



# Freshfields FS insights

## Part 2 – Focus on Consumer Protection

***Time to read: 7 minutes***

Having assessed in last month's edition the trend of financial services policy towards increasing consumer protection, in this second part of two editions on consumer protection, we address specific areas of focus and explore the uptick in enforcement action and mass claims in this area.

## Protection from Financial Crime

Regulators are increasingly focused on curtailing financial crimes that target consumers. In this regard, they require greater transparency on the details of the transferring parties to transactions.

The UK Financial Conduct Authority (FCA) is cracking down on money laundering operations that harm consumers. A recent FCA ["Dear CEO Letter:"](#) emphasised banks' obligations to prevent financial crime that exploits retail customers. These steps were taken alongside the UK Treasury Select Committee Economic Crime Inquiry, which focuses on two strands: [\(1\) anti-money laundering systems and sanctions;](#) and [\(2\) how consumers are affected by economic crime.](#) Following [oral evidence from the tech giants arising from concerns of consumer exploitation online](#), representatives from financial institutions are expected to be called by the Committee to answer questions on the steps they are following to protect consumers from financial crime. The [UK National Crime Agency and its subset, the National Cyber Crime Unit](#), have likewise intervened to safeguard consumer victims of online scams, which we consider further in the next section.

## Protection in Cyberspace

Reforms aimed at tackling consumer harm in cyberspace are emerging worldwide:

- In November 2020, the European Commission presented its ['New Consumer Agenda'](#), which acknowledges both benefits and risks associated with the digitalisation of retail finance. Alongside the revision of existing legislation, such as the [Consumer Credit Directive](#), the EU's strategy may result in new legislation to protect consumers. For instance, the European Commission has published a ['Digital Finance](#)

[Package](#)', including a [proposal for a Regulation relating to Digital Operational Resilience for the Financial Sector](#), geared to mitigate cyber risk to allow businesses and consumers to take full advantage of the innovation in digital finance.

- In the UK, the FCA and Prudential Regulatory Authority (PRA) are planning reforms addressed at [outsourcing](#) and operational resilience to ensure consumers are not adversely affected by operational disruption. In addition, the UK Department for Culture, Media and Sport has recently announced consultations on its Policy Priorities following Brexit, setting out the Government's "[Plan for Digital Regulation](#)" intended to improve the management of cybersecurity across several different sectors. The proposals include the formation of the [Digital Regulation Cooperation Forum](#), a body comprising the Competition and Markets Authority (CMA), FCA, Information Commissioner's Office (ICO) and Ofcom, which aims to ensure digital regulation protects consumers.
- The [US Government is proposing regulations to protect consumers that address the risks posed by ransomware](#) and cryptocurrencies.
- Earlier this year, the Hong Kong [Securities and Futures Commission warned of the risks of online investment scams and suggested it may intervene in this area to protect consumers](#).

We have offered practical guidance on recognising proposed cybersecurity [reforms for the finance sector](#), which present a major compliance challenge for firms for this year and beyond.

Where there are failings to protect consumers, regulators are increasingly willing to take enforcement action and consumers are also intervening directly via class action litigation.

## **Enforcement Action**

Consumer-driven private actions have increased alongside enforcement action to protect consumers. In China, for example, the Consumer Protection Bureau of the CBIRC, handled a total of about 360,000 complaints against banking and insurance institutions in 2020 and conducted widespread site inspections, in turn resulting in compensation totalling over two billion euros. The Hong Kong Insurance Authority has also brought its first [enforcement action](#) for mis-selling malpractice, indicating the willingness of the regulator to intervene in the future.

Regulators in the other regions, including the [UK FCA](#), [US UFPB](#), and [EU Consumer Protection Cooperation Network](#), have taken a similar approach. As recently noted by Nikhil Rathi, the FCA's CEO, [the regulator intends to increase](#) the use of its enforcement powers to address consumer harm, particularly via criminal and civil litigation. This is evident from the FCA's innovative use of civil litigation as a consumer protection tool in the [FCA BI test case](#). This was the first test case of its kind and was brought by the FCA as a means of testing the interpretation of commonly used business interruption insurance policy wording in the context of the COVID pandemic. The case also illustrates the increasing UK interest in protecting small and medium sized enterprises (SMEs) as well as individual consumers, something we can expect to continue in the UK given the political focus on SMEs.

It is also clear from FCA measures suggesting it will take enforcement action to achieve greater consumer protection across a wider range of financial instruments. By way of examples, the FCA is [expected to intervene on pension transfers](#) and [has announced it will extend its regulatory remit](#) to the Buy Now Pay Later sector. In Germany, BaFin is likewise increasingly involved in the enforcement of consumer protection legislation. BaFin's powers represent an additional vehicle for the enforcement of consumer protection legislation, although a

[recent judgment may limit the extent to which BaFin can intervene to develop and shape consumer protection law.](#)

The increased focus on consumer protection by policymakers and regulators is demonstrated by their tackling money laundering operations that harm consumers and proposing reforms in the field of cyberspace. In conjunction with this, there is an increased willingness by regulators to bring enforcement action in support of the consumer protection objective and by consumers to use class action litigation to protect their interests.

### **Consumer Driven Class Actions**

Given the recent measures we have summarised in this edition, consumers are increasingly aware of, and willing to litigate to protect, their interests. In response, policymakers have developed a range of mechanisms to allow consumers to vindicate their rights in mass claims. For example, the EU's [Representative Actions Directive](#) is expected to change the mass claims landscape in the region. The Directive, which needs to be implemented by the end of 2022, establishes an obligation for member states to create at least one collective redress mechanism to facilitate claims on behalf of consumers. We have explored the new procedure (including the entitled 'qualified entities', admissibility of claims, the opt-in or opt-out systems, settlement, evidence and funding) and have compared the EU regimes to the available [US class action procedures that aim to protect consumers](#). The UK Competition Appeal Tribunal has also recently handed down its [first antitrust class action certification decision. The decision follows the UK Supreme Court judgment in Merricks and provides guidance on a further vehicle for class actions by consumers.](#) The CAT has also allowed a collective action group to bring a [landmark £600m class action](#) on behalf of 2.3 million customers arising from harm to consumers.

The EU GDPR class action regimes have similarly paved a new way for consumers to bring class actions. A recent, high-profile settlement of a mass claim under GDPR demonstrated how thousands of consumers could be affected by a high-profile data breach and receive compensation. Even prior to the GDPR reforms, consumers have shown increasingly willingness to litigate to protect their personal data. One such example is Richard Lloyd, a former editor of “Which” and current board member of the FCA. Mr. Lloyd has successfully brought a claim in the [Court of Appeal for breaches of data privacy legislation arising from the unauthorised use of internet browsing data](#). The Supreme Court is expected to issue its eagerly anticipated final judgment in this case imminently.

The US is also experiencing an increase in class-action lawsuits within certain areas, including against Special Purpose Acquisition Companies (SPAC) companies driven by shareholder and consumer activism.

### **Consumers Remain at the Top of the Agenda**

The recent developments discussed in our consumer protection editions illustrate that the issue of consumer protection will be an important feature across the financial services landscape worldwide. We anticipate further consumer protection driven regulation and laws, and consequent enforcement action and litigation. Keep informed of these and other trends in our future editions of FS insights. Meanwhile, for additional thoughts on the issues covered in this edition, and other developments in the financial services arena, you can review our earlier editions [here](#), including on political and societal change (part 1), (part 2), technological transformation (covering the GameStop saga and the wider implications of technological change), and financial crime.

If you would like to provide feedback on this or other editions, please contact [Laura Feldman](#).



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