus customers on costs because their attention is drawn to flashy marketing materials and not to the mandated disclosure. Under a performance-based approach, confusion audits and a confusion cap can be used to compel firms to change their marketing to draw attention to costs, or low-fee funds might be in a safe harbour, which is likely to be sufficient in terms of consumer outcomes.
- In relation to expectations about investing and returns, as long as a firm is not causing, or is not responsible for, the expectation, then it is less concerning. The

key point is that the customer should know the costs and risks of the investment before making a decision.

- However, it is a problem if customers have subjective perceptions that are inaccurate and firms intentionally exploit those expectations, even if the firm did not create those expectations. This tends to occur where there is a significant risk of the investment failing, and that risk needs to be conveyed to the customer by the firm.
- Another example is a firm selling an investment that a customer cannot access for a long period of time, which would be an issue if the customer is nearing retirement and they did not understand the access restrictions. Even if the firm did not create the investor's expectation, the firm should be required to impress upon investors such a key limitation on the benefits of the investment.

Q: In the context of a performance-based approach being a way forward in how to design regulation and deal with the drawbacks of traditional regulation, what kind of drawbacks or challenges are there if a government was to implement a performance-based regulation approach? Are there any lessons that can be learnt from the environmental field? How has the idea of performance-based regulation resonated with policy makers, particularly if this approach may put more of the burden on firms?

Prof. Willis noted:

- In terms of drawbacks, it may become more costly for firms in a variety of ways, for example, to inform consumers. Currently disclosures are inexpensive to produce and they can be easily produced on a large scale, often with little impact on consumer outcomes.
- In the environmental regulation area, firms did try to fool the system in relation to smoke stack height, and it shows that regulators have to stay on top of monitoring performance-based outcomes. This can be hard, particularly where measurement is very challenging (e.g. multiple sources potentially polluting a wetland), and in these situations it may be necessary to have regulations governing the processes that firms engage in.
- In terms of the response from policy makers, regulators tend to get excited about a performance-based approach, however they tend to want someone else to do it first. Firms have also been willing to pay larger fines to avoid having this sort regulation implemented. Some firms are doing a good job, or have capacity to do a good job for consumers, and at some point they should be more willing to advocate for this kind of approach.

Q: In terms of implementing a performance-based approach, is it expensive or difficult for emerging markets? Is it more difficult to implement in a civil law framework?

Prof. Willis noted:

- A performance-based approach is currently implemented in other areas, for example, food safety, product safety for children's items and over-the-counter medicines, so it is possible to implement in a range of systems. While standardising disclosure to a certain extent can be helpful for consumers, Prof. Willis cautioned not to spend too much time trying to get the perfect disclosure. Focusing on the effect on the consumer is what will lead to getting to better consumer outcomes faster. A modest set of outcomes caps can be set initially and increased slowly.

- While civil law is not Prof. Willis' area of expertise, she observed that a civil law framework often has prescriptive laws, where certain things must be produced. The key is that the rule should be that a firm must produce the outcome. A mix of approaches is likely to be appropriate, alongside implementation of a performance-based framework.

Panel Presentations and Discussion: Current and proposed approaches towards promoting good outcomes for consumers

Ms Messy moderated a Panel session of experiences from three leading jurisdictions in developing and implementing outcomes- or performance-based regulation and supervision in the arena of financial consumer protection. This was an opportunity to hear directly about how this approach works in practice to promote good outcomes for consumers through the regulation and supervision of financial products and services – the challenges, the advantages, and the lessons learnt.

South Africa

Ms Katherine Gibson, Member of the Transitional Management Committee of the Financial Sector Conduct Authority, South Africa, gave a presentation on the South African perspective on performance-based regulation and financial consumer protection. The key points were:

Legislative reforms

- There are numerous legislative reforms underway in South Africa. In 2018, South Africa moved to a twin peaks approach, consisting of the Prudential Authority and the Financial Sector Conduct Authority ("FSCA"). The current focus is to further develop the twin peaks, particularly the conduct aspect, where the FSCA has a mandate to treat customers fairly. The FSCA have found that the rules alone have not worked, as highlighted earlier by Prof. Willis, and that disclosure alone will not improve consumer outcomes. The FSCA was looking for a balance, and to move away from a rules-based system towards outcomes-based regulation to back up the rules, not to replace the rules.
- A principles- or outcomes-based approach entails high-level requirements, that are general rather than specific and often use qualitative indicators rather than descriptors, it does not however mean an absence of rules. Rules can, for example, be suitable to protect highly vulnerable consumers, where market dynamics create poor incentives for providers (like in the consumer credit insurance market) or to respond to sustained egregious behaviour and practices.
- An appropriate mix of principles and rules are required to achieve the correct outcomes. It supports a shift away from a tick box approach to regulatory compliance, away from focusing on processes, and toward evaluating the ultimate outcomes produced. The approach is therefore towards a more effective balance between principles-based and rules-based measures to achieve desired outcomes. This approach is supported by the FSCA being required to "take into account the need for a primarily pre-emptive, outcomes focused and risk-based approach and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objective" (Financial Sector Regulation Act, which governs financial sector regulators).

- The Conduct of Financial Institutions Bill is an example of outcomes-based regulation in South Africa. It is a single law for market conduct regulation of all financial institutions that provides for a consistent activity-based and proportionate approach to conduct regulation, ensuring proper customer outcomes. It will apply to conduct in retail and wholesale sectors. This will require firms to demonstrate their approach to culture, how they are testing and how effective it is. Transformation is also a relevant factor given South Africa's history and there is a strong overlap with financial inclusion.
- While a 'big bang' approach to outcomes-based law may be difficult and takes time, a shift towards outcome-based regulation is supported if the legal framework is flexible. South Africa is using subordinate legislation to make these changes, which is useful to regulate new or evolving activities.
- Outcomes-based principles can be a stepping stone, which are easier to develop and implement relative to an extensive rules framework. The FSCA is at different stages of implementing an outcomes approach across the regulated sectors. For example, the insurance policyholder protection rules are advanced but have a heavy reliance on rules, while the conduct standard for banks is a first step.

Regulatory approach

- The law has changed, and the regulatory strategy also needs to change, which is challenging. The FSCA is adopting a set of guiding principles, including (among others) being pre-emptive, proactive, risk-based, proportional, intensive, intrusive, transparent and outcomes-focused. Outcomes-focused regulation entails developing conduct standards that combine principles and rules in a way best designed to achieve desired outcomes, not relying only on rules and 'box ticking'. The FSCA is moving from an 'industry silo' structure to an activity-based structure and building capacity for new functions. A new Financial Sector Regulation Act toolkit is being used to strengthen regulatory, supervisory and enforcement processes including customer redress.
- A wider ecosystem of data sources for analytics is being used: industry reporting (conduct of business returns), complaints to regulated entities, regulator and ombudsman, social media and payment transactions.
- There are various examples of this regulatory approach being put into practice, for example, in the insurance sector where benchmarking and guidance still needs to be given to industry as they shift to an outcomes approach. FSCA is working with the Consultative Group to Assist the Poor ("CGAP"), to pilot a customer outcomes indicator framework in South Africa, where a combination of quantitative and qualitative methods is required to investigate the consumer outcomes.
- In relation to enforcement, to date, it has been straightforward and not subject to challenge (i.e. it has been clear that poor outcomes were caused by a contravention of the law). However, there is potential for enforcement actions for a breach of principles-based requirements to be challenged, particularly where the quantum of the penalty to be imposed is significant. For example, there may be disagreement on whether the principle was in fact breached, the insurer may view the excess charged as fair, while the regulator may have a different view.

Singapore

Mr Sze Gin Low, Head of Market Conduct Policy Division of the Monetary Authority of Singapore ("MAS"), gave a presentation on the Singapore perspective on performance-based regulation and financial consumer protection. The key points were:

- Singapore's approach towards developing effective regulation focuses on achieving their mission and objectives (e.g. fair and transparent markets) using an outcomes-based approach where appropriate, and being aware that there is no single 'right' way to effective regulation. Rather, the type of regulation depends on the circumstances and a range of factors are considered, such as the risk profile, whether there is a level playing field, the alignment of industry incentives and whether there is a need to standardise practices or if different practices need to be accommodated.

- MAS promotes fair dealing by financial advisers in Singapore using an outcome-focused approach. In the early years of the regulatory framework for financial advisers, firms were generally compliant with the legal requirements, but there was still a steady flow of customer complaints. MAS looked at other jurisdictions, in particular the UK. In 2009, MAS issued outcome-based guidelines to complement the existing laws and regulations. To help firms achieve the outcomes, the guidelines provide a list of key issues, illustrations of good and poor practices, and set out self-assessment questions for the Board and Senior Management. MAS was also mindful that the success does not only rest on the firm, but that other stakeholders have a role. For example, industry groups could help by developing case studies, promoting best practices as well as identifying areas of improvements.

- Two years after issuing the guidelines, MAS conducted a mystery shopping exercise to assess the industry's implementation of the guidelines. The outcome of the mystery shopping exercise showed that there is still much room for improvement with serious deficiencies in several areas, for example, insufficient disclosures and unsuitable recommendations.

- MAS has since undertaken a range of measures to improve consumer outcomes. For example, they have introduced a balanced scorecard framework to incorporate non-sales KPIs in the remuneration of representatives so that incentive structures do not work against desired consumer outcomes (i.e. remuneration incentives for financial advisers to maximise sales). Another example is the steps taken to improve organisational culture – MAS is aware that they cannot dictate culture through regulation, that each firm must take ownership of the need to promote a culture of trust and ethical behaviours in their organisations. MAS have found a way to influence this in an outcomes-based way by setting out its expectations and collaborating with the industry. An example of industry's commitment to this outcome is demonstrated by the banking industry's introduction of annual surveys as a standardised measurement of public trust towards banks in Singapore. The annual survey will measure and benchmark whether efforts to promote fair dealing and maintain trust are working, as well as identify areas for improvement.

United Kingdom

Alexander Smith of the United Kingdom ("UK") Financial Conduct Authority ("FCA"), is responsible for the FCA's cross-cutting policy initiatives including the FCA's approach to

outcomes-based regulation and sustainable finance among others. Mr Smith spoke about the UK's journey towards outcomes-based regulation. The key points were:

- The FCA found that previously, firms simply complying with FCA rules did not necessarily mean that financial products and services delivered good outcomes for financial consumers, particularly vulnerable consumers.
- The FCA's Mission frames how they approach regulation, looking from a perspective of harm, both to consumers and to the market. In the UK, outcomes-based regulation means considering the issues and challenges from an end-user perspective. The FCA wants firms to focus on this, which in practice means greater judgement from firms and the FCA, which is a key challenge.
- In 2018, the FCA published their Approach to Consumers, which sets out sets out their vision for well-functioning markets for consumers and the conditions the FCA wants to see when competition is working well. It explains how the FCA uses their powers and tools to protect consumers and the FCA commits to review and adapt them to ensure they achieve the greatest impact for consumers.
- Another example is the FCA's response to the COVID-19 pandemic in relation to support for credit and mortgage customers, where many FCA interventions focused on the outcomes. These interventions were only temporary, but focused on the outcomes that the FCA wants to see and to ultimately deliver better outcomes for the individual needs of the consumer.
- A final example is the FCA guidance issued in February 2021, which aims to drive improvements in the way firms treat vulnerable consumers so that they are consistently able to achieve outcomes that are as good as everybody else. Recent FCA research shows that 27.7 million adults in the UK (53%) now have characteristics of vulnerability such as poor health, experiencing negative life events, low financial resilience or low capability.
- The FCA has 11 principles for firms in UK, one of which is that a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading. This supports consumers making informed decisions and balances the responsibility of the firm and the consumer.

Question & answer session

Ms Messy thanked the Panellists for their insightful presentations and moderated a Q&A session with the Panellists. The following questions were raised:

Q: How does an outcomes-based or performance-based approach align with a greater focus on firm culture among regulators and supervisors? On the other hand, does adopting this approach require any changes in the culture of regulators and supervisors?

Mr Smith noted:

- At the FCA in the UK, the governance and culture of firms has been a significant focus to drive real and sustainable changes. Each firm has a different culture that should not be prescribed by a regulator, but the behaviours of the firm affect the culture of the firm and drive the outcomes for consumers.

- The FCA themselves are mirroring this and going through ambitious transformation journey of its people and use of technology, to help them regulate the 60,000 firms in their jurisdiction. The FCA is aiming for an inclusive, diverse and inquisitive culture, one that focuses on outcomes, not just the process.

Mr Low noted:

- Outcomes-based regulation means there is need for a mindset change within the regulator. Moving to outcomes-based is not easier for the regulator, rather it is a different type of regulation, involving more engagement, assessment, monitoring and new skills.

Ms Gibson agreed with the other responses and noted:

- The difficulty with outcomes-based regulation is that there are a large number of regulated entities and sometimes more qualitative assessment is required. A quantitative risk-based approach with a digital angle is required, to help with the volume of information and to allow for more qualitative work.

Prof. Willis noted:

- In relation to Ms Gibson's presentation, the indicator framework and its development is promising as a risk-based approach to spot problems with the various indicators. Another possibility is to have firms set their own caps and monitor and report on them publicly, which can help with culture issues. The Australian Securities and Investments Commission work in relation to design and distribution obligations is along these lines.
- In relation to Mr Low's presentation, mystery shopping is certainly critical and the full picture will not be gleaned from consumer complaints alone. With regard to firm culture, it is important to find places where employee incentive structures are not aligned with consumer interests and change these structures to lead to the right outcomes for consumers.
- In relation to Mr Smith's presentation, regulators keeping pace with the technology advancements of regulated firms is essential. Technological tools are so powerful now, that they are expected to reduce the cost of an outcomes-based approach for both regulators and firms.

Q: How do you measure success of an outcomes- or performance-based approach? What tools are used and what are the challenges?

Ms Gibson noted:

- There are a wide range of tools and the right data is needed. It is important to understand the target market, and there are usually a range of quantitative indicators that are not necessarily an output by themselves, but can be read together and cross referenced against the outcomes to build a picture. For example, the data about the response to complaints data and switching/churn rates can give an indication on culture and may be an input to risk dashboards and indicators of risk.

Mr Smith noted:

- The FCA uses the full range of tools available (e.g. mystery shopping, consumer research, web scraping, direct supervision and engagement) and any policy intervention involves the FCA setting outcomes. When setting the outcomes, the

FCA specifies in its business plan and consultation documents the metrics that the regulator will use to measure the outcome. Depending on the outcome sought, a combination of indicators is usually used.

Mr Low noted:

- Measurement of the outcomes and success is required, and how it is measured depends on the subject matter. For example, consumer outcomes can be tested through, mystery shopping, a survey, customer complaints and the culture of firm can also give an indication about whether customers are being treated fairly. In relation to culture, conducting interviews with staff is one way of gaining valuable insights.

Q: Given consumers are very diverse and not a homogeneous group, with very different circumstances, needs and objectives, how do you go about setting outcomes or performance standards that can apply across varied contexts, especially consumers who may be vulnerable?

Mr Smith noted:

- The FCA guidance about vulnerable consumers starts with the meaning of 'vulnerable'. A broader definition is used, such that a vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care. The FCA's research shows that a third of people who show characteristics of vulnerability do not recognise it themselves.
- This is explained in the guidance in a way that firms can understand and monitoring and assessing occurs, so that improvements can be made when a firm is not acting with appropriate level of care to vulnerable consumers. This is aimed at the culture and mindset of firms to make sure they are serving customers well.

Mr Low noted:

- Coming up with a regulatory definition of a vulnerable investor is difficult as there are many aspects of vulnerability, so it is considered a suitable area to take an outcomes-based approach. The approach taken in Singapore is currently more prescriptive and identifies the characteristics of a vulnerable group. MAS working with industry to review this area.

Mr Gibson noted:

- The FSCA system is system is built on suitability and targets the fair treatment of customers. There is a spectrum of vulnerability, which may be dynamic and change over time. Financial institutions segment the market differently, so grouping vulnerable consumers may not make sense to the consumer. The FSCA rely on the proportional application of outcomes-based principles by firms, where the customer needs to understand the risks of the product, irrespective of whether the customer is vulnerable or not. The firm needs to be aware of the characteristics of their segments of customers, and ensure they are taking proportional steps to mitigate the risks to those customers in marketing and distributing their financial products and services.

Q: What are your thoughts about firms setting their own outcomes and measuring firms against those outcomes?

Mr Smith noted:

- In the UK, firms already do set their own outcomes, with the FCA's role as a regulator to engage with firms to understand the impact this could have on consumers.

Mr Low noted:

- In Singapore, firms have traditionally not set their own outcomes, however industry is increasingly coming together to set their own benchmarks. Where the regulator sets out its desired outcomes, the firm has to demonstrate that what they are doing is able to achieve the desired outcomes.

Mr Gibson noted:

- This would depend on the outcomes that the firm is setting – their own, as opposed to customer outcomes. Firms would probably need to be complying with the current expectations (e.g. conduct legislation) to be equipped to then go further and set their own outcomes for consumers and demonstrate the outcome is being achieved.

Ms Messy concluded the Panel discussion by thanking the Panellists for sharing their experiences and insights and for a rich discussion. Ms Messy highlighted that the discussion provides important insight to the Review of the Principles. She mentioned that there were many more questions, but not enough time to cover them all in the session.

Closing Remarks

Mrs Maria Lúcia Leitão, Chair of FinCoNet, thanked all speakers and moderators, and attendees for such interesting discussions, which were very relevant for the work of FinCoNet. She noted that the discussions had shown that the topic of performance-based regulation was a challenging topic, and a very important issue from the perspective of financial consumer protection. Mrs Leitão mentioned that FinCoNet is pleased to participate in international seminars and made a special mention of the Summary Report on the Creditworthiness assessments: current issues and challenges Seminar, which is on the FinCoNet website.

Mrs Leitão also took the opportunity to invite all the attendees to participate in next year's FinCoNet International Seminar, which will take place back-to-back with the 2021 FinCoNet AGM, hopefully, in person in Lisbon, Portugal.

SPEAKER BIOGRAPHIES

Performance-based Regulation & Financial Consumer Protection

Lauren E. Willis is Professor of Law, Rains Fellow, and Associate Dean for Research at Loyola Law School (Los Angeles) and has held visiting appointments at Harvard, Cornell, and the University of Pennsylvania. She is a leading critic of the use of financial education, disclosures, and "nudges" in consumer policymaking. Professor Willis has developed a ground-breaking performance-based approach to law that unites the interests of firms with consumers and enables regulators to keep pace with rapid marketplace change. Most recently, she has identified how law must evolve to address a new threat to fair competition and consumer protection – business use of artificial intelligence to design and target online communications and interfaces. Before academia, Professor Willis practiced law at the U.S. Department of Justice and with the U.S. Federal Trade Commission. She co-founded the Consumer Law Scholars Conference and advises the American Law Institute's Consumer Contracts project.

Richard Monks is the Director of Strategy at the FCA. Richard has over 15 years' experience in Financial Regulation, including roles in Supervision, Policy, Enforcement and as Private Secretary to former FSA Chairman, Lord Turner. Richard is responsible for setting the FCA Strategy, allocating FCA resource and for delivering cross-cutting strategic policy, such as Climate Change and Intergenerational issues.

Flore-Anne Messy is Head of the Consumer Finance, Insurance, Private Pensions Division at the OECD. The division covers financial literacy, financial consumer protection and financial inclusion issues as well as insurance and private pensions.

Ms Messy joined the OECD in June 2000 to develop the activities of the Secretariat for the Insurance and Private Pensions Committee (IPPC). Starting in 2010 she has been steering the work of the OECD financial education unit (including the OECD/INFE and PISA financial literacy exercises) and subsequently the OECD financial consumer protection activities (including the G20/OECD Task Force on Financial Consumer Protection and FinCoNet). Prior to the OECD she worked at Deloitte Touche Tomatsu Audit Paris, in the banking and insurance fields. She graduated from the Institute of Political Studies of Paris and received her thesis in international economies from University Pantheon-Sorbonne of Paris in 1998.

Maria Lúcia Leitão, Head of Banking Conduct Supervision Department, Central Bank of Portugal (Banco de Portugal).

With a background in Economy and European Studies, Maria Lúcia Leitão is since its inception (in 2011) the Head of Banking Conduct Supervision Department at the Banco de Portugal following her appointment as Deputy Head of Banking Supervision Department in 2007.

Mrs. Maria Lúcia Leitão is also the Chair of the Steering Committee of the Portuguese National Strategy for Financial Education lead by the three financial supervisory authorities.

Mrs. Maria Lúcia Leitão actively participates in several international fora dedicated to financial consumer protection and financial education. At the international level, Lúcia Leitão is Chair of the International Financial Consumer Protection Organisation (FinCoNet) and she is a member of the Advisory Board of OECD/INFE (International Network on Financial Education). At the European level, she participates as a member in the Standing Committee on Consumer Protection and Financial Innovation of the EBA (European Banking Authority). She also participates in the G20/OECD Task Force on Financial Consumer Protection. She also participated in the Joint Committee of the European Supervisory Authorities (ESAs).

Miles Larbey is the Head of Financial Consumer Protection at the OECD. In this role, he is responsible for the OECD's work on international financial consumer protection policy and supporting the G20/OECD Task Force on Financial Consumer Protection and FinCoNet, a network of market conduct supervisors. Particular areas of focus include the protection of vulnerable consumers, the impact of digitalization, demographic changes, financial inclusion, consumer credit and insurance. In the context of responding to the COVID-19 pandemic, Miles has been leading efforts to understand different approaches and facilitate information sharing between jurisdictions.

Before his role at the OECD, Miles held positions as Senior Executive Leader for Financial Capability at the Australian Securities and Investments Commission, was the General Manager of the Investor Education Centre in Hong Kong and worked on consumer protection and law reform at the Financial Conduct Authority in the UK.

Katherine Gibson Katherine Gibson is an economist from Durban with extensive experience in public policy. She is currently part of the Transitional Management Committee of South Africa's market conduct regulator, the Financial Sector Conduct Authority, serving on EXCO until appointment of the permanent Commissioners.

With a background in trade and competition policy, she worked for the National Treasury in the area of financial sector policy for over 12 years. Katherine was responsible for developing the conduct "peak" of South Africa's twin peaks framework, and has been with the FSCA since its establishment in April 2018.

Katherine lives with a boisterous menagerie and runs in the forests to escape.

Sze Gin Low Director and Head, Market Conduct Policy Division, Markets Policy & Infrastructure Department, Monetary Authority of Singapore (MAS)

Mr Low heads the Market Conduct Policy Division of the Monetary Authority of Singapore. The division is responsible for the formulation of policies relating to the provision of financial advice and capital markets services, market conduct, investor protection, and corporate governance of listed companies.

Prior to this appointment, Mr Low was heading the Corporate Finance and Investment Products Division, which has supervisory responsibility for capital markets activities such as the offer of investments, disclosure of interests in securities and the conduct of takeover and merger transactions.

Mr Low started his career as a lawyer in private practice and holds a Bachelor (Honours) of Law degree from the National University of Singapore.

Alexander Smith is head of strategic and cross-cutting policy at the FCA. He is responsible for the FCA's cross-cutting policy initiatives including the FCA's approach to outcomes-based regulation, sustainable finance, operational resilience, senior managers and certification regime and prudential policy. He is also responsible for the FCA's work to feed into a wider review of the financial services regulatory framework in the UK. Previously Alexander was responsible the FCA's policy approach to consumer protection and has previously led a range of projects including in relation to retail investment distribution, pension freedoms and firm culture.