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## Consumers of Financial Services and Multi-Level Regulation in the European Union

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# Consumers of Financial Services and Multi-Level Regulation in the European Union

Caroline Bradley

## **Abstract**

This Article focuses on the changing role of consumers of financial services in the development of financial services policy in the European Union ("EU"), illustrating tensions between two models of supranational rule-making: the technical and the political. As the European mode of governance has developed by claiming legitimacy largely through functional participation, it is important to focus on the workings of functional participation, and whether it delivers the claimed legitimacy. The first section of the Article describes in outline four different phases of financial services related policy-making in Europe: the period before the Single European Act, the period leading up to the 1993 deadline for development of the single market, and the more recent periods between 1993 and the Financial Services Action Plan ("FSAP") and the Lamfalussy Report and the period since 2001. The second section then describes some of the changing features of the rule-making process throughout the same period.

# CONSUMERS OF FINANCIAL SERVICES AND MULTI-LEVEL REGULATION IN THE EUROPEAN UNION

*Caroline Bradley\**

## INTRODUCTION

The European project of harmonization of the regulation of financial services is an example of multi-level governance in action.<sup>1</sup> This Article focuses on the changing role of consumers<sup>2</sup> of financial services in the development of financial services policy in the European Union (“EU”), illustrating tensions between two models of supranational rule-making: the technical and the political. As the European mode of governance<sup>3</sup> has developed by claiming legitimacy largely through functional participation,<sup>4</sup> it is important to focus on the workings of functional participation, and whether it delivers the claimed legitimacy.

The EU’s<sup>5</sup> internal market program involves the breaking down of barriers between national markets and the construction of a harmonized system of rules to regulate the regional market. From the start, the fundamental treaty freedoms, free movement of goods, persons, services and capital, together with competition law, were intended to further the interests of consumers.<sup>6</sup>

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1. See Liesbet Hooghe & Gary Marks, *Unraveling the Central State, But How? Types of Multi-Level Governance*, 97 AM. POL. SCI. REV. 233, 234 (2003).

2. The term “consumers” is used in this Article to mean users and potential users of financial services. It also includes the idea of consumer interest groups, which are an element of “civil society” within the European Union (“EU”), and the most significant element of civil society for the purposes of financial regulation.

3. See, e.g., Commission of the European Communities, *European Governance: A White Paper*, COM (2001) 428 Final (July 2001) (discussing European Union governance).

4. See STIJN SMISMANS, *LAW, LEGITIMACY, AND EUROPEAN GOVERNANCE* 28 (2004) (arguing that the White Paper on Governance placed functional participation “at the core of the legitimacy debate”).

5. In this Article, I commonly use the term “EU” to refer to the organization now known as the European Union or EU, although this term only strictly applies since the coming into force of the Maastricht Treaty in 1993.

6. See, e.g., STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* 4 (2005).

[T]he assumption of the original Treaty pattern is that the consumer will benefit from the process of integration through the enjoyment of a more efficient

Even before the introduction of a specific treaty competence of consumer protection, the European Community based the promulgation of rules to protect consumers on the imperative of market integration.<sup>7</sup> Financial services regulation is in part a subset of consumer protection regulation.<sup>8</sup> As the EU's rules regulating financial services have developed over time, it has become clear that some of the rules have a direct impact on consumers' rights, whereas other rules have a more indirect impact on consumers.

It is also clear that EU level rules on financial services increasingly pre-empt the powers of the Member States to regulate to protect consumers of financial services.<sup>9</sup> There are two reasons for this pre-emption. The first is that the volume and scope of EU level regulation of financial services has increased dramatically in recent years, and the second is that some EU measures in this field are now maximum-standards measures rather than minimum standards measures.<sup>10</sup> As the EU institutions adopt maximum harmonization measures, voters lose opportunities to influence the development of policy at the domestic level. For a long time, commentators on the European project have identified and critiqued a democratic deficit.<sup>11</sup> However, as supranational rules take away policy-making power from the Member

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market, which will yield more competition allowing wider choice, lower prices and higher-quality products and services. The substantive provisions of the Treaty . . . are designed indirectly to improve the lot of the consumer. In this sense, they are themselves instruments of consumer policy—but of an implicit, “hidden” type.

*Id.*

7. *See id.*

8. *See, e.g.*, Commission of the European Communities, White Paper: Financial Services Policy 2005-2010, COM (2005) 629 Final (Dec. 2005) [hereinafter Financial Services Policy 2005-2010] (“The Commission will deploy the most open, transparent, evidence-based policymaking based on a dual commitment to open consultation and impact assessments, so to ensure sound rules are drawn up, adding value to the EU’s financial services sector and consumers.”).

9. *Cf.* FIN. SERVS. AUTH. (“FSA”), THE LISTING REVIEW AND IMPLEMENTATION OF THE PROSPECTUS DIRECTIVE, CONSULTATIVE PAPER 04/16, 12, ¶ 2.6 (Oct. 2004), [hereinafter FSA CONSULTATIVE PAPER], available at [http://www.fsa.gov.uk/pubs/cp/cp04\\_16.pdf](http://www.fsa.gov.uk/pubs/cp/cp04_16.pdf) (noting that FSA was consulting in relation to areas where FSA had discretion in implementation of directive).

10. For an example of a maximum standards measure, see Council Directive No. 2003/71/EC, O.J. L 345/64 (2003).

11. *See* Shirley Williams, *Sovereignty and Accountability in the European Community*, in THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE 155, 162 (Robert O. Keohane & Stanley Hoffmann eds., 1991).

States, the democratic deficit becomes ever more significant for European citizens. The increasing significance of supranational standard-setting and multi-level governance more generally has led to discussions of the need for a global administrative law.<sup>12</sup> The literature on global administrative law addresses the general issue of an accountability deficit in supranational standard-setting.<sup>13</sup> As a result of these developments within the EU and beyond, it has become more important (at least as a political matter) to ensure that voters have opportunities to participate in the development of policy at the supranational level.<sup>14</sup>

The recent impetus towards a global administrative law reflects the idea that supranational rule-making, whether within regional groupings such as the EU or international groupings, tends to resemble domestic administrative rule-making, a technocratic process where the power to make detailed rules is delegated to bodies with expertise in particular areas.<sup>15</sup> However, unlike other supranational financial standard setting bodies such as the Basle Committee on Banking Supervision,<sup>16</sup> and the International Organization of Securities Commissions (“IOSCO”),<sup>17</sup> the EU and its institutions are extensions of do-

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12. See, e.g., B. Kingsbury, N. Krisch, & R. B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

13. See, e.g., *id.* at 16 (noting “an accountability deficit in the growing exercise of transnational regulatory power”).

14. See, e.g., Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communicating Europe in Partnership, COM (2007) 569 Final, at 9 (Oct. 2007).

Many political decisions that have a significant impact on Europeans’ day-to-day lives are taken at European level. Policies which are seen to match the expectations of citizens—whether on the internal market, climate change, sustainable mobility, trade, energy policy, or migration—and which are based on widespread consultation exercises are the best way of demonstrating the relevance of the EU to its citizens.

*Id.*

15. Cf. Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273, 277 (1997) (discussing “the sophisticated model of ‘regulation through committees’ which, since its very inception, was understood to be the European alternative to centralised regulation through agencies on the one hand, and regulatory competition or mutual recognition on the other”).

16. See J. BRAITHWAITE & P. DRAHOS, *GLOBAL BUSINESS REGULATION* 104 (2000) (describing the establishment of what is now the Basle Committee on Banking Supervision in response to the failures of the Herstatt Bank and Franklin National Bank in 1974).

17. See Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 878 (2006).

mestic democratic politics. In contrast to the formally non-binding nature of the principles produced by the technocratic processes of the Basle Committee and IOSCO, EU directives are adopted by means of political processes which include the participation of Members of the European Parliament ("MEPs") elected by citizens, and, on adoption, they are binding on the Member States. In addition, a larger proportion of the rules promulgated by the EU institutions than of these other supranational bodies affects consumer interests directly.<sup>18</sup>

The acceptance by the EU institutions of the need to increase the transparency and accountability of their rule-making processes, and to ensure that consumers can participate effectively in those processes is an important first step. The Commission has developed a number of initiatives to try to meet these needs. Whether or not they will succeed is, as yet, uncertain.

The first section of the Article describes in outline four different phases of financial services related policy-making in Europe: the period before the Single European Act, the period leading up to the 1993 deadline for development of the single market, and the more recent periods between 1993 and the Financial Services Action Plan ("FSAP")<sup>19</sup> and the Lamfalussy Report<sup>20</sup> and the period since 2001. The second section then describes some of the changing features of the rule-making process throughout the same period.

### I. PHASES OF FINANCIAL SERVICES POLICY

Between the establishment of the European Economic Community ("EEC") and the early twenty-first century, the rate of development and the volume of Europe-wide financial services measures has increased dramatically. During the years of eurosclerosis,<sup>21</sup> the EEC did succeed in adopting some measures

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18. The work of the Basle Committee focuses on developing standards for the cross-border regulation of international banks as institutions, and on issues of safety and soundness rather than on the retail activities of international banks.

19. Commission of the European Communities, Communication from the Commission: Implementing the Framework for Financial Markets: Action Plan, COM (1999) 232 Final (May 1999).

20. FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS (2001), available at [http://ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf) [hereinafter LAMFALUSSY REPORT].

21. See Williams, *supra* note 11, at 157 ("Charges of Eurosclerosis damaged the

which were designed to integrate the European financial markets. For example, in the early 1970s the Member States began to co-ordinate their monetary policies.<sup>22</sup> The first banking directive, which was adopted in 1977,<sup>23</sup> began to establish the conditions under which banks would be able to carry on cross border business in Europe.<sup>24</sup> In this same period the Commission was also addressing issues relating to securities markets<sup>25</sup> and insurance.<sup>26</sup>

However, although a number of measures were adopted during the 1970s to address the need to integrate Europe's markets, little concrete progress was achieved in the early years of the EEC. By the mid-1980s, the European Parliament,<sup>27</sup> the European Council, and the Commission began to take steps to try to complete the European internal market.<sup>28</sup> The Single European Act provided for a new procedural basis for achieving this internal market.<sup>29</sup> The new internal market initiative substituted

Community's image as a market worth investing in and as the inspiration for a renewal of Western Europe.").

22. See, e.g., Roger J. Goebel, *European Economic and Monetary Union: Will the Emu Ever Fly?*, 4 COLUM. J. EUR. L. 249, 257 (1998).

23. Council Directive No. 77/780, O.J. L 322/30 (1977) (on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions).

24. See Council Directive No. 73/183, O.J. L 194/1 (1973) (on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions).

25. See Council Directive No. 80/390, O.J. L 100/1 (1980) (coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing); Council Directive No. 79/279, O.J. L 66/21 (1979) (coordinating the conditions for the admission of securities to official stock exchange listing); Commission Recommendation No. 77/534, O.J. L 212/37 (1977) (concerning a European code of conduct relating to transactions in transferable securities).

26. See Council Directive No. 73/239, O.J. L 228/3 (1973) (on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance); Council Directive No. 73/240, O.J. SPEC. ED. 228/20 (1973) (abolishing restrictions on freedom of establishment in the business of direct insurance other than life assurance).

27. See, e.g., Williams, *supra* note 11, at 157.

28. See, e.g., *id.* at 162; see also Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final (June 1985).

29. See Single European Act, O.J. L 169/1, at 7 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11); Andrew Moravcsik, *Negotiating the Single European Act*, in *THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE*, *supra* note 11, at 41; see also Juliet Lodge, *The Single European Act: Towards a New Euro-Dyna-*

the ideas of mutual recognition and minimum standards for traditional detailed harmonization measures.<sup>30</sup> By 1989, George Zavvos described the Community's policy in banking law as having "three fundamental features: the harmonization of banking regulation, the mutual recognition of financial standards, and the home country control principle."<sup>31</sup>

Although the Second Banking Directive was adopted in 1989, before the original 1993 deadline for achievement of the single internal market, the Investment Services Directive, which included similar provisions for securities firms, was not adopted until 1993.<sup>32</sup> A capital adequacy directive, which applied to banks and securities firms was also adopted in 1993.<sup>33</sup> It took more time for the Member States to reach agreement on the content of these measures than the Commission had hoped.

Mutual recognition on the basis of minimum harmonized standards was designed to achieve a situation where a financial firm established in one Member State (its home State) would be allowed to supply services in other Member States and even establish offices in other Member States on the basis of its home State authorization to carry on business subject to home State rules. However, the usefulness of the mutual recognition principle was limited in a number of ways. Member States did not always implement the internal market directives properly.<sup>34</sup> And,

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*mism?*, 24 J. COMMON MKT. STUD. 203 (1986). Commentators noted that businesses seemed to support the new initiative, and that consumers and labor groups were also generally positive. See, e.g., Jacques Pelkmans & Peter Robson, *The Aspirations of the White Paper*, 25 J. COMMON MKT. STUD. 181, 184 (1987).

30. See, e.g., Moravcsik, *supra* note 29, at 41.

31. George Zavvos, *Doing Business in the European Internal Market: Banking Integration in the European Community*, 9 NW. J. INT'L L. & BUS. 572, 573 (1989); see also Council Directive No. 89/646, O.J. L 386/1 (1989) (on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC).

32. See Council Directive No. 93/22, O.J. L 141/27 (1993) (on investment services in the securities field). Article 31 of the directive required the Member States to adopt implementing measures by July 1, 1995, and stated that those measures must come into force by December 31, 1995. See *id.*; see also Mads Andenas, *Insurance and Banking*, 43 INT'L & COMP. L.Q. 728, 728 (1994) (noting the adoption of the Investment Services Directive after the original single market deadline).

33. Council Directive No. 93/6, O.J. L 141/1 (1993) (on the capital adequacy of investments firms and credit institutions). Article 12 of this directive provided that it was to be implemented by the Member States on the same schedule as the Investment Services Directive. See *id.*

34. For example, by 1997 the Commission stated: "Only 65% of Single Market directives are fully operational in all 15 Member States. The Single Market clearly can-



more fundamentally, the directives failed to go far enough to achieve market integration.<sup>35</sup> Generally the second generation of financial services directives retained provisions allowing host Member States to apply some of their own rules to financial firms from other Member States.<sup>36</sup> The Investment Services Directive did nothing to harmonize conduct of business rules for securities firms.<sup>37</sup> At this point in the development of the internal market, consumer protection was often seen as a matter for the Member States.<sup>38</sup>

Between the early 1990s, when it was clear that a number of Member States remained reluctant to open their national financial markets to competition from firms established in other Member States,<sup>39</sup> and the early 21st century, much has changed, in the markets,<sup>40</sup> and in the European regulatory sphere. Over

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not function optimally in these conditions." Commission of the European Council, Action Plan for the Single Market, CSE (97) 1 Final, at 3 (June 1997) [hereinafter Action Plan]. Although the situation has improved, non-implementation of directives is still an issue. See Commission Recommendation No. 2005/309, O.J. L 98/47 (2005) (on the transposition into national law of Directives affecting the internal market).

35. See, e.g., Commission of the European Communities, European Financial Integration Report 2007: Commission Staff Working Document, SEC (2007) 1696, at 8, § 2(1) (Dec. 2007) [hereinafter EFIR].

There is no widely accepted definition of financial integration. Generally a perfectly integrated market is regarded as a market where prices for similar products and services converge across geographical borders and where supply and demand can react immediately to cross-border price differences. An integrated market should enable all market participants (consumers, financial institutions, etc.) to buy and sell financial instruments and/or services, which share the same characteristics, under the same conditions, regardless of the location of origin of the participant. If the latter is the case, this should result in more opportunities for risk diversification, better allocation of capital, and higher economic growth.

*Id.*

36. See, e.g., Caroline Bradley, 1992: *The Case of Financial Services*, 12 *Nw. J. INT'L L. & BUS.* 124, 142-50 (1991); Niamh Moloney, *New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation*, 40 *COMMON MKT. L. REV.* 809, 810 (2003).

37. See, e.g., Bradley, *supra* note 36, at 151-52.

38. Although consumer protection measures had previously been justified by the need to achieve a common market, it was not until the Maastricht Treaty, which came into force in 1993, that specific treaty provisions empowered the European Community to act in the field of consumer protection. See WEATHERILL, *supra* note 6, at 2, 15-19. Consumer protection is one of the areas of the general good which the Member States are entitled to act to protect, absent harmonization. See, e.g., *Commission v. Federal Republic of Germany*, Case 205/84, [1986] *E.C.R.* 3755.

39. See, e.g., Daniel Mügge, *Reordering the Marketplace: Competition Politics in European Finance*, 44 *J. COMMON MKT. STUD.* 991, 992 (2006).

40. See *id.* at 1008-11.

this period, and building on decisions of the European Court of Justice, the Commission identified what it saw as the legal limits on the powers of the Member States to apply their own “general good” rules to financial firms authorized in other Member States.<sup>41</sup> The Commission also attempted to build on prior directives and achieve greater levels of integration, overcoming the reluctance of the Member States to agree on harmonization measures.<sup>42</sup>

By the late 1990s the Commission acknowledged that the people of Europe were not obtaining all of the benefits they could expect from a single European market.<sup>43</sup> In 1998 the Commission wrote that Europe was “still a long way from achiev-

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41. *See, e.g.*, Commission Interpretative Communication, O.J. C 43/5 (Feb. 16, 2000) (to Member States on the Freedom to provide services and the general good in the insurance sector). For example, the Commission referred to the following cases in this document: *Luisi & Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377; *Säger v. Dennemeger & Co. Ltd.*, Case C-76/90, [1991] E.C.R. I-195; *Alpine Investments BU v. Minister van Financiën*, C-384/93, [1995] E.C.R. I-1141. *See* Commission Interpretive Communication, *supra*, at 7 (2000); *see also* Commission Interpretative Communication, Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive, SEC (97) 1193 Final, at 25-26 (June 1997). In moving forward the single market project, the Commission saw the role of the European Court of Justice (“ECJ”) as significant. *See* Commission of the European Communities, First Report from the Commission to the Council and the European Parliament on the implementation of the Commission’s White Paper on completing the internal market, COM (86) 300 Final, at 16 (May 1986).

On financial services and securities, the Council has adopted the two proposals on UCITS scheduled for 1985. Viewed overall therefore, the White Paper programme for liberalisation in this sector is well-advanced. Two Council decisions are foreseen in 1986, namely on own funds and the directive to facilitate freedom to provide services in the field of non-life insurance. A ruling by the Court of Justice, expected this summer, is likely to lend a decisive impetus to progress in this field.

*Id.*

42. *See, e.g.*, Communication of the Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM (1999) 232, at 21-31 (May 1999) [hereinafter FSAP].

43. *See* Action Plan, *supra* note 34, at 1

The Single Market is not simply an economic structure. At its heart are 370 million people seeking better employment opportunities, improved living and working conditions, and a wider choice of quality products and services—including access for everyone to services of general interest—at lower prices. The Single Market is working in their interests. Much has already been achieved. Individuals already enjoy the right to move and work throughout the Union. The Single Market sets basic standards of health and safety, equal opportunities and labour law. However, more needs to be done to enforce these rights effectively.

*Id.*

ing the potential benefits of the Single Market in financial services."<sup>44</sup> In particular, the Commission noted that the market in consumer financial services was not fully integrated.<sup>45</sup> Consumers were important for the Commission not just because they would be beneficiaries of market integration, but because "[i]t is as consumers that citizens will above all judge the success of the Internal Market."<sup>46</sup>

The Commission published its Financial Services Action Plan ("FSAP") in 1999, identifying key areas for further harmonization,<sup>47</sup> including integration of retail markets, which was identified as a priority.<sup>48</sup> The FSAP also proposed "a more wide-ranging rethink of the way in which policy for financial markets is processed."<sup>49</sup> The Economic and Financial Affairs Council ("ECOFIN Council") appointed a Committee of Wise Men, led by Baron Lamfalussy, to rethink the EU's processes for developing financial policy, and this committee proposed a new system which would distinguish framework measures and detailed implementing rules.<sup>50</sup> In principle, the detailed implementing rules could be amended more easily than the framework measures and this ease of amendment would ensure that the rules could adjust to changing circumstances.<sup>51</sup> The Committee also emphasized the need for cooperation between national regula-

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44. Commission of the European Communities, Financial Services: Building a Framework for Action, COM (98) 625 Final, (Oct. 1998), available at [http://ec.europa.eu/internal\\_market/finances/docs/actionplan/index/fs\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/actionplan/index/fs_en.pdf).

45. See *id.* ("There is therefore a need to find pragmatic ways of reconciling the aim of enhancing consumer confidence by promoting full financial market integration while ensuring high levels of consumer protection.").

46. See, e.g., Commission of the European Communities, Communication from the Commission to the European Parliament and the Council: The Strategy for Europe's Internal Market, COM (1999) 464, at 10 (Oct. 1999) [hereinafter Strategy for Europe's Internal Market].

47. See generally FSAP, *supra* note 42.

48. See *id.* at 9, 26-27.

49. *Id.* at 17.

50. See LAMFALUSSY REPORT, *supra* note 20, at 19-20.

51. See *id.* at 20.

The two layers should be efficient, in the sense of achieving the stated objectives with the lowest cost in terms of regulatory burden; they should aim at establishing a level playing field, by removing any opportunity to erect regulatory barriers to competition; they should help speedy implementation and be flexible, so that they can be quickly adapted to the rapid pace of technical changes and product innovation in the financial markets.

tors and for more effective enforcement of Community law.<sup>52</sup>

Although the EU has adopted a number of financial services directives since the Lamfalussy Report, the process is still not always rapid. For example, the Market for Financial Instruments Directive (“MiFID”),<sup>53</sup> which replaces the Investment Services Directive, was adopted in 2004, three and a half years after the Commission proposed the replacement.<sup>54</sup> The Directive came into force in November 2007.<sup>55</sup>

Increasingly, financial services directives constrain the ability of the Member States to impose stricter rules than those established in directives. These constraints exist both as a formal matter and as a practical necessity. Whereas the Second Banking Directive and the Investment Services Directive were minimum standards measures, establishing baseline regulatory standards, some more recent directives establish maximum regulatory standards.<sup>56</sup> However, even where the text of EU measures allows the Member States some discretion in implementation, market participants have argued that the Member States should not use that discretion to promulgate “gold-plated” rules which would interfere with market integration.<sup>57</sup> In response to such arguments, the United Kingdom Financial Services Authority has agreed to adopt “intelligent copy-out” as its general ap-

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52. *Id.* at 19.

53. Council Directive No. 2004/39, O.J. L 145/1 (2004) (on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC).

54. Commission of the European Communities, Communication from the Commission to the European Parliament and the Council: Upgrading the Investment Services Directive, COM (2000) 729 Final, at 3-4, (Nov. 2000). The proposed directive was not published until 2002. See Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets, and Amending Council Directives 85/611/EEC, Council Directive 93/6/EEC and European Parliament and Council Directive 2000/12/EC, COM (2002) 625 Final, at 7 (Nov. 2002).

55. Commission Press Release, IP/07/1625 (Oct. 29, 2007).

56. See, e.g., FSA CONSULTATIVE PAPER, *supra* note 9, at 12, ¶ 2.6 (describing the Prospectus directive as a maximum harmonization measure); see also Council Directive No. 2003/71, O.J. L 345/64, at 68 (2003) (describing the purpose of the Directive as harmonization).

57. The Commission has recognized this concern. See, e.g., Financial Services Policy 2005-2010, *supra* note 8, at 5 (“The Commission will work intensively with Member States to monitor progress, ensure accurate implementation and avoid regulatory additions, so-called ‘goldplating.’”).

proach to the implementation of EU directives.<sup>58</sup>

Fifty years after the initiation of the European project, substantial progress has been achieved in integrating European financial markets at the wholesale level.<sup>59</sup> It is, however, clear that consumers and retail markets are still resistant to integration.<sup>60</sup> Differences in regulation impede cross-border banking business at the retail level,<sup>61</sup> and have led the Commission to focus on the integration of retail financial services.<sup>62</sup> For example, in late 2007 the Commission published a White Paper on mortgage markets.<sup>63</sup> In November 2007 the Council and the Parliament adopted a new directive on payment services.<sup>64</sup> Retail financial services is one of the areas the Commission proposes to focus on

58. See, e.g., FSA, BETTER REGULATION ACTION PLAN 6 (2005), available at [http://www.fsa.gov.uk/pubs/other/better\\_regulation.pdf](http://www.fsa.gov.uk/pubs/other/better_regulation.pdf) ("Our basic approach is to 'copy out' the text in our Handbook, adding interpretive guidance where that will be helpful. This avoids placing unintended additional obligations on firms. We will not gold-plate EU requirements. We will only add additional requirements when these are justified in their own right.") [hereinafter BETTER REGULATION ACTION PLAN].

59. See, e.g., EUR. CENT. BANK, FINANCIAL INTEGRATION IN EUROPE 11 (2007), available at <http://www.ecb.int/pub/pdf/other/financialintegrationineurope200703en.pdf> [hereinafter EUROPEAN CENTRAL BANK].

The unsecured money market became fully integrated shortly after the introduction of the euro. The repo market is, in terms of pricing, also highly integrated, with the full integration of the LVPS instrumental in achieving this result. Government bond markets became largely integrated in the run-up to EMU. In similar fashion, the corporate bond market received a major boost with the introduction of the euro and has since achieved a high degree of integration.

*Id.*

60. *Id.* ("[E]uro area banking markets, and in particular the retail banking markets continue to be rather fragmented. The lack of integration in retail banking markets is mirrored by a fragmented retail payments infrastructure."). Although there is competition in national mortgage markets there is not much cross-border competition. See *id.* at 11; see also EFIR, *supra* note 35, at 42 ("The lack of integration of retail financial markets is reflected in significant price variations and relatively low volume of cross-border transactions. This is due to cultural and consumer preferences, which may imply that retail markets will predominantly remain local, but also to differences in regulatory frameworks.").

61. See EUROPEAN CENTRAL BANK, *supra* note 59, at 38.

62. See, e.g., Commission of the European Communities, Green Paper on Retail Financial Services in the Single Market, COM (2007) 226 Final (Apr. 2007). The Commission has also sought to acquire data on the retail financial services market. See, e.g., Commission of the European Communities, Communication from the Commission: Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking (Final Report), COM (2007) 33 Final (Jan. 2007).

63. Commission of the European Communities, White Paper on the Integration of EU Mortgage Markets, COM (2007) 807 Final (Dec. 2007).

64. Council Directive No. 2007/64/EC, O.J. L 319/1 (2007) (on payment services

as part of its consumer scoreboard initiative.<sup>65</sup> Despite such developments, some national regulators and market participants argue that national discretion is more important in the context of retail markets than in the wholesale markets.<sup>66</sup> In a recent response<sup>67</sup> to the Commission's call for evidence on the regulation of "substitute" investment products,<sup>68</sup> the Joint Associations Committee<sup>69</sup> stated:

Not only are national regulators best placed to understand

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in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC).

65. See Commission of the European Communities, Communication from the Commission: Monitoring Consumer Outcomes in the Single Market: The Consumer Markets Scoreboard, COM (2008) 31 Final, at 5 (Jan. 2008) [hereinafter Consumer Markets Scoreboard] ("The ability of consumers to understand the choices available in the market affects the successful functioning of the market, even if the operators are transparent and truthful. Assessing complex products such as life insurance or high technology equipment may require professional advice.").

66. See, e.g., FSA, STRENGTHENING THE EU REGULATORY AND SUPERVISORY FRAMEWORK: A PRACTICAL APPROACH 5-6 (2007) available at [http://www.hm-treasury.gov.uk/media/4/0/fin\\_lamfaulssy071107.pdf](http://www.hm-treasury.gov.uk/media/4/0/fin_lamfaulssy071107.pdf)

Nevertheless, differences in national markets mean supervisors will often need to adopt different approaches and apply different tools in their daily work. For example, the appropriate regulatory approach for international financial centres dominated by wholesale markets is clearly different to the appropriate approach for more retail focused national markets in the EU.

Rather the UK authorities believe that consistent with a principles-based approach, supervisory convergence is primarily about delivering equivalent regulatory outcomes. Over time and through ongoing cooperation and sharing of best practice, it is likely and desirable that supervisory practices converge. However this needs to be part of an organic process, rather than one that is regulated into effect.

*Id.* (emphasis omitted).

67. See Letter from Joint Associations Committee to European Commission, (Jan. 18, 2007), available at [http://www.isda.org/whatsnew/pdf/080118-JAC-Call\\_response.pdf](http://www.isda.org/whatsnew/pdf/080118-JAC-Call_response.pdf) [hereinafter Joint Associations Committee].

68. See generally COMMISSION OF THE EUROPEAN COMMUNITIES, CALL FOR EVIDENCE: NEED FOR A COHERENT APPROACH TO PRODUCT TRANSPARENCY AND DISTRIBUTION REQUIREMENTS FOR "SUBSTITUTE" RETAIL INVESTMENT PRODUCTS? DG MARKT-G4 (2007), available at [http://ec.europa.eu/internal\\_market/finances/docs/cross-sector/call\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/cross-sector/call_en.pdf). The *Call for Evidence* invites views about the sectoral fragmentation of financial regulation in a context of blurred distinctions between investment products. See, e.g., *id.* at 3 ("This call for evidence focuses on whether this fragmented regulatory landscape leads to unacceptably high variations in the level of product disclosure and investor protection, depending on the regulatory status of the investment product.").

69. The Joint Associations Committee describes itself as being "sponsored by: European Securitisation Forum (ESF), International Capital Market Association (ICMA), International Swaps and Derivatives Association (ISDA), London Investment Banking Association (LIBA) and Securities Industry and Financial Markets Association (SIFMA)." Joint Associations Committee, *supra* note 67, at 1 n.1.

and respond to developments in their local markets, they are also best placed to judge the type of regulatory intervention most likely to be effective in addressing a particular local market issue. Thus, effective regulation in this area must leave scope for national regulators to act in their local markets. Conversely, the imposition of Europe-wide regulation at a detailed level, if not precisely calibrated, could result in significant customer detriment in some national markets. Put simply, we doubt whether it would be possible to create a Europe-wide regime in this area capable of addressing the vagaries of all of the EU national retail financial markets.<sup>70</sup>

In its resolution on financial services policy adopted in July 2007, the European Parliament expressed similar reservations about retail market harmonization.<sup>71</sup>

This brief and partial description illustrates the changing strategies for harmonizing European financial services regulation, from detailed harmonization to minimum standards and mutual recognition to indications of a more complex mix of different regulatory strategies for different contexts (including regulation through committees).<sup>72</sup> For example, there may be different levels of harmonization in different areas; some measures set maximum standards and others do not. For the future, there are visible tensions in financial services policy in the EU. The Commission continues to track the state of financial integration in the EU.<sup>73</sup> However, it is clear that integration is not an unalloyed good, as it can have a negative impact on market stability.<sup>74</sup> The fallout of the U.S. sub-prime lending crisis, which has had an impact on European markets as well as in the United States, illustrates that it is not a simple matter to separate wholesale and retail financial markets.<sup>75</sup> There is some resistance to the idea of

70. *Id.* at 3.

71. See European Parliament Resolution on financial services policy (2005-2010)—White Paper, O.J. L 2006/2270 (2007) (“warns, however, against simply overhauling the national consumer protection traditions and legal systems by one-size-fits-all harmonisation.”).

72. The committee system for financial services is briefly described below.

73. See generally EFIR, *supra* note 35.

74. See, e.g., *id.* at 37 (“the market links do not only contribute to risk diversification but may also serve as channels for cross-border contagion, transmitting risks across the financial system.”).

75. When sub-prime borrowers whose loans had been packaged through securitizations defaulted on their loans, investors generally lost confidence in structured credit investments and the credit markets suffered. See, e.g., Ingo Fender & Peter

general harmonization of retail regulation. Some European financial services regulators have adopted a commitment to Better Regulation,<sup>76</sup> which would tend to limit the volume of regulation for the future. Although the Commission has also stated its support for Better Regulation,<sup>77</sup> some doubt whether this support will have a noticeable impact on the Commission's behavior in the near future.<sup>78</sup> In the context of consumer policy generally, but including financial services, the Commission suggests that it interprets the Better Regulation agenda as requiring serious protection of consumer interests, by focusing on outcomes.<sup>79</sup>

At least to the extent that EU level measures are proposed to harmonize retail regulation, European consumers, and the organizations which represent their interests, have an interest in the content of those measures. The following section of this Article examines the mechanisms for consumers to participate in the processes which produce the harmonized rules which will affect them.

## II. CITIZEN PARTICIPATION IN FINANCIAL SERVICES POLICY-MAKING IN THE EU

### The original vision of the European Economic Community

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Hördahl, *Overview: Credit Retrenchment Triggers Liquidity Squeeze*, BIS Q. REV., at 1, 1 (Sept. 2007).

76. See BETTER REGULATION ACTION PLAN, *supra* note 58; see also AUTORITÉ DES MARCHÉS FINANCIERS, PROMOTING BETTER REGULATION (2006), available at [http://www.amf-france.org/documents/general/7235\\_1.pdf](http://www.amf-france.org/documents/general/7235_1.pdf).

77. See, e.g., Financial Services Policy 2005-2010, *supra* note 8, at 4.

78. See, e.g., HOUSE OF COMMONS TREASURY COMMITTEE, EUROPEAN FINANCIAL SERVICES REGULATION: SEVENTH REPORT OF SESSION, 2005-06, H.C. 778, at 10.

A change in the working culture at the Commission towards more proportionate, risk-based, policy making will not happen immediately. We welcome Commissioner McCreevy's assurances that the Commission will prove that new regulation will have a clear benefit to the European economy. It is essential that European policymakers ask and receive answers to the simple questions that McCreevy is posing: Is there a case for action? Is it the EU that is best placed to act? Is a regulatory proposal the only possible solution? To ensure growth and competitiveness in the European financial services industry, the Commission must now deliver on its promise to ensure better regulation principles are followed in its policymaking.

*Id.*

79. See Consumer Markets Scoreboard, *supra* note 65, at 10 ("The shift in policymaking away from an instrument-led approach to an outcome-led approach with a focus on consumer outcomes is ambitious and calls for an important change in the work of policymakers . . . . The prize is both better, simpler regulation and markets which better deliver what citizens want.").



included representatives of civil society in the process of rule-making through the participation of the European Economic and Social Committee ("EESC") as a consultative body. The Economic and Social Committee includes representatives of consumers. The European Parliament, which was originally a purely consultative body, is now a co-legislator with the Council, and its members are directly elected by European citizens. Thus, as a formal matter, the interests of consumers are represented in the EU's rule-making processes as constituents of MEPs and through the EESC.

Although the original design for the European institutions did not provide for a system of delegated rule-making, over time an increasing number of issues came to be addressed through the comitology process.<sup>80</sup> The Lamfalussy distinction between framework directives and detailed implementing rules<sup>81</sup> led to the establishment of a number of committees with responsibilities for helping to develop the detailed rules to implement framework directives, and for advising on the development of policy.<sup>82</sup>

The delegation of rule-making powers with respect to financial services to the Commission, with the assistance and advice of specialized committees brings the more general debate about the comitology system into the area of financial services policy. Thus, the call for representation of a wider range of interests within the EU's administrative processes<sup>83</sup> also applies in the fi-

80. See Joerges & Neyer, *supra* note 15, at 275 (noting the development of the committee system in the context of the CAP and its expansion as a result of the Single European Act).

81. See generally LAMFALUSSY REPORT, *supra* note 20.

82. See, e.g., Commission Decision No. 2004/8/EC, O.J. L 3/33 (2004) (amending Decision 2001/528/EC establishing the European Securities Committee); Commission Decision No. 2004/10/EC, O.J. L 3/36 (2004) (establishing the European Banking Committee); Commission Decision 2004/7/EC, O.J. L 3/32 (2004); (amending Decision 2001/527/EC establishing the Committee of European Securities Regulators); Commission Decision No. 2004/6/EC, O.J. L 3/30 (2004) (establishing the Committee of European Insurance and Occupational Pensions Supervisors); Commission Decision No. 2004/5/EC, O.J. L 3/28 (2004) (establishing the Committee of European Banking Supervisors).

83. See, e.g., Michelle Everson, *Administering Europe?*, 36 J. COMMON MKT. STUD. 195, 196 (1998)

EU administrative law . . . must at last acknowledge that the legal oversight of administration is less a case of safeguarding the narrow execution of legislative mandates, and more one of ensuring the fair representation of a wide range of interests within ongoing political processes. Similarly, it must go much fur-

financial services sector.<sup>84</sup> The Parliament has a role here, and a 2005 directive recognizes this, stating that “[d]emocratic accountability and transparency must be inherent in the Lamfalussy process.”<sup>85</sup> The same directive sets out a number of principles the Commission should respect in exercising its implementing powers, including “the need for high levels of transparency and consultation with all market participants and with the European Parliament and the Council.”<sup>86</sup>

The Commission has often linked the development of the internal market with a need to communicate more effectively with citizens and to ensure its responsiveness to consumers’ interests.<sup>87</sup> However, as a practical matter, financial firms, and especially large financial firms, are in a better position than

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ther, developing normative mechanisms which are not only flexible enough to accommodate the emerging, pluralist and essentially “self-defining” EU polity, but which also ensure that the pluralist process of internal market management is not simply a matter of the dominance of the strongest interest.

*Id.*

84. The Lamfalussy Report itself acknowledged this issue:

The European Commission alone has the right of initiative under the Treaty. However the Committee recommends that in the future, before the Commission draws up a proposal in these areas, it should take the following steps: 1. Consult, beforehand, in an open, transparent and systematic way with market participants and end-users (issuers and consumers). Deadlines should be set and made clear. Where necessary, open hearings should be held. There should be a strengthened and open dialogue with market participants and end-users so as to advise the Commission on a continuous basis on Level 1 work. Use of the Internet should be used to encourage more participation. A summary of the consultation process undertaken should be made available when the final proposal is made.

LAMFALUSSY REPORT, *supra* note 20, at 25.

85. Council Directive No. 2005/1/EC, O.J. L 79/9, at recital no. 6 (2005) (amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organizational structure for financial services committees).

86. *Id.* at recital no. 19.

87. *See, e.g.*, Strategy for Europe’s Internal Market, *supra* note 46, at 4.

The Internal Market is not an end in itself. The benefits of improved economic performance must be distributed equitably between all Member States and among all sections of society. Tangible benefits for citizens and consumers—safe and high quality food, products and services; better choice and lower prices—must be seen to be amongst the benefits of Internal Market policies. Policy makers—at both European and national level—therefore need to become ever more responsive to the views of those they serve. To achieve this, the Dialogue with Citizens and Business promises new ways (Internet and e-mail) of improving the interactive nature of policy development.

*Id.*

consumers to find out about rule-making proposals and to communicate their views.<sup>88</sup> Financial firms act collectively in responding to rule-making proposals through their trade associations.<sup>89</sup>

The Commission has taken a number of steps to encourage consumers to participate in the rule-making process. For example, the Commission publishes consultation documents on proposed directives and invites comments from the public.<sup>90</sup> The Commission initiated consideration for a revision of the Investment Services Directive in 2000 with a Communication.<sup>91</sup> The Communication noted that the harmonization of conduct of business rules had implications for retail investors.<sup>92</sup> However, a

88. See, e.g., Mügge, *supra* note 39, at 1001 (“Members of clearly circumscribed policy communities sit at the table whereas other stakeholders do not.”); cf. Director-General Holmquist, European Commission, Speech at a Meeting of the Social Economy Intergroup Session (Sept. 12, 2007), available at [http://ec.europa.eu/internal\\_market/speeches/docs/2007/jh12092007.pdf](http://ec.europa.eu/internal_market/speeches/docs/2007/jh12092007.pdf) (“Although the Commission’s increasing practice of conducting consultations is appreciated, some—for instance trade unions and consumers—do not feel sufficiently involved in what we do.”). See generally Commission of the European Communities, Communication from the Commission: European Governance: Better Lawmaking, COM (2002) 275 Final, at 3 (June 2002) (“Are the smallest voices really and always heard?”).

89. I have focused on the role of financial trade associations as actors in multi-level governance of financial services in Caroline Bradley, *Financial Trade Associations and Multilevel Regulation*, in MULTILEVEL REGULATION AND THE EU (Ramses Wessel, Andreas Follesdal & Jan Wouters eds., forthcoming 2008). A version of this paper is available at <http://blenderlaw.umlaw.net/wp-content/uploads/2007/07/bradleymultilevel-003.pdf>. In this paper I argue that consumers and the organizations which represent their interests are more likely than financial firms to be excluded from effective participation in supranational standard-setting due to the combined effects of opaque processes, framing, and lack of resources.

90. On consultation in the EU, see Commission of the European Communities, Communication from the Commission: Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 Final (Dec. 2002).

91. See Commission of the European Communities, Communication from the Commission to the European Parliament and the Council: Upgrading the Investment Services Directive (93/22/EEC), COM (2000) 729 Final (Nov. 2000).

92. See *id.* at 10.

As regards *retail investors*, the transition to home country supervision of investment services will need to be carefully managed. It is currently the case that host country authorities may have a comparative advantage as a first-line of defence in detecting and initiating action against firms which transgress in their dealings with retail investors. Moreover, conduct of business rules in the different Member States cannot be assumed to offer comparable protection to retail investors. Consequently, retail investors may derive benefit and confidence from the possibility of seeking redress within their own jurisdiction.

*Id.* (emphasis in original).

subsequent consultation produced sixty-nine responses to the “preliminary orientations,”<sup>93</sup> almost all of which came from market participants and regulators. The Commission described the author of only one of these comments as being from the “shareholder/investor” constituency.<sup>94</sup> The respondents did comment on the distinction between professional and retail investors,<sup>95</sup> and on the question whether transactions on behalf of execution-only customers should be subject to suitability requirements.<sup>96</sup> These issues are both relevant to consumers’ interests, and it is clear that financial firms might have different views about the appropriate rules from those of consumers,<sup>97</sup> yet, at this early stage in the development of MiFID,<sup>98</sup> no consumer groups seem to have been involved.

This is one example of a more general phenomenon: consumers have not taken advantage of all of the available opportunities to comment on proposals for rules which will affect their interests. Merely making consultation documents publicly available does not ensure responses from consumers. The Commission has taken positive steps to build consumer participation into its work. For example, in 2004, the Commission established the Forum of User Experts in the Area of Financial Services (“FIN-USE”) to ensure that the views of consumers and small businesses were reflected in EU policy-making,<sup>99</sup> and in 2006

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93. REVISION OF THE INVESTMENT SERVICES DIRECTIVE (93/22/EEC): SUMMARY OF RESPONSES TO THE PRELIMINARY ORIENTATIONS OF COMMISSION SERVICES Annex 2, 3 (2001), available at [http://ec.europa.eu/internal\\_market/securities/docs/isd/2001-07-summm\\_responses.pdf](http://ec.europa.eu/internal_market/securities/docs/isd/2001-07-summm_responses.pdf).

94. *Id.*

95. *Id.* at 18.

96. *Id.* at 21.

97. Cf. Mügge, *supra* note 39, at 1002.

Some market players will find application of an epistemic community’s orthodoxy inherently advantageous, for example because it highlights transparency or market opening. On the continuum between technocratic and political oversight, we should expect these firms to call for the former whereas those disadvantaged by dominant thinking support the latter. Rather than removing policy fields from politics, technocratization is itself highly political.

*Id.*

98. See *supra* note 53 and accompanying text.

99. See, e.g., FIN-USE EXPERT FORUM OF FINANCIAL SERVICES, FIN-USE ANNUAL REPORT 2004/5, at 2 (2005) (“FIN-USE was set-up by the European Commission in 2004 as an independent expert forum to help meet the pressing need to improve policy-making in the field of financial services through a more structured dialogue with consumers and small business in the European Union.”).

the Commission established a Financial Services Consumer Group.<sup>100</sup>

FIN-USE has expressed a lack of comfort with pre-emption of national discretion in financial regulation.<sup>101</sup> In its comment on the Green Paper on Retail Financial Services, FIN-USE argued against maximum harmonization for retail financial services,<sup>102</sup> and that “the appropriateness and effectiveness of ‘principles-based’ or light-touch prudential regulation needs to be urgently reviewed.”<sup>103</sup> There is a dramatic contrast between FIN-USE’s skepticism about harmonized financial regulation and the financial services industry’s condemnation of gold-plating. If the lines between the wholesale and retail markets were clear,<sup>104</sup> it would be easier to delimit cases where maximum harmonization were desirable, but FIN-USE suggests that it does not see such

100. See Commission Press Release, Financial Services: Commission hosts first meeting of Financial Services Consumer Group, IP/06/806 (June 20, 2006).

101. See, e.g., FIN-USE, RESPONSE TO THE COMMISSION’S INTERIM REPORT II REGARDING THE SECTOR INQUIRY ON RETAIL BANKING, MORE SPECIFICALLY CURRENT ACCOUNTS AND RELATED SERVICES 2 (2006).

FIN-USE believes that these laws, developed over many years and reflective of the diverse cultures that make up the EU, should not be lightly dismissed. Instead, an empirical case must be made for why the potential benefits of a bigger market outweigh the costs of doing away with existing consumer protection laws. To our experience, these laws not only protect the most vulnerable members of our society, but are also vital to the sustainability of the political and economic structures of the EU.

*Id.*

102. See FIN-USE, EXPERT FORUM OF FIN. SERVS., RESPONSE TO THE GREEN PAPER ON RETAIL FINANCIAL SERVICES IN THE SINGLE MARKET 1 (2007), available at [http://ec.europa.eu/internal\\_market/finservices-retail/docs/policy/gp\\_comments/other\\_eu\\_finuse\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/policy/gp_comments/other_eu_finuse_en.pdf).

[T]he adoption of the maximum harmonisation approach in the retail financial services market is limited in its application. It is important that the Commission commits to ensuring that robust and consistent minimum standards exist in relation to: the provision of information; quality of financial advice; regulation, legal protection and redress; and professional standards.

*Id.*

103. *Id.* at 2.

104. *Cf. id.* at 19:

[T]here are concerns about the developing risks in credit markets. In particular, cross-border selling or assignment of credit portfolios (credit claims, performing loans as well as non-performing loans) by part of the credit industry to credit investment/private equity companies raises concerns in the context of BASEL II and general prudential regulation. It is not clear if the risks are being shifted to an area which is not sufficiently supervised. This could have implications for consumer protection.

*Id.*

clear distinctions. FIN-USE's examples of potential problems with light touch regulation include "recent crises in the sub-prime market, credit markets and hedge fund/private equity sectors."<sup>105</sup>

FIN-USE has argued that a number of factors affect the ability of consumer organizations to participate in the rule-making process on an equal footing with representatives of the financial services industry. These factors are the different levels of resources available to the different groups, short time frames for consultation, the way in which consultation documents are drafted (for example do they contain jargon) and whether consultations are carried out only in English.<sup>106</sup>

The establishment of FIN-USE illustrates the Commission's efforts to include consumers in the development of financial services policy. However, the specialized financial services committees, concentrating on the technical aspects of their work, have been less interested in consumer views and have focused on consulting market participants. The Committee of European Securities Regulators ("CESR"),<sup>107</sup> has a Market Participants Consultative Panel,<sup>108</sup> but it does not have a consultative panel for consumers. In 2005, CESR did hold a meeting with consumer groups to focus on MiFID.<sup>109</sup> CESR's summary of the meeting stated:

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105. *Id.* at 2.

106. *Id.* at 23.

107. *See, e.g.*, Moloney, *supra* note 36, at 814 (noting that Committee of European Securities Regulators is a reincarnation of the Forum on European Securities Commissions ("FESCO"), which has worked on financial market harmonization since 1997); *see also* COMM. OF EUR. SEC. REGULATORS, CHARTER OF THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS, art. 5.11 (2006), *available at* <http://blenderlaw.umlaw.net/wp-content/uploads/2008/02/charter2006.pdf>.

The Committee will use the appropriate processes to consult (both ex-ante and ex-post) market participants, consumers and end users which may include inter alia: concept releases, consultative papers, public hearings and roundtables, written and Internet consultations, public disclosure and summary of comments, national and/or European focused consultations. The Committee will make a public statement of its consultation practices.

*Id.*

108. *See, e.g.*, Moloney, *supra* note 36, at 826 (stating that "CESR's Market Participants Group . . . which forms a core element of its market consultation mechanism, is dominated by wholesale-market interests").

109. *See* COMM. OF EUR. SEC. REGULATORS, MiFID CONSUMER DAY—22 MARCH 2005, ISSUES ON REGULATION OF INTERMEDIARIES AND MARKETS UNDER MiFID, SUMMARY OF THE MAIN CONCLUSIONS 1 (2005), *available at* <http://www.cesr-eu.org/popup2.php?id=3297>.

The importance CESR attaches to receiving comments on its advice from representatives of retail clients and consumers was stressed and CESR expressed its concern that the responses received to previous consultations carried out on MiFID, had not reflected sufficiently this set of stakeholders. CESR made it known that it intended to organise similar meetings in the future to continue and develop this dialogue further.<sup>110</sup>

At the meeting in 2005, consumer representatives raised some of the issues FIN-USE has noted about their lack of resources, and about the desirability of multi-lingual consultation.<sup>111</sup> As of early 2008, CESR appears only to consult in English, and does not appear to have held more similar meetings with consumers, although CESR has advertised for a Communications Officer, whose job would include “[a]ssisting as needed with the CESR Consumer Task force: developing and editing material targeted to retail investors.”<sup>112</sup> Groups which focus on consumers’ interests have participated in CESR’s consultations. In its response to a consultation on simplified prospectuses for retail investors, the Associazione Consumatori Utenti wrote: “we are convinced that the best solution for all parties involved can be easier reached if the consultation with consumers associations become less occasional and more systematic.”<sup>113</sup>

The Committee of European Banking Supervisors (“CEBS”), which was formed more recently than CESR, has a consultative committee which includes two members of FIN-USE, Riccardo de Lisa and Benoît Jolivet, and Manfred Westphal of the European Consumers’ Organisation (“BEUC”).<sup>114</sup> CEBS has stated that in its consultations it will generally “[t]arget the full range of interested parties, including market participants (e.g. credit institutions, investment firms, etc), consumers, other

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110. *Id.*

111. *Id.*

112. COMM. OF EUR. SEC. REGULATORS, JOB DESCRIPTION: COMMUNICATIONS OFFICER (2008), available at <http://blenderlaw.umlaw.net/wp-content/uploads/2008/01/cesradvert.pdf>.

113. Associazione Consumatori Utenti (“ACU”), Questionnaire on Simplified Prospectus For Retail Investors (May 31, 2007), available at <http://blenderlaw.umlaw.net/wp-content/uploads/2008/02/acu.pdf>.

114. See Comm. of Eur. Bank Supervisors (“CEBS”), Consultative Panel—Members, [http://www.c-eb.org/ConsultativePanel\\_members.htm](http://www.c-eb.org/ConsultativePanel_members.htm) (last visited Apr. 3, 2008).

end-users as well as their representative associations.”<sup>115</sup> However, market participants have shown that they feel they should have preferential access to policy-making in the banking context. When the CEBS proposed amendments to its consultation practices in 2007, the British Bankers Association responded by inviting the CEBS to hold informal roundtables with market participants before launching formal consultations, suggesting that the CEBS consultative panel was not always sufficiently informed about the needs of the market.<sup>116</sup> A joint submission by the London Investment Banking Association, the International Swaps and Derivatives Association, the Swedish Securities Dealers Association and the Finnish Association of Securities Dealers made a similar point:

We would encourage CEBS in the strongest possible terms to build on its informal mechanisms as much as on its formal procedures. Transparency of thinking at an early stage is one of the most powerful tools in achieving proposals that work well for all parties. Secondly we also ask CEBS to consider, when embarking on any stream of work, whether the Consultative Panel is as fully and as widely representative as it needs to be for that specific issue and to identify ways in which industry experience and input can be supplemented. Informal hearings are a good mechanism - providing that there is some structure and industry has a clear view of the kinds of issues

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115. CEBS, PUBLIC STATEMENT OF CONSULTATION PRACTICES (2005), available at [http://www.c-ebs.org/Consultation\\_papers/CP01\\_final.pdf](http://www.c-ebs.org/Consultation_papers/CP01_final.pdf).

116. Letter from Alex Merriman, Director, Wholesale & Regulation, British Bankers Association, to Andrea Enria, Secretary-General, Committee of European Banking Supervisors, on Amendments to CEBS Consultation Paper (CP 01Rev) to its Consultation Practices (June 18, 2007), available at [http://www.c-ebs.org/Consultation\\_papers/documents/BBA\\_CP01rev.pdf](http://www.c-ebs.org/Consultation_papers/documents/BBA_CP01rev.pdf).

We would also suggest that CEBS considers, prior to the launching of formal consultation, a further refinement of its practices. This would be the holding of *ad hoc roundtables* with market practitioners, ahead of the launch of a formal consultation.

The purpose of these would be to obtain specific technical observations on a particular issue from a wide range of market participants, in an informal, but transparent way. This would then in turn inform CEBS Members ahead of themselves developing a view about a particular issue. We recognise that the Consultative Panel already undertakes an important role in relation to inputting market feedback into CEBS, but we are not entirely convinced that this is always sufficiently focussed on ensuring that a complete and well-considered market view prevails. The BBA has substantial experience of organising these industry roundtables and we can assist CEBS in their development.

*Id.* (emphasis in original).



on which CEBS wishes to understand their attitudes.<sup>117</sup>

I have argued before that one of the major advantages financial trade associations have in multi-level regulation generally is that of framing and agenda-setting.<sup>118</sup>

A more detailed empirical review of the structure and content of the financial services committees' consultation practices and relations with market and consumer groups is beyond the scope of this Article. However, this sketch of the consultation landscape does demonstrate some of the process-related difficulties that Europe faces in moving forward with harmonization of financial regulation at this point.

### CONCLUSION

After fifty years, the European market is still a work in progress. The citizen as consumer is at the heart of the internal market. However, the retail financial services market in Europe is not fully integrated, and consumers do not benefit as much as they might from competition between different financial services providers.<sup>119</sup> Attempts to increase the level of retail market integration face some hurdles, however, as consumer groups and financial trade associations have different views on what quantity and what varieties of harmonization are desirable. Consumer groups and trade associations disagree even about the management of the process of rule-making. The difficulty of resolving the tensions between the views of consumer groups and financial firms in the context of financial services policy raises real questions about the potential of functional participation to legitimate European rule-making in this area.

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117. CEBS, COMMENTS TO CEBS (2007), available at [http://www.c-eps.org/Consultation\\_papers/documents/LIBAISDASSDAFASD\\_CP01rev.pdf](http://www.c-eps.org/Consultation_papers/documents/LIBAISDASSDAFASD_CP01rev.pdf).

118. See generally Bradley, *supra* note 89.

119. See generally Commission of the European Communities, Communication from the Commission: Sector Inquiry Under Article 17 of Regulation (EC) No 1/2003 on Retail Banking (Final Report), COM (2007) 33 Final (Jan. 31, 2007).