



21 March 2016

EBA response

to the EU Commission Green Paper on Retail Financial Services (COM 2015(630))

Background

1. On 10 December 2015, the EU Commission published a *Green Paper on Retail Financial Services – Better products, greater choice, and greater opportunities for businesses and consumers*.¹ This document provides the EBA's response to a subset of the questions that are asked in the Green Paper. The EBA has selected questions that are relevant for, i.e. fall into the scope of action of, the EBA and its 28 national member authorities.

Questions in the Green Paper and the EBA's response

Question 5: What should be our approach if the opportunities presented by the growth and spread of digital technologies give rise to new consumer protection risks?

2. The response to this and all other questions below reflects the views of the EBA as endorsed by the EBA's Board of Supervisors in March 2016. The Commission's approach to the spread of digital technologies should differ depending on which particular technology is being assessed, because the benefits and risks will differ. In order to arrive at an appropriate approach, the Commission should follow a thorough methodology that proceeds through a sequence of steps:
 - a. identify and assess the potential benefits of digital technologies, to consumers, to firms, to the financial system, to society more widely, ;
 - b. identify and assess the risks, not only those arising for consumers but also for firms; market confidence in terms of security and reliability; and, depending on the nature of the innovation, to financial integrity such as regulatory arbitrage of existing rules, anti-money laundering or the prevention of financial crime, and financial stability.

¹ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:630:FIN>

- c. prioritise the risks, in order to identify which ones can be left to market participants to address (in which case firms, for example, must fully assess the impact of any move to digitalise services on affected consumers prior to implementing them), and which ones do indeed require a legislative response;
 - d. ensure that any policy response that is developed strikes an appropriate balance between the competing demands of mitigating risks and harnessing the benefits of digital technologies; once the assessment above has been done, analyse whether the particular digital technology requires a standardised approach across the EU at all or whether it can be left to Member States and national authorities. While it is true that digital technologies are likely to travel more easily across borders than other financial innovations, and that a prima facie case for a harmonised approach therefore exists to facilitate market integration through the proliferation of innovation across the EU, a proper assessment should be carried out notwithstanding, for each particular innovation that is being considered; and,
 - e. if a harmonised regulatory approach across the EU is found to be suitable, the Commission should ensure that the legislative approach is technology-neutral, i.e. develop requirements that can be achieved by financial institutions through technical solutions that may differ and may also evolve over time (as the Commission has successfully done with the payment authentication requirements under the PSD2). The Commission should also consider seeking formal input, e.g. via requests for technical advice, from the EBA and other relevant public authorities, who are likely to have already gathered experience with the innovators and/or the innovations. This should include the input from data protection authorities, as the cross-border sale of banking products may give rise to data protection and information security issues.
 - f. assess the extent to which some risks are potentially already addressed in existing EU legislation, and consider, where appropriate, the option of amending or clarifying the scope of existing EU law, rather than developing new EU law;
3. Following the approach outlined above, it is of utmost importance to monitor the evolving possibilities of digital technologies. As the Commission is aware, the EBA regulation mandates and requires the EBA to monitor financial innovation. It regularly does so through a dedicated committee that brings together the national authorities from the 28 Member States, who have first-hand experience of the opportunities and risks of the innovations that are emerging in their jurisdictions. In order for the Commission to carry out its work, it may consider making use of the output of the EBA's monitoring work, much of which is already addressed to the Commission and co-legislators anyway.

Question 7: Is the quality of enforcement of EU retail financial services legislation across the EU a problem for consumer trust and market integration?

4. By way of responding to this question, the EBA interprets the wording "quality" of enforcement that is used in the question to mean how 'effectively' legislation is enforced,
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and the word “enforcement” to mean the broader concept of ‘supervision’ of firms and markets and their compliance with EU laws, and what any deficiencies this has on impact on consumer trust and market integration.

5. In the context of the banking sector, seven distinct points are worth noting, because the nature and intensity of the supervision of consumer protection requirements may differ between Member States for a number of reasons.
6. First, significant differences exist in the institutional arrangements and responsibilities that are allocated to national authorities across the EU for the supervision of consumer protection requirements. The authorities in some Member States may have an exclusive consumer protection remit, while in others the authorities may also have a prudential remit or, wider still, also a competition remit.
7. There is therefore a need for supervisory authorities to balance competing risks and make judgements on how most effectively to use their resources. Where that balance lies will inevitably differ between national authorities, depending also on additional factors such as the nature of the respective national markets. Additional complications arise because not every additional EU law that is transposed in Member States necessarily results in additional resources being made available to national competent authorities to police the new law.
8. Second, a consistent level of consumer protection regulation and supervision across the 28 Member States is of course one of the main mandates conferred on the EBA in its founding regulation. The question therefore goes to the heart of the EBA’s tasks. However, it should be noted that the EBA has received very few direct mandates in Level 1 legislation to develop detailed requirements for any of the banking products that fall into its scope of action and that its member authorities could then enforce.
9. Furthermore, the mandates that have been conferred on the EBA (such as the technical standards for disclosure documents under the PAD and PRIIPS) as well as the requirements the EBA has developed on own initiative in support of Level 1 legislation (such as the three sets of MCD Guidelines) are still being developed by the EBA and its member authorities, or have been developed but have not yet entered into force. The EBA’s member authorities have therefore not yet been in a position to enforce these recent requirements, and the impact on consumer trust or market integration is therefore not yet known. Also, many of the underlying EU Directives and Regulations themselves that are applicable to the banking sector, such as PAD, PRIIPS, MCD, PSD2, have not yet been transposed by Member States in national law. National authorities are therefore not yet able to supervise them in their jurisdictions.
10. Third, in terms of the expectations of the Commission as to what might constitute high quality enforcement, it is important to note the role that the EU legal framework plays. The standards set in legislation, and therefore expected of the regulators and firms, vary according to activity and product. Indeed, EU legislation is silent in relation to some products

or activities. The role of the EBA and its member authorities also varies depending on which Level 1 text is being considered.

11. More specifically, the products and services manufactured and distributed in the banking sector cover mortgages, consumer credit, deposits, payment accounts, payment services, and electronic money. The legislative provisions, in turn, that cover these products and that could enhance consumer trust and promote market integration are currently spread across various EU Directives and Regulations, such as MCD, PAD, PSD1/2, EMD, DGSD, MiFID II and PRIIPs Regulation (for structured deposits) and, to the extent that the governance and internal control of conduct risk is concerned, the CRDIV/R.
12. These EU Directives, and the provisions contained therein, are product-specific and differ from one another in terms of detail, depth and objectives, despite the fact that the sale of many banking products tends to be driven by consumer need and are not product-driven. That is to say, the sale occurs as a result of a consumer's need to buy these products as a prerequisite for being able to participate in the modern economy (as is the case, for example, for payment accounts and payment services), rather than his want for (optional) products and services that allow him to increase his wealth (through investment products) or protect himself against risks (through insurance products).
13. There is therefore no one, single harmonized Level-1 text on retail conduct and consumer protection rules in the banking sector, similar to what MiFID2 has established for the investment sector, or in financial services in general.
14. The resultant differences have given rise to significant regulatory gaps, which in turn have fostered regulatory arbitrage. For example, in the field of consumer loans, the Consumer Credit Directive (CCD), which does not fall into the EBA's scope of action, requires that creditors be subject to on-going supervision only as an alternative to regulation, and does not specify whether such supervision should cover the conduct of business when selling these products. This is despite the fact that, in some Member States, consumer credit has been seen to be sought by consumers as a substitute for other forms of credit, such as mortgage credit, which are more tightly regulated and therefore less accessible to some consumers.
15. The level of protection awarded to the consumer therefore differs between products, depending on whether or not the Directive governing this particular product requires conduct supervision. While there may be some valid reasons why different types of products give rise to different types of requirements across Directives, the Commission may want to take into account unintended consequences. For example, in the case of the CCD, several Member States have decided to impose more stringent requirements on those firms. The resultant fragmentation distorts consumer protection around Europe and may discourage consumers in well-regulated Member States from entering into cross-border transactions.
16. For the EU Directives that *do* fall into the EBA's scope of action, the EBA has shown the feasibility of such a traversal approach across the banking sector. Where appropriate, we

have been able to overcome difficulties, including those derived from the use of the CRDIV to develop conduct risk and consumer protection requirements, and have developed several sets of Guidelines that set out common, high-level requirements that apply to all products in the banking sector, i.e. to mortgages, deposits, payment accounts, payment services, electronic money and more.

17. Each of these Guidelines tends to be no more than 4 pages long, are high-level, and cover all three stages of the interaction between the consumer and the financial institution: the pre-sale stage (e.g. the EBA Guidelines on Product Oversight and Governance); point-of-sale (draft EBA Guidelines on remuneration of sales staff) and post-sale (JC Guidelines on complaints handling). They establish a basic set of conduct requirements that apply to all segments of the banking sector and also stay way below the very detailed and comprehensive requirements that MiFID II has established for the investment sector. The Commission may want to take inspiration from these requirements as and when EU law is considered to be developed or amended.
18. When considering this particular suggestion, the Commission may want to remind itself that for some of the products in the banking sector, such as payment accounts or credit cards, the detriment incurred in case it is mis-sold may be low and may be lower than, say, most investment products. However, due to the significantly wider take-up of banking products in society, the *aggregate* detrimental impact on consumer protection and market integration can be significant. Also, consumers tend to use the banking products they have bought much more frequently compared to other financial products. They are therefore at risk of detriment that differs in nature from other financial products, such as the impact of service outages of cash machines or payment account websites.
19. Fourth, and related to the third point above, the Level-1 texts mentioned above have generated a complex allocation of supervisory responsibilities between home and host authorities, which differ between Directives and which has resulted in consumers in a given MS being protected differently, depending on whether the financial institution that provides the service is authorised in that MS (and therefore supervised solely by the authority in that MS) or is passporting in from another MS (with supervisory responsibilities split between the home and host authority). This presents competent authorities with a challenge as to how best to address problems experienced with firm behaviour when passporting firms are involved. It also undermines consumer confidence, stifles the uptake of (often innovative) services across borders, prevents growth opportunities for firms, and therefore weakens the integration of the EU single market.
20. Fifth, the current allocation of responsibilities also fails to build confidence in an area not mentioned in the Green Paper: confidence amongst national supervisory authorities, so they can be comfortable with the supervisory approach taken when consumers operate with financial service providers based in other EU countries. While the needed supervisory convergence is of course one of the objectives of the EBA and not of immediate concern to legislators, the ability for the EBA and its member authorities to achieve the objective

depends on the degree of consistency, simplicity and clarity of the Level-1 legislation that national supervisors are meant to enforce.

21. Sixth, the lack of harmonised Level-1 provisions impede the working of the Joint Committee of the three European Supervisory Authorities (ESAs), the creation and importance of which the Commission has emphasised on numerous occasions. However, establishing consumer and market confidence consistently across the three sectors is impeded if the provisions in Level 1 legislation are dispersed across many Directives and differ in their aims, depth and application date. This undermines a consistent implementation of these rules, as recently demonstrated by the ESAs being unable to issue joint Guidelines on cross-selling of financial products across the three sectors, and agreeing instead for ESMA to proceed by issuing guidelines for the investment sector, only. This limitation to the investment sector contradicts the idea of establishing cross-sectoral consistent rules and therefore is far away from ideal. Furthermore, the outcome leaves one particular issue of regulatory concern, the cross-selling between banking and insurance products, unaddressed exposing consumers on the EU to an undesirable risk of detriment (for further details, see the letter sent by the three ESAs to Commissioner Hill on 27 January 2016)².
22. Lastly, the consistent enforcement of consumer protection legislation is at times hampered by the fact that Level 1 legislation itself is drafted in ambiguous ways, which allow different national transpositions.
23. In summary, many of the perceived differences between Member States in the quality of enforcement are driven by the underlying framework in EU law for consumer protection and retail conduct in the banking sector. This, in turn, can have a negative effect on consumer trust in the case of cross border transactions and market integration, due to the way it influences supervisory action.
24. It is therefore important to note that the EU legislative framework itself might not be delivering the levels of consumer protection or of enforcement across the banking sector that may be expected by firms and consumers. The EBA would ask the Commission to consider the need for coherence in EU conduct rules and in the allocation of responsibilities of supervisory authorities.
25. In arriving at the above conclusions, the EBA would like to emphasize that it is not calling for *more* EU legislation, but for legislation that is *consistent* across products in the banking sector and that recognizes the need for a minimum level of legislation and supervision of conduct rules in respect of all consumer facing activities in the sector. Also, any action the Commission may take should ensure that it does not jeopardize Member States or national authorities that have already stronger requirements in place than those proposed by the Commission.

² See <http://www.eba.europa.eu/-/esas-submit-a-joint-letter-to-the-european-commission-on-cross-selling-of-financial-products-in-the-eu>

Question 9: What would be the most appropriate channel to raise awareness about the different retail financial services and insurance products available throughout the Union?

26. In its Green Paper, the Commission states that consumers often lack access to information about cross-border offers of financial products, and that it is therefore difficult for them to shop beyond their home country. Furthermore, consumers face a number of barriers, including language, if they want to enquire about products in other Member States. The Commission therefore concludes that better information for customers is required to helping them switch, and that one way to do so would be to build consumer awareness by giving them access to channels that allow them to find out about products available from other Member States and understand their features.
27. However, question 9 assumes that lack of awareness amongst consumers across the EU is a causal driver for limited cross-border transactions, without providing much evidence in support of this assumption. A cursory look at the spread of digital services in the banking sector, such as certain innovative types of payments, appears to suggest the opposite, namely that such innovations can spread across Member States without the need for a coordinated involvement of a public authority. The financial transaction may eventually occur predominantly within, rather than across, Member States, but the innovation itself will have to have crossed borders in the first place, thus creating the opportunities for growth, choice and competition that the Green paper is trying to achieve.
28. This suggests that there are other drivers for the limited number of cross-border transactions that need to be identified and assessed, such as differences in language, degree of financial literacy; consumer preferences, or national legislation. It would appear that even if awareness existed, these other barriers would continue to prevent cross-border transactions. The barriers would also be so complex that trying to eliminate them would generate work and costs that may be disproportionate to the scale of the problem that the Commission is trying to address.
29. Only once a lack of awareness is confirmed as a significant causal driver should means of creating awareness be considered as a solution. The EBA has no view on what the most appropriate channel to raise awareness could be. However, we are of the view that whichever entity would be tasked with raising awareness would require comprehensive information about the products offered in the 28 Member States. That entity would therefore be exposed to significant and unpredictable reputational risks regarding the accuracy of said information and the reliability of the external sources that it would have to tap into.
30. It is equally doubtful whether the large amount of resources that would be required to monitor, assess, prioritise and inform consumers in all Member States about the services would be money well spent. Even more significant may be the efforts required to categorise the products in a consistent way, which is arguably a precondition of a centralised provision of information to consumers.

31. We are therefore of the view that neither the EBA nor national supervisory authorities should be directly involved in ensuring the visibility of products and services marketed in the EU; that this is best done by providers and/or new market players; and that the EBA and its national member authorities should limit themselves to providing the necessary framework for providers to be able to do so.
32. However, we do see merit in ensuring that, when information about services *is* provided by private entities such as comparison websites or consumer organisations, that this information is clearly structured, comprehensive, understandable, easily accessible, and provides a useful basis for comparisons of products both within and across Member States. The EBA stands ready to provide advice on how to develop the details of such information requirements.
33. Also, the Commission may want to consider seeking input from the EBA on appropriate uses by firms of personal financial and/or non-financial data on consumers, as well as on provisions in Directives such as the CCD and MCD that appear to impede the effective sharing of information between providers across borders (for example, with regard to cross-border access to *crédit bureaux*) and thus undermines access to financial services on a non-discriminatory basis.

Question 10: What more can be done to facilitate cross-border distribution of financial products through intermediaries?

34. We would like to respond by making two points. First, the Commission may want to, first, take a view on whether the requirements to which intermediaries are subjected are sufficient to facilitate cross border transactions. It could be argued, for example, that, in order to build consumer trust, intermediaries should have a sufficient level of knowledge of a national market – such as the applicable language, tax regime, national law, and consumer habits – before being allowed to distribute financial products on a cross-border basis. The Commission may also want to consider the merit of the establishment of points-of-contacts in the host country as a means to foster consumers’ trust when dealing with intermediaries.
35. For our second point, we would like to cast the net wider than financial intermediaries. While the goal of further integrating retail markets has certainly benefits for consumers, there are also additional risks that arise for consumers when they participate in cross-border transactions that the Commission may want to take account of. These risks include unknown tax obligations as well as foreign exchange risks for transaction between Euro and non-Euro Member States.
36. With regard to the latter, we are not referring to banking products with which the consumer satisfies an existing need for foreign currency, but to financial products for which foreign currency exchange constitutes an additional risk. In such cases, the foreign exchange risk can be significant, may even constitute a barrier, and consumers would be unlikely to have sufficient knowledge of foreign exchange rate volatility against which to judge the exposure they are taking on.

37. The Green Paper only seems to recognise these risks for mortgages, but not for other banking products. However, even for these other products, consumers may need to hedge the underlying foreign currency exposure, and the Commission may want to consider whether consumers should have clear and reliable information on the conversion rates and costs.

Question 22: What can be done at the EU level to support firms in creating and providing innovative financial services across Europe, with appropriate levels of security and consumer protection?

38. An important element in supporting the development and spreading of financial innovation is regulatory certainty, for both consumers and firms. Certainty allows innovators, many of which may not be subject to any financial regulation at all, to understand the requirements with which they have to comply as well as the associated cost. It helps them to assess the legal risks and develop their businesses in a way that anticipates regulatory requirements.
39. In order to achieve this, the perimeter of regulation—i.e. what is and is not regulated – needs to be monitored and reviewed regularly. The EBA has been mandated in its founding regulation to monitor financial innovation and, in order to fulfil this mandate, has issued several EBA Opinions addressed to the EU Commission and the EU co-legislators, on innovations such as Virtual Currencies or Crowdfunding. A more rapid consideration by the Commission of the views expressed in these Opinions would provide quicker certainty for all market participants involved.
40. This recommendation of ours does not imply the need for new EU law. Rather, and in line with our response to questions 5 and 7, the Commission’s assessment should consider whether the risks can be addressed, and the benefits be harnessed, by amending the scope of existing EU law such that the innovative activities are captured or by taking other appropriate measures.
41. Complimentarily to the suggestion above, the Commission may take inspiration from the EBA Guidelines on Product Oversight and Governance, which require financial institutions that bring products to the market to identify the target market, carry out product testing, disclose risks, monitor products, take remedial actions when needed, and carefully choose appropriate distribution channels. Such steps should be taken not just by market incumbents but also market challengers that bring innovative digital services to the market, so as to ensure that a level-playing field is established and maintained across the market.

Question 26: Does the increased use of personal financial and non-financial data by firms (including traditionally non-financial firms) require further action to facilitate provision of services or ensure consumer protection?

42. One of the phenomena that the EBA has been observing in recent years is the commercial and innovative uses of consumer data by financial institutions. Financial institutions, like market players in other sectors of the economy, have always used the data that their clients provide to them in various ways, either directly or indirectly.

43. However, in recent years, some financial institutions have started using data in more commercial and innovative ways. Some firms combine internal consumer data with data obtained from external sources, such as data vendors and social media. In the process, consumer data is in itself used as an asset in the provision of financial services. For example, some banks offer shopping discounts to customers based on their buying behaviour, but consumers may not realise the extent to which personal data is being shared between financial institutions and any third parties.
44. Banks, in particular, own a source of data – payment transactions data – that is very valuable, because it is not one-off but provides a continuous stream of consumer data. Today, large volumes of payments are made through electronic processes (e.g. credit and debit transfers, card payments), which gives financial institutions a thorough knowledge of their clients' purchasing habits and preferences.
45. There are also innovations that the Commission has been actively encouraging, such as opening up access to consumers' financial data to support innovation and financial services providers through the Payment Services Directive 2.
46. All these innovations may have benefits for consumers, such as increased consumer engagement, ease of switching, lowering costs, and general competition and, hence, consumer choice. However, these innovations may also give rise to risks. For example, for many years, in the interests of consumer protection, consumers have been rightly and successfully warned about the dangers of sharing sensitive financial information with others. The proliferation of technological solutions, such as payment account aggregation services, is likely to change consumer interaction with financial services and will likely result in financial data being shared more broadly with a greater range of firms. The need for consumer awareness of the associated risks will remain relevant but may require nuancing to reflect the changing landscape, and a proportionate but strong level of protection for consumers and firms should remain, including that the consumer has given her consent to the sharing of her data.
47. The EBA is in the processing of carrying out such an assessment and would be happy to input its findings into the Commission's emerging thinking.

Question 30: Is action necessary at EU level to make practical assistance available from Member State governments or national competent authorities (e.g. through one-stop shops) in order to facilitate cross-border sales of financial services, particularly for innovative firms or products?

48. This question, and of other questions in the Green Paper, appears to assume that the lack of cross-border sales is the only or main manifestation of the absence of a single market. This narrow view ignores another manifestation of the limited extent of the single market, which is the low level of financial activity of EU citizens that migrate between Member States. According to the most recent statistics available from Eurostat, around 1.5 million people previously residing in one EU Member State migrate to another Member State each year. Once they have taken up residence in the new Member State, these individuals will have a

need for financial services, and any resultant sale will register as a domestic, not as a cross-border sale.

49. Yet, it appears that no thorough assessment has so far been carried out about the extent to which non-standardised product characteristics, terms & conditions, consumer rights, or the supervision of providers discourages these migrants from engaging in as many financial products as they are likely to have done in their previous Member State, which in turn might undermine opportunities for economic growth. Elsewhere in the Green Paper, in section 3.1.2 and the related question 15, the Commission elaborates on one particular solution to this issue – namely the portability of existing products across borders. Yet, another, possibly complementary measure could be to making it easier for migrants to access financial products domestically in their new country of residence.

Question 31: What steps would be most helpful to make it easy for businesses to take advantage of the freedom of establishment or the freedom of provision of services for innovative products (such as streamlined cooperation between home and host supervisors)?

50. In addition to the points made in response to questions 5 and 7, we would like to point out that the development of level 1 regulation on conduct of business for the banking sector with an appropriate allocation of supervisory tasks is a key element to making it easy for businesses to take advantage of the freedom of establishment or the freedom of provision of services. This statement applies to both mature and innovative markets.
51. A regulatory framework that would be ideal for both consumers and firms would be one where strong and consistent rules apply, no matter in which EU country the activity takes place (i.e. the same rules are consistently applied and supervised). This should be underpinned by enforcement, comprehensive redress and compensation schemes and adequate information tools for consumers, all of which are directed towards an approach to innovation that seeks to improve outcomes for consumers and ensure that their best interests are protected.
52. However, it should also be borne in mind that the actual impact on cross border transactions of such a framework may be limited due to differences in tax regimes, language, culture, or consumer home bias, not all of which can be addressed via legislative measures.