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CONSTRUCTING A TAXONOMY OF FINANCIAL CONSUMER PROTECTION  
POLICY AND ASSESSING THE NEW CONSUMER DUTY IN THE UNITED  
KINGDOM’S FINANCIAL SECTOR

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#### I. INTRODUCTION: THE CONSUMER DUTY AND A FRAMEWORK FOR ANALYSIS

The U.K. Financial Conduct Authority ("FCA") has heralded the introduction of a new Consumer Duty ("Duty")<sup>1</sup> as a significant milestone in meeting its objective of financial consumer protection.<sup>2</sup> This Duty is a regulatory duty for *conduct* as well as *outcomes* in relation to financial consumers, but not directly enforceable by consumers in civil action. It potentially transcends the limitations of common law duties with regard to protecting economic interests<sup>3</sup> and the operation of specific regulatory duties transferred from European legislation.<sup>4</sup>

<sup>1</sup> FIN. CONDUCT AUTH., A NEW CONSUMER DUTY: FEEDBACK TO CP21/36 AND FINAL RULES (2022) [hereinafter A NEW CONSUMER DUTY], <https://www.fca.org.uk/publication/policy/ps22-9.pdf>.

<sup>2</sup> Financial Services and Markets Act 2000, c. 8, § 1B(3) (UK), <https://www.legislation.gov.uk/ukpga/2000/8/section/1B> [<https://perma.cc/DCU2-XF97>].

<sup>3</sup> See Iris H-Y Chiu & Alan H. Brener, *Articulating the Gaps in Financial Consumer Protection and Policy Choices for the Financial Conduct Authority—Moving Beyond the Question of Imposing a Duty of Care*, 14 CAP. MKTS. L.J. 217, 219-21 (2019).

<sup>4</sup> See, e.g., Directive 2014/65/EU, of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349-496 [hereinafter Directive 2014/65/EU]. Examples of such specific duties include the duty of suitability

Its basis, which is a general regulatory principle demanding that financial services firms deliver “good outcomes” to financial consumers,<sup>5</sup> is potentially game-changing, as financial regulation only exceptionally intervenes<sup>6</sup> into consumers’ welfare outcomes in financial transactions.

The development of the Duty responded to a history of high-profile scandals involving financial consumer losses and the general declining social sentiment towards financial services.<sup>7</sup> Further, financial firms authorised by the FCA often sold high-risk investment products by exploiting regulatory gaps.<sup>8</sup> Although many highlighted the FCA’s regulatory weaknesses, such as inadequate enforcement and insufficient coordination between supervisory teams,<sup>9</sup> these scandals were made possible in part by the exploitative application of substantive financial regulation. For example, financial regulatory standards focus on financial products’ point-of-sale,<sup>10</sup> which must be fairly conducted with customers; after-sale conduct and the welfare outcomes of financial products are relatively neglected by regulation.<sup>11</sup> Regulatory

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in giving investment advice, *id.* art. 25, and the duty of best execution in trading clients’ instruments, *id.* art. 27.

<sup>5</sup> See *PRIN 2.1: The Principles*, FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html> [<https://perma.cc/4FY8-EX5C>] (July 31, 2023).

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

<sup>7</sup> The history of financial mis-selling in the United Kingdom extends back to the 1980s and regulators continued to face the criticism that consumers are inadequately protected. See Huw Jones, *Full Steam Ahead on New Consumer ‘Duty’*, *Britain’s Finance Watchdog Says*, *REUTERS* (Feb. 22, 2023, 8:24 AM), <https://www.reuters.com/world/uk/full-steam-ahead-new-consumer-duty-britains-finance-watchdog-says-2023-02-22/> [<https://perma.cc/2M47-3HN8>]; A NEW CONSUMER DUTY, *supra* note 1, ¶ 1.10.

<sup>8</sup> See DAME ELIZABETH GLOSTER, *REPORT OF THE INDEPENDENT INVESTIGATION INTO THE FINANCIAL CONDUCT AUTHORITY’S REGULATION OF LONDON CAPITAL & FINANCE PLC 115-33* (2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/945247/Gloster\\_Report\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945247/Gloster_Report_FINAL.pdf) [<https://perma.cc/B8NE-YWLE>] (discussing products outside of the FCA’s regulatory perimeter, such as mini-bonds).

<sup>9</sup> RAJ PARKER, *INDEPENDENT REVIEW INTO THE FSA’S AND FCA’S HANDLING OF THE CONNAUGHT INCOME FUND SERIES I AND CONNECTED COMPANIES 50-59* (2019), <https://www.fca.org.uk/publication/corporate/connaught-independent-review.pdf> [<https://perma.cc/7NNY-6YXD>].

<sup>10</sup> See Chiu, *supra* note 6, at 659-60, for a summary of point-of-sale protection mechanisms such as information disclosure and advisory duties.

<sup>11</sup> *Id.* at 664-66.

reform seeks to mitigate consumer harm; instead of a targeted approach to regulating conduct, the Duty is much wider and more cross-cutting in nature.

In this light, we perceive a broader underpinning for the Consumer Duty—namely, the need to restore and reset the social contract between finance and consumers. The social contract perspective is relevant because individuals' and households' participation in the market for financial products and services, from seemingly basic bank account facilities<sup>12</sup> to personal investment products that aim to meet a variety of medium- or long-term savings needs,<sup>13</sup> is a long-standing trend of “financialisation.” “Financialisation” refers to the increased market provision of private financial welfare in capitalist democracies.<sup>14</sup> Participation in the market for financial products offered by private sector entities reframes society's need for self-care and responsibility,<sup>15</sup> and in this way, consumer protection provides a framework for a new social contract between the private financial sector and consumers, mediated by regulators, taking the form of “regulatory capitalism.”<sup>16</sup> The widespread marketisation of finance has taken place in Anglo-American jurisdictions<sup>17</sup> and in the European Union.<sup>18</sup> However, it is arguable that the terms of the social contract between

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<sup>12</sup> See Miguel Ampudia & Michael Ehrmann, *Financial Inclusion: What Is It Worth?* 7 (Eur. Central Bank, Working Paper No. 1990, 2017), <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1990.en.pdf> [<https://perma.cc/563X-DCQS>] (on the basic inclusion criteria of being banked).

<sup>13</sup> See Paul Langley, *Uncertain Subjects of Anglo-American Financialization*, 65 CULTURAL CRITIQUE 67, 76 (2007).

<sup>14</sup> *General Introduction: Financialization, Coupon Pool and Conjuncture*, in FINANCIALIZATION AT WORK: KEY TESTS AND COMMENTARY 1, 26 (Ismail Erturk, Julie Froud, Sukhdev Johal, Adam Leaver & Karel Williams eds., 2008); Andy Pike & Jane Pollard, *Economic Geographies of Financialization*, 86 ECON. GEOGRAPHY 29, 30 (2010).

<sup>15</sup> Langley, *supra* note 13, at 73; Ismail Erturk, Julie Froud, Sukhdev Johal, Adam Leaver & Karel Williams, *The Democratization of Finance? Promises, Outcomes and Conditions*, 14 REV. INT'L POL. ECON. 553, 572 (2007).

<sup>16</sup> See PAUL H. DEMBINSKI, FINANCE: SERVANT OR DECEIVER? 33-34 (Kevin Cook trans., 2009) (discussing the social contract between finance and society); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 15 (2005) (discussing “regulatory capitalism”).

<sup>17</sup> Simone Polillo, *Solving the Paradox of Mass Investment: Expertise, Financial Inclusion and Inequality in the Politics of Credit*, 78 REV. SOC. ECON. 53, 53 (2020); see Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1407-08 (2020) (discussing more debt markets and expansion of credit availability more specifically).

<sup>18</sup> GUIDO COMPARATO, THE FINANCIALISATION OF THE CITIZEN: SOCIAL AND FINANCIAL INCLUSION THROUGH EUROPEAN PRIVATE LAW 38-44 (2018).

consumers and finance have been in flux. Harm perpetuated by authorised financial institutions reflects poor sectoral culture and causes consumer trust erosion. The Edelman barometer, for example, shows that consumer trust in the financial services sector is in negative territory,<sup>19</sup> which is similar to trust levels in many financially developed jurisdictions where market choice and liberation are promoted.<sup>20</sup> This trust erosion reflects scepticism stemming from consumers' perception of possible harm, which is counterproductive to their seeking financial welfare solutions in the marketplace, and more general scepticism regarding consumers' ability to provide for their own financial welfare.<sup>21</sup> Regulatory policy often lags behind market failures and social pressure.

The precise achievements that consumer protection financial regulation aims to achieve are uncertain. Are consumers protected when they have sufficient choice in the market? Or are they protected when they have all the information they need to make decisions? Are consumers protected by procedural and/or substantive justice? Are consumers protected when they receive welfare expectations from financial products? Consumers' expectations of protection are likely out of step with the degree of protection offered by regulatory policy. This Article interrogates what the Consumer Duty achieves by clarifying the levels of financial consumer protection.

This Article argues that a taxonomy of consumer protection levels characterized by the substantive protections enjoyed by financial consumers is imperative. A narrow taxonomy would focus only on financial consumer protection and analyse the substantive protections that consumers enjoy before and after the Duty's introduction. Such an approach is arguably incomplete. The consumer experience in finance is arguably a distinct sphere of consumer services. Hence, one might argue that protective levels in finance should not be compared to other sectors. It is highly likely, however, that consumers' experience surrounding individual welfare in other sectors affects their perceptions and expectations in their financial consumer experiences. Consumers

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<sup>19</sup> EDELMAN, EDELMAN TRUST BAROMETER 2022, at 24 (2022), [https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL\\_Jan25.pdf](https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf) [<https://perma.cc/F7AJ-RVUP>].

<sup>20</sup> Sonia Rach, *FCA: 'Trust and Loyalty Aren't Difficult to Get but They Can Be Eroded'*, FT ADVISER (Sept. 29, 2022), <https://www.ftadviser.com/fca/2022/09/29/fca-trust-and-loyalty-aren-t-difficult-to-get-but-they-can-be-eroded/> [<https://perma.cc/B653-WXLD>].

<sup>21</sup> Chiu & Brener, *supra* note 3, at 217-18.

have broad experiences within the rise of marketisation, increasing support for industrial development,<sup>22</sup> and political commitment<sup>23</sup> to the market economy. Economic organisation in capitalist economies shapes consumers in their capacities as economic and social actors. Consumer protection is a policy development that is both cross-cutting<sup>24</sup> and sectoral.<sup>25</sup> As such, financial regulation can learn from insights in other sectoral developments.

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<sup>22</sup> See Iain Ramsay, *Consumer Law and the Search for Empowerment*, 19 CANADIAN BUS. L.J. 397, 405 (1991) (discussing on policy encouraging consumption as a social policy supporting capitalist industrialisation).

<sup>23</sup> See, e.g., *Special Message to Congress on Protecting Consumer Interest*, 15 March 1962, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/asset-viewer/archives/jfkpof-037-028> [<https://perma.cc/M3AP-MVTG>] (Oct. 28, 2023) (concerning Kennedy's consumer protection speech reflecting political commitment); Council Resolution (EC) No. C92/1 of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1985 O.J. (C 92) 1; see also Bastian Schüller, *The Definition of Consumers in EU Consumer Law*, in EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE 123 (James Devenney & Mel Kenney eds., 2012); see also U.N. Conference on Trade and Development, *United Nations Guidelines for Consumer Protection*, 17, U.N. Doc. UNCTAD/DITC/CPLP/MISC/2016/1 (July 2016), [https://unctad.org/system/files/official-document/ditccplpmisc2016d1\\_en.pdf](https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf) [<https://perma.cc/GE9K-EWX2>].

<sup>24</sup> See, e.g., Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64 [hereinafter Directive 2011/83] (transposed into legislation in the United Kingdom as the Consumer Rights Act 2015) (Articles 6-8 concern information rights; Article 9 concerns the right of withdrawal; and Articles 17-22 concern miscellaneous rights such as the right not to be charged extra fees for payment methods exceeding the trader's cost or charged additional fees without consent, and rights regarding mode and timing of delivery); Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), 2005 O.J. (L 149) 22 [hereinafter Directive 2005/29/EC]; Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 [hereinafter Council Directive 93/13/EEC]; see generally *Digital Fairness – Fitness Check on EU Consumer Law*, EUR. COMM'N, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law/public-consultation_en) [<https://perma.cc/5YFE-HQ9P>] (last visited Sept. 27, 2023) (discussing the above, amongst others, legislations of a cross-cutting nature across sectors).

<sup>25</sup> See STEPHEN WEATHERILL, EU CONSUMER LAW AND POLICY 118-21, 122-26, 126-28 (2d ed., 2013) (concerning, respectively, consumer protections for package travel, timeshare schemes, and passenger travel rights).

Hence, in unpacking the taxonomy of protection levels for financial consumers, it is meaningful to survey the cross-cutting protection levels offered to consumers and rules that govern selection of other marketised sectors. This helps us contextualise and compare the protection levels and regulatory tools offered by financial regulation. We selected the following sectors to survey the existing levels of consumer protection: energy; telecommunications services; aviation services; packaged holidays; and goods sectors including food, healthcare (i.e., both healthcare services and pharmaceuticals), and e-commerce. We conducted literature reviews of the key regulatory policies in these areas, mainly in the United Kingdom and European Union, and compared those policies with the United States where relevant, as all of the above are developed capitalist economies with similar consumer protection debates. Our literature reviews allow us to construct a cross-cutting taxonomy of consumer protection levels that are delivered by different policy designs and tools. These regulatory designs and tools that deliver different consumer protection levels also reflect two key ideological or policy positions in the social contract between consumers and the relevant marketised sector. These two key premises—an economically informed premise and a more sociologically framed premise—permeate the sectors we survey and form the basis of our cross-sectoral taxonomy construction. Our taxonomy allows holistic appraisal of the Consumer Duty’s achievements through the lens of the various protective levels for financial consumers and allows us to assess whether the Consumer Duty leaves any gaps in financial consumer protection.

The selection of the above consumer sectors is based on the following rationales, which are not listed in order of weighting or priority:

(a) the sector’s importance to the consumer experience, as recognised and specifically mentioned in the United Nations Guidelines for Consumer Protection (“UNGCP”);<sup>26</sup>

(b) a reasonable representation of sectors that are overseen by dedicated regulatory agencies;

(c) a reasonable representation of service-based sectors where the services to be accessed are not merely optional in humans’ daily experiences, but are instead staple or essential, since financial services encompass a narrow range of staple and optional services;

(d) a reasonable representation of service-based sectors where consumers’ pre- and post-sale regulation is important;

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<sup>26</sup> *United Nations Guidelines for Consumer Protection*, *supra* note 23, at 17.

(e) a reasonable representation of goods-based sectors to allow for assessment of particular differences in treatment based on whether a good or service is being provided; and

(f) the inclusion of e-commerce generally as an example of an industry with cross-cutting regulatory policy and of a forum in which financial services are increasingly accessed.

Part II argues that there are two broad ideological premises for consumer protection—namely, an economically informed premise and a more sociologically framed premise. Both premises shape consumer protection policy in a cross-cutting manner. Our approach in this Part does not discuss all sectoral policy factors that shape consumer protection in each sector, but it allows us to distil a key range of consumer protection policy designs/tools aligned with each ideological premise, considering the interacting qualities between the ideological premises. This Part generates a taxonomy of consumer protection policies, explaining the level of protection offered by each key regulatory tool and the ideological influence that shapes each level of protection. This taxonomy is then used to explain the levels of consumer protection in the non-financial goods and services sectors we have selected.

In Part III, we apply the taxonomy to the financial sector to explain the levels of consumer protection in the United Kingdom prior to the introduction of the Consumer Duty. This Part then interrogates the changes brought about by the Consumer Duty. We argue that there is potential for substantive changes to consumer protection levels to be recognised, but these changes may not go far enough to offer an optimal level of consumer protection.

Part IV highlights the key gaps in financial consumer protection not filled by the Duty and interrogates more normative questions in relation to levels of desired financial consumer protection. Part V concludes.

## II. THE TAXONOMY FOR CONSUMER PROTECTION POLICY

It is arguably necessary for consumer protection to be implemented as regulatory law and not just as private law. There are limitations to private contractual contexts' ability to address market failures in various consumer markets, and ex post redress may not adequately meet consumers' needs.<sup>27</sup> Our literature reviews of *regulatory*

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<sup>27</sup> See John Goldring, *Consumer Law and Legal Theory: Reflections of a Common Lawyer*, 13 J. CONSUMER POL'Y 113, 126-27 (1990).



consumer protection in different sectors in the United Kingdom, European Union, and selectively in the United States reveal that suites and combinations of different regulatory designs and tools are deployed by regulators, but are broadly implemented under two ideological/policy themes.

This type of cross-sectoral mapping exercise has also been carried out by Howell E. Jackson and Paul Rothstein, who constructed a taxonomy for the benefits and objectives sought to be achieved in consumer protection generally.<sup>28</sup> The exercise was intended to tease out the need for empirical data to validate the taxonomy of purported benefits sought to be achieved by each type of regulatory tool for consumer protection. Our Article agrees that consumer protection and its regulatory tools have cross-sectoral resonance, and, although each sector addresses different specific objectives, there are key similarities in their underpinning ideologies and policies. In this manner, the regulatory benefit taxonomy proposed by Jackson and Rothstein can be further enriched by the recognition that every sector seeks to achieve a range of consumer protection levels. The range of protection levels may be shaped by policy objectives in relation to efficiency, rights, justice, or other values. At a high level, these policy objectives can be divided into two broad camps: consumer empowerment ideologies, which focus on how consumer confidence in market participation can be augmented, therefore also sustaining the economic structures of liberal markets;<sup>29</sup> and consumer citizenship ideologies, which focus on other social and normative values<sup>30</sup> that support consumers' individual socio-economic actorhood by focusing on fair and just treatment, meeting welfare needs, and distributive outcomes.<sup>31</sup> In this manner, we enrich Jackson and Rothstein's taxonomy by relating the range of key cross-sectoral consumer protection levels to their underpinnings in cross-cutting ideologies. We first discuss the two key underpinning ideologies for consumer protection generally before setting out our taxonomy.

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<sup>28</sup> Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 HARV. BUS. L. REV. 197, 220 (2019).

<sup>29</sup> Iain Ramsay, *Ordoliberalism and Opportunism? The Making of Consumer Law in the UK*, in THE MAKING OF CONSUMER LAW AND POLICY IN EUROPE 235, 270 (Hans-W Micklitz ed., 2021).

<sup>30</sup> Hans-W. Micklitz, *Norbert Reich, Founder and Pioneer of Consumer Law 1937–2015—Obituary*, 39 J. CONSUMER POL'Y 3, 4 (2016) (characterizing Reich's thought leadership in this area).

<sup>31</sup> See Bourgoignie, *infra* note 33 and accompanying text.

*A. Consumer Empowerment and Shaping Regulatory Designs/Tools*

“Consumer empowerment”<sup>32</sup> is an important, cross-sectoral ideological principle that influences consumer protection regulation in many sectors, focusing on enabling the consumer to confidently participate in the marketisation of goods and services. This underpinning ideology shapes certain levels of consumer protection through regulatory design. This Part discusses the regulatory tools that are commonly deployed to achieve the consumer empowerment objective. These tools aim to correct market failures, remove impediments to market choice, and facilitate the consumer’s ability to choose. Other protective regulatory tools not discussed here are categorised, in our view, under the consumer citizenship objective which is discussed shortly.

Although Thierry Bourgoignie defines the consumer as a “taker” of producers’ goods or services<sup>33</sup> who is unable to tailor production to their needs, the consumer does not need to be seen as disempowered in an industrialist society and capitalist economy in which different producers are compelled to compete for the consumer’s choice. As is consistent with the political ideology that individuals’ welfare outcomes should not be subject to central planning and can be better regulated by individual autonomy, the empowered consumer can realise their potential in a marketplace that provides choice and in which informed consumer decisions can be made.<sup>34</sup> In our view, the empowered consumer political ideology de-emphasises public sector-based ordering and welfare provision. In this framework, welfare decisions are a matter of private choice. The consumer empowerment ideology is therefore characterised by regulatory policy that seeks to “make markets work” for such consumer empowerment. Regulatory policy becomes focused on promoting competitive marketplaces, dismantling anti-competitive practices,<sup>35</sup> and breaking down market failures

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<sup>32</sup> Gillian K. Hadfield, Robert Howse & Michael J. Trebilcock, *Information-Based Principles for Rethinking Consumer Protection Policy*, 21 J. CONSUMER POL’Y 131, 134 (1998); see Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law: Has It Come of Age?*, 28 EUR. L. REV. 370, 377 (2003) (relating to EU single market policy and regulation, and this ideology has been dominant as part of the “economic constitution” of the single market policy); GERAINT HOWELLS, CHRISTIAN TWIGG-FLESNER & THOMAS WILHELMSSON, *RETHINKING EU CONSUMER LAW* 1-45 (2017) (providing an updated discussion); WEATHERILL, *supra* note 25, at 92-142.

<sup>33</sup> Thierry Bourgoignie, *Characteristics of Consumer Law*, 14 J. CONSUMER POL’Y 293, 297-301 (1992).

<sup>34</sup> Hadfield et al., *supra* note 32, at 134.

<sup>35</sup> Mark Armstrong, *Interactions Between Competition and Consumer Policy*, 4 COMPETITION POL’Y INT’L 97, 100-06 (2008); see also Christopher Decker,

that impede meaningful or informed choice. Competition regulation is, in our view, aimed at *protecting consumers at the level of “having meaningful choice”* and is an important cross-cutting measure of consumer protection for all marketized sectors.

Protecting consumers’ “economic self-determination”<sup>36</sup> is furthered by the commonly adopted regulatory policy of mandatory pre-sale disclosure for all goods and services. This helps consumers overcome information asymmetry with producers and make informed choices. However, as theorists and policymakers increasingly accept that consumers have behavioural weaknesses and limited rationality,<sup>37</sup> mandatory disclosure regulatory tools are not per se sufficient to help consumers make informed choices.<sup>38</sup> Mandatory disclosure can be provided in an unfriendly manner that is full of legal jargon or not eminently accessible, therefore allowing producers to discharge their legal risk but playing little part in ensuring consumers’ understanding.

Policymakers have refined regulatory designs and tools to address these features of “disempowerment” in the consumer choice journey. Many regulatory policies, including in financial regulation, now incorporate behavioural insights into requirements that mandatory disclosures be accessible and understandable<sup>39</sup> and regulations

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*Concepts of the Consumer in Competition, Regulatory, and Consumer Protection Policies*, 13 J. COMPETITION L. & ECON. 151, 169-76 (2017) (discussing how competition law should evolve to meet consumer protection needs as market structures change, such as in platform economies).

<sup>36</sup> Jules Stuyck, *European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?*, 37 COMMON MKT. L. REV. 367, 372-73 (2000).

<sup>37</sup> Vanessa Mak, *The Myth of the ‘Empowered Consumer’: Lessons from Financial Literacy Studies*, 1 J. EUR. CONSUMER & MKT. L. 254, 263 (2012); see generally Dimity Kingsford-Smith & Olivia Dixon, *The Consumer Interest and the Financial Markets*, in THE OXFORD HANDBOOK OF FINANCIAL REGULATION 695, 710-15 (Niamh Moloney, Eilís Ferran & Jennifer Payne eds., 2015).

<sup>38</sup> Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 J.L. & SOC’Y 349, 357 (2005).

<sup>39</sup> E.g., Regulation (EU) 2017/1129, of the European Parliament and of the Council of 14 June 2017 on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading on a Regulated Market, and Repealing Directive 2003/71/EC, art. 7, 2017 O.J. (L 168) 12, 33-36 [hereinafter Regulation (EU) 2017/1129] (summarizing securities prospectuses); *Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and Amending Directive (EU) 2019/1937*, COM (2020) 593 final (Sept. 24, 2020) (proposing to regulate markets in Crypto-assets Compromise Text) [hereinafter COM/2020/593 final]; Regulation (EU) 2020/1503, of the European Parliament and of the Council of 7 October 2020 on European Crowdfunding Service Providers for Business, and Amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, art. 23, 2020

requiring that marketing information be made available at crucial choice-affecting points in time. These policies include compulsory risk warnings,<sup>40</sup> regulations against misleading marketing and claims,<sup>41</sup> and regulations on financial promotions that limit the marketing of certain financial products.<sup>42</sup> Protecting consumers' meaningful choice also extends to forms of proportionate post-sale regulatory intervention where the pre-sale context is insufficient to allow for meaningful choice, such as in distance-selling and online commerce. Regulatory provisions for cooling-off rights and post-sale withdrawals of contract<sup>43</sup> are examples of this kind of post-sale regulatory intervention. Further, for ongoing contracts, especially for services that are subject to renewal, regulatory policy has been introduced in some sectors to facilitate post-sale service switching and the removal of impediments for consumers to exit an ongoing service provider.<sup>44</sup>

There is cross-cutting regulatory policy that recognises that standard contractual terms for consumers affect individual autonomy

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O.J. (L 347) 1, 29-30 [hereinafter Regulation (EU) 2020/1503] (regulating online crowdfunding investor disclosure).

<sup>40</sup> See, e.g., Jackson & Rothstein, *supra* note 28, at 283 (surveying mandatory health warnings on tobacco products); FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK 27-30 (2024) [hereinafter CONDUCT OF BUSINESS SOURCEBOOK], <https://www.handbook.fca.org.uk/handbook/COBS.pdf> [<https://perma.cc/B3KA-SQ8H>] (discussing various risk warnings in financial transactions or products, such as "capital loss" warnings, for all investment products regulated in the United Kingdom); see also SARAH BROWN, THE REGULATION OF CONSUMER CREDIT: A TRANSATLANTIC ANALYSIS 155-88 (2019) (providing more precise warnings regarding credit).

<sup>41</sup> See generally Directive 2005/29/EC, *supra* note 24; John Velentzas, Georgia Broni & Elektra Pitoska, *Unfair Commercial Practices on Marketing - Advertising and Consumer Protection in EU Member States*, 1 *PROCEDIA ECON. & FIN.* 411, 417-18 (2012).

<sup>42</sup> See CONDUCT OF BUSINESS SOURCEBOOK, *supra* note 40, at 63-88 (discussing limited promotions of illiquid investments).

<sup>43</sup> See Directive 2011/83, *supra* note 24, art. 9 (providing generally a cross-cutting rule); WEATHERILL, *supra* note 25, at 108-10, 128-32.

<sup>44</sup> See, e.g., *Access to and Use of Energy Services*, YOUR EUROPE, [https://europa.eu/youreurope/citizens/consumers/energy-supply/access-use-energy-services/index\\_en.htm](https://europa.eu/youreurope/citizens/consumers/energy-supply/access-use-energy-services/index_en.htm) [<https://perma.cc/KR2U-2HEB>] (Mar. 14, 2022); *Switch Supplier or Energy Tariff*, OFGEM, <https://www.ofgem.gov.uk/information-consumers/energy-advice-households/switching-energy-tariff-or-supplier> [<https://perma.cc/U53G-Y9XG>] (last visited June 4, 2023) (in relation to utilities switching in the European Union and United Kingdom); *How to Open, Switch or Close Your Bank Account*, MONEYHELPER, <https://www.moneyhelper.org.uk/en/everyday-money/banking/how-to-open-switch-or-close-your-bank-account> [<https://perma.cc/4LT4-WKSK>] (last visited June 4, 2023) (discussing bank account switching in the United Kingdom).

and choice,<sup>45</sup> although the terms could be efficient for consumer markets. Many regulations allow consumers to challenge these terms in post-sale civil actions.<sup>46</sup> This recognition of unequal information or bargaining power is consistent with both the consumer empowerment and consumer citizenship ideologies,<sup>47</sup> as consumers can re-open the question of distributive balance, which may be more consistent with the “consumer citizenship” framing discussed below.<sup>48</sup> The consumer empowerment ideology inevitably interacts with the consumer citizenship ideology in policy that includes a range of consumer protections. For example, where regulation provides accessible out-of-court redress, including redress established by public sector institutions,<sup>49</sup> it can be regarded as empowering for consumer confidence in market participation and as providing opportunities for consumers to adjust their distributive and welfare consequences.

Regulatory programmes for improving consumer understanding or literacy in any particular sector reflect regulatory support for maintaining the meaningfulness of consumer choice, consistent with consumer empowerment ideologies in the United Kingdom, European Union, and United States. However, where financial literacy levels are not universally attained,<sup>50</sup> even proponents of consumer empowerment argue that regulators should intervene to disincentivise certain consumer choices,<sup>51</sup> or indeed to create default enrolments into

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<sup>45</sup> E.g., Council Directive 93/13/EEC, *supra* note 24 (allowing non-individually negotiated standard terms to be challenged for unfairness); see also Peter Rott, *Unfair Contract Terms*, in RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW 287, 302-04 (Christian Twigg-Flesner ed., 2016).

<sup>46</sup> Rott, *supra* note 45, at 308.

<sup>47</sup> See generally Norbert Reich, *Diverse Approaches to Consumer Protection Philosophy*, 14 J. CONSUMER POL’Y 257-58, 260 (1992) (concerning, respectively, inequality in information and unequal bargaining power).

<sup>48</sup> See discussion in Part II(B) on consumer citizenship below.

<sup>49</sup> Iain Ramsay, *Consumer Law, Regulatory Capitalism and the ‘New Learning’ in Regulation*, 28 SYDNEY L. REV. 9, 27-29 (2006) (discussing Financial Ombudsman in the UK, and formerly the UK’s Office of Fair Trading); see generally Immaculada Barral-Viñals, *E-Consumers and Effective Protection: The Online Dispute Resolution System*, in EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE 93-98 (Mel Kenny & James Devenney eds., 2012) (on the weaknesses of out-of-court dispute resolution for e-commerce).

<sup>50</sup> Leora Klapper & Annamaria Lusardi, *Financial Literacy and Financial Resilience: Evidence from Around the World*, 49 FIN. MGMT. 589, 589 (2020) (noting that about half of adults in major emerging countries who use credit cards or borrow from financial institutions are financially literate, which raises awareness for the significant minority that is not).

<sup>51</sup> E.g., Mak, *supra* note 37, at 261-62 (on paternalistic interventions).

perceived optimal ones,<sup>52</sup> a policy tool that Richard H. Thaler and Cass R. Sunstein have described as “nudge,”<sup>53</sup> and framed as a form of “libertarian paternalism.”<sup>54</sup> These policy tools arguably reflect a mixture of consumer empowerment and consumer citizenship ideologies. Thaler and Sunstein describe their libertarian paternalistic suggestions as framing consumers’ choice architecture more appropriately for their capacities and needs, but this paternalism nevertheless seeks to deliver on certain welfare benefits for consumers where they are unable to navigate the architecture themselves.<sup>55</sup>

In sum, this Part discusses protecting consumers’ ability to have meaningful choice when making decisions, a key priority in consumer protection across sectors. Regulatory tools adopted across sectors include market participation and access, pre-sale “equipping” and removal of impediments or harm, empowerment in terms of post-sale redress to re-open the question of choice, and even positive nudging towards optimal choices. In Figure 1, we construct the first part of our taxonomy, mapping the regulatory designs and tools that are intended to protect consumers’ optimal choice and choice capacity at different levels.

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<sup>52</sup> This is exemplified by, for example, default enrolments in occupational pensions schemes or the mandatory automatic enrolment under the United Kingdom’s Pensions Act 2008. Pensions Act 2008, c. 30 (UK).

<sup>53</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 107-17 (2009).

<sup>54</sup> Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1184-85 (2003).

<sup>55</sup> THALER & SUNSTEIN, *supra* note 53, at 107-17.

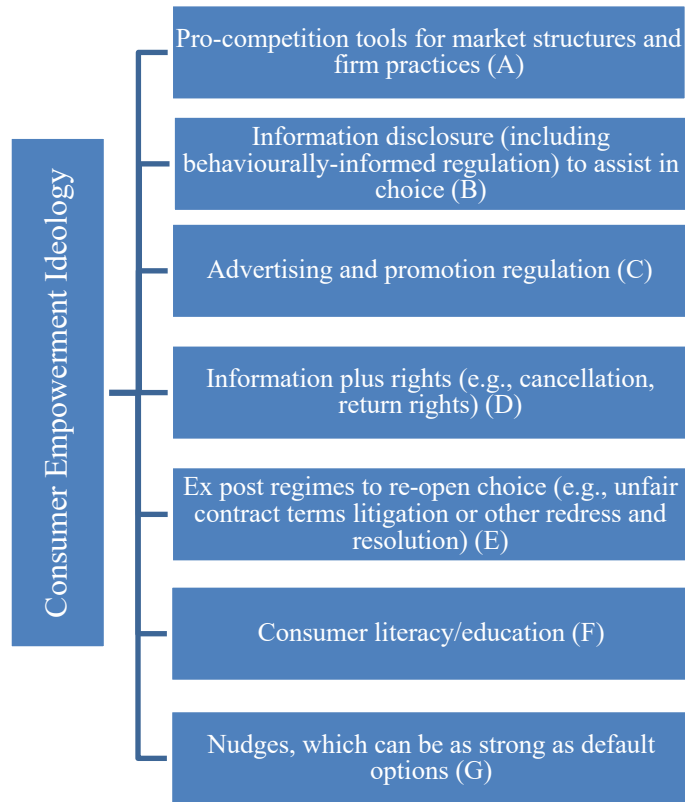


Figure 1: The Taxonomy of Consumer Protection Designs/Tools Shaped by the Consumer Empowerment Ideology

*B. Consumer Citizenship and Shaping Regulatory Designs/Tools*

Next, we survey the consumer protection levels that are not focused on protecting meaningful choice at the pre-contractual stage, but on protecting consumers’ expectations to be treated decently as market citizens or to be treated in relation to consumption outcomes. It is argued that consumers submit to the market structures and offerings in markets to meet their welfare needs,<sup>56</sup> and in this way, we argue that these market systems become places of “economic citizenship” for consumers, who therefore can have reasonable expectations of being treated in a citizenly manner in markets. Consumer protection, viewed through this lens, should therefore include matters such as the social

<sup>56</sup> Bourgoignie, *supra* note 34, at 298-300.

treatment of consumers, whether their welfare needs are met, and what distributive outcomes they experience. Hence, regulation could provide for “rights-based” expectations for consumers,<sup>57</sup> as well as duties (usually legal or formal) on the part of product or service providers. These protection levels are generally consistent with the “consumer citizenship” framing of consumers as socio-economic actors that are subject to economic and market structures.

For example, rights to access certain products or services that are regarded as staple or essential would be consistent with the citizenship ideology. There is a patchwork of basic rights to access to, for example, telecommunications, postal, or energy “connections.” Electricity providers must connect consumers to electricity supply upon request,<sup>58</sup> but they are not necessarily obligated not to disconnect their supply.<sup>59</sup> The EU Universal Services Directive provided individuals a right to be connected to a fixed telephone line, to access directory enquiry services, and to access public pay phones.<sup>60</sup> However, as discussed in the sectoral reviews below, this patchwork of rights does not appear holistic, and financial services cannot be divided between near-essential services and optional ones. Regulators also seem slow to recognize newer forms of mass-market needs, such as for internet and mobile services.

Where duties are imposed on product or service providers to conduct business with consumers in certain ways,<sup>61</sup> such duties can be regarded as giving rise to consumer rights. These duties are often important to rebalance the principal-agent relationship<sup>62</sup> such as in

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<sup>57</sup> See generally Monika Jagielska & Mariusz Jagielski, *Are Consumer Rights Human Rights?*, in *EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE* 336 (Mel Kenny & James Devenney eds., 2012) (discussing a rights-based framing for consumers’ rights but acknowledging the limited avenues for enforcement under public and private law).

<sup>58</sup> Electricity Act 1989, c. 29, § 16(1) (UK), <https://www.legislation.gov.uk/ukpga/1989/29/contents> [<https://perma.cc/U7T3-37JR>].

<sup>59</sup> *Id.* § 2, sch. 6.

<sup>60</sup> Directive 2002/22/EC, of the European Parliament and of the Council of 7 March 2002 on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services (Universal Service Directive), arts. 4-6, 2002 O.J. (L 108) 51, 59-60 (repealed in 2020).

<sup>61</sup> See Financial Services and Markets Act 2000, c. 8, § 138D (UK) (providing a right of private action for breaches of regulatory duties, but only for “private persons”).

<sup>62</sup> Alessio M. Paces, *Financial Intermediation in the Securities Markets Law and Economics of Conduct of Business Regulation*, 20 INT’L REV. L. & ECON. 479, 481-86 (2000) (describing how financial intermediaries “bridge the gap” for investors).



consumers' relationships with their financial service intermediary, where providers wield informational and bargaining power over consumers. Such duties either relate to processes of engagement with consumers or outcomes that consumers should expect. The former pertain to how consumers are treated in market participation processes, including pre- and post-sale situations, while the latter pertain to the welfare outcomes that consumers obtain. Duties imposed on product or service providers to conduct their business with consumers in a fair and honest manner<sup>63</sup> are process-based in nature, meaning that they deal with the way the sale is conducted rather than the outcomes of the product or service sold. At the pre-sale stage, these duties may include managing or disclosing conflicts of interest,<sup>64</sup> clarifying the quality of product or level of service provided, clarifying price breakdowns and avoiding hidden charges,<sup>65</sup> and refraining from unfair discrimination.<sup>66</sup> General legal duties of fairness,<sup>67</sup> good faith,<sup>68</sup> or acting in the best interests of consumers may also be open-ended,<sup>69</sup> but they provide opportunities for consumers to clarify their individual protection levels if they choose to challenge provider conduct.

In relation to the post-sale stage, duties may include reasonable expectations of effective customer service, especially for ongoing services,<sup>70</sup> and protection of consumers' privacy and data.<sup>71</sup> Indeed, the regulatory policies that support removal of impediments to "switching"<sup>72</sup> are also rooted in empowerment and citizenship ideologies.

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<sup>63</sup> See *United Nations Guidelines for Consumer Protection*, *supra* note 23, at 9 (arguably overlapping with pre-sale disclosure duties that are generally regarded as pursuant to consumer empowerment and informed choice).

<sup>64</sup> See Directive 2014/65/EU, *supra* note 4, art. 23 (on managing conflicts of interest in investment services).

<sup>65</sup> *United Nations Guidelines for Consumer Protection*, *supra* note 23, at 9.

<sup>66</sup> See Jackson & Rothstein, *supra* note 28, at 288-89 (discussing in relation to U.S. credit and rental markets). The United Kingdom's cross-cutting Equality Act 2010 arguably prohibits discrimination whether in relation to public or commercial service provision, as well as in work or education, discrimination based on one or more of the nine protected characteristics. *Id.*

<sup>67</sup> See, e.g., Council Directive 93/13/EEC, *supra* note 24, art. 3 (relating to "fair terms" in consumer contracts protections).

<sup>68</sup> See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 *MOD. L. REV.* 11, 11 (1998).

<sup>69</sup> See, e.g., Directive 2014/65/EU, *supra* note 4, art. 24.

<sup>70</sup> See *United Nations Guidelines for Consumer Protection*, *supra* note 23, at 10 (relating to complaints-handling).

<sup>71</sup> See *id.* at 11.

<sup>72</sup> See, e.g., *Access to and Use of Energy Services*, *supra* note 44; *Switch Supplier or Energy Tariff*, *supra* note 44 (in relation to utilities switching in the EU and

Next, consumer protection levels can also be provided in relation to expectations of certain welfare outcomes. For example, product or service bans or prohibitions<sup>73</sup> can be introduced by regulatory fiat to prevent consumers from being harmed. Such regulatory policy aims to prevent negative outcomes. These can be regarded as paternalistic in relation to the reduction in choice<sup>74</sup> available to consumers, but evidence-based approaches could support regulators' decisions to implement product or service prohibitions.<sup>75</sup> To a lesser extent, welfare-based regulation can include product or service restrictions,<sup>76</sup> such as compelling providers to introduce fewer and "plain vanilla" ranges of products or services with fewer price ranges,<sup>77</sup> in order to avert the consumer harm of having "too much choice," which obfuscates optimal decision-making.<sup>78</sup>

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United Kingdom); *How to Open, Switch or Close Your Bank Account*, *supra* note 44 (bank account switching in the United Kingdom).

<sup>73</sup> *E.g.*, Jason Scott Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundations of Dodd-Frank Mortgage Regulation*, 23 GEO. MASON L. REV. 617, 637-43 (2016) (discussing the U.S. Consumer Financial Protection Bureau's work in paternalistic interventions); *see* WEATHERILL, *supra* note 25, at 216-53 (stating that bans can be calibrated more specifically in relation to vulnerable or unsophisticated consumers).

<sup>74</sup> Todd J. Zywicki, *Market-Reinforcing Versus Market-Replacing Consumer Finance Regulation*, in REFRAMING FINANCIAL REGULATION: ENHANCING STABILITY AND PROTECTING CONSUMERS 319, 320 (Hester Peirce & Benjamin Klutsey eds., 2016).

<sup>75</sup> FIN. CONDUCT AUTH., PRODUCT INTERVENTION AND PRODUCT GOVERNANCE SOURCEBOOK (PROD), at PROD 2/6 (2023), <https://www.handbook.fca.org.uk/handbook/PROD.pdf> [<https://perma.cc/FR7T-Y87T>] (The FCA is subject to an evidence basis for introducing "product intervention," including product bans.).

<sup>76</sup> *See* FIN. CONDUCT AUTH., CONSUMER CREDIT SOURCEBOOK, at CONC 5A/4-5A/8 (2023), <https://www.handbook.fca.org.uk/handbook/CONC.pdf> [<https://perma.cc/T3K6-C7TD>]; John Y. Campbell, Howell E. Jackson, Brigitte C. Madrian & Peter Tufano, *Consumer Financial Protection*, 25 J. ECON. PERSP. 91, 99 (2011) (on the use of standard mortgages to help consumers avoid the pitfalls of unrestrained market choice in adjustable-rate mortgages); Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards*, 130 Q.J. ECON. 111, 162 (2015) (on the CARD Act's restrictions on charges which were found to be welfare improving for borrowers).

<sup>77</sup> *E.g.*, SERGEANT REVIEW OF SIMPLE FINANCIAL PRODUCTS: FINAL REPORT 9 (2013), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/191721/sergeant\\_review\\_simple\\_products\\_final\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191721/sergeant_review_simple_products_final_report.pdf) [<https://perma.cc/D96B-JRES>] (discussing benefits of simple financial products).

<sup>78</sup> *Id.* at 4-5, ¶ 1.9.

Other welfare-based regulatory policy may seek to impose strict or near-strict liability<sup>79</sup> on providers of goods or services in relation to their ability to meet reasonably expected quality standards. Legislative protection of such expectations, in, for example, the EU Product Liability Directive, reflects a paradigm of social contract between consumers and producers. This standard safeguards the reasonable social expectation of welfare outcomes and is usually supported by regulation that prescribes or governs quality standards,<sup>80</sup> either directly or by reference to authorised and supervised industrial or technological developments.<sup>81</sup> Liability allocation regulations also distribute risk<sup>82</sup> so that consumers generally do not need to bear certain risks that may be beyond their control or capacity.<sup>83</sup> Performance guarantee regulations,<sup>84</sup> which are also part of the regulatory toolbox for securing welfare outcomes, mandate certain reasonably accepted positive outcomes for consumers.<sup>85</sup> For example, mandatory guarantees of

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<sup>79</sup> See, e.g., Council Directive 85/374/EEC, of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, arts. 1, 6, 8, 1985 O.J. (L 210) 29 (product liability for goods in the EU) [hereinafter Council Directive 85/374/EEC].

<sup>80</sup> See, e.g., Consumer Rights Act 2015, c. 15, §§ 9-11 (UK) (goods to be of satisfactory quality, as described and fit for purpose); *id.* §§ 34-36 (the equivalent duties for digital content); see also Directive (EU) 2019/771, of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods, Amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, art. 7, 2019 O.J. (L 136) 28, 41-42 [hereinafter Directive (EU) 2019/771] (enacting similar quality obligations for sale of consumer goods within the European Union).

<sup>81</sup> See, e.g., *Guidance: CE Marking*, GOV.UK, <https://www.gov.uk/guidance/ce-marking> [<https://perma.cc/A52Q-8HN6>] (Aug. 1, 2023) (discussing the need for CE marking under precise EU Directives relating to various products—the mark being evidence of having been inspected and passed technical requirements relating to qualities such as health and safety, overseen and approved under regulation); Directive 2009/48/EC, of the European Parliament and of the Council of 18 June 2009 on the Safety of Toys, art. 16, 2019 O.J. (L 170) 10-11 (EU) [hereinafter Directive 2009/48/EC].

<sup>82</sup> Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 64 (2006) (as an example of risk warnings that need to be made however small the risks were).

<sup>83</sup> See, e.g., Directive (EU) 2015/2366, of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing Directive 2007/64/EC, art. 74, O.J. (L 337) 96-97 [hereinafter Directive (EU) 2015/2366].

<sup>84</sup> See Directive (EU) 2019/771, *supra* note 80, art. 10 (product warranty for a minimum of two years in the EU).

<sup>85</sup> Examples of reasonably accepted outcomes for consumers are a well-functioning product or guaranteed remedy within two years. *Id.*

product quality for a reasonable length of time can set a minimum threshold<sup>86</sup> for the extent of consumer loss, therefore playing a distributive role in terms of consumers' and producers' exposures to risk and responsibility. Finally, regulations that provide special protections for vulnerable consumers or disadvantaged consumers also reflect cognisance that such citizens are susceptible to being exploited in marketised processes<sup>87</sup> or suffering unfavourable welfare outcomes.<sup>88</sup>

At a broader level, consumer protection relates not only to individual transactions but to the collective interests of consumers as market citizens.<sup>89</sup> Initiatives supporting consumers' political representation as a group is consistent with a citizenship ideology that supports consumers' collective voice to be heard in policy processes. This is affirmed at the treaty level in the European Union<sup>90</sup> and the United Kingdom.<sup>91</sup> Consumer groups are therefore *politically* treated as

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<sup>86</sup> See Directive (EU) 2015/2366, *supra* note 83, art. 74; see generally *FSCS Protects You When Financial Firms Fail*, FIN. SERVS. COMP. SCHEME, <https://www.fscs.org.uk/> [<https://perma.cc/2ZF8-FKAJ>] (last visited June 4, 2023). The Financial Services Compensation Scheme is for bank depositors and users of insurance and investment firm services facing insolvency. The financial services compensation guarantee is set at £100,000.

<sup>87</sup> FIN. CONDUCT AUTH., FINALISED GUIDANCE: FG21/1 GUIDANCE FOR FIRMS ON THE FAIR TREATMENT OF VULNERABLE CUSTOMERS 9 (2021), <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf> [<https://perma.cc/ECB9-U6LL>] (recognising in the FCA's issuance of guidance for financial firms dealing with "vulnerable consumers," but vulnerability is defined only in relation to physical and mental health, change of life circumstances, low resilience or capability). *But see* Peter Cartwright, *Understanding and Protecting Vulnerable Financial Consumers*, 38 J. CONSUMER POL'Y 119, 123 (2015); Abdul Karim Aldohni, *Loan Sharks v. Short-Term Lenders: How Do the Law and Regulators Draw the Line?*, 40 J.L. & SOC'Y 420, 429 (2013) (on exploitative practices in payday lending).

<sup>88</sup> See, e.g., Directive 2009/48/EC, *supra* note 81, annex II (imposing safety standards upon toys marketed in the EU from the perspective of safety to children, therefore bearing in mind the possible behavioural weaknesses of children).

<sup>89</sup> Reich, *supra* note 47, at 277-78 (although recognising consumers' micro-heterogenous preferences).

<sup>90</sup> Consolidated Version of Treaty on the Functioning of the European Union art. 169, June 7, 2016, O.J. (C 202) 124 [hereinafter TFEU].

<sup>91</sup> See, e.g., *Financial Services Consumer Panel*, INDEP. STATUTORY PANELS, <https://www.fs-cp.org.uk/> [<https://perma.cc/7RCZ-847S>] (last visited June 4, 2023) (the Consumer Panel that the FCA must consult); *2021-22 Stakeholder Engagement and Consumer Vulnerability Incentive Panel Report*, OFGEM (Sept. 30, 2022), <https://www.ofgem.gov.uk/publications/2021-22-stakeholder-engagement-and-consumer-vulnerability-incentive-panel-report> [<https://perma.cc/SE99-XHJ2>] (the U.K. Ofgem Stakeholder Engagement (and Consumer Vulnerability) Panel); *Communications Consumer Panel (CCP)*, OFCOM, <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/committees/communications-consumer-panel>

stakeholders in policy development and can positively affect policy directions.<sup>92</sup>

Figure 2 below presents the second part of our taxonomy of consumer protection levels in regulatory tools that are consonant with the consumer citizenship ideology.

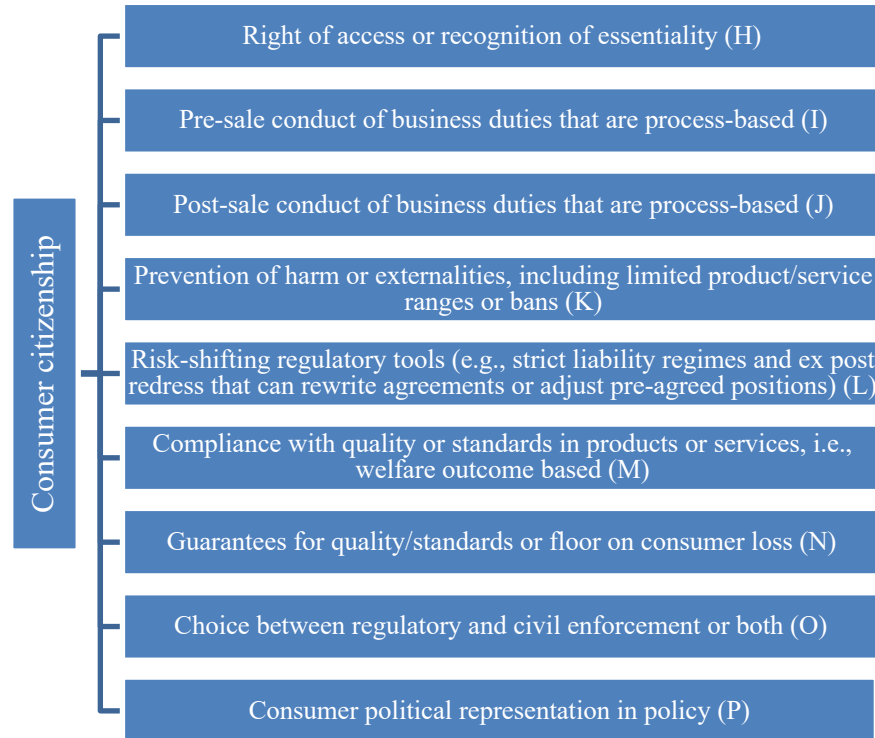


Figure 2: The Taxonomy of Consumer Protection Designs/Tools Shaped by the Consumer Citizenship Ideology

[<https://perma.cc/J4ZQ-XLD3>] (last visited June 4, 2023) (the U.K. Ofcom Communications Consumer Panel).

<sup>92</sup> Lisa Kastner, *From Outsiders to Insiders: A Civil Society Perspective on EU Financial Reforms*, 57 J. COMMON MKT. STUD. 223, 236 (2019) [hereinafter Kastner, *From Outsiders to Insiders*] (discussing nuanced success by consumer groups in European financial consumer law reforms); Lisa Kastner, *Tracing Policy Influence of Diffuse Interests: The Post-Crisis Consumer Finance Protection Politics in the US*, 13 J. CIV. SOC'Y 130, 142-43 (2017) (discussing the involvement of consumer groups in U.S. law reforms).

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

Although we broadly classify a range of consumer protection levels under two ideological umbrellas, the ideological principles are not binary in nature and often interact with each other. Hans Micklitz argues that consumer protection developments, especially across EU legislation, are primarily intended to support confidence in market participation.<sup>93</sup> However, empowerment ideologies can contribute to citizen welfare expectations,<sup>94</sup> and the latter does not mean restriction of choice. The embrace of both sets of ideologies and their interacting nature is reflected in both the European Union's treaty provision on consumer policy as well as the United Nations' Guidelines for Consumer Protection ("UN Guidelines").

Article 169 of the Treaty on the Functioning of the European Union ("TFEU") provides for the recognition of consumer policy as being in the interest of consumers' welfare, such as health, safety, and economic interests.<sup>95</sup> The TFEU frames consumer empowerment as consisting of fundamental rights to information and education and it recognises consumers' citizenly rights to political organisation. The UN Guidelines aim to protect consumers' economic interests and rights, which are framed in terms of "access to non-hazardous products" and "just, equitable and sustainable economic and social development and environmental protection," which resonate with welfare-related and substantive outcomes.<sup>96</sup> The Guidelines address consumer protection from unfair dealing and harmful outcomes, and welfare protections such as national standards for product safety and quality. The need to embrace both sets of ideological principles is therefore clear. Our full taxonomy of consumer protection levels integrates Figures 1 and 2 above and is represented in Figure 3 below.

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<sup>93</sup> Hans-W. Micklitz, *European Consumer Law*, in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 526, 537 (Erik Jones, Anand Menon & Stephen Weatherill eds., 2012) (on consumers becoming efficient shoppers and switchers).

<sup>94</sup> *Id.* (on consumers gaining welfare through market participation).

<sup>95</sup> TFEU, *supra* note 90, art. 169.

<sup>96</sup> *United Nations Guidelines for Consumer Protection*, *supra* note 23, at 6.

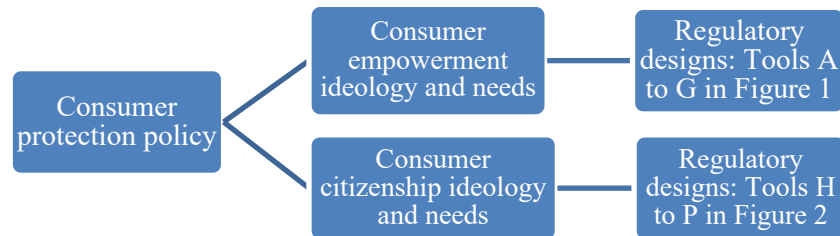


Figure 3: *The Ideologically Based Taxonomy for Consumer Protection Policy*

### C. Sectoral Reviews and the Taxonomy

In this Section we unpack how the sectoral reviews we conducted are reflected in the taxonomy above. This Part contextualizes the financial sector discussion in Section B.

#### i. Protection of Consumer Choice

First, as many consumer issues are cross-sectoral in nature,<sup>97</sup> we observe that in the marketised economies in the West, regulatory designs or tools reflecting the consumer empowerment ideology are cross-sectorally similar. The prevalence of such consumer empowerment regulatory designs is reflected in “essential” services sectors such as telecommunications markets in the United Kingdom.<sup>98</sup> Such regulatory designs and tools facilitate consumers’ exercise of choice through pre-sale disclosure regulation<sup>99</sup> and removal of impediments

<sup>97</sup> Peter Rott & Chris Willett, *Consumers and Services of General Interest*, in HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 267, 271-72 (Geraint Howells, Iain Ramsay & Thomas Wilhelmsson eds., 2d ed. 2018) (on conceptualising similar consumer concerns across services of general interest).

<sup>98</sup> See generally Patrick Xavier, *Consumer Information Requirements and Telecommunications Regulation*, 24 INFO. SOC’Y 342 (2008) (where consumer protections include information on price comparison and quality of service for mobile telephone services).

<sup>99</sup> Stephen Littlechild, *Promoting Competition and Protecting Customers? Regulation of the GB Retail Energy Market 2008–2016*, 55 J. REGUL. ECON. 107, 111-

to market discipline, such as inconveniences or disincentives to switch service providers.<sup>100</sup> These levels of protection are pronounced especially for sectors featuring weak consumer bargaining power for ongoing contracts that can often be subject to automatic renewals or unannounced price increases.<sup>101</sup>

Protecting consumers' ability to make informed choices does not address the more fundamental question of access to near-essential goods or services. As discussed, the duty for service providers in the United Kingdom to connect consumers to electricity services on request does not mean that there is a right not to be disconnected if consumers do not pay.<sup>102</sup> In particular, poor customers' placement on disadvantageous pre-payment energy meters and susceptibility to the termination of supplies is increasingly framed as a social justice issue.<sup>103</sup> The EU Universal Services Directive, which covers a right to landline services, does not address consumer needs for mobile and internet services. This failure to expand communication rights can be contrasted with more forceful regulation in healthcare, where access to medicines has been promoted in view of health and safety interests.<sup>104</sup>

Where food is concerned, although it is an essential good to all citizens, regulation is focused on consumer empowerment and protection from harm. Under the EU General Food Law, food that is unsafe or injurious to health shall not be available on the market.<sup>105</sup> Indeed,

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12, 120 (2019) (The U.K. Ofgem's strategy up to 2008 was focused on giving consumers better information, especially with regard to tariff information.).

<sup>100</sup> Maria Ioannidou, *Effective Paths for Consumer Empowerment and Protection in Retail Energy Markets*, 41 J. CONSUMER POL'Y 135, 136 (2018) (on encouraging consumers to switch).

<sup>101</sup> Christopher Bisping & T. J. Dodsworth, *Consumer Protection and the Regulation of Mobile Phone Contracts: A Study of Automatically Renewable Long-Term Contracts Across Jurisdictions*, 42 J. CONSUMER POL'Y 349, 363 (2019) (on the potential for scrutiny of price increases in ongoing contracts as being unfair by the relevant regulator).

<sup>102</sup> See generally Gordon Walker, *The Right to Energy: Meaning, Specification and the Politics of Definition*, 378 L'EUROPE EN FORMATION 26 (2015).

<sup>103</sup> See generally STEFAN BOUZAROVSKI, *ENERGY POVERTY: (DIS)ASSEMBLING EUROPE'S INFRASTRUCTURAL DIVIDE* 9-39 (2018).

<sup>104</sup> Kwanghyuk Yoo, *Interaction of Human Rights Law and Competition Law: The Right to Access to Medicines and Consumer Welfare in the U.S. Pharmaceutical Sector*, 43 VT. L. REV. 123, 126 (2018).

<sup>105</sup> Regulation (EC) No 178/2002, of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, art. 14, 2002 O.J. (L 31) 1, 10.



the scope of injury caused by unsafe food is broad, as it relates to long-term and cumulative effects and the Law covers the health sensitivities of particular groups of consumers.<sup>106</sup> However, food quality is regulated with consumer empowerment in mind. Some food regulation deals with integrity in claims about the benefits of food or food labels<sup>107</sup> in order to prevent consumers from being deceived. In the United Kingdom, for example, there is generally little or no paternalistic regulatory strategy in steering food consumption towards health or sustainability,<sup>108</sup> as obesity and the risk of lung cancer are not regulated paternalistically.<sup>109</sup> The “sugar tax” remains controversial<sup>110</sup> and tobacco products are not banned in the United Kingdom.<sup>111</sup>

<sup>106</sup> *Id.* art. 14(4).

<sup>107</sup> See generally Tatiana Klompenhouwer & Henk van den Belt, *Regulating Functional Foods in the European Union: Informed Choice Versus Consumer Protection?*, 16 J. AGRIC. & ENV'T ETHICS 545, 551-52 (2003) (on the draft European legislation to ensure that health claims in food are scientifically substantiated); Christopher Chen, *Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Product Information*, 47 FOOD & DRUG L.J. 185, 185, 199 (1992) (on the prevention of mis-labelling).

<sup>108</sup> See SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, POLICY PAPER: GOVERNMENT FOOD STRATEGY (2022), <https://www.gov.uk/government/publications/government-food-strategy/government-food-strategy> [<https://perma.cc/576U-GXML>] (these strategies remain “voluntary” or in partnership with the industry).

<sup>109</sup> The U.K. government introduced the Calorie Labelling (Out of Home Sector) (England) Regulations 2021, see Calorie Labelling (Out of Home Sector) (England) Regulations, 2021 No. 909, <https://www.legislation.gov.uk/uksi/2021/909/made> [<https://perma.cc/53UU-XRSL>], which imposes a duty to disclose calorie information for certain foods sold to consumers, *id.* § 5, but this is not the same as restricting access or bans which would be more paternalistic. Further, although tobacco advertising is prohibited, see Tobacco Advertising and Promotions Act 2002, c. 36, §§ 2-3, (UK), tobacco is allowed to be sold in the United Kingdom, subject to risk warnings, DEP'T OF HEALTH & SOC. CARE, TOBACCO PACKAGING GUIDANCE: GUIDANCE FOR RETAILERS, MANUFACTURERS AND DISTRIBUTORS OF TOBACCO PRODUCTS, ENFORCEMENT AGENCIES AND THE PUBLIC ON TOBACCO PACKAGING IN GREAT BRITAIN (2021), <https://assets.publishing.service.gov.uk/media/6079a6a88fa8f57356118bb2/tobacco-packaging-guidance-great-britain-april-2021.pdf> [<https://perma.cc/VEQ6-54MJ>], although the risk to lung cancer is established, see *Causes: Lung Cancer*, NHS, <https://www.nhs.uk/conditions/lung-cancer/causes/> [<https://perma.cc/R8LT-823E>] (last reviewed Nov. 1, 2022).

<sup>110</sup> Hunt Allcott, Benjamin B. Lockwood & Dmitry Taubinsky, *Should We Tax Sugar-Sweetened Beverages? An Overview of Theory and Evidence*, 33 J. ECON. PERSPS. 202, 202 (2019).

<sup>111</sup> See *supra* note 109.

*ii. Protection of Pre-Sale Antecedents*

Strong regulatory protection for consumers generally governs the pre-sale stage for goods and services, consistent with the consumer empowerment ideology. For example, general cross-cutting laws such as regulations against unfair commercial, marketing, or selling practices,<sup>112</sup> and mandatory minimum information provisions in e-commerce or distance-selling<sup>113</sup> regulate business conduct in both goods and services sectors. These regulatory tools address potentially “disempowering” distortions in the market that affect rational and informed choice, but also promote fair and honest consumer treatment and avoid exploitation, consistent with the consumer citizenship ideology. In this manner, it is arguably well-accepted by policymakers that consumer empowerment is highly intertwined with citizenly expectations for consumer treatment in the market.

Pre-sale consumer empowerment protections do not necessarily overcome structural consumer choice weaknesses. The consumer choice weaknesses in near-essential services sectors, like energy and telecommunications, are particularly prominent. Consumers are often passive and avoid the inconvenience or hassle of switching.<sup>114</sup> Hence, the exit that comes with choice of service alternatives may not be readily exercised. Further, the availability of choice in near-essential services like energy has backfired, as complex tariff structures are often not readily comprehensible and can inflict financial harm upon consumers.<sup>115</sup> The UK Ofgem, which regulates the companies that provide gas and electricity in the United Kingdom, has now intervened and mandated “simpler” tariffs.<sup>116</sup> Regulators often face a dilemma between increasing choice in the market or intervening to protect consumers from choice overload that may adversely harm their expectations of utility or outcomes.

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<sup>112</sup> Directive 2005/29/EC, *supra* note 24, arts. 5-9 (on what constitutes unfair, misleading, or aggressive commercial practices).

<sup>113</sup> Directive 97/7/EC, of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, art. 4, 1997 O.J. (L 144) 19, 22 [hereinafter Directive 97/7/EC].

<sup>114</sup> Ioannidou, *supra* note 100, at 143.

<sup>115</sup> Littlechild, *supra* note 99, at 120, 122 (on complex tariffs and adverse impact on consumers).

<sup>116</sup> Press Release, Ofgem, Simpler Energy Tariffs (Jan. 2, 2014), <https://www.ofgem.gov.uk/publications/simpler-energy-tariffs> [<https://perma.cc/JL8G-7SC7>].

*iii. Protection of Consumers' Expected Utility and Outcomes*

Consumer choice does not mean that a consumer's post-stage utility and outcomes will be fuss-free. Consumer protection levels for after-sale care, performance, and quality also play an important role. There is a cross-cutting rule in the European Union for fairness review of contractual terms for consumers that allows standardised terms and business conduct to be reviewed after the sale.<sup>117</sup> This provision arguably straddles the consumer empowerment and citizenship ideologies, as such ex-post review serves as a market failure correction mechanism for unequal bargaining power and simultaneously addresses the distribution of risk and responsibility between consumers and their providers. There is, however, no cross-cutting rule on the reviewability of sale price or consideration.<sup>118</sup>

There is more after-sales protection for consumers in relation to welfare or utility in goods sectors than in services sectors, such as in the European Union.<sup>119</sup> This difference may be due to the fact that consumers' physical or safety interests are implicated more obviously in goods sectors than in services sectors, where failure or disappointment may relate more to inconvenience or economic interests. However, the healthcare sector is an important service sector relating directly to consumers' physical safety and health interests, and consumer protection in the sector is generally characterized as paternalistic, although there is increasing recognition of consumer choice in healthcare.<sup>120</sup> Paternalistic aspects of healthcare regulation include regulatory overriding of adverse patient choices<sup>121</sup> and framing

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<sup>117</sup> Council Directive 93/13/EEC, *supra* note 24, art. 3; *see also* Consumer Rights Act 2015, c. 15, § 62 (UK), <https://www.legislation.gov.uk/ukpga/2015/15/section/62/enacted> [<https://perma.cc/5XK6-HKB8>].

<sup>118</sup> Consumer Rights Act 2015, c. 15, § 64 (UK).

<sup>119</sup> *Cf.* Consumer Rights Act 2015, c. 15 (UK) (for the purposes of “goods,” electricity and water are regarded as “tangible moveable items” in the Consumer Rights Act 2015).

<sup>120</sup> Julie Donohue, *A History of Drug Advertising: The Evolving Roles of Consumers and Consumer Protection*, 84 MILBANK Q. 659, 661 (2006); James C. Robinson, *Reinvention of Health Insurance in the Consumer Era*, 291 J. AM. MED. ASS'N 1880, 1881 (2004).

<sup>121</sup> *See* Bård Hobæk & Anne Kveim Lie, *Less Is More: Norwegian Drug Regulation, Antibiotic Policy, and the “Need Clause”*, 97 MILBANK Q. 762, 763 (2019) (discussing limits on access to prescription drugs); *see also* R (Burke) v. Gen. Med. Council [2005] EWCA (Civ) 1003 (Eng.).

patients' rights<sup>122</sup> as part of a "rights" category that is founded in expected physician duties and conduct.<sup>123</sup> Arguably, healthcare is a unique services sector and this level of paternalism is justified because it generates trustful and reliant relationships in a field of persistent expertise asymmetry<sup>124</sup> between healthcare professionals and patients. This paradigm is not equally observed in other sectors.

Physical and safety interests are protected by ex-ante requirements for safety, such as in general product safety regulation and toy safety manufacturing regulation in the European Union, represented by the mandatory "CE" marking.<sup>125</sup> Ex-ante drug approval is arguably the most stringent form of pre-market public sector authorisation and vetting.<sup>126</sup> Ex-ante regulatory protection also includes pre-emptive recall actions in view of safety risk in food, toys, or other products. Consumer protection levels are geared towards harm prevention, as far as possible, and they are calibrated according to the importance of physical health and safety interests, which are often distinctively supported by consumer protection objectives, such as in the TFEU<sup>127</sup> or the UN Guidelines.<sup>128</sup>

The performance or quality of goods post-sale is regulated in terms of protecting consumers' expected utility outcomes.<sup>129</sup> Where

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<sup>122</sup> ALEX MOLD, MAKING THE PATIENT-CONSUMER: PATIENT ORGANISATIONS AND HEALTH CONSUMERISM IN BRITAIN 95 (2015) (including also rights of access to records and right to complain).

<sup>123</sup> Wendy K. Mariner, *Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care*, 15 J. CONTEMP. HEALTH L. & POL'Y 1, 11 (1998).

<sup>124</sup> *Id.*

<sup>125</sup> The CE marking shows that the manufacturer has checked that these products meet EU safety, health, and environmental requirements and is an indicator of a product's compliance with EU legislation. See Directive 2009/48/EC, *supra* note 81, arts. 4(2), 16. Also see the United Kingdom's guidance on implementing the CE marking more generally across a variety of products. *Guidance: CE Marking*, *supra* note 81.

<sup>126</sup> See *Authorisation of Medicines*, EUR. MEDS. AGENCY, <https://www.ema.europa.eu/en/about-us/what-we-do/authorisation-medicines> [<https://perma.cc/8WRG-R59T>] (last visited June 4, 2023) (The European Medicine Agency in the European Union conducts the market authorisation of medicine.); see also Asif Janjua, *MHRA Process Licensing: Useful Information*, GOV.UK: BLOG (Oct. 4, 2019), <https://mhrainspectorate.blog.gov.uk/2019/10/04/mhra-process-licensing-useful-information/> [<https://perma.cc/CL65-Q79B>] (The Medicine and Healthcare Products Regulatory Agency deals with the U.K. equivalent.).

<sup>127</sup> TFEU, *supra* note 90, art. 169.

<sup>128</sup> *United Nations Guidelines for Consumer Protection*, *supra* note 23, at 14.

<sup>129</sup> See Cynthia Hawes & Christian Twigg-Flesner, *Sales and Guarantees*, in HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 172, 187 (Geraint

goods are concerned, the United Kingdom<sup>130</sup> and European Union<sup>131</sup> provide for sales of goods to meet performance standards in relation to fitness for purpose and their purported quality. The United Kingdom adopts a “satisfactory quality” standard for goods and digital content while the European Union mandates that goods sold must be sufficiently durable, secure, compatible with ordinary expected use, and functional, as well as complete with necessary installation and accessories.<sup>132</sup> Further, the European Union mandates that manufacturers provide a minimum guarantee of goods’ performance for at least two years.<sup>133</sup> In this manner, we see that the mandatory warranty period of two years as providing a reasonable time for satisfying consumers’ expected utility or performance of the good. Ex-post product liability also secures consumer protection through remedies for harm. Product harm is usually actionable as a matter of strict liability.<sup>134</sup> A strict liability standard may have a deterrent effect, since it incentivizes high and protective standards in manufacture and design, as well as a remedial effect for injured consumers. The definition of “defect” could however be subject to interpretation in the courts such as in U.S. litigation.<sup>135</sup> Overall, consumers are well-protected in relation to the benefits of products outweighing their risks, and manufacturers are often mandated to inform consumers of risks, especially to life and health, without delay even after products have been released into the market.<sup>136</sup>

Consumer protection regulation for after-sales performance and quality in the services sector is—arguably endemically—weaker than

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Howells, Iain Ramsay & Thomas Wilhelmsson eds., 2d ed. 2018) (discussing the guarantee or warranty for consumers’ benefit).

<sup>130</sup> Consumer Rights Act 2015, c. 15, §§ 9-11 (UK).

<sup>131</sup> Directive (EU) 2019/771, *supra* note 80, arts. 6, 7 (on fitness for purpose and conformity with description).

<sup>132</sup> *See id.* art. 7.

<sup>133</sup> *See id.* art. 10.

<sup>134</sup> Council Directive 85/374/EEC, *supra* note 79, arts. 1, 4, 6, 7 (product liability for goods in the European Union).

<sup>135</sup> *See* Geraint Howells & David G. Owen, *Products Liability Law in America and Europe*, in HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 202, 210-12 (Geraint Howells, Iain Ramsay & Thomas Wilhelmsson eds., 2d ed. 2018) (on how U.S. courts took a risk-utility test to determine if the hazards of a product are indeed defective).

<sup>136</sup> Stefan Lenze, *German Product Liability Law: Between European Directives, American Restatements and Common Sense*, in PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE 100, 112-13, 118 (Duncan Fairgrieve ed., 2005) (on balancing risks and benefits to consumers and information duties).

goods sectors,<sup>137</sup> subject to some specific interventions. In England and Wales, consumers of service contracts are entitled to a fair and reasonable standard of care and skill from the service provider.<sup>138</sup> In comparison to goods, performance standards for services are judged by what is reasonable for the provider rather than consumers' reasonable expectations for utility. This means that consumer protection levels are calibrated with less certainty for expected outcomes or utility in the provision of services than in goods, as consumers have to prove negligence in service provision.<sup>139</sup> Quality of goods is enforced by strict liability for defects or a mandatory performance guarantee for at least two years.

There are examples of precise regulatory interventions that have been introduced for certain service performance standards, however. For example, the EU Postal Services Directive provides for postal services as a service with universal right to access, and a guarantee of one postal clearance and delivery to every home every working day.<sup>140</sup> The EU Packaged Holidays Directive also prohibits providers' arbitrary changes to agreed travel package itineraries.<sup>141</sup> Regulated sectors like energy and telecommunications are subject to regulators' prescribed standards, which govern supply continuity and restoration.<sup>142</sup> Such performance standards are, in our view, precise and sector-specific. Aviation regulations provide for ex-post performance standards

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<sup>137</sup> Rott & Willett, *supra* note 97, at 293 (dealing with the standards to which provided services are subject and discussing higher standards of quality for services beyond the normal "reasonable care" standard if such services are mass-supplied, more like goods).

<sup>138</sup> Consumer Rights Act 2015, c. 15, § 49 (UK).

<sup>139</sup> *See generally* GERAINT HOWELLS & STEPHEN WEATHERILL, *CONSUMER PROTECTION LAW* 213-60 (2d ed. 2017).

<sup>140</sup> Directive 97/67/EC, of the European Parliament and of the Council of 15 December 1997 on Common Rules for the Development of the Internal Market of Community Postal Services and the Improvement of Quality of Service, art. 3, 1998 O.J. (L 15) 14, 19.

<sup>141</sup> Directive (EU) 2015/2302, of the European Parliament and of the Council of 25 November 2015 on Package Travel and Linked Travel Arrangements, Amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and Repealing Council Directive 90/314/EEC, arts. 6, 7, 2015 O.J. (L 326), 1, 13-14.

<sup>142</sup> *See, e.g., Quality of Service Guaranteed Standards*, OFGEM, <https://www.ofgem.gov.uk/energy-policy-and-regulation/Publications-by-licence-and-licensee/industry-codes-and-standards/standards/quality-service-guaranteed-standards> [<https://perma.cc/UZU3-GJ2V>] (last visited June 4, 2023); *see also* Elizabeth Newman, *Consumer Protection and Telecommunications*, in *TELECOMMUNICATIONS LAW AND REGULATION* 491, 497 (Ian Walden ed., 5th ed. 2018).

instead of ex-ante ones. For example, where air travel passengers' flights are delayed over three hours, they are entitled to reasonable food, lodging care, and expenses.<sup>143</sup> These precise performance standards reflect the underlying social contract, where regulation protects consumer expectations for specific outcomes. Arguably, however, other outcomes or expected utility—such as certain levels of comfort in aviation travel or certain levels of convenience or quiet in a hotel provided in a package holiday—may not be so precisely protected by regulation and may need to be the subject of more general contractual litigation.

*iv. Protection of Consumers' Economic Interests*

Further, consumer protection seldom intervenes into questions of value or price.<sup>144</sup> This relates to consumer protection in terms of their economic interests. Economic interests can be framed in terms of either (1) "value for money"<sup>145</sup> or (2) distributive outcomes and economic welfare.<sup>146</sup> The former relates more to a consumer empowerment ideology wherein the consumer is able to purchase an economically optimal good or service. The latter is broader in scope

<sup>143</sup> Martine De Serres, *Consumer Protection*, in ROUTLEDGE HANDBOOK OF PUBLIC AVIATION LAW 330, 334 (Paul Stephen Dempsey & Ram S. Jakhu eds., 1st ed. 2016); Erika Maurice & Vincent C. Lesch III, *Recent Developments in Aviation Litigation: Consumer Protection Using European Union Regulations*, 16 MASS TORTS 11 (2018); Laura Pierallini, *Regulation 261/2004 – Passengers' Right to Compensation in Case of Flight Delay. Looking for a Fair Balance of Interests. The Role of the Court of Justice of the EU and the Risk to Waste a Chance for Reform*, in FROM LOWLANDS TO HIGH SKIES: A MULTILEVEL JURISDICTIONAL APPROACH TOWARDS AIR LAW 117, 118-20 (2013); Magdalena Kučko, *The Right to Double Compensation Where the Re-Routed Flight Suffers a Long Delay – Upholding High Standards of EU Consumer Protection*, 28 MAASTRICHT J. EUR. & COMPAR. L. 143, 144-45 (2021) (discussing the European court's clarification of these rights).

<sup>144</sup> See, e.g., Consumer Rights Act 2015, c. 15, § 64 (UK); see also Directive 98/6/EC, of the European Parliament and of the Council of 16 February 1998 on Consumer Protection in the Indication of the Prices of Products Offered to Consumers, art. 5, 1998 O.J. (L 80) 27, 29 (governing conduct of price discounting in order to prevent misleading impressions, amended in 2019/2161).

<sup>145</sup> Such as emphasised by the U.K. FCA in its Consumer Duty. See FIN. CONDUCT AUTH., FINALISED GUIDANCE: FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY 57-58, ¶¶ 7.9-7.21 (2022) [hereinafter FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY], <https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf> [<https://perma.cc/G4TB-V939>] (on assessment of fair value for consumers).

<sup>146</sup> Where, for example, a regulator imposes or caps certain prices to protect consumers from financial detriment. This is discussed below in relation to price caps on roaming charges for mobile phone services and limits to credit card interchange fees.

and involves ex-post adjustment of welfare outcomes so that consumers' distributive interests are met.

Competitive pricing is a feature of an optimally working market in a capitalist economy. Hence, competition regulation plays a significant role in markets for services especially where providers may exert dominance or where market structures and prices disadvantage consumers.<sup>147</sup> Paternalistic interventions into price can limit market workings and innovations. Longstanding evidence of abusive market practices, however, underpin two examples of such regulatory intervention in the European Union—namely, the limitation of credit card interchange fees that are normally passed onto consumers<sup>148</sup> and the price cap on mobile roaming charges.<sup>149</sup> These measures are viewed as addressing market failure rather than focusing on redistribution, since persistent oligopolies in these markets handicap the operation of competitive forces. However, the United Kingdom's "energy price cap"<sup>150</sup> may be viewed as an unusual distributive measure to ensure affordable access to energy, which has further culminated into a stronger price guarantee<sup>151</sup> in light of the extraordinary energy price inflation since the outbreak of war in Ukraine.

*v. Distributive Dimension of Consumers' Economic Interests*

Consumers' distributive interests are generally protected by ex-post redress carried out individually. Such consumer protection is, however, conditioned on access to justice, or out-of-court dispute resolution mechanisms that provide an efficient remedial avenue to

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<sup>147</sup> See Littlechild, *supra* note 99, at 108-09 (discussing the Ofgem response to the energy market after privatisation and liberalisation).

<sup>148</sup> Regulation (EU) 2015/751, of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions, art. 3, 2015 O.J. (L 123) 1, 10-11.

<sup>149</sup> Andreas Bartels, Doru Alexandru Pleșea, Michael Studeny & Vanessa Just, *The Interdependence of Competition Policy, Consumer Policy and Regulation in Introducing and Safeguarding Effective Competition in the EU Telecommunications Market*, 19 AMFITEATRU ECON. J. 367, 376 (2017).

<sup>150</sup> See Littlechild, *supra* note 99 (discussing the cap, which is reviewed and set quarterly by Ofgem, based on the Competition and Markets Authority's review of the energy sector); see also Simone Pront-van Bommel, *A Reasonable Price for Electricity*, 39 J. CONSUMER POL'Y 141, 146 (2016).

<sup>151</sup> See *Energy Price Cap*, OFGEM, <https://www.ofgem.gov.uk/information-consumers/energy-advice-households/check-if-energy-price-cap-affects-you> [<https://perma.cc/9HZT-8HGZ>] (last visited June 4, 2023) (explaining energy price cap).



consumers.<sup>152</sup> In regulated sectors, out-of-court Ombudsman services such as the energy, communications, or financial Ombudsmen offices in the United Kingdom,<sup>153</sup> provide fora that help realise consumer protection in distributive ways. However, in general sectors, redress provision is relatively weaker<sup>154</sup> as complaint handling can be delegated to firms<sup>155</sup> or left to private civil redress.

*vi. Mixed Empowerment and Citizenly Protections for Online Consumers*

Finally, consumer contracts for e-commerce goods or services raise unique protection issues.<sup>156</sup> The dominant consumer protection paradigm relates to empowerment and choice, reflected in comprehensive information provision at the pre-contractual stage.<sup>157</sup> However, informed choice is limited in faceless and borderless transactions where consumers take on higher post-sale risks. The right of post-sale withdrawal has thus become an important feature of consumer protection.<sup>158</sup> The right to withdraw is consistent with the empowerment

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<sup>152</sup> The European Union believes in the efficacy of out-of-court dispute resolution for consumers. See *Out-of-Court Procedures for Consumers*, YOUR EUR., [https://europa.eu/youreurope/citizens/consumers/consumers-dispute-resolution/out-of-court-procedures/index\\_en.htm](https://europa.eu/youreurope/citizens/consumers/consumers-dispute-resolution/out-of-court-procedures/index_en.htm) [<https://perma.cc/PHN6-XAUH>] (June 8, 2023).

<sup>153</sup> See, e.g., *How We Can Help*, ENERGY OMBUDSMAN, <https://www.ombudsman-services.org/sectors/energy> [<https://perma.cc/2M66-2K97>] (last visited June 4, 2023); see also *How We Can Help You*, COMMC'NS OMBUDSMAN, <https://www.ombudsman-services.org/sectors/communications> [<https://perma.cc/2K66-PYQG>] (last visited June 4, 2023).

<sup>154</sup> Cf. Regulation (EU) 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), arts. 20-21, O.J. (L 277) 1, 53-56 [hereinafter Regulation (EU) 2022/2065] (There is no cross-cutting mandatory complaints handling or out-of-court dispute resolution for sales or e-commerce, but the Digital Services Act does provide internal complaints handling and out-of-court dispute resolution for parties affected by platform providers' decisions to take down what they consider to be illegal content.).

<sup>155</sup> Cf. Directive 97/7/EC, *supra* note 113, art. 5 (not mandating complaints handling or out of court dispute settlement); Directive (EU) 2019/771, *supra* note 80, art. 19 (envisaging that consumer groups or public bodies can enforce on behalf of consumers, but this is at the volition of these bodies).

<sup>156</sup> Patrick Quirk & John A. Rothchild, *Consumer Protection and the Internet*, in *HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW* 308, 308-09 (Gerraint Howells, Iain Ramsay & Thomas Wilhelmsson eds., 2d ed. 2018).

<sup>157</sup> Directive 97/7/EC, *supra* note 113, arts. 4-5.

<sup>158</sup> Joasia A. Luzak, *To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers*, 37 J. CONSUMER POL'Y 91, 91, 108

ideology in terms of realising informed choice.<sup>159</sup> The right to withdraw also has distributive consequences for improving consumers' post-sale economic interests.

The e-commerce context also raises unique concerns in relation to consumers' data privacy, transaction security, and the rise of online harms and platform governance where multisided platforms may mediate consumer transactions in both business-consumer and consumer-consumer contexts. In this respect, regulators, particularly in the European Union, have instituted cross-cutting rules for electronic and digital commerce.<sup>160</sup> Competition law has been rejuvenated to prevent practices that impede consumer choice on digital platforms.<sup>161</sup> Significant online platforms are particularly prevented from inflicting competitive harm by being designated as gatekeepers who have obligations to provide interoperability and third-party access.<sup>162</sup> Consumer empowerment ideology continues to underpin the development of consumer protection in the online context, as regulators particularly target choice impediments and disempowerments.

These cross-cutting rules also protect consumers in relation to social and citizenly expectations, such as in relation to their personal data and information. Such protection is now framed as data subjects'

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(2014); Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law* 50 COMMON MKT. L. REV. 109, 110 (2013) (arguing that likely higher cost will be translated into price).

<sup>159</sup> Christian Twigg-Flesner, Reiner Schulze & Jonathon Watson, *Protecting Rational Choice: Information and the Right of Withdrawal*, in HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 111, 125 (Geraint Howells, Iain Ramsay & Thomas Wilhelmsson eds., 2d ed. 2018).

<sup>160</sup> See Regulation (EU) 2022/2065, *supra* note 154, art. 30.

<sup>161</sup> Regulation (EU) 2022/1925, of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 6, O.J. (L 265) 1 [hereinafter Regulation (EU) 2022/1925] (against locking consumers into certain choices or services); *see also* Regulation (EU) 2022/2065, *supra* note 154, art. 14.

<sup>162</sup> Regulation (EU) 2022/1925, *supra* note 161, arts. 5-7.

rights and data handlers' obligations.<sup>163</sup> Cybersecurity<sup>164</sup> and online harm monitoring and prevention<sup>165</sup> are regulated in relation to corporate risk management and control, and are framed more as regulatory duties and compliance for providers, reflecting a regulatory licence that is broader than just consumer protection.

Our sectoral reviews reveal many cross-cutting regulatory designs and tools that support the predominant ideology of consumer empowerment and choice, but also cater to consumers' citizenly expectations. These designs are more extensive in goods sectors, but a patchwork of citizen-oriented protections for access and rights to near-essential services and paternalistic interventions also exist in some service sectors.

Using this taxonomy, we turn to examine consumer protection levels in the financial sector and discuss if the United Kingdom's Consumer Duty makes any distinctive changes.

### III. LEVELS OF CONSUMER PROTECTION IN THE FINANCIAL SECTOR

#### *A. Overview of the United Kingdom's Financial Consumer Protection Regulation (Pre-Consumer Duty)*

The financial sector provides a range of payment, credit, insurance, and investment products and services to consumers, some of which may be regarded as more "staple" than others. Developed financial jurisdictions, such as the United Kingdom, support

<sup>163</sup> Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), arts. 13–22, O.J. (L 119) 1 (on data subjects' rights); *id.* arts. 25, 28, 32 (on duties regarding the handling and processing of personal data); *see generally* Alaa Altorbaq, Fredrik Blix & Stina Sörman, *Data Subject Rights in the Cloud: A Grounded Study on Data Protection Assurance in the Light of GDPR*, 2017 12TH INT'L CONF. FOR INTERNET TECH. & SECURED TRANSACTIONS 305 (2017), <https://ieeexplore.ieee.org/abstract/document/8356406> [<https://perma.cc/GJ2R-RW8F>]; *cf.* Michael Veale, Reuben Binns & Jef Ausloos, *When Data Protection by Design and Data Subject Rights Clash*, 8 INT'L DATA PRIV. L. 105 (2018) (discussing the challenges with regard to privacy by design).

<sup>164</sup> *Cyber Resilience Act*, EUR. COMM'N (Sept. 15, 2022), <https://digital-strategy.ec.europa.eu/en/library/cyber-resilience-act> [<https://perma.cc/3993-8XPV>] (proposing EU Cyber Resilience Regulation).

<sup>165</sup> Regulation (EU) 2022/2065, *supra* note 154, arts. 31, 33–37; *see also* EMILY HAVES, ONLINE SAFETY BILL: HL BILL 87 OF 2022–23 9–13 (2023) <https://research-briefings.files.parliament.uk/documents/LLN-2023-0005/LLN-2023-0005.pdf> [<https://perma.cc/5V6C-VRN2>] (the United Kingdom's impending Online Safety Act 2023).

privatisation and marketisation of financial services, and consumers are encouraged to navigate choice and engage in self-provision for their financial needs within the broader context of “financialisation,” discussed in Part I.<sup>166</sup> The U.K. Financial Conduct Authority explicitly sets out to protect consumers and promote competition as a means of promoting consumer choice.<sup>167</sup> To promote competition in financial services markets, the FCA adopts a pro-innovation stance, as enabling innovations to come to market and comply with regulations can lead to more market choice for financial consumers. This is reflected in the FCA’s institutional innovation-supporting framework.<sup>168</sup> Financial regulation is focused on consumer empowerment, and starts by focusing on market failure as justification for regulatory intervention.<sup>169</sup> The prevalence of cost-benefit scrutiny for regulatory initiatives in the United States,<sup>170</sup> European Union (based in the Treaty’s proportionality language),<sup>171</sup> and United Kingdom,<sup>172</sup> underpin the “market failure” basis for financial regulation, which includes consumer protection regulation.

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<sup>166</sup> See *supra* note 14 and accompanying text.

<sup>167</sup> Financial Services and Markets Act 2000, c. 8, §§ 1B, 1C, 1E (UK) (amended by Financial Services Act 2012, c. 21 (UK)).

<sup>168</sup> The FCA has made some facilities permanent to help innovators in finance consult on regulatory compliance and test their innovations in controlled conditions. See, e.g., *FCA Innovation Hub*, FIN. CONDUCT AUTH. <https://www.fca.org.uk/firms/innovation> [<https://perma.cc/NC4N-SZTE>] (last visited June 4, 2023) (hosting various pro-innovation activities like the Regulatory Sandbox and Crypto-Sprint).

<sup>169</sup> ZANNA ISCENKO, PETER ANDREWS, KRISTINE DAMBE & PETER EDMONDS, ECONOMICS FOR EFFECTIVE REGULATION 16 (2016), <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-13.pdf> [<https://perma.cc/AD9D-CNR4>].

<sup>170</sup> See, e.g., CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 3 (2018).

<sup>171</sup> Anne Meuwese & Suren Gomtsian, *Regulatory Scrutiny of Subsidiarity and Proportionality*, 22 MAASTRICHT J. EUR. & COMP. L. 483, 501, 504 (2015) (on cost-benefit analysis being built into subsidiarity considerations in the European Union).

<sup>172</sup> See Directive (EU) 2016/97, of the European Parliament and of the Council of 20 January 2016 on Insurance Distribution, arts. 18-23, O.J. (L 26) 19, 40-44 [hereinafter Directive (EU) 2016/97]; see also HM TREASURY, FINANCIAL SERVICES FUTURE REGULATORY FRAMEWORK REVIEW: PROPOSALS FOR REFORM 8 (¶ 27), 17 (¶ 1.28), 52 (¶¶ 6.20-6.23) (2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032075/FRF\\_Review\\_Consultation\\_2021\\_-\\_Final\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032075/FRF_Review_Consultation_2021_-_Final_.pdf) [<https://perma.cc/G959-3NHV>] (reforming regulatory accountability for cost-benefit analyses in the Financial Services and Markets Act 2023, which implements the government’s initiative to subject financial regulators to more cost-benefit scrutiny and accountability, reflecting the Conservative government’s dislike to “red-tape”).

The European Union generally imposes pre-sale mandatory disclosure requirements for information relating to financial products, such as credit,<sup>173</sup> insurance,<sup>174</sup> packaged products,<sup>175</sup> securities products,<sup>176</sup> investment fund products,<sup>177</sup> online crowdfunding products,<sup>178</sup> and even crypto-assets.<sup>179</sup> Pre-sale disclosure is based on the standard of materiality, which allows investors to make an informed assessment of an investment product.<sup>180</sup> This is a cross-cutting standard for all financial products, and is bolstered by summary disclosure documents,<sup>181</sup> which are intended to be more accessible and comprehensible for retail consumers. Over time, regulatory adjustments have assisted with consumer behavioural weaknesses, such as mandatory

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<sup>173</sup> See generally JONATHAN KIRK, THOMAS SAMUELS & LEE FINCH, MIS-SELLING FINANCIAL SERVICES 54-125 (2d ed. 2022) (discussing requirements in the EU Consumer Credit Directive 2008/48/EC and Mortgage Credit Directive 2014/17/EU).

<sup>174</sup> See Directive (EU) 2016/97, *supra* note 172, arts. 18-23.

<sup>175</sup> Regulation (EU) No 1286/2014, of the European Parliament and of the Council of 26 November 2014 on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPs), arts. 5-7, O.J. (L 352) 1, 10-11 [hereinafter Regulation (EU) No 1286/2014] (on the key information document which is pre-contractual).

<sup>176</sup> Regulation (EU) 2017/1129, *supra* note 39, arts. 6, 7.

<sup>177</sup> See, e.g., Directive 2009/65/EC, of the European Parliament and of the Council of 13 July 2009 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), art. 68, 2010 O.J. (L 176) 32, 73 [hereinafter Directive 2009/65/EC] (UCITS prospectus and continuing disclosure); Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and Amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, O.J. (L 174) 1 (for hedge and private equity/venture capital funds); *id.* art. 23 (on disclosure to investors).

<sup>178</sup> Regulation (EU) 2020/1503, *supra* note 39, arts. 19, 20, 23, 24.

<sup>179</sup> COM/2020/593 final, *supra* note 39 (White paper disclosure for the Markets in Crypto-assets Regulation (MiCAR) 2023).

<sup>180</sup> See Iris H-Y Chiu, *The Fallacies Regarding Financial Inclusion and Financial Regulation that Is Shaped to Promote this Policy*, in FALLACIES AND MYTHS IN CORPORATE AND FINANCIAL LAW (Alexandra Andhov, Claire Hill & Saule Omarova eds., forthcoming 2024).

<sup>181</sup> E.g., Regulation (EU) 2017/1129, *supra* note 39, art. 6 (on mandatory disclosure made to a material standard); Directive 2009/65/EC, *supra* note 177, art. 59 (on enabling investors to make an informed judgment); Regulation (EU) No 1286/2014, *supra* note 175, pmbls. 15, 26.

warnings, investment caps,<sup>182</sup> and specific financial marketing and promotion restrictions.<sup>183</sup>

Consumer weaknesses, as discussed below, continue to be observed despite relatively developed financial markets, such as the United Kingdom's. Consumers are not necessarily able to assess the myriad choices before them, as financial literacy levels are generally low<sup>184</sup> and too many choices challenge effective decision-making.<sup>185</sup> Consumers may instead opt for few or conservative products that do not maximise their economic interests,<sup>186</sup> such as the staple bank deposit account; or respond to marketing and make unsuitable choices without help. There is little regulatory guidance in financial products that are near-essential or less optional. In spite of the growth in market choice, financial inclusion is a vaguely defined policy, a critique we return to in Part IV. Staple financial needs, such as a basic bank account, are provided by market forces, but they may include contractual features that pose hazards to unwary consumers. In the United Kingdom, many banks have developed "free-if-in-credit" current accounts where banks profit greatly if accounts are overdrawn and overdrafts

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<sup>182</sup> The 10% cap for retail investing applies to less liquid investments such as online peer-to-peer lending. FIN. CONDUCT AUTH., LOAN-BASED ('PEER-TO-PEER') AND INVESTMENT-BASED CROWDFUNDING PLATFORMS: FEEDBACK TO CP18/20 AND FINAL RULES 16, ¶ 2.21 (2019), <https://www.dlapiperintelligence.com/investmentrules/blog/articles/2019/Downloads/ps19-14.pdf> [<https://perma.cc/696N-TUY9>].

<sup>183</sup> FIN. CONDUCT AUTH., PS22/10: STRENGTHENING OUR FINANCIAL PROMOTION RULES FOR HIGH-RISK INVESTMENTS AND FIRMS APPROVING FINANCIAL PROMOTIONS 12, ¶ 2.2 (2022), <https://www.fca.org.uk/publication/policy/ps22-10.pdf> [<https://perma.cc/2H8K-ZB28>] (discussing the FCA's mandatory warning notices and digital summaries for high-risk investment products).

<sup>184</sup> Brandon Russell, *New Study Reveals the State of Financial Literacy in the UK*, IFA MAGAZINE (June 9, 2023), <https://ifamagazine.com/glasgow-revealed-to-be-home-to-the-least-financially-literate-brits/> [<https://perma.cc/P9SW-NEUR>].

<sup>185</sup> Choice overload, discussed in Nathan Cheek, Elena Reutskaja, Barry Schwartz & Sheena Iyengar, *Is Having Too Many Choices (Versus Too Few) Really the Greater Problem for Consumers?*, BEHAVIORAL SCIENTIST (Oct. 3, 2022), <https://behavioralscientist.org/is-having-too-many-choices-versus-too-few-really-the-greater-problem-for-consumers/> [<https://perma.cc/UTW2-FXYV>].

<sup>186</sup> The FCA is of the view that "[t]here are 15.6 million UK adults with investible assets of £10,000 or more. Of these, 37% hold their assets entirely in cash, and a further 18% hold more than 75% in cash . . . . Over time, these consumers are at risk of having the purchasing power of their money eroded by inflation." *Consumer Investments: Strategy and Feedback Statements*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/publications/corporate-documents/consumer-investments-strategy> [<https://perma.cc/RS35-RHAA>] (June 15, 2023).

are accessed.<sup>187</sup> Avoiding this requires care on customers' part and it is challenging for impecunious customers to avoid accidentally tipping into expensive overdrafts.<sup>188</sup>

Further, consumers may not appreciate that some financial products are double-edged swords.<sup>189</sup> Credit products may be empowering for immediate consumption or investment needs, but ex post economic welfare is not subject to clear regulatory protection. The same can be said about investment products that help to protect the monetary value of savings but can also be subject to market losses during the investment horizon. The protection of consumer choice seems to operate at the level of voluntary access, and given consumers' general low financial literacy,<sup>190</sup> one may question if more regulatory guidance or paternalism is warranted for near-essential financial products.

Evidence of regulatory enhancement to protect consumers from harm has been created since the end of the 2008 global financial crisis,<sup>191</sup> in the form of "product intervention."<sup>192</sup> Product intervention responds to the recognition that financial sector culture can result in exploitative product competition that offers little utility to consumers.<sup>193</sup> In this manner, simplistic assumptions about the unequivocal "good" of choice are questioned by confronting the realities of financial product markets. Product intervention powers can be exercised by

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<sup>187</sup> Marianne Curphey, *Overdraft Fees and Charges Are Major Source of Income for Banks*, BANKRATE, <https://www.bankrate.com/uk/current-accounts/overdraft-fees-charges-bank-income-fca/> [<https://perma.cc/Q67Q-S86F>] (last visited Feb. 9, 2024).

<sup>188</sup> See *Off. of Fair Trading v. Abbey Nat'l plc* [2009] UKSC 6 (a challenge for fairness was brought by the former Office of Fair Trading in the United Kingdom against banks in view of least-capabilised customers incurring expensive overdraft charges, which ultimately did not succeed); cf. FIN. CONDUCT AUTH., BANKING: CONDUCT OF BUSINESS SOURCEBOOK, at BCOBS 2/10 (2024) [hereinafter BANKING: CONDUCT OF BUSINESS SOURCEBOOK], <https://www.handbook.fca.org.uk/handbook/BCOBS.pdf> [<https://perma.cc/559M-ETZK>] (the FCA has since introduced rules to ensure that an overdraft cannot be unarranged and that customers would have notice of the need to put in place a consented arrangement).

<sup>189</sup> See Chiu, *supra* note 180.

<sup>190</sup> Russell, *supra* note 184.

<sup>191</sup> Niamh Moloney, *The Legacy Effects of the Financial Crisis on Regulatory Design*, in THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS 111, 112, 117-20 (Eilís Ferran, Niamh Moloney, Jennifer G. Hill & John C. Coffee eds., 2012).

<sup>192</sup> *Product Intervention*, ESMA, <https://www.esma.europa.eu/investor-corner/product-intervention> [<https://perma.cc/T727-VQSU>] (last visited June 4, 2023).

<sup>193</sup> Dan Awrey, *Toward a Supply-Side Theory of Financial Innovation*, 41 J. COMPAR. ECON. 401, 410 (2013) (on financial innovators' incentives to innovate in order to extract rents).

regulators in the United Kingdom and European Union by banning or restricting certain financial products in order to prevent mis-selling or harm. The European Union<sup>194</sup> and United Kingdom<sup>195</sup> have issued a number of product intervention bans to preclude consumers from engaging in high-risk investments such as binary options, contingent bonds sold by banks, or unlisted corporate securities.<sup>196</sup>

The European Union and United Kingdom have also developed a “product governance” regime<sup>197</sup> that mandates that financial firms design products in such a way as to meet the needs of certain target markets in mind. Product governance intends to steer financial product providers towards considering their target markets first to ensure that product design, marketing, and distribution are suitable for them. This is, however, not the same as the “product safety” vetting that is championed by U.S. Senator Elizabeth Warren,<sup>198</sup> and ex ante product regulation remains elusive. Product governance regulation is “meta-level” in the sense that it requires firms to institute processes for designing and marketing suitable products, but such processes are left to the firms’ own implementation.<sup>199</sup> This can result in a “black box” of internal firm processes that are not scrutable by consumers. The United Kingdom and European Union are, however, increasingly

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<sup>194</sup> See *Product Intervention*, *supra* note 192.

<sup>195</sup> See, e.g., *FCA Bans the Sale of Crypto-Derivatives to Retail Consumers*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/news/press-releases/fca-bans-sale-crypto-derivatives-retail-consumers> [<https://perma.cc/H75X-CLJP>] (Oct. 6, 2020); *FCA Confirms Speculative Mini-Bond Mass-Marketing Ban*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/news/press-releases/fca-confirms-speculative-mini-bond-mass-marketing-ban> [[perma.cc/R3GE-6PBS](https://perma.cc/R3GE-6PBS)] (Dec. 10, 2020); *FCA Confirms Permanent Ban on the Sale of Binary Options to Retail Consumers*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/news/statements/fca-confirms-permanent-ban-sale-binary-options-retail-consumers> [[perma.cc/8ZFS-SWJG](https://perma.cc/8ZFS-SWJG)] (Mar. 29, 2019).

<sup>196</sup> See Johnston, *supra* note 73. The United States has introduced product bans in relation to mortgages. For a critique of the regulations, see *id.*

<sup>197</sup> Directive 2014/65/EU, *supra* note 4, art. 24(2); Commission Delegated Directive 2017/593, of 7 April 2016 Supplementing Directive 2014/65/EU of the European Parliament and of the Council with Regard to Safeguarding of Financial Instruments and Funds Belonging to Clients, Product Governance Obligations and the Rules Applicable to the Provision or Reception of Fees, Commissions or any Monetary or Non-Monetary Benefits (EU), arts. 9-10, 2017 O.J. (L 87) 500, 501.

<sup>198</sup> Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION (Edward J. Balleisen & David A. Moss eds., 2010).

<sup>199</sup> FIN. CONDUCT AUTH., FCA HANDBOOK, at PROD 3.2.1-3.2.5 (2018), <https://www.handbook.fca.org.uk/handbook/PROD/3/2.html> [<https://perma.cc/V6K5-96LN>] (articles PROD 3.2.1 to 3.2.5 last updated in January 2018).



requiring product manufacturers and distributors to show evidence of compliance, such as by testing their product designs and regular reviewing, in order to aid regulators' supervision in this area. Sufficiently intense supervision is likely necessary to enforce product governance standards<sup>200</sup> as market-driven discipline is likely impracticable.

On the whole, product governance regulation continues to allow the financial sector to determine product offerings and quality to consumers, in line with maintaining a market for consumer choice. However, as with the limits of food regulation discussed in Section A, regulatory protections made pursuant to consumer empowerment fail to connect with consumers' varying or lack of ability to assess the optimal qualities they seek in their choices.<sup>201</sup> Financial product regulation can relate to qualities such as safety; risk and return profiles; short, medium or long-termism; and sustainability, just as food can relate to qualities such as cost-effectiveness, health, nutrition, lifestyle compatibility, diversity, sustainability, and animal welfare concerns. The operations of private producer competition and marketing, even if subject to pre-sale information and marketing regulations, need not help consumers understand their optimal needs. Quality regulation should apply to financial products with important sectoral attributes, such as long-term investment performance. This would be similar to the regulatory supervision for reliability of regulated energy services in the United Kingdom.<sup>202</sup> There is a certain superficiality in protecting ex ante consumer choice when consumers are more concerned about ex post ultimate welfare and outcomes in relation to credence goods,<sup>203</sup> such as financial products. This point is revisited in Part IV.<sup>204</sup>

Few financial regulations aim to protect the ex ante economic welfare of certain consumers of financial products, particularly in relation to recognised vulnerable characteristics. One such regulation is

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<sup>200</sup> Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 32-33 (2008).

<sup>201</sup> Klompenhouwer & van den Belt, *supra* note 107, at 552-53 (on the Consumer's Association findings of consumer weaknesses in understanding food claims in a market for choice).

<sup>202</sup> OFGEM, THEME 4: ENSURING A SECURE AND RELIABLE GAS AND ELECTRICITY SUPPLY, [https://www.ofgem.gov.uk/sites/default/files/docs/2013/02/ensuring-a-secure-and-reliable-gas-and-electricity-supply\\_0.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2013/02/ensuring-a-secure-and-reliable-gas-and-electricity-supply_0.pdf) [https://perma.cc/K2M8-EGF7] (last visited Feb. 6, 2024).

<sup>203</sup> MEN-ANDRI BENZ, STRATEGIES IN MARKETS FOR EXPERIENCE AND CREDENCE GOODS 1-5 (2007).

<sup>204</sup> See *infra* Part IV, concerning Proposals for Performance-Based Regulation.

the price cap on high-cost credit.<sup>205</sup> Another is the price cap on investment management charges for defined contribution occupational pension schemes.<sup>206</sup> The former seeks to protect payday borrowers from being exploited, though their credit risk means that they have to expect to pay a relatively high charge for credit to reflect the risk undertaken by the lender.<sup>207</sup> As many payday borrowers are members of the most disadvantaged economic communities, the price cap regulation reflects social notions of concern for their vulnerabilities, as well as welfare considerations that mitigate against a purely economic assessment of their credit risk.<sup>208</sup> Next, the United Kingdom's mandate that elderly consumers obtain advice before entering into equity release mortgages also seeks to ensure that welfare needs of vulnerable consumers are assessed by experts.<sup>209</sup> This requirement places legal risk upon advisors to reinforce a good economic outcome for consumers.

The price cap on investment management charges for defined contribution occupational pension schemes may also be motivated by social policy reasons. Since mandatory automatic enrolment in occupational pensions saving has been legislated in the United Kingdom, the paternalistic measure should be supported by affordable access to long-term saving that prevents financial services providers from exploiting the captured market.<sup>210</sup> Indeed, this measure is a rare regulatory intervention, providing financial inclusion for working citizens to save in a basic and important financial product. These rare measures reflect financial regulators' embrace of citizenly concerns regarding some financial products. However, providing financial inclusion in basic products does not mean that regulators are certain of consumers'

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<sup>205</sup> See FCA, High Cost Short Term Credit (2019), <https://www.fca.org.uk/firms/high-cost-credit-consumer-credit/high-cost-short-term-credit>.

<sup>206</sup> See generally DEP'T FOR WORK AND PENSIONS, THE CHARGE CAP: GUIDANCE FOR TRUSTEES AND MANAGERS OF OCCUPATIONAL PENSION SCHEMES (2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1045257/charge-cap-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1045257/charge-cap-guidance.pdf) [https://perma.cc/7Y5F-DUY5].

<sup>207</sup> *Why Is the APR for Payday Loans So High?*, LENDING STREAM (Oct. 11, 2023), <https://www.lendingstream.co.uk/blog/why-apr-for-payday-loans-high/> [https://perma.cc/722R-V3TR].

<sup>208</sup> Aldohni, *supra* note 87; Paul Heidhues & Botond Köszegi, *Exploiting Naivete about Self-Control in the Credit Market*, 100 AM. ECON. REV. 2279 (2010).

<sup>209</sup> Louise Overton & Lorna Fox O'Mahony, *Stakeholder Conceptions of Later-Life Consumer Vulnerability in the Financial Services Industry: Beyond Financial Capability?*, 41 J. CONSUMER POL'Y 273, 275 (2018).

<sup>210</sup> Sunstein & Thaler, *supra* note 54.

ultimate welfare. For example, high-cost credit caps do not mean that the consumer's credit consumption is sustainable and do not create mobilising outcomes in overall financial management. Defined contribution pension savings also contain no guarantee of long-term economic outcomes.

Financial regulators' preferred approach is to make the consumer choice protection more meaningful by regulating the conduct of intermediaries who help consumers navigate choice. Although regulating intermediaries intends to address the principal-agent problems between consumers and financial intermediaries, such policy reinforces the marketised model of financialisation, which is that consumers need to navigate free markets to select products and services that they determine to meet their needs.<sup>211</sup> It also leads to tremendous growth<sup>212</sup> of the financial sector in terms of abundance of product choice and financial intermediation services and chains.<sup>213</sup> Although the European Union and United Kingdom started later in providing conduct of business regulation for consumer protection,<sup>214</sup> as compared to the United States,<sup>215</sup> the regulatory regimes are quite similar today since they both address the potential junctures of power and influence exerted by financial intermediaries over consumers.

Consumers generally enjoy proprietary protection over their monies and assets that are held by financial intermediaries. These intermediaries are regulated stringently to segregate, protect, and carry out third-party audits of customer monies and assets.<sup>216</sup> Financial services providers are held to extensive pre-contractual and pre-sale duties to consumers, such as responsible lending for consumer credit

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<sup>211</sup> See *supra* text accompanying notes 12-18 for a discussion of financialisation.

<sup>212</sup> GEORGINA HUTTON, FINANCIAL SERVICES: CONTRIBUTION TO THE UK ECONOMY (2022), <https://researchbriefings.files.parliament.uk/documents/SN06193/SN06193.pdf>.

<sup>213</sup> Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573 (2015) (on the growth of rent-extracting intermediation chains).

<sup>214</sup> Directive 2014/65/EU, *supra* note 4. The first harmonised measure is the Investment Services Directive 1992 superseded by the more detailed Markets in Financial Instruments Directive 2004, then recast in 2014/59/EU. The United Kingdom had a self-regulatory framework for investment services until the 1990s.

<sup>215</sup> See *cf.* Investment Company Act, 15 U.S.C. §§ 80a-1–80a-64 (1940); Investment Advisers Act, 15 U.S.C. §§ 80b-1–80b-21 (1940).

<sup>216</sup> See, e.g., Directive 2014/65/EU, *supra* note 4, art. 16(8) (discussed in *In re Lehman Bros. Int'l (Eur.) (In Admin.)* and *In re the Insolvency Act 1986* [2012] UKSC 6 (UK)).

based on pre-contractual assessment of affordability<sup>217</sup> and suitability assessments for investments where advice is provided.<sup>218</sup> Brokerage services are also held to a “best execution” standard for customers.<sup>219</sup> Further, where new intermediaries connect with financial consumers, regulators have included these intermediaries in the regulatory ambit, as illustrated below. For example, the FCA regulates retail credit provided by retailers of goods,<sup>220</sup> price comparison websites as insurance distributors,<sup>221</sup> claims management companies for consumers dealing with insurers or financial institutions where there is a dispute,<sup>222</sup> and even pre-paid funeral parlour plans.<sup>223</sup>

These regulations have not prevented egregious conduct toward consumers and consumer harm, however. For example, some financial intermediaries aggressively classify consumers barely over certain income thresholds as “professional” and exclude them from the highest levels of consumer protection afforded to consumers buying risky financial products.<sup>224</sup> Intermediaries are often also incentivised to sell

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<sup>217</sup> Catharine I. Garcia Porras & Willem H. van Boom, *Information disclosure in the EU Consumer Credit Directive: Opportunities and Limitations*, in CONSUMER CREDIT, DEBT AND INVESTMENT IN EUROPE (James Devenney & Mel Kenny eds., 2012); Vanessa Mak, *What Is Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands*, 38 J. CONSUMER POL'Y 411 (2015); cf. Olha O. Cherednychenko & Jesse M. Meindersma, *Irresponsible Lending in the Post-Crisis Era: Is the EU Consumer Credit Directive Fit for Its Purpose?* 42 J. CONSUMER POL'Y 483 (2019) (critiquing the EU Consumer Credit Directive).

<sup>218</sup> Directive 2014/65/EU, *supra* note 4, art. 25.

<sup>219</sup> *Id.* art. 27. “Best execution” means that brokers should achieve the best possible result for clients in trading their financial instruments. Such best result may be based on speed, certainty, or price of the transaction.

<sup>220</sup> See *FCA Handbook Glossary: “Retail Revolving Credit”*, FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/glossary/G3571r.html> [https://perma.cc/634Z-5UG8].

<sup>221</sup> FIN. SERVS. AUTH., FINALISED GUIDANCE: GUIDANCE ON THE: SELLING OF GENERAL INSURANCE POLICIES THROUGH PRICE COMPARISON WEBSITES (2011), [https://www.fca.org.uk/publication/finalised-guidance/fg11\\_17.pdf](https://www.fca.org.uk/publication/finalised-guidance/fg11_17.pdf) [https://perma.cc/HS96-Q36R].

<sup>222</sup> *Claims Management Companies: Our Regulation*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/firms/claims-management-regulation> [https://perma.cc/CR7Z-5DFH] (Feb. 6, 2023) (noting that the FCA became the regulator of claims management companies in 2019).

<sup>223</sup> Press Release, Fin. Conduct Auth., FCA Regulation Boosts Consumer Protection in the Funeral Plans Market, <https://www.fca.org.uk/news/press-releases/fca-regulation-boosts-consumer-protection-funeral-plans-market> [https://perma.cc/E445-5BBC] (July 29, 2022).

<sup>224</sup> See e.g., JOHN SWIFT, LESSONS LEARNED REVIEW COMMISSIONED BY THE NON-EXECUTIVE DIRECTORS OF THE FINANCIAL CONDUCT AUTHORITY INTO THE SUPERVISORY INTERVENTION ON INTEREST RATE HEDGING PRODUCTS (IRHPS):

complex but profitable financial products whose ultimate welfare benefits to consumers remain in doubt.<sup>225</sup> For example, the notorious London Capital & Finance firm sold risky unregulated products to consumers while benefiting from the FCA's license to provide investment advice. In this way, authorised status can be used as a cloak for carrying out other unauthorised activity, therefore deceiving consumers about the safety of dealing with such intermediaries.<sup>226</sup> Financial intermediaries have also built up notoriety in passing bundled and complex fees, charges, and other costs to consumers.<sup>227</sup> In this market for financial consumer choice, financial intermediaries fuel the variety and complexity in choice due to competition,<sup>228</sup> and, instead of being guides for consumers, hazardous signs suggest that they would exploit consumers instead.<sup>229</sup>

Financial regulators catch up to reinforce regulated behaviour ex post facto, but ex post enforcement is not preferable to ex ante

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REPORT OF THE INDEPENDENT REVIEWER 278 (2022), <https://www.fca.org.uk/publication/corporate/independent-review-of-interest-rate-hedging-products-final-report.pdf> [<https://perma.cc/L8SW-ZCF5>] (noting that banks classified small business customers as “professional” for the purposes of selling interest rate hedging swaps before the global financial crisis of 2008); see also DIANE BUGEJA, *REFORMING CORPORATE RETAIL INVESTOR PROTECTION: REGULATING TO AVERT MIS-SELLING* (2019).

<sup>225</sup> See John Kay, *Bonds Designed to Leave Savers Bemused*, JOHN KAY (Nov. 17, 2010), <https://www.johnkay.com/2010/11/17/bonds-designed-to-leave-savers-bemused/> [<https://perma.cc/4B7J-YFE3>]; see also Awrey, *supra* note 193.

<sup>226</sup> See GLOSTER, *supra* note 8 (discussing the London and Capital Finance scandal).

<sup>227</sup> Judge, *supra* note 213; see also FIN. SERVS. AUTH., PS12/3: DISTRIBUTION OF RETAIL INVESTMENTS: RDR ADVISER CHARGING – TREATMENT OF LEGACY ASSETS: FEEDBACK TO CP11/26 AND FINAL GUIDANCE (2012), <https://www.fca.org.uk/publication/policy/ps12-03.pdf> [<https://perma.cc/BCC2-UY9A>] (showing that such bundling is also an issue in the European Union and United Kingdom, as the United Kingdom dealt forcefully with product provider commissions); Commission Delegated Directive 2017/593, of 7 April 2016 Supplementing Directive 2014/65/EU of the European Parliament and of the Council with Regard to Safeguarding of Financial Instruments and Funds Belonging to Clients, Product Governance Obligations and the Rules Applicable to the Provision or Reception of Fees, Commissions or any Monetary or Non-Monetary Benefits, art. 13, 2017 O.J. (L 87) 502. The European Union also dealt with dealing commissions in its 2017 reform disallowing dealing commissions to include research payments unless otherwise agreed with clients.

<sup>228</sup> Madison Darbyshire, *Asset Managers Warn Too Much Choice Is Confusing Retail Investors*, FIN. TIMES (Mar. 13, 2023), <https://www.ft.com/content/da561eeb-838d-48b6-891a-a87c2dc089e0> [<https://perma.cc/45EK-YUKL>].

<sup>229</sup> One example of such exploitation is the case of London and Capital Finance, discussed in GLOSTER, *supra* note 8.

prevention of harm.<sup>230</sup> New rules have also been introduced to constrain behaviour.<sup>231</sup> For example, the European Union has robustly addressed the scale of green or environmental, social, and governance (“ESG”) product mis-selling due to the lack of clear regulation for product labelling.<sup>232</sup> This is increasingly being tackled by the United States and United Kingdom.<sup>233</sup> However, regulators are still unable to fully outlaw financial intermediaries’ conflicts of interests, which arise because financial intermediaries act on both the supply and demand sides of the market where clients’ interests may conflict with each other.<sup>234</sup> Further, increased regulation increases cost, which hinders consumers’ access to financial services such as advice. The FCA attempted to ban product provider commissions to financial advisors so that they could fully serve investors’ interests instead of purely monetary incentives.<sup>235</sup> This regulation, however, ironically increased

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<sup>230</sup> Financial customers suffered harm when their assets were not properly segregated by financial firms that became insolvent, such as in relation to Lehman Brothers Europe. This issue was discussed in *Lehman Brothers International (Europe) (In Administration) v. CRC Credit Fund Ltd* and others. See *Lehman Brothers International (Europe) (In Administration) v. CRC Credit Fund Ltd* [2010] EWCA (Civ) 917. The Financial Conduct Authority subsequently introduced regulation to enhance protection of client monies and assets, by preventive measures such as strengthening senior management oversight and accountability and third party audit. See FIN. CONDUCT AUTH., CLIENT ASSETS, at CASS 1A.3.1 (2023), <https://www.handbook.fca.org.uk/handbook/CASS.pdf> [<https://perma.cc/TP7H-9CQX>]; U.K. FIN. CONDUCT AUTH., SUPERVISION, at SUP 3.10 (2023), <https://www.handbook.fca.org.uk/handbook/SUP.pdf> [<https://perma.cc/6S4D-R3JB>].

<sup>231</sup> See, e.g., HUTTON, *supra* note 212.

<sup>232</sup> Regulation (EU) 2019/2088, of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, O.J. (L 317) 1 (the EU Sustainable Financial Disclosure Regulation).

<sup>233</sup> Iris H-Y Chiu, *Sustainable Finance Regulation- Authoritative Governance or Market-Based Governance for Fund Management?*, 57 J. FIN. TRANSFORMATION 48 (2023) [hereinafter Chiu, *Sustainable Finance Regulation*].

<sup>234</sup> See Iris H-Y Chiu, *Is There Scope for Reforming the Emaciated Concept of Fiduciary Law in Finance? Critically Discussing the Potential Achievements of Reform*, 28 EUR. BUS. L. REV. 937 (2017) (discussing the U.K. Law Commission’s Fiduciary Duties and Regulatory Rules project in 1995); Law Commission, *Fiduciary Duties and Regulatory Rules: Current Project Status*, L. COMM’N, <https://www.lawcom.gov.uk/project/fiduciary-duties-and-regulatory-rules/> [<https://perma.cc/8244-D7VE>] (last visited Feb. 11, 2024).

<sup>235</sup> See, e.g., CONDUCT OF BUSINESS SOURCEBOOK, *supra* note 40, at COBS 6.1A. The Retail Distribution Review was carried out between 2006 and 2012 and culminated in a number of regulatory changes, including the introduction of FCA Handbook COBS 6.1A.

the price of financial advice for consumers,<sup>236</sup> resulting in more consumers engaging in financial transactions without advice. Although EU regulation provides a whitelist of presumably safer investments that can be sold without advice,<sup>237</sup> such as regulated mutual funds in the European Union and United Kingdom, and requires certain standards of portfolio diversification, liquid investments, liquidity management,<sup>238</sup> and listed securities products, the whitelist does not guarantee safety. For example, retail investors were caught by surprise when blue chip companies such as Carillion suddenly became insolvent in 2019.<sup>239</sup> The Woodford UCITS funds that Carillion sold to retail investors breached portfolio and liquidity constraints and were ultimately liquidated, unbeknownst to the investors, leaving them with losses after four years.<sup>240</sup> Sadly, even consumers who purchase advice do not need to be particularly well-served as the United Kingdom imposes a patchy regulatory landscape on advice quality.<sup>241</sup>

Conduct of business regulation is ultimately process-based and governs conduct in a pre-contractual manner, serving to protect consumers' meaningful choice. However, we have argued that the concept of consumer choice in finance is riddled with fundamental weaknesses concerning consumers' actual needs, and financial intermediaries have

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<sup>236</sup> *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/publications/calls-input/evaluation-rdr-famr> [<https://perma.cc/5SEQ-EY2W>] (Dec. 3, 2020); Carmen Reichman, *Advice Gap Is Expanding, Advisers Say*, FTADVISER (Dec. 2, 2022), <https://www.ftadviser.com/ftadviser-focus/2022/12/02/advice-gap-is-expanding-advisers-say/> [<https://perma.cc/L4AQ-S3HL>].

<sup>237</sup> See Directive 2014/65/EU, *supra* note 4, art. 25(4) (regulating “execution-only” financial products).

<sup>238</sup> See Directive 2009/65, of the European Parliament and of the Council of 13 July 2009 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), art. 40, 2010 O.J. (L 176) 1, 36 (EU).

<sup>239</sup> Attracta Mooney, *Retail Investors Bear the Brunt of Carillion Losses*, FIN. TIMES (Jan. 16, 2018), <https://www.ft.com/content/a57cfd52-fa9f-11e7-a492-2c9be7f3120a>.

<sup>240</sup> Matthew Feargrieve, *The Liquidity Lessons of Neil Woodford*, MEDIUM (Mar. 27, 2020), <https://matthewfeargrieve.medium.com/matthew-feargrieve-the-liquidity-lessons-of-neil-woodford-60e5c66a8cd7> [<https://perma.cc/37BN-ZTBG>]; see also Kalyeena Makortoff, *Woodford Fund Compensation for Investors Likely to Total 77p in the Pound*, THE GUARDIAN (Apr. 20, 2023), <https://www.theguardian.com/business/2023/apr/20/woodford-fund-compensation-for-investors-likely-to-total-77p-in-the-pound> [<https://perma.cc/8MPS-656A>].

<sup>241</sup> Debbie Gupta, *Improving the Suitability of Financial Advice*, FIN. CONDUCT AUTH. (Oct. 3, 2019), <https://www.fca.org.uk/news/speeches/improving-suitability-financial-advice> [<https://perma.cc/876S-ELM4>].

exploited such weaknesses instead of guiding consumers. Is the best solution more intensive regulation of intermediary conduct? As conduct regulation is focused on point-of-sale, it does not address the nature of financial products as credence goods, for which performance or outcome to a consumer only becomes evident over time. Without further consumer protection, financial intermediaries would continue to be incentivised to sell financial products whose future performance is not their concern.

Consumers may realise their financial needs and understand the performance of a financial product only after enough time passes post-sale. Consumer protection that utilises ex post welfare or utility outcomes, or adjustment of economic consequences to meet financial needs, is relatively rare in financial regulation. It may be argued that neither the industry nor regulators can guarantee how changing market conditions will affect the performance of credence goods. Increases in a central bank's base interest rate to fight inflationary pressures would affect long-term credit cost that may not have been fully appreciated or anticipated by a consumer and provider at the pre-contract stage. The value of investment products can be affected by changes in market conditions, geopolitical conditions, and policy factors that are unlikely to be fully anticipated in relation to consumers' savings needs.<sup>242</sup> In light of those factors, limited regulatory avenues are available for ex post welfare adjustment for consumers.

As a general observation, financial regulation provides minimal loss protections for financial consumers, but they have been successful in rare instances.<sup>243</sup> The success of these instances can be explained on the basis of fair risk distribution regulation, since consumers, compared to providers, are less able to prevent welfare loss. Such risk distribution also performs the role of inspiring confidence in financial markets, preventing consumer participation withdrawal. This is particularly relevant for financial services that are commonly used. Examples of such risk distribution regulation include the European Union's provision that consumers must not bear losses of more than fifty

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<sup>242</sup> For a discussion of these changes by Schroders, an investment management firm, see Keith Wade & Irene Lauro, *Measuring the Impact of Geopolitics on Markets*, SCHRODERS WEALTH MGMT. (Oct. 10, 2019), <https://www.schroders.com/en-us/us/wealth-management/insights/measuring-the-impact-of-geopolitics-on-markets/> [<https://perma.cc/5J5J-V8YR>].

<sup>243</sup> See Feargrieve, *supra* note 240, for an example of a minimum loss cap for financial consumers in payment services.



euros where unauthorised remittance transfer takes place,<sup>244</sup> and deposit guarantee scheme provisions for bank depositors that are widely found in most jurisdictions.<sup>245</sup> The United Kingdom has further expanded the deposit guarantee scheme into a financial sector-wide compensation scheme to protect insurance and investment customers where their regulated financial intermediary firm becomes insolvent.<sup>246</sup> A guarantee is, to an extent, also available to defined benefit pension savers if their schemes become insolvent, where, for example, the sponsoring employer becomes insolvent.<sup>247</sup> The U.K. Pensions Regulator's safety net, however, does not require a full honouring of pension benefits promised to savers as if the employer were solvent.<sup>248</sup>

At a micro level, financial consumers' protection in ex post welfare performance or distributive adjustment is considerably patchier. Online financial consumers in Europe and the United Kingdom enjoy cooling-off or withdrawal rights for financial services or products sold via distance,<sup>249</sup> and also enjoy withdrawal rights for financial products such as online crowdfunding offers.<sup>250</sup> These provide an ex post opportunity for welfare adjustment since consumers are given some post-contract time to decide whether the financial service or product would be economically optimal for them. These rights are exercisable within a very short-term period only, however.

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<sup>244</sup> Directive (EU) 2015/2366, *supra* note 83, art. 74, O.J. (L 337) 35, 96-97.

<sup>245</sup> See Directive 2014/49/EU, of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes, O.J. (L 173) 149 (EU Deposit Guarantee Scheme Directive).

<sup>246</sup> *FSCS Protects You When Financial Firms Fail*, FIN. SERVS. COMP. SCHEME, <https://www.fscs.org.uk/> [<https://perma.cc/K62Q-PD9L>] (last visited June 4, 2023).

<sup>247</sup> *The Pension Protection Fund*, MONEYHELPER, <https://www.moneyhelper.org.uk/en/pensions-and-retirement/pension-problems/the-pension-protection-fund> [<https://perma.cc/K6M3-T4YB>] (last visited June 4, 2023).

<sup>248</sup> *What We Do*, PENSION PROT. FUND, <https://www.ppf.co.uk/about-us/what-we-do> [<https://perma.cc/FJ3R-YA4R>] (last visited June 4, 2023).

<sup>249</sup> Directive 97/7/EC, *supra* note 113; The Financial Services (Distance Marketing) Regulations 2004, SI 2004/1283 (UK), <https://www.legislation.gov.uk/uksi/2004/2095/contents> [<https://perma.cc/AL4R-V47K>].

<sup>250</sup> See Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European Crowdfunding Service Providers for Business, and Amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, art. 22, 2020 O.J. (L 347) 1, 28; see also Martin Ebers & Benedikt M. Quarch, *EU Consumer Law and the Boundaries of the Crowdfunding Regulation*, in *THE EU CROWDFUNDING REGULATION* (Pietro Ortolani & Marije Louisse eds., 2022) (critique regarding consumer protection on these platforms in relation to the lack of financial services compensation and liability for mis-disclosure).

It is possible for consumers to argue for ex post welfare adjustment if financial products have disappointed due to actionable causes such as mis-selling or conduct of business failures.<sup>251</sup> This welfare adjustment would therefore be based on defects in the pre-sale stage which adversely affected choice, hence including recompense. In this respect, the provision of out-of-court dispute resolution, such as that offered by the U.K. Financial Ombudsman, has significantly helped consumers access justice.<sup>252</sup> The cap for recovery is limited to £415,000.<sup>253</sup> Further, the United Kingdom and United States have developed significant out-of-court redress powers for consumers, including ordering consumer redress where industry-wide mis-selling has occurred.<sup>254</sup> Where unauthorised financial services or products have been offered, the U.K. FCA has also been able to secure contractual avoidance orders resulting in full refunds to customers.<sup>255</sup> Where regulatory rules have been breached, regulators have voluntarily sought welfare adjustment outcomes for consumers in mass redress schemes.<sup>256</sup>

Generally, however, financial product performance and welfare outcomes are not protected by financial regulation.<sup>257</sup> Whether they should be is questioned, since financial welfare is assumed to be a matter of pre-sale choice. Financial products are credence goods, however, whose impact on consumers' welfare outcomes is only discovered post-sale. For example, a pre-sale affordability assessment for a borrower may change long-term and can be affected by sharp rises in

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<sup>251</sup> See Financial Services and Markets Act 2000, c. 8, § 138D (UK).

<sup>252</sup> *Financial Dispute Resolution That's Fair and Impartial*, FIN. OMBUDSMAN SERV., <https://www.financial-ombudsman.org.uk> [<https://perma.cc/6MDB-WRD8>] (last visited Feb. 13, 2024) (on ease of access by complainants).

<sup>253</sup> *Award Limits Increase*, FIN. OMBUDSMAN SERV. (Mar. 20, 2023), <https://www.financial-ombudsman.org.uk/news/changes-award-limits> [<https://perma.cc/PR93-P5Q2>].

<sup>254</sup> Financial Services and Markets Act 2000, c. 8, § 404 (UK); see also *CFPB to Issue \$95 Million in Redress to Consumers Harmed by Premier Student Loan Center*, CONSUMER FIN. PROT. BUREAU (Dec. 13, 2022) <https://www.consumerfinance.gov/about-us/blog/cfpb-to-issue-95-million-redress-to-consumers-harmed-by-premier-student-loan-center/> [<https://perma.cc/68H6-6SM6>] (discussing CFPB recoveries for consumers).

<sup>255</sup> See, e.g., *Asset Land Investment Plc v. Fin. Conduct Auth.* [2016] UKSC 17 (UK); *Fin. Conduct Auth. v. Capital Alternatives Ltd* [2014] EWHC (Ch) 144 (concerning unauthorised collective investment schemes); see generally JONATHAN KIRK, THOMAS SAMUELS & LEE FINCH, *MIS-SELLING FINANCIAL SERVICES* 283-307 (2d ed. 2022).

<sup>256</sup> See Financial Services and Markets Act 2000, c. 8, § 404 (UK).

<sup>257</sup> See generally Chiu & Brener, *supra* note 3.

the Central Bank's base interest rate. Consumers may need welfare adjustment when circumstances change, a protection not offered by financial regulation.<sup>258</sup> The United Kingdom nudges regulated credit institutions to treat borrowers with forbearance and to explore alternative affordable arrangements that may involve post-contract variations.<sup>259</sup> Such guidance still leaves consumers to deal with their banks, unlike the extraordinary intervention undertaken by the United Kingdom during the height of the COVID-19 pandemic.<sup>260</sup> Nevertheless, non-performing loans can cause regulated credit institutions to face capital shortfalls, as credit institutions must provision more capital against their risks. The danger of poorer capital positions for credit institutions is that their solvency may be impaired, and their stability may be put in doubt. As regulators are careful to supervise credit institutions for their solvency and stability, the levels of consumer protection provided may be affected by potential conflicts between regulatory objectives for regulators who seek to protect the profitability and stability of credit institutions.<sup>261</sup>

At a more macro level, high levels of individual and household debt, such as debt taken on to gain access to near-essential goods, such as education,<sup>262</sup> raise larger welfare problems because of the financial management burdens imposed on consumers.<sup>263</sup> Although the United Kingdom provides for the general "fairness" of credit bargains to be re-opened ex post and challenged in court,<sup>264</sup> there is a lack of

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<sup>258</sup> See generally John Linarelli, *Debt in Just Societies: A General Framework for Regulating Credit*, 14 REGUL. & GOVERNANCE 409 (2020); Toni Williams, *Who Wants to Watch? A Comment on the New International Paradigm of Financial Consumer Market Regulation*, 36 SEATTLE U. L. REV. 1217 (2013).

<sup>259</sup> See FIN. CONDUCT AUTH., GUIDANCE FOR FIRMS SUPPORTING THEIR EXISTING MORTGAGE BORROWERS IMPACTED BY THE RISING COST OF LIVING (2023), <https://www.fca.org.uk/publications/finalised-guidance/fg23-2-guidance-firms-supporting-existing-mortgage-borrowers-impacted-rising-living-costs> [<https://perma.cc/W5EP-AH3L>].

<sup>260</sup> See Iris H-Y Chiu, Andreas Kokkinis & Andrea Miglionico, *Debt Expansion as "Relief and Rescue" at the Time of the Covid-19 Pandemic: Insights from the Legal Theory of Finance*, 28 IND. J. GLOB. LEGAL STUD. 29 (2021).

<sup>261</sup> Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1286, 1299, 1342 (2014).

<sup>262</sup> Victoria J. Haneman, *(Re)Framing Student Loan Debt as a Commons*, 84 L. & CONTEMP. PROBS. 153, 162 (2021).

<sup>263</sup> Johnna Montgomerie & Daniela Tepe-Belfrage, *Caring for Debts: How the Household Economy Exposes the Limits of Financialisation*, 43 CRITICAL SOCIO. 653, 654 (2017).

<sup>264</sup> *Plevin v. Paragon Pers. Fin. Ltd* [2014] UKSC 61 [17] (UK); Sarah Brown, *Consumer Credit Relationships – Protection, Self-Interest/Reliance and Dilemmas*

litigation that sheds light on how such a legal right affects the debt-burdened lives it seeks to improve. Is it beyond financial regulators' remit to examine whether high levels of debt, such as student debt, increase chances of higher employability or wage income?<sup>265</sup> There is a lack of macro-level policy strategy that addresses whether consumers' mobilisation expectations are really met by choosing certain financial products. Consumers' overall live in states of "debtfare."<sup>266</sup> This is a welfare issue that transcends the micro-level question of choice or conduct in any particular financial transaction.

The level of consumer protection in terms of performance, welfare, or outcomes in investment products is even less articulated at the ex post stage than credit products. A retail securities investor in the United Kingdom is unlikely to be able to initiate mis-disclosure litigation for securities losses because of the lack of a supportive securities litigation framework and industry,<sup>267</sup> and existing regulation that protects issuers against only dishonest or reckless mis-disclosures.<sup>268</sup> An investor in the United Kingdom is also unlikely to bring a successful claim against a financial institution merely because of its product's poor long-term performance.<sup>269</sup> Financial regulation can only extend to the quality of investment advice sought at the pre-sale stage, which must be as free from conflicts of interest as possible,<sup>270</sup> and is subject to the quality standard of "suitability" in the United Kingdom and European Union.<sup>271</sup> Such regulation can potentially be seen as distributively unjust where financial products suffer losses (perhaps "normally," depending on market vicissitudes) while investment advisers

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*in the Fight Against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law*, 36 LEGAL STUD. 230, 231 (2016).

<sup>265</sup> Jean François Bissonnette, *The Political Rationalities of Indebtedness: Control, Discipline, Sovereignty*, 58 SOC. SCI. INFO. 454, 455 (2019); Tayyab Mahmud, *Neoliberalism, Debt and Discipline*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW 69, 82-83 (Ugo Mattei & John D. Haskell eds., 2015).

<sup>266</sup> MARK HORSLEY, *THE DARK SIDE OF PROSPERITY: LATE CAPITALISM'S CULTURE OF INDEBTEDNESS* 32, 131 (2015); SUSANNE SOEDERBERG, *DEBTFARE STATES AND THE POVERTY INDUSTRY: MONEY, DISCIPLINE AND THE SURPLUS POPULATION* 46 (2014).

<sup>267</sup> Iris H-Y Chiu, *A Confidence Trick: Ex Ante Versus Ex Post Frameworks in Minority Investor Protection in the UK*, 11 EUR. CO. L. 6, 6 (2014).

<sup>268</sup> Financial Services and Markets Act 2000, c. 8, § 90A (UK).

<sup>269</sup> *Worthing v. Lloyds Bank Plc* [2015] EWHC (QB) 2836 [32].

<sup>270</sup> See, e.g., Directive 2014/65/EU, *supra* note 4, at 357 (relating to independent advice, as required by Article 24(7) of Directive 2014/65/EU); see also *supra* notes 235-36 (detailing basis of the United Kingdom's retail distribution review reforms).

<sup>271</sup> Directive 2014/65/EU, *supra* note 4, at 408-11.

and portfolio managers earn their sizeable advice or management fees.<sup>272</sup>

The lack of ex post accountability or redress for consumers' performance expectations or welfare outcomes is particularly stark for near-essential investment products like pension saving. Commentators warn of potential "time bombs" in relation to pension welfare shortfalls or even pension poverty due to the inability to predict the performance of defined contribution saving schemes.<sup>273</sup> The potential scale of the problem is social in nature. One should question whether taking pension advice twenty years ahead of the pension pot's maturity is sufficient pre-sale protection for consumers' ultimate performance expectations and welfare outcomes. There is a fundamental limitation to the protection of consumer choice at the pre-sale stage, if such predictions remain disconnected from the ultimate performance, utility, or outcomes that consumers reasonably expect.

Mapping against the taxonomy developed in Part II,<sup>274</sup> financial regulation in our view provides extensive, sophisticated, and behaviourally inspired tools to protect consumer choice in developed financial markets. These tools reflect a policy agenda in favour of financialisation and the continued dominant role of private sector finance in meeting consumers' varied financial needs.<sup>275</sup> Financial regulation hence extensively caters to the consumer empowerment ideology. We also take the view that the conduct of private sector financial intermediaries is extensively regulated, but regulatory duties often strike a balance between keeping the industry's legal risks manageable and providing a framework for reasonable consumer treatment. For example, fiduciary care is generally not expected from financial intermediaries.<sup>276</sup> Consumer protection relating to citizenly expectations is, in our view, scarcely granted in terms of access to near-essential financial products or services, post-sale quality protection, or welfare outcomes. While consumers bear the cost of regulatory burdens,

<sup>272</sup> See Madison Darbyshire, *Cathie Wood's Flagship Ark Fund Tops \$300mn in Fees Despite Losses*, FIN. TIMES (Mar. 9, 2023), <https://www.ft.com/content/7930fbf7-d2d6-464c-9ffa-20efcf58e21e> [<https://perma.cc/4NLA-3BQV>].

<sup>273</sup> Simoney Kyriakou, *Pension Poverty Warning as DC Models Found Outdated*, FTADVISER (Apr. 28, 2021), <https://www.ftadviser.com/pensions/2021/04/28/pension-poverty-warning-as-dc-models-found-outdated/> [<https://perma.cc/3WC5-BQDR>].

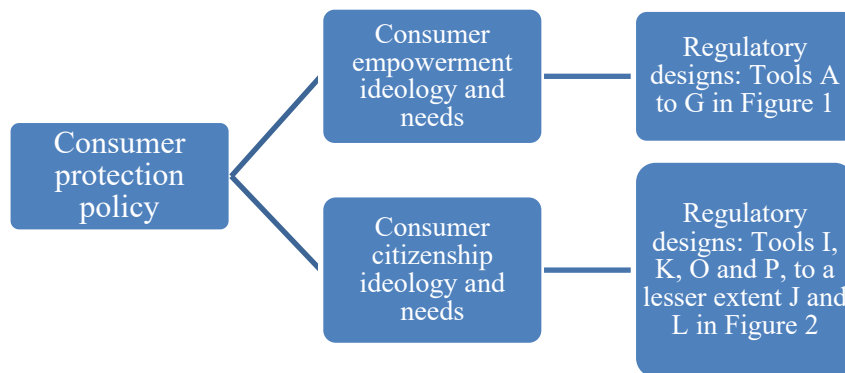
<sup>274</sup> See Figure 3 *infra*, at Part I(A)(ii).

<sup>275</sup> Iain Ramsay & Toni Williams, *Peering Forward, 10 Years After: International Policy and Consumer Credit Regulation*, 43 J. CONSUMER POL'Y 209 (2020).

<sup>276</sup> Chiu, *supra* note 234.

regulation lags behind vis-à-vis clever regulatory evasions and an egregious financial sector culture.<sup>277</sup> In our view, despite the state of development in Western financial markets in the European Union, United Kingdom, and United States, Western financial consumers face perverse incentives on the part of financial intermediaries and product providers and are supported by limited pre-sale choice regulations that seek to improve their ultimate consumer welfare and outcomes. Even with extensive enrolment of consumers as stakeholders in policy development in the European Union and United Kingdom,<sup>278</sup> it is questionable whether their representation countervails powerful financial industry lobbies<sup>279</sup> that shape the balance of priorities struck by financial regulation.

Figure 4, which follows, depicts the regulatory tools deployed in financial regulation, applying the taxonomy created in Part II.



*Figure 4: The Taxonomy Representation of Financial Regulation Tools*

<sup>277</sup> GLOSTER, *supra* note 8 (discussing the London and Capital Finance scandal).

<sup>278</sup> Consumer stakeholders in policy development may participate in fora, including the mandatory consumer panel for the FCA and the ESMA Stakeholder Panel, which includes consumer representatives.

<sup>279</sup> *See e.g.*, MARCUS WOLF, KENNETH HAAR & OLIVIER HOEDEMAN, THE FIRE POWER OF THE FINANCIAL LOBBY: A SURVEY OF THE SIZE OF THE FINANCIAL LOBBY AT THE EU LEVEL (2014) [https://corporateeurope.org/sites/default/files/attachments/financial\\_lobby\\_report.pdf](https://corporateeurope.org/sites/default/files/attachments/financial_lobby_report.pdf) [<https://perma.cc/JG99-FU46>].

This Article now discusses the extent to which the introduction of the United Kingdom’s Consumer Duty changes consumer protection levels as discussed.

### *B. The United Kingdom’s Financial Consumer Duty*

The Consumer Duty was implemented in the United Kingdom in July 2023 as a regulatory principle imposed on all regulated financial services firms.<sup>280</sup> It is framed in the following terms: “a firm must act to deliver good outcomes for retail customers.”<sup>281</sup> This principle is further explicated by the Duty in terms of four particular consumer outcomes and three cross-cutting conduct rules.<sup>282</sup>

As a regulatory principle, the Consumer Duty forms the “bedrock” of regulatory rules and enforcement,<sup>283</sup> meaning that it creates a basis for future development of precise rules and can also found a cause for regulatory action. Where there may not be precise rules of conduct that govern a particular matter, the FCA has been able to utilize its Principles to articulate a cause of action against egregious conduct.<sup>284</sup> Principles-based enforcement was used against the London inter-bank offered rate manipulation scandal<sup>285</sup> when interest rate

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<sup>280</sup> Sheldon Mills, *Countdown to the Consumer Duty*, FIN. CONDUCT AUTH. (May 10, 2023) <https://www.fca.org.uk/news/speeches/countdown-consumer-duty> [<https://perma.cc/3CTD-RV7L>].

<sup>281</sup> *PRIN 2.1: The Principles*, *supra* note 5.

<sup>282</sup> *PRIN 2A*, FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/PRIN/2A/> [<https://perma.cc/GTH6-ETNE>] (July 31, 2023).

<sup>283</sup> The nature of principles was explained in *R v. Financial Services Authority* as forming the bedrock of regulatory rules and enforcement. *R v. Fin. Servs. Auth.* [2011] EWHC (Admin) 999 (UK).

<sup>284</sup> Final Notice from the Financial Services Authority to Kensington Mortgage Company Limited (Apr. 12, 2010), <https://www.fca.org.uk/publication/final-notices/kensington.pdf> [<https://perma.cc/5ZRH-3FA3>] (FSA’s enforcement against Kensington Mortgage Co. Ltd).

<sup>285</sup> The scandal involved banks that are trusted to make submissions for their inter-bank lending rate to a self-regulating panel which would average these submissions to publish the London inter-bank offered rate as an interest rate benchmark for many loan contracts. These banks manipulated their submissions in order to meet their own interests. This jeopardised the integrity of the London inter-bank offered rate as a self-regulating variable rate benchmark to which many loan contracts are referred. See Miranda Marquit & Benjamin Curry, *What is Libor and Why Is It Being Abandoned?*, FORBES ADVISOR, <https://www.forbes.com/advisor/investing/what-is-libor/> [<https://perma.cc/6KKD-9H4W>] (Feb. 16, 2023).

benchmarks were not formally regulated.<sup>286</sup> Principles-based regulation can potentially fill the gaps of rules-based regulation and allows the FCA to consider how to govern the financial services industry more holistically at any point in time. However, the Principles may not be civilly enforced in courts, as they do not give rise to an individual right of action.<sup>287</sup> However, the Financial Ombudsman is able to consider allegations of failures to adhere to Principles and provide out-of-court redress for consumers.<sup>288</sup> In sum, the Consumer Duty is chiefly enforced by the FCA or consumers before the Ombudsman.

*i. Four Outcomes*

At first blush, the reference in the Duty to “good outcomes” seems a radical departure from the account of consumer protection discussed in sub-section (A).<sup>289</sup> Does the Duty’s reference to outcomes pertain to consumer citizenship needs, such as meeting the performance or welfare expectations of financial products? Unpacking the four precise outcomes of the Duty’s stipulation presents a more nuanced picture. Two of the four outcomes more clearly relate to the pre-contractual stage and to empowering consumer choice. The other two have post-contractual implications for consumers and may potentially provide for their welfare outcomes. However, these observations are only arguable, and it remains to be seen how the FCA and the Upper Tribunal,<sup>290</sup> which can be asked to review the FCA’s enforcement decisions, will interpret what these outcomes demand from regulated firms.

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<sup>286</sup> Final Notice from the Financial Conduct Authority to Martin Brokers (UK) Ltd (Martins) (May 15, 2014), <https://www.fca.org.uk/publication/final-notices/martin-brokers-uk-ltd.pdf> [<https://perma.cc/5ACX-WJJ2>] (FCA’s enforcement against Martin Brokers); Final Notice from the Financial Services Authority to Kensington Mortgage Company Limited (Apr. 12, 2010), <https://www.fca.org.uk/publication/final-notices/kensington.pdf> [<https://perma.cc/6PYA-LACC>] (FCA’s enforcement against Kensington Mortgage Company Limited).

<sup>287</sup> See A NEW CONSUMER DUTY, *supra* note 1, at 65-66.

<sup>288</sup> Simon Rawle, *A New Consumer Duty – Setting a Higher Standard of Care for Consumers*, FIN. OMBUDSMAN SERV. (Aug. 8, 2022) <https://www.financial-ombudsman.org.uk/data-insight/blogs/new-consumer-duty-setting-higher-standard-care-consumers> [<https://perma.cc/LUU3-R7WB>].

<sup>289</sup> See *supra* Part III(A).

<sup>290</sup> Financial Services and Markets Act 2000, c. 8, §§ 127, 132 (UK), <https://www.legislation.gov.uk/ukpga/2000/8/section/127> [<https://perma.cc/R96N-RRH6>].



Two goods-related outcomes concerning the protection of consumer choice empowerment are the consumer communications outcome and the product governance outcome. The consumer communications outcome is to be achieved by firms providing not only mandatory disclosures to consumers, but also ensuring that communications are understood by consumers and that they are equipped to make effective decisions.<sup>291</sup> Such communications are broad, covering pre- or post-contract communications, communications related to product disclosure or marketing, and communications in any medium given to the consumer.<sup>292</sup> From this policy perspective, communications are meant to be purposeful and practically helpful to consumers, rather than to merely discharging mandatory legal obligations. Although such communications do not deviate from the legal standard for financial promotion, which is the standard of “fair, clear and not misleading,”<sup>293</sup> the regulatory expectations can now arguably be framed around “comprehensibility” and “helpfulness” for consumers. Firms are therefore expected to take proactive steps to ensure that consumers understand information, rather than to dump information onto them. The consumer communications outcome principally seeks to support the protection of meaningful choice for consumers, as financial intermediaries are engaged in more proactive and hands-on roles to assist consumers in understanding financial products or services. It is uncertain how far the communications outcome would affect the consumer’s understanding of their needs or choice universe more broadly. The communications outcome arguably does not relieve the consumer from the need to seek financial advice which should be separately contracted for and remunerated.<sup>294</sup>

Although the communications outcome relates to consumers’ pre-contractual stage, consumers may argue that a poor communications outcome is connected to or caused by a poor decision they made in purchasing certain financial products or services. In light of this perspective, consumers may have some scope for ex post adjustment of their welfare outcomes. For example, under the FCA, a firm must, where appropriate, test the quality of its communications before sending them out, remedy deficiencies, and adapt them to consumers’

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<sup>291</sup> See *PRIN 2A.5 Consumer Duty: Retail Customer Outcome on Consumer Understanding*, FIN. CONDUCT AUTH. (July 31, 2023), <https://www.handbook.fca.org.uk/handbook/PRIN/2A/5.html> [<https://perma.cc/7ARX-D3KT>].

<sup>292</sup> A NEW CONSUMER DUTY, *supra* note 1, at 51.

<sup>293</sup> CONDUCT OF BUSINESS SOURCEBOOK, *supra* note 40, at COBS 4.2.1.

<sup>294</sup> See generally *id.* at COBS 6.1A.

needs.<sup>295</sup> Where such testing is not carried out or carried out inadequately, such as on a small sample of consumers, the resulting untested communications can contribute to the perception that the firm's communications are defective. As such, firms need to discharge a greater burden to show that consumers' choices are fully informed, rather than leaving consumers to take responsibility for being fully informed. That said, it is possible, but not entirely clear, that a defective communications outcome can result in consumers' welfare or distributive adjustments before the Ombudsman.

The U.K. FCA also requires firms to test their consumer interfaces, which includes communications meant for consumers; the user interfaces, designs, and engagement with consumers; the nature of products that are meant for consumer target markets as may be relevant; and whether products represent good value for consumers.<sup>296</sup> This is a broad regulatory expectation across all four outcomes, reflecting the regulators' expectations that firms should prove that they would deliver the outcomes expected in the Consumer Duty. The Duty is essentially a meta-level form of regulation, allowing each firm to implement its own consumer-facing processes and interfaces.<sup>297</sup> Hence, firms' implementations are not normally scrutable by regulators. However, by requiring firms to engage in testing,<sup>298</sup> firms are compelled to provide an ex ante evidentiary basis to justify their implementation of the Duty. The consumer communications outcome seeks to protect consumer choice by compelling firms to make greater substantive effort to compensate for consumers' generally weaker understanding and financial literacy. In our view, this level of consumer protection continues to focus on empowering consumers to make their own choices upon receiving information or disclosure, which is not different from the extant level of financial consumer protection

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<sup>295</sup> See *PRIN 2A.5 Consumer Duty: Retail Customer Outcome on Consumer Understanding*, *supra* note 291, §§ 2A.5.10-14.

<sup>296</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 5.33, 5.34. Testing expectations are also expanded in chapters 6 and 8 and paragraph 11.33.

<sup>297</sup> The FCA's FG22/5 Final Non-Handbook Guidance for the Consumer Duty, *see id.*, provides guidance to firms on how to deliver the four outcomes in the Consumer Duty but cannot be overly prescriptive. How firms achieve this is dependent on their processes and systems, such as referred to in paragraphs 5.14 (relating to the consumer support outcome); 8.55 (relating to the communications outcome); 11.7 (discussing monitoring product benefits and relating to the product governance outcome); and 11.37 (on assessing whether customers suffer from vulnerability).

<sup>298</sup> See *supra* note 296 on the extent and expectations of testing.

discussed in Part III(A). The Duty in our view goes just a little further, as firms have to demonstrate more proactively and clearly that they are offering such protection.

Next, the product governance outcome seeks to ensure that financial products are suitably designed and appropriately marketed and distributed to consumers.<sup>299</sup> This aspect of the Duty does not add to the legal standards in product governance regulation discussed earlier.<sup>300</sup> However, precise articulation of regulatory expectations for certain ex ante processes in product governance such as product testing, reviewing, proactively identifying only suitable consumers,<sup>301</sup> could create proactive “sub-duties” for product governance compliance. In our view, compliance with these sub-duties would likely provide the evidentiary basis for firms to show that they are implementing the outcome, which must be provided by firms themselves. It may be argued that the product governance outcome in the Duty would make it highly unlikely that previous scandals, such as the unsuitable marketing of mini-bonds,<sup>302</sup> could occur again to retail investors without impunity. How would product manufacturers be able to justify the marketing of mini-bonds to mass market consumers, where perhaps only the consumers with a higher risk appetite may be fairly exposed?

We take the view that under the Consumer Duty, financial product distributors are placed in a “gatekeeping” position against product manufacturers, since they must concurrently ensure the suitability of their target market and review the suitability of their marketing practices.<sup>303</sup> Distributors may naturally be incentivised to please product suppliers. However, distributors will face legal risks when implementing product governance obligations,<sup>304</sup> and they are subject to testing

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<sup>299</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶ 6.3.

<sup>300</sup> *See supra* Part III(A).

<sup>301</sup> *See PRIN 2A.3 Consumer Duty: Retail Customer Outcome - Products and Services*, FIN. CONDUCT AUTH. (July 31, 2023), <https://www.handbook.fca.org.uk/handbook/PRIN/2A/3.html> [<https://perma.cc/85VT-NHJX>]; *see also* PRODUCT INTERVENTION AND PRODUCT GOVERNANCE SOURCEBOOK (PROD), *supra* note 75, at PROD 3.2. The exhortation to target only customers the product is intended for is elaborated in paragraphs 6.18-6.25, of the FCA’s Final Non-Handbook Guidance for the Consumer Duty. FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 6.18-6.25.

<sup>302</sup> *See* GLOSTER, *supra* note 8.

<sup>303</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 6.62, 6.66.

<sup>304</sup> *Id.* ¶¶ 6.57, 6.66.

and review processes<sup>305</sup> to provide the evidentiary basis for their implementation.

The product governance outcome supports the protection of consumer choice. It makes strides towards holding product providers accountable for only providing consumers with choices that the providers believe are suitable for the consumer.<sup>306</sup> However, this continues to neglect real questions regarding consumers' inability to understand their financial needs and the universe of choices before them. Each product provider's assessment of potential suitability of a product does not necessarily help consumers to compare with other products in terms of features and quality. In the absence of *ex ante* product regulation—such as the regulations that govern drug approval or product CE markings, which unequivocally promise certain qualities<sup>307</sup>—it is uncertain if product governance would provide the necessary clarity and quality framework for consumers' meaningful choice in the financial goods and services sector.

The Consumer Duty did not substantively change the orientation of the existing product governance regime for consumer protection. The product governance regime remains a process-based form of regulation for financial intermediaries whose conduct is scrutinised pre-sale and pursuant to empowerment of consumer choice. Product governance regulation thus remains disconnected from consumers' ultimate welfare expectations or outcomes from product performance.

Next, we turn to two outcomes expressly articulated as post-sale consumer outcomes: the “consumer support” and “fair value” outcomes. The key question is whether these outcomes shift the needle in terms of protecting financial consumers' expectations of performance or welfare, which we critically discussed earlier.<sup>308</sup>

The consumer support outcome envisages pre- and post-sale consumer support, regardless of product.<sup>309</sup> Such consumer support does

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<sup>305</sup> *Id.* ¶¶ 6.80, 6.85 (where testing requirements are set out for firms, including manufacturers and distributors).

<sup>306</sup> The EU Guidelines issued by ESMA go along the same lines. *See* EUR. SEC. MKTS. AUTH., FINAL REPORT: GUIDELINES ON MiFID II PRODUCT GOVERNANCE REQUIREMENTS (2023), [https://www.esma.europa.eu/sites/default/files/2023-03/ESMA35-43-3448\\_Final\\_report\\_on\\_MiFID\\_II\\_guidelines\\_on\\_product\\_governance.pdf](https://www.esma.europa.eu/sites/default/files/2023-03/ESMA35-43-3448_Final_report_on_MiFID_II_guidelines_on_product_governance.pdf) [<https://perma.cc/AU56-D4ET>].

<sup>307</sup> *See supra* note 125 and accompanying text.

<sup>308</sup> *See supra* Part III(A).

<sup>309</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶ 9.3.

not envisage exceeding what consumers currently enjoy in expected legal or contractual rights, such as switching products, cancelling contracts within stipulated regulatory periods, or submitting claims, such as for insurance products. The manner of consumer support, however, demands that firms ensure that consumers are given “appropriate frictions” in decisions made at the pre-sale stage and are not faced with unreasonable barriers in accessing post-sale assistance.<sup>310</sup> Further, favouring or prioritising new customers over existing ones would be regarded as inconsonant with the expectations of the Duty. The Consumer Duty intends, in our view, to prevent firms from legalistically adhering to their regulatory or contractual duties without engaged concern for consumers. Further, specific attention must be given to the needs of vulnerable consumers.<sup>311</sup>

Ex post consumer support appears to be process-based and deal with customer interfaces. To protect consumers, for example, firms may have to consider whether automated forms of consumer support such as chatbots are sufficient, and whether they should dismantle undue barriers to seek human assistance. However, an increase in consumers’ ability to demand post-sale care can expand possibilities for requesting adjustment to aspects of their bargains during the lifetime of their ownership of a credence good. For example, credit consumers could argue that they need to switch to a different product or argue for contractual variation when changing circumstances affect their loan affordability. It is arguable that the Consumer Duty places the expectation that credit institutions would have to support such customers on a firmer footing, changing from the current situation where borrowers are left to deal with lenders themselves and find little forbearance and understanding.<sup>312</sup> Although lenders would have legal rights of enforcement against borrowers in default, for example, in our view the Consumer Duty may provide more leeway for consumers to bargain for forbearance or other measures that could improve their welfare outcomes.

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<sup>310</sup> See *PRIN 2A.6 Consumer Duty: Retail Customer Outcome on Consumer Support*, FIN. CONDUCT AUTH. (July 31, 2023), <https://www.handbook.fca.org.uk/handbook/PRIN/2A/6.html?date=2099-07-01> [<https://perma.cc/LF85-TYGG>].

<sup>311</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 9.13, 9.18, 9.37, 9.55.

<sup>312</sup> Such difficulty is expressed in a July 2022 report prepared for the FCA. YONDER CONSULTING, *BORROWERS IN FINANCIAL DIFFICULTY 11* (2022), <https://www.fca.org.uk/publication/research/borrowers-in-financial-difficulty.pdf> [<https://perma.cc/Y6T5-6NAV>].

The fair value outcome demands that product manufacturers and their distributors engage in fair value assessments to ensure that consumers are not exploited.<sup>313</sup> At first blush, this outcome is pre-contractual and focused on ex ante harm prevention. Product manufacturers must carry out initial value assessments and review them at stages of product adaptation or product renewal.<sup>314</sup> Such value assessments include assessments of cost to the manufacturer as well as comparative assessments with similar market products, and must take into account both financial and non-financial benefits to consumers.<sup>315</sup> The FCA seems focused on fair value assessments as a key component of the four outcomes above, and issued a special review of processes that evidence such fair value assessment.<sup>316</sup> Distributors must also assess fair value before carrying out distribution based on the characteristics and needs of the target market, distributors' cost, intended benefits to consumers, and the remuneration of all intermediaries involved in the offering and distribution of the product.<sup>317</sup> Both manufacturers and distributors need to ensure that vulnerable customers do not miss out on fair value.<sup>318</sup> Further, the fair value assessment seems imposed throughout the life cycle of financial products,<sup>319</sup> and both manufacturers and distributors must take steps to avoid or mitigate harm if their reviews raise the finding that fair value is no longer provided.<sup>320</sup>

The fair value outcome is, on its face, focused on point-of-sale and does not expect product manufacturers to assess fair value beyond a reasonable foreseeable future according to the characteristics of a

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<sup>313</sup> See *PRIN 2A.4 Consumer Duty: Retail Customer Outcome on Price and Value*, FIN. CONDUCT AUTH. (July 31, 2023), <https://www.handbook.fca.org.uk/handbook/PRIN/2A/4.html> [<https://perma.cc/36FJ-P4GS>].

<sup>314</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶ 7.9.

<sup>315</sup> *PRIN 2A.4 Consumer Duty: Retail Customer Outcome on Price and Value*, *supra* note 313, at PRIN 2A.4.8.

<sup>316</sup> See *Consumer Duty: Findings from Our Review of Fair Value Frameworks*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/publications/good-and-poor-practice/consumer-duty-findings-our-review-fair-value-frameworks> [<https://perma.cc/UCS8-4T8N>] (Nov. 17, 2023).

<sup>317</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 7.31-7.33.

<sup>318</sup> *Id.* ¶ 7.51.

<sup>319</sup> *Id.* ¶¶ 7.15-7.16.

<sup>320</sup> *Id.* ¶ 7.14.

product.<sup>321</sup> However, the obligation<sup>322</sup> to ensure that fair value continues throughout the life of the product can be used to consumers' advantage by adjusting for the performance or welfare outcomes they attain. For example, customers that are renewing insurance products should arguably be presented with equally favourable deals as new customers, since fair value assessments are triggered at each renewal period. The life-cycle review obligation also leaves open the question of whether open-ended mutual fund investors can ask for post-sale review of fund charges and fees after a period of poor performance. In addition to consumer welfare at the point-of-sale, the need to consider consumers' benefits can arguably include their ultimate welfare or performance expectations of the financial product they purchase.

Although the consumer support and fair value outcomes do not explicitly address consumers' welfare or performance protections, initiated consumers can take advantage of the Duty to approach their financial intermediaries for more ex post support, which can then lead to welfare or distributive adjustment. However, these outcomes are not framed as rights for consumers. Nevertheless, the four outcomes are not strict in nature, and are required in combination with three cross-cutting rules of conduct discussed below. We examine these rules of conduct to determine the consumer protection levels that are really achieved by the Duty.

### *ii. Three Cross-Cutting Rules of Conduct*

The four "good outcomes" are supported by three cross-cutting rules of conduct—namely, regulated firms must act in good faith, avoid foreseeable harm, and support consumers towards their financial objectives.<sup>323</sup> The finding of "poor outcomes"—which means that any of the four good outcomes discussed above in the Consumer Duty are not met—seems to necessarily involve a failure one or more of the conduct rules as well.<sup>324</sup> This is reflected in the FCA's provision that "[t]he cross-cutting obligations define how firms should act to deliver

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<sup>321</sup> *Id.* ¶ 7.9.

<sup>322</sup> *PRIN 2A.4 Consumer Duty: Retail Customer Outcome on Price and Value*, *supra* note 314, at PRIN 2A.4.8.

<sup>323</sup> See *PRIN 2A.2 Cross-Cutting Obligations*, FIN. CONDUCT AUTH. (July 31, 2023), <https://www.handbook.fca.org.uk/handbook/PRIN/2A/2.html> [<https://perma.cc/8DZJ-PZ92>].

<sup>324</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 5.4, 5.5.

good outcomes for retail customers.”<sup>325</sup> In this way, it is arguable that the four good outcomes are not judged to entail a form of strict liability. That said, the FCA’s guidance points to the Consumer Duty’s intention to help consumers deliver the four good outcomes, and such outcomes would be monitored by supervisory action.<sup>326</sup> However, the FCA also clarifies that the outcomes help to define expected conduct, and “do not exhaust those rules.”<sup>327</sup> This may mean that poor *conduct* is itself actionable even in the absence of poor *outcomes*, and poor outcomes can reflect poor conduct. It remains uncertain if poor outcomes are per se actionable, as the FCA’s guidance emphasizes monitoring the outcomes’ achievement.<sup>328</sup> Consumers’ economic or financial welfare interests, in the absence of actionable conduct, remain matters for “luck egalitarianism”<sup>329</sup> or market vicissitudes. In this manner, where a consumer attempts to seek welfare adjustment on the basis of a support or fair value outcome, their success may be limited by the operation of conduct rules.

The conduct rules do not require firms to go above and beyond to accommodate consumers. The “good faith” conduct rule is firmly situated within commercial bounds of reasonableness and is explained to mean honest, fair, and open dealing, based on the general duty to act in the best interests of customers.<sup>330</sup> This duty does not prevent firms from meeting their legitimate commercial interests or exposing consumers to product risks that are inherent and understood. Further, good faith is not fiduciary in nature,<sup>331</sup> as the strict fiduciary standard of single-minded loyalty<sup>332</sup> does not apply generally to the financial

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<sup>325</sup> See *PRIN 2A.2 Cross-Cutting Obligations*, *supra* note 323, at PRIN 3.2.27.

<sup>326</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶ 11.11.

<sup>327</sup> *PRIN 2A.2 Cross-Cutting Obligations*, *supra* note 323, at PRIN 2A.2.28.

<sup>328</sup> See *id.* at PRIN 2A.2.25.

<sup>329</sup> Linarelli, *supra* note 258.

<sup>330</sup> Commission Delegated Regulation (EU) 2017/565, of 25 April 2016 Supplementing Directive 2014/65/EU of the European Parliament and of the Council as Regards Organisational Requirements and Operating Conditions for Investment Firms and Defined Terms for the Purposes of that Directive, art. 37(2), 2017 O.J. (L 87) 1, 38 (requiring investment firms to ensure that “financial analysts [to] not undertake personal transactions or trade, other than as market makers acting in good faith”).

<sup>331</sup> See Chiu, *supra* note 234.

<sup>332</sup> This is exemplified in the classic English case *Mothew (T/A Stapley & Co) v. Bristol & West Bldg. Soc’y* [1996] EWCA (Civ) 533 (Eng.) (“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The



services sector whose practices are subject to contractual and regulatory modifications.<sup>333</sup>

Firms cannot exploit customers' needs or weaknesses, manipulate them, neglect their interests, or discriminate amongst them without a reasonable basis.<sup>334</sup> To this end, the good faith conduct rule frames outcomes such as communications, product governance, and fair value within a framework focused on the broader values of fairness and open-ness. Since good consumer outcomes are framed in terms of proactive actions like testing, review, and proactive remediation,<sup>335</sup> good faith extends to those actions. Ultimately, the standard of care imposed by the FCA on firms is arguably higher since the firms are required to take proactive prevention actions and firms need to understand what may be considered exploitative of consumers. Firms may find it harder to justify financial products of dubious utility, such as products with built-in hazards and huge disparities between teaser rates and the mortgage rates applied after the teaser rates end, insurance products that may never be used, or investment products whose return structures are excessively complex. Under the good faith conduct rule, firms would also be unlikely to justify using their regulated status for one activity to engage in unregulated and high-risk financial promotion.<sup>336</sup> In this manner, the good faith cross-cutting rule could work towards prevention of harm more generally than under precise regulations and lead financial firms to treat consumers more fairly.

The next cross-cutting conduct rule requires firms to avoid foreseeable consumer harm. Firms are not expected to protect consumers from the inherent risks of financial products but must take steps to ensure that product design and business conduct avoid causing

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distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.”)

<sup>333</sup> THE LAW COMMISSION, FIDUCIARY DUTIES AND REGULATORY RULES: REPORT ON A REFERENCE UNDER SECTION 3(1)(E) OF THE LAW COMMISSIONS ACT 1965, ¶ 14.9 (1995), <https://cloud-platform-e218f50a4812967ba1215eaccede923f.s3.amazonaws.com/uploads/sites/30/2015/04/lc236.pdf> [<https://perma.cc/Q594-76A5>].

<sup>334</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 5.13, 5.14, 11.11.

<sup>335</sup> *Id.* ¶¶ 4.3, 5.22 (on proactivity required to achieve good outcomes and avoid foreseeable harm).

<sup>336</sup> This occurred in the London and Capital Finance collapse. *See* Kalyeena Markortoff, *Investors Face £230m Loss in London Capital & Finance Collapse*, THE GUARDIAN (Jan. 9, 2020, 11:19 AM), <https://www.theguardian.com/uk-news/2020/jan/09/investors-face-230m-loss-in-london-capital-finance-collapse> [<https://perma.cc/8V7X-BFJ9>].

foreseeable harm, including to vulnerable consumers. Firms' calculation of foreseeable harm is based on generally acceptable short-term standards, as the FCA's guidance refers to foreseeable harm around the time of the purchase of the product.<sup>337</sup> However, as the FCA's guidance also expects firms to help consumers avoid foreseeable harm throughout the life cycle of the product, it is arguable that the conduct expected of firms is not so short-term after all and extends beyond point of sale.

Finally, firms must engage in conduct that enables and supports consumers' attainment of their financial objectives. In our view, this does not extend to consumers receiving particular or guaranteed financial performance from their products. This conduct expectation is carefully worded in order to focus on firms' *supportive* roles, which is an "assisting" role towards meeting consumers' financial needs but not warranting that they will certainly be achieved. The expectation that firms support their consumers' achievement of financial objectives does not relate to the firms' responsibility for product performance or consumer welfare. In this manner, conduct rules are framed *proactively* against harm but only *supportively* towards consumers' attainment of welfare or product performance.

We perceive a genuine and innovative effort on the part of the FCA to address the meaningful protection of consumer choice by requiring firms to proactively make choice comprehensible and not harmful. Whilst the Consumer Duty still focuses on consumer empowerment, the regulator recognises the limits of leaving consumers to be self-responsible and makes demands of the industry in terms of proactive and preventive conduct. One of the key ills of the financial sector is the generation of abundant choice that fails to provide clear qualities or justification concerning meeting consumers' financial needs. Financial sectoral culture is also ridden with perverse short-term incentives and conflicts of interest. It is not inordinate to impose more responsibility on the industry to justify the choices it offers. The FCA Duty does not, however, create a radical shift towards more intense citizenly protections for financial consumers, such as ensuring that product quality meets consumers' welfare needs. This Article has argued that there may be some scope for consumers to initiate conversations with firms about post-sale welfare and performance. This possibility is not placed within a rights-based framework, however.

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<sup>337</sup> FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145, ¶¶ 5.23, 5.24 (on what is reasonably foreseeable at the time).

The Duty's mandate that firms use proactive measures, such as testing, reviewing, and harm prevention, demonstrate both a heightened standard of care and an evidentiary basis for compliance. There is some potential to compel the industry to become more circumspect in terms of how firms' offerings of choice are presented to consumers. Although the Duty stops short of regulating product quality, performance, and welfare outcomes, consumer protection advocates may hope that the industry engages in pre-emptive self-discipline to make consumers' choice more navigable and manageable.

The introduction of the Consumer Duty has arguably not changed the focus of financial consumer protection, which mainly protects choice almost as an end in itself. We believe that the consumer protection tools offered in the Consumer Duty make no difference to the levels of consumer protection represented in the Taxonomy in Figure 4 above.

We argue that there is unfinished business in governing the levels of financial consumer protection. In particular, there is no justification for the exclusion of certain consumer citizenship needs that can be reflected in regulatory tools, such as *H* (right of access), *M* (welfare and outcomes), and *N* (guarantees or quality standards) in Figure 2. Although the Consumer Duty has expanded the scope of regulatory tool *K*, since firms are enrolled in proactive prevention of harm, the scope of regulatory tool *L*, which caters to consumers' distributive needs, remains minimal. We argue below that financial consumer protection remains in need of reform.

#### IV. HOW CONSUMERS SHOULD BE PROTECTED IN THE FINANCIAL SECTOR

In this Part, we address the remaining financial consumer protection gaps and whether the FCA should reform the Duty and facilitate its effective enforcement. At a high level, we argue that the Consumer Duty's exclusion of certain levels of consumer protection that are aligned with consumer citizenship needs cannot be normatively supported by reference to the FCA's legislative mandate. We argue that the legislative mandate of "consumer protection" for the FCA<sup>338</sup> entails certain legitimate expectations of their policy output. The legitimacy of regulators' reforms and actions can be evaluated by considering their "input" legitimacy, which refers to the elements of

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<sup>338</sup> Financial Services and Markets Act 2000, c. 8, § 1B (UK).

consultation, policy considerations, and processes that feed into their policy formation, as well as “output” legitimacy, which considers whether regulatory reforms would effectively meet the social needs of consumer protection.<sup>339</sup>

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

First, consumers who have claims exceeding the Ombudsman's jurisdictional maximum of £415,000 will not be able to attain civil enforcement, creating distributive consequences.<sup>340</sup> This unequal outcome is not supported, especially by input legitimacy. The FCA has undergone extensive reform consultation over a five-year period, starting with a discussion concept paper that proposed a duty of care but resulted in no concrete actions until the proposed Consumer Duty.<sup>341</sup> The industry, stakeholders, and the general public were given many opportunities to provide input on the policy formation process, including consumer group advocates in the United Kingdom. Scholars have recognised that civil societies are important actors in financial regulation in both the European Union<sup>342</sup> and the United States,<sup>343</sup> though they face considerable resistance from industry groups.

Although the FCA received feedback on its consultation paper regarding the desirability of private enforcement and consumer redress<sup>344</sup> from consumer organisations and the Financial Services Consumer Panel (an independent statutory body established by the FCA),<sup>345</sup> the FCA decided that the Duty is not privately enforceable in court, but left the door open for future review.<sup>346</sup> The

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<sup>339</sup> See, e.g., FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 6-42 (1999).

<sup>340</sup> Consumers who seek redress from the Ombudsman cannot also go to court to obtain additional remedies. See *Clark v. In Focus Asset Management & Tax Solutions Ltd* [2008] EWCA (Civ) 643 (Eng.).

<sup>341</sup> FIN. CONDUCT AUTH., DISCUSSION PAPER ON A DUTY OF CARE AND POTENTIAL ALTERNATIVE APPROACHES (2018), <https://www.fca.org.uk/publication/discussion/dp-18-05.pdf> [<https://perma.cc/YJ3S-5CP3>].

<sup>342</sup> Kastner, *From Outsiders to Insiders*, *supra* note 92, 223-41.

<sup>343</sup> See, e.g., John T. Woolley & J. Nicholas Ziegler, *The Two-Tiered Politics of Financial Reform in the United States* (U.C. Berkeley Inst. Lab. & Emp., Working Paper Series No. 111-11, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1948758](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948758) [<https://perma.cc/3SXR-L8B4>].

<sup>344</sup> See, e.g., A NEW CONSUMER DUTY, *supra* note 1, ¶ 1.26.

<sup>345</sup> Financial Services and Markets Act 2000, c. 8, § 1Q (UK).

<sup>346</sup> A NEW CONSUMER DUTY, *supra* note 1, ¶ 11.10.

marginalisation of this consumer group input is perplexing. The lack of private enforcement can affect output legitimacy in terms of how effectively consumers can achieve their individual protection under the Duty. Further, discipline by civil enforcement can buttress implementation effectiveness. The industry has already voiced concerns over regulatory burdens and costs imposed by the Duty, undermining the market competitiveness in the United Kingdom.<sup>347</sup> In January 2023, the FCA published a review on the readiness of the firms to implement the Duty by July 31, 2023, and observed that some firms did not believe that the Duty represents a real regulatory change and/or have inadequately or only superficially implemented the requirements.<sup>348</sup> In light of the industry's mixed readiness and willingness to lobby against the Consumer Duty, the FCA's neglect of civil society representations for the civil actionability of the Duty is regrettable.

It is important for consumers to have access to appropriate dispute resolution mechanisms, both within financial services providers and through independent dispute resolution bodies. More generally, the United Kingdom's Consumer Rights Act 2015 was enacted to, among other objectives, provide consumers a right to bring actions for competition law infringements.<sup>349</sup> The importance of such access is recognised by the G20 High-Level Principles on Financial Consumer Protection ("G20 Principles")<sup>350</sup> and the World Bank Good Practices for Financial Consumer Protection.<sup>351</sup> Principle 12 of the G20 Principles states that jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely, and efficient. In addition, the International Network of Financial Services

<sup>347</sup> Laura Noonan, George Parker & Ian Smith, *City of London Minister Attacks Flagship Regulatory Reform*, FIN. TIMES (Feb. 26, 2023), <https://www.ft.com/content/68473f3f-b57c-4e86-aa5f-6a1f7161cf45> [<https://perma.cc/Q4ZV-J9HT>].

<sup>348</sup> *Consumer Duty Implementation Plans*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/publications/multi-firm-reviews/consumer-duty-implementation-plans> [<https://perma.cc/D6KD-JV3A>] (Jan. 25, 2023).

<sup>349</sup> See Jessica Simor QC, Nicholas Gibson, Ben Silverstone & Anita Davies, *Private Enforcement*, in UK COMPETITION LAW: THE NEW FRAMEWORK 206 (Ros Kellaway, Rhodri Thompson & Christopher Brown eds., 2016).

<sup>350</sup> OECD, G20/OECD HIGH-LEVEL PRINCIPLES ON FINANCIAL CONSUMER PROTECTION (2022), [https://web.archive.oecd.org/2022-12-12/648348-G20\\_OECD%20FCP%20Principles.pdf](https://web.archive.oecd.org/2022-12-12/648348-G20_OECD%20FCP%20Principles.pdf) [<https://perma.cc/966X-PATX>].

<sup>351</sup> THE WORLD BANK GRP., GOOD PRACTICES FOR FINANCIAL CONSUMER PROTECTION (2d ed. 2017), <https://openknowledge.worldbank.org/server/api/core/bitstreams/eca2f77f-64c0-5102-ab82-eea089d285c1/content> [<https://perma.cc/6T5R-SMD4>].

Ombudsman Schemes has issued guidelines setting out the fundamental principles for external dispute resolution mechanisms.<sup>352</sup>

The FCA's decision to jettison civil society demands for a civil action based on the Consumer Duty can be revisited. In previous work, Iris H-Y Chiu, one of the authors of this Article, has argued that the FCA should reconsider its deficiencies to facilitate the spectrum of redress options available to financial customers and consumers.<sup>353</sup> The output legitimacy that the FCA needs to demonstrate is that its enforcement is sufficient for the Consumer Duty to be robustly implemented. Otherwise, the exclusion of individual civil redress would scarcely be justified.

Next, we criticise the FCA's decision to jettison the availability of civil redress for consumers based on the Consumer Duty, on the basis that supervisory actions and regulatory enforcement cannot fully provide for consumers' needs. The FCA may consider that its supervisory actions, such as the provision of guidance to firms,<sup>354</sup> help to prevent consumers from suffering poor outcomes. The Consumer Duty also requires firms to proactively rectify and redress harms experienced by retail customers where the harms are foreseeable based on complaints data, monitoring, or other sources.<sup>355</sup> Such policy guidance and the emphasis on prevention provides some clarity and thus reduces disputes and, at the same time, improves firms' compliance. However, such standardised expectations may not meet individual consumers' distributive or welfare needs. The FCA is also committed to quickly identifying firms that fall short of the Duty and using its supervisory powers to prevent future harm by varying or removing the firms' permissions.<sup>356</sup> However, some consumers may have already suffered harm before that revocation of licence to operate occurs. Further, although it may be said that the FCA can use its powers to require firms to pay restitution under section 384 of the Financial Services and Markets Act 2000 ("FSMA") upon regulatory enforcement, such

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<sup>352</sup> *Fundamental Principles*, INFO NETWORK, <https://www.networkfso.org/principles.php> [<https://perma.cc/9X3K-UFGM>] (last visited Feb. 18, 2024).

<sup>353</sup> Chiu & Brener, *supra* note 3.

<sup>354</sup> See generally FG22/5 FINAL NON-HANDBOOK GUIDANCE FOR THE CONSUMER DUTY, *supra* note 145.

<sup>355</sup> *PRIN 2.1: The Principles*, *supra* note 5.

<sup>356</sup> FIN. CONDUCT AUTH., A NEW CONSUMER DUTY: FEEDBACK TO CP21/13 AND FURTHER CONSULTATION 61-63 (2021), <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> [<https://perma.cc/3KWV-ZTFR>].

powers are rarely invoked.<sup>357</sup> The FCA would also not be able to order firms to redress consumers under section 404 of the FSMA, which usually relates to larger scale mis-selling by firms.<sup>358</sup> In this manner, consumers cannot rely on the FCA's supervisory or enforcement actions per se to achieve individual redress, and the threshold for the Financial Ombudsman may sometimes be too low for some consumers to obtain full redress.

Overall, the FCA's stance is not surprising given the United Kingdom's preference for public enforcement rather than private enforcement in other areas involving regulated firms, such as those involving non-disclosure of material information in securities laws.<sup>359</sup> Even in analogous breaches of competition law, recent legislative proposals aim to strengthen public enforcement against traders by the Competitions and Markets Authority, rather than through private enforcement.<sup>360</sup>

Whether individual consumers' distributive needs would be met by relying on regulatory enforcement remains questionable. Dame Gloster's independent review of the London & Capital mis-selling scandal in the United Kingdom pointed out that the FCA was slow to act on consumers' complaints.<sup>361</sup> Further, although the Ombudsman can provide an accessible redress avenue, the Ombudsman's decisions do not provide legal precedent and its value in shaping or deterring firm misconduct remains uncertain.<sup>362</sup>

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<sup>357</sup> FIN. CONDUCT AUTH., ENFORCEMENT GUIDE, at EG 11/2 (2024), <https://www.handbook.fca.org.uk/handbook/EG.pdf> [<https://perma.cc/SC4Z-9VM2>].

<sup>358</sup> A NEW CONSUMER DUTY, *supra* note 1, ¶ 11.08.

<sup>359</sup> Paul Davies QC, *Davies Review of Issuer Liability: Liability for Misstatements to the Market: A Discussion Paper by Professor Paul Davies QC*, 28 (2007), <https://www.treasurers.org/ACTmedia/daviesdiscussion260307.pdf> [<https://perma.cc/3UZ4-HL2D>].

<sup>360</sup> *Strengthening Consumer Enforcement and Dispute Resolution: Policy Summary Briefing*, GOV.UK, <https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/strengthening-consumer-enforcement-and-dispute-resolution-policy-summary-briefing> [<https://perma.cc/E72M-GG5S>] (Dec. 21, 2023); *see also* Jan-Pieter Krahen & Christian Wilde, *Skin-in-the-Game in ABS Transactions: A Critical Review of Policy Options* (Eur. Corp. Governance Inst., Working Paper No. 549/2018, 2021).

<sup>361</sup> GLOSTER, *supra* note 8, at 133 (¶ 5.1).

<sup>362</sup> *Decisions and Case Studies*, FIN. OMBUDSMAN SERV., <https://www.financial-ombudsman.org.uk/decisions-case-studies> [<https://perma.cc/NLY2-GSC2>] (last visited Feb. 18, 2014).

*B. Lack of Output Legitimacy in Securing Welfare or Performance Outcomes for Consumers and the Need for Redefinition of “Good Outcomes”*

In the context of financialisation,<sup>363</sup> consumers have little choice but to turn to marketized participation to meet their financial needs. In this manner, consumers need protection in relation to ease of access to near-essential or staple financial products. Further, consumers should be able to ask that the performance of financial products actually delivers the relevant welfare sought, such as funding education, housing, or retirement. Such performance also needs to continue through the time horizon of the consumer's financial needs. However, we note the FCA's prevalent absence of regulatory consumer protection principles in this context, such as *H* (right of access), *M* (welfare and outcomes), and *N* (guarantees for quality standards).<sup>364</sup>

The Consumer Duty arguably does not address the needs outlined above. As analysed, the Duty continues to support the same regulatory rhetoric of consumer empowerment, with limited delivery of consumer citizenship needs, placing consumers' welfare squarely within consumers' responsibility, or more likely, consumers' experience of “luck” circumstances such as financial market cycles. The Duty continues to focus on processes that firms need to implement, such as testing and reviewing procedures, rather than end-outcomes that pertain to performance and welfare. The “good outcomes” specified in the Duty are, in our view, too process-based and remain unconnected to consumers' real and ultimate needs for their financial products and services to meet their expected welfare. This creates a lacuna where “expected welfare” becomes a notion that is defined and manipulated by the financial services industry, which is incentivised to shape outcomes for the consumer in a self-serving manner.

We argue that the FCA needs to embrace a concept of “good outcomes” that ultimately connects with consumers' expected welfare outcomes, which is the very *raison d'être* for their market participation. Further, we argue that “good outcomes” will benefit from a more robust redefinition that meets the increasing trend in financial products that are marketed with hybrid objectives, such as environmentally friendly or socially mobilising objectives.

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<sup>363</sup> See *supra* Part I.

<sup>364</sup> See *supra* Figures 2 and 3.



At the core, the FCA missed an opportunity to formulate the needs of financial citizens, which we term “financial wellbeing.” Policy-makers increasingly recognise financial wellbeing as an integral part of the wellbeing of a member of society generally, together with their physical and mental health.<sup>365</sup> While there may be debates or controversies over what is regarded as financial wellbeing, it can be broadly designated at two levels—both objectively (for the target population) and subjectively (based on the individual), around financial needs, financial freedom, control over finances, and financial security.<sup>366</sup> In the United States, the Consumer Financial Protection Bureau (“CFPB”) regards financial wellbeing as “how much your financial situation and money choices provide you with security and freedom of choice,” and drills down to “[h]av[ing] control over day-to-day, month-to-month finances”; “[h]av[ing] the capacity to absorb a financial shock”; “[being] on track to meet your financial goals and [h]av[ing] the financial freedom to make the choices that allow you to enjoy life.”<sup>367</sup>

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

### *C. The Need for Financial Inclusion for Near-Essential Financial Products or Services*

Despite the fact that the UN Guidelines for Consumer Protection<sup>368</sup> and UN Sustainable Development Goals (“SDGs”)<sup>369</sup> contain explicit references to financial inclusion, the Duty does not require the

<sup>365</sup> See Richard G. Netemeyer, Dee Warmath, Daniel Fernandes & John G. Lynch, Jr., *How Am I Doing? Perceived Financial Well-Being, Its Potential Antecedents, and Its Relation to Overall Well-Being*, 45 J. CONSUMER RSCH. 68 (2017).

<sup>366</sup> Andrew Godwin, Wai Yee Wan & Qinzhe Yao, *Financial Wellbeing – The Missing Link in Financial Advice Under Private Law and Statute*, in INTERMEDIARIES IN COMMERCIAL LAW 291 (Paul S. Davies & Tan Cheng-Han eds., 2022).

<sup>367</sup> *Why Financial Well-Being?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/consumer-tools/financial-well-being/about> [<https://perma.cc/4RHG-ED56>] (last visited June 4, 2023).

<sup>368</sup> See *United Nations Guidelines for Consumer Protection*, *supra* note 23, ¶ 67.

<sup>369</sup> Financial inclusion is referenced in the targets of eight of the seventeen SDGs. See *The 17 Goals*, U.N. DEP’T OF ECON. & SOC. AFFS., <https://sdgs.un.org/goals> [<https://perma.cc/2PH7-YSTX>] (last visited Feb. 19, 2024).

FCA to regulate access to near-essential financial products or services. In 2019, the U.K. Treasury Select Committee of the Parliament found that almost 1.3 million British adults in the United Kingdom do not have bank accounts,<sup>370</sup> which is the common channel for accessing other financial services such as payment and consumer credit. These unbanked customers tend to face challenging circumstances such as having no permanent home or are illiterate,<sup>371</sup> suggesting that already vulnerable consumers are also marginalised from financial markets. However, the Duty has not sought to widen participation on a reasonable basis for marginalised consumers.

In light of rising cost of living in the wake of the COVID-19 pandemic, the U.K. Treasury Committee's First Report recommends that the FCA should explicitly "have regard" to financial inclusion in its rulemaking, though this would not be adopted as one of the FCA's objectives.<sup>372</sup> The Committee is concerned that the new Duty may increase costs for firms, thus disincentivising them from offering services to marginalised customers.<sup>373</sup> Financial products or services can be designed in a manner that carries fixed costs for the firms; hence, firms are not incentivised to service a casual consumer user, such as of a small loan, and may also withdraw such services.<sup>374</sup> The U.K. government and the FCA's position is that "having regard" to financial inclusion may raise consumer expectations that the FCA could morally compel the provision of financial services to consumers even if commercially unreasonable.<sup>375</sup> Instead, the FCA exhorts firms to facilitate access, such as to general insurance and cash.<sup>376</sup>

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<sup>370</sup> *Increasing Financial Inclusion*, WWW.PARLIAMENT.UK, <https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/1642/164205.htm> [<https://perma.cc/4P3W-CYAH>] (last visited June 4, 2023).

<sup>371</sup> *Id.* ¶¶ 21, 29.

<sup>372</sup> HOUSE OF COMMONS TREASURY COMM., *FUTURE OF FINANCIAL SERVICES REGULATION: RESPONSES TO THE COMMITTEE'S FIRST REPORT, SECOND SPECIAL REPORT OF SESSION 2022-23*, ¶ 75 (2022), <https://committees.parliament.uk/publications/28577/documents/172352/default/> [<https://perma.cc/ML8H-VYU6>].

<sup>373</sup> *See id.*

<sup>374</sup> *See generally* Campbell et al., *supra* note 76; *see also* Patrick Jenkins, *Banks Must Not Be Allowed to Use Financial Exclusion as a Route to Profit*, FIN. TIMES (May 22, 2023), <https://www.ft.com/content/b3daadb3-4541-4b64-a007-855ffb4974a1> [<https://perma.cc/CYB8-RHAN>].

<sup>375</sup> HOUSE OF COMMONS TREASURY COMM., *supra* note 372, ¶¶ 84, 89.

<sup>376</sup> *Keeping Pace with Rising Costs - Improving Financial Inclusion for Consumers*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/news/speeches/keeping-pace-rising-costs-improving-financial-inclusion-consumers> [<https://perma.cc/7SMS-CAKS>] (June 6, 2022).

We are of the view that the FCA missed an opportunity to use the Consumer Duty as an agenda item to further financial inclusion. While the term “financial inclusion” is often not defined and a consensus is elusive, having access to basic financial services in any advanced economy is increasingly recognised as essential,<sup>377</sup> consistent with other essential services such as access to energy,<sup>378</sup> telecommunications,<sup>379</sup> healthcare,<sup>380</sup> and pharmaceuticals,<sup>381</sup> and that it should be treated as such to ensure consumer access and fair pricing. Basic financial services include access to a basic bank account for savings,<sup>382</sup> consumer credit, and insurance in order to build resilience and financial health.<sup>383</sup> Otherwise, marginal groups will be driven to unregulated money lenders or other high-cost shadow credit systems, such as the buy-now pay-later credit systems which the U.K. legislature is now pushing to restrict.<sup>384</sup> However, access should not be the only touchstone; even where access is provided, products may be bundled with products and features by financial service providers that serve as debt-traps for the unwary consumer, as detailed in Section B.<sup>385</sup> In this manner, consumer inclusion should also be regulated to ensure access, quality, and performance. Marginalised or vulnerable consumers need

<sup>377</sup> HM TREASURY, FINANCIAL INCLUSION REPORT 2021-22, 7 (2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1125329/Financial\\_Inclusion\\_Report\\_\\_002\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1125329/Financial_Inclusion_Report__002_.pdf) [<https://perma.cc/PC7A-QHCU>].

<sup>378</sup> Simone Pront-van Bommel, *A Reasonable Price for Electricity*, 39 J. CONSUMER POL'Y 141, 149 (2016).

<sup>379</sup> Littlechild, *supra* note 99.

<sup>380</sup> *See supra* note 104 and accompanying text.

<sup>381</sup> *See generally* Stacy Clark, *Recent Case Developments in Health Law: Pharmaceutical Price-Fixing and Consumer Protection: Blue Cross & Blue Shield v. AstraZeneca Pharmaceuticals LP*, 38 J.L. MED. & ETHICS 160 (2010).

<sup>382</sup> Peter Cartwright, *Understanding and Protecting Vulnerable Financial Consumers*, 38 J. CONSUMER POL'Y 119, 134 (2015).

<sup>383</sup> CHRISTOPH BREIDBACH, CHRIS CULNANE, ANDREW GODWIN, CARSTEN MURAWSKI & CYNTHIA SEAR, FINFUTURE: THE FUTURE OF PERSONAL FINANCE IN AUSTRALIA 32 (2019), [https://www.unimelb.edu.au/\\_data/assets/pdf\\_file/0004/3145612/FinFuture\\_White\\_Paper.pdf](https://www.unimelb.edu.au/_data/assets/pdf_file/0004/3145612/FinFuture_White_Paper.pdf) [<https://perma.cc/4PS7-3W9L>]; Andrew Leyshon & Nigel Thrift, *Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States*, 20 TRANSACTIONS INST. BRIT. GEOGRAPHERS 312 (1995).

<sup>384</sup> *See* HM TREASURY, REGULATION OF BUY-NOW PAY-LATER: CONSULTATION ON DRAFT LEGISLATION (2023), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1136257/BNPL\\_consultation\\_on\\_draft\\_legislation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1136257/BNPL_consultation_on_draft_legislation.pdf) [<https://perma.cc/CY2X-JLQ6>].

<sup>385</sup> *See supra* text accompanying notes 262-66.

such protective levels more intensely than more affluent consumers in the financial markets.

*D. The Need to Ensure Consumer Protection in Terms of Financial Well-Being*

Next, we argue that the FCA could have added more to the Consumer Duty to protect consumers in relation to their reasonable welfare or performance expectations of financial products and services. The Duty is carefully worded only to support the consumer's own pursuit of their financial objectives. Financial well-being is difficult to delimit, as it relates to the present financial affairs of the consumer and their future financial well-being, which includes the financial product's expected performance in a manner that is sustainable and resilient for the consumer. Extant literature broadly includes the ability to cover expenses and emergencies and future goals,<sup>386</sup> the ability to bounce back from adverse financial events,<sup>387</sup> and ownership of an appropriate number of months of expenses in savings<sup>388</sup> within the definition of financial well-being. In our view, considerations of well-being must go beyond proactively assessing the product governance outcome or the "suitability" of the product as stipulated in the Consumer Duty.<sup>389</sup> Instead, regulation should set performance-based standards on regulated firms that provide financial products or services to consumers.<sup>390</sup> Performance-based regulation, which often use regulatory tools *M* (welfare outcome-based) and *N* (guarantees for quality standards) have already been implemented in other sectors, discussed in Section A(ii). Many goods are regulated for safety and

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<sup>386</sup> Godwin et al., *supra* note 366, at 294; *see generally* ELAINE KEMPSON & CHRISTIAN POPPE, UNDERSTANDING FINANCIAL WELL-BEING AND CAPABILITY - A REVISED MODEL AND COMPREHENSIVE ANALYSIS (2018), [https://www.researchgate.net/publication/326847922\\_Understanding\\_Financial\\_Well-Being\\_and\\_Capability\\_-\\_A\\_Revised\\_Model\\_and\\_Comprehensive\\_Analysis](https://www.researchgate.net/publication/326847922_Understanding_Financial_Well-Being_and_Capability_-_A_Revised_Model_and_Comprehensive_Analysis).

<sup>387</sup> Fanny Salignac, Axelle Marjolin, Rebecca Reeve & Kristy Muir, *Conceptualizing and Measuring Financial Resilience: A Multidimensional Framework*, 145 SOC. INDICATORS RSCH. 17, 38 (2019).

<sup>388</sup> *See* COMMONWEALTH BANK OF AUSTRALIA, IMPROVING THE FINANCIAL WELLBEING OF AUSTRALIANS: TOWARD BETTER OUTCOMES FOR AUSTRALIANS . . . EVERY DAY, RAINY DAY, ONE DAY (2019), <https://www.commbank.com.au/content/dam/commbank-assets/banking/guidance/2018-06/using-survey-banking-data-to-measure-financial-wellbeing.pdf> [<https://perma.cc/P7TN-8NRV>].

<sup>389</sup> *PRIN 2.1: The Principles*, *supra* note 5.

<sup>390</sup> *See, e.g.*, Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015).

quality over a reasonable time horizon of expected use, and some services such as utilities are regulated for both price and a set of performance targets, which are backed by award-penalty mechanisms.<sup>391</sup>

Lauren E. Willis's vision of performance-based consumer law requires intense scrutiny into the effects of firms' actions on consumers.<sup>392</sup> Such scrutiny can produce supervisory insights that feed into adjustments to regulation and/or supervision in order to motivate consumer protection.<sup>393</sup> We argue that Willis's framework should guide the FCA in reforming and supervising the Consumer Duty so that the outcomes consumers achieve can be evaluated against what they reasonably expect. Shortfalls in the financial well-being of consumers who do not receive what they expect from their products should be evaluated to consider regulatory adjustment and enforcement possibilities. Such performance-based regulation is needed in view of the vast gap between consumers' expectations of financial well-being and the protective levels currently provided.<sup>394</sup>

For example, the financial well-being of a consumer of a credit product pertains not only to affordability *ab initio* but also to the product's sustainable affordability and resilience over its time horizon. Further, a consumer's financial well-being is a holistic matter and the utility or performance of any particular product or service has to be considered against the consumer's broader economic or financial goals and other financial products that the consumer has purchased.<sup>395</sup> With respect to home mortgages, for example, under the FCA's Mortgage Conduct of Business Rules ("MCOB"), which remain unchanged after the Duty's introduction, a financial institution must engage in responsible lending and proactively assess affordability for the consumer through a set of metrics that includes committed expenditures and "basic essential expenditure and basic quality-of-living costs."<sup>396</sup>

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<sup>391</sup> See generally David E.M. Sappington & Dennis L. Weisman, *Designing Performance-Based Regulation to Enhance Industry Performance and Consumer Welfare*, 34 ELEC. J., Mar. 2021.

<sup>392</sup> Willis, *supra* note 390, at 1314.

<sup>393</sup> *Id.* at 1406 (on how performance-based data can help regulators review and adapt their regulatory designs).

<sup>394</sup> See *supra* Part III(A).

<sup>395</sup> See Todd H. Baker & Corey Stone, *Making Outcomes Matter: An Immodest Proposal for a New Consumer Financial Regulatory Paradigm*, 4 BUS. & FIN. L. REV. 1 (2020).

<sup>396</sup> See FIN. CONDUCT AUTH., MORTGAGES AND HOME FINANCE: CONDUCT OF BUSINESS SOURCEBOOK, at MCOB 11.6.5 (2023),

Yet, the choice of a mortgage to purchase a home may reduce a low-income consumer's ability to afford other products that build their children's college funds, for example, which may not be regarded as a "basic essential expenditure." The Duty needs significant improvement in order to recognise and incorporate performance-based standards that meet different consumers' financial well-being needs.

Critics may argue that measuring financial well-being outcomes is difficult because consumers are heterogeneous and have different individual goals. As such, consumers must arguably make a choice within the abundant range offered in the market that best meets their interest. Even if consumers retain financial advisers, they do not necessarily disclose full information to them. These difficulties may be overstated, however. Well-being measurement difficulties can be alleviated through regulator-implemented consumer surveys that assess consumer spending habits,<sup>397</sup> proprietary and aggregated data from financial institutions, or integrated datasets. For instance, health and social care records are being integrated in order to improve individual patient outcomes for healthcare.<sup>398</sup>

Financial products and services are credence goods, meaning that their outcomes will not be known until much later. The nature of credence goods increases the importance of performance-based regulation of financial products or services. We are not advocating that such regulation removes all financial risks that consumers may face—rather, we argue that in evaluating whether the provision of a product or service delivers a "good outcome," the key metric should be the individual financial consumer's wellbeing, which takes into account their resilience, sustainability, and ability to bear the risks that affect the consumer over time.

#### *E. The Need to Ensure Consumer Protection in Relation to Hybrid Objectives*

Next, we argue that "good outcomes" for consumer financial products include outcomes relating to non-financial objectives that are

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<https://www.handbook.fca.org.uk/handbook/MCOB.pdf> [<https://perma.cc/F62R-3GWP>]; see also Mak, *supra* note 217.

<sup>397</sup> See, e.g., *Financial Well-Being Survey Data*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/financial-well-being-survey-data/> [<https://perma.cc/7F6U-KWN8>] (last visited June 4, 2023).

<sup>398</sup> Eren Waitzman, *Primary and Community Care: Improving Patient Outcomes*, UK PARLIAMENT (Aug. 10, 2022), <https://lordslibrary.parliament.uk/primary-and-community-care-improving-patient-outcomes/>.

promoted by financial products, such as in relation to environmental, social, and governance (“ESG”) goals for investing and loan products. Empirical research has found that many consumers are motivated by prosocial objectives when selecting such financial products,<sup>399</sup> making their objectives hybrid in nature. Some are even willing to sacrifice financial objectives to an extent to achieve the promoted non-financial goals.<sup>400</sup> Hence, “good outcomes” for consumers in relation to products promoted with hybrid objectives should include attainment or performance of the relevant financial and non-financial objectives.

With the rise in market offerings of sustainable finance products, regulators in the United States, European Union, and United Kingdom have voiced concerns regarding “greenwashing” and mis-selling,<sup>401</sup> culminating in reforms introduced in the European Union, and in progress in the United States and United Kingdom.<sup>402</sup> The European Union’s reforms are particularly remarkable because they require certain sustainably-labelled or ESG-labelled investment products to attain double materiality,<sup>403</sup> in other words, the achievement of financial and non-financial objectives represented at the point of sale.<sup>404</sup> The FCA

<sup>399</sup> Charlotte Christiansen, Thomas Jansson, Malene Kallestrup-Lamb & Vicky Noren, *Households’ Investments in Socially Responsible Mutual Funds*, 87 Q. REV. ECON. & FIN. 46, 57-58 (2023).

<sup>400</sup> Miwa Nakai, Tomonori Honda, Nariaki Nishino & Kenji Takeuchi, *Psychological Characteristics of Potential SRI Investors and Its Motivation in Japan: An Experimental Approach*, 8 J. SUSTAINABLE FIN. & INV. 349, 352 (2018) (on literature showing that investors do not mind sacrificing some degree of financial return); see generally Gunnar Gutsche & Andreas Ziegler, *Which Private Investors Are Willing to Pay for Sustainable Investments? Empirical Evidence from Stated Choice Experiments*, 102 J. BANKING & FIN. 193 (2019) (empirically examining investors’ willingness to sacrifice financial return).

<sup>401</sup> Christin Nitsche & Michael Schröder, *Are SRI Funds Conventional Funds in Disguise or Do They Live Up to Their Name?*, in RESEARCH HANDBOOK OF INVESTING IN THE TRIPLE BOTTOM LINE 414 (2018); Kenza Bryan & Alice Hancock, *EU Regulators Flag Rising Greenwashing Practices by Banks*, FIN. TIMES (June 1, 2023), <https://www.ft.com/content/5d236244-e073-412d-b981-0d2757f60b4b> [<https://perma.cc/D6GR-2SGV>]; Chris Flood, *Investors Warned of ‘Greenwashing’ Risk as ESG-Labelled Funds Double*, FIN. TIMES (Apr. 24, 2023), <https://www.ft.com/content/79772342-d260-4dd5-b943-5e75bc27878c> [<https://perma.cc/Q68S-VZH7>].

<sup>402</sup> Chiu, *Sustainable Finance Regulation*, *supra* note 233.

<sup>403</sup> Iris H-Y Chiu, *The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics*, 23 EUR. BUS. ORG. L. REV. 87, 95, 99 (2022).

<sup>404</sup> Regulation (EU) 2019/2088, of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317) 1 (discussed in context in Felix E. Mezzanotte, *Recent*

is also considering ensuring that “green mortgages” are designed to match the claims made in their promotion.<sup>405</sup>

In line with the European Union’s double materiality reforms, we argue that consumer protection in finance should recognise consumers’ needs to secure both financial and non-financial performance of their hybrid financial products over a time horizon. This double materiality includes both the prevention of mis-selling at the point-of-sale (the focus of the United States’ and United Kingdom’s reforms<sup>406</sup>), which caters to consumer empowerment protection in terms of choice and the continued attainment of both financial and sustainable objectives.<sup>407</sup> Performance-based regulation should also continuously address the trade-offs between financial and sustainable objectives in consumer investments, the transparency and accountability fund managers make regarding these trade-offs, and the involvement of consumer choice and discipline. Such performance-based regulation would also need to address the possibility that sustainable objectives met by certain investment products may not be the ones that the consumer specifically prioritizes. In such a case, consumers should be properly apprised and have opportunities to review their investments.

The evaluation of non-financial objective performance is a work in progress. Inspiration can be sourced from the goal-measuring practices in impact,<sup>408</sup> as well as from the developing sustainability criteria introduced in European regulation.<sup>409</sup> Where non-financial performance evaluations may rely on third-party ESG rating or analysis providers, it is also imperative to consider how non-financial industries

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*Law Reforms in EU Sustainable Finance: Regulating Sustainability Risk and Sustainable Investments*, 11 AM. UNIV. BUS. L. REV. 215 (2023)).

<sup>405</sup> *The FCA’s View of Green Mortgages*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/news/speeches/fca-view-green-mortgages> [<https://perma.cc/E69K-BM5G>] (Apr. 19, 2023).

<sup>406</sup> See Chiu, *Sustainable Finance Regulation*, *supra* note 233, at 59.

<sup>407</sup> P6, Iris H-Y Chiu, *Sustainable Finance Regulation – Authoritative Governance or Market-Based Governance for Fund Management?*, 57 J. FIN. TRANSFORMATION 48 (2023).

<sup>408</sup> Jane Reisman, Veronica Olazabal & Shawna Hoffman, *Putting the “Impact” in Impact Investing: The Rising Demand for Data and Evidence of Social Outcomes*, 39 AM. J. EVALUATION 389, 390-91 (2018) (on various measurement methods).

<sup>409</sup> These criteria are based on a taxonomy of sustainable outcomes which are scientifically developed. See Regulation (EU) 2020/852, of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088, 2020 O.J. (L 198) 13 (evidencing technical screening criteria developed under it).



may be regulated<sup>410</sup> in order to secure credibility for consumers of such financial products. As sustainable finance regulation continues to evolve globally, we argue that consumer protection should be integrated into that agenda and not left by the wayside.

*F. Proposals for Performance-Based Regulation for Financial Consumers' "Good" Outcomes*

A performance-based regulatory framework for “good outcomes” for financial consumers may be criticised as allowing consumers’ subjectivities to become standard expectations, since objective standards may not necessarily meet the heterogenous needs of different consumers. A compromise could be introduced as a starting point—that is, the regulator could establish a performance standard for firms to prevent substantive harm or reduce certain risks of participating in financial services and markets. This standard can also apply to consumers’ non-financial investment objectives, meaning that firms should avoid or prevent the substantial non-attainment of those objectives. In this way, our proposal extends beyond the Consumer Duty’s emphasis on preventing foreseeable harm, as it covers the time horizon of the credence good. This is important since harm prevention considered only at the pre-sale stage is not useful to consumers, when the performance of their financial products and/or their hybrid objectives extend across time.

We argue that proper screening and continued monitoring of consumer outcomes through skin-in-the-game regulations best incentivise financial firms to reduce harm and risks to consumers and best ensure consumers’ well-being and hybrid outcomes. This could be accomplished through a combination of “carrots” for outperformance of financial products over a time horizon and “sticks” that compel firms to disgorge their rewards or share loss where consumers incur harms and

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<sup>410</sup> Alice Hancock & Kenza Bryan, *EU Eyes Conflicts of Interest Crackdown in ESG Ratings Rules*, FIN. TIMES (June 7, 2023), <https://www.ft.com/content/b4eaf375-6141-45a7-9f30-d9462605c01f> [<https://perma.cc/NMW4-83DA>] (on impending EU legislation to regulate ESG rating providers). The United Kingdom maintains a code of conduct for ESG rating providers in soft law. See *Code of Conduct for ESG Data and Ratings Providers*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/news/news-stories/code-conduct-esg-data-and-ratings-providers> [<https://perma.cc/W9EV-T6RF>] (Nov. 22, 2022); Matteo Gargantini & Michele Siri, *Information Intermediaries and Sustainability: ESG Ratings and Benchmarks in the European Union* (Eur. Cap. Mkts. Inst. Working Paper No. 15, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4316820](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4316820) [<https://perma.cc/CNK7-7W9X>].

risks proscribed by performance-based regulation. Accordingly, regulators should consider regulatory tools *L* (risk-shifting), *M* (welfare-outcomes), and *N* (guarantees for quality/standards or floor on consumer loss), in the taxonomy in Figure 2.<sup>411</sup>

Mandatory loss-sharing mechanisms can be introduced where harms and risks to financial well-being occur. These mechanisms are not novel in financial regulation and have been used to combat perverse incentives. For instance, to prevent harm to investors in securitised assets, the United States and the European Union require securitisers to retain a minimum economic risk in the credit of loans that are securitised in asset-backed securities (“ABS”).<sup>412</sup> This example shows that regulatory tools *N* and *L* have effectively been used to align the interests of the securitisers and originators of ABS with those of the investors. Existing peer-to-peer originators or platforms in the market have skin in the game by volunteering to retain and disclose their position in the loans on the balance sheet or purchasing a slice of the loans; in other words, if the lenders default, they take the loss alongside the investors.<sup>413</sup> Such loss-sharing mechanisms combat the perverse incentives of poor loan underwriting. Loss-sharing mechanisms can incentivise financial product providers, especially of investment products, to reduce perverse incentives that focus only on selling and augmenting their market share regardless of the ultimate performance of these credence goods.

Critics may argue that skin-in-the-game regulations can be burdensome and exacerbate conflicts of interest. For instance, one disadvantage is that financial firms become unable to represent themselves as independent financial advisers as they retain financial interest in certain financial products.<sup>414</sup> On the other hand, skin-in-the-game

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<sup>411</sup> See *supra* Figure 2.

<sup>412</sup> Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78rr, amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1346 (2010); see also *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/securities-topics/dodd-frank-act> [<https://perma.cc/63GS-KVLR>] (Apr. 11, 2023); Regulation (EU) No 575/2013, of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms and Amending Regulation (EU) No 648/2012, 2013 O.J. (L 176) 1.

<sup>413</sup> See Adair Morse, *Peer-to-Peer Crowdfunding: Information and the Potential for Disruption in Consumer Lending* (Nat’l Bureau of Econ. Rsch., Working Paper No. 20899, 2015) [https://www.nber.org/system/files/working\\_papers/w20899/w20899.pdf](https://www.nber.org/system/files/working_papers/w20899/w20899.pdf) [<https://perma.cc/BZ8A-6KEE>].

<sup>414</sup> For a firm to hold out as providing independent advice, it must be able to recommend a diverse range of products not limited to products offered by the firm or

regulations may not prevent loan originators with greater information to exploit their advantages in other ways.<sup>415</sup> In the context of ABS, the European Union allows securitisers to select various options for retention despite the requirement for retention of risks, which has led to a lack of risk transparency.<sup>416</sup> Mandatory loss-sharing can cause firms to devise strategies to minimise or avoid their exposures or obligations, which could become a new problem for regulators to combat. However, these problems are not insurmountable. For example, the scope of mandatory loss-sharing can be limited to financial products that are complex, as there is greater potential for firms to avoid regulation by designing complex products. Regulators, the industry, and stakeholders can establish a set of metrics or benchmarks that outline how financial institutions will share the losses for complex consumer products.<sup>417</sup>

Further, voluntary loss-sharing mechanisms have been offered in the United Kingdom in high-risk consumer investments such as peer-to-peer lending. Zopa, the United Kingdom's leading peer-to-peer lending platform, used to offer a voluntary compensation fund that could be called upon where investors suffered loss due to borrower defaults on the platform.<sup>418</sup> until Zopa became authorised as a bank and began benefiting from the deposit guarantee scheme.<sup>419</sup> Such measures incentivise consumer participation, which benefits the financial services provider, especially where investment is optional. As

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closely affiliated firms. *COBS 6.2B Describing Advice Services*, FIN. CONDUCT AUTH. (Jan. 3, 2023), at COBS 6.2B.11, <https://www.handbook.fca.org.uk/handbook/COBS/6/2B.html> [<https://perma.cc/6X67-BJHQ>].

<sup>415</sup> FIN. CONDUCT AUTH., CP18/20: LOAN-BASED ('PEER-TO-PEER') AND INVESTMENT-BASED CROWDFUNDING PLATFORMS: FEEDBACK ON OUR POST-IMPLEMENTATION REVIEW AND PROPOSED CHANGES TO THE REGULATORY FRAMEWORK (2018), <https://www.fca.org.uk/publication/consultation/cp18-20.pdf> [<https://perma.cc/PPE4-2573>]. The FCA has cautioned that this may lead to conflicts of interests on the part of the platform, which takes advantage of the superior information to sell out early. *Id.* at ¶ 5.40.

<sup>416</sup> Krahnert & Wilde, *supra* note 360.

<sup>417</sup> *Id.*

<sup>418</sup> *Zopa Safeguard* has since been retired as Zopa's status as an authorised entity changed and it now benefits from deposit insurance as an authorised banking institution in the United Kingdom. The Safeguard Fund is however discussed at *Introducing: The Zopa Safeguard Offer*, ZOPA (Apr. 29, 2013), <https://www.zopa.com/blog/article/introducing-the-zopa-safeguard-offer> [<https://perma.cc/XW4U-3RFL>].

<sup>419</sup> Daniel Lanyon, *Exclusive: Zopa Exits Peer-to-Peer Lending*, ALTFI (Dec. 7, 2021), [https://www.altfi.com/article/8608\\_exclusive-zopa-exits-peer-to-peer-lending](https://www.altfi.com/article/8608_exclusive-zopa-exits-peer-to-peer-lending) [<https://perma.cc/SNE8-B5ZK>].

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many consumers participate in investment markets to provide for their near-essential saving needs, which are dominated by mutual and exchange-traded funds, there is less of an incentive for these product providers to attract participation by providing voluntary loss-sharing. As such, regulators should consider requiring mandatory loss-sharing in order to rebalance the potential loss of performance or welfare over time. Such loss-sharing should occur even if the product provider is solvent, changing from the FSCS, which only protects consumers where the firm has become insolvent.<sup>420</sup> This loss-sharing should be activated upon the failure to meet performance-based regulatory standards relating to substantive harm, risk materialisation, or failure to meet consumers' reasonable expectations of performance. Such skin-in-the-game regulatory tools serve to meet consumers' financial harm-reduction needs and incentivise behavioural change on the part of product providers. There is also a justice and distributive aspect to this, which is important to the consumer. One potentially good outcome may be the offering of more non-complex products whose features or performance bases are more comprehensible to consumers. However, the regulator should be aware of other unintended behavioural consequences on the firms' part.

In relation to substantial failure of non-financial objectives in hybrid products, it is arguable that loss-sharing mechanisms should include financial distribution to the consumers affected and contribution from the financial firm to make amends for the harm caused, such as to charitable or other responsible agency-led harm mitigation efforts. Such contribution can be established by collective agreement or negotiation with affected consumers so that consumers with hybrid objectives retain a stake in non-financial actions, even if those actions benefit third-party beneficiaries.

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

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<sup>420</sup> *Designated Investment Business*, FIN. SERVS. COMP. SCHEME, <https://www.fscs.org.uk/about-us/tcs-tech-info/des-inv-bus/> [<https://perma.cc/9R4F-J2YP>] (last visited Feb. 20, 2024).

and quality), and *N* (guarantees of standards and quality), even at personalised levels for consumers.

Much remains to be accomplished in financial consumer protection in the United Kingdom, and the FCA's vaunted Consumer Duty has unfortunately failed to break new ground, although it has established more stringent expectations for the attainment of old, familiar protective levels. Consumers deserve a newer deal.

## V. CONCLUSION

This Article critically evaluates the United Kingdom's Consumer Duty reform, which is purported to bring in a new era for scaling new levels of consumer financial protection. The achievements of such consumer protection cannot be evaluated in isolation and need to be contextualised against other regimes of consumer protection such as energy; telecommunications services; aviation services; packaged holidays; and goods sectors, including food, healthcare (i.e., both services and pharmaceuticals), and e-commerce. Hence, this Article offers a new taxonomy for cross-cutting consumer protection levels against which to evaluate the Duty.

Using the taxonomy, we assess that while the Consumer Duty has made improvements, these relate to the same old levels of consumer protection for consumer empowerment and choice. Using the framework of input and output legitimacy, we argue that there are significant gaps remaining in the Consumer Duty that pertain to "consumer citizenship" needs. First, by excluding private civil redress from the Duty and disregarding the feedback from consumer organisations, much reliance is placed on the FCA's own enforcement. Given international recognition that effective enforcement does not only lie with public regulatory enforcement, there is a real risk that consumers may feel that they are outgunned and unable to achieve distributive justice, impacting the output legitimacy of the reforms. Second, the FCA lacks output legitimacy in its failure to secure performance or welfare outcomes for consumers and its failure to recognise that these are crucial to consumers' expectations for their well-being or their hybrid objectives.

This Article argues that there is a need to develop the Consumer Duty into a performance-based regulatory framework to secure consumer protection in relation to reasonably expected performance and welfare outcomes, utilising regulatory tools that are often ignored in financial regulation but utilised in other sectors. To start, we suggest

that the FCA should embrace a performance-based regulatory standard that reduces harm and failure to consumers as a pathway to developing more varied quality and performance standards and welfare benchmarks for products and services. The performance-based paradigm has the potential to bring about regulatory adjustments based on consumers' experience of effects and outcomes. We are of the view that such regulatory adjustments may finally meet consumers' needs in terms of performance or welfare outcomes in financial products. One such regulatory adjustment is a loss-sharing proposal which would require firms to share in consumers' losses where a complex financial product is sold. This proposal may be seen as radical but is based on existing examples of skin-in-the-game incentives in financial regulation. Ultimately, as the Consumer Duty intends to educate financial firms to put themselves in consumers' shoes, it is not excessive to require them to be engaged with consumers' actual welfare outcomes.