The Consumer Finance Law Review

Editors

Richard Fischer, Obrea Poindexter and Jeremy Mandell

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EDITORS' PREFACE

Consumer choice for financial products and services is proliferating across global markets. The ability to reach consumers at any time on their mobile devices and tablets, or on their in-home computers has helped attract substantial capital investment in consumer financial services.[1] Consumers in many diverse markets, with varying degrees of size, sophistication and modernisation, can now access myriad financial products and services with just a swipe, tap or click. Traditionally cash-based economies now also have a wide range of options for electronic payments, alternative lending and other banking and financial services.

The staggering capital investment has, in turn, attracted non-traditional providers to the consumer financial services marketplace. From garage-based start-ups to billion-dollar technology firms, companies that previously focused on delivering smartphones, social media platforms or internet-browsing capabilities are developing innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and other non-bank financial service providers, have responded by innovating to improve their product and service offerings to retain and strengthen their customer relationships.

At the same time, there have been significant changes in the political landscape in various global markets, and these changes may affect cross-border investments and payments, broader investments in financial technology, and the nature of regulatory and enforcement oversight.

The increasing rate of innovation in consumer financial services, the changing profile of market participants, and the evolving political landscape have given rise to new legal questions or a different spin on longstanding legal theories. This country-by-country survey of recent developments in consumer financial services considers how these new and different legal theories are being addressed in 14 jurisdictions across the globe, with particular attention to payments, deposits, and revolving credit and instalment credit arrangements.

1 See 'Fintech and the evolving landscape: landing points for the industry,' Accenture, 13 April 2016, available at: www.fintechinnovationlablondon.co.uk/pdf/Fintech_Evolving_Landscape_2016.pdf.

One fundamental question confronting policymakers around the world is what entity in the financial value chain should be viewed as the provider of the financial product or service. In the alternative lending context, for example, non-bank platform operators are partnering with banks to originate loans funded on the bank's balance sheet, on the balance sheet of the platform provider, or through raising capital from investors of varying degrees of sophistication. These 'marketplace lenders' in many cases are not lenders at all, but merely technology service companies providing a platform that enables lenders to more efficiently source capital. In other cases, regulators and courts have taken the view that the marketplace lender is leveraging a bank partnership to take advantage of the special powers of a regulated bank, without itself being subject to such regulation. Courts and regulators are taking varying approaches to determine the rights and obligations of each entity participating in an increasingly disintermediated market.

In the payments context, policymakers have taken varying approaches to regulating electronic money schemes, as well as payment interfaces that rely on established payment networks, such as the payment card networks or batch processing networks. These approaches require careful consideration of the precise flow of funds to determine whether the payment provider accepts liability to one or more participating consumers.

In addition, increasing reliance on third-party service providers has led banking regulators to focus on banks' vendor risk management programmes. Many regulators have created an expectation that banks have an effective process for managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and contractual provisions related to regulatory compliance. These expectations are imposing significant costs on banks and their downstream service providers.

Other legal issues are affecting payment providers, consumers and regulators as payment system stakeholders pursue faster payments. Jurisdictions around the world are at varying stages of developing or implementing a ubiquitous, secure and efficient electronic payment system. Stakeholders are pursuing faster payments as a means to make more convenient, timely and cost-effective payments, including cross-border payments. Well-established legal principles, including settlement finality and consistent consumer protections, must be considered anew in a faster payments context.

Established payment system stakeholders, including payment card networks, are also refining fraud protections and data security measures to address an evolving risk landscape. For example, tokenisation in the payment-card space is one fraud prevention measure that is being implemented by card issuers, card networks and mobile wallet providers. As another example, EMV chip cards, firmly entrenched in many jurisdictions, are still in the process of being deployed in certain large card markets.

The evolution of consumer demands also raises new and interesting legal questions. For example, consumers and service providers are seeking to access and aggregate account or transaction data from multiple financial institutions. Now, a number of apps on browser-based tools allow consumers to aggregate account information and receive financial advice and personal wealth management services. These services give rise to significant legal issues, including matters related to privacy, data security, data ownership and consumer choice.

Cybersecurity and data security are, of course, a core concern in consumer financial services, however they are delivered. Regulators in many jurisdictions are tending toward more prescriptive requirements, including specific security controls, as well as aggressive enforcement.

The entry of new market participants also raises questions related to fair access to financial services for consumers. For example, marketplace lenders are using new and alternative sources of data to evaluate potential borrowers. The data may not be as thoroughly tested or as demonstrably statistically sound as the credit data used by traditional lenders. As a result, lenders must carefully consider whether use of alternative data sources has any unintended adverse impact on classes of potential borrowers. In addition to considering the potential adverse impact of the use of alternative data on potential borrowers, regulators and courts in some jurisdictions are revisiting the classes of consumers that are protected by fair lending or equal credit opportunity laws.

Further, consumer protection authorities continue to focus on combating unfair trade practices, particularly with respect to new market entrants that may not have the same culture of compliance as traditionally regulated financial institutions. Prohibitions on unfair trade practices have been enforced on a broad range of market participants in consumer financial products and services, including payments, credit cards and other credit products, as well as deposit products.

Notwithstanding the many legal issues, this is a time of great choice for consumers and exciting opportunity for financial services providers. Advancements in technology have given consumers in developing markets, as well as unbanked or under-banked consumers in more well-developed markets, access to financial products and services previously unavailable to them. Therefore, regulators and consumer protection agencies are challenged to ensure financial stability and a level playing field, while also promoting consumer choice.

This survey of consumer finance law describes the legal and regulatory approaches taken in the jurisdictions covered. Each chapter addresses the key characteristics of, and current climate within, a particular jurisdiction. Although payments, lending and deposits are the focus of this survey, other financial products and services are discussed where relevant.

Richard Fischer, Obrea Poindexter and Jeremy Mandell
Morrison & Foerster LLP
Washington, DC
February 2017

Chapter 1

AUSTRIA

Gerhard Dilger and Michael Fischer[1]

I OVERVIEW

Consumers – in particular borrowers – are very well protected in Austria. The rules protecting consumers directly and indirectly are enforced by the Austrian Financial Market Authority (FMA). The FMA's consumer protection activities in 2016 generally focused on companies' compliance with their information and notification duties both to the FMA and consumers as well as companies' complaint handling procedures. In 2016 virtual currencies and reduction of foreign currency loans in the consumer segment were a special focus of the FMA.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

In Austria consumers benefit from a very high level of statutory protection. Consumer finance issues are mainly provided for in the following laws and – where applicable – their European law equivalents:

- Federal Act concerning the Distance Marketing of Consumer Financial Services implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC;
- Federal Act Establishing Provisions for the Protection of Consumers (KSchG) implementing: (1) Directive 2011/83/EU 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

1 Gerhard Dilger is a consultant and Michael Fischer is an associate at Wolf Theiss.

Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council; and (2) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;

- Federal Act concerning Consumer Credits (VKrG) implementing Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC;
- Federal Act concerning Consumer Credits with respect to Mortgages (HiKrG) implementing Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010;
- Federal Act on the Provision of Payment Services (ZaDiG) implementing Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC; and
- Federal Act on the issuance of electronic money and the taking up, pursuit and supervision of the business of electronic money institutions implementing Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.

Additional provisions in other laws such as data protection laws, general civil laws or certain other administrative laws ensure a very high statutory safety level for consumers.

ii Regulation

Generally laws are implemented by the Austrian parliament; ordinances are established by the competent authorities; and both are enforced by the relevant administrative authorities. With respect to financial market issues (including consumer finance regulations) the supervising authority for banks is the FMA. Banks that infringe the administrative provisions of consumer protection laws face administrative fines imposed by the FMA and could be sued by consumers who incurred damage as a result of the breach.

Additionally consumers may also contact the ombudsman of the Joint Alternative Dispute Resolution Institution of the Austrian Credit Institution Sector, or – but only with respect to foreign currency loans – the Alternative Dispute Resolution Institution for Consumer Deals. Both bodies are responsible for out-of-court settlement of consumer disputes and competent bodies under Article 3 of the Alternative Dispute Resolution Act, which implements Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC. Generally alternative dispute solution procedures require the consent of the defendant and alternative dispute resolution procedures are not mandatory, meaning a bank may refuse to participate, which leaves the consumer with the option to file a claim.

Furthermore consumers may approach the Consumer Association for Consumer Information (VKI), the most well-known, organised and powerful consumer association in

Austria. The VKI is very active with respect to the supervision of general terms and conditions of banks and investment funds; it has fought and won many actions for consumers leading to a very detailed and consumer-friendly Austrian Supreme Court practice in recent years.

III PAYMENTS

i Overview

The ZaDiG sets forth the rules under which payment service providers may operate and service users are protected. Direct cash transactions between payer and payee, under Article 2(3)(1) ZaDiG,[2] are, however, exempted. According to a press release of the Austrian Chamber of Commerce, 75 per cent of all purchase transactions in Austria are conducted using cash.[3] The general civil law rules apply to cash transactions.

Consumer protection measures are mainly set forth as part of the duties of payment service providers to inform consumers (Article 26 et seq ZaDiG) as well as the rules applicable to transaction content (HiKrG with respect to a mortgage credit, etc.).

ii Recent developments

The market for online payment services including mobile payment services is increasing.[4] Innovative ideas with respect to the identification of new clients and the usability of mobile and online payment methods are becoming more and more important, and banks are looking to cover the gap between client demand for easy and quick payment methods and the legal framework requiring the banks to provide high safety standards and comply with anti-money laundering and anti-terrorism-financing regulations, and know-your-client duties.

Financial technology start-ups and financial innovation think tanks are driving the market's development and bringing new challenges with them. The FMA has set up on its homepage a Fintech Navigator, which includes the possibility to contact the regulator directly if the company does not already have a licence.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Banks must hold a banking licence under the Austrian Banking Act (BWG) to administer funds or accept deposits (deposit business) and for the provision of non-cash payment transactions, clearing services and current-account services for other parties (current-account business) if such business is not merely a payment service for which a licence under ZaDiG would be required. Most of the regulations are seen as protective laws allowing the consumer – if a bank breaches its obligations – to claim damages from the bank.

2 Corresponding to Article 3(a) of Directive 2007/64/EC.

3 https://www.wko.at/Content.Node/iv/presse/wkoe_presse/presseaussendungen/pwk_165_16_Leitl:-Wahlfreiheit-beim-Zahlen-muss-erhalten-.html, download 20161206.

4 Ibid.

ii Recent developments

Austria has implemented Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes through the Deposit Guarantee and Investor Protection Act (ESEAG), which has led to a reorganisation of Austrian deposit guarantee schemes to comply with European law standards. Following a transposition period until the end of 2018 – until which the system of deposit guarantee schemes will be regulated on the level of financial market sectors and on an institutional level – as of 1 January 2019 a single deposit guarantee and investor protection scheme shall be applicable for all depositors with credit institutions in Austria. The Austrian legislature has also foreseen the possibility that a sector or a group of institutions may apply for a licence as a deposit guarantee scheme on an institutional level, but presumes (which can be seen from the preparatory material to the law) that owing to the very high complexity involved it seems very unlikely that such option will be chosen by Austrian market participants.[5]

V REVOLVING CREDIT

i Overview

Issuing credit cards requires the bank to have at least a payment service provider licence under the ZaDiG and in most cases also a banking licence for deposit business and for providing loans to consumers a lending business licence under the BWG.

The decision to give credit to a consumer is at the sole discretion of the credit institution, which must comply with all its obligations under the VKrG and HiKrG, and the general obligations under the KSchG and the general civil law rules.

ii Recent developments

In 2016 the discussion around negative interest and the banks' obligation to let borrowers benefit from negative interest rates dominated the market participants' focus. Recently the Court of Appeal decided that with respect to 'old' loans, in which no limitations, wording or clauses with respect to negative interest rates have been included, negative interest rates must be passed on to the consumer.[6] Also certain first-instance courts have decided in favour of consumers by ruling that general terms and conditions that do not provide for a floor (covering negative interest rates) and a cap (covering too high interest rates) are too detrimental to consumers and are therefore void.[7]

5 Explanation to the Governmental Proposal ESEAG, 686 of the attachments, 25th period page 2 of 21 et seq.

6 60 R 4/16t.

7 27 Cg 32/15x.

VI INSTALMENT CREDIT

i Overview

Lenders require a lending business licence under the BWG to provide loans to consumers. The decision to give credit to a consumer is at the sole discretion of the credit institution, which must comply with all its obligations under the VKrG and HiKrG, and the general obligations under the KSchG and the general civil law rules.

ii Recent developments

The implementation deadline for Directive 2014/17/EU expired in March 2016 and Austria has complied with its obligation to transpose the Directive into the HiKrG. Although it has not brought materially new rules for mortgage-backed loans, it has made a completely new law necessary as the Austrian approach to implementing Directive 2011/83/EU has brought more extensive regulations in some areas and therefore led to mortgage-backed loans being governed by the HiKrG rather than the VKrG.

The HiKrG has of course brought additional compliance requirements for banks with it, adding another layer of complexity and cost.

As part of the implementation of Directive 2014/17/EU the legislature also focused on the assessment of the creditworthiness of the consumer, formalising an aspect that previously gave the banks more space to operate and which now could be seen as a new requirement that will concentrate loans in a more limited market.

VII OTHER AREAS

The Austrian Supreme Court's practice with respect to statutory limitation periods and consequential damages in foreign currency loans should be noted. In summary the Supreme Court holds that the moment when the borrower recognises (or was in the position to recognise or should have recognised) that the loan is detrimental to the borrower's purpose, the statutory limitation period of three years for a damage claim commences. If the borrower is not in the position to claim an exact amount, the borrower must file a claim for a declaratory judgment. If the borrower waits until the damage has actually occurred but the court finds out that the borrower has known (or should have known) that the loan was detrimental for for more than three years without filing a claim, the borrower's claim becomes time-barred, and – which is in many cases very important – the same applies to consequential damages resulting from foreign currency loans.[8]

VIII UNFAIR PRACTICES

The Supreme Court and inferior courts throughout the last year dealt with many claims challenging general terms and conditions clauses with respect to unfair and non-transparent practice. As the Supreme Court has implemented a very strict standard with respect to transparency, many of the clauses used by banks have been found invalid under the KSchG. Although few cases have captured the public interest or been taken up by media or consumer

8 10 Ob 51/16x.

associations, the following are noteworthy: (1) a case in which the court held that the consumer must be able to calculate or to understand the calculation of adjustments of the applicable interest rate to the loan; the court of appeal confirmed the court's decision that clauses that do not meet these criteria are not transparent and consequently invalid;[9] and (2) a case in which the court has held that the consumer must have precise information on potential cost with respect to a loan and its securitisation; the Supreme Court has confirmed the court's view that unclear provisions are invalid[10] and debt collection costs which are unspecified and – in the worst case – might lead to unjustified cost transfer to consumers.[11]

In general many cases dealt with the following aspects:

a interest calculation including in many cases the lack of transparency of calculation methods, leading in most cases to the invalidity of clauses, which the courts hold should be transparent and understandable; and

b shifting of cost to consumers and extending the term 'cost' to fees and expenses that might be generated in connection with a business relationship, whether or not the consumer has caused such cost, leading in most cases to the invalidity of such clauses as the courts would like costs to be proportionate.

The courts have also decided cases where banks had new clauses implemented in their general terms and conditions that resulted in detrimental provisions for the consumer as to fees or other provisions, leading in most cases to the invalidity of such clauses, as the courts only recognise balanced new clauses for agreements with respect to consumers.

IX RECENT CASES

i Enforcement actions

The FMA is not obliged to publish its sanctions but it may do so in certain situations. The following descriptions are based on the latest sanctions made public on the FMA's homepage but should not be seen as representative of the FMA's focus:

a an investment firm had not informed the FMA that certain services had been outsourced to third parties, infringing its obligation under Article 151 of the Investment Fund Act, which resulted in administrative fines for the managing directors;

b a credit institution had implemented insufficient procedures to identify politically exposed persons infringing the credit institution's obligation under Article 40(b) of the BWG, which resulted in administrative fines for the managing directors; and

c a credit institution had implemented insufficient procedures to identify the ultimate beneficial owner, infringing the credit institution's obligation under Article 40(a) of the BWG, which resulted in administrative fines for the managing directors.

9 57 Cg 14/16h.

10 6 Ob 17/16t.

11 43 Cg 8/16y.

In certain cases the FMA does not impose administrative fines, but instead orders the bank to change its management board, holding that certain directors are no longer fit and proper. Such action is not made public according to current law but is one of the regulator's most powerful tools.

ii Disputes before the regulator

A dispute between a consumer and a bank might lead to an administrative fine for the bank or the bank's management, but the regulator will not settle the dispute between the consumer and the bank. Individual consumers can protect their rights before the alternative dispute resolution institutions and the competent courts.

As there is no standing practice in Austria with respect to the public disclosure of alternative dispute resolutions, neither the Joint Alternative Dispute Resolution Institution of the Austrian Credit Institution Sector nor the Alternative Dispute Resolution Institution for Consumer Deals has published any relevant cases with respect to consumer finance issues. In most cases publication would not be expected, as from a bank's point of view the confidentiality aspect of out-of-court settlement prevails, whereas from a consumer's perspective there seems to be no interest in publication because the consumer will have already benefited from the alternative dispute resolution (as the consumer's claim is likely to have been fulfilled).

Austria is 'overbanked', meaning that very many banks are competing for a limited number of wealthy clients, which could be interpreted as a very consumer-friendly environment where consumer expectations and claims are more often satisfied than denied.

iii Litigation

One of the most important cases for the protection of consumers has recently been decided before the European Court of Justice.[12] In the case a major bank operating in Austria was offering contracts for internet e-banking to its customers and providing payment services. As part of the general terms in its e-banking contracts, it included a term under which 'notices of changes' were communicated to the customer through the internal mailbox of the bank's internet e-banking system. The bank created a mailbox for every customer in its e-banking system. Customers could access their personal mailbox by logging in with their personal password through the e-banking website. Electronic messages were then transmitted by the bank to that mailbox. There was no supplementary communication, for example, through a message sent to the personal private email of the client informing him or her that a message has been sent to the corresponding e-banking mailbox. The VKI considered that the term and the described set-up did not comply with the duty of providing information in a 'durable medium' set out in Directive 2007/64.

Following the request for a preliminary ruling of the Austrian Supreme Court, the key question for the European Court of Justice was whether electronic information transmitted by the bank to its customer into the respective e-banking mailbox of the customer as described above was provided on a 'durable medium'.

In its ruling the European Court of Justice established the following two conditions that must be fulfilled for such a system to provide information in a 'durable medium': (1) 'that that website allows the user to store information addressed to him personally in

12 C-375/15.

such a way that he may access it and reproduce it unchanged for an adequate period, without any unilateral alteration of its content by that service provider or by another professional being possible'; and (2) 'if the payment service user is obliged to consult that website in order to become aware of that information, the transmission of that information must be accompanied by active behaviour on the part of the provider aimed at drawing the user's attention to the existence and availability of that information on that website.'

In summary this means that the existing e-banking solutions must be amended to include some sort of notification (e.g., email) for customers regarding messages in their e-banking mailbox.

Another important case[13] dealt with reminder fees of a bank which calculated the cost for reminder fees in case of late payment without reference to cause or other limitation as 5 per cent on top of the other interest plus additional reminder fees. The court held that unlimited fees – without linking them to the consumer's fault or other circumstances – breaches Austrian mandatory law, which provides that only the necessary cost for out-of-court extremely detrimental and invalid as there was no balanced relation between the listed reminder fees and the actual delayed payment or enforced claim.

X OUTLOOK

It is very likely that fintech developments will continue to drive the market and also that the FMA will focus on this area to protect all consumer classes and ages with respect to risks posed by new technology. It will be also interesting to see how the negative interest debate will develop and whether the Supreme Court will establish a standing practice with respect to giving the right for an equivalent cap and floor for interest rates to consumers.

We assume that Austria will continue to extend its rate of non-cash payment activities making it more and more relevant to provide consumers with user-friendly applications. An ageing population in the coming years will create an immense need for non-cash payment solutions for the generation above 60 years, which has not grown up with internet and therefore might require even more user-friendly solutions on the market.

Recently the FMA published an ordinance effectively allowing for video identification of customers when opening accounts.

In general the speed of change will increase and it remains to be seen whether laws will keep pace with the developments in the market.

Generally we expect to face more and more anti-money laundering and anti-terrorism financing regulations and the alignment of these provisions with tax fraud provisions. The tendency for stricter tax regulations will most likely also bring additional layers of complexity into the financial market. This also means additional paperwork for the consumer and might make acquisitions quite arduous.

E-money brings more and more applications and online solutions for money and money-equivalent transactions. For consumers the indirect ratings used by platforms (or even direct ratings) are becoming more and more important as the 'big data effect' might provide for non-cash payment offers depending on the creditworthiness of consumers depending on whether the legal framework allows or denies such applications.

13 4R 129/15t.

Chapter 2

BELGIUM

Pierre E Berger and Pauline Kustermans[1]

I OVERVIEW

Consumer finance law generally refers to all laws and regulations governing financial products and services for consumers. In Belgium, a consumer is defined as a natural person who is acting for purposes that are outside his or her trade, business or profession. The Belgian legislator (as well as legislators worldwide) has long been of the opinion that protective and corrective legislative measures should be put in place to address a consumer's inferior position (as opposed to businesses) with regards to knowledge, expertise and experience in the financial sector. Particularly in the aftermath of the financial crisis of 2007–2008, Belgian policymakers have been focusing on stronger consumer protection, together with better financial education, in order to achieve financial stability.[2] Considering the significant potential detriment that financial services can cause to individual consumers and to the financial markets, improved protection for consumers in financial markets is also a key preoccupation of the European Union.[3]

For the past decade, the traditional consumer finance landscape has been challenged by new digital technologies. In particular, constant developments in the area of financial technology (fintech) are fundamentally changing the financial services industry.[4] Fintech uses software to provide financial services and reshapes the way financial services are structured,

1 Pierre E Berger is a partner and Pauline Kustermans is an associate at Baker McKenzie.

2 Directorate-General for Internal Policies, Consumer Protection Aspects of Financial Services, European Union, 2014, 18, www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf.

3 Directorate-General for Internal Policies, Consumer Protection Aspects of Financial Services, European Union, 2014, 14-15, www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf.

4 EPRS, Consumer Protection the EU, European Union, 2015, 9, www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf.

provisioned and consumed.[5] Fintech offers many advantages: it enhances customer experience (faster, better, cheaper), it introduces new ways to provide and make use of financial products and services (e.g., mobile payments, online lending platforms and automated advice), it enhances the availability and accessibility of financial products and services (24/7 via the internet, the cloud), it improves efficiency, etc. The digital evolution has also opened the door to new players in the financial sector (i.e., fintech companies) that are challenging the traditional players (particularly banks) and their monopoly in the financial sector. While some of these fintech companies may disrupt the traditional European financial market (the 'disruptors'), there are also many fintech companies that act as 'enablers' and could thus be of service to the traditional players. There are more and more initiatives in the Belgian and European market involving cooperation between banks and fintech companies. This allows fintech companies to benefit from a bank's extensive customer base and expertise with complex regulation, while banks can get an insight into new findings in the field of technology and consumer experience in order to improve their products and services. Some authors, regulators and governments (including the Belgian ones) therefore prefer to refer to 'tech for fin' instead of 'fintech'. Despite the many benefits offered by fintech, the World FinTech Report of Capgemini and LinkedIn shows that Belgian consumers are still hesitant and place more trust in the traditional players.

Belgium has historically led the way in new technologies supporting the financial sector, particularly with regards to electronic banking (Bancontact, Isabel, Swift, MasterCard). However, in January 2016, the Belgian High Level Expert Group on the Future of the Belgian Financial Sector expressed the need for Belgium to foster an environment that stimulates the growth of fintech in order for Belgium to maintain its leading position.[6] As such, the High Level Expert Group invited the Belgian Financial Services and Markets Authority (FSMA) to assess the desire for a light-touch regulatory regime in order to lower the barriers to entry for new players. The FSMA has also recognised the benefits of fintech and identified fintech as an important focus of its activities as of 2016. In this regard, the FSMA has opened a fintech portal on its website in order to support a dialogue between the FSMA and companies in the innovative financial technology sector.[7] Moreover, since 2015, the FSMA has been chair of the Financial Innovation Standing Committee of ESMA.[8]

Given the many benefits and opportunities that come along with the digital revolution, the Belgian regulator is keen to promote the development of the fintech sector. However, the area of financial services remains complex and measures to ensure consumer protection and financial stability remain required. Moreover, legislation is often not yet adapted to new technologies. Hence, the regulator is challenged to ensure sufficient regulation and supervision. Digital innovations in the financial services sector also raise new concerns with regards to security (particularly in terms of fraud, identity theft and cyber crime). The

5 World Economic Forum, The Future of Financial Services, 2015, www3.weforum.org/docs/WEF_The_future__of_financial_services.pdf.

6 Report of the High Level Expert Group, The Future of the Belgian Financial Sector, Brussels, 13 January 2016, 53.

7 www.fsma.be/en/Supervision/finbem/fintech.aspx.

8 European Securities and Markets Authority.

Belgian regulator faces the challenge of finding a balance between a supportive approach, (i.e., encouraging financial innovation) and a protective approach (i.e., ensuring consumer protection and financial stability).[9]

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Consumer finance law covers a wide range of financial products and services, including banking, payment, credit and investment products and services. In this chapter, the focus will be on consumer payments, deposits and lending activities.

Payments

The Belgian regulatory framework for payments and related services is largely harmonised at the European level. The main statutes are:

a Title 3 Payment Services of Book VII Payment and Credit Services of the Code of Economic Law (the Payment Services Regulations) which implements:
- Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (PSD1);
- Regulation (EC) No. 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No. 2560/2001;
- Regulation (EU) No. 260/2012 of the European Parliament and of the Council establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No. 924/2009 (the SEPA Regulation); and
- Regulation No. 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions; and

b Act of 21 December 2009 on the status of payments institutions and electronic money institutions, access to the activity of payment service provider and the issuance of electronic money and the access to payments systems (the Payment Institutions Act) which implements:
- the Payment Services Directive; and
- Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions.

The Payment Services Regulations and the Payment Institutions Act regulate the provision of payment services. Payment services are defined as:

a services enabling cash to be placed on a payment account as well as all the operations required to operate a payment account;

b services enabling cash withdrawals from a payment account as well as all the operations required to operate a payment account;

9 www.euractiv.com/section/digital/news/commission-champions-laissez-faire-in-first-response-to-fintech-revolution/.

c execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider:
- execution of direct debits, including one-off direct debits;
- execution of payment transactions through a payment card or a similar device; and
- execution of credit transfers, including standing orders;

d execution of payment transactions where the funds are covered by a credit line for a payment service user:
- execution of direct debits, including one-off direct debits;
- execution of payment transactions through a payment card or a similar device; and
- execution of credit transfers, including standing orders;

e issuing or acquiring payment instruments;
f money remittance; and
g execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.

Only institutions that are duly licensed in accordance with the Payment Institutions Act are allowed to provide payment services (i.e., credit institutions, electronic money institutions and payment institutions). In addition, those regulated payment service providers must comply with the substantive provisions of the Payment Services Regulations.

Deposit-related activities
The Belgian regulatory framework for deposit-related activities consists primarily of:
a the Payment Services Regulations;
b the Payment Institutions Act; and
c the Act of 25 April 2014 on the status and the supervision of credit institutions and listed companies (the Banking Act).

Deposit taking (i.e., the activity that consists of receiving deposits or other repayable funds from the public) is a regulated activity that is reserved for duly authorised credit institutions only. Credit institutions are required to join a collective deposit guarantee scheme.

Consumer lending activities
The Belgian regulatory framework for consumer lending activities consists primarily of Title 4 Credit Agreements of Book VII Payment and Credit Services of the Code of Economic Law (the Credit Regulations).

The Credit Regulations have a broad scope of application and regulate any agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation.

The legislator has always been of the opinion that mortgage credit should be regulated separately due to its specificities. Hence, the rules are twofold:

a consumer credit is regulated by Chapter I of the Credit Regulations (the Consumer Credit Regulations). Consumer credit is defined as credit, regardless of the name or form, that is being granted to the consumer, except mortgage credit;

b mortgage credit is regulated by Chapter II of the Credit Regulations (the Mortgage Credit Regulations). Mortgage credit is defined as:
- 'mortgage credit with a moveable purpose' (i.e., a credit agreement secured by a mortgage security that is not intended for financing the acquisition or the preservation of immoveable property rights or the refinancing of such credit agreements); and
- 'mortgage credit with an immoveable purpose' (i.e., a credit agreement secured by a mortgage security that is intended for the financing of the acquisition or preservation of immoveable property rights or the refinancing of such credit agreements). A credit agreement that is not secured by a mortgage security but is intended for the financing of the acquisition or preservation of immoveable property rights, with the exception of the renovation of immoveable property, or a credit agreement with regard to barges also qualifies as mortgage credit with an immoveable purpose.

ii Regulation

In Belgium, the supervision of the financial sector is entrusted to three different authorities, each of which has a specific set of objectives and competences: the National Bank of Belgium (NBB), the Financial Services and Markets Authority (FSMA) and the Federal Public Services Economy, SMEs, Self-Employed and Energy (FPS Economy).

The National Bank of Belgium and the Financial Services and Markets Authority

The NBB is established under the Act of 22 February 1998 establishing the organic statue of the National Bank of Belgium (the NBB Establishment Act). The NBB's mission is, among others, to ensure the prudential supervision of the financial sector. As such, the NBB is responsible for the individual prudential supervision of credit institutions (as referred to in the Banking Act) and payment institutions (as referred to in the Payment Institutions Act).

The FSMA is established under the Act of 2 August 2002 on the supervision of the financial sector and on financial services (the Financial Supervisory Act). The FSMA is responsible for: (1) overseeing financial markets and supervising company information; (2) supervising financial products; (3) supervising compliance by financial institutions with the rules of conduct; (4) supervising a wide range of financial service providers and intermediaries; (5) contributing to the financial education of savers and investors; and (6) supervising supplementary pensions.[10] As such, the FSMA is responsible for the supervision of mortgage and consumer credit providers and intermediaries in mortgage and consumer credit (as referred to in the Credit Regulations).

10 FSMA introductory brochure, www.fsma.be/en/About%20FSMA.aspx, 8-19.

The NBB and the FSMA have wide powers and competences for the purposes of carrying out their supervisory tasks:[11]

a The NBB and the FSMA can issue regulatory instruments, such as circulars and communications, to explain and interpret legislation. With these regulatory instruments the NBB and the FSMA indicate how they will apply the rules.

b The NBB and the FSMA can impose a variety of preventive and corrective measures.

c The NBB and the FSMA can ask undertakings under their supervision to provide relevant documentation and information, and can conduct on-site inspections in order to verify compliance with all the rules (including by the use of mystery shoppers).

d Where a financial service provider (e.g., payment institution or creditor) offers services without the required registration or authorisation, the NBB and the FSMA can publish a warning to advise the public.

e If the NBB and the FSMA determine that a financial service provider no longer fulfils the conditions for registration or authorisation they may take administrative measures. The most severe measure is revoking the authorisation (whereby the undertaking may no longer carry out its activities).

f The NBB and the FSMA can also impose administrative sanctions (such as fines and other penalties) for infringements of financial legislation.

FPS Economy

Whereas the NBB and the FSMA supervise providers of financial services (such as payment institutions and creditors) in terms of licensing, operating and conduct of business requirements, the FPS Economy is entrusted with the supervision of such providers' compliance with the substantive rules governing financial products and services, including the Payment Services Regulations and Credit Regulations. As part of these supervisory powers, for example, creditors have to submit their model mortgage and consumer credit agreements to the FPS Economy for prior approval.

The FPS Economy's main mission is to detect and identify breaches of the financial rules and regulations. In this regard, the FPS economy is allowed to use mystery shoppers. In case of an infringement, the FPS Economy can take various measures, such as issuance of a warning, reaching an administrative settlement and seizing the goods of an infringer. The FPS Economy can refer its findings to the NBB and the FSMA, which will subsequently impose appropriate administrative sanctions.

III PAYMENTS

i Overview

Payments are regulated by the Payment Services Regulations and the Payment Institutions Act. As set out above, the payment services rules are mainly derived from EU legislation.

The regulations are twofold:

a licensing regime: only duly licensed institutions are allowed to provide payment services (i.e., credit institutions, electronic money institutions and payment institutions); and

11 FSMA introductory brochure, www.fsma.be/en/About%20FSMA.aspx, 20.

b substantive provisions: payment services providers need to comply with the substantive provisions of the Payment Services Regulations, including information and disclosure requirements, costs, authorisation of payment transactions and execution of payment transactions (execution time, liability).

With the emergence of new technologies, payment solutions are transforming every day. The internet and mobile devices (such as smartphones and tablets) have become key elements in consumers' day-to-day lives. The traditional payment methods, such as cash payments and bank wire transfers are increasingly being surpassed by new digital payment methods, such as online and mobile payments.[12] The Digital Payments Study 2016 conducted by Visa shows that Belgium ranks in the top 10 countries with the highest proportion of mobile payments users.[13] Today in Belgium there are more than 11 million users of online banking and more than 3 million users of mobile banking.[14] Nevertheless, although Belgium is transforming to a less cash-reliant society, many payments in Belgium are still made using cash.[15]

The current regulatory framework for payment services is being challenged by the rapid growth in digital technologies and the introduction of new types of payment services in the market.[16] In particular, the EU considered that:

> *Many innovative payment products or services do not fall, entirely or in large part, within the scope of the regulations. Moreover, the scope of application of the regulations has proven to be too ambiguous, too general or simply outdated, taking into account market developments. This has resulted in legal uncertainty, potential security risks in the payment chain and a lack of consumer protection in certain areas. It has proven difficult for payment service providers to launch innovative, safe and easy-to-use digital payment services and to provide consumers and retailers with effective, convenient and secure payment methods.*[17]

ii Recent developments

In order to respond to the developments in the payments landscape, particularly rapid technological changes, the European Parliament and the Council adopted the recast Payment Services Directive (PSD2),[18] which will replace the current Payment Services Directive. Two of the key changes introduced by the PSD2 are enhanced security requirements and an expanded scope. In particular, the PSD2 introduces two new regulated payment services (i.e., payment initiation services and account information services):

a 'payment initiation service' means a service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider; and

12 www.ecb.europa.eu/paym/retpaym/undpaym/html/index.en.html.

13 www.visaeurope.com/media/pdf/40172.pdf.

14 http://dashboard.febelfin.be/nl dd. 16 January 2017.

15 www.febelfin.be/nl/belgie-elektronisch-vs-cash-betalen; http://dashboard.febelfin.be/nl.

16 Directive (EU) 2015/2366 on payment services in the internal market, Recital 3.

17 Directive (EU) 2015/2366 on payment services in the internal market, Recital 4.

18 Directive (EU) 2015/2366 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.

b 'account information service' means an online service to provide consolidated information on one or more payment accounts held by the payment service user with either another payment service provider or with more than one payment service provider.

The PSD2 entered into force on 12 January 2016. Member States must implement PSD2 into national law by 13 January 2018.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

As set out above, any activity that consists of receiving deposits or other repayable funds from the public is a regulated activity that is reserved for duly authorised credit institutions only. Hereinafter the focus will be on access to banking services, deposit guarantees and overdrafts.

Access to banking services

In modern society, having a bank account is indispensable for consumers' day-to-day lives. A bank account enables consumers to make and receive payments, purchase goods or services online, pay bills, obtain credit, etc.[19] Hence, when people are excluded from having a bank account, they are isolated from society.

In 1996 the banks in Belgium already adopted the 'Charter regarding a basic banking service'. With this Charter the banks (voluntarily) agreed that any person who is domiciled in Belgium could open an account and engaged themselves to offer the 'basic banking service'. This basic banking service included the execution of transfers, enabling cash deposits and withdrawals, and issuing bank statements.[20]

In 2001, the Belgian legislator considered that the right to financial services, in particular the access to financial banking services, is a fundamental right[21] and that it should be guaranteed by law. Consequently, on 4 March 2003 the Act on the implementation of a universal banking service was adopted, which ensured the offering of basic banking services free of charge. Today the rules on the basic banking services can be found in Chapter 8 Basic Banking Service of the Payment Services Regulations (which also takes into account European developments in this area).

In accordance with Article VII.57 of the Code of Economic Law, every credit institution is required by law to offer the basic banking service and every consumer is entitled to the basic banking service. The 'basic banking service' is defined as 'a payment service which includes the following services':

a services enabling all the operations required for the operating of a payment account;
b services enabling money to be placed on a payment account;
c services enabling cash withdrawals from a payment account; and

19 Directorate General for Internal Policies, Basic banking service, Brussels, European Union, 2011, 8 (www.europarl.europa.eu/activities/committees/studies).
20 Memorie van Toelichting, Parl. St. Kamer, Doc 50 1370/001, 4.
21 Memorie van Toelichting, Parl. St. Kamer, Doc 50 1370/001, 4.

d the execution of payment transactions, including transfers of funds in and out of a payment account with the consumer's payment service provider or with another service provider following:
- the execution of direct debit;
- the execution of payment transactions through a payment instrument; and
- the execution of money transfers, including standing payment orders.

The annual fee charged for the basic banking service may not exceed €12.

A credit institution may reject an application for a basic banking service or revoke a basic banking service only where:

a the consumer already has access to a basic banking service or a payment account (even with another credit institution);

b the consumer already has an account or accounts for a total amount exceeding €6,000; or

c the consumer has committed fraud, misuse of trust, fraudulent bankruptcy, forgery or money laundering.

When a credit institution rejects or revokes an application for a basic banking service the credit institution will have to inform the consumer of the complaints and out-of-court redress procedures that the consumer can rely on, and the information details of 'Ombudsfin' (which is the competent body to deal with such complaints procedures). The credit institution will also have to inform Ombudsfin immediately of its decision to reject or revoke. Ombudsfin can annul the decision taken by the credit institution or order another credit institution to provide the basic banking service.

Deposit guarantees

Deposit guarantee schemes have attracted much attention in the aftermath of the financial crisis. In Belgium, the deposit guarantee scheme has been established within the Deposit and Consignation Office of the Federal Public Services Finances: the Guarantee Fund for financial services. The Banking Act requires all Belgian credit institutions to participate in the Guarantee Fund. The Guarantee Fund ensures the protection of funds held by depositors, savers and investors in case of default of the institution. In particular, the Guarantee Fund provides for a guarantee of €100,000 per depositor per institution.

Overdrafts

An overdraft offers a consumer the possibility to draw down funds which exceed the current balance in the consumer's current account. If the overdraft has been explicitly agreed, it is called an 'overdraft facility'. If the overdraft has been tacitly accepted (without an explicit agreement) it is called 'overrunning'. Overdrafts generally fall within the scope of application of the Credit Regulations,[22] albeit under a light-touch regime.

In case of overrunning, the law requires a creditor to notify the consumer when the overrunning exceeds €1,250 and lasts more than a month. If the overrunning has not been

22 Credit agreements (1) where the credit is granted free of interest, (2) under the terms of which the credit has to be repaid within two months and (3) where the charges do not exceed €4.17 per month are excluded from the scope of application of the Credit Regulations.

repaid within three months, the creditor is obliged to suspend any drawdowns under the credit facility and put an end to the credit agreement, or conclude a new credit agreement providing for a higher total amount of credit.

ii Recent developments

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes has been implemented into Belgian law by means of the Act of 22 April 2016 transposing Directive 2014/49/EU on deposit guarantee schemes and containing various provisions. In particular, this Act has amended the Banking Act as well as the Royal Decree of 14 November 2008 on the implementation of the crisis measures provided for by the Act of 22 February 1998 on the organic status of the National Bank of Belgium, with regards to the establishment of the Guarantee Fund for financial services.

V REVOLVING CREDIT

i Overview

Belgian law does not define 'revolving credit' as such. However, revolving credit is a specific type of 'credit facility', which is defined by Article I.9, 48 of the Code of Economic Law as any credit agreement, regardless of the name or form, whereby a creditor makes available to a consumer purchasing power, money or any other means of payment and the consumer can use the credit by one or more drawdowns, among others, by means of a payment instrument or any other means, and the consumer commits himself to repaying the credit as agreed. In case of revolving credit, the consumer can redraw again any amounts repaid. Where the possibility to redraw the credit is subject to the prior consent of the creditor or conditions other than those initially agreed, the redrawing will be considered to constitute a new credit agreement.

Revolving credit, as a type of credit, falls within the scope of application of the Credit Regulations (both consumer credit and mortgage credit). As such only duly licensed creditors can grant such credit and only duly licensed credit intermediaries can intermediate such credits. Moreover, the credit agreement will need to comply with the substantive provisions of the Credit Regulations, including rules on advertising, pre-contractual information and advice requirement, creditworthiness assessment, mandatory contractual provisions, interest rates and costs, etc.

The Credit Regulations require the implementation of a 'zero setting' for both revolving consumer credit and revolving mortgage credit agreements of indefinite duration or with a term of more than five years. In particular, such credit agreements will have to provide for a term by which the total amount of the credit facility must be repaid.[23] The zero setting term will restart upon the first drawdown following the last zero setting.

With regards to revolving consumer credit and revolving mortgage credit with a moveable purpose the creditor is required to regularly inform the consumer by means of a statement of account, on a durable medium, containing the following information:

23 Article 14, Section 3 of the Royal Decree of 16 September 2016 on the costs, percentages, duration and repayment methods of credit agreements subject to Book VII of the Code of Economic Law sets the maximum terms for zero setting.

a the precise period to which the statement of account relates;
b the amounts and dates of drawdowns;
c the total amount outstanding, and the date of the previous statement;
d the new total amount outstanding;
e the dates and amounts of payments made by the consumer;
f the applicable borrowing rate(s);
g the separate amounts of any charges;
h where applicable, the minimum amount to be paid and the interest due;
i where applicable, the outstanding balance due from the previous statement (except with regards to overdraft facilities);
j where applicable, the different dates of the charges due (except with regards to overdraft facilities); and
k the date and the amount of interest due for each borrowing rate, and information on the calculation method of the interest due on the amount outstanding (except with regards to overdraft facilities).

Often the revolving credit will be linked to a payment instrument, such as a credit card. The issuance of payment instruments is a regulated activity. As such, the creditor will also fall within the scope of application of the payment services rules and regulations.

ii Recent developments

The Central Individual Credit Register of the National Bank of Belgium records information relating to all consumer credits and mortgage loans, as well as any payment defaults resulting from these loans. The purpose of this registration is to strengthen the means of preventing the excessive indebtedness of private individuals.[24] Creditors are required by law to consult the Central Individual Credit Register prior to the conclusion of a credit agreement with a consumer. The National Bank of Belgium publishes statistics regarding the information recorded in the Central Individual Credit Register on a monthly basis. The statistics for 2016 show that credit facilities represent more than 50 per cent of all credit agreements. In particular, in 2016 there were 6,241,985 credit facilities for a total amount of €17,046,306.[25]

VI INSTALMENT CREDIT

i Overview

Instalment credit is defined as any credit agreement, regardless of the name or form, whereby a creditor makes available to a consumer money or any other payment means and the consumer has to repay the credit in periodic payments. A typical example is a car financing agreement whereby the consumer obtains a credit that allows the consumer to purchase a car and stretch out the repayment over a longer period of time by instalments. Another example of an instalment credit is a student loan that allows students to pay their tuition fees in instalments. However, student loans are less common in Belgium because of the low tuition

24 www.nbb.be/en/central-credit-register/credits-individuals/mission.

25 Centrale voor kredieten aan particulieren, Statistieken, Brussel, 2016, 8.

fees. Mortgage credits will generally have to be repaid by instalments and thus qualify as instalment credit. For example: traditional home loans (i.e., a credit intended for purchasing a house whereby the credit has to be repaid by monthly payments over a period of 30 years).

Instalment credit has been subject to regulation in Belgium for a long time. Mortgage credits were already regulated by the Royal Decree No. 225 of 7 January 1936 on the regulation of mortgage loans and ensuring supervision of undertakings granting mortgage loans. Instalment loans for consumers (except for mortgage loans) were already regulated by the Act of 9 July 1957 on the instalment sale and instalment loan. Today, instalment credit, as a specific type of credit, is subject to the general rules on mortgage and consumer credit which can be found in Title 4 Credit Agreements of Book VII of the Code of Economic Law.

The rules are twofold. On the one hand, persons granting (or intermediating in the granting of) instalment credits are subject to specific licensing and registration requirements. On the other hand, the Credit Regulations contain specific substantive provisions with regards to instalment credit agreements, including requirements on advertising, pre-contractual information and advising, credit-worthiness assessment, contractual rights and mandatory provisions, securities, etc.

ii Recent developments

The Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immoveable property has been implemented into Belgian law by the Act of 22 April 2016 amending and introducing provisions concerning consumer credit and mortgage credit in various books of the Code of Economic Law, which has entered into force on 1 December 2016.

VII UNFAIR PRACTICES

In Belgium, the provisions protecting consumers against unfair practices in the financial sector can be found in various laws and regulations.

First there is Book VI Market practices and consumer protection of the Code of Economic Law (Book VI), which implements 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 Directive 2011/83/EU on consumer rights. Book VI can be considered to constitute the lex generalis in relation to specific consumer finance laws and regulations. Book VI has provisions on advertising, (pre-contractual) information requirements, misleading and aggressive commercial practices and unfair contractual terms.

Book VI is supplemented by sector-specific legislation. Particularly the Credit Regulations contain extensive provisions on advertising, (pre-contractual) information requirements, unfair contractual terms, prohibited practices (e.g., tying practices), etc. The Credit Regulations are mainly derived from EU legislation.

Since 2014 Belgian law provides for the possibility to file a class action for breaches of the Payment Services Regulations and the Credit Regulations.

VIII RECENT CASES

i Enforcement actions

There is no publicly available information about any recent enforcement actions by the FSMA or the NBB against institutions for breach of consumer finance laws and regulations.[26]

ii Disputes before the regulator

There is no publicly available information about any significant recent complaints brought by or on behalf of consumers before the regulator or Ombudsfin. Ombudsfin's annual report for 2015[27] shows that most of the complaints, that Ombudsfin receives, relate to payment accounts, payment cards, and the conclusion and execution of credit agreements (both consumer and mortgage credit).

iii Litigation

There is no publicly available information about any significant recent court cases concerning consumer finance.

IX OUTLOOK

Considering the massive digitization of the local and international financial markets, with new technology solutions being invented each day, it is clear that fintech will continue to reshape the consumer finance landscape, whether as 'enabler' or 'disruptor'.

26 All intermediaries in mortgage and consumer credit must be registered with the FSMA. The register is published by the FSMA on its website and lists all registered intermediaries (www.fsma.be/nl/Supervision/finbem/vt/cons.aspx). It appears from the register for intermediaries in consumer credit that the FSMA has withdrawn the registration of one undertaking in 2016, however there is no further information available.

27 www.ombudsfin.be/sites/default/files/jaar-verslag-2015.pdf.

Chapter 3

BRAZIL

Pedro Paulo Barradas Barata and Alessandra Carolina Rossi Martins[1]

I INTRODUCTION

Financial inclusion oriented policies and the integration of technology into financial services and products through financial technology companies (fintechs) have brought consumer protection into the spotlight.

Increasing the public's access to essential financial services[2] and, more generally, improving the levels of financial inclusion, became a driver for financial policies and programmes in the recent administrations and remains a priority despite the political turmoil Brazil has experienced.

Consumer protection standards play an important role in these discussions since the federal government and regulatory agencies aim not only to increase the financial inclusion indexes by accessing a larger part of the population but are also aiming to improve the quality of financial education of the individuals already participating in the banking system.

In the wake of such government programmes and policies on financial inclusion, new products and services arising from the fintech movement such as online lending, peer-to-peer lending, online and mobile payment solutions, and digital checking accounts, among others, have also contributed to the increasingly prominent role of consumer protection standards given the high penetration of such products and services in the market.

As a result, the legal and regulatory framework that is applicable not only to consumer financing but also to all financial products and services offered to consumers has been subject to constant changes and improvements in recent years resulting in clearer standards and an increasingly favourable regulatory environment for consumer financing practices in Brazil.

1 Pedro Paulo Barradas Barata is a partner and Alessandra Carolina Rossi Martins is an associate at Pinheiro Neto Advogados.

2 The concept of 'essential financial services' generally includes, at least, checking accounts, debit cards to operate the account, withdrawals and at least a monthly statement, according to Brazilian regulatory standards.

i Overview

For the last years, the federal government and Central Bank have been implementing public policies and actions to foster consumer financing activities as one way to increase financial inclusion and financial citizenship in Brazil.

The Central Bank undertook a series of financial inclusion and consumer empowerment and protection commitments. In 2011, the Central Bank became a signatory of the Maya Declaration and undertook a series of commitments for short, medium and long-term implementation to develop financial inclusion, financial citizenship, financial education, consumer empowerment and consumer protection initiatives in Brazil.[3]

By extension, consumer empowerment and market conduct, consumer protection, dispute resolution involving consumers, and the relationship between the regulatory authorities (specially the Central Bank), financial institutions and the consumers have received increasing attention from the federal government and the regulatory agencies.

From 2009 to 2014, the forums organised by the Central Bank have addressed the financial inclusion and more recently the consumer empowerment and consumer protection guidelines. In 2015, the Central Bank along with the Brazilian Micro-enterprises and Small Businesses Support Service (SEBRAE) organised the first Forum on Financial Citizenship in Brazil. This forum focused the discussions on four main topics: financial inclusion in small businesses, the relationship between citizens and the financial system, financial well-being, and citizenship and financial vulnerability.[4]

Throughout 2016, the Central Bank continued to prioritise financial inclusion and organised debates and forums to discuss with scholars and industry players measures intended to develop Brazil's levels of financial citizenship and financial inclusion.[5]

In December 2016, in accordance with pronouncements from the federal government, the Central Bank launched a tentative agenda of actions and points of interest for the upcoming years (the Agenda BC+). The Agenda BC+ offers a glimpse of the short, medium and long-term actions that may be expected from the regulators and is structured around four main pillars:[6]

a more financial citizenship;
b more modern laws;
c a more efficient financial system; and
d cheaper credit.

Each pillar is based on a central point of interest and contemplates both internal and external measures to be taken by the Central Bank in the upcoming years.

3 Celebrating Five Years of Advancing Global Financial Inclusion: 2016 Maya Declaration Progress Report.

4 I Fórum de Cidadania Financeira: 4 and 5 November 2015.

5 II Fórum de Cidadania Financeira: 21 and 22 November 2016.

6 Presentation of the President of the Central Bank Ilan Goldfajn – Agenda BC+: 20 December 2016.

II LEGAL AND REGULATORY FRAMEWORK

Consumer financing activities are highly regulated in Brazil, being subject to both banking and consumer laws and regulations.

i Banking legal and regulatory framework

General aspects

Brazil has a sophisticated and solid banking system, though subject to a relatively pro-consumer regulatory framework.

The Brazilian financial system in its current format was established in 1964 by Federal Law 4595/64 (the Banking Law), which sets forth the ground rules for its infrastructure and regulatory framework. The Banking Law assigned to the Monetary Council (CMN),[7] the Brazilian Central Bank (the Central Bank),[8] and the Securities Exchange Commission (CVM)[9] the authority to regulate and oversee local financial institutions as well as to define regulatory policy. The Banking Law sets the basis for the Central Bank's role as the primary regulatory authority governing the financial system, which was later confirmed and expanded by the Brazilian Constitution of 1988.[10]

Despite the several legislative enactments that followed the Federal Constitution, the Banking Law remains the most significant law in the regulatory structure of the Brazilian financial system. Among the significant laws integrating the regulatory framework of the Brazilian financial system are:

a the Capital Markets Law (Law 4728/65);
b the Securities Law (Law 6385/76);
c the White Collar Crime Law (Law 7492/86);
d the Anti-Money Laundering Law (Law 9613/98);
e the Liquidation Law (Law 6024/74);
f the RAET Law (Decree-Law 2321/87); and
g the Joint-Liability Law (Law 9447/97).

In addition to the aforementioned legal framework, the Brazilian banking system is also bound to implementing resolutions issued by the CMN in its role as regulatory authority, and supplementary regulations issued by the Central Bank in its role as regulatory and supervising

7 The CMN is the highest authority responsible for establishing monetary and financial policies in Brazil, in charge of overall supervision of Brazilian monetary, credit, budgetary, fiscal and public debt policies. It is also responsible, among other things, for regulating the criteria for organisation, operation and inspection of financial institutions.

8 The Central Bank is responsible for implementing the policies established by the CMN and issuing regulations in accordance with such policies. It is responsible, among others, for authorising the operations and supervising financial institutions' activities in Brazil.

9 The CVM is responsible for regulating, overseeing and inspecting the Brazilian securities market and its participants. It is also responsible, among other things, for overseeing the exchange and organised over-the-counter markets. The CVM regulatory authority also extends to banks engaged in investment banking and securities activities as well as to other participants in the securities market.

10 Article 192 of the Federal Constitution of 1988, as amended.

authority. While the CMN resolutions set the policies and guidelines for the financial system, the Central Bank regulations serve to establish the technical details for implementation of the CMN resolutions.[11]

Performance of consumer financing activities

The Banking Law and ancillary legal and regulatory framework do not provide for a legal definition of the word 'bank'. The individuals or legal entities (either private or public) that have as their primary or ancillary activity the raising, intermediation or investment, or custody of their own or third-party funds are regarded as 'financial institutions'. The performance of such activities is exclusive to financial institutions and subject to prior and express authorisation by the Central Bank on a case-by-case basis.

As a result, banks are defined in terms of their permissible functions. The Brazilian banking legal and regulatory framework recognised four categories of banks:

a commercial banks;
b multiservice banks;
c investment banks; and
d development banks.

Consumer financing activities are generally performed by commercial banks, or multiservice banks with a commercial bank licence. The activities of commercial banks (which also apply to multiservice banks with a commercial bank licence) are generally in line with the functions of such banks worldwide and include: granting of rural credits and personal loans (including consumer financing), receipt of deposits, offering checking accounts, providing short-term lending, collection of trade acceptance bills and other credit documents, and accepting and processing utility bill payments.

Consumer credit companies are also extensively engaged in consumer financing. Consumer credit companies, although not regarded as banks, are deemed financial institutions under Brazilian law and, therefore, are subject to the CMN's and the Central Bank's regulatory authority. Such entities have the primary purpose of financing working capital and the acquisition of goods and services and, consequently, are often formed with the specific purpose of engaging in consumer financing practices.

The other entities that may occasionally engage in consumer financing or similar activities are credit unions and leasing companies, both also deemed as financial institutions albeit not classified as banks. Credit unions are financial institutions organised as not-for-profit autonomous associations of persons (individuals or legal entities) for the main purpose of extending credit and providing services to their members. Leasing companies primarily engage in the leasing of moveable assets and real estate.

Consumer protection oriented banking regulation

From 2001 to 2009, a CMN resolution establishing procedures for entering into financial transactions and provision of services to the public became known in the Brazilian banking industry as the Banking Consumer Code. This resolution was revoked in 2009 and replaced with CMN Resolution 3694/09, which remains in force.

11 Likewise, the CVM issues rulings and opinions that are binding on banks engaged in investment banking and securities activities and on other securities market players.

The new Resolution ended up not inheriting the nickname of its predecessor but it is the banking rule currently in force that contains the most comprehensive set of guidelines to be followed when providing financial services and entering into financial transactions.

CMN Resolution 3694/09 is structured in the form of mandatory provisions aimed to prevent risks to financial institutions, but ultimately accords greater protection to customers, for example, by establishing that the financial institution shall ensure the adequacy of products and services for customers' needs, interests and objectives, as well as the integrity, reliability, security and confidentiality of transactions, services and products.

Additionally, in late 2016 CMN enacted Resolution 4539/16, which provides guidelines and principles for the creation of internal policy and procedures by financial institutions in respect of their relationship with clients and the users of their products and services.

ii Consumer legal and regulatory framework

As a general rule, consumer relations in Brazil are ruled by Law No. 8078/90, known as the Consumer Protection Code. The rules of the Consumer Protection Code apply only to instances where there is a supplier, on the one hand, supplying a product or providing a service under a contract, and an 'end user', on the other hand. Unlike other jurisdictions, in Brazil the law does not provide a clear definition of the term 'consumer'.

Currently, there are two different schools of thought regarding the concept of end user, as adopted by the Consumer Protection Code. The first, known as the maximalist school, advocates that the concept of end user refers to a practical perspective, meaning that if an entity or person acquires a product or service and is not going to resell it to a third party, such entity or person should be considered an end user of such product or service for legal purposes.

That is to say that, even if a person or entity acquires the product or service as input for further use in the manufacturing process, it should be regarded as the end user of the supplies. Thus, the Consumer Protection Code and its relevant provisions would govern the relationship between such end user and the supplier of the goods or service.

The second school, the finalist school, holds that the concept of end user has an economic nature. To that extent, if the person or entity acquires inputs for further use in the manufacturing process, it should not be treated as end user of the respective supplies.

According to this second school, this relationship should be considered of a commercial nature, thus ruled by the Civil Code.

This is the position adopted by most Brazilian scholars.[12]

After a number of conflicting decisions on the matter, the Superior Court of Justice reached the conclusion that, as a rule, the individual that acquires goods or services to be used in its manufacturing chain in a for-profit activity, is not a consumer in the legal sense of the word.

Notwithstanding this, the Court accepts exceptions to this rule, for instance, in cases where the end user is vulnerable compared with the supplier (i.e., a taxi driver who acquires a car to use as his or her own taxi), the unbalanced relationship should trigger the protective rule set forth in the Consumer Protection Code.

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12 Cláudia Lima Marques, 'Contratos no Código de Defesa do Consumidor', São Paulo: *Revista dos Tribunais*, 1992, p. 66.

Specifically concerning financial products, after extensive debates the Brazilian courts held that such products and services are subject to the Consumer Protection Code, as long as the counterparty to the agreement is regarded as an end user, as described above.

On 15 March 2013, the federal government enacted Decree No. 7962, providing general guidance for e-commerce in Brazil. Similarly to the Consumer Protection Code, Decree No. 7962/13 sets out very broad and high-level rules applicable to any kind of product or service sold over the internet.

According to Decree No. 7962/13, if a consumer-financing product is offered through electronic means, the financial institution will also be required to make available an electronic channel to handle any requests or complaints relating to such product. In addition, the financial institution will be required to grant a statutory trial period of seven days, during which the consumer will be able to forfeit the agreement without any cost or charge.

Ombudsman, complaints and dispute resolution

Consumers have a set of channels in case of complaints against financial services and products, both in the regulatory and consumer spheres. The primary and more direct channels are the financial institution's Customer Service Attendance channel (SAC) and the ombudsman department.

Financial institutions engaging in consumer financing activities are required by Decree-Law 6523/08 (the SAC Law) to maintain a call centre service (the SAC) to receive and handle requests from consumers in respect of information, questions, complaints, suspension, or cancellation of the products or services. The SAC Law sets out general rules to be observed by SACs, including minimum service levels offered by the channel, availability of services, disclosure of SAC contact information, handling of requests and quality of services.

In addition to the SAC, financial institutions engaging in consumer financing activities are required under Brazilian banking regulations to maintain an ombudsman department. The current regulation was updated in 2015 (CMN Resolution 4433/15) aiming to establish a more effective and transparent ombudsman service that is capable of providing better assistance to the institution's customers.

Additionally, the aforementioned new regulation harmonises the scope of the ombudsman's activity with the SAC activities under the SAC Law. In this context the ombudsman department has the following responsibilities:

a to provide assistance as final recourse to answer customers' demands, after such demands have been analysed by other customer service channels (including banking correspondents and the SAC);

b to serve as interface between the institution and its customers, including for dispute mediation; and

c to report on its activities to the institution's management.

Despite the treatment of any consumer complaint by the financial institution's aforementioned internal channels, the consumer may also register a complaint with the Central Bank's specific channel. This channel is not the Central Bank's ombudsman (which only deals with complaints against the regulator itself) but rather a channel made available only for submission of customer complaints. Any complaint filed through such channel will not result in an effective action of the Central Bank in respect of the individual's case but only improve the Central Bank's ability to properly supervise the entity concerned.

Any breach of consumer's rights should also be subject to a complaint brought before consumer protection agencies known as PROCONs. PROCONs have the authority to oversee consumer relations and to set conciliatory hearings to try to foster a settlement for disputes between consumers and suppliers.

If PROCON understands that a supplier is adopting a commercial practice that is against the Law, it may file an administrative proceeding to investigate the practice. After the supplier presents its defence, an administrative penalty may be imposed if PROCON decides that a breach was committed. The most common penalty is a fine. The value of the fine varies depending on the seriousness of the infraction, the economic status of the supplier and the advantage obtained by the latter, and shall not exceed circa 9 million reais.

Consumers may also file individual lawsuits against suppliers. For claims that do not exceed 40 minimum wages,[13] consumers may bring the lawsuit before small claims courts. Small claims court offer a simplified and expedited proceeding.

If the claim exceeds 40 minimum wages, then consumers should bring the lawsuit before a state court, which follows a more time-consuming proceeding.

III PAYMENTS

i Overview

The legal currency in Brazil is the real and, as a rule, all obligations enforceable in Brazil must be denominated in local currency. The real as hard currency is accepted in all establishments and for the fulfillment of all cash obligations enforceable in Brazil.[14]

Payments in Brazil, although denominated in local currency, may be executed by a few methods:

a Wire transfers: all wire transfers between bank accounts are operated by the financial institutions of the transferor and the transferee. Brazil has a sound and secure payments system – the Brazilian Payments System (SPB) – which includes all entities, systems and procedures for processing and settlement of transactions involving transfer of funds, foreign currency, financial assets, or securities. Wire transfers may be processed in real time or within 2 days, depending on the volume of funds being transferred and the transfer system selected by the transferor.

b Debit, credit and stored value cards: payment instruments are increasingly the most accepted and used payment instrument in Brazil. Refer to Section III.ii, *infra* for further information on the payment instruments' industry.

c Cheques: cheques are instruments of credit similar to promissory notes and governed by a specific legal regime. Given the level of fraud that occurred with cheques in the 1990s their acceptance is now very restricted.

d Direct debits: a very popular payment method in Brazil. By granting specific and express authorisation to the financial institution, the consumer may allow the automatic debit of the amounts due to a certain third-party from its account.

13 Currently, the minimum wage amounts to 937 reais.

14 Decree-Law 857/69.

e Boletos: a second very popular payment method in Brazil. Such instruments – issued by banks or other institutions accredited to provide such services – allow the payment to thirdy parties by individuals that do not have access to essential financial services or, in other words, do not have bank or payments accounts.

ii Recent developments

The payments industry has an important role in the Brazilian economy as the acceptance of payment instruments in the wholesale market increased significantly over the last decade. In view of the growing volume of transactions using payment instruments and given their importance as tools for financial inclusion, in 2013 the federal government enacted Law 12685 (the E-payments Law).

The E-payments Law provides the legal framework for 'payment arrangements' (i.e., the set of rules governing a payment scheme, such as credit or debit card transactions), and 'payment agents' (i.e., any agent that issues a payment instrument or acquirers a merchant for payment acceptance), which became part of the SPB and subject to oversight by the Central Bank. In spite of being regulated by the Central Bank, payment agents are not deemed to be financial institutions and are prohibited from engaging in activities that are exclusive to financial institutions. The E-payments Law brought within the scope of the CMN and the Central Bank supervision the entire market of credit, debt and pre-paid cards that were not previously regulated by them (unless issued by a financial institution) until then.

Following the sway of the E-payments Law, the CMN and the Central Bank enacted a set of rules on payment arrangements and payment agents, which became effective in May 2014.

This set of rules encompasses, among others:

a consumer protection and anti-money laundering compliance and loss prevention rules that should be followed by all entities supervised by the Central Bank when acting as payment agents and payment arrangers;

b the procedures for incorporation, organisation, authorisation and operation of payment agents, as well as for the transfer of control, subject to the Central Bank's prior approval;

c definition of arrangements excluded from the SPB;

d payment accounts, which are broken down into prepaid and post-paid accounts; and

e a liquidity requirement for prepaid accounts by which their balance must be allocated to a special account at the Central Bank or else invested in government bonds, starting at a lower rate and rising gradually to the total account balance (according to a specific timeline).

Following discussions with market players and industry representatives, the Central Bank has been adjusting and improving the regulations over time mainly to include operational and non-discriminatory tools to foster competition in the payments market. The most recent update to the regulation is dated January 2017.[15]

15 Carta–Circular 3802/17.

IV DEPOSIT ACCOUNTS AND OVERDRAFT

i Overview

The maintenance of deposit accounts is the exclusive activity of financial institutions. The CMN resolution on opening and closing deposit accounts dates back to 1993[16] and, although updated in 2000 and 2002, it was structured considering only personal transactions. As a result, certain provisions of this rule became a source of debate especially in light of the evolution of branchless banking and remote access to financial services and products.

As a result, banking correspondents (or 'banking agents' as they are more commonly known outside Brazil) were created in 1999 to promote the access of the Brazilian population to banking services. To the extent the costs of setting up branch offices and placing automatic teller machines in scarcely populated or poor areas was prohibitive, the CMN and the Central Bank created the banking correspondent concept, which allowed financial institutions to engage non-financial entities to render financial services on their behalf using the infrastructure already in place.

This model has been widely adopted by the industry since its inception and banking correspondents can now carry out a wide range of services, including receipt and forwarding of credit product and account opening proposals on behalf of the financial institution.[17]

The banking correspondent, however, is a mere representative of the financial institution before its customers and, therefore, is subject to a comprehensive set of rules intended to allow the consumer to properly identify the terms of the service or product offered as well as the financial institution that he or she is effectively contracting with.

The Brazilian legal and regulatory framework also establishes that in the event of intervention, extrajudicial liquidation or liquidation of a financial institution in a bankruptcy proceeding, the Fundo Garantidor de Crédito (FGC), a deposit insurance system, guarantees a maximum amount of 250,000 reais for certain deposits (such as the amounts kept in a deposit account) and credit instruments held by an individual, a company or other legal entity with a financial institution.

Overdrafts are not subject to specific regulation. They rely on credit facilities taken out by consumers with the financial institution at the time a bank account is opened (or at any time afterwards). Overdraft protection is subject to applicable fees and to interest[18] accruing on overdrawn amounts.

The long-term establishment of this practice resulted in a movement towards the adoption of public policies and actions led by the Central Bank to reduce the cost of credit to the public, especially in terms of consumer financing. These actions are dealt with in the cheaper credit pillar of the Agenda BC+ referred to in Section I, *supra* that mostly comprises actions aiming to reduce the cost of credit and banking spread.

16 CMN Resolution 2025/93.

17 CMN Resolution 3954/11.

18 As a general rule, collection of compensatory interest is subject to the limitations set forth by Decree-Law 22,626 of 1933 (the Usury Law). However, court precedents have unanimously established that the Usury Law limitations are not applicable to financial institutions.

ii Recent developments

The growing use of electronic channels in the Brazilian banking industry, coupled with an increasing presence of fintech in the development of new financial products and services in 2015 and 2016 resulted in the enactment of a number of new rules.

Among such new rules, the CMN issued Resolution 4480/16 that expressly authorises the opening and closing of bank deposit accounts by Brazilian residents using exclusive electronic means and sets forth the terms and conditions applicable thereto.

CMN Resolution 4480/16 addresses the main challenges faced and discussed by the banking and fintech industries in offering financial products by electronic means such as use of electronic signatures and standards for verification of a customer's identity in know-your-customer processes. The issuance of the aforementioned occurred in a moment when several discussions on the matter were being held by the market and the Central Bank announced its more open and market-oriented approach regarding the integration of technology innovations into the financial system.

At the same time CMN also enacted Resolution 4479/16 that reflects the impacts of electronic transactions in the Brazilian banking system by creating specific treatment under CMN Resolution 3694/09 referred to in Section II, *supra* to consumer relations carried out exclusively by electronic means.

Concurrently with the abovementioned measures and following the E-payments Law regulatory framework, stored value cards (which are the payment instruments used to operate the prepaid payment accounts referred to in Section III.ii, *supra*)[19] became one of the most dynamic and fast-growing products for consumers of financial services in Brazil.

Stored value cards allow consumers to store funds in a secure structure and to meet their financial transactions needs (such as paying bills, withdrawing monies through ATMs, transferring of funds to other accounts) without having to turn to the traditional banking system. They have become especially popular among unbanked individuals (that is, those without deposit accounts) or those with bad credit history that may face difficulties in opening a conventional deposit account.

V FINANCING TRANSACTIONS: REVOLVING CREDIT AND INSTALMENT CREDIT

i Overview

Financing transactions in Brazil are subject to the lending regime set out in the Brazilian Civil Code (Law 10406/02) supplemented by specific banking and consumer regulation. The main difference between the general lending regime and the banking lending regime is loans granted by financial institutions are financial transactions which are not subject to Usury Law limitations on accrual of compensatory interest.

Such transactions, however, are subject to a range of regulatory and consumer-protection requirements at all stages of the loan cycle, which include disclosure of the agreement terms

19 Stored value cards include gift cards, reloadable general spending cards and meal vouchers, among others.

and applicable charges,[20] APR disclosure obligations,[21] credit rating[22] and credit analysis,[23] formalisation of the credit instrument, limitation on fees,[24] treatment of past-due debts,[25] early payments,[26] and credit collection practices.[27]

Lines of credit, as well as personal and student loans are essentially governed by the same legal and regulatory framework as described above, regardless of whether repayment is set in one or more instalments.

Revolving credits usually convey the same treatment of lines of credit, as both have the same nature. Revolving credit in credit card financings has been under extensive discussions in Brazil during the last months especially on account of the high interest rates involved. In December 2016, the federal government and the Central Bank announced they would take measures to enhance the regulations to promote competition and lead the industry to lower the interest rates charged in credit card financings. The regulation resulting from said measures was issued by the CMN in late January 2017, by which revolving credit in credit card financings became subject to certain regulatory requirements and limitations.

Real-estate financing is, for its part, subject to special regulatory regimes given the specific characteristics and guarantees involved.

ii Recent developments

Financing transactions directed to consumers are the principal market of fintech companies targeting the Brazilian banking market. Since 2012 online lending and peer-to-peer solutions have proliferated in Brazil, particularly between 2015 and 2016.

The integration of cutting-edge technologies such as big data and blockchain/DLT along with a more relaxed approach by the regulatory authorities has allowed fintechs to blossom. This approach taken by the Central Bank towards fintech is part of the more efficient financial system pillar of the Agenda BC+. The regulator has demonstrated much interest in the benefits and efficiencies that fintech may bring to the banking industry and to its financial inclusion strategies.

The regulatory framework tends to evolve accordingly. In this sense, the structures in Brazil are based on a partnership between a regular financial institution and the fintech, given the regulatory constraints on financing activities. As a result, Brazilian fintech companies are striving to create technological solutions that would plug the gaps arising from traditional inefficiencies in the banking system. The results of this synergy from a regulatory and an industry perspective are yet to be seen.

20 CMN Resolution 3694/09.

21 CMN Resolution 3517/07; CMN Resolution 3909/10; CMN Resolution 4197/13; and Carta-Circular BACEN 3593/13.

22 Law 12414/11; Decree 7829/12; CMN Resolution 4172/12.

23 Federal Constitution, Consumer Protection Code.

24 CMN Resolution 3919/10.

25 CMN Resolution 2682/99.

26 Consumer Protection Code.

27 Consumer Protection Code.

VI UNFAIR PRACTICES

The Brazilian market is heavily regulated, and consists of several different players, with different levels of compliance.

Amid main unfair practices, one could refer to origination of the loans, when certain players failed to properly disclose to borrowers the actual terms and conditions of an offered loan, its applicable fees, repayment terms and so on.

In the past, it was also common for lenders to ask borrowers to execute loan agreements in blank, providing no information on the actual interest rate, number of instalments and applicable fees.

Currently, over-indebtedness is a matter of great concern. As Brazil has not yet enacted specific laws protecting consumers against over-indebtedness, there have been several cases brought before the courts in which borrowers claim that lenders overlooked a general duty of good faith by extending credit facilities clearly beyond a borrower's ability to pay.

But the main matter of concern still relates to interest rates. As Brazilian law does not set limits to interest rates that financing companies may charge, and the Brazilian interest rates are among the highest in the world, there are thousands of lawsuits challenging the interest rate established in loan agreements.

As a rule, however, the courts only review interest rates when it is evidenced the rate charged is above the average adopted for the same period and type of loan for unjustified reasons (say, a higher default risk).

VII RECENT CASES

i Disputes before the regulator

The Central Bank currently does not process disputes between consumers and financial institutions. As referred to in Section II, *supra*, the Central Bank only receives and processes complaints against financial institutions for the purposes of improving its supervisory activities.

The Central Bank announced in December 2016 its intention to take steps[28] to adopt mediation as an alternative method for resolution of conflicts between consumers and financial institutions. This action is part of the more financial citizenship pillar of the Agenda BC+ we referred to in Section I, *supra*.

ii Litigation

Recently, two of the leading credit bureaus in Brazil faced mass litigation due to a new credit scoring system they implemented. Consumers claimed that such credit scoring could be equated with a consumer database and, as such, depended on consumer's prior authorisation. Based on this reasoning, consumers flooded the courts with individual lawsuits for redress of moral damages (i.e., pain and suffering), on grounds that credit bureaus had not sought consumers' prior approval before running their new credit scoring system.

In November 2014 Superior Court of Justice held that the credit scoring system should not be equated with a consumer database, thus not requiring a consumer's prior

28 For this purpose the Central Bank indicated its intention to implement technical cooperation with the National Council of Justice – part of the Ministry of Justice.

authorisation.[29] Nevertheless, consumers have the right to know the information used to build the credit score and the servicer providing the score is liable for any inaccurate or outdated information.

Another relevant case refers to a lawsuit filed by a leading bank against a fintech. Based on access to a consumer's bank accounts and investments, this fintech offers analyses and suggestions about allocation of funds and investment strategy to consumers. To provide such service, the fintech requires the consumer's prior authorisation to access his or her banking information, including a log-in and password for online access to the bank account.

The plaintiff bank claims that the consumer's authorisation for online access to his or her bank accounts is void as it violates banking secrecy rules. The lower court denied an injunction sought by the bank to immediately suspend the fintech's access to consumers' banking information, however. The case is pending a final decision.

VIII OUTLOOK

The level of usage of banking essential services in Brazil reached 89.6 per cent in 2015 compared with 77.8 per cent in 2010, an increase of 11.8 base points in five years.[30] Although usage of banking services has increased steadily in recent years, the current recession and political uncertainty Brazil has been through may result in a slowdown in the increase of financial inclusion in the country.

On the other hand, the global fintech movement struck Brazil in late 2014 and has since become central to discussions involving financial inclusion. The fintech movement has brought new colours to the discussions on access to financial services, customer relations and consumer protection in a digital environment.

Within this context, the government and regulatory agencies are likely to continue pushing for the development and implementation of policies, programmes and institutional actions to promote financial inclusion and financial citizenship and, by extension, consumer protection standards will continue to play an increasingly important role in the recent development of Brazilian financial products and services.

In addition, the user experience has taken a central role in the discussions on consumer financing products and services. The successful offer of financial products and services can no longer rely only on the product economics but also on customers' evaluation, opinions shared on social media as well as the institution's role in consumer-related rankings and complaint centres.

The client was recognised as the effective user and final beneficiary of a range of financial products and services in an environment where the opinions and experience of each customer may be largely shared and, consequently, matters greatly in terms of branding and market share consolidation.

29 Special Appeals Nos. 1.457.199 and 1.419.697.

30 Pesquisa FEBRABAN de Tecnologia Bancária 2015, p. 42.

Chapter 4

CANADA

Alison Manzer, Suhuyini Abudulai, Belinda Chiu and Bryan Woodman[1]

I OVERVIEW

It is important to consider the laws of the applicable jurisdiction within Canada when engaging in a consumer transaction or entering into an agreement with a consumer. Consumer protection laws in Canada are not entirely harmonised: the federal, provincial and territorial governments share responsibility. The Consumer Measures Committee (CMC), formed pursuant to the Agreement on Internal Trade (1994), is a multi-jurisdictional organisation coordinating consumer protection in Canada. The CMC has completed several harmonisation agreements, covering cost of credit disclosure, internet sales and prohibited collection practices. At the federal level, various laws address matters such as anticompetitive practices, packaging and labelling, federally regulated financial institutions, interest and privacy. The provinces and territories have consumer protection laws in place that address general matters, as well as laws specific to certain industries (e.g., debt collection and payday loans). Disclosure requirements in consumer agreements vary by type of agreement and from Canadian provincial jurisdiction to jurisdiction. Individuals and entities offering certain goods or services to consumers, including credit reporting agencies and agents, payday lenders, direct sellers, motor vehicle dealers, travel agencies and agents, loan brokers, and mortgage brokers, require provincial or territorial licences to carry out their activities. Equal credit opportunity legislation does not exist in Canada, *per se*, but fair access to financial services will fall under the purview of human rights legislation in Canada, which makes it illegal to discriminate against persons on several protected grounds.

The Financial Consumer Agency of Canada (FCAC) promotes the adoption of policies designed to implement laws, voluntary codes of conduct and public commitments by federally regulated financial institutions; it is also responsible for educating and protecting consumers of financial products and services. The Office of Consumer Affairs, part of the

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federal government department responsible for industry matters: Innovation, Science and Economic Development Canada, uses policy instruments to support consumer protection regulation in Canada, working with the public and private sector. Each of the provinces and territories has a consumer affairs office.

In recent years, government policy emphasis on consumer protection has increased with the introduction of new laws, principles and codes. The federal government has enhanced consumer protection through: (1) credit card reforms, requiring summary information boxes, mandatory 21-day interest free grace periods and consent for credit limit increases; (2) the introduction of a Code of Conduct for the Credit and Debit Card Industry in Canada, which contains 10 elements that apply to credit and debit card networks and their participants (e.g., card issuers and acquirers), (3) changes to mortgage pre-payment fee disclosure and pre-paid card rules; (4) an expanded mandate for the FCAC; (5) the passing of the Financial Literacy Leader Act and the designating of November as Financial Literacy Month; and (6) formalisation of complaint processes.

Recent developments also include proposed amendments, introduced on 25 October 2016, to the Bank Act, adding a new consumer protection chapter that consolidates and streamlines provisions and adds new measures and principles. While the proposed amendments were withdrawn for further consideration, it is expected revisions of this type will be reintroduced. Further, the Competition Bureau launched a fintech market study on 19 May 2016 into the competitive landscape for new, technology-led innovation and emerging services in Canada's financial services sector. At the provincial and territorial level, amendments have been proposed to certain consumer laws addressing payday loans, door-to-door sales, alternative financial services and unfair practices. Concerns about the trends in consumers' use of payday loans brought amendments to consumer protection laws and a 2016 study launched by the FCAC of payday loan users across Canada. The results led to the FCAC updating its website content on payday loans and plans to develop new consumer education materials to foster greater consumer awareness of their high cost. The FCAC is also working with stakeholders across Canada to promote awareness. Addressing electronic commerce, Canada's Anti-Spam Law (CASL) came into effect on 1 July 2014 (sections relating to unsolicited installation of computer programs or software came into force on 15 January 2015). General prohibitions under CASL include bans on sending commercial electronic messages without the recipient's consent or permission, on using false or misleading representations online when promoting products or services and on collecting personal information in violation of federal law.

Emerging technologies continue to change the consumer landscape. Consumer transactions have changed with the digitisation of money (e.g., increased use of mobile technology for payments). Aspects of the existing legal framework can be applied to the emerging trends. In some instances, however, further amendments to laws or new laws will be required to address the rapidly changing payments environment in Canada.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Federal and provincial legislation govern payments, deposits and lending. Legislation regulates entities by type or is specific to the nature of the product or service offered to consumers. The Bank Act is the primary federal legislation respecting banks, federal credit unions and banking. On 25 October 2016, amendments were proposed to the Bank Act, creating a new consumer financial protection framework, which consolidates existing consumer protection provisions, streamlining provisions that apply to banks in relation to consumer protection and introducing some new measures. The amendments have been withdrawn for further study. It is not yet known when the amendments will come into force or what final form they will take, but it is anticipated the legislation will go forward. Products and services offered by trust and loan companies to consumers are regulated under the federal Trust and Loan Companies Act. Provincial and territorial legislation addresses disclosure of the cost of credit in consumer agreements (e.g., lease agreements, credit agreements and credit card agreements), prescribing the disclosure requirements applicable in advertising and in consumer agreements, as well as setting out the rights and obligations of borrowers and lenders and lessors. Legislation regulating lending practices in each Canadian province or territory include:

a British Columbia – Business Practices and Consumer Protection Act, Disclosure of the Cost of Consumer Credit Regulation, and the Payday Loans Act;
b Alberta – Fair Trading Act, Cost of Credit Disclosure Regulation and Payday Loans Regulation;
c Saskatchewan – Consumer Protection and Business Practices Act, Cost of Credit Disclosure Act, Cost of Credit Disclosure Regulations, Payday Loans Act, and Payday Loans Regulation;
d Manitoba – Consumer Protection Act, Consumer Protection Regulation, High Cost Credit Products Regulation, and Payday Loans Act;
e Ontario – Consumer Protection Act, Ontario Regulation 17/05 and Payday Loans Act;
f Quebec – Consumer Protection Act and Regulation Respecting the Application of the Consumer Protection Act;
g New Brunswick – Cost of Credit Disclosure Act;
h Nova Scotia – Consumer Protection Act, Consumer Protection Act Regulations and Payday Lenders Regulations;
i Prince Edward Island – Consumer Protection Act, Conduct of Creditors Regulations and Cost of Borrowing Disclosure Regulations;
j Newfoundland and Labrador – Consumer Protection and Business Practices Act, and Cost of Consumer Credit Disclosure Regulations;
k Yukon – Consumers Protection Act and Consumers Protection Regulation;
l Northwest Territories – Consumer Protection Act, Consumer Protection Regulation, Cost of Credit Disclosure Act and Cost of Credit Disclosure Regulations; and
m Nunavut – Consumer Protection Act and Consumer Protection Regulation.

Payments Canada (formerly the Canadian Payments Association) is responsible for the payments system in Canada and provides rules and standards in relation to clearing and settlement, including payment services. Pre-authorised debit agreements must comply with Payments Canada rules, including Rule H1, which prescribes required content and notification requirements.

Prepaid products (e.g., gift cards and prepaid cards) are regulated federally and provincially. The federal Prepaid Payment Products Regulation applies to prepaid payment products issued by federally regulated financial institutions. It does not apply to those issued by provincially regulated institutions or retailers. Provincial consumer protection laws regulate prepaid cards and gift cards.

ii Regulation

The FCAC Compliance and Enforcement Branch administers the consumer provisions in federal financial institution legislation (including the Bank Act) and monitors compliance by federally regulated financial institutions, payment card network operators and external complaints bodies with voluntary codes of conduct and public commitments. The FCAC utilises various methods to gather information on current issues in the financial sector, identifying compliance concerns that may lead to investigation and the application of compliance or enforcement methods. Federally regulated entities have reporting deadlines to report received complaints to the FCAC. Consumer complaints directly received by the FCAC are reviewed, and information concerning third-party dispute resolution, if applicable, is provided to consumers. In some instances, complainants are directed to go through the respective entity's complaint procedure, and, where necessary, the FCAC may direct the consumer to a provincial regulator or another government agency or department.

The Office of the Superintendent of Financial Institutions (OSFI) supervises and regulates banks and federally incorporated and registered entities, including insurers, trust and loan companies, and private pension plans that are subject to federal oversight. OSFI assists in developing and interpreting laws, issuing guidelines, and granting approval to federally regulated entities as required under financial institution laws.

The Competition Bureau has responsibility for administering and enforcing, among other laws, the Competition Act. Various methods are employed to resolve issues, including referring criminal matters to the Director of Public Prosecutions of Canada and non-criminal matters to the Competition Tribunal or courts. Alternative resolution methods may also be used, voluntary compliance encouraged or public alerts issued to provide education to consumers and business respecting anticompetitive practices.

Provincial and territorial offices are responsible for enforcement of the consumer laws in their jurisdictions. Enforcement actions include court proceedings, administrative monetary penalties, compliance orders, voluntary commitments and public notices.

III PAYMENTS

i Overview

The Canadian payments system comprises various payment methods to purchase goods and services, under various laws (federal and provincial), procedures and rules, and it is recognised globally as a well-functioning system. Payments Canada operates the clearing and settlement system. Financial institutions have arrangements to exchange and transfer funds on behalf of their customers and on their own behalf. The payments system facilitates transactions involving the exchange of funds in return for goods and services. Technology has evolved the methods used to make payment over the last decade. Payment methods used by Canadians include cash, cheque, prepaid cards, gift cards and electronic payment systems (e.g., e-transfers, PayPal and mobile payments).

ii Recent developments

The Canadian payments landscape continues to evolve, with the introduction of new payment products and services in the marketplace changing basic consumer transactions, including contactless cards, peer-to-peer payments and mobile wallets.

Various studies and consultations have been undertaken to address the modernisation of Canada's payment systems. It is anticipated that, as payment technologies evolve, the payments legal framework will undergo significant change.

A market study was launched by the Competition Bureau on 19 May 2016, to examine the competitive landscape for technology-led innovation and emerging services in the Canadian financial services sector. The Competition Bureau is not examining all consumer financial services related to technological innovations (crypto-currencies, for instance, are excluded from the study). The results of the study may inform changes in law.

In 2016 April, Canada adopted ISO 20022, a global standard for electronic payment messages to facilitate the transition from paper to electronic payments. ISO 20022 uses a global 'language' for payments data, to streamline multi-jurisdictional payments.

The Code of Conduct for Credit and Debit Cards was amended in 2015 to extend to mobile payments. This code applies to credit and debit card networks, and their participants, and provides the disclosure requirements to, and rights of, merchants that accept credit and debit card payments. The update to the code added three elements: (1) no obligation on merchants to accept contactless payments; (2) new disclosure requirements for merchant–acquirer agreements; and (3) mandatory dispute resolution processes for merchant complaints. It also contains new protections for merchants that choose not to accept mobile payments: (1) if the payment processor introduces a new fee, the merchant can cancel the agreement or stop accepting mobile payments; (2) the merchant can cancel contactless payments on 30 days' notice without penalty; and (3) merchants have more flexibility to exit contracts with credit card processors without penalty. In addition, consumers must be allowed to control the settings on their device and mobile wallets to choose either a debit or credit application when making payment.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

The provision of deposit accounts by financial institutions in Canada is fully regulated. Financial services sector participants wishing to take deposits will be regulated as a bank, or as a loan or trust company, credit union or credit cooperative. All have similar regulation that looks to prudential regulation, including a requirement to hold an operating licence and to meet capital requirements, among others. Deposits will benefit from deposit insurance provided by the Canada Deposit Insurance Corporation, a federal crown agency. This insures individual deposits to the extent of C$100,000 for an account; insured accounts include registered savings plans as well as operating or savings accounts.

Financial institutions that provide deposit accounts are subject to consumer protection legislation relating to disclosure as to interest. The financial institution must also satisfy anti-money laundering and anti-terrorist financing identification, verification and monitoring requirements. Consumers wishing to open a deposit account need to provide the requisite information to permit compliance with those requirements.

Overdraft facilities are generally available in Canada on a negotiated basis. There is no automatic requirement that financial institutions provide consumers with access to overdraft facilities. Whether an overdraft facility will be available in connection with an account will depend on the specific agreement reached between the consumer and the financial institution. Overdraft facilities are the same as any other credit facility, but they are not provided frequently for consumer relationships. If the overdraft facility is available, any extension of credit on the overdraft facility will be subject to the agreement reached as to the requirement for repayment, the provision of security, and all will be subject to the bank set-off rights against accounts held for repayment. Disclosure of the cost of borrowing must be given by the lender providing the facility.

ii Recent developments

There has been little recent development in the law, or practice, governing the deposit accounts or overdrafts. There have been some increases in the requirements for disclosure as to interest, and increasing protection for privacy as to personal information of financial institution customers. Anti-money laundering legislation also requires significant enquiry at the time of the opening of an account and in the event of account activity that indicates either suspicious or connected transaction issues. Financial institutions are not required to provide consumers with access to deposit accounts and overdraft facilities.

V REVOLVING CREDIT

i Overview

Revolving credit facilities may be made available to consumers, although this is a relatively unusual consumer credit relationship in Canada. Revolving credit facility loans will be repayable on demand. The facility will generally be documented by a simple letter of commitment or term sheet, and may be supported by a request for security. Consumer revolving loans are frequently provided on an unsecured basis.

The demand nature of the revolving facility may be supplemented by a requirement that the facility be periodically repaid, subject to re-advancement, during the course of the term. The most common term for a revolving facility is annual, with annual reviews determining whether the facility will be re-extended.

Revolving loans are a common product of the regulated financial institutions, and may be available from a broad range of additional sources. Most of the specific technical aspects of revolving loans are not regulated, but some areas, such as payday loans or pawn based loans, have specific regulation, which is addressed in Sections VIII–IX, *infra*.

Consumer credit regulation focuses on disclosure, privacy and anti-money laundering. Disclosure is focused on plain language documentation and providing disclosure of the cost of credit. The most common forms of revolving credit arrangements are credit cards and lines of credit.

The extensions of credit are generally lightly regulated, if regulated at all, relying on the contractual agreement between the consumer and the lender. Servicing of these loans is subject only to limitations on how collection activities can be undertaken. If security is required, the security will generally be margin-based and will often consist of a requirement to deliver marketable securities or other liquid assets.

Credit that is based on assets, such as automobiles or household goods, will generally not be provided as revolving credit but rather as a term loan. An emerging credit product for consumers are home equity arrangements, where a mortgage-type arrangement is entered into providing the ability to require advances and repayments based on the security provided from real estate. These loans are regulated, more particularly as to the entities that can provide such facilities, and otherwise are subject to similar requirements with regard to disclosure.

Consumers are given some protection under law relating to personal property security allowing for increased rights to rectify a default or to redeem security in the event of default and realisation.

ii Recent developments

Legislation is emerging that would limit the ability of collection agents, on behalf of lenders, to undertake activities that would amount to harassment, or to make calls, either in person or by telephone, outside specified hours. Lenders directly undertaking collection activities are generally less restricted.

Disclosure requirements are increasing as to what must be provided to consumers. Banks have a specific required disclosure that must be provided in the specified, box format. Other regulated financial institutions similarly have requirements for disclosure, and consumer disclosure requirements are prevalent across essentially all providers of credit. A failure to provide appropriate disclosure can jeopardise the ability to recover interest, although it will not generally affect the ability to recover principal.

Much of the revolving credit, particularly credit card, automobile loans and some consumer lines of credit, is still being securitised in Canada. This will impose the requirements that pool standards be met in connection with the advance, credit underwriting and documentation of consumer credit.

VI INSTALMENT CREDIT

i Overview

Mortgage lending is prevalent in Canada. Mortgage lending is provided by a number of sources, both mortgage specialised lenders and regulated financial institutions. Regulated financial institutions are constrained by the debt-to-property-value ratio (80 per cent), the deposit required, and the creditworthiness of the consumer as a consequence of capital requirements and specific loan-to-value restrictions. Mortgage insurance is generally available in Canada, and is commonly obtained from Canada Mortgage and Housing Corporation (CMHC), a Canadian crown agency, and from private providers. Mortgage insurance is most commonly used for first-time homebuyers, those with a small deposit, those with non-prime credit and mortgages to be securitised. Mortgages will require disclosure of the cost of credit. This will be required regardless of the person providing the mortgage loan.

Mortgage lending is generally subject to regulation, requiring the involvement of a mortgage broker in order to lend to consumers in this sector unless the lender is a regulated financial instititution. The security for mortgages will be the real property, and only rarely in a consumer mortgage arrangement will it include other security.

Mortgage remedies are limited by law, and will require periods of notice, rights to rectify and redeem, but in general mortgages may be readily realised upon regardless of the consumer nature of the loan. In Canada, a most common method of realisation is to sell the property and repay the mortgage, and any surplus then goes to the consumer.

Vehicle financing for consumer purposes is readily available. There are a number of sources including unregulated lenders, dealer- or vendor-based lenders and financial institutions. Consumer lending for motor vehicles includes both purchase loans and lease transactions. Motor vehicle equity loans are also now available in Canada. These loans will be subject to consumer protection requirements for disclosure as to the cost of borrowing. The security will generally consist of the motor vehicle; it is rare for other security to be required, but this may be requested.

Student loans are available in Canada, and are generally part of a government, provincial, mix of grant and loan programme. Specialised lenders participate in the student loan market. Protections are provided to the students as consumers, in that the terms of the student loans are heavily regulated. Lenders providing student loans are protected by the inability of students to fully avoid the requirements for repayment, once required by the terms of the loan, by using bankruptcy arrangements.

Servicing of these consumer credit products is regulated as to collection activities, disclosure and privacy.

ii Recent developments

The most significant changes in the instalment credit area of consumer finance in Canada are changes in the mortgage lending sector. Mortgage lending since 2008 has been heavily dependent on the federal government-supported mortgage-backed securities programme overseen by CMHC. Recent changes are reducing the ability to access insurance, which is central to the ability to securitise these mortgages. The restriction on allocation of insurance, and access to the mortgage-backed securities programme that uses the CMHC mortgage, will decrease access to consumer mortgages and potentially increase cost.

There is also increasing regulation on the part of regulated financial institutions, banks and trust companies participating in the mortgage market. Requirements under a guideline known as B-20 are increasing the underwriting requirements for these regulated financial institutions.[2] Banks and trust companies in Canada provide the bulk of residential mortgage lending, and accordingly these increased requirements will decrease access to consumer credit and increase cost.

Motor vehicle lending is relatively unregulated; access to the ability to realise on the motor vehicle in the event of repatriation of the asset, as a consequence of default or at the end of a term can create a form of regulation in this sector. Only persons licensed to participate in the auctions that are the most common means of disposal of automobiles can actively participate on a large scale in the automotive lending or leasing sector. The access to auctions, and the used automobile market, is increasingly being regulated as persons who deal in used automobiles must fulfil regulatory requirements as to capital, education and representation status.

Lenders are required to comply with regulatory requirements as to consumer disclosure, privacy and anti-money laundering, all of which are imposing increasing requirements on lenders participating in this sector.

2 Office of the Superintendent of Financial Institutions (Canada), Guideline B-20, Residential Mortgage Underwriting Practices and Procedures.

VII OTHER AREAS

i Fintech advances and legislation

Fintech, whether using blockchain technology, or otherwise, is still relatively unregulated in Canada. Customers are free to agree that they will use, or accept, an alternate funds transfer system such as blockchain technology. The consumer must, however, be fully informed as to the increased risk of participating in the alternative financial sector, particularly with regard to currency transfers and exchanges. In general, money services businesses operating in the fintech sector will use customer assurances as to their ability to transfer funds on a basis reasonably equivalent to that of the traditional financial services sector. There is no restriction in Canada from these money services businesses providing assurances using their financial capability, and guarantees, or using insurance to provide equivalent assurances to the customer that funds will move to the intended recipients without risk of loss. The consumer should either be fully informed of the additional risk or be protected by assurances of this nature. Canada has not enacted restrictions on dealing in virtual currency, such as bitcoin.

Regulation is being considered in Canada relating to anti-money laundering requirements for handling of virtual currency, which would generally be considered to be adequately addressed at present by money services businesses that have had to register and deal with anti-money laundering legislation for some time. There is accordingly no restriction on customers in Canada transferring funds using virtual currency.

The general view in Canada is that identification and information should be made available at the point of customer interface, which is fund deposit for exchange to virtual currency. This should include a consumer warning as to the potential for increased risk.

Fintech in Canada is relatively undeveloped. Fintech providers may provide back-office, supplemental or private label services for the traditional financial institutions, banks and trust companies. In doing so the fintech provider will be subject to the usual consumer protection requirements, including on privacy, cost of credit disclosure, anti-money laundering and anti-terrorist financing.

Fintech advances within the traditional sectors, such as banks now using mobile phone and similar types of banking delivery, is increasing. This type of fintech product is not the subject of significant legislation, and it is considered that this is merely the delivery of traditional financial services, using alternative means, which will be subject to the usual consumer protection legislation.

ii Harmonisation projects

Consumer protection legislation in Canada is not entirely harmonised, though efforts have been made to standardise certain legislation across the country. The Agreement on Internal Trade, an inter-governmental trade agreement, was signed 18 July 1994 by the Canadian First Ministers and came into force 1995 July. Under Chapter 8 of the Agreement on Internal Trade, the CMC was created. The CMC has a representative from each level of government (i.e., federal, provincial and territorial) and provides a forum for national cooperation in Canada on the consumer front, through harmonisation of laws, regulations and practices.

The CMC has completed harmonisation agreements, adopted by most Canadian jurisdictions, on cost of credit disclosure, direct sellers regulation, internet sales contracts, and prohibited collection practices. The following harmonisation agreements have been completed by the CMC:

a the Agreement for Harmonization of Cost of Credit Disclosure Laws provides a set of rules governing the way credit is advertised and disclosed in consumer agreements;

b the Harmonized List of Prohibited Collection Practices provides a set of practices for collection agencies;

c the Direct Sellers Harmonization provides a uniform 10-day cooling-off period for consumers when they purchase products or services from door to door sales persons and sets out requirements for disclosure in the consumer agreement;

d the Internet Sales Contract Harmonization Template includes measures to protect consumers who make purchases online; and

e the Cooperative Enforcement Agreement on Consumer Related Measures facilitates information exchange among the consumer protection agencies carrying out enforcement activities.

VIII UNFAIR PRACTICES

Across Canada, provinces have enacted consumer protection legislation that addresses unfair, deceptive or abusive practices relating to all consumer goods and services, including those in the consumer finance context. Each province's ministry for consumer services (or equivalent) investigates and enforces the applicable jurisdiction's consumer protection legislation against organisations or individuals that have contravened the provincial law. At the federal level, these practices are scrutinised by Canada's Competition Bureau (the Bureau), an independent law enforcement agency that investigates and enforces the Competition Act, which protects consumers against false and misleading representations, and FCAC. Both the Bureau and FCAC also release consumer alerts, provide resources and guidelines for consumers and businesses, and evaluate complaints that are submitted by the public.

Currently, eight of the thirteen provinces and territories in Canada have consumer protection legislation that explicitly describes or provides lists of acts or practices deemed to be unfair, deceptive or abusive.[3] At the time of writing, Nunavut is seeking to amend its consumer protection legislation to include an enumerated list of unfair business practices.[4]

3 In Alberta, Manitoba, Prince Edward Island and Saskatchewan, the provincial consumer protection legislation provides an enumerated non-exhaustive list of practices that are considered unfair. British Columbia, Newfoundland and Labrador, and Ontario legislation also describe practices that are unfair or deceptive, and include non-exclusive lists of examples. Quebec's consumer protection act describes prohibited practices throughout but does not include a specific list or reference to 'unfair' practices. In each province, the legislation empowers the Lieutenant Governor in Council to create legislation to include additional prescribed practices.

4 Bill 25, An Act to Amend the Consumer Protection Act, 3rd Sess, 4th Leg, Nunavut, 2016, cl 3 (second reading), available online at: http://www.assembly.nu.ca/sites/default/files/Bill%2025%20-%20An%20Act%20to%20Amend%20the%20%20Consumer%20Protection%20Act-%20EF%20final.pdf.

Based on alerts, investigations and enforcement actions issued by the provincial ministries, the majority of recent unfair practices related to consumer finance involve payday lenders and debt collection agencies. During 2016, a number of companies and individuals were investigated for practices including misrepresentations about assisting consumers with debt, harassment and intimidation of debtors by collection agencies, and granting payday loans on terms and for amounts not permitted by legislation. In many instances, enforcement action and penalties were levied, including the suspension of a licence to operate as a collector or lender in the applicable jurisdiction. Neither the Bureau nor the FCAC has investigated any complaints or released any consumer alerts in 2016 related to unfair, deceptive or abusive practices relating to consumer finance goods and services. In 2016, provincial courts made a number of key decisions in the area of consumer finance products, particularly in relation to prepaid cards, where the courts clarified the applicability of provincial consumer finance laws to different types of prepaid cards and in some instances carving-out exceptions to the general prohibition against expiry dates. For more details on these investigations and enforcement actions, as well as litigated cases, see Section IX, *infra*.

Although there were no new enforcement actions by the applicable consumer protection agencies and ministries in Ontario and Prince Edward Island, Bill 59 in Ontario, titled the 'Putting Consumers First Act' has gone through its first reading. Bill 59 will amend the Ontario Consumer Protection Act, 2002, the Collection and Debt Settlement Services Act, and the Payday Loans Act, 2008, among others.[5] With respect to consumer finance aspects, Bill 59 expands on prohibited practices relating to credit agreements, payday loans, and debt collection.[6]

IX RECENT CASES

i Enforcement actions

In Alberta, the Director of Fair Trading recently issued an order against a debt repayment company relating to claims made by the company that misrepresented the performance and capability of its debt repayment services.[7] Claims such as 'We help hundreds of people every month, just like you' and 'Our record of success is indisputable' were made, yet an investigation revealed the company had no clients and was not licensed as a debt repayment agency in Alberta.[8] The Director of Fair Trading has also issued notices of administrative penalties in 2016 for prohibited practices enumerated in the Collection and Debt Repayment

5 Bill 59, Putting Consumers First Act (Consumer Protection Statute Law Amendment), 2nd Sess, 41st Leg, Ontario, 2016 (first reading), available online at: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4333&isCurrent=false&ParlSessionID=.

6 Ontario Ministry of Government and Consumer Services, News Release: Ontario Putting Consumers First, (3 November 2016) online: Ontario.ca https://news.ontario.ca/mgs/en/2016/11/ontario-putting-consumers-first.html.

7 Government of the Province of Alberta, Director's Order under Section 157 of the Fair Trading Act to Milton Kaseke, Complete Debt Solutions, and any employee, representation or agent of the above, (21 March 2016) online: servicealberta.ca https://www.servicealberta.ca/pdf/admin-penalties/Milton_Kaseke_Complete_Debt_Solutions.pdf.

8 Ibid.

Practices Regulation, including improper contact of a debtor's partner[9] and pursuing a debt that has not been acknowledged in the last six years,[10] and the Payday Loans Regulation for unauthorised withdrawals from a borrower's account.[11]

The Director of Consumer Protection in British Columbia issued notices of administrative penalties against two companies in 2016 relating to improper debt collection practices, resulting in one instance in the suspension of a debt collector's licence.[12] In addition, a payday lender entered into an undertaking as a result of alleged contraventions relating to unfair practices for improper debt collection and payday loan practices, including an implication that a payday loan would improve a borrower's credit rating when it would not.[13]

The Deputy Director of Payday Loans in Saskatchewan issued an order against a payday lender following an inspection that revealed the company had engaged in an unsuitable practice of pre-authorised debit (PAD) transactions without entering into a PAD agreement with the borrower.[14]

Quebec's consumer protection authority has investigated and fined a number of companies for improper debt collection practices, including harassment and threatening a borrower with legal action. Fines levied for these unfair practices ranged from a few hundred dollars to over C$10,000.[15]

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9 Government of the Province of Alberta, Notice of Administrative Penalty, (13 September 2016) online: servicealberta.ca https://www.servicealberta.ca/pdf/admin-penalties/Optimum_Credit_Recovery_Inc.pdf.

10 Government of the Province of Alberta, Notice of Administrative Penalty, (8 June 2016) online: servicealberta.ca https://www.servicealberta.ca/pdf/admin-penalties/International_Credit_Experts_Inc_June_8_2016.pdf.

11 Government of the Province of Alberta, Notice of Administrative Penalty, (14 April 2016) online: servicealberta.ca https://www.servicealberta.ca/pdf/admin-penalties/1869982_Alberta_Ltd_o_a_Money_Vault.pdf.

12 Consumer Protection BC, Recent Enforcement Actions – Case 29290, (5 July 2016) online: consumerprotectionbc.ca https://www.consumerprotectionbc.ca/consumers-alias/help-for-consumers-enforcement-actions/recent-enforcement-actions?&task=view_result&case_number=29290&bus_name=; and Case 29170, (11 July 2016) https://www.consumerprotectionbc.ca/consumers-alias/help-for-consumers-enforcement-actions/recent-enforcement-actions?&task=view_result&case_number=29170&bus_name=.

13 Consumer Protection BC, Recent Enforcement Actions – Case 29259, (5 August 2016) online: consumerprotectionbc.ca https://www.consumerprotectionbc.ca/consumers-alias/help-for-consumers-enforcement-actions/recent-enforcement-actions?&task=view_result&case_number=29259&bus_name=.

14 Government of Saskatchewan, Order issued to S.T. Holdings Inc. d/b/a Premiere Cash, (24 June 2016) online: fcaa.gov.sk.ca http://www.fcaa.gov.sk.ca/Default.aspx?DN=12c3beb6-e15a-48b9-b89f-cc5aa4e2ecdf.

15 Office de la Protection du Consommateur, Poursuites et condamnations, online: opc.gouv.qc.ca http://www.opc.gouv.qc.ca/en/news/poursuite-condamnation-region-date/ (a list of all actions taken by the regulator in 2016; French only).

ii Disputes before the regulator

Manitoba's Consumer Protection Office has released alerts relating to the province's new laws for high-interest loans,[16] after the minister issued two administrative penalties against payday lenders for entering into loan agreements that exceed the allowable proportion of the borrower's net pay, among other things, in late 2015.[17]

Newfoundland and Labrador appears to be focused on improper securities trading, having released two consumer alerts in 2016 relating to various (allegedly overseas) companies who are targeting consumers in Newfoundland but are not registered to sell securities in Canada. Service NL, the responsible provincial government body, has indicated that it has launched an investigation into at least one of these companies.[18] Similar alerts relating to binary options platforms was posted by Saskatchewan's Financial and Consumer Affairs Authority (FCAA).[19] Saskatchewan FCAA has also released an alert to warn investors that individuals are fraudulently using the FinCEN (the US Financial Crimes Enforcement Network government agency) name to elicit information from Saskatchewan residents.[20]

iii Litigation

In recent years, the ambit of provincial consumer protection laws has been challenged in a number of cases, leading to seminal decisions that have reshaped, and will continue to reshape, the consumer protection landscape in Canada for years to come.

In *Bank of Montreal v. Marcotte* and two companion cases (*Amex Bank of Canada v. Adams* and *Marcotte v. Fédération des Caisses Desjardins du Québec*)[21] the Supreme Court of Canada (SCC) ruled that the Quebec Consumer Protection Act applies to federally regulated financial institutions, including their credit card businesses. The SCC confirmed the continued exclusive federal jurisdiction over banking, while clarifying that provincial consumer protection laws may nonetheless still apply.

On the heels of the *Marcotte* decision, there has been a flurry of class action lawsuits brought under provincial consumer protection laws against telecommunications companies with respect to their mobile device billing practices. This is an area that is poised to continue its evolution and one that should be watched carefully by all federally regulated businesses, as the limits of the applicability and inter-relationship between provincial and federal consumer protection laws are tested.

In *Sankar v. Bell Mobility*,[22] the Ontario Court of Appeal did not rule on the province's jurisdiction over prepaid wireless phone cards, nor did it specifically address whether they were subject to the Ontario Consumer Protection Act's gift card regulations (the Regulations). The ONCA did confirm that the Regulations do not strictly prohibit time-limited contracts, which it differentiated from the prohibition on the expiry of contracts of future performance.

16 http://news.gov.mb.ca/news/index.html?item=39134&posted=2016-09-01.

17 http://news.gov.mb.ca/news/?item=36633; http://news.gov.mb.ca/news/?item=35013.

18 http://www.servicenl.gov.nl.ca/consumer_alerts.html.

19 http://www.fcaa.gov.sk.ca/Default.aspx?DN=f7582398-8be1-4023-a7e7-239997b6eee9.

20 http://www.saskatchewan.ca/government/news-and-media/2016/june/06/fraudulently-getting-financial-information.

21 *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 SCR 725.

22 *Sankar v. Bell Mobility* 2015 ONSC 632 (CanLII).

Similarly, the British Columbia Supreme Court determined that open-loop stored-value cards issued by entities, including credit unions, were subject to the Business Practices and Consumer Protection Act (British Columbia).

X OUTLOOK

It is understood that if the proposed Bank Act amendments are enacted, the consumer code will undergo significant change. The outlook is that over the course of the next year the consumer code will be substantially amended and reintroduced. The outlook in Canada will continue to have a significant focus on consumer protection in the mortgage area, as to disclosure and the availability of products, but also to prevent consumers from potential abuse related to mortgage products that they may not understand. Reverse mortgages, home equity loan mortgages, high-ratio and sub-prime mortgages are increasingly becoming the subject of a mix of direct and indirect regulation. Indirect regulation arises from the penalties imposed on regulated financial institutions, as to capital and permitted pools, and to access to securitisation financing.

Canada is working increasingly on harmonising consumer protection legislation, which is primarily a provincial jurisdiction. Harmonisation projects have been ongoing for many years in the consumer credit areas including mortgage lending, consumer lending, cost of credit and interest earned disclosure, and consumer leasing. It is likely that the harmonisation projects will continue over the course of the next year.

Chapter 5

CHILE

León Larraín A and Gustavo Delgado B[1]

I OVERVIEW

The legal framework for consumer finance in Chile has been strengthened during the past 10 years. This legislative trend was certainly boosted by several recent consumer scandals that shook the credit market, and also by Chile's admission to the Organisation for Economic Co-operation and Development. New legislation was introduced aiming to reduce information inequality between companies and customers, and to make financial contracting clearer for consumers. In 2011, Chile's Congress passed a bill concerning financial consumer issues that added new sections to Act No. 19,496 (the Protection of Consumer Rights Act), which gave greater powers to the consumer protection authority, the National Service of Consumers (SERNAC), and enabled it to impose sanctions on financial institutions. Similar efforts had been conducted to protect the confidentiality of debtors' personal data.

SERNAC has filed several class action lawsuits against financial services on the grounds of abusive clauses in adhesion contracts. The case law available is still limited, but interesting from an academic perspective. There remains little scientific development on financial consumer issues that is clearly reflected in the small amount of manuals, research and papers available in national literature at this moment.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Consumer finance law in Chile is governed by Act No. 20,555 of 2011 (the Consumer Finance Act), which modified the Protection of Consumer Rights Act. Other legislation particularly relevant for consumer law on financial issues includes the Decree with Force of Law (DFL) No. 3 of 1997 (the General Banking Act); Act No. 18,840 of 1989 (the Organic Constitutional Act of the Central Bank of Chile), Act No. 20,715 of 2013, on protection

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to money credit debtors; Act No. 18,010 of 1981, on money credit operations; Act No. 20,009 of 2005, on limitation of liability of credit card holders; Act No. 20,575 of 2012, establishing the principle of finality on treatment of personal data; Act No. 19,628 of 1999, on protection of private life; Act No. 19,659 of 1999, on illegal collection procedures; DFL No. 707 of 1982, on current accounts and cheques; the Civil Code; and the Commercial Code.

ii Regulation

Relevant provisions for consumer financial law can be found in the Updated Digest of Rules (UDR) issued by the Chilean Banks and Financial Institutions Authority (SBIF);[2] and in the Compendium of Financial Rules issued by the Chilean Central Bank. Another relevant regulation is Decree No. 44 of 2012, of the Ministry of Economy, on information to consumer on credit cards.

III PAYMENTS

i Overview

Cash

Cash remains the default legal payment method in Chile.

Credit card

The UDR define a credit card as any instrument that allows its holder or user to obtain credit granted by the issuer to acquire goods or pay for services rendered or sold by the entities affiliated with the corresponding issuer or operator.[3] Credit cards are widely accepted as a payment method in Chile.

The SBIF supervises all institutions that issue credit cards,[4] with the major exception of cards issued by retailers (since they are not generally accepted in the market). Given that retailers are not compelled to provide up-to-date information to the SBIF, reports submitted by the SBIF regarding debt ratio and levels of payment may be somewhat distorted.

In addition, Chilean law limits the liability of credit card holders in case a card is lost or stolen, once the card holder has notified the issuer.[5]

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2 The main chapters for consumer law in the UDR are Chapter 1-6 on minimal conditions of banking premises; Chapter 1-7 on electronic transfers; Chapter 1-8 on working hours of the banking system; Chapter 1-10 on backup of documents; Chapter 1-16 on operations with politically relevant customers; Chapter 2-1 on catchment; Chapter 2-4 on savings accounts; Chapter 2-5 on savings accounts for housing; Chapter 2-6 on deposits accounts; Chapter 2-9 on term deposits; Chapter 2-15 on debit cards; Chapter 8-1 on overdrafts on current accounts; Chapter 8-3 on credit cards; Chapter 16-4 on people who cannot sign documents; Chapter 18-8 on state guarantee of deposits; Chapter 18-9 on information available to public in bank offices; and Chapter 20-1 on exhibition of Chilean ID Card.

3 UDR, Chapter 8.

4 Article 2, General Banking Act.

5 Act No. 20,009.

Debit card

The UDR define a debit card as an instrument of payment via electronic devices that operates with online capture of transactions, by which the corresponding amounts are immediately debited in the holder's account and credited to the beneficiary's account.[6] According to the Compendium of Financial Rules of the Central Bank, only banks and credit unions may issue debit cards. Debit cards are widely accepted as a payment method in Chile.

Bank cheque

Chilean legislation defines a cheque as a written order, issued against a bank, to pay upon its presentation, from within the funds that the drawer may have in a current account.[7] A cheque is always payable on demand, at its submission before a bank.

Chilean law establishes that banks are liable for paying falsified cheques when the signature differs from the real account holder's, when the cheque has obvious alterations or when it does not match with the serial numbers of the account holder's chequebook. Further, payment of lost or stolen cheques will be suspended upon immediate notification to the bank and of the account holder.

Account holders who write cheques without funds in their current account may commit a serious criminal offence on the grounds of fraudulent issuing of cheques.

Electronic transfer

This method refers to any money transaction performed by electronic devices (e.g., PCs, mobile phones). It is mostly regulated by the UDR.[8] The Protection of Consumer Rights Act makes clear that consumers may make electronic transfers to any bank and that banking institutions may not restrict this right.

Banks must provide a system that ensures privacy to account holders and back up all the information of transactions. Further, banks must develop systems to identify fraud.

ii Recent developments

Almost all institutions of the Chilean banking system have mobile apps that can be operated 24 hours a day and run from electronic devices. The SBIF is continuously developing new rules applicable to electronic devices.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

Legal regime

Deposit accounts are jointly regulated by the Compendium of Financial Rules of the Chilean Central Bank[9] and the UDR.[10] Deposit accounts may be opened by both natural or legal persons (even by residents abroad), and shall always be operated in Chilean pesos.

6 UDR, Chapter 2-15.
7 DFL No. 707, Article 10.
8 UDR, Chapter 1-7.
9 Compendium of Financial Rules of the Chilean Central Bank, chapter III E.2.
10 UDR, Chapters 2-4, and 2-6.

Banks may charge fees for account management. The UDR establishes that customers must be kept informed of the amount of the fees in periodical account statements, and inside the bank premises. Additionally, banks must inform to general public the percentage of interest that is paid for the amounts kept on the accounts.

State guarantee of deposits

The General Banking Act established that deposits of natural persons are subject to a regime of state guarantee. This guarantee covers 90 per cent of the amount kept on the account, with the threshold of 120 *unidades de fomento* per calendar year. This state guarantee may be triggered if the financial institution is declared bankrupt and may be made effective by an executive order of the SBIF.

Overdrafts

Bank customers can agree on overdraft lines of credit. Banks allowing overdrafts must notify clients about the maximum overdraft amount, the rate of interest, guarantees of the operation and date and term of the overdraft.[11]

According to the Compendium of Financial Rules of the Chilean Central Bank,[12] banks may also grant overdrafts without previous stipulation. The UDR provide that an overdraft shall be treated neither as a banking product nor a contractual right, but as an exceptional situation.[13]

V REVOLVING CREDIT

i Overview

Chilean law regulates revolving credit with regard to credit cards. According to the regulation in force, card issuers must inform customers whether or not the line of credit is revolving.[14] Besides, card issuers must inform periodically, and in simple terms, the monthly interest rate of the revolving credit. The rate of the revolving credit reported in the statement of account will apply for the following period.

If the card issuer applies the maximum interest rate allowed by law, said issuer must inform the SBIF on the operation, identifying dates of the operation, amount of the credit, monthly interest rate, contractual term and other charges.[15]

ii Recent developments

Maximum interest rates have been substantially reduced in the last years through a new calculation formula (see Section VII, *infra*).

11 UDR, Chapter 8-1.

12 Compendium of Financial Rules, Chapter III.G.3.

13 UDR, Chapter 8-1.

14 Article 3, No. 13, Decree 44 of 2012, of the Ministry of Economy, on information to consumer on credit cards.

15 SBIF (2014), Circular No. 1.

VI INSTALMENT CREDIT

General rules

Instalment credit as opposed to revolving credit is the general rule in Chile. The Protection of Consumer Rights Act regulates some rights debtors will always have. This rights are as follows:

a Advance repayment: consumers can repay in advance all or part of the amount due, and the provider cannot limit this possibility to a specific period.

b Privacy of data: defaulters can figure in special registers, but these may only show data related to the unpaid debt.

c Removal from defaulters' registers: after the credit is paid, the provider must erase the information of the consumer.

d Basic services: debts related to basic services cannot figure in defaulters' registers.

e Right of information: the credit institution must provide all the requested information about debts and charges.

f Extrajudicial collection proceedings: these cannot impact or affect the personal home, nor the consumers' employment situation.

g Confidentiality: banks may not inform family members or other related persons of the consumer's debt.

Specific rules

a Mortgages: the main regulations about mortgages are contained in the Civil Code. The mortgage grantor (who will not necessarily be the mortgagor) will always have the right to dispose of the asset.[16] Also, mortgage grantors can limit their liability to a determined sum. The Protection of Consumer Rights Act prohibits the execution of loan agreements, including mortgages, that guarantee credits other than the one agreed, without the prior written request of the debtor.[17]

- Specific mortgages (mortgages in guarantee of one specific contract): the credit provider must provide, and pay the cost of, the public deed declaring the release of the guarantee, and also to notify the Land Registry within 45 days of the debt being discharged.
- General mortgages (mortgages constituted to guarantee all the obligations between the institution and the debtor): the credit provider must inform the debtor within 20 days of the debt being discharged. If the provider does not inform, the debtor may request the mortgage's cancellation. After this communication, the debtor must request the public deed of cancellation and its registration, costs for which will be borne by the credit provider.

b Car financing: Notwithstanding that there are not specific rules for this kind of credits, SERNAC made a statement about these contracts in 2014, pointing out that customers were suffering abuses by paying excessive amounts.[18]

16 Civil Code, Article 2415.

17 The Protection of Consumer Rights Act, Article 17 D.

18 SERNAC (2014): Boletín Crédito de consumo automotor. http://www.sernac.cl/wp-content/uploads/2014/08/Boletin-Credito-Automotor-Agosto-2014.pdf.

c Student loans: In Chile, there are three main alternatives available for higher education financing through specific student loans, regulated by special laws:

- Solidarity Fund credit: This is a credit directly granted by any of the 25 state-run or traditional universities that are members of the Council of Chilean University Rectors, for the 80 per cent poorest Chilean university students. It has an annual interest rate of 2 per cent. The payment of the credit starts two years after the end of the studies, paying a fee equivalent to 5 per cent of the annual incomes of the consumer.
- State guaranteed credit: This is a credit granted by financial institutions, with a maximum annual interest rate of 2 per cent. The state guarantees up to 90 per cent of the credit. The repayment of the credit starts 18 months after the ending of the studies. Consumers can request to pay fees equal to or lower than the 10 per cent of their income. It is possible to request the suspension of the repayment of the credit, in case of unemployment or postgraduate studies abroad.
- CORFO credit for degree students: CORFO (Corporación de Fomento a la Producción, the Chilean agency for development of industry) maintains a financial line for banks to give credit to students in more favourable conditions than those available to other consumers (annual interest rate between 6.5 per cent and 8 per cent, approximately).

VII OTHER AREAS

The Consumer Finance Act

Prior to 2011, SERNAC had insufficient powers to supervise or sanction financial institutions for violations of financial consumer rights. Mostly prompted by major consumer scandals in recent years, consumer legislation was strengthened setting out special rules on consumer financial law. The Consumer Finance Act specifically introduced a list of rights for financial consumers, such as being informed of the total cost of the financial product and the objective conditions set by the financial institution, or the timely release of guarantees on financial products.

Standardised summary sheet

The Consumer Finance Act was aimed to correct inequalities in the access of information available in the market and to strengthen duties of information in the financial consumer contractual relationship. For that purpose, the Act established a new duty for financial institutions to give consumers a standardised summary sheet of main clauses of the contract, in order to facilitate their comparison.

SERNAC Seal

At the request of financial institutions, SERNAC shall grant adhesion contracts a special 'SERNAC Seal' that demonstrates their conformity with consumer law (i.e., no abusive clauses) and the existence of a customer service to resolve consumer complaints and queries. Arbitrators and mediators resolve complaints submitted by consumers. Arbitration and mediation is free of charge for consumers.

Equivalent annual cost (CAE)

The Consumer Finance Act compels financial institutions to notify customers of the total annual cost of their products in every advertisement for credit operations, for comparison purposes. This shows a percentage that reveals the real cost of a credit in an annual period, including the capital, interests and all expenses and costs of the credit, whatever the term agreed for the payment of the obligation.

Maximum conventional interest rate

Act No. 18,010 establishes a new formula to calculate the maximum rate of interest that financial institutions may charge on money credit operations to customers[19] (maximum conventional interest rate). It is forbidden to set an interest rate that exceeds the multiplication between the amount of the respective capital and the greater of 1.5 times the current interest rate[20] at the time of the agreement, as determined by the SBIF for each type of credit operation, and the current interest rate at the time of the agreement increased by 2 percentage points per year, whether fixed or variable rate. As a result of this new calculation formula, the maximum conventional interest rate for non-adjustable, 90-day operations below 200 *unidades de fomento* (in Chilean pesos), plunged from 55 per cent in 2013 to 35 per cent in 2016.

Use of personal data

Act No. 20,575 established the principle of finality in the usage and treatment in financial operations. This new legislation was aimed to protect due confidentiality of financial consumers' data for evaluations on commercial risks, particularly, the consolidated record of debt defaults. It is forbidden for financial institutions to share or use this information for the purposes of applications for schools, emergency medical care, job selection and application to public employments.[21] Data banks should observe the principles of legitimacy, access and opposition, information, data quality, purpose, proportionality, transparency, non-discrimination, limitation of use and security in the processing of personal data.[22]

VIII UNFAIR PRACTICES

The Protection of Consumer Rights Act established an exhaustive list of abusive clauses on adhesion contracts that are deemed to be unfair practices. The list of abusive clauses is as follows:

a granting a party the right to suspend performance of, or to modify, the contract, notwithstanding legal exceptions;

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19 Exceptions to this rule are those that are agreed with customers who are institutions or banking or financial companies, foreign or international, those agreed in foreign currency on foreign trade operations, operations made by the Central Bank of Chile with financial institutions and those operations where a bank or a financial institution is the debtor.

20 According to Act No. 18,010, 'current interest rate' is the weighted average of the amounts charged by the banks established in Chile, in the operations carried out in the country (Article 6).

21 Act No. 20,575, Article 1

22 Act No. 20,575, Article 3.

b establishing price increases for services, accessories, financing or surcharges, unless such increases correspond to additional benefits that the consumer can accept or reject in each case;
c making consumers liable for omissions or deficiencies that are not imputable to them;
d reversing the burden of proof so that it falls on the consumer;
e containing absolute limitations of liability that may deprive consumers of the right to compensation;
f clauses contrary to good faith; and
g including blank spaces that have not been filled or unused.[23]

IX RECENT CASES

SERNAC v. Cencosud Retail[24]

In February 2006, major retailer Cencosud Retail raised fees for credit card management by invoking abusive clauses that enabled the retailer to make unilateral modifications of the contract and to give broad and ambiguous powers of attorney on behalf of consumers, without their consent. The consumer authority estimated that more than 608,000 consumers along the country were affected. In 2013, the Chilean Supreme Court confirmed the ruling of the 10th Civil Court of Santiago, compelling Cencosud Retail to compensate affected consumers restituting undue charges. The total amount of the compensation to which Cencosud Retail was ordered to pay amounted to approximately 26.4 billion Chilean pesos.

SERNAC v. Beneficios Chile and Solución[25]

In 2012, SERNAC filed a class action against two issuers of credit cards on contracts that contained several abusive provisions, such as enabling the card issuer to modify or suspend the contract unilaterally, restraining the amount available in the line of credit if the income of consumers varied. In 2013, the parties reached a settlement where the card issuers agreed to restitute 100 per cent of the amounts overcharged and to pay as compensation for costs of the claim 0.1 *unidades tributarias mensuales* to each consumer affected. Beneficios Chile and Solución were also fined.

SERNAC v. Banco Santander-Chile[26]

SERNAC filed a class action against Banco Santander-Chile on the grounds of breach of information duties imposed by the Protection of Consumer Rights Act. In particular, the consumer authority claimed that Santander omitted information about the costs of the credit operation (such as taxes and insurance). In 2013, both parties reached a judicial settlement subject to a condition subsequent. In the settlement, Santander promised to perform an internal audit of its customer service: in the case that, according to the internal audit results, the level of customer satisfaction was to be below 74 per cent and over 50 per cent, the bank

23 The Protection of Consumer Rights Act, Article 16.
24 10th Civil Court of Santiago, file No. 1391-2012. Court of Appeals of Santiago, file No. 976-2011. Supreme Court, file No. 12355-2011.
25 Third Civil Court of Coquimbo, docket No. 2820-2011; appeal on Court of Appeal of La Serena, docket No. 669-2016, still pending.
26 14th Civil Court of Santiago, docket No. 2820-2011.

would give its customer service staff further training. If the level of consumer satisfaction did not meet the threshold of 50 per cent, the judicial procedure would be resumed. In November 2014, Santander submitted a compliance survey that showed that 83 per cent of the customers were satisfied with the service provided by the banking institution. Since SERNAC disagrees with such survey, the procedure could resume.

SERNAC v. Banco Consorcio[27]

SERNAC filed a lawsuit against Banco Consorcio, a major Chilean banking institution, for including abusive clauses in mortgage loans that enabled the bank to charge default interest from the first day of each month in which the debt would be collectable, and broad and ambiguous powers of attorney on behalf of consumers, without their consent. In 2015, both parties reached an agreement to restitute to consumers the amounts paid for of undue default interest, to compensate affected consumers a total of 982.48 *unidades de fomento* and to pay each affected consumer 0.1 *unidades tributarias mensuales* for costs of the claim.

SERNAC v. Financiera La Elegante SAC Limitada[28]

In 2011, SERNAC filed a class action against Financiera La Elegante, a financial institution that issued and operated credit cards for a retailer. The consumer authority alleged that several clauses in La Elegante's contracts enabled the financial institution to fix or modify charges to customers unilaterally and to interpret silence of the consumers as acceptance, and established broad and ambiguous powers of attorney that allowed the company to contract services on behalf of the consumer, such as insurance, without giving any account. In 2015, a civil court in Coquimbo ruled against La Elegante, but denied compensation for losses since it was not demonstrated during the trial that the company ultimately applied abusive clauses, even though the court declared the existence of abusive clauses and imposed a fine to La Elegante. Currently, there is an appeal against the ruling, pending at the Court of Appeals of La Serena.

Pending SERNAC class actions

SERNAC has also filed several class actions against Chilean banks and financial institutions on the grounds of abusive clauses and broad and ambiguous powers of attorney.[29]

X OUTLOOK

Some of the most relevant and noteworthy lawsuits directed by SERNAC against financial institutions are still pending final ruling. These decisions will provide useful guidance as to the interpretation of the recently enacted Consumer Finance Act. Along with SERNAC, consumer organisations will certainly increase their role in consumer dispute resolution. Further, new bills of law now in discussion in the National Congress can consolidate the trend of empowering the consumer authority and restricting contractual freedom for financial institutions.

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27 25th Civil Court of Santiago, docket No. 1553-2015.

28 Third Civil Court of Coquimbo, docket No. 2820-2011.

29 These lawsuits can be followed online: http://www.sernac.cl/proteccion-al-consumidor/juicios-colectivos/iniciados-por-sernac-2/#bancosyfinancieras.

Chapter 6

CZECH REPUBLIC

Michaela Ericssonová and Viktor Glatz[1]

I OVERVIEW

The Czech Republic has adopted comprehensive consumer finance regulations, which provide the consumer with sufficient, though in some aspects excessive, protection. Czech consumer financing legislation is inspired by European regulation of consumer finance, which has displayed an increasing tendency to protect the consumer in recent years, in particular by strengthening the consumer's position in consumer credit regulation.

2016 was a significant year for consumer finance in the Czech Republic, as new and stricter regulation was adopted; the new regulation imposes new requirements on consumer credit providers, in particular on non-bank entities, and shifts the supervision of such entities onto the Czech National Bank (CNB).

The CNB newly supervises the entire consumer finance market, which should ensure a higher level of consumer protection. Consumers may benefit not only from the new regulation establishing rules for entities and processes on the financial market but also from the possibility of alternative resolution of disputes with financial institutions.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

In the Czech Republic, a consumer's position and its statutory protection are regulated and ensured by various legal acts containing both general consumer protection rules as well as specific rules for providing loans and other payment services to consumers.

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The core legal regulations ensuring the protection of consumers include the following acts, which have been influenced by European legislation:

a Act No. 257/2016 Coll. on Consumer Credit (the New CCA) implementing:
- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (CCD);
- Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immoveable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 (MCD) – replacing Act No. 145/2010 Coll. on Consumer Credit (the Old CCA), implementing the CCD;

b Act No. 634/1992 Coll. on Consumer Protection (CPA) implementing:
- 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;
- Directive 2011/83/EU of the European Parliament and of the Council of 11 May 2005 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;

c Act No. 284/2009 Coll. on the Payment System (PSA) implementing Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC, and repealing Directive 97/5/EC;

d Act No 216/1994 Coll. on Arbitration and the Enforceability of Arbitration Awards (the Arbitration Act);

e Act No. 89/2012 Coll. Civil Code (the Civil Code); and

f Act No. 374/2015 Coll. on Recovery and Resolution in the Financial Market (the FMRA) implementing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

ii Regulation

The Czech parliament adopts laws in the Czech Republic, but individual implementing regulations are generally issued by relevant authorities; for example, the CNB issues implementing regulations regarding the consumer financing market. The powers of the CNB have been recently broadened in connection with the implementation of the New CCA, which became effective on 1 December 2016. The CNB now supervises the consumer credit market instead of individual trade offices (which formerly granted trade licences to non-bank providers of consumer credit) and the Czech Trade Inspection Authority (CTIA) (which carried out inspections of non-bank providers). The CNB will now decide who will be entitled to operate on the market and will maintain a register of licensed persons in the area of consumer credits. It will also oversee the fulfilment and observation of the conditions stipulated by the New CCA and may impose sanctions for non-compliance with the New CCA.

After the expiry of the transitional period set down by the New CCA, during which the CTIA will supervise certain non-bank providers, the CNB will become the sole supervising authority within the consumer financing market.

In the event of any disputes, consumers may approach the Financial Arbitrator – the competent authority entitled to settle disputes between institutions and their clients regarding, for instance, provision of payment services, transfer of funds, use of electronic payment instruments, provision of credit, collective investment products, life insurance or foreign exchange transactions. In addition to this alternative dispute resolution method, a consumer may also file a claim with a competent court.

As of 1 December 2016, and pursuant to the New CCA and the Arbitration Act, it is no longer possible to agree on an arbitration clause in contracts with consumers.

III PAYMENTS

i Overview

Payment methods are regulated by the PSA, which establishes conditions under which payment service providers may provide their services. Consumer protection in this respect consists of, in particular, information obligations of the payment system providers towards the consumers and the setting of deadlines for the processing of payment transactions.

The PSA does not apply to direct cash transactions, which fall under general civil law regulation. The Act on the Restriction of Cash Payments sets forth certain cases where payment may only be made via a bank transfer (for instance a payment exceeding the amount of 270,000 koruna).

The Czech Republic is the leading country in the EU for contactless payments. The use of contactless payment cards has seen a sharp increase in the Czech Republic over the past few years, with all the major banks offering contactless payment cards. According to statistics from 2016,[2] 70 per cent of currently issued payment cards are contactless and 63 per cent of all card payments were contactless in 2015.

ii Recent developments

In 2016 the amendment to the PSA, which implemented Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, was adopted and comes into force and effect as of 1 March 2017. This amendment will enable consumers to easily switch between payment accounts of different banks while preserving all their recurring payments settings. The amendment also requires that banks

2 www.bankovnikarty.cz/pages/czech/profil_statistiky.html accessed on 12 January 2017 www.businesswire.com/news/home/20160513005344/en/Czech-Republic-Cards-Payments-Industry-Report-2016 accessed on 12 January 2017.

use uniform labelling of services provided in connection with payment accounts, which will provide consumers with a better opportunity to compare similar services provided by different banks and their prices.

The Ministry of Finance of the Czech Republic is currently preparing the implementation of 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, into the PSA.

The Act No. 297/2016 Coll., on Trust Services for Electronic Transactions (TSA) was adopted in 2016 and implemented Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. The TSA regulates only the aspects which the Regulation expressly determines are to be regulated at national level, such as certain practices of, and requirements imposed on, trust service providers and rules regarding electronic signatures, electronic seals and the preservation of documents using electronic time stamps. It further establishes the Ministry of Interior as the trust service providers' supervising authority. The Act does not regulate electronic identification as this will be covered by a special act, which is currently being drafted by the Czech government.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

In order for a bank to be able to accept deposits from the public in the Czech Republic, the bank is required to hold a banking licence under the Act No. 21/1991 Coll. on Banks (the Act on Banks).

The guarantee of receivables from deposits is facilitated by a financial market guarantee system established under the FMRA; this guarantee system includes a fund which serves as deposit insurance. The assets in this fund comprise mainly of contributions from local banks and branches of banks from non-EU states, proceeds from investments, insolvencies and liquidations. The guarantee does not apply to deposits from certain persons such as banks, financial institutions, insurance companies or the state. The limit of deposit insurance under the guarantee system is €100,000 per one person with a deposit account in one bank.

ii Recent developments

At the end of 2015, the Czech Republic implemented (1) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes and (2) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, into the Act on Banks and the FMRA. The implementation has led to the establishment of the financial market guarantee system, which administers the deposit insurance fund, and to new obligations for banks to provide their clients with information regarding the system of deposit insurance.

V REVOLVING CREDIT

i Overview

The new regulation of consumer credit also applies to revolving loans and sets down certain additional information obligations and rules enabling the termination of these loans if they had been concluded for an indefinite period of time.

ii Recent developments

In 2016 one of the major Czech banks started offering a new alternative to the 'payday loans' aimed at clients without financial reserves who tend to seek out problematic loan companies when they face unexpected expenses. The loan in question is a small revolving consumer loan within the range of 5,000 to 50,000 koruna with an interest rate of 16.9 per cent p.a.

VI INSTALMENT CREDIT

i Overview

Providing consumer loans in the Czech Republic requires obtaining a licence from the CNB – either a bank licence, a licence for a provider of certain payment services or a licence for a non-bank provider. A licence is required for all types of consumer loans, including consumer loans relating to residential immoveable property.

The rules for providing consumer loans are set out in the New CCA, which *inter alia* contains certain specific provisions for consumer loans relating to residential immoveable property (in accordance with Directive 2014/17/EU). Such loan may only be provided to a consumer if the consumer's creditworthiness is proved to the lender before a consumer credit agreement is entered into or prior to any substantial increase in the total amount of consumer credit. Should the provider grant a consumer loan to a consumer in violation of the results of the creditworthiness assessment (i.e., also when there are reasonable doubts as to the consumer's ability to repay the loan), the agreement will be deemed invalid. In such case, the consumer is obliged to return the principal of the consumer loan within a period corresponding to his or her options and capabilities.

A lender must provide a consumer with a set of pre-contractual information (including the annual percentage rate), which allows the consumer to assess the conditions offered and compare it to products of other providers. Certain information obligations must be complied with not only at the time the consumer loan agreement is being entered into but also throughout the course of the corresponding contractual relationship. Non-compliance with certain information obligations by the lender results in a decrease of the agreed lending interest rate to the repo-rate announced by the CNB.

The New CCA implements certain limits for payments, which the lender may require in the event that the consumer is in default, prepays the consumer loan or any part thereof or withdraws from the agreement within 14 days after it had been concluded.

Moreover, the lender must provide the consumer with an additional period of time before it accelerates the loan or enforces the mortgage. Security provided for consumer loans may not be obviously disproportionate to the amount of the secured receivable. It is also forbidden to use telephone lines with higher fees (premium-rate numbers) for the purpose of providing consumer loans or access to related services. Consumer loans must not be secured by a promissory note or a cheque.

ii Recent developments

The New CCA, in effect as of 1 December 2016, significantly changed existing consumer credit regulation. The goal of the New CCA was not only to implement the MCD but also to unify the regulation of ordinary consumer loans and mortgage-backed loans, to align such regulation with the principles of regulation in other sectors of the financial market, to improve the quality of services provided by the retail credit market and to reduce irresponsible lending.

Unlike the Old CCA, the New CCA covers all types of loans provided to consumers; previously, the Old CCA did not apply to loans lower than 5,000 koruna or higher than 1.88 million koruna or to loans provided for housing purposes.

As far as institutional regulation is concerned, the New CCA also places very strict requirements on non-bank providers of consumer credit. This measure, which goes beyond European legislation, aims to force unfair providers from the market and to reduce the number of non-bank providers of consumer loans. However, according to some experts and consumer protection organisations, the side effect of tightening legal requirements may be the expansion of the grey market where the legal rules will not be respected at all.

In order to obtain a licence from the CNB, the non-bank providers must now comply with strict requirements laid down in the New CCA; these include certain corporate requirements (such as a special form of legal entity, minimum amount of capital, origin of capital), personal requirements (the non-bank providers and persons representing them in providing loans must be credible and professionally qualified, i.e., have a certain level of education and pass a professional exam provided by an accredited entity) and requirements regarding internal procedures (including AML rules, remuneration policy, rules for creditworthiness assessment, rules for dealing with consumers' complaints and claims, rules for addressing consumers in default, rules for enforcing receivables, rules for external and internal communication, rules for verifying and controlling the activities of persons representing the lender, etc.).

Non-bank entities who were allowed to provide consumer loans before 1 December 2016 on the basis of a trade licence may continue to do so until the CNB decides on their application for a licence for a non-bank provider, but not longer than 18 months after the New CCA became effective, provided that the application for the relevant licence is submitted within three months from the date on which the New CCA came into effect.

In connection with the New CCA, the CNB recently issued guidelines, benchmarks and other documents concerning the interpretation of the New CCA, the submission of the application for the licence and details of the CNB's expectations on how the individual conditions set down by the New CCA should be met.

Banks in the Czech Republic are currently preparing a new service for payment cards. When paying with a card, the client will be able to decide whether to pay the purchase price straight away or whether to spread the payment across monthly instalments. This step is the banks' reaction to the declining demand for credit cards. At first, this new option is expected to be available only in internet or mobile banking applications but there is the possibility that it will spread to card payments directly in shops.

VII OTHER AREAS

In connection with the implementation of the New CCA, intensive discussions were held as to whether a deferred payment agreement relating to the postponement of payments under an existing loan agreement or from an energy supply agreement (concluded either by the original creditor or with the assistance of a debt collection agency) fall within the scope of the New CCA. The definition of a consumer loan contained in the New CCA also includes deferred payment, but the New CCA does not apply to consumer loans provided free of charge. On 8 December 2016 the European Court of Justice (Case C127/15) decided that (1) a credit rescheduling agreement, which is concluded, following the consumer's default, between that consumer and the lender through a debt collection agency, is not agreed as 'free of charge', where, by that agreement, the consumer undertakes to repay the total amount of that credit and to pay interest and costs that were not provided for by the initial contract under which that credit was granted; and (2) a debt collection agency that concludes, on behalf of a lender, a rescheduling agreement for unpaid credit, but which acts as a credit intermediary only in an ancillary capacity, which is for the referring court to determine, must be regarded as a 'credit intermediary'. The combination of this decision together with Czech legal requirements regarding non-bank providers and intermediaries leads to the conclusion that a collection agency that agrees or intermediates a deferred payment agreement with a consumer containing payments in addition to those originally agreed, would be considered to be performing intermediation in the sense of the New CCA and would need to obtain the relevant licence from the CNB. The implications of such decision are more far-reaching, as the energy suppliers who conclude a deferred payment agreement containing additional payments with a consumer would theoretically need to obtain a licence for a non-bank provider and fulfil all the conditions set down by the New CCA. This could, as a consequence, be disadvantageous for the consumer as the suppliers would in the end directly enforce the due payments rather than enable the consumer to postpone the payments on the basis of a deferred payment agreement.

VIII UNFAIR PRACTICES

In recent years the topic of *ad hoc* arbitration clauses in consumer loan agreements has been widely discussed. The general conclusion is that if certain conditions have not been met, *ad hoc* arbitration clauses can cause an imbalance to the detriment of the consumer and including such arbitration clauses in consumer loan agreements is therefore considered to be an unfair practice. In terms of consumer protection, *ad hoc* arbitration can cause various problems with one of the most severe ones being the inability to have the arbitral award reviewed by a court on the facts of the case. In October 2013 the Supreme Court of the Czech Republic decided that an *ad hoc* arbitration clause meets the conditions of being an unfair contractual clause if (1) it had not been agreed upon individually, (2) the creditor could not have reasonably expected the consumer to agree with such clause upon individual discussion thereof, and (3) the arbitration clause creates a significant imbalance between the parties. According to the Supreme Court, *ad hoc* arbitration clauses in consumer loan agreements are only acceptable if the selection of the arbitrator is transparent and the consumer is guaranteed the same rights as in proceedings before ordinary courts. In a decision issued in July 2014 the Supreme Court also held that if the consumer is not given the opportunity to affect the content of the arbitration clause (i.e., the consumer has to, without any reservations, accept the conditions set out by the creditor in order to be granted a loan) such arbitration clause is contrary to the consumer protection rules. In order to protect consumers, *ad hoc* arbitration clauses that do not meet the aforementioned conditions have been deemed invalid, causing the relevant arbitration awards to be unenforceable.

In December 2016 the amendment of the Arbitration Act prohibited arbitration clauses in consumer loan agreements entirely (this applies to all consumer agreements in general), and disputes arising therefrom can now only be handled by ordinary courts.

IX RECENT CASES

i Enforcement actions

In 2014 the CTIA imposed fines on loan companies for wrongly calculating the annual percentage rate (APR) in consumer loan agreements. The disputes arising out of these decisions have led to a major decision of the Supreme Court of the Czech Republic (32 Cdo 4838/2015) regarding the effect of a wrongly calculated APR in consumer loan agreements. According to the Old CCA, the consumer loan agreement has to include certain information, including the APR. However, if the consumer loan agreement does not include all the required information and the consumer informs the creditor thereof, the consumer loan is deemed to have been granted with the interest rate in the amount of the annual discount rate published by the CNB (which has been within the range of 0.05 per cent to 2.5 per cent p.a. over the last decade)[3] with effect as of the date of the relevant consumer loan agreement and any provisions on any other payments under the consumer loan agreement are invalid. Prior to the discussed decision, Czech courts have claimed that a wrongly calculated APR in a consumer loan agreement does not cause the aforementioned effect, because – as long as the agreement includes the APR (whether calculated correctly or incorrectly) – the information requirements set out by applicable legislation have been met. In July 2016, the Supreme Court, however, decided that if any of the information provided by a creditor is wrong, it constitutes a violation of the law causing the aforementioned effect on the interest rate and on the validity of any provisions regarding any other payments under the consumer loan agreement. The Supreme Court decision was issued only a few months before the enactment of the New CCA, which contains more specific rules to deal with this issue. The rules under the New CCA are as follows (1) if the consumer loan agreement does not include the APR at all, the interest rate is equal to the repo rate published by the Czech National Bank as of the date of the agreement, unless the originally agreed interest rate was lower (in which case that interest rate applies), (2) if the APR set out in the consumer loan agreement is lower than it actually is, the interest rate and the entire amount that the consumer is obliged to pay are lowered so that they correspond to the APR provided in the consumer loan agreement. As a result of this decision of the Supreme Court, the loan companies that had been wrongly calculating the APR under the old legislation may be ordered to return a vast majority of interest that they have received from consumer loans resulting in potential losses in the range of billions of koruna.

ii Disputes before the regulator

As of December 2016, the CNB has become the regulator and supervising authority for non-bank providers of consumer loans. Currently the main agenda of the CNB in this regard

3 www.cnb.cz/en/faq/how_has_the_cnb_discount_rate_changed_over_time.html.

is the granting of licences to companies intending to provide or intermediate consumer loans. As the CNB has only been acting as the regulator in this area for a short period of time any significant disputes are yet to come.

In the Czech Republic the equivalent of an ombudsman in the area of consumer finance is the financial arbitrator. The financial arbitrator provides free resolution of disputes between consumers and financial institutions; the proceedings are commenced on the application of the consumer. In recent years the financial arbitrator has also been resolving disputes related to wrongly calculated APRs in consumer loan agreements. The financial arbitrator has repeatedly decided that one of the loan companies has been wrongly calculating the APR in its consumer loan agreements and has adhered to the opinion confirmed by the Supreme Court in July 2016 that a wrongly calculated APR means that the consumer loan is deemed to have been agreed with an interest rate in the amount of the annual discount rate published by the CNB. Prior to the discussed decision of the Supreme Court, however, some of the decisions of the financial arbitrator had been overturned by courts, which have been dealing with appeals against the decisions of the financial arbitrator.

iii Litigation

In 2013 thousands of clients brought cases against banks claiming that the banks have been illegally charging loan account management fees. The clients claimed that the loan agreements included clauses regarding account management fees that were in violation of Section 56 of the Civil Code, which forbids certain unfair provisions in consumer contracts. These cases were inspired by a decision of the German Federal Court of Justice from July 2011, which found such fees to be illegal as the loan accounts exist mainly for the purposes of the bank's accounting and not as a service to the client, thus charging fees for the management of such accounts to the client constitutes an unjustified transfer of the bank's costs onto the client. In the Czech Republic, however, the vast majority of these disputes have ended with a decision in favour of the banks.

For the purposes of this chapter one particular case can be used as an example as it is the only one that has been reviewed by the Czech Constitutional Court. In this case the claimant had entered into a loan agreement with the bank, and the agreement contained a clause requiring the consumer to pay a loan account management fee in the amount of 150 koruna per month ('the clause'). The claimant had been paying the fee for over five years without any objections before coming to the conclusion that the fees had been charged illegally and suing the bank to return the fees paid in the amount of 7,200 koruna on the grounds of unjust enrichment. The claimant argued that the bank had not specified what services were being provided for the account management fee and considering, therefore, that the clause is invalid due to being uncertain and incomprehensible. In addition, the claimant asserted that the clause was in violation of the prohibition to deviate from the law in detriment of the consumer as well as of good faith, resulting in a significant imbalance in the rights and obligations of the parties. The District Court in *Prague 4* dismissed the action on the following grounds: (1) the clause was a sufficiently specific declaration of will and the subsequent behaviour of the parties indicates that both parties knew what the fee was being charged for as the claimant had been paying the fee for five years without any objections, (2) the clause did not constitute an invalid deviation from the law to the detriment of the consumer as the purpose of consumer protection is mainly to provide consumers with sufficient information enabling them to make free decisions on the market rather than limiting their contractual freedom to such an extent as to prevent them from undertaking obligations other than those specifically set out by law for certain types of contracts, (3) the clause specified the price for performance, therefore, according to Section 56(2) of the Civil Code, it is exempt from being reviewed by courts in terms of being unfair towards the consumer, and (4) charging fees related to the management of consumer loan accounts is a common practice in the banking world and is supported by legal regulations.

As the claim was only for the amount of 7,200 koruna the decision of the District Court in *Prague 4* was final without the possibility of an ordinary appeal to be filed (which Czech law only allows for claims exceeding 10,000 koruna). The claimant therefore instead decided to file a constitutional complaint to the Constitutional Court, which consequently dismissed the complaint. One of the main arguments of the court was based on the assertion of a balance between consumer protection regulations and the principle of the autonomy of will, in respect of which the Constitutional Court stated that the principle of the autonomy of will and freedom of business activity cannot be replaced by paternalistic interferences of the state.

X OUTLOOK

After the recent trend of decreasing interest rates in mortgages, which led to a dramatic increase in demand in this area, the interest rates are expected to go up. One of the main reasons for this change is the adoption of the New CCA, which increased the banks' costs of providing mortgages by imposing stricter administrative requirements and giving consumers more options to make early repayments. The adoption of the New CCA is expected to cause a slight increase in the price of consumer loans in general. It is therefore expected that the demand for consumer loans will decrease in the near future. It remains to be seen whether the New CCA will become an effective instrument of consumer protection in the area of consumer loans.

Along with an increase in consumer loan interest rates the demand for loans could also drop due to constantly low interest rates in savings accounts, which could encourage consumers to use their savings before applying for a loan.

In respect of payments, we expect the continuation of the increasing trend of cashless and contactless payments along with the implementation of new technologies in financial services. Along with the implementation of Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, banks are expected to require their clients to use electronic IDs in order to log in to internet banking applications.

In August 2016 the Czech parliament adopted the Act on the Central Evidence of Accounts, which will come into effect in January 2018. This act implements a part of the European Commission's anti-terrorism package and will enable the government to access information about individual clients of banks and their accounts.

Chapter 7

HUNGARY

Melinda Pelikán, Zsófia Polyák and Diána Boross-Varga[1]

I OVERVIEW

Consumer protection in the financial sector has developed greatly in Hungary over the past few years. After the financial crisis in 2008, certain provisions have been amended or implemented in Hungarian legislation (also via EU laws) to prevent another financial crisis.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The legislation related to consumer loans is rather fragmented; several laws and regulations are in force in respect of the existence and operation of the financial institutions providing loans for consumers. The following list of legislation is not exhaustive; however, it includes the most important provisions regarding consumer loans:

- Act CCXXXV of 2013 on Payment Service Providers;
- Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises (the Banking Act);
- Act CXXXIX of 2013 on the National Bank of Hungary;
- Act CXVI of 2012 on Financial Transaction Duty;
- Act CLXII of 2009 on Credit Provided to the Consumer;
- Act LXXXV of 2009 on the Pursuit of Payment Services Business;
- Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices;
- Act CLV of 1997 on Consumer Protection;
- Act XXV of 2005 on the Remote Selling of Financial Services;
- NGM Decree No. 56/2014 (XII.31.) on the information rules for consumer loans;

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- NGM Decree No. 61/2013 (XII.17.) on the maximum technical interest rate;
- Government Decree 536/2013 (XII.30.) on the detailed rules of the conditions of supplementary financial servicing;
- Government Decree 535/2013 (XII.30.) on the protection of IT systems of financial institutions, investment ventures and commodity exchange service providers;
- Government Decree 163/2011 (VIII.22.) on the disproportionately high monthly instalment payment in credit limit contracts connected to bank account credit;
- Government Decree 82/2010 (III.25.) on yield calculation and disclosure of deposit interest and securities;
- Government Decree 361/2009 (XII.30.) on the conditions of circumspect public credit providing and the inspection of creditworthiness;
- Government Decree 154/2009 (VII.23.) on the detailed rules of the requisition and redemption of the government joint and several guarantor related to housing loans;
- Government Decree 153/2009 (VII.23.) on issues prevailing in the financial sector and required for increasing the effectiveness of consumer protection;
- MNB Decree No. 58/2014 (XII.17.) on the required settlement regarding void contractual conditions of loan contracts and on the provisions of the consumer protection connected to the modifying of consumer loan contracts;
- MNB Decree No. 32/2014 (IX.10.) on the regulation of income prorated instalment payment and collateral instalments; and
- MNB Decree No. 28/2014 (VII. 23.) on the rules on the complaints management of financial organisations.

Along with the laws listed above, the guidelines issued by the National Bank of Hungary, in its capacity as financial supervisory authority (the Supervisory Authority) are taken into account in practice. Although the guidelines are not mandatory rules of law, the guidelines are important, since, in some cases the mandatory rules of law might have controversial provisions or be too broad. In such cases any interested party might formally request the Supervisory Authority to issue a guideline on its interpretation of certain topics.

ii Regulation

National Bank of Hungary

Under Act CXXXIX of 2013 on the National Bank of Hungary, the Supervisory Authority exercises continuous supervision over the entities and persons covered by financial sector laws.

Within this framework, the Supervisory Authority monitors the activities of financial and capital market institutions, funds, insurance companies and financial infrastructure bodies both on-site and off-site, using the tools of prudential supervision, as well as market surveillance and consumer protection tools. If necessary, it might take any measures prescribed by law to make the financial sector participants comply with applicable laws. The purpose of the supervision is to ensure timely recognition and appropriate management of risks to avoid jeopardising the stability of the financial system and the confidence of financial intermediaries. The information obtained during the continuous supervision is included by the Supervisory Authority in the risk assessment. The data on risk and institutional assessment determine the method and the intensity of the supervisory treatment of a particular financial institution, as well as the scheduling and focus of further investigations.

The Supervisory Authority monitors the activities of the financial institutions in relation to preventing and combating money laundering and the financing of terrorism, and performs IT supervision. If immediate action is required, the Supervisory Authority may conduct targeted or on-site investigations.

Additionally, financial consumer protection is an important part of the Supervisory Authority's duties, as is market surveillance to eliminate unauthorised, unlicensed financial services. The Supervisory Authority takes actions to protect the rights of customers using financial services and issues guidance for service providers on responsible and fair behaviour. The Supervisory Authority is responsible for identifying market practices that are disadvantageous for customers.

Dispute resolution

In addition to litigation, consumers may turn to an out-of-court conciliatory body to settle a dispute with a financial institution.

The Financial Conciliatory Board (FCB) was established in accordance with Article 24 of Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers[2] as a professional independent alternative forum for resolving disputes. FCB was launched in 2010, and started to operate as of July 2011. The FCB is the Hungarian member of the FIN-NET.[3]

The powers and competence of the FCB cover contractual disputes between consumers and financial institutions (and other institutions supervised by the Supervising Authority) with a view to reaching an out-of-court settlement. To this end, the FCB must attempt to reach a conciliation agreement or, failing this, to adopt a decision to enforce consumer rights simply, efficiently and practically, and under the principle of cost-efficiency.[4]

Consumers may initiate an FCB proceeding provided they have attempted to settle the case directly with the financial institution, which must provide the FCB with its statement on submission, otherwise, in the absence of a negotiated settlement, the FCB shall issue a recommendation. The recommendation is not directly enforceable against the financial institution.

The decision or recommendation of the FCB is adopted without prejudice to the consumer's right to have a claim enforced in a court of law.

The binding decision or recommendation of the FCB may not be appealed, but annulment of the decision or recommendation by court order may be requested by either the consumer or the financial institution based on certain conditions.[5]

2 'Member States shall ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place, using existing bodies where appropriate. Member States shall encourage those bodies to cooperate in order to also resolve cross-border disputes concerning credit agreements.'

3 FIN-NET is dispute resolution network of national out-of-court complaint schemes in the European Economic Area countries.

4 Paragraph 1 Section 96 of Act CXXXIX of 2013 on the National Bank of Hungary.

5 Paragraph 3 Section 116 of Act CXXXIX of 2013 on the National Bank of Hungary.

III PAYMENTS

The most frequent payment methods in Hungary are:

a money transfer;
b authorisation for the execution for the transfer (collective, single, bill of exchange);
c cash substituting tools (debit card, cheque); and
d cash payment.

The settlement system used between the banks for settlement in Hungarian forints (through the Interbank Clearing System maintained by GIRO Zrt.) is the VIBER, which is a real-time gross settlement system (RTGS); thus domestic money transfers are fulfilled within four hours.[6]

In recent years the popularity of the pay pass (without using POS terminals) card has increased, and according to the latest report of the Supervisory Authority on the payment system, the state will promote use of this payment method.

The e-money and the e-wallet are known by Hungarian law, but for providing such services, a special licence must be obtained from the Supervisory Authority.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

In Hungary, only banks licensed by the Supervisory Authority are entitled to receive deposits and other funds from the public and to provide for their own account.

Under a deposit account contract, the depositor may deposit a certain amount of money with the bank, and the bank undertakes to accept the money and to repay the same amount at a later date with interest.

Act V of 2013 on the Civil Code has relatively few provisions on deposit account contracts and distinguishes between fixed-term and non-fixed-term deposits.[7] Such provisions are not mandatory, the parties might agree on other conditions. The following summarises the main provisions of the Civil Code on deposit accounts:

a In the case of fixed-term deposits, the bank must repay the funds held on the account upon maturity or as instructed by the depositor.
b The depositor may request repayment of the funds held in the account before the expiry of the term specified in the contract. In the absence of the depositor's request, the bank shall not be entitled to repay the funds held on the account before expiry.
c The funds not collected upon maturity shall be converted into a deposit of indefinite period.
d In the case of deposits for a non-fixed term the bank must promptly repay the funds held in the account as instructed by the depositor.

Although, the Civil Code identifies only fixed and non-fixed terms, in market practice a distinction is made between deposit accounts on the length of the term of the deposit, the

6 Subject to the exceptions in Chapter V of MNB Decree No. 18/2009 (VIII.6.).
7 Section 6:390 of the Civil Code.

interest rate provided, and the break fees to be incurred in case of early termination, etc. The deposits for non-fixed terms are usually simple payment accounts, where the account holder bank provides interest.

There is a special deposit account, which is popular among long-term investors. In this case, a special deposit account shall be opened in Hungarian forints, where the consumer could deposit money only in the first year after its opening. Afterwards the deposited amount shall remain in the deposit account for five or more years. After the expiry of such term the depositor could request the refund of the deposit and the accrued interest. This special type of deposit is free from tax on interest.[8]

Since the base interest rate for the forint has decreased continuously from 2011 (currently it is 0.9 per cent), the deposit account has been lost a lot from its significance in the past few years.

i Protection of deposits

The National Deposit Insurance Fund (OBA) is a fund guaranteeing deposits, operating in accordance with Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes.

Each bank operating or providing financial services in Hungary must join the OBA,[9] which shall indemnify depositors if the licence of a bank where deposits are held were withdrawn by the Supervisory Authority because the bank can no longer be relied on to fulfil its obligations, or fails to pay any of its undisputed debts within five days of the date on which they are due or no longer has sufficient own funds (assets) for satisfying the known claims of creditors, and a dissolution or a liquidation procedure has been opened against such bank.

The maximum amount of the indemnification is €100,000 per person and per bank. This amount covers the principal and the interest deposited at the bank. If the amount to be indemnified is above this limit, the OBA shall not be liable for further compensation.

The OBA shall pay compensation, up to €50,000 additionally, to natural persons for eligible deposits, provided that they were transferred to a discretionary account during a three-month period before the day of the opening of the compensation procedure and if the amount deposited originates from:

a the sale of residential property, or the sale of lease rights or any right of tenancy;
b benefits received upon the termination of employment or upon retirement;
c insurance benefits; or
d compensation received for criminal injuries or wrongful conviction.[10]

V REVOLVING CREDIT

Revolving credits are frequently used within the retail sector. These kinds of loans are provided for undefined purposes. The consumer may use the credit at his or her sole discretion. In

8 Act CXVII of 1995 on personal income tax.

9 Subject to authorisation by the Supervisory Authority, branches of third-country credit institutions are not required to join the OBA if the Supervisory Authority considers that they have deposit insurance equivalent to the deposit guarantee scheme prescribed under Directive 2014/49/EU of the European Parliament and of the Council.

10 Section 214 A of the Banking Act.

general, these loans are non-secured, the proper examination of the creditworthiness of the consumer is the responsibility of the lender, which must have the applicable internal policies in place regarding credit risk assessment. Each examination shall be based on the (1) respective internal policies; (2) the information provided by the consumer; (3) the creditworthiness of the consumer; and (4) the information received from KHR, the official credit bureau system. The result of the examination shall not be based only upon the collateral (if any) provided by the consumer.[11;12]

The overdraft loan and the credit card loan are the most common revolving credit types provided in Hungary. The overdraft loan is linked to a current account. In case of credit card loans, the consumer shall not have its payment account at the card issuer bank. The repayment of the credit card loans might occur with money transfer, check payment, etc.

In both cases (credit card loan, overdraft loan) Decree 83/2010 (III.25.) on the calculation of the annual percentage rate (APR) shall apply in respect of the maximum possible interest rate. The maximum amount of the annual percentage rate shall be the effective base interest rate (published by the Supervisory Authority) plus 39 per cent in the case of overdraft and credit card loans.

In case of overdraft, the lender may not charge any fees for early repayment, and shall provide the consumer monthly with the information prescribed by the law.[13]

The overdraft and the credit card agreement may be extended as required by the parties. The method of the interest calculation shall be set out in the agreement. Regarding the interest conditions of such loans, the lender may not amend them unilaterally. In certain cases the lender may unilaterally amend the overdraft or the credit card agreement. In such cases, however, the consumer may terminate the agreement within 30 days from the acknowledgement of such modification.

VI MORTGAGE LOANS

The Hungarian mandatory rules of law are rather consumer-friendly regarding mortgage loans. As of 21 March 2016, many changes were implemented into the Hungarian legislation as a result of Directive 2014/17/EU of the European parliament and of the council on credit agreements for consumers relating to residential immovable property. For the main novelties, introduced by Act CCXV of 2015, which implemented the directive, see below.

The information provided to the consumer before entering into a mortgage agreement shall be personalised (tailor-made information), therefore any calculation shall reflect the factual financial situation of the consumer. The form the information must take shall be in accordance with the mandatory rules of law (set out in a decree issued by the National Bank of Hungary).

The draft of the mortgage loan agreement shall be handed over to the consumer at least three days before it is signed, and the consumer shall not accept the binding offer within this period, during which the lender is committed to its binding offer, but the consumer is not engaged to enter into the mortgage loan agreement. The lender shall keep its binding offer for 15 days.

11 Section 14 (1)–(3) of Act CLXII of 2009 on consumer loans.

12 Section 3 of Decree 361/2009 (XII.30.) on the responsible examination of creditworthiness.

13 Section 19 of Act CLXII of 2009 on consumer loans.

The tie-in sale is prohibited in respect of the mortgage loans, the consumer has the right to enter into the mortgage loan agreement only and shall not be obliged to buy additional services.[14] Package deals (i.e., another payment service with favourable price in case of entering into a mortgage loan) are not prohibited.

The main consumer-friendly amendment is that the consumer may amend the currency of the mortgage loan in each quarter with its unilateral statement to be sent to the lender, provided that the new currency is the currency of 50 per cent or more of the consumer's wage or assets and is is the lawful currency of the territory of the consumer's residence at the time of entering into the mortgage loan agreement.

According to mandatory rules, the amendment of the currency shall not be deemed as an amendment of the original mortgage loan agreement, therefore if it was incorporated into a notarial deed, the amendment of the deed is not necessary.

VII OTHER AREAS

i Advertising of loans

The advertising of loans are strictly regulated by the respective consumer protection laws and regulations. Marketing material on any loan must be clear and firm.

The marketing materials published on the website of the lender must be perfectly legible (small print shall be avoided). The annual percentage rate must be highlighted and the abbreviated term 'APR' shall be indicated. If any further figure appears in the advertisement related to the interest rate, or any costs, fees or consideration, the following information shall be included in the marketing communication: (1) the rate and type of the interest; (2) the remuneration, fees, costs and tax included in the total consideration of the loan; (3) the maximum amount of the loan; (4) the term of the loan; (5) the annual percentage rate; (6) the total amount to be paid by the consumer and the amount of the instalments; and (7) if any further undertaking is required from the borrower (e.g., insurance), this obligation shall be indicated in the advertisement.[15]

In addition an example related to the loan shall be introduced in the advertisement, the figures to be used in such example are prescribed by the respective government decree[16] and currently correspond to a three-year term loan of 500,000 forints.

ii KHR

The official credit bureau system, KHR, is the only official credit bureau database in Hungary. It was launched by Act CCXXII of 2011 on the credit bureau system. Regarding the information on the borrowers, the accession to the official credit bureau system is required by the mandatory rules of law for each financial institution.

Default under a loan or credit agreement shall be registered in the KHR by the lender, if the respective payment delay exceeds a period of 90 days, and the overdue and unpaid amount is higher than the actual minimum monthly wage, which is currently (as of 1 January 2017) 127,500 forints per month. This data will be registered and available in the

14 Some exceptions are listed in Section 14/A of Act CLXII of 2009 on consumer loans.

15 Section 4 of Act CLXII of 2009 on consumer loans.

16 Section 9 of Decree 83/2010 (III.25.) on the calculation of the annual percentage rate.

KHR, irrespective of whether the consumer has given consent. Regarding the data protection, the consumers' consent for the transfer of personal data shall be given simultaneously when entering into a loan- or credit agreement. If the consumer fails to give such consent, however, in case of default, the lender must provide data to the KHR.

VIII UNFAIR PRACTICES

In 2016 the Supervisory Authority conducted inspections of market participants specifically to check compliance with the new rules, in line with the following legislative changes:

a modifications regarding APR;

b pre-contractual information duties of credit institutions in connection with consumer loan agreements; and

c unilateral change on interest rates charged to credit cards.

With respect to the rules regarding APR, the Supervisory Authority typically made determinations of violation of rules related to (1) calculation of APR (e.g., Mecsek Takarék Szövetkezet, Hungarian Branch of Citibank Europe plc); the (2) maximum level of APR (e.g., Mecsek Takarék Szövetkezet, UniCredit Bank Hungary Zrt., Duna Takarék Bank Zrt., OTP Bank Nyrt.); and (3) indication of and communication regarding APR (e.g., Magyar Cetelem Bank Zrt., Budapest Hitel-és Fejlesztési Bank Zrt., Multifaktoring Pénzügyi Zrt., UniCredit Bank Hungary Zrt., OTP Bank Nyrt., MKB Bank Zrt.).

Concerning the pre-contractual information duties of the credit institutions in connection with consumer loan agreements, the Supervisory Authority made many determinations that financial institutions had violated the rules (e.g., Hungarian Branch of Citibank Europe plc, UniCredit Bank Zrt., Duna Takarék Bank Zrt., OTP Bank Nyrt., MKB Bank Zrt.)

In respect of unilateral change on interest rates charged to credit cards, only one financial institution was found to have breached the law (OTP Bank Nyrt.).

IX RECENT CASES

i Enforcement actions

The Supervisory Authority sanctioned the institutions by imposing consumer protection penalty for infringements detailed in Section VIII, *supra*, in a range between 800,000 and 8 million forints, depending on the seriousness of the infringement, and ordered them to satisfy the obligations immediately.

ii Disputes before the regulator

The FCB is a forum to reach an out-of-court settlement of financial consumer disputes between Hungarian consumers and financial service providers. In 2016 the majority of disputes arose in connection with the following topics:

a cash flow (account management issues regarding credit cards, using ATM and online banking platform, termination of bank account contracts);

b debt settlement (suspended enforcement, instalment payment options, debt cancellation, dispute settlement); and *c* vehicle financing (circumstances of signing the loan agreement, disputes regarding their validity, issues related to options and document certifying ownership and their collateral nature, debt settlement).

iii Litigation

In 2015 and early 2016 special attention was paid to the so-called broker affairs (e.g., Buda-Cash Brókerház Zrt. and DRB banking group, Hungária Értékpapír Zrt., Questor Group). Litigations related to foreign currency-denominated loans resulted in significant deliberation on questions of settlement, conversion into forints and contract modification. A large number of consumer protection problems have arisen from unilateral fee increases (bank account and bank car fees) and account termination.

X OUTLOOK

On 3 January 2017 the recommendation of the Supervisory Authority regarding consumer product supervisory measures for financial providers came into effect. The purpose of the recommendation is to ensure the financial consumer protection considerations during consumer product design, and to ensure the design and sale of products that serve the real interests and needs of consumers.

According to the recommendation, it is essential that product developers choose distributors who possess relevant information regarding the sales of products and appropriate knowledge, experience and ability to inform consumers. Distributors may offer the products only in reasonable cases (and supported by factual data) to other consumers than the predetermined target. In addition a special requirement is that distributors – prior to the consumer decision-making – are to make consumers possible become knowledge the main characters, risks and full price to be paid (including all fees, charges and costs) of the product.

Chapter 8

MEXICO

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I OVERVIEW

A historical event key to understanding Mexico's current system and financial consumer protection policy is the 1994 recession often referred to as the 'Tequila crisis'. The crisis derived, among other factors, from Mexico's lack of international reserves, which prompted local currency to suffer great devaluation. To resolve the crisis, the Mexican government was forced to implement severe measures, including passing several key reforms and new regulations, establishing the autonomy of the Mexican Central Bank, and adopting a floating exchange rate.

During the crisis interest rates sharply increased and on the other hand the value of Mexico's currency fell steeply, resulting in many abusive practices by the financial institutions. As financial institutions grew again and the system recovered, the authorities became aware of the abusive practice and observed the necessity to develop consumer protection policies. This led to the enactment of the Law to Protect and Defend Financial Services Users in 1999 and the creation of the National Commission for the Protection and Defence of Users of Financial Services (CONDUSEF).

Originally CONDUSEF was designed to be an ombudsman in financial consumer protection that could conciliate disputes between institutions and consumers, with the capacity to formulate unbinding recommendations without being authorised to impose any sanctions. But a weak organism without any real enforcement powers could not fully pursue a protection purpose. Therefore, several efforts have been made since then to turn CONDUSEF from an ombudsman into a real authority with specific and full regulation and supervision powers.[2]

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2 www.centerforfinancialinclusion.org/publications-a-resources/client-protection-library/107-summary-of-client-protection-in-mexico.

In 2000 Congress passed a reform to require financial institutions to maintain specialised units for the attention of consumers (UNEs). These units were designed to provide answers to requests and claims filed by consumers. In 2002 the Secured Credit Transparency Law was enacted, bringing many useful and protective concepts such as total annual cost (CAT) and implementing mandatory incorporation of certain clauses in adhesion contracts. In 2004, the first Transparency and Financial Order Law was enacted. This was a major step in regulating fees, eradicating some discriminatory practices and implementing an obligation to register fees before the Mexican Central Bank.

In 2007 a new Transparency and Financial Order Law was enacted. It created several registries including those for fees and adhesion contracts. It also required financial institutions to offer some basic products and regulated electronic transactions. In 2009 many consumer protection authorities were transferred from the National Banking and Securities Commission (CNBV) to CONDUSEF, who received regulation, inspection and sanctioning authority. In 2010 the Central Bank was vested with the power to authorise and modify the fees charged by the financial institutions to clients, as well as the applicable procedure and regulation for releasing collateral loans upon payment, and the authority to publish interest rates for comparative purposes.

Finally, the financial reform of 2014 brought about many changes, and it was the most important reform in the evolution of the consumer protection process.[3] The key changes from a consumer finance perspective were the following: (1) CONDUSEF was vested with powers to issue and publish recommendations to financial institutions; (2) CONDUSEF was authorised to represent financial users in class actions against financial institutions; (3) a Bureau for Financial Institutions was created under the supervision of CONDUSEF to provide consumers with information on the performance of financial institutions including claims initiated against them and sanctions imposed; (4) CONDUSEF was vested with powers to determine which clauses are abusive under adhesion contracts and to order institutions to remove them; and (5) a general prohibition against tied sales was included.

Currently, one of the hot topics of consumer finance in Mexico – as in many other parts of the world – is fintech. Mexico is one of Latin America's leaders on the financial technologies market. According to figures of the Mexican Central Bank there are currently 158 fintech platforms operating within our country, of which 30 per cent are focused on payments and virtual currencies; 28 per cent on crowdfunding and online loans; 13 per cent on financial management for companies; 4 per cent on royalty-based crowdfunding; and 25 per cent dedicated to other activities.[4]

However, while this market continues to grow Mexico does not have any specific regulation for these entities. Financial authorities consider these technologies as important for financial inclusion and continue to seek their regulation in order to promote competition

3 Full text at: www.dof.gob.mx/nota_detalle.php?codigo=5329408&fecha=10/01/2014. A brief summary of such reform is available at: www.banxico.org.mx/disposiciones/marco-juridico/resumen-de-las-principales-reformas-al-sistema-fin/%7BCC6BFD8E-D1F9-474F-2E20-DFC2434432E9%7D.pdf.

4 Figures obtained from the 2016 Financial System Report issued by the Mexican Central Bank, full text is available at: www.banxico.org.mx/publicaciones-y-discursos/publicaciones/informes-periodicos/reporte-sf/%7B14D26AD1-8933-0713-B7D6-59CBBC13ECEA%7D.pdf.

with other financial institutions but the quest for financial inclusion clashes with the need to ensure consumer safety and to address anti-money laundering concerns. The regulator is reviewing how best to balance the goals of financial inclusion and consumer protection in forthcoming regulation.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The main statutes governing payment, deposit and lending services are the following:

a The Law to Protect and Defend Financial Services Users (LPDUSF), the main objective of which is to protect and defend the rights and interests of the public users of financial services rendered by public, social and private institutions and also provides all the powers and authorities granted to CONDUSEF.

b The Credit Institutions Law (LIC), the main objective of which is to regulate the banking and credit services and the organisation and functioning of all credit institutions as well as all operations that such institutions can perform, the protection of the public's interests and the terms on which the Mexican State will exercise its supervision of the Mexican Banking System.

c The Transparency and Financial Order Law (LTOSF), the main objective of which is to regulate all fees, exchange rates and all other aspects related to financial services, including the granting of facilities by financial institutions and by non-financial institutions.

d The Secured Credit Transparency Law (LTFCCG), the main objective of which is to regulate all financial activities and services provided for the granting of secured loans for housing purposes (facilities for the acquisition, construction, refurbishment or refinancing of housing).

e The General Law of Negotiable Instruments and Credit Transactions (LGTOC), the main objective of which is to regulate all negotiable instruments and credit transactions including, among other things, deposits and lending transactions.

ii Regulators

The Mexican financial system is a well-developed system in which several regulators take part.

The first regulator that needs to be mentioned is the Ministry of Finance and Public Credit (SHCP). It is in charge of planning, coordinating, evaluating and protecting the financial system.

There are two supervisory Commissions. The first one is the CNBV, which has general powers of regulation and supervision over most financial entities. The CNBV regulates capital requirements, mandatory reserves, anti-money laundering and know-your-customer policies and generally the operations of credit institutions. The second one is CONDUSEF, which primarily acts to protect financial consumers. It pursues financial education and financial transparency for consumers to make informed decisions on the products offered on the Mexican financial system. It also protects consumers' interests through regulation and supervision of the financial institutions and provides assessment and legal services for the defence of their rights.[5]

In order for CONDUSEF to reach its objectives, it has been vested with powers that can be classified into three categories:

a regulation powers over: adhesion contracts; account statements; marketing and advertisement; transaction receipts; sound financial practices; offering and commercialisation of products; and supervision, inspection and surveillance;

b consumer protection powers over: the complaint process; corrective and sanctioning measures; initiating class actions; the conciliation process; legal assessment and defence; and the arbitration procedure; and

c transparency powers over: comparison of fees; evaluations regarding adhesion contracts, cover letters of contracts, web pages, account statements, brochures, information and advertisements; comparison of products and services; publishing fines and reports of evaluations; and overseeing several registries for public consultation.

There are five kinds of complaint processes regulated by CONDUSEF. These are in addition to court procedures. Two may be filed first before the financial institution (for example, banks, investment funds, bonding institutions, general bonded warehouses):

a claims filed before UNEs, in terms of the procedure foreseen by Article 50 *bis* of the LPDUSF; and

b claims filed before the financial institutions, in terms of Article 23 of the LTOSF on which the consumer has 90 days to file the claim, the financial institution has 45 days to submit their answer and 45 days to submit documentation.[6]

The other three may be filed directly before CONDUSEF:

c Electronic procedure. The costumer makes a visit to CONDUSEF's offices and files its printed claim. Later on CONDUSEF notifies and makes the corresponding requirements to the financial institution through a homologated electronic system.

d Conciliation procedure. In terms of Article 60 and followings of the LPDUSF, the procedure starts by filing a claim to CONDUSEF and within the next 20 days a hearing is scheduled to be held. After the hearing an opinion is issued by CONDUSEF. If required, CONDUSEF can also issue a technical opinion depending on whether the contractual obligation not complied with by the financial institution is considered to be valid and enforceable and this report may later be submitted to the competent courts.

e Arbitration. In terms of Article 73 of LPDUSF, this is a voluntary procedure that must be agreed by both parties to appoint CONDUSEF or a third party to act as an arbitrator to finally settle their dispute.

Separately and acting as an independent and autonomous entity, we have the Mexican Central Bank in charge of monetary policy, issuing currency, promoting and developing a sound

5 Full text of the LPDUSF that regulates CONDUSEF is available at: www.diputados.gob.mx/LeyesBiblio/pdf/64.pdf.

6 Full text of the LTOSF can be found at www.diputados.gob.mx/LeyesBiblio/pdf/LTOSF.pdf.

financial system, regulating intermediation and financial services and determining alongside SHCP the Mexican exchange policy. The Mexican Central Bank has two types of powers regarding consumer protection.[7] The most important is regulation over fees charged, interest rates, exchange rates, credit cards and banking operations. The second regards transparency, specifically the power to publish comparative studies of economic terms among the different products offered.

Finally, alternative lenders (i.e., non-financial institutions) are supervised and regulated by the Consumer Protection Agency (PROFECO). The LTOSF grants PROFECO fewer powers and authorities than those granted to CONDUSEF and only with respect to non-financial institutions. PROFECO has issued its own regulations on adhesion contracts that are applicable to alternative lenders (non-financial institutions).

III PAYMENTS

i Overview

Cash continues to be the most important payment method in Mexico. The number of people who do not have their own bank account in Mexico is significant. According to the statistics of the most recent financial inclusion report published by the CNBV, only 62 per cent of the Mexican adult population holds an account with a financial institution.[8] The CNBV and the Mexican Central Bank are very much concerned with this and over the last decade have made considerable efforts to increase banking penetration in Mexico. Some of these measures have included launching simplified bank accounts with transactional and balance limits but that may be opened remotely, such as first and second level accounts that are addressed in Section IV, *infra*. Others regard facilitating mobile payments. At the same time, cash payments are being limited and controlled under anti-money laundering and counterterrorism provisions.

Credit and debit cards are also recognised payment methods but their penetration level is still very far from that of cash. Credit cards may be issued by almost any lending financial institution (banks and multiple purpose financial entities) while debit cards may only be issued by banks and in a limited manner by other financial institutions authorised to take retail deposits.

Non-financial institutions may only issue closed-loop prepaid cards that are not cash-redeemable. Open-loop cards (i.e., those that may be used with different merchants) and cash-redeemable cards may be deemed to be retail-deposit-taking activities, which are limited to banks and a limited number of financial institutions.

Electronic transfers are also common payment methods. Banks are required to offer this service to their clients. Certain fees may be charged for interbank transfers. The Electronic Interbank Payment System (SPEI) is the most-used system for these means.[9] SPEI is a system developed and managed by the Mexican Central Bank that allows the public

7 All of the Mexican Central Bank's authorities are regulated under the Law of the Bank of Mexico, available at: www.diputados.gob.mx/LeyesBiblio/pdf/74.pdf.

8 The full text of the CNBV's 7th financial inclusion report is available at: www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20IF/Reporte%20de%20Inclusion%20Financiera%207.pdf.

9 More information on SPEI available at: www.banxico.org.mx/sistemas-de-pago/servicios/sistema-de-pagos-electronicos-interbancarios-spei/.

to generate online transfers almost instantly. The Mexican Central Bank clears and settles these transactions and it works very efficiently. To use the SPEI platform, users must have a standardised bank key (CLABE) and the account number of the receiver's debit card or their mobile phone number (if the account has been previously linked).

Checks are also used as payment methods although the new banked generation is relying more on electronic payments and card payments. In Mexico the number of transactions involving checks suffered a 7.5 per cent decrease between 2009 and 2014 according to the information published by Tecnocom on its 2015 trends in payment instruments report.[10]

Mobile banking is a recently introduced payment method regulated under the General Provisions Applicable to Credit Institutions (the General Provisions) issued by CNBV, which defines it as the electronic banking service accessed through a mobile phone number linked with the account.[11] This payment method is subject to the limitations set forth on account levels referred to in Section IV, *infra*. Mobile banking is highly regulated in terms of authentication, identification and security procedures, among others.

The General Provisions contain several provisions that ensure credit institutions establish sufficient safety measures and security controls for the information used through electronic devices, such as the express consent of the user for hiring this service, a provision in the agreement specifying the maximum amounts allowed per operation, mechanisms to identify the user and grant access, and procedures to cancel the service, among others.

Under the same regulations, mobile payments are defined as those performed through a mobile limited to an equivalent of 1,500 *unidades de inversión* (UDIs) per day (approximately 8,400 pesos). The regulation of mobile payments is lighter than the regulation of mobile banking to foster financial inclusion by simplifying low-value payments.

ii Recent developments

As a result of the current regulation and according to CNBV's figures the use of mobile banking and mobile payments is on the rise. During December 2013 the accounts linked with a mobile number were 2.7 million, whereas by June 2015 the accounts linked with mobile hit 6.07 million. These figures showed substantial growth equivalent to a 124.9 per cent.[12]

Another recent development was the establishment of security measures applicable to both credit and debit cards to avoid their cloning by replacing the use of the magnetic stripe on cards with a chip. This led to the issuance of new cards and several modifications made by the institutions in order to adapt all their ATMs and points of sale (POS) nationwide. As a consequence of the above, any institution that agrees to perform operations with cards without a chip at their ATMs or POS assumes liability for all risks and must bear any costs arising from cloning such unrecognised charges reported by the cardholder.

10 The full text of Tecnocom's trends in payment instruments report for 2015 is available at: www.tecnocom.es/documents/10181/6646636/Tecnocom15_esp.pdf.

11 Full text of General Provisions Applicable to Credit Institutions issued by CNBV is available at: www.cnbv.gob.mx/Normatividad/Disposiciones%20de%20car%C3%A1cter%20general%20aplicables%20a%20las%20instituciones%20de%20cr%C3%A9dito.pdf.

12 Full text of the CNBV's financial institution report found at: www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20IF/Reporte%20de%20Inclusion%20Financiera%207.pdf.

Another key development was the issuance of the General Rules for Payment Networks. Before the issuance of these rules, card payment networks were mainly unregulated. These rules regulate the following:[13]

a The terms and conditions of the payment networks, which among other things (1) permit the inclusion of new participants in networks on a non-discriminatory and competitive basis in respect to pricing, operational, technical and contractual conditions; (2) permit the resolution of conflicts of interest between the participants in networks; (3) allow transparency of the content available to potential participants in networks; and (4) guarantee the integrity of the payment networks, the continuity of the operation and security of the information without creating barriers to entry.

b Participants in networks, by establishing the inclusion of certain provisions on the agreements executed among them, such as: (1) an itemised description of the services, conditions and standards of the services provision; (2) terms and conditions (including economic terms and consideration) of the services provided in the agreement; (3) equal and non-discriminatory treatment; and (4) production of account statements.

c Interchange fees, which shall be included in the conditions for the participants and duly registered with the Mexican Central Bank observing the procedure and requirements set forth for such means.

Also related to payment networks, a few years ago several complaints from the participants of the credit and debit card payment market over the lack of transparency and competition regulation in clearing houses were filed. A clearing house (switch) is an entity authorised by the Mexican Central Bank to act as the central entity or operator of a centralised processing mechanism through which authorisation requests, payments authorisations, payment rejections, returns, adjustments or other financial obligations related to card payments are exchanged exchange between acquirers and issuers, including clearing.

In response the Mexican Central Bank, seeking to ensure competition within the sector, issued the Rules applicable to Clearing Houses for Card Payments with the objective of combating barriers to entry, avoiding price distortions and improving security systems. Among the prohibitions set forth in such regulations all exclusivities, discriminatory practices and charging of fees not authorised by the Mexican Central Bank were forbidden.[14]

Finally, we should mention that non-traditional players like PayPal are also bringing new payment systems into Mexico. The regulation of these systems that are linked to traditional debit and credit cards but allow electronic transactions is still very underdeveloped.

13 Full text of the General Rules for Payment Networks is available at: www.cnbv.gob.mx/Normatividad/Disposiciones%20de%20car%C3%A1cter%20general%20aplicables%20a%20las%20Redes%20de%20Medios%20de%20Disposici%C3%B3n.pdf.

14 Full text of the Rules applicable to Clearing Houses for Card Payments available at: www.banxico.org.mx/disposiciones/normativa/circular-4-2014/%7BA29B4521-A321-6047-0D7C-B074C58C03F9%7D.pdf.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

The Mexican Central Bank in exercise of its regulatory powers issued the general provisions contained in Disposition 3/2012.[15] Four types of local-currency deposit accounts are identified and regulated. Each represents a different level that depends on the balance and transactional amounts in the account. This classification is relevant to determine the different means available to withdraw them from such accounts and requirements to open them, including know-your-customer requirements. The higher the level the more difficult it is to open and access such accounts.

The first level belongs to those accounts in which the amount of resources deposited over a monthly period is limited to be under 750 UDIs (approximately 4,200 pesos). The balance of these accounts can never exceed 1,000 UDIs (approximately 5,600 pesos). The holders of these accounts are only able to withdraw their resources using debit cards. All other transactions through mobile phones or electronic devices other than ATMs or POS remain prohibited for level 1.

The second level belongs to those accounts in which the amount of resources deposited over a monthly period is limited to under 3,000 UDIs (approximately 16,800 Mexican pesos) without any limit on the balance in the account. The key feature of these accounts is that according to anti-money laundering regulations they may be opened remotely (i.e., without the need to visit a branch).

The third level belongs to those accounts in which the amount of resources deposited over a monthly period is limited to under 10,000 UDIs (approximately 56,000 pesos) without any limit on their balance. These have fewer know-your-customer requirements than level-four accounts but more than level-two accounts.

Accounts in levels 2, 3 and 4 are entitled to use all withdrawal means except checks.

The last level has no limit on deposits or balance but the level of scrutiny and the requirements to open these accounts is the highest. Only these accounts are checking accounts.

Another type of deposit account is the deposit account for foreign currency on sight. These accounts are only available to entities and not to individuals except in limited circumstances.

Deposit insurance with respect to bank accounts is provided by IPAB. IPAB is a decentralised public organism that, subject to certain restrictions, guarantees the amounts of deposits and credits up to 400,000 UDIs per account holder (approximately 2.24 million pesos).

Another important topic is what are known as basic products. Every bank that receives local currency sight deposits is required by law by law to offer individuals a basic deposit account product for sight deposits, savings or payroll that should be free from any fees or charges. These basic products are subject to maximum monthly deposit limits since their main objective is to aid consumers with lower incomes.

15 Full text available at www.banxico.org.mx/disposiciones/normativa/circular-3-2012/%7B60333E30-FC8B-94D3-E1D0-4AF8E3C75E90%7D.pdf.

ii Recent developments

In an effort to increase banking penetration, a few years ago the CNBV authorised the establishment of bank agents. They are now an important channel to offer payment products. Convenience stores, such as OXXO, are the most remarkable example of bank agents. Bank agents can open bank accounts and perform certain banking services on behalf of banks. To date 18 different banks have agents. Banks require certain authorisations to engage a non-financial institution as an agent.

An important recent development is the option for account holders to link their mobile number to their account. This serves the purpose of expanding electronic transfers by providing a friendly alternative to traditional electronic banking services. Mobile communication penetration is high in Mexico so the rationale behind this change was to increase banking penetration by relying on a tool that is widely known and used by Mexican customers. This has proven beneficial in other jurisdictions. The linking process is determined by each institution, made through SMS and limited to only one account per mobile number.

V REVOLVING CREDIT

i Overview

Credit cards are means to withdraw from a credit facility. An individual or entity that is granted with a credit card needs to execute a credit facility agreement with the bank or lending institution. Credit facility agreements are regulated by the LTOSF and secondary regulation issued by CONDUSEF for financial institutions and PROFECO for non-financial institutions.

Credit cards, as a withdrawal means, are also regulated by the Mexican Central Bank and specifically by the provisions of Disposition 34/2010.[16] Important rules for the protection of consumer interests were set out in such Disposition, such as: (1) entities can execute credit facility agreements with banks or lending institutions but credit cards can only be issued by individuals; (2) credit cards are non-transferable and must only be issued and delivered upon request of the holder; (3) all credit cards must be delivered inactivated; (4) the institution issuing the credit card must take out insurance that covers the amount of the debt in case of the holder's death.

Similarly to what occurs with deposit accounts, every financial institution that offers revolving credit facilities linked to credit cards to the public is required by law to offer individuals basic credit card products that shall be free from any fees or charges. These basic products are subject to a certain credit limit and carry special requirements, since their main objective is to aid consumers with lower incomes.

16 Full text available at: www.banxico.org.mx/disposiciones/normativa/circular-34-2010/%7B8589E2C1-0350-4469-94DE-DC929B400C2F%7D.pdf.

Another topic to be discussed with respect to credit cards is regulation on interest rates contained in the LTOSF and the general provisions contained in Disposition 14/2007 issued by the Mexican Central Bank.[17] The main provisions may be summarised as follows:

a all credit must have one interest rate only. This means that only one ordinary interest rate and, if applicable, only one default interest rate can be provided under a credit agreement. As an exception to this rule, different rates are allowed when several interest periods are provided, although each interest period cannot be less than three years;

b the calculation methods for interest rates may be freely determined by the parties using one of the following options: a fixed rate; a variable rate using only the reference of alternate rates mentioned in the Disposition; and a floating band rate with a maximum fixed limit;

c rates can only be unilaterally modified by the credit institution for revolving credit facilities with prior written notice given at least 30 days before it becomes effective, in order that clients may decide whether or not they intend to continue;

d as a general rule, credit interest can only be charged after the contract becomes effective and is in arrears, therefore charging interest in advance is forbidden; and

e for most credit banks must allow anticipated payment of loans and debts.

Similar to the regulations for interest rates mentioned above, according to the general provisions contained in Disposition 22/2010[18] and 36/2010[19] issued by the Mexican Central Bank there are also several principals that need to be observed regarding fees:

a institutions can only charge one fee per event;

b alternative fees are forbidden;

c no fees can be charge for the cancelation of financial services;

d fees must be properly registered and published; and

e in order to modify fees a special process has to be observed.

ii Recent developments

In 2009 the LTOSF was amended to include regulators against predatory lending. For instance, loans may only be granted based on the borrower's borrowing capacity; transactions that overdraw the credit limit shall not be authorised; credit cards can only be issued upon request; the credit card limit can only be raised upon the client's authorisation or request; and the minimum payment shall be calculated with a method that excludes the possibility of negative amortisation.

17 Full text available at: www.banxico.org.mx/disposiciones/normativa/circular-14-2007/%7B02420422-590D-BF48-356D-E25E6AB76656%7D.pdf.

18 Full text available at: www.banxico.org.mx/disposiciones/normativa/circular-22-2010/%7B0000032C-5C42-98A8-C852-DAAD11A0FE57%7D.pdf.

19 Full text available at: www.banxico.org.mx/disposiciones/normativa/circular-36-2010/%7BBF11D750-CA4B-E981-49AF-239F94F9FAF4%7D.pdf.

According to CONDUSEF figures, both credit and debit cards currently hold 90 per cent of all banking-related claims; as the credit card is the product related to most claims with 56 per cent of the total. These figures show a 39 per cent increase compared with 2015.[20]

In addition, the Mexican Supreme Court recently granted judges discretionary powers to modify interest rates. This will be discussed in Section IX, *infra*.

VI INSTALMENT CREDIT

i Overview

A few decades ago, granting instalment credit was only based on the amount of assets or collateral that the borrower had. This was an unhealthy practice that hindered most people's access to credit and resulted in institutions wasting considerable time, effort and money on collection practices because many of the credits defaulted.

As a result of the above new regulation was issued to determine eligibility criteria that have to be met by the borrower in order to access credit. Relevant factors to take into account for lenders are: (1) the borrower's payment capacity; (2) the borrower's solvency and assets; (3) level of debt; (4) credit history; and (5) job stability. [21]

The LTOSF and secondary regulation issued by CONDUSEF for financial institutions and PROFECO for non-financial institutions regulates installment credit from a consumer perspective. Some of the main rules are described below.

Loan agreements executed through an adhesion contract (as such term is defined in Section VIII, *infra*) must have a cover letter that contains the total annual cost (CAT). CAT is defined as an annual percentage indicator obtained after measuring the 'all-in' financing cost. In other words, it needs to include all costs, expenses and applying fees, helping consumers to compare the different products offered by institutions. This provision is also applicable to credit card facility agreements.

An amortisation schedule must be provided by the lender, which details the balance of principal and interest, the date and amount for each payment to be made bearing in mind that interest can only be charged for the duration of contracts and any charges in advance are forbidden for most credits. This statute also introduced the obligation of institutions to receive anticipated payments as amounts destined to reduce principal and early payments that are exhibitions made in advance to avoid default. If prepayments are made the institution has the obligation to issue a new amortisation schedule.

Also as result of the reforms passed and early discussed, the Unregulated Financial Company for Multiple Purposes (SOFOM ENR), which is one of the most-used vehicles for micro-financing purposes, was placed under new regulation that required it to be registered under CONDUSEF supervision. Therefore, these entities changed from being 'unregulated' to being 'lightly regulated'.

20 Figures available at: www.gob.mx/condusef/prensa/se-incorporan-al-buro-de-entidades-financieras-reclamaciones-por-posible-fraude-robo-de-identidad-banca-remotay-comercio-electronico.

21 Article 65 of LIC, full text available at: www.diputados.gob.mx/LeyesBiblio/pdf/43_170616.pdf.

ii Recent developments

As a result of the new supervision powers of CONDUSEF over the multiple SOFOM ENR companies, CONDUSEF revoked 1,449 registries of these institutions for violations to transparency and anti-money laundering regulations.[22] This proves that CONDUSEF is taking its enforcement and regulatory powers seriously with respect to SOFOM ENRs.

Regarding mortgages, the overall interest rate was of 10.19 per cent for June 2016, which meant a new historical minimum for these types of credit, considering that the overall interest rate for June 2009 was of 12.8 per cent, meaning a reduction of 20 per cent.[23] Interest rates increased at the end of 2016 following concerns of inflation by the Mexican Central Bank derived from the significant devaluation of the Mexican peso and they are expected to continue increasing during 2017.

Mortgage credit in Mexico has greatly increased over the 2009–2015 period; in 2009 around 83,000 credits were granted, which were estimated to be worth around 59.356 billion pesos, while for 2015 the total number was approximately 114,000 credits granted, estimated to be worth 112.693 billion pesos. This comparison shows 90 per cent growth in this sector. As for 2016 the statistics for the first semester show that credits granted exceed 55.68 billion pesos, thus by the end of the year they are expected to overtake 2015 results.[24]

Regarding personal loans, CONDUSEF revealed that until April 2016 around 11.3 million personal credit contracts had been entered into worth approximately 188 billion pesos. Twenty-five banking institutions offer this type of credit and among those there are eight banks that concentrate 80 per cent of all personal loans.[25]

For car loans there are 18 banking institutions offering this product, among which seven of them concentrate 80 per cent of the total number of credits. As a result of CONDUSEF evaluations those banks received an overall result of 5.7 out of a 10-point scale, the highest ranking institution for this evaluation was BBVA Bancomer, which received a 7.1, and the lowest-ranking institutions were Scotiabank and HSBC, which each received 4.[26]

VII OTHER AREAS

Consumer protection laws have implemented several registration requirements to make information publicly available to consumers. Below is a description of some of these registration requirements.

a SIPRES – The registry in charge of providing public access to corporate and general information of the financial institutions under CONDUSEF supervision, such as their domicile and minimum capital stock.

22 Full Article is available at: www.gob.mx/condusef/prensa/1-449-sofom-enr-no-renovaron-su-registro-ante-condusef?idiom=es.

23 Statistics available at: www.gob.mx/condusef/prensa/reprueban-bancos-en-supervision-de-credito-hiportario.

24 Idem.

25 Statistics available at: www.gob.mx/cms/uploads/attachment/file/118517/supervision-credito-al-consumo.pdf.

26 Statistics available at: www.gob.mx/condusef/prensa/presenta-condusef-resultados-de-la-supervision-de-credito-al-consumo?idiom=es.

b RECA – The registry implemented for financial institutions to submit all their adhesion contracts so that consumers can be informed and have access to the content of the different contracts used by them.

c REUS – A registry to which consumers submit their information when they do not desire to be disturbed by any merchandising or advertisement communications from financial entities.

d RECO – The registry of all fees that institutions under CONDUSEF supervision charge, it was established for transparency purposes and it functions in a parallel way to that under the supervision of the Central Bank.

e REUNE – This registry serves as a directory of all UNEs.

f REDECO – The registry providing information regarding collection agencies that assist financial institutions on the collection process and it was created as a database to include all of their relevant information so that anyone could easily file a complaint for abusive practices.

Collection practices were recently regulated by the issuance of rules for collection agencies by the CONDUSEF.

VIII UNFAIR PRACTICES

Deriving from the 2014 reform, CONDUSEF now has the power to determine which clauses are considered to be abusive in the adhesion contracts of financial institutions and to order financial institutions to remove them. For such effects CONDUSEF defines: (1) an adhesion contract as a document unilaterally drafted by a financial institution for the purpose of implementing non-negotiable consistent general terms and conditions to be applicable for one or several products, operations or services with consumers; and (2) an abusive clause is a clause that brings imbalance between the rights or obligations of the parties harming the consumer.

The following are some of the abusive clauses detected and banned by CONDUSEF's General Provisions:[27]

a clauses establishing early termination if borrower defaults an obligation unrelated to the contract (cross-defaults);

b clauses allowing the institution to terminate the contract early without prior notification;

c clauses that unreasonably restrict consumers' rights;

d clauses that impose a penalty, charge or fee for early or anticipated payments; and

e clauses allowing the modification or restriction of the contract without the prior consent of the consumer, unless such modification is in consumers' favour.

In collection practices, it was observed that collection agencies often used names that resembled public institutions, used confidential or private numbers that rendered it difficult to identify them, threatened and intimidated debtors or their relatives, and tried to collect

27 Full text of the General Provisions available at: www.dof.gob.mx/nota_detalle.php?codigo=5368784&fecha=19/11/2014.

debts from third parties. In response, the authority prohibited those practices, created the aforementioned REDECO and implemented a system to file claims to impose sanctions for these types of abuses and practices.

IX RECENT CASES

i Enforcement actions

According to figures of CONDUSEF for the first 11 months of this year, 5,220 sanctions were imposed on financial institutions with an estimated total amount of 161 million pesos, from which: (1) 88.5 million pesos were imposed as a result of violations to LPDUSF; (2) 72.9 million pesos were imposed as a result of violations to LTOSF; and (3) 40,000 pesos were imposed as a result of violations of the LIC.[28]

Regarding remote banking (internet, telephone, mobile and similar transactions) the figures for the first semester of 2016 show that 1.1 million claims were filed for an estimated total of 2.95 billion pesos, most of the claims were filed for fraud, cloning, theft and identity theft issues and the amount recovered was 1.108 billion pesos.

Also regarding abusive clauses[29] around 900 clauses have been detected from which 647 have been already eliminated, while the Bureau for Financial Institutions shows that currently 289 other abusive clauses are in the elimination process. For the first time insurance institutions were included.

ii Disputes before the regulator

In the first semester of 2016 a total amount of 3.742213 million claims were filed regarding the financial sector, which meant a 46 per cent increase compared the previous year. Of that total, the institutions receiving more claims were banks, with 3.690142 million of which 90 per cent of such claims concerned credit and debit cards.

During the first 11 months of this year, CONDUSEF performed 1.559370 million defence actions, of which 1.332222 million consisted of legal assessment and 1,848 were free legal defences.

Regarding the free legal defence programme conducted by CONDUSEF for the period January–September 2016, the results show that 99.23 per cent of the trials were resolved in favour of consumers. There were a total of 1,030 trials, of which 1,021 were won and only nine trials were lost. Such actions resulted in the recovery of almost 47.1 million pesos for such consumers.[30]

28 Figures available at: www.gob.mx/cms/uploads/attachment/file/173832/multasporley.pdf.

29 Figures available at: www.gob.mx/condusef/prensa/se-incorporan-al-buro-de-entidades-finan cieras-reclamaciones-por-posible-fraude-robo-de-identidad-banca-remotay-comercio-electronico.

30 www.gob.mx/condusef/prensa/recupera-condusef-47-1-mdp-a-favor-de-usuarios-de-enero-a-septiembre.

iii Litigation

The Mexican Supreme Court of Justice recently ruled[31] that judges may discretionally reduce interest rates considered inequitable and notoriously usury to them, on such precedent the Supreme Court determined that the usury financing prohibition foreseen by the third paragraph of Article 21 of the American Convention on Human Rights allow Mexican judges to use their discretion and criteria to order the reduction of any interest rate considered as excessive or abusive, even if the reduction is not requested by the parties involved in the procedure.

This resolution also establishes several elements that judges need to review in every case, such as the interest rate used by other banks in similar operations. Nevertheless, this resolution does not limit the capacity of judges to reduce interest rates.

X OUTLOOK

Even though interest rates are expected to increase and while the future of NAFTA remains uncertain, we can expect the Mexican financing sector to continue to grow. As for consumer protection, we can expect CONDUSEF to increase its supervision of insurance entities and to extend its regulation.

According to the aforementioned figures we also expect the free legal defence programme of CONDUSEF to increase its scope and ensure positive results. This authority also has an active role regarding identity theft and phishing, which will be some of the things we should be on the lookout for.

We also expect upcoming regulation on fintech that is sure to have an impact on web-based lending, electronic payments, crowdfunding and other alternative sources of financing.

31 Resolution by the First Chamber of the Mexican Supreme Court issued regarding the contradiction between two precedents number 350/2013.

Chapter 9

PORTUGAL

Hélder Frias[1]

I OVERVIEW

The Portuguese financial system is fully integrated with the international and European financial markets. The Bank of Portugal (BdP) joined the European System of Central Banks (ESCB) on 1 January 1999. As a result, the definition and implementation of the country's monetary and exchange rate policy, the management of official currency reserves, the efficiency of payment systems and the issuing of banknotes are now controlled by the ESCB.

The Portuguese regulatory system governing credit institutions and financial companies is, in broad terms, identical to the legal framework in force in other EU Member States. The direct influence of EU law has provided the Portuguese banking industry with a high level of protection regarding consumer finance, and recent national government policies have further contributed to this high level of protection. This has been achieved through reinforcing the information disclosure duties of credit institutions and financial companies and setting limits on interest rates in certain types of financing agreements.

Further to the Economic Adjustment Programme for Portugal adopted in response to the 2011 to 2014 economic crisis, the Portuguese banking industry has undergone significant adjustments that led to an asset contraction and to a change in funding structure, giving preference to consumer deposits rather than wholesale funding through securities. The banking industry in Portugal now comprises over 150 credit institutions, of which the four largest groups of banks are (by total value of assets and from the largest to the smallest): Caixa Geral de Depósitos (a state-owned bank), Banco Comercial Português, Novo Banco (a bridge bank following the resolution measure applied by the BdP over Banco Espírito Santo) and Banco Santander Totta.

By the end of the first quarter of 2016 the key financial indicators showed that the banking industry had a total asset value of €408.9 billion, while the value of credit granted to customers amounted to €255.4 billion and the value of deposits to €249.1 billion.

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II LEGAL AND REGULATORY FRAMEWORK

i Legislation

The Portuguese legal framework governing consumer payment, deposit and lending services is strongly influenced by EU legal instruments. As for national law, at the top of the hierarchy, the Constitution of the Portuguese Republic (CRP) contains principles regarding the national financial system as a whole as well as other provisions governing the regulatory role of the BdP. Subordinate to this is the Basic Law of the BdP, enacted by Law No. 5/98, of 31 January, as amended. This establishes the basic structure of the BdP and relevant aspects of banking supervision. The Commercial Code and Civil Code must also be considered.

The Portuguese regulatory framework governing the activity of credit institutions and financial companies (authorisation, registration, etc.) is set out in the Credit Institutions and Financial Companies General Framework, enacted by Decree-Law No. 298/92, of 31 December, as amended (RGICSF). This law also governs, among others, the supervisory activity of the banking regulator, the BdP and the Resolution Fund. In turn, payment institutions are subject to the Legal Framework of Payment Institutions and Payment Services, enacted by Decree-Law No. 317/2009, of 30 October, as amended.

In particular, Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers was implemented into Portuguese law by Decree-Law No. 133/2009, of 2 June. This regime has been in force since 1 July 2009. Notwithstanding, the previous regime enacted by Decree-Law No. 359/91, of 21 September, is still applicable to credit agreements executed before 1 July 2009.

Among several others, the following laws (as amended) must also be taken into consideration: (1) Decree-Laws No. 381/77, of 9 September, and 454/91, of 28 December, regarding payments by means of bank cheques and other debt securities; and (2) Decree-Laws No. 220/94, of 23 August, and 51/2007, of 7 March, regarding lending agreements (the applicable information, disclosure duties, interest rates, etc.) and Decree-Law No. 349/98, of 11 November, regarding mortgage loans.

Lastly, Decree-Law No. 446/85, of 25 October, as amended,[2] establishes the Portuguese unfair contract terms regime applicable to adhesion contracts.

ii Regulation

The BdP, as the Portuguese central bank, is principally responsible for implementing and enforcing the regulation of consumer finance services. Notwithstanding, other bodies, notably the Portuguese Association of Consumer Law (APDC) and the Consumer's Directorate-General, from the Ministry of Economics support consumers in general and in some circumstances offer legal advice to their members.

The BdP is responsible for the prudential and market conduct supervision of credit institutions, financial companies and payment institutions to ensure the stability, efficiency and soundness of the financial system, as well as the compliance with rules of conduct and transparency requirements towards bank customers, and ensuring the safety of deposits and depositors, and the protection of consumer interests. Credit institutions or financial

2 Decree-Law No. 446/85 has been amended, *inter alia*, by Decree-Law No. 220/95 of 31 January as a result of Directive 93/13/EEC of the Council of 5 April on unfair terms in consumer contracts.

companies pursuing financial intermediation activities are subject to the supervision of, and regulations issued by, the Portuguese Securities Market and Exchange Commission. In turn, whenever those entities also pursue insurance intermediation activities (e.g., banks), they will be subject to the supervisory powers, and the regulations issued by, the Portuguese Insurance and Pensions Supervisory Authority. Among others, a significant number of those regulations are targeted at consumer protection and safeguarding customer rights.

The BdP has powers to issue notices, instructions and circular letters, which set out rules and conduct for the banking industry regarding the services to be provided to the general public. Furthermore, the BdP may enforce Portuguese banking laws and regulations through: (1) fines and ancillary penalties; (2) mandatory injunctions; (3) seizure of documents and valuables or (4) special audits through on-site inspections.

Each consumer may file complaints against banks or other institutions (credit institutions, financial companies, payment institutions, etc.) within the scope of the marketing of consumers' banking services (deposits, home credit, consumer finance, credit cards, etc.). These entities must present their complaints book when solicited to do so. These complaints may also be filed directly before the BdP, which may only verify whether the institution is complying with its duties, and may not demand that the institution remedy the damages or compensate the consumer. This level of legal protection is only guaranteed by courts and similar judicial entities.

Finally, Portugal has implemented Directive 2013/11/EU of the European Parliament and of the Council, of 21 May, by means of Law No. 144/2015, of 8 September, regarding the alternative resolution of consumer disputes.

III PAYMENTS

i Overview

Payment instruments in Portugal are highly reliable and the payments market in Portugal is in line with best international practice. According to the official numbers released by the BdP, Portugal is the euro area country with the most card payments, as a percentage of GDP.

Prior to the entry into force in Portugal of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (the Payment Services Directive), the issuance and management of debit cards was mainly governed by the Bank of Portugal Notice No. 11/2001 of 20 November on credit and debit cards and corresponding terms of use (BdP Notice 11/01) and by the RGICSF. The pursuit of this activity in the Portuguese territory had to be carried out by credit institutions or financial companies.

Upon the implementation into Portuguese law of the Payment Services Directive by Decree-Law No. 317/2009, of 30 October, as amended (DL 317/09), the RGICSF has been amended to provide for the establishment of the new 'payment institutions' (which do not fall under the definition of credit institutions or financial companies) that are entitled to provide 'payment services' including the issuance of debit cards.

However, BdP Notice 11/01 has not been amended or revoked in light of the new rules on the provision of payment services. Consequently, at present, DL 317/09 provides rules on the issuance of debit cards applicable to the entities which may provide payment services – credit institutions, financial companies and payment institutions – and BdP Notice 11/01 provides rules on the issuance of debit cards for credit institutions and financial companies.

The large majority of rules provided for in BdP Notice 11/01 are also provided for in DL 317/09, although there are some differences: whereas in DL 317/09, when the client is not a consumer, or a micro enterprise, parties may agree that the rules on the information requirements set out in the law are not applicable, the rules set out in BdP Notice 11/01 are mandatory. Further, BdP Notice 11/01 requires the agreements to be written in Portuguese; it expressly provides that the information on charges and rates of interest cannot be inserted in the agreement by reference to a list of costs and charges available in the branches or by another medium (such as the website); and the issuer is entitled to change the agreement by giving 15 days' notice to the client.

More recently, Regulation (EU) 2015/751 of the European Parliament and of the Council, of 29 April 2015, on interchange fees for card-based payment transactions (IFR), became directly applicable in its entirety from 9 June 2016.

ii Recent developments

To date the BdP has only issued some guidelines on its website regarding interchange fees, which are mainly addressed to consumers, containing among other matters, a summary of the main provisions of the Regulation, and an explanation of the concepts of 'brands' and 'co-branding'.

Based on the information publicly available Portugal has not yet exercised (nor indicated that it will exercise) any of the three discretions mentioned below:

a discretion in relation to domestic consumer debit card transactions under Article 3(2) or 3(3) of the IFR;

b discretion to set a lower interchange fee cap in relation to domestic consumer credit transactions under Article 4 of the IFR; or

c discretion to waive fee caps in relation to domestic schemes, such as the three party payment card scheme, until 9 December 2018 under Article 1(5) of the IFR.

More broadly, retail payments grew in value and volume, reflecting the trend of private consumption in Portugal. Recourse to electronic payments rose further, particularly for international purchases, in line with the growth of tourism in Portugal. The use of cheques declined further, while recourse to electronic payment instruments continued to increase.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

In Portugal, only credit institutions authorised by the BdP may take deposits and other repayable funds.

As provided in Decree-Law No. 430/91, of 2 November, as amended, there are several types of deposits. If we consider the movement of funds, the most common are on-demand and term deposits. The first are characterised by the freedom to withdraw the funds at any time, while the second are refundable only after a certain period, although credit institutions may allow for early fund mobilisation subject to a penalty on the accrued interest. On the other hand, if we consider the banks' remuneration, we may include simple or indexed deposits, as the first use fixed rates (or variable rates indexed to money market rates), while in indexed deposits the remuneration depends on the evolution of other variable rates.

Under the principle of contractual freedom, each credit institution is free to determine the conditions in these types of contracts, which are frequently set out in standard adhesion contracts for the opening and managing of bank accounts. These contracts may reveal a clear asymmetry between the rights and obligations of credit institutions and consumers. As mentioned above, these contracts are subject to the Portuguese unfair contract terms regime.

Credit institutions must comply with certain information disclosure duties to ensure consumers understand the contract terms. The content of the information requirements regarding simple deposits is provided in BdP Notice No. 4/2009, of 20 August, while the details of the information for indexed deposits are set out in BdP Notice No. 5/2009, of 20 August.

In addition, credit institutions may authorise overdrafts, through an agreement with the consumer or a tacit acceptance from the institution itself. The first option is called an overdraft facility and is based on a contract between the client and the credit institution, allowing the client to continue to withdraw money up to a certain pre-agreed amount when the account has no more funds. The second option is called overrunning and refers to the situation where there is no prior agreement, instead the credit institution tacitly allows consumers to make use of funds even if it exceeds their current balance.

Under Decree-Law No. 27-C/2000, of 10 March, as amended, all credit institutions must offer access to basic banking services at a reduced cost through a minimum banking services account. This service consists of, in particular: (1) opening and holding of minimum banking services accounts; (2) provision of a debit card; (3) access to the accounts through cash machines, home banking services and over the counter; and (4) deposit facilities, withdrawals, payment for goods and services, direct debit and transfers between different national banks.

The Portuguese Deposit Guarantee Scheme (DGS) covers every deposit up to a maximum of €100,000 per client and per bank. Further, Directive 2014/49/EU of the European Parliament and of the Council, of 16 April, states that every DGS must ensure a capitalisation level of 0.8 per cent. Recent data shows that in 2015 the Portuguese DGS had a capitalisation level of 1.24 per cent, placing the Portuguese guarantee fund among the most highly capitalised DGSs within the EU.

ii Recent developments

Law No. 66/2015, of 6 July, has brought some changes to the legal framework for deposits. Firstly, credit institutions cannot offer overdraft facilities or overrunning under the regime of minimum banking services. Secondly, pursuant to the amendment now introduced in the RGICSF, credit institutions must send an annual invoice-receipt detailing all the fees and expenses related to on-demand deposits from the previous year to the account holder.

V REVOLVING CREDIT

A bank card is issued in accordance with an umbrella agreement that must establish the terms of the contractual relationship between the cardholder and the issuer. Very often a credit agreement is executed through the use of a credit card with a line of credit underlying it, as opposed to the lending of a certain amount. As the terms of a credit card are linked to the credit agreement, only where a limit has been set out in the scope of a line of credit is there the possibility of revolving credit. Lending entities must provide the customer with written contracts, which are commonly drafted as standard contracts (and therefore subject to the unfair contract terms regime) and usually presented as the card's general terms, as the cards' sole purpose is to serve as a means of payment.

As for servicing amounts charged by the credit card issuer, they vary among the different credit institutions. However, it is mandatory for all such costs to be clearly indicated in the credit agreement, which must contain information on all the applicable interest and exchange rates, or, if relevant, the calculation method and the reference date used in determining the applicable interest and exchange rate.

Decree-Law No. 227/2012, of 25 October, establishes the principles and rules on the management and monitoring of the risk of consumer default that credit institutions must follow. This statute provides that all credit institutions must create a plan of action for the risk of default (PARI). More importantly, this statute creates and defines the out-of-court procedure for regularisation of default situations (PERSI), which consists of a debt restructuring procedure for financial consumers. The PERSI is applicable to the majority of credit agreements executed with consumers and does not depend on any access conditions (not even a request from the consumer). During debt restructuring negotiations under the PERSI, the consumer has a set of legal guarantees, including prohibitions on credit institutions terminating the credit agreement; taking legal actions to claim those credits; and assigning those credits to a third party.

Finally, reference must be made to the current panorama of contactless cards that have recently been introduced in the Portuguese banking industry. Usually the issuer entity establishes both the maximum amount allowed for single payments and an overall maximum for successive transactions without the use of the card's PIN code. The BdP has recently issued a circular letter on the subject, publishing best practice regarding the information that issuers must provide to their customers, including the obligation to provide the information in writing or another durable medium.

VI INSTALMENT CREDIT

The consumer credit regime applies to contracts for amounts between €200 and €75,000. There are different forms of consumer credit, depending on their purpose, namely personal credit, which may include student and health loans; and car loans, through leasing, with reservation of title, or others. Even though they are all considered consumer credit, these contracts entail different costs, fees and charges.

The mortgage loan regime applies to contracts for the purpose of the purchase, construction, maintenance or improvements of privately owned property or the purchase of land for development. These contracts may be secured by a mortgage on the property, which may be reinforced by other means, such as the life insurance of the debtor and his or her spouse or any other kind of guarantee that may fit the intended purpose.

Credit institutions may terminate both consumer and mortgage loan contracts. Credit institutions may terminate consumer credit contracts if: there is a failure to pay two consecutive instalments exceeding 10 per cent of the total amount of credit; and the creditor has given an additional minimum of 15 days for the consumer to pay the late instalments, together with possible compensation due, with a warning regarding the consequences of losing the right to pay by instalments or the consequences concerning the termination of the contract. For the purpose of mortgage loans, credit institutions may terminate the contract if the consumer fails to pay at least three overdue and unpaid instalments.

For both types of credit contracts, consumers may request a partial or total early repayment, upon providing a prior notice to the bank. If the consumer decides on advanced repayment, it could result in extra costs. For consumer credit contracts, credit institutions may not charge any fees when this concerns the early repayment of loan agreements with a variable interest rate. On the other hand, they may do so in the case of the early repayment of loan agreements with a fixed interest rate. Concerning mortgage loans, banks may charge extra fees for early repayments for loan agreements with either fixed or variable interest rates.

The consumer, whether requesting details on consumer or mortgage loans, is entitled to clear, complete and up-to-date information regarding the characteristics, conditions and costs of the loan. Credit institutions, apart from these pre-contractual obligations, must continue to inform their clients, among others, on the status of the loan, of changes to the interest rate and of any breaches of contractual obligations. BdP Notice No. 10/2014, of 3 December, establishes the information requirements that must be fulfilled by credit institutions during the term of the consumer credit contract. By the same token, BdP Notice No. 2/2010, of 16 April, as amended, establishes the information requirements for mortgage loans provided by credit institutions.

VII OTHER AREAS

In recent years, two other issues have been widely discussed in Portugal, as much for their relevance within the banking industry as for the rising public controversy they have caused.

The first issue relates to the effects of a potential negative interest rate on lending agreements. This was due to the lowest interest rates in years, with direct effects on the EURIBOR (Euro Interbank Offered Rate), whose three-month rate in the first half of 2015 reached negative values for the first time. In Portugal EURIBOR is commonly used as the variable interest rate in consumer finance agreements such as home credit. The BdP was thus questioned as to whether such negative values should serve as a 'discount' on the consumers' credit instalments or whether the variable interest rate should be deemed as equal to zero, whenever the relevant credit agreement did not specifically govern the matter.

The BdP started by issuing Circular Letter No. 26/2015/DSC, of 30 March, where, in general terms, it stated that the interest rate applicable to a contract should result from the arithmetic average between the fixed and the variable interest rate; and, if no specific provision exists regulating the negative value event, credit institutions may hedge against the event with financial instruments. This means that the clients would benefit from the negative value of EURIBOR. More than one year later and after much controversy, the Governor of the BdP stated before Portugal's parliament and in a letter to the Minister of Finance that credit institutions should not bear the risk of negative interest rates alone and that, if the average between the variable interest rate and the spread (usually a fixed rate) is negative, then it should be deemed as equal to zero. This is now a matter in the hands of political parties, as a new legislative proposal is being drafted.

Secondly, the Portuguese banking industry has recently discussed the lifting of bank secrecy by tax authorities, as a new legislative proposal was presented to, and voted on by, the Parliament. Bank secrecy is considered to be an instrument defending the fundamental right to privacy of every citizen provided for in Article 26 of the CRP. Additionally, pursuant to Article 78 of the RGICSF, among others, all members and employees of credit institutions must respect consumers' bank secrecy. Its violation is sanctioned with up to one year in prison, pursuant to Article 195 of the Portuguese Penal Code.

In light of the proposed amendment to the banking secrecy regime, the government and other left-wing parties supporting it proposed the lifting of bank secrecy in bank accounts holding over €50,000. This legislative proposal never became an effective law, as the President vetoed it on the grounds of its inappropriate timing and owing to the lack of justification presented for the lifting of secrecy and for the determined threshold. This rejection followed the negative opinion on the law issued by the Portuguese Data Protection Authority. In particular, the law was criticised for proposing to lift bank secrecy without the tax authorities needing to present evidence of tax crimes or an unjustified growth in assets.

VIII UNFAIR PRACTICES

Recent case law of Portuguese superior courts has questioned the effectiveness and validity of specific standard unfair contract terms used in banking contracts.

The assessment of the legal compliance of unfair contract terms adopted by each credit institution and financial company is not usually made beforehand at the time of their drafting. This means that the failure to satisfy the requirements imposed by the Portuguese unfair contract terms regime is indeed more frequent than is desirable.

The law allows for procedures to challenge unfair contract terms used in consumer finance contracts, not only by the customers, but also by the Public Prosecutor's Office and consumer associations, among others, who may initiate a general procedure for an injunction, the effects of which all parties concerned may benefit from.

Recent examples of unfair contract terms deemed invalid by Portuguese courts include:

a clauses under which the customer expressly authorises the bank, without requiring any formalities, to be compensated for any liabilities arising from the contract by debiting any other deposit accounts that the customer is the holder of, or will become the holder or joint holder of, within the bank, as well as the automatic set-off of any debts arising from the contract with any other customer's credits over the bank;

b clauses that allow the bank to cancel or suspend customers' cards without prior notice, for example in the case that the customer is featured in the List of High Risk Users of the Bank of Portugal;

c clauses that allow the bank to assign its contractual position, in whole or in part, to other entities within the group, based in Portugal or abroad; and

d clauses, as contrary to the requirements of good faith, that allow the bank to set off its credit against a customer with a joint bank account balance, of which the customer is or will become the holder.

IX RECENT CASES

i Enforcement actions

In the context of its supervisory powers, the BdP has conducted a number of inspections that specifically targeted compliance with the consumer finance rules. Particular attention was paid to annual percentage rates, information duties and the conduct of business. Pursuant to these inspections, the BdP issued both recommendations and mandatory orders to credit institutions. In a small number of cases, it also applied sanctions.

ii Litigation

In 2016, the Portuguese appeal courts rendered two judgments that significantly influenced credit institutions rights' in the case of consumer default. These rulings found it unlawful for a provision in a consumer finance contract to depart from the legal regime and allow the creditor to claim the outstanding compensatory interest if the debt is accelerated following an event of default. This entails that, if the consumer fails to pay the instalments in due course, creditors will only be entitled to: the principal amount; the accrued compensatory interest; and the default interest. Although these decisions do not bind other courts, they nevertheless provide solid grounds for other courts to rule in the same way.

Another subject addressed by the appeal courts was the relationship between consumer finance and other consumer contracts. The Lisbon Court of Appeal ruled that, where a consumer loan was granted specifically in connection with an underlying consumer contract (e.g., the sale and purchase of a good or a service), the termination of the underlying contract entails the termination of the loan. The court decided that it was abusive for the creditor to fill in and execute a blank promissory note issued by the consumer to secure the consumer loan.

X OUTLOOK

After the considerable downturn that took place in 2011–2012, consumer finance activity in Portugal has been steadily on the rise since 2013.

Credit institutions and financial companies have increased advertising on consumer finance products that, in some cases, offer considerably higher yields than other financing products. This trend is expected to continue in 2017.

Car loans played an important role in the growth in 2016, probably owing to the anticipation of car vehicle acquisitions in response to the scheduled increase in the vehicle tax for 2017.

In 2016, Law 13/2016, of 23 May, introduced new rules for tax debt enforcement procedures. Since mid 2016, family houses with a tax valuation up to €574,323 may not be seized or judicially sold to pay tax debts. Prior to its approval, there were some indications that the prohibition might have been more inclusive and also extend to other debts – such as mortgage loans – which ultimately were not part of the version adopted. Nevertheless, there might be some developments in 2017 regarding this subject.

As mentioned above, negative interest rates are also a key point to look for in 2017. There is a proposal for a law that provides for the mandatory application of negative interest rates by credit institutions. This will cover both existing and new credits. With the notable exception of mortgages, consumer finance does not often raise this problem in Portugal, given the generally high applicable interest rates. Nevertheless, it is something that might impact the Portuguese financial market as a whole.

Chapter 10

SOUTH AFRICA

Ina Meiring[1]

I OVERVIEW

In South Africa, the National Credit Act 34 of 2005 (NCA) regulates consumer finance and is primarily aimed at protecting consumers and making credit and banking services more accessible. In this chapter, we focus mainly on the NCA.

In addition to the NCA, the Consumer Protection Act 68 of 2007 (CPA) is also aimed at protecting consumers. The CPA does not apply to credit agreements but applies to the goods and services that are the subject of credit agreements. The exemptions under the CPA include any transaction with consumers who are juristic persons whose asset value or annual turnover, at the time of the transaction, equals or exceeds 2 million rand. The CPA will therefore apply to all transactions with individuals, and to all transactions with juristic persons whose asset value or annual turnover, at the time of the transaction, is below 2 million rand.

The CPA provides for certain fundamental consumer rights, including:

a the right to protection against discriminatory marketing;
b the right to restrict unwanted direct marketing;
c the right to choose;
d the right to disclosure and information;
e the right to fair and responsible marketing;
f the right to fair and honest dealing;
g the right to fair, just and reasonable terms and conditions; and
h the right to fair value, good quality and safety.

1 Ina Meiring is a director at Werksmans Advisory Services (Pty) Ltd.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The NCA in general applies to all credit agreements between parties dealing at arm's length and made or having an effect in South Africa.[2] An agreement is a credit agreement if it is a credit facility, credit transaction, credit guarantee or a combination of these.[3] Such agreements generally have two main elements: credit is granted (e.g., a loan is provided) and a fee, charge or interest is imposed in respect of the deferred payment.

The NCA will always apply to a credit agreement entered into with an individual or sole proprietor. Among others, the NCA will not apply to a credit agreement in which the consumer is a juristic person[4] whose asset value or annual turnover, together with that of all its related juristic persons, equals or exceeds 1 million rand, nor to a large credit agreement[5] concluded with a juristic person whose asset value or annual turnover is less than 1 million rand.

Credit providers must provide consumers with pre-agreement statements and quotations in the prescribed form. The content of the credit agreements is also prescribed.[6]

The cornerstone of the NCA is the prevention of reckless credit granting and debt relief measures to deal with the problem of over-indebted customers.[7] The NCA requires peremptory pre-assessment of consumers and imposes severe sanctions in certain instances of reckless credit granting.

In terms of Section 80(1)(b)(ii), a credit agreement is reckless if the credit provider, having conducted an assessment, entered into an agreement with the consumer although the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over-indebted. The regulations under the NCA contain provisions prescribing the criteria to conduct an affordability assessment, the assessment of existing financial means and prospects and the calculation of financial obligations.

A consumer may apply to a debt counsellor to be declared over-indebted. The debt review process, as set out in Section 86 of the NCA read together with applicable regulations, is quite detailed and comprises various phases.

A credit provider is not allowed to charge an amount or impose a monetary liability on a consumer in respect of credit fees or charges prohibited by the NCA, or an amount of a fee or charge or an interest charge under a credit agreement exceeding the amount that may be charged under the NCA.

In terms of Section 101 of the NCA, a credit agreement can only require from the consumer payment of the principal debt, an initiation fee, a service fee, interest, cost of credit

2 Section 49(1) of the NCA.
3 See the definitions in Section 8 of the NCA.
4 The NCA has limited application if the credit agreement is entered into with a juristic person who falls within the thresholds. See Section 6 of the NCA.
5 A large credit agreement is either a credit transaction in terms of which the principal debt is 250, 000 rand or more, or a mortgage agreement.
6 See Sections 92 and 93 of the NCA.
7 See Section 3 on the purposes of the NCA.

insurance, default administration charges and collection costs. All of these fees and charges are either prescribed or limited in their application. The credit provider may further charge default administration charges and collection costs, as defined.

A credit provider may also, in terms of Section 106 of the NCA, require a consumer to maintain, during the term of their credit agreement, credit life insurance not exceeding, at any time during the life of the credit agreement, the total of the consumer's outstanding obligations to the credit provider in terms of their agreement. There are detailed requirements for such insurance.

Note that the cost of credit must be disclosed in detail in the pre-agreement statement and quotation. If the credit provider charges a prohibited fee, this will be an offence under the NCA.[8]

The NCA prescribes a two-stage approach to a credit provider's debt enforcement by distinguishing between procedures that must be complied with before debt enforcement and further procedures that are dealt with as debt procedures in a court. The required procedures before debt enforcement are contained in Section 129, and the debt procedures in a court are found in Section 130.

ii Regulation

The NCA provides for the establishment of the National Credit Regulator (NCR)[9] and the National Credit Tribunal (NCT).[10]

The NCR was established as the regulator under the NCA and is responsible for (among others) the regulation of the credit industry, the registration of industry participants, investigation of complaints and ensuring the enforcement of the NCA.

The NCT is an independent body distinct from the NCR. It may adjudicate any application that may be made to it in terms of, and make any order provided for in, the NCA in respect of such an application. In addition, it may also adjudicate on allegations of prohibited conduct and impose remedies provided for in the NCA.

Any person who complains of a contravention of the NCA may submit a complaint to the NCR, which may investigate a complaint or may initiate a complaint in its own name.[11] The NCR may refer the matter to a consumer court, the NCT or the National Prosecuting Authority (if an offence in terms of the NCA is committed).

In terms of Section 55 of the NCA, the NCR may issue a compliance notice to a person who it, on reasonable grounds, believes has failed to comply with a provision of, or is engaging in an activity in a manner inconsistent with, the NCA. If a person fails to comply with the compliance notice, or if a person objects to the notice, the matter will be referred to the NCT.

Section 57 of the NCA provides that, if a registered credit provider repeatedly contravenes the NCA, the NCR may request the NCT to cancel the credit provider's registration. If a credit provider is also a regulated financial institution, the NCR may impose conditions on the registration of that person; refer the matter to the regulatory authority

8 Section 100(3) of the NCA.
9 See Sections 12–25 of the NCA.
10 See Sections 26–34 of the NCA.
11 See Sections 26–34 of the NCA.

that licensed the financial institution, with the request that the authority review that licence; or at the request, or with the consent, of the regulatory authority that licensed the financial institution, request the NCT to cancel the registration.

A person affected by a decision of the NCR to impose conditions on the registration of a credit provider may apply to the NCT to review the decision. A decision of the NCT is subject to appeal or review by the High Court.

In addition to suspending or cancelling a credit provider's registration, in terms of Section 150 of the NCA, the NCT may make the following orders (among others) in relation to prohibited or required conduct in terms of the NCA: declaring conduct to be prohibited, interdicting any prohibited conduct, imposing an administrative fine or requiring payment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement.

The amount of an administrative fine may not exceed the greater of 10 per cent of the credit provider's annual turnover during the preceding financial year or 1 million rand. The annual turnover of a credit provider is the total income of that credit provider during the immediate preceding year under all credit agreements to which the NCA applies, less the amount of that income that represents the repayment of principal debt under those credit agreements. Any decision, judgment or order of the NCT may be served, executed and enforced as if it were an order of the High Court.

III PAYMENTS

i Overview

The National Payment Systems Act 78 of 1998 (NPS Act) provides for the management, administration, operation, regulation and supervision of the payment, clearing and settlement systems in South Africa. The South African Reserve Bank (SARB) is the overseer of the national payment system.

Apart from the Bills of Exchange Act 34 of 1964, payment methods are not specifically regulated by legislation. Payment methods include electronic transfers, cards, cheques, debit orders and ATMs or mobile devices. The NCA specifically allows debit order payments and regulates their content.[12]

The use of point of sale devices and ATMs have, according to the 2015/2016 Annual Oversight Report published by the National Payment System Division (NPSD) of the SARB (the Report) increased to add to the availability of the infrastructure to the broader population in South Africa.

ii Recent developments

The Report further confirms that the NPSD has initiated a review of the NPS Act in 2016. The aim is, among others, to align the NPS Act with international standards and best practices. In addition, the payment industry has:

a engaged in the design of an authenticated collection system for debit orders. Authentication options will include electronic (non-card) and card-based options; and

12 Section 124 of the NCA.

b concluded the development and design of card specifications for an open, interoperable national biometric authentication standard which will accommodate biometrics for card-present transactions in South Africa.

The SARB continues to monitor and research the developments regarding virtual currencies, block chain and distributed ledger technologies.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

A large proportion of the South African population lacks access to financial services, mostly because they do not have a bank account and live in remote or rural areas. The Banking Association of South Africa refers to 'financial inclusion' and explains that it is a central aim of the banking sector, whereby the sector seeks to improve the range, quality and availability of financial services and products focusing on the unserved, underserved and financially excluded. Principles of financial inclusion include access, affordability, appropriateness, usage, quality, consumer financial education, innovation and diversification, and simplicity.

The Banking Association reports that the banking industry has set a target of improving financial inclusion in South Africa by raising the current levels of banked individuals from 67 per cent to 70 per cent by 2015 and reaching a target for financial inclusion of 90 per cent by 2030.[13]

Overdrafts are regulated as credit facilities under the NCA (see Section III, *supra*).

ii Recent developments

South Africa does not have explicit deposit insurance or deposit guarantee schemes. However, in a position paper issued by National Treasury in 2015, titled 'Strengthening South Africa's Resolution Framework for Financial Institutions',[14] it was proposed that a proper resolution strategy should include the protection of depositors in a manner consistent with deposit insurance arrangements. In addition, it was proposed that the South African Reserve Bank should have the power to invoke the deposit insurance scheme. This paper will form the basis of discussions in the industry towards the drafting of a special resolution bill.

V REVOLVING CREDIT

i Overview

Revolving credit is regulated as a credit facility under the NCA.[15]

A credit provider is not allowed to make an offer to increase the credit limit under a credit facility, or induce a person to accept such an increase, on the basis that the limit will

13 See www.banking.org.za/what-we-do/overview.

14 2015 Resolution Framework Policy http://www.treasury.gov.za/publications/.

15 See Section 8(3) of the NCA.

automatically be increased unless the consumer declines the offer.[16] When entering into a credit agreement, the credit provider must afford the consumer an opportunity to decline the option of pre-approved annual credit limit increases as set out in Section 119(4).[17]

Consumers must be provided with contact telephone numbers where they can report the loss or theft of a PIN or a card, and the consumer may not be held liable by the credit provider after the time that the consumer has reported the loss or theft of the card or PIN, unless the consumer's signature appears on the voucher, sales slip, or similar record evidencing that particular use of the credit facility; or the credit provider has other evidence sufficient to establish that the consumer authorised or was responsible for that particular use of the credit facility.[18]

A consumer may require the credit provider to reduce the credit limit under the facility and to stipulate a maximum credit limit that the consumer is prepared to accept. A credit provider may also reduce the credit limit under that credit facility to take effect on delivery of a written notice.[19]

ii Recent developments

Credit cards are not only issued by banks. If the card is a multi-function card which could also allow the cardholder to withdraw cash from the credit facility, the issuer will only be able to issue such a card in partnership with a bank, so as to avoid conducting the business of a bank as provided for under the Banks Act 94 of 1990.

VI INSTALMENT CREDIT

i Overview

Instalment credit in respect of moveable goods, such as the financing of vehicles, is regulated as instalment agreements under the NCA. If the instalment agreement does not reserve ownership of the moveable until the agreement is fully complied with, or does not have a provision authorising repossession of the moveable in the event of a breach of the agreement, it will not be regarded as an instalment agreement for purposes of the NCA. It may then be regarded as a credit transaction as provided for in Section 8(4)(f) of the NCA (i.e., payment is deferred and a charge, fee or interest is payable).

A mortgage agreement is also regulated under the NCA as a credit agreement.[20]

16 Section 74(2) of the NCA.

17 Section 74(6) of the NCA. See Section 119 for the circumstances under which the credit limit under a credit facility may be increased.

18 Section 94 of the NCA.

19 Section 118 of the NCA.

20 A mortgage is defined in Section 1 of the NCA as a mortgage bond registered by the registrar of deeds over immoveable property that serves as continuing covering security for a mortgage agreement.

If a credit agreement is an instalment agreement or a mortgage agreement, the credit provider may include in the principal debt deferred any of the following items to the extent that they are applicable in respect of goods that are the subject of the agreement:

a an initiation fee as contemplated in Section 101(1)(b), if the consumer has been offered and declined the option of paying that fee separately;
b the cost of an extended warranty agreement;
c delivery, installation and initial fuelling charges;
d connection fees, levies or charges;
e taxes, licence or registration fees; or
f subject to Section 106, the premiums of any credit insurance payable in respect of that credit agreement.[21]

Certain types of credit agreements are excluded from the application of Sections 81 to 84 of the NCA insofar as those provisions relate to reckless credit. The excluded agreements include a school loan or a student loan and emergency loan. Although these loans must be reported to the National Credit Register, no such register has as yet been created. In the case of an emergency loan, the credit provider must obtain and retain proof of the existence of the emergency, as defined in Section 1 of the NCA.

VII OTHER AREAS

The Protection of Personal Information Act 4 of 2013 (POPI) has recently been promulgated, but is not yet fully effective.[22] Once POPI has come into full force (which may occur in 2017), it will govern the processing of personal information as defined. These obligations are placed on the responsible party, which is defined as a private or public body or any other person that, alone or in conjunction with others, determines the purposes of and means for processing personal information.

21 Section 102 of the NCA.

22 Certain sections of POPI became effective in 11 April 2014, and deal mainly with the establishment of the office of the Information Regulator and with the powers of the Minister to issue regulations.

Therefore, to the extent that a responsible party company processes personal information of consumers (data subjects),[23] it must comply with all of the conditions for lawful processing.[24] There are eight conditions for lawful processing. The conditions relate to accountability,[25] processing limitations,[26] purpose specification,[27] further processing limitation,[28] information quality,[29] openness,[30] security safeguards[31] and data subject participation.[32]

The Financial Intelligence Centre Act 38 of 2001 (FICA) compels only accountable institutions listed in Schedule 1, to identify and verify the identity of a new client before any transaction may be concluded or any business relationship is established. Credit providers are not listed specifically as accountable institutions, but banks are.

FICA and the Prevention of Organised Crime Act 121 of 1998 (POCA) provides the primary legal foundation for combating money laundering in South Africa. Money laundering is described in Section 1(1) of FICA as an activity that has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of Section 64 of FICA or Sections 4, 5 or 6 of POCA (offences relating to the proceeds of unlawful activities).

FICA requires all suspicious and unusual transactions to be reported. This obligation is, however, more widely cast in that it applies not only to accountable institutions but to any person who carries on business in South Africa. The term 'business' has not been defined, and the ordinary meaning of the word will therefore apply, namely that of a commercial activity or undertaking.[33] Failure to report under Section 29 constitutes an offence. A person convicted of this offence will be liable to imprisonment for a period not exceeding 15 years, or to a fine not exceeding 10 million rand.

A person convicted of a money laundering offence under Sections 4 to 6 of POCA is liable to a maximum fine of 100 million rand or to imprisonment for a period not exceeding 30 years. Also, the proceeds as well as the instrumentalities of the crime may be lost to the state in terms of the confiscations and forfeiture powers under POCA.

23 Data subject means in terms of Section 1 of POPI, the person to whom the personal information relates and includes individuals and juristic persons.

24 Sections 4 and 5 of POPI.

25 The responsible party must ensure that all of the conditions for processing are met.

26 Processing must be adequate, relevant and not excessive. It is not necessary to collect data directly from the data subject if the data subject provided consent to the collection of the information from another source.

27 The information must be collected for a specific, explicitly defined and lawful purpose.

28 Further processing must be compatible with the purpose of collection.

29 Information must be complete, accurate and updated where necessary.

30 The data subject must be aware that personal information is collected.

31 The integrity and confidentiality of personal information must be ensured.

32 Data subjects have the right to access personal information and to request correction of inaccurate, irrelevant, out of date, excessive or incomplete or misleading information.

33 See Guidance Note 4 on Suspicious Transaction Reporting issued in terms of Section 4(c) of FICA.

Section 4 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 also creates various offences associated with the financing of or economic support for 'specified offences'. Specified offences include the offence of terrorism and an offence associated or connected with terrorist activities. The offences listed in Section 4(1) focus on the commission of terrorist acts or to benefit a terrorist or terrorist organisation.

VIII UNFAIR PRACTICES

Several credit providers have been deregistered in applications brought before the NCT by the NCR. The reasons for their deregistration include granting credit to consumers recklessly without taking reasonable steps to conduct an affordability assessment, failure to provide consumers with a pre-agreement statement and quotation, failure to provide consumers with copies of the credit agreements, charging consumers in excess of the fees and interest rates prescribed under the NCA.[34] In addition debt counsellors have been deregistered for committing fraud by not passing on money paid to them to the credit providers to whom the money was due, or by misleading consumers into being placed under debt review against their will.

IX RECENT CASES

i Enforcement actions

Notable recent judgments of the NCT include:

a the prohibition of conduct where a respondent advertised credit to consumers who had been blacklisted;[35]

b the deregistration of a credit provider for breaching the NCA by charging interest rates and collection commission in excess of the rates prescribed by the NCA;[36] and

c the deregistration of a debt counsellor who misled consumers into being placed under debt review against their will.[37]

ii Disputes before the regulator

The NCR has a complaints department that receives complaints about alleged contraventions of the NCA, resolves such complaints informally and promotes the informal resolution of disputes.

iii Litigation

In *Absa Ltd v. Moore and Another,*[38] the facts were that the Moores fell victim to a property scam. Under the impression that they were applying for a secured loan, the Moores sold their house to an 'investor', Mr Kambini, to whom Absa granted a home loan secured by a mortgage bond. The property was transferred to Mr Kambini and the Moores' (five)

34 See the Annual Report 2015/2016 by the NCT.

35 *National Credit Regulator v. City Finance* NCT/22130/2015/55(6).

36 *National Credit Regulator v. Mayibuye Cash Loans* CC NCT/22132/2015/57(1).

37 *National Credit Regulator v. Celeste Sullivan* NCT/22678/2015/57(1).

38 *Absa Ltd v. Moore and Another* 2017(1) SA 225 (CC).

mortgage bonds cancelled simultaneously with the registration of Mr Kambini's bond. When Mr Kambini later defaulted on his loan, Absa took judgment against him and attached the property, which was still occupied by the Moores, in execution of his debt.

A High Court found that the agreements signed by the Moores were invalid by reason of simulation and granted the Moores' application for an interdict prohibiting the proposed sale in execution. The court ordered the restitution of the property to the Moores subject to the reinstatement of their original mortgage bonds. In an appeal by Absa, the Supreme Court of Appeal held the agreements to be invalid for fraud, not simulation, and undid the condition imposed by the High Court, which it found to be unjustified and incompetent.

In an application for leave to appeal to the Constitutional Court, Absa sought only the reimposition of this condition (i.e., the reinstatement of the Moores' original mortgage bonds). The Constitutional Court held that while a debt may be paid without the consent of the debtor (the Moores), provided the payer (Kambini) intended to pay and the creditor (Absa) intended to accept payment, the question was whether the 'fraud unravels all' principle could aid Absa by undoing the debt discharge and the bond cancellation. The answer was that it could not: the payment was valid despite the fraud, and effective to discharge the Moores' debt to Absa. The fraud did not unravel the cancellation of the Moores' bonds: they were accessory to the main debt they owed Absa, which was validly cancelled. The court was of the view that this outcome was fair: Absa, which enjoyed the institutional resources and power to protect itself against the fraudulent scheme, but didn't do so, had to suffer the loss its loan to Mr Kambini caused to it. In addition, Absa has a claim against Kambini, and it was accordingly not impoverished. Leave to appeal was accordingly refused.

In *Edwards v. FirstRand Bank Ltd t/a Wesbank*,[39] Wesbank as the credit provider had issued summons against the consumer appellant (Mr Edwards) after he fell into arrears with his instalments under an instalment sale agreement between them, cancelling the credit agreement and claiming return of the vehicle that was its subject matter. Having obtained summary judgment against Mr Edwards, Wesbank then repossessed the vehicle, and after notices in terms of Sections 127(2) and 125 of the NCA were dispatched to Mr Edwards by ordinary post using the address he had furnished in the credit agreement, sold the vehicle at an auction. Mr Edwards alleged that he did not receive the notice.

The court confirmed that although it may be advisable to send the notice in terms of Section 127(2) by registered mail, that was not what the law required. The credit provider must place facts before the court showing that notice, on a balance of probabilities, reached the consumer. The court would then determine whether facts presented constituted adequate proof of delivery. From the evidence it was clear that a notice was sent to the address furnished by Mr Edwards. Since he knew there was no street delivery of mail, he only had himself to blame for not having received it. In the result, the appeal was dismissed.

X OUTLOOK

A second revised draft of the Financial Sector Regulation Bill (FSR Bill) has been published for public comment. The intention is to establish a twin peaks model of financial sector

39 *Edwards v. FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA).

regulation for South Africa. Two regulators will be established, namely a Prudential Authority (PA), operating within the administration of the SARB, and a new Financial Sector Conduct Authority (FSCA), which is intended to replace the Financial Services Board.

The FSR Bill also sets out the functions of the SARB in relation to financial stability and managing systemic risks and systemic events. The intention is that the PA will supervise the safety and soundness of banks, insurance companies and other financial institutions, while the FSCA will supervise how financial services firms conduct their business and treat customers.

The twin peaks system of regulation will (when fully phased in) focus on a more harmonised system of licensing, supervision, enforcement, customer complaints (including ombudsmen), appeal mechanism (tribunal) and consumer advice and education. Full implementation of the twin peaks system of regulation will inevitably require further legislative and operational changes.

Chapter 11

SPAIN

Laura Machuca Menéndez[1]

I OVERVIEW

Consumer finance has been one of the business areas most affected in Spain by the economic downturn following the financial crisis. Unemployment increased by over 4 million in Spain, eroding the net wealth of the country and triggering a surge in non-performing loans. The length and the severity of the downturn and the uncovering of cases of malpractice among financial institutions have led to the government introducing new legislation to protect the most vulnerable segments of society.

The balance sheet problems of the Spanish financial institutions also contributed to the reduction in credit availability in the system. However, since 2013, the trends have slowly been reversing. Non-performing loans are gradually coming down from their peak levels in early 2014, while new loan production has been picking up.

Since then, credit entities have activated growth strategies in the consumer lending segment in particular, which has benefited from an increase in household spending on consumer goods, in particular the motor sector, with vehicle registrations up 24 per cent in 2015, according to the Ministry of Interior.

Consumer lending excluding credit cards is the fastest-growing segment in household lending, and is up almost 30 per cent between January and November 2016 according to Bank of Spain data. A total of €23 billion in loans has been granted to Spanish households by financial institutions over that period. New loans in this segment grew by 18 per cent in 2015 and 20 per cent in 2014. With economic growth expected by most observers to be above 2 per cent in 2017/18, growth in this segment should continue. In addition, new entrants in the financial technology space will likely necessitate ongoing reviews of legislation.

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II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Broadly speaking, Spanish consumer finance regulations follow the European rules, and are built on the general consumer law regime.

A number of provisions apply to consumer payment, deposit and lending services. Below is a brief overview of the most significant regulations applicable to the consumer finance industry in Spain, in order of relevance.

a Law 16/2011, of 24 June, on Consumer Credit (LCC) regulating the granting of credit to consumers, has incorporated Directive 2008/48/EC, of 23 April 2008, on credit agreements for consumers into the domestic legal system. The LCC applies to the loans and credit granted by an entity, as part of its commercial or business activity, to a consumer (defined as a natural person who, in the contractual relationships covered by the LCC, is acting for purposes outside his or her trade, business or profession). Certain contracts are excluded from the scope of the LCC, namely contracts with a value of less than €200; and credit agreements secured by mortgages, leasing agreements, etc. The LCC provides for various matters related to consumer credit, such as pre-contractual information to be provided, rights of the consumer, the credit agreement and the calculation of the annual percentage rate. The special consumer protection covered by the LCC focuses on: (1) the information and actions to be taken prior to entering the credit agreement – including publicity; (2) the information provided to consumers; (3) the content, form and events or circumstances under which the agreements would become null and void; (4) the right of withdrawal; and (5) the delimitation of terms, such as the total cost of the credit and the annual percentage rate, specifying the circumstances under which the total cost of the credit may be modified and stipulating the conditions in which the agreement must be amended. In relation to the agreements entered into by consumers expressly linked to credit financing, failure to provide the credit results in the ineffectiveness of the agreement, preserving the consumers' rights, both against the supplier of the goods and services, and against the lender.

b Law 2/2009, of 31 March, on the contracting of mortgage loans and credits with consumers and the brokering for the execution of loans and credits, which regulates the granting to consumers of real-property-backed loans and the rendering of brokerage services for the granting of consumer loans. Under this regulation, entities (other than credit entities or financing credit establishments) granting real estate loans or rendering brokerage services for the granting of real property loans to consumers must be registered with the public registry in the region where they maintain their corporate address. Foreign entities must be registered with the national registry maintained by the National Consumers' Institution in accordance with Royal Decree 106/2011, of 28 January.

c Legislative Royal Decree 1/2007, of 16 November, containing the restated text of the act for the protection of consumers and other ancillary provisions (as amended by Law 3/2014, of 27 March), which regulates the general terms and conditions that must apply to the relationship between companies (including credit entities) and consumers (i.e., the rights of consumers, contracts executed with consumers, the right of withdrawal, clauses deemed abusive and the liability of the vendor).

d Law 16/2009, of 13 November, on payment services (the Law on Payment Services), developed by Royal Decree 712/2010, of 28 May, on the legal regime regarding payment services and payment entities (the RD on Payment Services), which contains certain provisions protecting consumers. The Law on Payment Services strictly follows the provisions contained in the Payment Services Directive 2007/64/EC.

e Law 7/1998, of 13 April, governing the contracting with consumers through the adherence to general terms in contracts (the Law on General Terms in Contracts), which regulates standard terms of contracts.

f Law 22/2007, of 11 July, on distance marketing of consumer financial services, which applies to the contracts regarding financial services entered into by regulated entities (such as credit entities and branches of credit entities in Spain) and consumers, when the services are rendered and the contract has been formalised over distance. It contains a set of rules that govern the provision of pre-contractual information, communications, rights of withdrawal, payment and unsolicited services and communications.

g Law 10/2014, of 26 June, on organisation, supervision and solvency of credit institutions and its related Order EHA/2899/2011, of 28 October, on transparency and protection of financial services to customers and Circular 5/2012 of the Bank of Spain, of 27 June, addressed to credit entities and payment services providers, on transparency of banking services and lending responsibility.

h Law 5/2015, of 27 April, on promoting corporate financing (Law 5/2015), which deals with the activity of crowdfunding for the first time in Spain and lays out the requirements that the platforms providing these services must comply with.

All these regulations aim at protecting consumers and impose several obligations on the lenders contracting with them, including exhaustive duties of information and transparency. In addition, both Law 7/1998, of 13 April, and Law 22/2007, of 11 July, contain provisions whereby abusive clauses or misleading or obscure provisions that are detrimental to consumers should be considered void.

Apart from the aforementioned general regulations, certain regional provisions also apply.[2]

Finally, attention should be drawn to Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010. The purpose of this Directive is to harmonise the regulations on consumer protection in relation to the procurement of mortgage loans. Although many of the information obligations provided thereunder are already set forth in Spanish regulations, Spain has not yet implemented the Directive into its national legislation.

ii Regulation

The Bank of Spain is the main body in charge of implementing and enforcing regulation of consumer finance services in Spain.

2 For instance, Law 20/2014, of 29 December, modifying Law 22/2010, of 20 July, of the Consumer Code of Catalonia, aimed at improving consumer protection in relation to mortgage loans and credits, financial vulnerability and consumer relations.

In addition to the execution in Spain of the directions and instructions on the Eurosystem's monetary policy, the Bank of Spain promotes the general economic policy of the Spanish government and the stability of the financial system. To execute these functions, the Bank of Spain also has legislative powers and may issue circulars.

Order ECC/2502/2012, of 16 November, regulates the procedure for the filing of claims before the Bank of Spain's Complaints Service, among others. In particular, this Order sets forth: (1) financial services users' right to submit complaints and enquiries, (2) the medium and content of such complaints or enquiries, (3) other procedural aspects such as the need to file a prior complaint or claim with the customer service of the credit entity or, where applicable, with the consumer ombudsman, (4) the filing of collective complaints, (5) the scenarios and the procedure for the rejection of complaints, and (6) the handling of complaints.

Notwithstanding the above, consumers may raise their complaints and submit suggestions through a filing with the Spanish regional consumer associations. Once the form has been filed, the Complaints and Suggestions Unit will inform the consumer of the actions to be taken within the following 20 business days. In the absence of a reply, the consumer may address his or her complaint to the General Services Inspectorate of the Ministry of Health, Equality and Social Policy. Because of the regional government structure, there are 17 different consumer protection bodies in Spain, one per region. In addition some municipalities and cities have created their own bodies.[3]

All clauses considered abusive by a court ruling are filed in the General Terms in Contracts Registry in Spain, created by the Law on General Terms in Contracts. Citizens may check this Registry to verify whether the clauses included in their contracts are abusive.

III PAYMENTS

i Overview

As mentioned in Section II.i, *supra*, payment services are regulated in the Law on Payment Services, the RD on Payment Services and Order EHA/1608/2010, of 14 June, on transparency and payment services. These regulations govern the performance of payment transactions by any means (among others, issues such as the consent and withdrawal of consent in payment transactions, limitations on payment methods, information to be provided to the payer and to the beneficiary of a payment transaction, authentication, expenses derived from payment transactions, and notification procedure of unauthorised transactions), and the provision of services framework agreement (content, amendment and termination).

The payment industry has evolved substantially over the past decades, from the traditional channels using cash and cheques to a much greater use of digital channels such as online banking or mobile payments. Payment services can be defined as activities regarding payment transactions (fund movements from one account to another) made through payment methods other than cash: wire transfer, direct debit and payment cards. With new entrants into the payment services industry from large technology companies to specialised start-ups, the legislation will require adaptation.

3 A list of the different consumer bodies currently existing in Spain is available here: http://www.msssi.gob.es/en/organizacion/ccaa/directorio/home.htm.

Fintech continues to evolve, however, and more areas will need to be addressed by regulation in the future. An example of this is the use of blockchain technology more widely in the banking system. This is still in its infancy, but it could be used for shared databases with an application in international payments and securities settlements, which could raise consumer protection and data privacy issues.

ii Recent developments

Mobile payments

New payment technologies, including both contactless cards and new mobile payments are increasingly present in Spanish purchasing processes. These payment methods have certain advantages for consumers, such as their convenience and the intended increase in the security of daily transactions.

Although fintech and mobile payments are not yet regulated in Spain, final guidelines on the security of online payments, published by the European Banking Authority on 19 December 2014, were approved by the executive committee of the Bank of Spain on 24 March 2015.

Limits on cash payments

A limitation of cash payments to prevent tax fraud came into force in 2012 in Spain when the Spanish government passed Law 7/2012, of 29 October. Under this regulation, no cash payments of €2,500 or more can be effected in transactions where at least one of the parties involved is a company or professional. This Law has significant implications for citizens who are sometimes obliged to use other means of payment.

Currently, the Spanish government is considering reducing this limitation to €1,000.

The use of big data

Another aspect of fintech is the use of big data (often focusing on spending and payment patterns) for the purposes of credit scoring and the provision of other financial services or cross-selling. This is not yet regulated specifically, although the European Banking Authority launched a public consultation on 19 December 2016 about the potential benefits and risks of big data for consumers and financial firms, to determine whether any further regulatory or supervisory actions may be needed.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Deposit guarantee

The objective of a deposit guarantee fund is to guarantee depositors the recovery of their money, in the event that an entity that is a member of the fund becomes insolvent or has any other problem that prevents it from meeting its payments and complying with its obligations. The guaranteed amount has a limit of €100,000 per depositor.

Membership of the Deposit Guarantee Fund of Credit Institutions is mandatory for all Spanish banking institutions recorded in the Bank of Spain's Special Registry, and the branches of banking institutions authorised in a country that is not a member of the European Union, in the event that the guaranteed deposits and securities held by the branch are not covered by a guarantee system in the country of origin, or if the coverage is insufficient. The membership of branches of financial institutions authorised in another country member of the European Union is voluntary, because deposits and securities are already covered in the country of origin.

ii Overdrafts

In the case of overdrafts, the law specifies that the client must pay back the amount immediately, pay interest on the amount of the overdraft and pay the corresponding banking fees. The cost of the overdraft (interest and fees) is limited by law in the case of consumers. The annual percentage rate of the overdraft in current accounts cannot be higher than 2.5 times the legal interest rate at any point in time. For 2016, this limit has been set at 7.5 per cent.

According to Article 20 of the LCC, if overdrafts are accepted implicitly, the consumer must be informed individually, in a timely manner and in a due form, about the rate of the overdraft, the reference rates used if applicable, as well as of any potential modifications. If the overdraft lasts for more than one month, the bank will inform the consumer in the same way about the overdraft and its amount, the rate applied, and the penalties, expenses or late payment interest applied.

V REVOLVING CREDIT

i Overview

The use of credit cards in Spain is not particularly widespread. The amount credited is usually paid at the end of the month, and instalments rarely last beyond three months. The latest amount of outstanding credit card balances according to Bank of Spain data amounts to €10.6 billion (as of November 2016), only 0.1 per cent of GDP.

Credit lines for consumers are being introduced by some financial institutions and this is taking the commercial name of revolving credit. The difference with the credit card is that the client is given a maximum spending amount over a certain period, which the individual can choose when to pay down.

ii Recent developments

The Bank of Spain publishes the interchange and discount fees received by payment companies from the use of cards in point of sale terminals (PoS) situated in Spain, when both the payment servicer and the beneficiary are located in Spain. Publication of this information is in accordance with Article 13 of Law 18/2014, of 15 October, on urgent measures for growth, competitiveness and employment, and Circulars of the Bank of Spain 1/2015, of 24 March, and 1/2016, of 29 January, which expand upon it. The Law specifies that the information will be available on the websites of both the Bank of Spain and the payment servicer.

In 2014, the European Parliament established a new maximum on fees to be charged to consumers in card payments, which was enacted into Spanish legislation in Royal Decree 8/2014, of 4 July and reiterated in Law 18/2014. The new law establishes a maximum 0.3 per cent fee for credit cards and 0.2 per cent for debit cards (with a maximum of €0.07 per transaction). For amounts below €20, the maximum fee is 0.2 per cent for credit and 0.1 per cent for debit.

VI INSTALMENT CREDIT

i Overview

Mortgages

Conditions of mortgage loans vary depending on the type of asset that will be mortgaged: primary residence, secondary residence, etc. In general, financial institutions offer better terms for primary residences. Virtually all the mortgages in Spain are amortising mortgages with variable rates with a fixed spread over 12 month EURIBOR, although more recently fixed-rate mortgages have gained in popularity. The maximum term allowed is 30 years, and the loan to value of the loan can only be above 80 per cent in certain exceptions.

In the event of default, the repossession of the asset can be executed through court proceedings or an out-of-court agreement (with the intervention of a notary) depending on what is agreed in the contract.

Car financing

This is one of the most popular consumer finance products, which has seen a strong increase post-crisis.

According to Law 10/2014, of 26 June, on organisation, supervision and solvency of credit institutions, contracts will be considered operating leases when they have as an exclusive purpose to loan the use of an asset, acquired for that purpose with the specifications of the future beneficiary, in exchange for compensation consisting in the payment of periodic instalments, but, when there is a call option, the price should be the market price.

Personal loans

This type of financing has traditionally been easier to obtain, given the higher remuneration of the loan and the relatively shorter duration compared to a mortgage loan, for example. The financial institution will study the repayment capacity of the client, and will not normally require any specific guarantee, but the individual will be liable for the debt with his or her present and future assets.

There are different ways to pay back a personal loan. The modality depends on the frequency of the instalments (normally monthly) and how the amounts change over time (constant, increasing or decreasing). Another possibility is to establish an initial period with no payment of principal. However the most common practice is for financial entities to extend personal loans with a repayment schedule consisting in periodic instalments of equal amounts which include both interest and the repayment of principal.

ii Recent developments

Royal Decree 6/2012, of 9 March, promulgated urgent measures for the protection of mortgagors without resources. The regulation is aimed at offering protection to families that, because of the long duration of the crisis, cannot meet their mortgage obligations. This Royal Decree: (1) defines the target population to be protected; (2) stabilises a limit of late payment interest charged to that population; (3) includes a code of good practice in its annex (regulated in Law 1/2013, of 14 May), which financial institutions can comply with to facilitate the renegotiation of loans to the target population and, if this is not possible, to introduce payment in kind in favour of the lending institution (in practice, eliminating the full recourse nature of the loan); (4) establishes certain fiscal measures to support these mechanisms; and (5) introduces some flexibility in out-of-court repossessions of the mortgage collateral.

VII OTHER AREAS

As stated in Section II.i, *supra*, Law 5/2015 regulates crowdfunding, which was previously unregulated under Spanish law.

Law 5/2015 addresses crowdfunding from three perspectives: (1) the legal framework governing crowdfunding platforms; (2) the authorisation, registration and reservation of activity in favour of the platforms; and (3) the regulations applicable for each of the three sides involved in the financing channel (the project owner that required financing, the investors interested in participating financially and the platform through which the project owner can announce the project and raise funds), including restrictions on permitted activities and rules to protect non-qualified investors, as defined in Law 5/2015.

Specific restrictions apply to how the platforms can raise financing (i.e., only through the issuance of shares in public limited companies, bonds or other equity securities; the issuance of shares in limited companies; and loans, pursuant to Law 5/2015). The use of the funds is also regulated (which may only be for the ends of entrepreneurialism, education or consumption) as are the services that can be rendered by the platforms (primarily marketing and communication services and not investment services or activities reserved for credit institutions).

The activities of crowdfunding platforms are subject to authorisation from the National Securities Market Commission (CNMV) and registration in the CNMV's registry in accordance with the procedures established in Law 5/2015. The CNMV, in collaboration with the Bank of Spain, is in charge of the supervision, inspection and penalisation of the platforms and any other natural or legal persons violating Law 5/2015 regarding crowdfunding.

In relation to the protection of investors, Law 5/2015 refers to qualified and non-qualified investors, differentiating them primarily on the basis of proven economic capacity and, in some cases, on whether the investor has expressly applied to be considered a qualified investor. In the latter case, if a natural person, the crowdfunding platform must analyse the request case by case. Non-qualified investors may not invest more than €3,000 per project, or more than €10,000 within any 12-month period, in projects published through a single crowdfunding platform. Moreover, the platform must warn investors of specific risks associated with the investment.

Finally, subject to specific particularities, regulations on the protection of consumers and end users apply to relationships between project owners and investors as well as relationships between platforms and project owners, in the event the project owner is considered a consumer.

VII UNFAIR PRACTICES AND LITIGATION

Apart from the aforementioned practices and the regulation of usury, we would highlight the following unfair practices that have recently drawn attention:

i The limitation of late payment interest

In consumer loans, a maximum rate of 2 per cent applies over the interest rate agreed on the loan, and for mortgages a maximum rate of three times the legal interest rate applies for late payments.[4]

ii Mortgage interest rate floors declared unfair due to a lack of transparency

Mortgage loan agreements in Spain in recent years have often included floor clauses, which provide that, if the interest rate falls below a certain threshold, the client must continue to pay a minimum interest equal to that threshold. There has been a great deal of discussion on whether these clauses are unfair to consumers, and, consequently, many individuals have initiated judicial proceedings seeking a court ruling declaring that floor clauses are unfair and not binding. In this regard, the Supreme Court, in its ruling of 9 May 2013,[5] declared some floor clauses void (i.e., those which establish a minimum interest rate for mortgages of a variable nature) for lack of transparency.

The Supreme Court also imposed the obligation on financial institutions to pay back all the overcharged amounts to clients as from May 2013 (the date of the ruling) due to considerations on financial stability and the public interest.

Several Spanish courts have asked the European Court of Justice about whether the limitation of the effects of the invalidity from the date of the judgment of the Supreme Court is compatible with Council Directive 93/13/EEC, of 5 April, on unfair terms in consumer contracts, given that, according to that Directive, such clauses are not binding on consumers.

In its judgment of 21 December 2016,[6] the European Court of Justice ruled against the limitation on retroactivity and the overcharged amounts will have to be returned not only from May 2013, but also as from the time of their origination. More recently, the Spanish government has announced its intention to pass a Royal Decree in the near future, setting out the terms for the return by the credit entities of the overpaid amounts in relation to floor clauses, and providing consumers with an extrajudicial process that is speedier and less costly than court proceedings.

4 Supreme Court case of 3 June 2016, available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7693401&links=28079119912016100009&optimize=20160608&publicinterface=true.

5 Supreme Court Case of 9 May 2013, available at: http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6703660&links=28079119912013100009&optimize=20130510&publicinterface=true.

6 Judgment of the European Court of Justice of 21 December 2016, joined cases C-154/15, C-307/15 and C-308/15, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186483&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=561464.

IX RECENT CASES

In 2015, the Complaints Department of the Bank of Spain dealt with 59,223 new cases filed by users of financial services. Claims peaked in 2013 and, since then, have gradually come down but have still remained above pre-crisis levels. Forty-six per cent of claims received in 2015 were related to mortgage-floor disputes; 20 per cent referred to other forms of lending; and 15 per cent related to deposits.

According to the Bank of Spain's Claim Report 2015,[7] the number of decisions issued in favour of the claimant, in claims excluding mortgage-floor disputes, remains extremely high, underlining the inadequate attention given to customer service by credit entities in the settlement of claims, since in 60.8 per cent of cases, the Complaints Department of the Bank of Spain upheld the claims, which, as stated before, had already been filed with the corresponding bank entity in the first instance.

In relation to claims on mortgage floors, of the number of decisions issued by the Complaints Department of the Bank of Spain, 66.6 per cent were issued in favour of the claimant. This reveals a weaker performance by the customer services of the credit entities in this kind of complaint.

Finally, the corrections carried out by the corresponding credit entities as a result of the decisions issued in favour of the claimant amount to 40 per cent in the case of claims excluding mortgage floors, and 35.4 per cent in the case of claims on mortgage floors, on average.

X OUTLOOK

The economic outlook and the need to address the aftermath of the real estate bubble suggests that consumer lending will continue to be the fastest-growing type of loan, at least in the medium term in Spain.

The digital economy, however, is transforming the traditional consumer lending space, with new channels such as crowdfunding, new entrants into the payment segment and even the creation of virtual currencies.

The new entrants are largely unregulated entities from the technology sector, which often already have a well-known consumer brand. They are targeting the consumer lending segment because of its relatively high profitability and healthy growth prospects, and because without the legacy and the capital requirements of the banks, new entrants can be more competitive in pricing, offering lower rates, and can also be faster to market.

This will result in a higher degree of disintermediation in the future. That the new entrants are largely unregulated entities from the fintech sector means that as they play a bigger role in the consumer sector, with either payments or lending, more legislation will be needed.

7 Bank of Spain's Claim Report 2015 available at: http://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/15/MR2015_Documento_Completo.pdf.

Chapter 12

THAILAND

Sui Lin Teoh and Saroj Jongsaritwang[1]

I OVERVIEW

Consumer finance in Thailand has been growing steadily in recent years. According to statistics from the Bank of Thailand (BOT), there are more than 2 million personal loan accounts and more than 20 million credit cards issued to consumers as at September 2016.[2] While financial services are mostly provided to consumers by financial institutions under the supervision of the BOT, certain services may also be provided by non-financial institutions. These non-financial institutions, however, are regulated under rules and regulations issued by the BOT to control the provision of restricted services, such as personal loans, credit cards, and e-payment services.

With the emergence and increased use of the social media, online shopping and online trading platforms, channels of financial services have become broader so as to provide consumers access to the most convenient and up-to-date range of services. Financial services are currently available to and accessible by consumers through various channels, both online and offline. Traditional payment systems such as over-the-counter and cash payments are expected to be gradually reduced while usage of online channels like mobile applications and e-Money are expected to increase. This is in accordance with the National e-Payment Master Plan initiated and implemented by the Thai government since 2015.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The main pieces of legislation regulating consumer payment, deposit and lending services in Thailand are the Financial Institutions Act 2008 (FIA), the Bank of Thailand Act 1915 (BOTA), and the Civil and Commercial Code (CCC). The FIA and the BOTA, including

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2 Detailed statistics can be found at www.bot.or.th.

subsidiary rules and regulations issued thereunder, generally prescribe the scope of permitted and prohibited activities for service providers providing payment, deposit and lending services to customers, whereas the CCC governs the legal relationship between consumers and service providers in respect of the services provided.

The issue of consumer protection is also becoming increasingly important, and protection is afforded mainly under the Consumer Protection Act 1979 (CPA), pursuant to which minimum standard terms and conditions must be reflected in certain types of financial contracts, and the Debt Collection Act 2015 (DCA), which was recently enacted to establish fair collection practices and to penalise unfair deceptive and violent practices in debt collection.

ii Regulation

The BOT is the main authority in charge of supervising and examining financial institutions (and non-financial institutions in certain cases, e.g., granting personal loans and credit cards). Where financial institutions violate or fail to comply with the FIA, the BOT has the power to take certain action, for example, issuing a warning, demanding compliance with relevant requirements, or ordering the closure of offending institutions.

In January 2012, the Financial Consumer Protection Centre (FCC) was established by the BOT to serve as a one-stop service centre to handle enquiries and complaints regarding financial products and services provided by service providers, as well as to resolve problems, coordinate, and track results of complaints. The FCC generally forwards a consumer's complaint together with its suggestions to the relevant department within the BOT for consideration. Consumers are easily able to file a complaint with or contact the FCC for consultation through several channels (for example, doing so by phone, fax or email, or by visiting the BOT's offices).

The BOT is authorised to regulate the operations of service providers, and has the power to take disciplinary action in the event of non-compliance. In the event of a dispute between the consumers and the service providers concerning their contractual relationship or the subject matter of a transaction (for example, a demand for repayment of a debt or return of property under leasing contracts), the parties would be required to commence court proceedings.

The Office of the Board of Consumer Protection (OBCP) is the authority that specifically oversees businesses and practices subject to the control measures under the CPA. In cases where a contract between the consumer and the service provider does not comply with any of the requirements under the CPA (for example, requirements as to the language of the contract), the consumer may refer the issue to the OBCP for its determination, or request that the OBCP file proceedings against the service provider on the consumer's behalf, as the case may be.

III PAYMENTS

i Overview

Payment methods available for consumers may generally be divided into cash payments and non-cash payments.

Cash payment

Cash payment is the most traditional, common and widely accepted payment method in Thailand. Payments made by consumers to recipients by cash are subject to and governed by the provisions under the CCC; for example, the provisions on contracts and debts. The BOT is the main authority responsible for the issue and management of banknotes and other government notes, as well as the formulation and implementation of monetary policies.

Non-cash payment

Apart from cash, payments can be made by paper-based methods. Examples of paper-based payments include payment orders, cheques, bills of exchange, and promissory notes. These modes of payments are governed by the CCC. Relevant service providers such as issuing banks would be subject to control measures under the rules and regulations announced by the BOT from time to time.

Non-cash payments may also be made on a paperless basis. In such cases, payment may be effected by the use of debit cards, credit cards, prepaid cards or other cards of a similar nature. There are also certain paperless payment services that do not require the use of any cards, and are available on electronic or online platforms accessible from computers, tablets, smartphones and other compatible devices. The most common services would be electronic fund transfers and online applications known under various names depending on the relevant service providers (e.g., mobile banking/m-banking, internet banking/i-banking or cyber banking). As no physical money is used or transferred in such transactions, the paperless payment would sometimes be referred to as 'e-money'.

Paperless payments are governed under the provisions concerning contracts and debts under the CCC, together with the Electronic Transaction Act 2001, which is the main law regulating electronic transactions. Additionally, the Royal Decree Regulating Electronic Payment Services 2008 (REPS) was enacted to ensure additional security and credibility for services provided by electronic means. The REPS requires service providers to notify, register, or obtain permission from the BOT before providing each type of electronic payment services.

As cash management normally involves complicated and costly processes (such as handling, transporting, sorting out damaged or soiled banknotes for destruction, and implementing security measures throughout the said processes), there have been initiatives to reduce cash usage so as to minimise processing costs and expenses. Several cashless payment methods were therefore introduced and promoted by the Thai government and authorities in recent years.

ii Recent developments

National e-Payment Master Plan – PromptPay

The 'PromptPay' or 'Any ID' system (PromptPay) was officially introduced for the first time in July 2016. It allows a fund transfer to be made to or from a bank account by using a Thai ID card number or mobile phone number of the account owner (instead of a bank account number). A Thai national can choose to register his or her ID card number or mobile phone number with one bank account held with any bank in Thailand.

PromptPay was implemented under phase 1 of the National e-Payment Master Plan initiated by the Thai government in 2015, the main objective of which is to develop an integrated e-payment infrastructure for fund transfers and payment systems between the government and the private sector. In particular, the infrastructure is intended to be used as the main (and probably the only) channel through which tax and social security disbursement payments will be made by the government to private sectors (i.e., the e-tax system and e-social welfare system, respectively). Ultimately, the government aims to transform Thailand into a 'cashless society' where purchases of goods and services are made by credit cards, electronic fund transfers, or any other methods under the Plan, in lieu of cash or cheques.

Migration of ATM and debit cards to Thai standard chip cards

With effect from 16 May 2016, all newly issued ATM and debit cards are required to be chip-based, as opposed to magnetic-strip-based. Approximately 60 million magnetic stripe cards currently in use must be switched to chip cards by the end of December 2019. The adoption of chip card technology is touted as one of the best measures to increase security and solving counterfeit card fraud issues encountered by the holders of magnetic stripe cards (which are easily skimmed for the purpose of making unauthorised payments and cash withdrawals). This measure should enhance consumer confidence in ATM and debit cards instead of cash, which is in line with the objective of the National e-Payment Master Plan for Thailand to become a 'cashless society'.[3]

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Deposit accounts and overdrafts held by consumers with service providers fall within the scope of the provisions on Deposit under the CCC. In particular, the CCC sets out general provisions on deposit contracts, which govern and are applicable to deposits of all kinds of property, including money; and specific rules for the deposit of money (for example, the provision prohibiting depositors from demanding the return of the deposited money before the contractually agreed time).

Financial institutions (as depositories) are required to comply with the FIA and other rules and regulations concerning deposit accounts and overdrafts as may be imposed by the BOT from time to time. For instance, they are required to apply the same interest rates for the same category or type of consumers, and announce updated terms and conditions for deposit contracts for general consumers, interest rates, discounts, fees, penalties, formulae and calculation method, in a prominent place at their head office and all branches, to inform the public and consumers who contract with or use services at such office or branch.[4]

Since 2008, crucial security measures have been implemented through the enactment of the Deposit Protection Agency Act 2008 (DPAA). The Deposit Protection Agency was established under the DPAA with the key objectives of providing protection for deposits of money with financial institutions, enhancing confidence and stability in the financial institution system, and managing the insured financial institutions as well as liquidating insured financial institutions whose licences have been revoked.

Pursuant to the DPAA, consumers who have deposits with a financial institution whose licence has been revoked can submit a request to the Deposit Protection Agency within a specified time frame in order to claim their deposit. To be eligible to claim their deposit in this case, the consumers must be the owners of an eligible account (i.e., a Thai baht

3 BOT News Issue Nos. 22/2559 and 25/2559.

4 Notifications of the BOT Nos. SorNorSor. 80/2551, SorNorSor. 81/2551, and SorNorSor. 82/2551.

denominated bank account held in Thailand). Non-resident baht accounts opened for specific purposes in accordance with exchange control laws would not be deemed to be eligible bank accounts. Within 30 days of submitting the request, reimbursement of the aggregate sum of all eligible accounts will be made to the consumers; however, if the aggregate sum exceeds the limit on coverage currently in force (discussed in further detail below), reimbursement will be made up to such limit only.

ii Recent developments

The coverage limit for deposits reimbursable to consumers pursuant to the DPAA is planned to be gradually reduced from the full amount of the deposits to 1 million baht. The Royal Decree Prescribing the Coverage Limits of Deposits in General Cases 2016, which came into effect on 11 August 2016, sets out the annual coverage limits for 2016 to 2020, as follows:

- From 11 August 2016 to 11 August 2017, the coverage limit will be 15 million baht.
- From 11 August 2017 to 11 August 2018, the coverage limit will be 15 million baht.
- From 11 August 2018 to 11 August 2019, the coverage limit will be 10 million baht.
- From 11 August 2019 to 11 August 2020, the coverage limit will be 5 million baht.

V REVOLVING CREDIT

i Overview

Revolving credit may generally be granted to individual consumers in the form of credit cards and overdraft credit, both of which are governed under the section on loans in the CCC.

The credit card business is regarded as a business involving and widely affecting consumers and the public. The BOT has therefore sought to regulate the provision of such services by implementing certain requirements, such as the requirement that consumers must have an aggregate income of at least 15,000 baht per month or 180,000 baht per year) in order to be eligible to be issued with a credit card, requirements on credit limit determination and increase, and requirements on practices such as providing information to and contacting consumers, debt collection practices and fee rates). Importantly, interest rates applied on outstanding debts and overdue payments must not exceed the maximum rates specified by the BOT.[5]

In addition, credit card contracts are subject to control under the CPA and the Notification of the Contract Committee Prescribing Credit Card Business as a Business Subject to Contract Control 1999 (Notification on Credit Card Business). Essentially, this means that credit card contracts are therefore required to be made in accordance with the general requirements under the CPA, and specific requirements for credit card contracts under the Notification on Credit Card Business. General requirements include requirements that the credit card contracts contain necessary contract terms without which the consumers would be unreasonably disadvantaged; and that such contracts must not contain the terms that are unfair to consumers. Specific requirements stipulate that credit card contracts are required be in the Thai language, clearly visible and legible, and that characters are to be of a size not smaller than two millimetres. In addition, the contract must contain certain

5 Notifications of the BOT Nos. SorNorSor. 16/2552, SorNorSor. 17/2552, and SorNorSor. 18/2552.

significant information and conditions (for example, the condition that consumers have the right to terminate the contract for the credit card at any time, and are entitled, upon termination, to receive a refund of the service fees proportionate to the period for which the card has not been used). The requirements also prohibit contracts from containing onerous conditions, for example, stipulating that consumers must be liable for all expenses from the use of the credit card even where such expenses are incurred through no fault of the consumers.

Lastly, according to the Unfair Contract Terms Act 1997 (UCTA), where standard form contracts are used for credit cards, such contracts must not contain any terms that compel consumers to pay interest, a penalty, expenses or any other excessive sum, in the case of a default in payment; or provide for the charging of compound interest. Such terms would be regarded as unfair contract terms and thus only enforceable to the extent that they are deemed by a court to be fair and reasonable, taking into account the relevant circumstances.

ii Recent developments

Introduction of the DCA

Debt collection has been regulated and controlled under the DCA since 2 September 2015. First, the DCA stipulates that any person who wishes to operate a debt collection business must register the business with the Ministry of Interior, with the exception of debt collection by lawyers acting on behalf of their clients. The DCA stipulates, in particular, that debt collection activities must be carried out at the places and during the hours permitted by law (such as from Mondays to Fridays between 8am and 8pm). The Ministry of Interior also has the power to announce regulations setting out the maximum number of attempts that the collector is entitled to pursue or contact the debtor each day. There are certain prohibited practices and restrictions that, if breached, would amount to an offence under the DCA, such as:

a The use of violence or any act that causes injury to body, reputation or property of the debtors or consumers or other persons.

b The use of derogatory speech or language towards debtors or consumers or other persons.

c The notification or disclosure of the debt status of the debtors or consumers to persons who are not involved in the debt collection.

d Contacting the debtor by postcard, unsealed document, facsimile or other means that openly show that a collection of a debt is being pursued (except for the notification of enforcement of a mortgage in a newspaper in certain cases).

e Engaging in any acts that may be fraudulent or misleading (for example, using any statement, symbol or uniform that would create an impression that it represents the court, state official or governmental agency).

Penalties for breach include a fine, imprisonment, and revocation of the debt collector's licence.

Protection under the DCA are available only to individual borrowers and guarantors under credit agreements (including lending, credit card, hire-purchase, leasing transactions and any other similar transactions), but not to juristic persons of any kind. In the event that a debtor or consumer or any person receives treatment from a debt collector that is in violation of the DCA, such debtor or consumer or person is entitled to file a complaint to the Debt Collection Commission for further investigation.

VI INSTALMENT CREDIT

i Overview

Instalment credit granted to individual consumers would normally be categorised as secured and unsecured loans, as discussed below.

Secured loans

Secured loans include, for example, leasing or a financial lease, and loans granted for the purchase of assets whereby such assets are mortgaged back to creditors (e.g., houses, or condominium units). This type of loan is mainly governed by the provisions in the CCC on loans, contracts, and mortgages, and certain rules and regulations that may be imposed by the BOT from time to time on financial institutions to regulate their operations and to protect consumers. These include, for example, the requirement for two originals of a leasing agreement to be executed and for details of the price of the asset, the terms of the lease, the interest rate to be included in the agreement.[6]

Unsecured loans

Unsecured loans are monies granted to consumers based solely on the consumers' credit, without any security (referred to as 'clean loans'), the most common examples of which are personal loans (including education or student loans). The main provisions governing unsecured loans are found in the sections concerning loans in the CCC.

The granting of personal loans, whether by the financial institutions or non-financial institutions, is specifically controlled by the BOT under the relevant Notifications.[7] In particular, the granting of personal loans must be in accordance with the requirements of the BOT (for example, loans must be granted to the customers who are deemed to be in a financial position to satisfy the debts, and the applicable interest rates and the aggregate amount of all interest, fees, and other penalties must not exceed the maximum rates specified by the BOT).

In addition, the business of lending to consumers by financial institutions is a controlled-contract business under the CPA and the Notification of the Contract Committee Re: the Designation of the Business of Lending by Financial Institutions to Consumers as a Business that is Subject to Contract Control 2001 (the Notification on Lending Business). As with a credit card business, personal loan contracts are required to be made in accordance with the general requirements under the CPA (see Section V.i, *supra*), and specific requirements for personal loan contracts under the Notification on Lending Business.

Specific requirements for personal loan contracts include, for example, requirements that the contract must be in the Thai language, clearly visible and legible, and that characters be of a size not smaller than two millimetres. The content of the contracts must also contain certain significant information and conditions (for example, where the contracts impose a fine or fee on consumers for prepayment of a debt, such contracts must clearly state the rate

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6 Notification of the BOT No. SorNorSor. 01/2551.

7 Notifications of the BOT Nos. SorNorSor. 73/2551 and SorNorSor. 83/2551, and Notification of the BOT Prescribing Rules, Procedures, and Conditions for the Operation of Controlled Personal Loan Business by Non-Financial Institutions, dated 20 July 2006.

of the fine or fee as well as the amount on which such fine or fee will be calculated), and must not contain any prohibited conditions (such as terms permitting the financial institution to terminate the contract without notifying the consumer in writing).

ii Recent developments

The introduction of the DCA provides the long-awaited protection for consumers with instalment credit in relation to debt collection, and this is discussed in Section V.ii, *supra*.

VII OTHER AREAS

i Amendments to the guarantee and mortgage laws

Provisions concerning guarantees and mortgages under the CCC have been amended for the benefit of guarantors and mortgagors according to the Civil and Commercial Code Amendment Act (No. 20) of 2014, and the Civil and Commercial Code Amendment Act (No. 21) of 2015 (collectively, 'the Amended Law'). The main objective behind the Amended Law is to provide better protection to guarantors and mortgagors, such as to ensure that they are afforded fair treatment by creditors. The protection is available for guarantors or mortgagors who are not the debtors themselves, but enter into the guarantee or mortgage agreements to secure the debts of the debtors.

Under the Amended Law, guarantees and mortgages can be given only for a valid debt. Where a guarantee or mortgage is granted for a debt that will be financed in the future, the relevant agreement must indicate the objective of the debt, the nature of the debt, the limitation of guaranteed amount, and the debt financing period. In addition, the Amended Law requires the consent of the guarantors or the mortgagors, as the case may be, to any extension of the debt repayment period granted by creditors to debtors (in other words, consent granted in advance in the agreement will not be enforceable).

Other significant changes concerning guarantees are (1) provisions prohibiting individual guarantors (but not juristic persons) from being liable in the same manner as joint debtors, or in the capacity of joint debtors; and (2) the provision requiring creditors to notify guarantors in writing of a debtor's default within 60 days from such default, and prohibiting creditors from demanding payment of the debt during such period.

With regard to mortgages, similarly, individual mortgagors (but not juristic persons) must not be liable for any debts exceeding the price of the mortgaged property, and any agreements specified otherwise will be void. Further, in cases where the creditor wishes to enforce the mortgage, it must send a written notice to the debtor (not less than 60 days in advance) demanding the debt repayment, and another written notice to the mortgagor (within 15 days from the notice to the debtor) of its intention to enforce the mortgage.

VIII UNFAIR PRACTICES

In recent years, unfair practices most widely discussed and reported to relevant authorities would likely be inappropriate, abusive and deceptive practices of debt collection. Such issues, however, are expected to be reduced after the enactment of the DCA (as discussed in Section V.ii, *supra*).

IX RECENT CASES

i Enforcement actions

The BOT recently received a complaint from a group of consumers alleging that their personal information, such as national identification numbers and telephone numbers, were sold by commercial banks' officers to third parties without their consent. This resulted in unanticipated contact from third parties offering products and services to them (e.g., insurance and financial services). The Thai Bankers Association has clarified that no such information had been distributed by the commercial banks as claimed. The issue is currently being investigated by the BOT on an urgent basis.

ii Disputes before the regulator

Based on the records and reports of the FCC published on its official website, major complaints raised by consumers in 2016 involve issues regarding operational issues for service providers, for example, delays in processing, failure to provide sufficient information on services, charging of high fees and cross-selling of products. Financial services that were the subject of the most complaints are credit cards and personal loans.[8]

Cross-selling is an issue of utmost concern given the gradual increase in the number of the complaints. For example, when customers were requested to change their ATM or debit cards from magnetic-strip cards to chip cards recently, certain service providers refused to issue the standard cards claiming that such cards were out of stock, and issued other types of cards bundled with other products such as life insurance. The BOT has circulated a letter to all branches of commercial banks directing that sufficient amounts of standard chip cards without any bundled products or services must be available to consumers at all times.[9] Consumers who encounter the chip card issuance issue have the right to inform the FCC to investigate the matter and take appropriate action accordingly.

iii Litigation

According to the information revealed by the Office of the Judiciary, based on the number of the consumer cases filed with the courts in Thailand in 2015, the most common claims relate to personal loans, credit cards, and car and motorcycle leasing and hire purchases.

Notably, the Supreme Court held in a decision that a supplementary credit card holder must be jointly and severally liable with the holder of the main credit card given that this was clearly provided for in the credit card agreement signed by both cardholders.[10] This departs from a previous decision of the Supreme Court in 1999 in which the holder of the supplementary card was not found liable as a joint debtor, since the application form for the supplementary card did not make provision for such liability.[11] In view of this, the determining factor would appear to be the content of relevant agreements, specifically whether or not the liability of the supplementary cardholder is clearly stated, and whether

8 Detailed statistics can be found at www.1213.or.th (information available in Thai only).

9 Letter of the BOT No. ThorPorTor.PhorTor1.(51) Vor. 1310/2559, dated 3 October 2016.

10 Supreme Court Decision No. 21063/2556.

11 Supreme Court Decision No. 1297/2542.

or not the supplementary card holder had signed such documents. Application forms for a supplementary credit card are normally short and do not contain as many terms and conditions as the application for the main card holder.

X OUTLOOK

The National e-Payment Master Plan will continue to be one of the main projects prioritised by the Thai government for the foreseeable future. Apart from the launch of PromptPay under phase 1 of the Plan, there are other phases being concurrently implemented or planned for implementation in the near future. These include the card acceptance expansion project under phase 2, the adoption of an e-tax system under phase 3, the adoption of a government e-social welfare system under phase 4, and a project to educate the public on the e-payment system under phase 5. Consumer protection remains a significant issue of concern when implementing the National e-Payment Master Plan. Therefore, it is likely that additional specific laws or BOT announcements will be issued for the purpose of ensuring the security of transactions and governing the operations of service providers and other relevant sectors, especially as the Plan involves new technology.

Chapter 13

UNITED KINGDOM

Harriet Russell, Ben Regnard-Weinrabe and Nikki Johnstone[1]

I OVERVIEW

Consumer finance, and retail banking and payments, are accessible and established industries in the UK. The regulatory environment is mature and is derived from both domestic and European legislation. Fast-paced innovation has diversified the market in recent years, with many new products and providers, although the availability of credit has in recent years become more restricted in some respects owing to the response of regulators and lenders to the financial crisis and other developments. For the most part, regulators have sought to facilitate innovation as the UK government tries to keep the jurisdiction competitive, while increasing consumer protection in a number of areas.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

In the UK, consumer lending, deposit-taking and payments are regulated under a number of 'vertical' (i.e., product-specific) and 'horizontal' (non-product-specific) regulatory regimes, which to a large extent derive from EU laws. There is therefore a large degree of consistency of regulation across the European Economic Area[2] (EEA) in these areas, with this being particularly the case for payments.

The consumer credit regimes for secured and unsecured lending are set out in the Consumer Credit Act 1974 (CCA), the Financial Services and Markets Act 2000 (FSMA), secondary legislation and the UK Financial Conduct Authority (FCA) Handbook of rules

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2 Made up of the countries of the EU plus Norway, Iceland and Liechtenstein. EU financial services laws tend to be 'single market' measures that also apply to the additional EEA countries.

and guidance (the FCA Handbook).[3] The FCA Handbook includes, among other things, the Consumer Credit sourcebook (CONC) and the Mortgage and Home Finance Conduct of Business sourcebook (MCOB). The CCA and FSMA implement and supplement the EU Consumer Credit Directive and Mortgage Credit Directive (MCD).[4] FSMA sets out the licensing regime for different types of lending, as well as a range of intermediary and ancillary activities.

The consumer credit regimes are also highly prescriptive of conduct matters, such as the format and content of advertising and the information to be provided before, during and after entering into credit agreements; consumer rights; and required or prohibited practices, in areas such as underwriting, charging or collecting on loans. Failure to comply can in many cases have an impact on the enforceability of loan agreements and result in customer remediation and enforcement action. In many cases the consumer credit regime protects not only consumers, but also 'quasi-consumer' borrowers such as sole traders and certain small partnerships and unincorporated associations in the case of non-mortgage lending (certain business mortgages are also regulated). We discuss the consumer credit regime in more detail below.

FSMA also includes the licensing regime for deposit-taking, namely provision of banking products such as current and savings accounts, as well as a range of related conduct requirements protecting 'banking customers' (consumers and quasi-consumers[5]) under the Banking Conduct of Business sourcebook (BCOBS) in the FCA Handbook. BCOBS sets out a variety of obligations on banks (and rights for customers) in relation to bank accounts, for example:

a rights for banking customers to switch their accounts from one bank to another, where they do not already have such rights under the Payment Accounts Regulations (see below);[6]

b cancellation rights;[7]

c information requirements, which in many respects mirror those under the Payment Services Regulations 2009 (PSRs), distance marketing and e-commerce regimes (see below), but also apply more widely – for example to advertising;[8] and

d liability of banks for unauthorised and improperly executed transactions, again mirroring those under the PSRs.[9]

As a general rule, where a bank account is already subject to the PSRs, matching requirements under BCOBS are disapplied.[10]

3 The FCA Handbook is available at: www.handbook.fca.org.uk/handbook/.

4 Respectively, Directives 2008/48/EC and 2014/17/EU.

5 Namely, micro-enterprises, charities with an annual income below £1 million and certain trustees – see BCOBS 1.1.1 and the definition of 'banking customer' in the glossary to the FCA Handbook.

6 BCOBS 5.1.5 to 5.1.8.

7 BCOBS Chapter 6.

8 BCOBS Chapters 2 to 4, in particular. Certain information requirements apply with respect to consumers only.

9 BCOBS 5.1.12 and 5.1.14 to 5.1.19.

10 BCOBS 1.1.3 and 1.1.4.

The payments regime is set out primarily in the PSRs, supplemented by detailed guidance in 'The FCA's role under the Payment Services Regulations 2009: Our approach' document. The PSRs implement the EU Payment Services Directive (PSD),[11] and include both a licensing regime for 'payment institutions', which are a form of non-bank financial institution, and extensive conduct requirements, which apply not only to payment institutions but also to other types of financial institution such as banks and electronic money institutions (EMIs) when providing payment services in relation to their products. We describe the PSRs in more detail later in this chapter.

Closely related to the payments regime is the electronic money (or e-money) regime under the Electronic Money Regulations 2011 (EMRs), which implement the EU Electronic Money Directive.[12] The EMRs include a licensing regime for EMIs, which are non-bank financial institutions permitted to issue and hold e-money balances (effectively quasi-deposit balances that are intended as a means of spending rather than as a means of saving), and which can also provide the same payment services as payment institutions and limited credit facilities such as credit cards or quasi-overdraft facilities. The EMRs have a limited number of conduct requirements specifically for e-money, including prohibitions on payment of interest (or equivalent) and customer rights to refunds of their e-money.[13] Again, the conduct requirements generally apply to all customers, although there is a partial opt-out from the refund provisions available for non-consumers.[14]

Other areas of payments regulation are:

a the EU Interchange Fee Regulation,[15] which caps interchange fees, potentially requires reorganisation of card schemes (such as Visa and MasterCard), and requires changes to card scheme rules and customer agreements to provide, in particular, merchants with new rights when taking payments through the card schemes;

b the EU Payment Accounts Directive,[16] as implemented in the UK by the Payment Accounts Regulations 2015, which impose fees transparency, account switching and accessibility obligations typically in relation to current accounts provided by banks but also potentially certain other payment accounts;[17] and

c a purely UK regime under the Financial Services (Banking Reform) Act 2013 (FSBRA), which includes broad provisions geared toward improving competition, innovation and the service user experience in the context of payment systems (e.g., Visa, MasterCard and domestic UK clearing systems such as the faster payments service).

11 Directive 2007/64/EC.

12 Directive 2009/110/EC.

13 EMRs 39-45.

14 EMR Section 44.

15 Regulation (EU) 2015/751.

16 2014/92/EU.

17 For regulatory guidance on which payment accounts are subject to the UK regulations, see www.fca.org.uk/publication/policy/ps16-20.pdf.

There are, additionally, a variety of 'horizontal' requirements generally applicable across all the consumer lending, retail banking and payment services referred to above, including for example:

a the anti-money laundering, terrorist finance and sanctions regimes under legislation such as the Money Laundering Regulations 2007, Proceeds of Crime Act 2002, Terrorism Act 2000, EU Wire Transfer Regulation[18] and HM Treasury's Consolidated List;[19]

b fairness requirements under the Consumer Rights Act 2015 (CRA) and (other than for payment institutions and EMIs) the FCA's 'treating customers fairly' regime;[20]

c consumer cancellation rights and information requirements for financial services contracts entered into remotely with consumers (e.g., online or through a phone, under the Financial Services (Distance Marketing) Regulations 2004);

d information requirements and provisions on the placing and confirmation of orders under the Electronic Commerce (EC Directive) Regulations 2002, which also apply in part to non-consumers;

e prohibitions on a range of inappropriate practices with respect to consumers, including, for example, misleading omissions from advertising, under the Consumer Protection from Unfair Trading Regulations 2008; and

f restrictions and requirements regarding use of individuals' personal data, including for marketing purposes, under legislation such as the Data Protection Act 1998 (deriving from the EU Data Protection Directive 1995,[21] to be replaced by the EU General Data Protection Regulation[22] with effect from May 2018) and the Privacy (Electronic Communications) Regulations 2003 (deriving from the Privacy and Electronic Communications Directive).[23]

Again, to a large extent those requirements derive from EU legislation.

As regards the impact of the 'Brexit' referendum on 23 June 2016, resulting in a vote for the United Kingdom to leave the EU, the general approach of the UK financial services regulators appears to be that it is business as usual[24] and that financial institutions should continue to comply with EU laws or UK laws deriving from EU laws unless and until they are amended following implementation of Brexit.

Finally, although it falls outside the discussion in this chapter, it is worth noting that payment service providers (PSPs) and others involved in the issue or acceptance of credit

18 Regulation (EC) 1781/2006.

19 www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets.

20 Principles 6 and 7 in section 2.1 of the FCA's Principles for Businesses (PRIN) in the FCA Handbook.

21 Directive 95/46/EC.

22 Regulation (EU) 2016/679.

23 Directive 2002/58/EC.

24 For example, the FCA has stated that consumers' 'rights and protections, including any derived from EU legislation, are unaffected by the result of the referendum and will remain unchanged unless and until the Government changes the applicable legislation'.

cards, debit cards and similar products under the aegis of a card scheme, such as Visa or MasterCard, are usually subject to detailed rules, operating regulations or similar requirements set by the governing authority of the scheme.

ii Regulation

Following the financial crisis in 2007/8, the UK government undertook a review of all aspects of financial regulation, which led to a reformation of the UK's financial regulators.

On 1 April 2013, the UK's Financial Services Authority was abolished and its licensing and regulatory functions – including in relation to banking, e-money and payment services – were transferred to two new regulators: the Prudential Regulatory Authority (PRA) and the FCA. On that date the PRA became the licensing authority for banks (the powers of the PRA are, however, now planned to transfer to a Bank of England Prudential Regulation Committee)[25] and the FCA became the licensing authority for non-bank mortgage lenders and intermediaries, payment institutions and EMIs. The FCA also became the conduct regulator for banks as well as most mortgage lenders, intermediaries, payment institutions and EMIs.

The Office of Fair Trading (OFT) had for a long time been the licensing and conduct regulator for most non-mortgage consumer lending, but it was dissolved and its responsibilities passed to the FCA in April 2014.

A subsidiary of the FCA, the Payment Systems Regulator (which became operational on 1 April 2015), is the lead regulator for the UK payment systems regime under FSBRA and the lead enforcement authority for the EU Interchange Fee Regulation.

Those regulators have at their disposal a wide range of investigative, enforcement and disciplinary tools. For example, they have a broad range of information gathering and investigatory powers; and they can impose (or apply to court for) a range of sanctions, typically including public censure, powers to give directions, financial penalties, disgorgement of illgotten profits, customer restitution, imposition of conditions on licences (or their revocation), injunctions and, in some cases, criminal prosecution.[26]

Finally, it is worth noting the out of court disputes resolution regime presided over by the Financial Ombudsman Service (FOS). This is governed by the Dispute Resolution: Complaints manual (DISP) in the FCA Handbook, and generally provides consumers and quasi-consumers with a free channel for bringing complaints against banks, lenders, payment institutions and EMIs (with those providers typically having to pay case fees to FOS). FOS has a mandate for determining complaints on the basis of what it considers to be 'fair and reasonable in all the circumstances of the case'.[27] If FOS upholds a complaint, as it often does, it can make a substantial financial award against the provider.

25 Under the Bank of England and Financial Services Act 2016.

26 See, for example, the FCA's Enforcement Guide (EG) and Decision Procedure and Penalties Manual (DEPP) in the FCA Handbook; and the PSR's Powers and Procedures Guidance (March 2015) in relation to FSBRA and Guidance on the PSR's approach as a competent authority for the EU Interchange Fee Regulation (October 2016).

27 DISP 3.6.1.

III PAYMENTS

The payment services regime was introduced under the PSRs on 1 November 2009. At that time, its main impact was on traditional products such as current accounts, credit cards, money remittance and merchant acquiring. Since then, the range of payment products and PSPs on the market has diversified, particularly in the areas of digital and mobile banking, e-money and mobile payments – and the application of payment services regulation has broadened accordingly.

i Overview

In the following paragraphs, we summarise some of the main obligations on PSPs.

Regulated payment services

The PSRs regulates the following activities:

a executing funds transfers, for example, transfers to or from a payment account (such as a current account or e-money account), or placing or withdrawing of cash on such accounts, or money remittance services involving transfers that are not from or to an account;

b issuing payment instruments (e.g., payment cards or potentially apps in mobile phones); or

c acting as merchant acquirers or some other forms of payment processor.[28]

There are also a number of exemptions from those regulated payment services, perhaps most notably the following.

The commercial agent exemption is available for 'payment transactions . . . through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee'. There has been much discussion over whether and when online marketplaces (or equivalent) should be able to rely on this exemption.

The limited network exemption, which most notably applies to 'services based on instruments that can be used to acquire goods or services only . . . under a commercial agreement with the issuer, either within a limited network of service providers or for a limited range of goods or services'. This exemption lends itself to products such as certain fuel, restaurant or store cards – although some providers have sought to rely on it for broader networks of service providers, or wider ranges of goods and services, so requiring an exercise of judgment (and potentially engagement with local regulators) as to how far it is appropriate to do so.[29]

28 The full list of regulated payment services (and related exemptions) is set out in Part 1 of Schedule 1 to the PSRs.

29 The full list of exemptions is in Part 2 of Schedule 1 to the PSRs; the commercial agent and limited network exemptions are in paragraphs (b) and (k) of Part 2, respectively.

Authorisation and passporting

Where a PSP provides a regulated payment service in the UK, and an exemption does not apply, the PSP needs to be suitably licensed by the FCA or another relevant authority including in another EEA country. Typically, the PSP will be licensed as a bank, EMI or payment institution.

The PSRs set out the licensing regime for payment institutions.[30] Licensed payment institutions are required to maintain a certain level of regulatory capital, and to safeguard customer funds. There are number of options for how to safeguard, with the most common method being to put funds received from or for customers (or matched amounts) in a ring-fenced bank account. Although this is the most common way to safeguard, it does often raise a number of operational challenges, and some PSPs will accordingly look to alternative safeguarding options such as safeguarding insurance (although this can be expensive and hard to obtain).[31]

Other key areas of focus under the licensing regime are the robustness of a payment institution's systems and controls,[32] particularly its IT systems; and the need for any functions outsourced by a payment institution – including intra-group outsourcings – to be appropriately overseen by the payment institution and to meet a number of other requirements.[33]

As well as payment institutions being permitted to provide regulated payment services, they can also provide credit in limited circumstances,[34] for example by issuing credit cards.

A payment institution authorised in one EEA state (such as the UK) can use its licence in all other EEA states – the 'passporting' regime. This means that, once authorised in one EEA jurisdiction, a payment institution does not need fresh licences to provide payment services in others EEA countries, although it may need to comply with other local law requirements (such as anti-money laundering and data protection regulations).

Finally, a 'small payment institution' regime also exists but with restrictions on total monthly transaction amounts, and without the ability to passport.[35]

Conduct of business requirements

As well as the licensing regime for payment institutions, the PSRs set out extensive conduct requirements for all PSPs when providing payment services – including banks and EMIs, as well as payment institutions. Those requirements largely only apply to transactions executed in an EEA currency (such as the euro or sterling) where both the payer's PSP and payee's PSP are operating from a location in the EEA.[36]

PSPs have to provide pre-contract and transactional information to customers. In some cases, the information needs to be 'provided' in a 'durable medium', which raises a number of challenges as to how and when information is provided or stored.

30 See PSRs 5-17. The EMRs set out a similar licensing regime for EMIs.

31 See regulation 19 PSRs for further details of the safeguarding requirements.

32 PSR 6(5).

33 PSR 21.

34 PSR 27.

35 PSRs 12-15 and 23.

36 PSRs 33 and 51.

The PSRs govern the time frames in which payments must be executed, after being initiated by a customer, in order to reduce the scope for PSPs to retain 'float' (i.e., to keep hold of funds for their own purposes rather than putting them at the disposal of their customers).

For transfers in euros (and domestic transfers in the domestic currency, such as sterling transfers within the UK), the payer's PSP usually needs to ensure that cleared funds are received by the payee's PSP by the end of the business day after the transfer was initiated. For other EEA currency transfers, up to four business days are usually permitted.[37]

Once the payee's PSP receives cleared funds, it must immediately put them at the disposal of the payee.[38]

Departures from those rules apply most notably for internal transfers (where the same PSP is acting for both payer and payee), which need to be executed immediately; and for card payments, where there is a usually a basis for delaying putting funds at the disposal of the payee (i.e., of the merchant taking payment).

The PSRs also have detailed provisions as to the rights and liabilities of customers and PSPs; in particular, PSPs need to immediately re-credit unauthorised transactions to customers' accounts (with limited scope for making customers liable for them), and are also ordinarily liable for misexecution of transactions, for example if they are sent to the wrong payee or not sent at all.[39] These requirements brought important protections to customers, whose rights were – prior to introduction of the PSRs – less well defined in these areas, with delayed refunds of unauthorised transactions having been a particular concern of regulators.

Finally, it is worth noting that the PSRs set out high-level provisions on payments security, and constraints on certain charges and charging practices.

The conduct of business requirements in the PSRs apply to payment services provided not only to consumers but also to business customers, although non-consumers (other than micro-enterprises and charities)[40] can be asked to opt out of many of the conduct requirements.[41]

ii Recent developments

PSD2

The PSD will be replaced by the second EU Payment Services Directive[42] (PSD2), which must be implemented into each EEA state's national laws by 13 January 2018. PSD2 has made a number of changes to the scope of the PSD, most notably in the following areas.

'One-leg-out' transactions – where only one of the PSPs executing a transaction is operating from a location in the EEA – are largely out of scope of the PSD conduct requirements. The EEA end of one-leg-out transactions will, however, largely fall within the scope of PSD2.[43]

37 PSR 70.

38 PSRs 72 and 73.

39 PSRs 60-62, 75 and 76.

40 As defined in PSR 2.

41 PSRs 33 and 51.

42 Directive 2015/2366/EU.

43 Article 2 PSD and Article 2 PSD2.

The current PSD conduct requirements only apply to transactions carried out in an EEA currency, whereas many of those requirements will apply to transactions in all currencies under PSD2.[44]

The limited network exemption (and another exemption relied on by mobile operators) will be narrowed, and greater emphasis has been given to the intended parameters of the commercial agent exemption.

A definition of 'acquiring of payment transactions' is introduced for the first time,[45] which means that some payment processors who currently have unregulated relationships with merchants may have regulated relationships in future (and may need to seek authorisation accordingly).

Two new third-party payment services are introduced by PSD2, namely payment initiation services and account information services, each of which involves a PSP that does not handle funds providing customers with services in relation to payment accounts offered by third-party PSPs, where those payment accounts are accessible online.

A payment initiation service is a 'service to initiate a payment order at the request of the payment service user with respect to a payment account held at another [PSP]'.[46] It is anticipated as a 'software bridge between the website of the merchant and the online banking platform of the payer's account servicing [PSP] in order to initiate internet payments on the basis of a credit transfer',[47] and in practice is likely to include services that allow customers to pay online merchants directly from their bank accounts rather than using credit or debit cards. Such payments would typically be routed through domestic payment systems (such as the faster payment service in the UK) and may offer merchants the benefits of payments clearing to their accounts more quickly, more cheaply and with less risk of being reversed back to the customer, by comparison to card scheme payments such as Visa or MasterCard. However, it remains to be seen whether such payment methods are as advantageous to customers.

An account information service is 'an online service to provide consolidated information on one or more payment accounts held by the payment service user with either another [PSP] or with more than one [PSP]'.[48] They are likely to include account aggregation services such as Money Dashboard, which offer customers a single place in which to view information for a number of different payment accounts offered by multiple PSPs.

After implementation of PSD2, the third-party PSPs will have (at their customers' request) mandatory access to payment accounts or payment account data, on non-discriminatory terms, to enable delivery of their payment initiation and account information services.[49] The EBA has published draft regulatory technical standards (discussed further below) covering the basis on which the account providers and third-party PSPs will securely communicate with each other in order to facilitate delivery of those third-party services.[50]

44 Article 2 PSD and Article 2 PSD2.

45 Under Article 4(44) PSD2.

46 Article 4(14) PSD2.

47 Recital (27) PSD2.

48 Article 4(16) PSD2.

49 Articles 36 and 66-68 PSD2.

50 Article 98, PSD2 and EBA Consultation Paper 2016-11 on the draft Regulatory Technical Standards specifying the requirements on strong customer authentication

The new provisions are intended to encourage introduction of new, competing services. The example of how payment initiation services may benefit merchants has been given above; in the case of account information services (potentially offered in conjunction with payment initiation services), there is an opportunity for third-party PSPs to obtain transactional data, provide customers with added value services and potentially cross-sell them other products.

The other major impact of PSD2 will be to introduce detailed and rigorous security requirements, by comparison to the PSD. The new regime includes:

a a requirement for PSPs to establish a framework of appropriate mitigation measures and control mechanisms to manage the operational and security risks relating to the payment services they provide, and to submit a comprehensive assessment of such operational and security risks to their regulators on an annual basis;[51]

b obligations to notify a 'major operational or security incident' to regulators and, if the incident could have an impact on the financial interests of customers, obligations to also notify customers without undue delay of the incident and of all measures that they can take to mitigate the adverse effects of the incident;[52] and

c a requirement for customers to undergo 'strong customer authentication' when accessing their payment accounts or initiating electronic payment transactions.[53] Strong customer authentication requires payers to authenticate themselves to their PSPs using 'two or more elements categorised as knowledge (something only the user knows), possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others'.[54]

The EBA is tasked with producing various related regulatory technical standards, including on strong customer authentication.[55] The EBA published a consultation draft of the standards in August 2016.[56] The responses to the consultation have expressed a wide range of concerns, most notably at lack of clarity as to which technical solutions might meet the standards, and concerns that the standards are over-prescriptive and do not allow for a risk-based approach. If so, that could result in a cumbersome customer experience (particularly when shopping online) and restrict future innovations.

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and common and secure communication under PSD2, available at www.eba.europa.eu/documents/10180/1548183/Consultation+Paper+on+draft+RTS+on+SCA+and+CSC+%28EBA-CP-2016-11%29.pdf.

51 Article 95 PSD2.

52 Article 96 PSD2.

53 Unhelpfully, the term 'electronic payment transactions' is not defined, creating some uncertainty of scope.

54 Articles 4(30) and 97 PSD2.

55 Article 98, PSD2.

56 'Consultation Paper: On the draft Regulatory Technical Standards specifying the requirements on strong customer authentication and common and secure communication under PSD2', 12 August 2016, www.eba.europa.eu/documents/10180/1548183/Consultation+Paper+on+draft+RTS+on+SCA+and+CSC+%28EBA-CP-2016-11%29.pdf.

Passporting after Brexit

Following the Brexit vote on 23 June 2016, one of the major questions facing the payments industry is whether, and if so how, passporting rights will operate once Brexit is implemented. This will depend on what outcome is negotiated for Brexit: in particular, if the UK stays in the single market (or possibly negotiates a similar arrangement, such as mutual recognition of financial services licences), then a UK payment institution (or indeed bank or EMI) authorisation may continue to serve in other EEA countries and vice versa. At the time of writing, however, it is difficult to assess whether such an outcome is likely or not.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Access to banking services

The Payment Accounts Regulations 2015, which came into force on 18 September 2016, obliged certain UK banks[57] to provide payment accounts with basic features to any consumers who meet certain criteria including being legally resident in the EU, with it in some cases being a challenge to ascertain eligibility.[58]

Deposit guarantee

The deposit guarantee scheme in the UK is the Financial Services Compensation Scheme (FSCS). The FSCS protects certain customers with deposit accounts in the UK against losses in the event that their bank is unable to meet its obligations to them.

The obligations on banks and building societies in relation to deposit guarantees are set out in the 'Depositor Protection' part of the PRA Rulebook.[59] Among much else, the PRA's rules set out that the maximum compensation payable for the aggregate eligible deposits of each depositor is £75,000 (except, in certain circumstances, where the maximum compensation is £1 million or unlimited in connection with personal injury or incapacity).[60]

Overdrafts

Overdrafts allow customers to withdraw or spend more than the amount of the funds currently available in their payment account. As a form of unsecured lending, they are subject to many of the provisions of the consumer credit regime described above and below. Charges for using overdrafts have in the past been subject to litigation under the fairness regime currently set out in the CRA,[61] and are also under scrutiny by various organisations, such as the UK Competition and Markets Authority (CMA) (see below).

57 Under Regulation 21.

58 For example, asylum seekers and 'consumers who have not been granted a residence permit but whose expulsion is impossible for legal or practical reasons' may be among those eligible, and it may not be straight forward to establish their status. See Regulation 23.

59 The PRA Rulebook is available at: www.prarulebook.co.uk.

60 Rule 4 (Limits on compensation payable), Depositor Protection rules, PRA Rulebook.

61 Most notably, *Office of Fair Trading v. Abbey National plc* [2009] UKSC6, [2010] 1 AC 696.

ii Recent developments

Open banking

On 9 February 2016, the Open Banking Working Group[62] published a detailed framework for delivering an Open Banking Standard in the UK.[63] It has been designed to 'help improve competition and efficiency, and stimulate innovation in the banking sector'.[64]

The Open Banking Standard recommends that open application programme interfaces (APIs) be built 'to help provide open access to open data and shared access to private data of the customer'.[65] The intention is that customers can procure access to their own 'private' banking data, so that they may better manage their finances and make better decisions about the financial products they chose. The Open Banking Standard also promotes open data exchange between financial institutions.

It will be noted that in these respects, the UK Open Banking Standard pre-empts aspects of the account information service regime being introduced by PSD2.

CMA final report on retail banking market investigation

The CMA launched a market investigation into the supply of retail banking services to personal current account customers and small and medium-sized enterprises in November 2014. The CMA's final report[66] was published in August 2016, and introduced a package of binding remedies, including the following.

The CMA is requiring the largest retail banks[67] in the UK to develop and adopt an open API banking standard in order to share information, for the reasons propounded by the Open Banking Working Group (see above). According to the CMA, of all the measures it considered as part of its investigation, 'the timely development and implementation of an open API banking standard has the greatest potential to transform competition in retail banking markets . . . by making it much easier for both personal customers and [small and medium sized enterprises] to compare what is offered by different banks and by paving the way to the development of new business models offering innovative services to customers'.[68]

The CMA is implementing a set of remedies to increase customers' awareness of their overdraft usage and help them manage it. These remedies include:

a requiring banks to alert customers that they have exceeded, or are about to exceed, their credit limit; and

62 The Open Banking Working Group is a joint industry and government group made up of representatives from banks, fintech companies, consumer bodies and the government.

63 https://theodi.org/open-banking-standard.

64 'Introducing the Open Banking Standard', Open Data Institute 2016, page 5.

65 Ibid.

66 'Retail banking market investigation: Final report', CMA, 9 August 2016, https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf.

67 RBS, Lloyds, Barclays, HSBC, Santander, Nationwide, Danske Bank, Band of Ireland and AIB.

68 Paragraph 166.

b where customers are permitted to exceed their credit limit, a requirement that banks provide information about a 'grace period' during which no additional charges will be applied if the account returns to being within its pre-agreed credit limit by the end of the grace period.[69]

It is worth noting that, for many customers, banks have already offered such alerts and grace periods for some time.

V REVOLVING CREDIT

In this section, we discuss credit cards (as illustrative of revolving credit) and some related areas of regulation and recent developments.

Like overdrafts, credit cards involve provision of both payment services and credit facilities, and as such are subject to both the payment services regime (discussed above) and the consumer credit regime. Where these regimes overlap, the consumer credit regime usually takes priority.

i Overview

As noted above, the consumer credit regime derives largely from the CCA and FSMA, including CONC and other aspects of the FCA Handbook. They include both a licensing regime and detailed conduct requirements.

As regards conduct requirements, the regime is highly prescriptive of matters such as the format and content of advertising and information needing to be provided before, during and after entering into credit agreements; consumer rights; and required or prohibited practices, in areas such as underwriting, charging or collecting on loans. The conduct requirements vary depending on the type of consumer credit activity being carried on, with the heaviest burden falling on lenders themselves. We provide a more detailed description of some of the requirements below.

Failure to comply with the consumer credit regime can in many cases have an impact on the enforceability of loan agreements or related charges, and result in customer claims, customer remediation and enforcement action.

Licensing

FSMA sets out a licensing regime (similar in various respects to the payment institution licensing regime) under which firms can obtain 'permissions' for lending and a range of intermediary and ancillary activities such as credit broking, operating an electronic system in relation to lending, debt adjusting, debt counselling, debt collecting and debt administration.[70]

Such activities are generally regulated if the lending is to:

a individuals, whether consumers or sole traders; or

69 As summarised in Figure 15.1 of the final report.

70 Respectively, Articles 36A, 36H, 39D, 39E, 39F and 39G of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the 'RAO). See the RAO for the full list of regulated activities.

b ‘relevant recipients of credit’ (or in the case of lending through an electronic system, ‘relevant persons’), being partnerships of two or three partners (of which at least one partner is a natural person) or unincorporated associations (of which at least one member is a natural person).[71]

There are a variety of exemptions from the regulated activities, perhaps most notably the business borrowing exemption and the charge card exemption.

The business borrowing exemption is where the borrowing is for business purposes and exceeds £25,000 – so, for example, a business credit card with a credit limit of £26,000.

The charge card exemption applies to credit cards or other forms of revolving credit where all the credit drawn down over a period of three months or less is repayable in one go, and where no interest or other significant charges apply (or where the credit is secured on land).[72]

Generally, the above UK credit-related licences cannot be passported (i.e., cannot be used in other EEA countries), although banks and (as noted above) payment institutions and EMIs can passport certain lending activities.

Pre-contractual information

Before a customer enters into a credit agreement, the lender must provide certain pre-contractual information, including:

a an ‘adequate explanation’ of various specified features of the credit agreement, in order to put the customer in a position to assess whether the agreement suits their needs and financial situation;[73]

b the Standard European Consumer Credit Information (SECCI), which contains detailed information relating to the credit agreement;[74] and

c a summary box, designed to set out key information about the credit card product in a simple, standard format, in order to make it easy for customers to understand and compare credit cards.[75]

Creditworthiness

Before entering into a credit card agreement, the lender must undertake an assessment of the creditworthiness of the customer. The assessment should take into the account not only the customer’s ability to repay the proposed credit within a reasonable period but also the potential for the commitments under the credit agreement to adversely impact the customer’s financial situation. The assessment has to be based on ‘sufficient information’ obtained from the customer ‘where appropriate’ and a credit reference agency ‘where necessary’.[76]

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71 Articles 60L and 36H of the RAO, respectively.

72 The business borrowing and charge card exemptions are in Articles 60C(3) and 60F(3) of the RAO respectively.

73 Under CONC 4.2.5.

74 Most notable under the Consumer Credit (Disclosure of Information) Regulations 2010.

75 Further information, including an example of the standard summary box, is provided by the UK Cards Association: www.theukcardsassociation.org.uk/individual/credit-card-summary-box.asp.

76 CONC 5.2 (Creditworthiness assessment: before agreement).

The lender must carry out a fresh creditworthiness check before significantly increasing a customer's credit limit,[77] and must not increase it if the customer is opposed to the increase or is at risk of financial difficulties.[78]

The creditworthiness assessment, as a safeguard against over-indebtedness post-financial crisis, is a key area of regulatory scrutiny. CONC contains detailed rules and guidance, which, while fairly prescriptive, do allow some flexibility as to the information to be gathered and assessed. Industry guidance is also available.[79]

Failures in the creditworthiness assessment can lead to regulatory or other action (resulting potentially in customer remediation and other sanctions).

Form and content of the agreement

The CCA and underlying regulations[80] prescribe the form and content for credit agreements, and require the agreement to be signed by both the lender and borrower, using either 'wet ink' signatures or electronic signatures.

Connected lender liability

The consumer credit regime sets out a wide variety of rights for borrowers, the best known of which is perhaps Section 75 CCA.

Section 75 provides that where a customer uses their credit card to make a purchase for something which costs between £100 and £30,000, they have a claim against their lender in the event of a misrepresentation or breach of contract by the supplier. The customer is free to bring such claim directly against the card issuer, without needing to bring a claim against the supplier first. Section 75 also applies in relation to other similar arrangements, not credit cards alone.

From a lender's perspective, Section 75 is potentially very significant in that customers could bring a claim for consequential losses (i.e., claims against the lender are not limited to the amount of credit provided).

Statements and statutory notices

Lenders must provide borrowers with statements and a range of statutory notices (generally with highly prescribed content and timings) in a variety of circumstances, perhaps most notable of which – in the context of a credit card – is the obligation to provide customers missing two consecutive payments with a 'notice of sums in arrears' (NOSIA).[81]

Failure to comply strictly with the requirements can result in sanctions such as unenforceability of the credit agreement and inability to charge any interest or default sums during the period of default. A number of lenders have had to undergo costly remediation exercises to remedy failures in this area.

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77 CONC 6.2.1.

78 CONC 6.7.7.

79 Such as the Common Financial Statement produced by the Money Advice Trust, the Finance and Leasing Association and the British Bankers' Association; and Information for Practitioners produced by the Lending Standards Board.

80 Most notably the Consumer Credit (Agreements) Regulations 2010.

81 Section 86C CCA.

ii Recent developments

The FCA's credit card market study

Within days of taking over responsibility for the regulation of consumer credit in the UK in April 2014, the FCA announced its intention to launch a market study into the credit cards sector, in order to explore whether competition was working effectively and 'to ask how the industry worked with those people who were in difficult financial situations already'.[82]

The FCA published its final report on 16 July 2016.[83] The major concern expressed was the extent and nature of 'problem' credit card debt. According to the report, in 2014 around 6.9 per cent of UK cardholders (which equates to about 2 million people) were in arrears or had defaulted. The FCA also found that 8.9 per cent of credit cards active in January 2015 (5.1 million accounts) will take – based on current repayment patterns and assuming no further borrowing – more than 10 years to pay off their balance.[84]

Also set out in the final report was a package of reforms that the UK Cards Association has, on behalf of the credit card industry, volunteered to implement. They include sending notifications to all consumers before the expiry of a promotional offer; and helping borrowers mitigate the risk of inadvertently incurring charges by alerting them before they reach their credit limits, and allowing them to request card repayment dates falling after their pay days.

Review of retained CCA provisions

When the FCA took over responsibility for the regulation of consumer credit in 2014, much of the CCA was replaced with rules under FSMA. However, a range of provisions have been retained in the CCA and its subordinate legislation.

By 1 April 2019, the FCA must review the retained CCA provisions and submit a report to HM Treasury, setting out any recommendations for legislative change. The aim of the review is to consider the appropriateness of repealing the remaining provisions of the CCA, taking into account the proportionality of the consumer credit regime and the extent to which retained provisions of the CCA could be replaced by FCA rules or guidance.[85]

Accordingly, in February 2016, the FCA launched a 'call for input' on the retained provisions in the CCA.[86] Many players in the consumer finance market are using this as an opportunity to make submissions about aspects of the consumer credit regime that they believe need to be amended (not just simplified), such as moderating the stringent sanctions for certain breaches, for example of the NOSIA requirements.

82 'FCA announces competition review into credit cards – particular focus on how industry works with those in difficult financial situations', 3 April 2014, www.fca.org.uk/news/press-releases/fca-announces-competition-review-credit-cards-particular-focus-how-industry.

83 FCA Market Study MS14/6.3, 'Credit card market study: Final findings report', www.fca.org.uk/publication/market-studies/ms14-6-3-credit-card-market-study-final-findings-report.pdf.

84 Paragraph 1.30, FCA Market Study MS14/6.3.

85 Part 5 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014.

86 www.fca.org.uk/publication/call-for-input/call-for-input-review-retained-provisions-consumer-credit-act.pdf.

VI INSTALMENT CREDIT

i Overview

Personal loans

Typically, non-mortgage personal loans based on provision of a fixed amount of credit (as opposed to revolving credit) are subject to broadly the same regulatory regime as credit cards. Some key areas of difference are:

a the equivalent exemption to the 'charge card exemption' applies where credit is repaid within one year in 12 instalments or less, with no significant charges for credit applying;[87] and

b in addition to NOSIAs, a key area for enforcement action and customer remediation is incorrect annual statements.[88]

Security

Any security provided in relation to a consumer credit agreement must be in writing, setting out specified information in a prescribed manner and executed by the surety.[89] Failure to document and execute a security agreement in accordance with the CCA will mean that the security is only enforceable with a court order. Various other provisions also apply under the consumer credit regime in relation to security.

Hire purchase and conditional sale

Two of the most common forms of secured consumer lending in the UK (popular in the context of car financing, for example) – hire-purchase agreements and conditional sale agreements – both involve a delayed transfer of title, which, as one legal commentator notes, 'is technically not a form of security so far as the law is concerned'.[90]

A hire purchase agreement is an agreement for the hire of goods in return for periodical payments with an option (or other specified trigger) for ownership of the goods to pass to the borrower.[91]

A conditional sale agreement is an agreement for the sale of goods under which the purchase price (or part of it) is payable by instalments and the seller owns the goods until the purchase price is paid or another specified condition is satisfied.[92]

These agreements are treated as credit agreements and are, again, subject to largely the same requirements as credit card agreements. A key difference is a right for borrowers

87 Article 60F(2) RAO.

88 Lenders must provide annual statements to borrowers in relation to fixed-sum loan agreements under Section 77A CCA. A non-compliant annual statement results in the same consequences as an incorrect NOSIA, which is that the statement will be deemed to have not been sent at all. See *JP Morgan Chase Bank, National Association v. Northern Rock (Asset Management) Plc* [2014] EWHC 291 (Ch) (19 February 2014).

89 Section 105 CCA.

90 Paragraph 3.4 Hire-Purchase and Instalment Sale, Goode: Consumer Credit Law and Practice.

91 Section 189 CCA.

92 Section 189 CCA.

to terminate their credit agreement early without having to repay the whole of the credit; instead, they normally need to pay (or have paid) half of the total price of the goods and return the goods to the creditor.[93]

Student loans

The Student Loans Company (a non-profit-making, government-owned organisation) administers government-provided loans to students attending universities and colleges in the UK. Loans are available for tuition fees and maintenance support, with repayments ordinarily being taken directly from a borrower's salary by their employer on behalf of HM Revenue and Customs, once their salary reaches a certain level.[94]

There are various legislative provisions in place to enable student loans to fall outside of the consumer credit regime in the CCA and FSMA.[95]

Mortgages

Mortgages largely fall outside of the CCA. They are nonetheless subject to a similar licensing regime and conduct requirements under FSMA, although MCOB generally applies in place of CONC, with some areas of difference including substantially different information requirements and detailed rules on early repayment charges.

Consumer buy-to-let mortgages, however, are governed by a special, lighter touch regime under the Mortgage Credit Directive Order 2015.

ii Recent developments

High-cost short-term credit

High-cost, short-term credit (HCSTC) is defined as unsecured credit made available to individuals (or 'relevant recipients of credit') in relation to which the APR is at least 100 per cent and which is advertised as being provided for at most a year (or similar) or under which the credit is due to be substantially repaid within a year.[96] 'Payday lending' is the example cited most often, and has been one of the FCA's top priorities since it took over responsibility for regulating consumer credit. Of particular note:

a the FCA has granted lending permissions to very few pay day lenders, compared with the previous licensing regime under the OFT; and

b CONC has introduced rules that apply specifically to HCSTC firms, including specific conduct standards and price caps: interest and charges must not exceed 0.8 per cent of the amount borrowed per day over the contractual period of the loan; default fees must not total more than £15; and the total cost of the credit cannot exceed 100 per cent of the amount borrowed.[97]

93 Sections 99 and 100 CCA.

94 See the student loans regime under the Teaching and Higher Education Act 1998.

95 See for example Section 8 of the Sale of Student Loans Act 2008.

96 See the glossary to the FCA Handbook.

97 CONC Rule 5A.2.

In November 2016, the FCA launched a consultation on whether, among other things, aspects of the HCSTC regime should be extended to other forms of high-cost credit products, such as catalogue credit, some rent-to-own credit, pawn-broking, credit cards and overdrafts.[98]

Peer to peer lending

On 1 April 2014, the UK introduced a new regulatory framework for 'peer-to-peer' lending, also known a 'loan-based crowd funding', which included the introduction of a new regulated activity: 'Operating an electronic system in relation to lending'.

Firms (P2P platforms) that operate an electronic system in the UK must be authorised by the FCA if they facilitate lending or investment by individuals and relevant persons[99] or borrowing by individuals and relevant persons, provided that the P2P platform:

a is capable of determining which credit agreements should be made available to each of the borrowers and lenders;

b undertakes to receive and pay out amounts of interest or capital due to lenders; and

c either takes steps to collect (or arrange for the collection) of repayments or exercises, or enforces rights under the credit agreement.[100]

P2P platforms are also entitled to conduct other activities ancillary to the running of the platform, including interaction with credit information agencies.

P2P platforms must comply with various sections of the FCA Handbook. Notably, FCA rules in CONC require P2P platforms to provide certain protections to borrowers who are individuals or 'relevant recipients of credit'. They in many ways mirror obligations on lenders elsewhere under the consumer credit regime. Accordingly, P2P platforms must, among other things, provide adequate explanations of the key features of the credit agreement to borrowers; assess the creditworthiness of borrowers; and provide post-contract information where the borrower is in arrears or default.

In July 2016, the FCA published a call for input to the post-implementation review of the FCA's crowdfunding rules, including those mentioned in the previous paragraph.[101] An interim feedback statement published in December 2016 announced that the FCA has identified areas of specific concern, including the improvement of wind-down plans to allow existing P2P loans to be administered in the event of the P2P platform's failure; cross-investment (i.e., investment in loans originated on other P2P platforms); the application of mortgage-lending standards where the funds raised through the P2P platform is to finance the acquisition of property; and rules on the content and timing of disclosures (including financial promotions) to persons lending or investing through the platform.[102]

98 FCA Call for Input: High-cost credit – Including review of the high-cost, short-term credit price cap.

99 'Individual consumers' would include natural persons such as consumers and sole traders. 'Relevant persons' include partnerships of two or three persons, not all of whom are bodies corporate, or unincorporated bodies of persons that do not consist entirely of bodies corporate and are not a partnership.

100 Article 36H RAO.

101 www.fca.org.uk/publication/call-for-input/call-input-crowdfunding-rules.pdf.

102 www.fca.org.uk/publication/feedback/fs16-13.pdf.

MCD

The MCD as implemented in the UK broadly applies to credit agreements entered into with individuals (or trustees) secured by a mortgage on residential land in the EEA.[103]

The MCD was implemented in the UK on 21 March 2016, although certain provisions are subject to later implementation including transitional arrangements. The implementing measures were – with a view to minimising disruption – in effect added on top of the existing UK regulated mortgages regime under FSMA, particularly through changes to MCOB (with the exception of consumer buy to let mortgages which, as noted above, are regulated under a separate Mortgage Credit Directive Order 2015).

Among the key changes under the MCD were:

a bringing second charge mortgages (in many cases previously regulated under the CCA) within the FSMA mortgage regime;

b changes to exemptions from mortgage-related regulated activities;[104]

c amended advertising rules;[105]

d restrictions on bundling mortgages with the sale of other financial products;[106]

e additions to the affordability assessment requirements;[107]

f introduction of standard pre-contractual information in the form of a European Standardised Information Sheet (ESIS) although, for a transitional period up to 21 March 2019, mortgage lenders can for certain mortgages continue to use the existing 'key facts illustration' with extra information;[108]

g introduction of a new step involving making a binding mortgage offer and a related cooling-off period;[109]

h an amended APR calculation and introduction of a requirement to have an additional APR in the ESIS for certain mortgages (particularly variable rate mortgages);[110] and

i new early repayment rights.[111]

VII UNFAIR PRACTICES

The CRA sets out a detailed fairness regime that applies both to terms in consumer contracts and notices given to consumers. It generally applies in relation to all finance, payments and retail banking relationships with consumers.

The CCA also has a regime giving courts wide powers of redress where a credit agreement, or related relationships or practices, give rise to an unfair relationship between the lender and borrower.[112] It also applies to business borrowers falling within scope of the CCA (as described above) irrespective of the amount borrowed.

103 Article 3 MCD.
104 Article 4(4B) RAO.
105 Chapter 3A of MCOB.
106 MCOB 2A.2.
107 Chapter 11A of MCOB.
108 Chapter 5A of MCOB, and MCOB TP 1 MCD Transitional Provisions.
109 MCOB 6A.3.
110 Chapter 10A of MCOB.
111 MCOB 2A.4.
112 Sections 140A to 140C CCA.

In addition, the FCA's 'treating customers fairly' regime[113] broadly applies to unfair practices across the financial services described in this chapter (although, notably, not generally to payment institutions and EMIs). The regime also applies with respect to business customers.

Key areas of scrutiny and challenge in this area include misselling, the breadth of contract variation provisions, and the levels (and disclosure) of charges.

VIII RECENT CASES

i Enforcement actions

On 28 September 2016, the FCA issued final notices[114] to an HCSTC provider, Wage Payment and Payday Loans Ltd (WPPL), and its director, in which the FCA:

a cancelled WPPL's interim permissions to provide regulated activities including consumer credit lending;
b refused WPPL's application for full permission; and
c banned the director from carrying out any regulated activity carried on by an authorised firm.

This illustrates the FCA's tough regulatory stance on HCSTC (described above), and specifically reflected its concerns over the inappropriate dismissal of certain customer complaints, excessive sums being removed from some customers' accounts, and failures in assessing whether customers could afford loans before lending to them.

In November 2015, in another enforcement case the PRA issued a fine of more than £1.2 million[115] to a bank, R Raphael & Sons Plc, which outsourced certain functions to another group company without putting in place an appropriate outsourcing agreement or adequately overseeing the outsourcing. The PRA fine illustrated the importance of having robust arrangements in place even for an intra-group outsourcing.

Finally, after Northern Rock (in December 2012) and Barclays Bank (in September 2013) announced that errors in their NOSIAs had been identified, the OFT asked all retail banks to perform a detailed review of their consumer statements and notices, and as a result 17 banks and building societies have agreed to refund interest incorrectly charged following the delivery of incorrect NOSIAs.[116] This industry-wide remediation process is likely to be ongoing, and will probably involve many millions of pounds.

ii Litigation

Durable medium

The PSD requires that various information be provided in a durable medium. Historically, this was generally done by sending a paper mailing to customers, but nowadays for obvious reasons many PSPs aim to provide information electronically. While sending personal emails

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113 Principles 6 and 7 in section 2.1 of PRIN.

114 www.fca.org.uk/publication/decision-notices/wage-payment-payday-loans-limited.pdf.

115 www.bankofengland.co.uk/pra/Documents/supervision/enforcementnotices/en271115.pdf.

116 http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2014/18-14.

is often an adequate way of meeting the requirements, for a variety of reasons some PSPs aim to use alternative means of electronic communications, and there is some uncertainty as to whether and how those alternatives can meet the requirements. At the time of writing, in the *BAWAG* case[117] the Court of Justice of the European Union (CJEU) is being asked to consider whether and how e-banking mailboxes can be used to provide information in a durable medium under the PSD.

The judgment, once given, may have an impact not just on how information can be provided in a durable medium under the PSD, but also under various other EU financial services and consumer protection legislation.

Unfair relationships

In the 2014 *Plevin* case[118] on unfair relationships under the CCA, the UK Supreme Court held that a credit broker's non-disclosure of the amount of commission it received from a lender for arranging payment protection insurance (which was 71.8 per cent) could, and in this case did, amount to an unfair relationship between the customer and the lender in respect of the related credit agreement.

Unfair terms

There has been renewed focus on the drafting of unilateral rights of variation in consumer contracts, to ensure that they are fair and enforceable under the CRA, following recent CJEU decisions,[119] which set out the following principles.

The contract must – in plain, intelligible language – set out the reasons for and method of any such variation, so that before entering into the agreement the consumer can foresee alterations that may be made.

Not providing this information cannot be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of the variation and of their right to terminate their contract if they do not wish to accept the variation.

It will also be relevant whether the consumer's right of termination can actually be exercised in the specific circumstances.

117 *BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v. Verein für Konsumenteninformation*.

118 *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (12 November 2014).

119 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési* (Case C-472/10, judgment given 26 April 2012) and *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen e.V.* (Case C-92/11, judgment given 21 March 2013).

Chapter 14

UNITED STATES

Richard Fischer, Obrea Poindexter and Jeremy Mandell[1]

I OVERVIEW

The US consumer financial services marketplace is competitive and heavily regulated. Advances in technology and significant capital investment have attracted technology firms, including established firms and start-ups, to compete in the financial services market with traditional providers, including banks and the card networks. The Consumer Financial Protection Bureau (CFPB) has matured into a strong enforcement agency, alongside the federal bank regulators, including the Federal Reserve, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation, and state regulatory authorities. The CFPB continues to issue significant rules, based on its authority under the Consumer Financial Protection Act of 2010 (CFPA), its founding statute, as well as other federal consumer financial protection laws. Looking forward, the rate of innovation and the new US presidential administration have the potential to create an inflection point for the US consumer financial services market and opportunities for both new and established market participants.

II STATUTORY AND REGULATORY FRAMEWORK

i Statutory framework

Consumer payments, deposits and credit are subject to a complex set of federal and state statutes and regulations. With respect to consumer payments, the Electronic Fund Transfer Act (EFTA) establishes the basic rights, responsibilities and liabilities of consumers and entities that provide electronic fund transfer services. In addition, laws in nearly every state regulate money transmission, generally under a state licensing regime. With respect to deposits, the Federal Deposit Insurance Act (FDIA) establishes comprehensive deposit insurance coverage,

1 Richard Fischer is a senior partner, Obrea Poindexter is a partner and Jeremy Mandell is a senior associate at Morrison & Foerster LLP.

while other federal laws, including the Truth in Savings Act, provide consumer protections. Consumer credit also is heavily regulated under federal and state law. The Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA) provide the backbone for federal consumer protections related to the various forms of consumer credit. State law, including state usury protections, may also apply. Finally, the CFPA and the Federal Trade Commission (FTC) Act set forth prohibitions on unfair, deceptive and, in some cases, abusive acts or practices (UDAAP/UDAP).

In addition to these substantive statutes covering consumer payments, deposits and credit, there is an overlay of federal statutes covering law enforcement objectives (e.g., the Bank Secrecy Act) and consumer financial privacy (e.g., the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act (FCRA)), among other key statutes and regulations targeting public policy objectives. This overlay is the subject of extensive review and analysis in other treatises or law journals and is referred to herein only in passing.

ii Regulatory framework

Entities that provide consumer financial products or services are subject to regulation and enforcement by federal and state authorities. At the federal level, the CFPB has enforcement authority with respect to 'covered persons', including banks with assets over US$10 billion, 'larger participants' in certain consumer financial product or service markets and 'service providers', as those terms are defined in the CFPA.[2] The CFPB also has authority to write rules prohibiting covered persons and service providers from engaging in UDAAPs and to enforce such rules.[3] The CFPB also has rule-making and enforcement authority under the federal consumer financial protection statutes, including those listed above (e.g., EFTA and TILA), that apply to all persons subject to the laws, without regard to whether they are a covered person or a service provider.[4] Finally, the CFPB has authority to enforce against any person who aids or abets a UDAAP, which means 'knowingly or recklessly' providing 'substantial assistance to a covered person' in connection with a violation of the UDAAP prohibition.[5]

In addition to the CFPB, at the federal level, the banking regulators and the FTC have enforcement authority with respect to certain banks and non-banks, respectively. At the state level, banking departments, licensing authorities and state attorneys general have varying degrees of rule-making and enforcement authority.

III PAYMENTS

i Overview

In the United States, the primary payment methods are cash, debit card, credit card, cheques, and ACH transactions. The Federal Reserve System (Federal Reserve) estimates that in 2015 alone there were over 144 billion non-cash retail payment transactions in the US, with

2 12 U.S.C. Section 5481.

3 Id. Section 5531.

4 Id. Sections 5512, 5561–5567.

5 Id. Section 5536.

a value of almost US$178 trillion.[6] According to the Federal Reserve, the most common payment methods are card-based (debit, credit and prepaid), while ACH transactions have the highest dollar value for non-cash retail payments.[7]

Although there is a great deal of industry interest and activity around online and mobile payments, to date, most online and mobile payments are processed using traditional payment infrastructures. Nevertheless, emerging payment solutions can leverage a number of enhancements over traditional payment methods, including improved customer interfaces, increased use of customer data, and integration with customer loyalty or reward programmes or other third-party services used by consumers. These enhancements have the potential to lessen friction and promote consumer conversion and usage rates. Many of the novel legal and regulatory issues surrounding emerging payments are related to these enhancements.

ii Recent developments

On 21 July 2015, the Federal Reserve established a Faster Payments Task Force (Task Force) to support the Federal Reserve's efforts to improve the speed, safety and efficiency of payments.[8] The Task Force was assembled to engage stakeholders and advance the work outlined in the Federal Reserve's Strategies for Improving the US Payment System, published in January 2015.[9] On 2 February 2016, the Task Force published a set of criteria by which the Task Force will evaluate faster payments approaches, including ubiquity, safety and security, efficiency and speed.[10] Private-sector entities submitted proposals on faster payment approaches, and the Task Force plans to report on the 19 proposals under review in 2017.

On 15 October 2015, major US payment card networks independently began implementing a fraud liability shift from issuers to merchants. The liability shift was designed to encourage card issuers and merchants to transition from magnetic stripe technology to more secure EMV chip technology. EMV chips generate a unique, one-time code needed for a transaction to be approved, thereby greatly reducing counterfeit card risk. Notwithstanding the EMV liability shift, merchants in 2016 were not uniform in upgrading their card acceptance systems to accept chip-based card transactions.

On 22 November 2016, the CFPB published a final rule to regulate prepaid accounts.[11] The prepaid accounts rule amends key provisions of the CFPB's Regulation E (Electronic Funds Transfers) and Regulation Z (Truth in Lending).[12] The rule applies to payroll card accounts, certain government benefit accounts, and prepaid accounts whose primary function is to provide consumers with general transaction capabilities (e.g., to conduct transactions with merchants, at ATMs, or person to person). The rule establishes a prescriptive 'pre-acquisition' disclosure regime, provides an alternative to written periodic statements, and contains modified error resolution procedures and cardholder liability

6 See Federal Reserve System, The Federal Reserve Payments Study 2016 at 2 (22 Dec. 2016).

7 Id. at 3.

8 Press Release, Federal Reserve Board, Federal Reserve Announces Steering Committees of New Payments Task Forces System (21 July 2015).

9 Federal Reserve System, Strategies for Improving the U.S. Payment System (26 Jan. 2015).

10 Faster Payments Task Force, Faster Payments Effectiveness Criteria (2 Feb. 2016).

11 Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83,934 (22 Nov. 2016).

12 12 C.F.R. pts. 1005 and 1026.

limitations. The prepaid accounts rule also extends modified versions of certain requirements under the Credit Card Accountability Responsibility and Disclosure Act to prepaid accounts, including a requirement to submit to the CFPB, and to post to a public website certain prepaid account agreements.[13] Finally, the prepaid accounts rule subjects discretional overdraft services certain credit features associated with prepaid accounts to the credit card requirements of Regulation Z. The prepaid accounts rule will significantly alter the way prepaid card programmes are offered and managed in the United States. With limited exceptions, the rule is effective 1 October 2017.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Access to deposit accounts for currently 'unbanked' or 'underbanked' consumers and compliance with overdraft rules remain high priorities for US regulatory agencies, including the CFPB. The CFPB has taken action against institutions that have charged inappropriate overdraft fees and has encouraged alternatives that prevent consumers from overdrafting their accounts. Technological developments such as online banking, mobile banking and text-message alerts for low balances can help consumers better manage their accounts and prevent overdrafts.

ii Recent developments

On 3 February 2016, CFPB Director Richard Cordray wrote letters to the top 25 US retail banks urging banks to offer an account that would not permit account holders to overdraft their accounts.[14] In his letter, Director Cordray said these accounts would present lower risk to banks and require less screening for risk, thus extending their availability to consumers who may be 'unbanked' because of low credit scores.

On 18 May 2016, the CFPB and the prudential regulators issued interagency guidance outlining expectations that supervised financial institutions investigate and resolve 'credit discrepancies' when customers make deposits to their checking and other deposit accounts.[15] The guidance states that, through technological and other processes, supervised financial institutions are capable of fully reconciling credit discrepancies in most cases, and the agencies 'expect financial institutions to adopt deposit reconciliation policies and practices that are designed to avoid or reconcile discrepancies, or designed to resolve discrepancies such that customers are not disadvantaged'.[16] The guidance notes that failure to reconcile or resolve credit discrepancies may constitute an unfair, deceptive, or abusive act or practice.

On 14 July 2016, the CFPB entered into a consent order with, and assessed a US$10 million fine against, Santander Bank, NA (Santander) for allegedly allowing a telemarketing service provider to make false statements to consumers and violating the requirement under Regulation E that financial institutions obtain a consumer's affirmative

13 Pub. L. No. 111-24, 123 Stat. 1734 (2009).

14 Letter from Richard Cordray, Director, CFPB, to Financial Institution CEOs (2 Feb. 2016).

15 See Interagency Guidance Regarding Deposit Reconciliation Practices (18 May 2016).

16 Id. at 2.

consent before charging overdraft fees on certain transactions.[17] According to the consent order, Santander paid its service provider a higher hourly rate when it achieved target levels of consumer opt-ins to overdraft service and failed to detect the service provider's improper practices in achieving those goals, including signing consumers up for overdraft service without their consent, misrepresenting the costs of the overdraft service, misrepresenting the fees a consumer could face by opting out, and misrepresenting the purpose of the sales call.

V REVOLVING CREDIT

i Overview

According to the Federal Reserve, the total revolving consumer credit outstanding as of October 2016 was over US$980 billion.[18] By some estimates, credit card debt may make up approximately three-quarters of all revolving consumer credit outstanding.[19] Revolving credit transactions are subject to a variety of statutes and regulations, including TILA and ECOA, that impose both substantive and disclosure requirements. In addition, credit card issuers and acquirers are contractually obligated to comply with card network rules. These laws and rules focus primarily on consumer protections such as those related to disclosure of terms, credit balances, billing error resolution, changes in terms, credit reporting and discrimination.

ii Recent developments

On 30 June 2016, the US Court of Appeals for the Second Circuit overturned Visa and MasterCard's US$7.25 billion antitrust settlement with merchants over interchange fees and the ability of merchants to impose credit card surcharges.[20] The Second Circuit rejected what would have been the largest ever class action settlement, holding that plaintiff class members were inadequately represented and, therefore, the settlement was 'unreasonable and inadequate'.[21] While participants in the settlement have sought review of the Second Circuit's ruling, the decision creates uncertainty with respect to whether the networks will permit merchants to impose surcharges on customers who pay with a credit card.

There is also uncertainty with respect to a minority of states that have laws restricting the ability of merchants to impose surcharges on consumers who pay with a credit card. In several states, merchants have filed lawsuits challenging the constitutionality of state surcharge statutes, and federal circuit courts have reached mixed conclusions.[22] In September 2016,

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17 Consent Order, *In the Matter of Santander Bank, N.A.*, No. 2016-CFPB-0012 (14 July 2016).

18 See Federal Reserve Board, G.19 Consumer Credit, October 2016 (7 Dec. 2016).

19 See CFPB, The Consumer Credit Card Market at 29 (3 Dec. 2015).

20 *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Case 12-4671, U.S. Court of Appeals for the Second Circuit (30 June 2016).

21 Id. at 16–17.

22 Compare *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 127 (2d Cir. 2015), cert. granted, 2016 WL 2855230 (29 Sept. 2016) (upholding New York ban on credit card surcharges) and *Rowell v. Pettijohn*, 816 F.3d 73, 80 (5th Cir. 2016) (upholding Texas ban on credit card surcharges) with *Dana's R.R. Supply v. Attorney Gen.*, Florida, 807 F.3d 1235 (11th

the US Supreme Court agreed to hear the Second Circuit case, *Expressions Hair Design v. Schneiderman*, and consider whether state laws that prohibit credit card surcharges are unconstitutional.

On 22 July 2015, the US Department of Defense published a final rule to amend its regulation implementing the Military Lending Act (MLA).[23] The final rule significantly expands the scope of the MLA provisions by covering both new types of creditors and new credit products, including credit cards and other revolving credit accounts. The rule applies to creditors that extend consumer credit to 'covered borrowers', or any consumer who, at the time he or she is first obligated on a credit transaction, is an active duty service member or a spouse or dependent of an active duty service member (the rule does not apply to a credit transaction when the service member ceases to be on active duty).[24] The rule includes a cap on the military annual percentage rate (MAPR) of 36 per cent for any billing cycle, requires creditors to provide various disclosures to consumers, and prohibits prepayment penalties and compelled arbitration.[25] The MAPR calculation is subject to detailed and complex rules for determining what fees and charges must be included, which are broader than the parallel requirements under TILA. Compliance with the rule was required by 3 October 2016; however, compliance for credit cards is delayed until 3 October 2017, unless extended for an additional year.[26]

VI INSTALMENT CREDIT

i Overview

Residential mortgages are heavily regulated products in the United States. A complex web of state and federal statutes and regulations governs nearly every aspect of the residential mortgage loan lifecycle, including underwriting, origination, closing, servicing, loss mitigation, and foreclosure. While non-mortgage instalment products, including auto loans, student loans and personal loans, are not subject to the volume and degree of end-to-end regulatory requirements seen in the mortgage market, they are nonetheless regulated at the federal and state levels. Moreover, the CFPB's enforcement arm has recently focused on the auto finance and student loan servicing markets, while its rule-making arm is considering a sweeping new rule to regulate the short-term instalment loan market.[27]

Beyond traditional instalment loan products, online lending platforms, or 'marketplace lenders', have proliferated rapidly in the US. Marketplace lenders, which are generally non-bank platform providers, typically partner with banks, which originate loans and sell either the loans or the receivables to the marketplace lender, private investors, or

Cir. 2015) (striking down Florida ban on credit card surcharges) and *Italian Colors Restaurant v. Harris*, 99 F.Supp.3d 1199 (E.D. Cal. 2015), appeal docketed, No. 15-15873 (9th Cir. 30 Apr. 2015) (striking down California ban on credit card surcharges).

23 Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed. Reg. 43,560 (22 July 2015).

24 32 C.F.R. Sections 232.1–232.3.

25 32 C.F.R. Sections 232.4(b), .6, and .8(h) and (c).

26 32 C.F.R. Section 232.13.

27 See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864 (proposed 22 July 2016).

both. Alternatively, marketplace lenders may independently originate loans under state lending licences and sell the loans or the receivables to investors. Federal and state regulators are intently focused on marketplace lending at present.[28]

ii Recent developments

The Home Mortgage Disclosure Act (HMDA) requires certain financial institutions that originate mortgages to collect and report data about the mortgages they originate. On 28 October 2015, the CFPB published a final rule amending Regulation C, which implements HMDA.[29] The rule, most of which becomes effective on 1 January 2018, makes changes to the types of institutions required to collect and report HMDA data, the types of transactions subject to collection and reporting, the particular data about transactions that institutions must collect and report, and the method and frequency of such reporting.

On 19 October 2016, the CFPB published significant amendments to its mortgage servicing rules.[30] The amendments make multiple modifications to required loss mitigation procedures and add special rules governing borrowers in bankruptcy and successors in interest. Most of the rule's provisions become effective on 19 October 2017.

With respect to non-mortgage transactions, a series of recent cases have addressed the relationship between marketplace lenders and banks, questioning whether a bank is, in fact, the 'true lender' in a partnership with a marketplace lender, given that the marketplace lender or a private investor typically purchases the bank's loans or receivables within days of origination. These cases are significant because, if the marketplace lender is the 'true lender' instead of the bank, the marketplace lender could be required to obtain state licences and the loans must conform to state consumer credit and usury laws. Outcomes of these cases have varied widely. One federal district court deferred to the form of the loan transaction, holding that federal law expressly pre-empts state usury laws for bank-partner programmes.[31] A state supreme court, on the other hand, analysed the substance of the loan transaction, holding that the marketplace lender was the 'true lender' because it held the 'predominant economic interest' in the transaction.[32]

While distinguishable from the 'true lender' line of cases, and a revolving credit case on the facts, the US Supreme Court's denial of *certiorari* in *Midland Funding, LLC et al. v. Madden* is also an important case for lenders.[33] By declining to review *Madden*, the Supreme Court let stand the Second Circuit's controversial holding that Section 85 of the National Bank Act,[34] which pre-empts state laws governing the rate of interest a national

28 See, e.g., U.S. Treasury Dept., Opportunities and Challenges in Marketplace Lending (10 May 2016); Press Release, Cal. Dept. of Bus. Oversight, California DBO Announces Inquiry into 'Marketplace' Lending Industry (11 Dec. 2015).

29 Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66,128 (28 Oct. 2015).

30 Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (19 Oct. 2016).

31 *Sawyer v. Bill Me Later Inc.*, 23 F.Supp.3d 1359 (D. Utah 2014).

32 *CashCall v. Morrissey*, No. 12-1274, 2014 WL 2404300 (W. Va. 30 May 2014), cert. denied, 135 S. Ct. 2050 (2015).

33 *Midland Funding, LLC v. Madden*, 136 S. Ct 2505, 579 U.S. __ (2016).

34 12 U.S.C. Section 85.

bank may charge on a loan, does not have pre-emptive effect after a national bank sells a loan to a non-bank.[35] The case could have significant implications for the secondary loan market, which relies on the long-standing 'valid when made' principle of contracts, and in particular for marketplace lenders, which routinely purchase and sell bank-originated loans. At present, *Madden*'s holding applies only in the Second Circuit, which is comprised of Connecticut, New York and Vermont.

VII OTHER AREAS

Regulators and courts have focused on other areas related to consumer financial services, including fair access, privacy and cybersecurity, credit reporting, anti-money laundering and use of third-party service providers. The developments identified below are representative and not exhaustive.

i Fair access to financial services

On 15 September 2016, the US Department of Housing and Urban Development issued guidance on how the non-discrimination provisions in the Fair Housing Act apply to persons who have limited ability to speak, read, write or understand English in housing transactions.[36]

The CFPB issued guidance on fair access issues, including CFPB Director Cordray's 30 August 2016 letter to an advocacy group, which concluded that the ECOA and its implementing Regulation B prohibit credit discrimination based on gender identity and sexual orientation, including discrimination based on actual or perceived non-conformity with gender-based stereotypes.[37] The CFPB also announced a series of steps designed to improve consumer access to checking accounts, including warning financial institutions that failure to accurately report negative checking account histories to consumer reporting agencies could result in CFPB action and issuing several guides to assist consumers with navigating the deposit account system.[38]

Also, in *Hawkins v. Community Bank of Raymore*, an evenly divided US Supreme Court failed to define the proper interpretation of the meaning of the term 'applicant' under the ECOA; specifically, whether a spousal guarantor qualifies as an 'applicant'.[39]

ii Privacy and cybersecurity

The US privacy regime is generally based on principles of notice and choice, while cybersecurity is based on a standard of 'reasonableness'.

For cybersecurity, the trend is toward more prescriptive requirements, as well as aggressive enforcement. For instance, in February 2016 the California Attorney General

35 *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015).

36 Dept. of Housing and Urban Development, Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency (15 Sept. 2016).

37 Letter from Richard Cordray, Director, CFPB, to Services & Advocacy for GLBT Elders (30 Aug. 2016).

38 See Press Release, CFPB, CFPB Takes Steps to Improve Checking Account Access (3 Feb. 2016).

39 *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072, 577 U. S. __ (2016).

released a report establishing the Attorney General's position that reasonable security practices under California law include meeting 20 specific security controls.[40] In the same vein, in December 2016 the New York Department of Financial Services published revised draft cybersecurity regulations that would impose specific cybersecurity requirements on covered entities.[41]

On 2 March 2016, the CFPB obtained its first consent order related to data security practices, against Dwolla, Inc.[42] The FTC has long been the primary federal regulator of non-banks' information security practices. The FTC is, however, engaged in a lengthy dispute, currently pending review by a court of appeals, regarding what constitutes 'unfair' data security practices that violate Section 5 of the FTC Act.[43]

iii Credit reporting

Regulatory agencies and courts are actively considering matters related to credit reporting.

On 3 January 2017, the CFPB took action against Equifax and TransUnion (collectively, CRAs) alleging deception regarding their credit scoring products.[44] The CFPB alleged that the CRAs deceived consumers about the value of the credit scores they sold and deceived consumers into enrolling in subscription programmes. The CFPB also alleged violations of the FCRA by Equifax related to the requirement to provide a free annual credit report, because Equifax first presented consumers with Equifax advertisements, while the FCRA prohibits such advertising until after consumers receive their annual report. The CRAs were ordered to make restitution of over US$17.6 million and pay civil money penalties of US$5.5 million.

On 16 May 2016, the US Supreme Court issued its opinion in *Spokeo, Inc. v. Robins*, an FCRA case where the issue was '[w]hether the particular procedural violations alleged . . . entail a degree of risk [of harm] sufficient to meet the concreteness requirement' necessary for standing to bring such an action.[45] The Court remanded the case to the Ninth Circuit for further proceedings, but in doing so provided guideposts that courts, including the Ninth Circuit, should use in evaluating standing questions. The effect of *Spokeo* remains to be seen; nonetheless, the decision should make it more difficult for consumer class action claims seeking statutory damages for technical or procedural violations.

iv Anti-money laundering

In preparation for its review by the Financial Action Task Force (FATF), an international standards-setting body, the Financial Crimes Enforcement Network (FinCEN), a division of the US Treasury Department, adopted a number of enhanced anti-money laundering controls in 2016. On 11 May 2016, FinCEN published a final rule requiring financial institutions to

40 Harris, K., California Data Breach Report (Feb. 2016).

41 Cybersecurity Requirements for Financial Services Companies, I.D. No. DFS-39-16-00008-RP (revised proposed rule) (to be codified at 23 NYCRR 500), N.Y. St. Reg. 28 Dec. 2016 at 23.

42 Consent Order, *In the Matter of Dwolla, Inc.*, File No. 2016-CFPB-0007 (2 Mar. 2016).

43 See generally *In the Matter of LabMD, Inc.*, FTC Docket No. 9357.

44 See Consent Order, *In the Matter of Equifax Inc. and Equifax Consumer Services LLC*, File No. 2017-CFPB-0001 (3 Jan. 2017); Consent Order, *In the Matter of TransUnion Interactive Inc. TransUnion, LLC, and TransUnion,* File No. 2017-CFPB-0002 (3 Jan. 2017).

45 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550, 578 U.S. __ (2016).

enhance their customer due diligence procedures by identifying and verifying information about each individual who, directly or indirectly, owns 25 per cent or more of a legal entity customer of the financial institution, and each individual who has significant responsibility to control, manage, or direct the legal entity customer.[46] These individuals are referred to as 'beneficial owners'.[47] The rule also added a 'fifth pillar' to the prior four pillars of minimum requirements for an anti-money laundering compliance programme, which requires financial institutions to develop and update customer risk profiles, maintain and update customer information, and conduct ongoing anti-money laundering monitoring.[48]

The FATF review generally found that the United States has robust anti-money laundering controls, but that 'significant gaps' still exist, including with respect to certain industries and professions that are insufficiently covered by existing regulations.[49]

In addition, interagency guidance issued on 21 March 2016 made clear that banks have an obligation to collect and verify information for individual cardholders of general-purpose prepaid cards that have features similar to a deposit account, regardless of whether the funds are held in a pooled account or whether the prepaid programme is managed by the bank or by a third party on behalf of the bank.[50]

v Use of partners and third-party service providers

Bank regulators recently have increased their scrutiny of the use of partners and third-party service providers. Both the OCC and the CFPB have issued guidance on the use of service providers, including the expectation of comprehensive and rigorous service provider oversight and management, and continue to take related enforcement actions.[51] For example, in 2016, the CFPB brought an enforcement action against a national bank relating to its use of a service provider in marketing the bank's overdraft service, and required the bank to develop new vendor management policies and maintain certain compliance-related contractual provisions (i.e., duty to provide adequate training).[52]

On 26 October 2016, the CFPB reissued its guidance on the use of service providers to clarify that the 'depth and formality' of service provider risk management programmes may vary depending on the service being performed (e.g., complexity and potential for consumer harm) and the performance of the service provider in carrying out activities in compliance with law.[53] Both the OCC's and CFPB's guidance require supervised entities to

46 See Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (11 May 2016).

47 See id. at 29,451–29,452.

48 See id. at 29,457.

49 FATF, Anti-money laundering and counter-terrorist financing measures – United States, Fourth Round Mutual Evaluation Report (2016).

50 See Interagency Guidance to Issuing Banks on Applying Customer Identification Program Requirements to Holders of Prepaid Cards (21 Mar. 2016).

51 See OCC Bulletin 2013-29, Third Party Relationships: Risk Management Guidance (30 Oct. 2013); CFPB Bulletin 2012-3, Service Providers (13 Apr. 2012).

52 See Consent Order, *In the Matter of Santander Bank, N.A.*, File No. 2016-CFPB-0012 (14 July 2016).

53 See CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers (26 Oct. 2016).

have an effective process for managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and certain contractual provisions related to compliance expectations.

VIII UNFAIR PRACTICES

The CFPB has continued to flex its enforcement muscle in the UDAAP context by issuing public consent orders relating to a broad range of consumer financial products and services including auto loans, credit cards, debt collection, credit reporting, data security, deposit accounts, student loans and service member loans. A brief review of UDAAP standards and key orders are summarised below.

Generally, 'unfairness' means unjustified consumer injury, or substantial injury to the consumer that the consumer could not have reasonably avoided, which is not outweighed by offsetting consumer or competitive benefits.[54] 'Deception' generally exists where there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, and the representation, omission or practice is material.[55] Finally, the 'abusive' standard, which was newly established under the CFPA, prohibits material interference with a consumer's ability to understand a term or condition of a consumer financial product or service; or taking unreasonable advantage of a lack of the consumer's understanding, an inability of the consumer to protect his or her own interests, or reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[56]

i Unfair practices

The following are examples of CFPB allegations of unfair practices:

a Credit reporting. The CFPB alleged that failure to update or correct inaccurate credit reports for customers that remitted multiple partial payments that, when aggregated, constituted an eligible payment was 'unfair'.[57]

b Debt collection. The CFPB alleged that failure to identify and remit payments by consumers to debt buyers in a timely manner was 'unfair' because it precluded the debt buyers from updating consumers' account balances.[58] Filing debt collection lawsuits based on summary data without reviewing account level documentation was also alleged to be 'unfair'.[59]

c Payment processing. The CFPB alleged that continuing to process payments despite warnings, including high return rates, consumer complaints, and government enforcement actions, that their clients were engaged in fraudulent or illegal activities was 'unfair'.[60]

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54 12 U.S.C. Section 5531(c).

55 Federal Trade Commission, Policy Statement on Deception (14 Oct. 1983).

56 12 U.S.C. Section 5531(d).

57 Consent Order, *In the Matter of Wells Fargo Bank, N.A.*, File No. 2016-CFPB-0013 (22 Aug. 2016).

58 Consent Order, *In the Matter of Citibank, N.A.*, File No. 2016-CFPB-0003 (23 Feb. 2016).

59 Consent Order, *In the Matter of Pressler & Pressler, LLP et al.*, File No. 2016-CFPB-0009 (25 Apr. 2016).

60 Complaint, *CFPB v. Intercept Corp, et al.*, No. 3:16-cv-00144-ARS (D. N.D. 6 June 2016).

d Account opening. The CFPB alleged an 'unfair' practice, and levied its largest civil penalty to date against a bank, where the bank opened deposit accounts by transferring funds from existing consumer accounts without the consumer's knowledge, and then charged fees on the new accounts.[61]

e Lead aggregators. The CFPB alleged that failure to vet or monitor the entities to which a lead aggregator sold leads or loan applications, and failure to disclose the end purchasers of the applications was 'unfair'.[62]

f Payday loans. The CFPB found that failure to disclose that the discount provided on loans, in which the consumer agreed to a shorter term than the statutory maximum, would be reversed upon default was 'unfair'.[63] The CFPB alleged that a different lender's practice of pressuring or coercing consumers to cash their cheques by retaining custody of the cheque to prevent consumers from leaving, processing the cheque without consumers' consent, and misrepresenting consumers' ability to cancel or reverse the cheque-cashing transaction was also 'unfair'.[64]

g Service member loans. Freezing a consumer's electronic account access and disabling certain electronic services, without adequate notice, after a consumer became delinquent on an account was alleged to be 'unfair'.[65]

h Student loans. The CFPB alleged that failure to disclose that the bank allocated partial payments proportionately across all grouped accounts, while treating each loan within the group as separate in its assessment of late fees and credit reporting, and failure to disclose to consumers that they could direct how the partial payment should be allocated was an 'unfair' practice.[66] The CFPB alleged that failure to aggregate multiple partial payments submitted within the same billing cycle likewise was 'unfair'.[67]

ii Deceptive practices

The following list includes examples of CFPB allegations of deceptive practices:

a Auto loans. The CFPB found that failure to disclose costs that only applied to non-cash customers, such as mandatory repair coverage and a GPS payment tracker, as 'finance charges' was 'deceptive'.[68]

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61 Consent Order, *In the Matter of Wells Fargo Bank, N.A.*, File No. 2016-CFPB-0015 (8 Sept. 2016).

62 Complaint, *CFPB v. D and D Marketing, Inc.*, d/b/a T3 Leads et al., File No. 2:14-cv-09692 (C.D. Cal. 17 Dec. 2015).

63 Consent Order, *In the Matter of Flurish, Inc.*, d/b/a LendUp, File No. 2016-CFPB-0023 (27 Sept. 2016).

64 Complaint, *Consumer Financial Protection Bureau v. All American Check Cashing, Inc., et al.*, Docket No. 3:16-cv-00356-WHB-JCG (S.D. Miss. 11 May 2016).

65 Consent Order, *In the Matter of Navy Federal Credit Union*, File No. 2016-CFPB-0024 (11 Oct. 2016).

66 Consent Order, *In the Matter of Wells Fargo Bank, N.A.*, File No. 2016-CFPB-0013 (22 Aug. 2016).

67 Id.

68 Consent Order, *In the Matter of Y King S Corp, d/b/a Herbies Auto Sales*, File No. 2015-CFPB-0001 (21 Jan. 2016).

b Credit reporting. Misrepresenting the cost of credit repair services and falsely stating that the services would remove material negative entries on consumers' credit reports and increase consumers' credit scores was alleged to be 'deceptive'.[69]

c Data security. The CFPB made its first foray into data security when it found that misrepresenting the security of the company's data, including misrepresenting that the data security practices met or exceeded industry standards and that its processing system was in compliance with payment card industry standards, was a 'deceptive' practice.[70]

d Debt collection. The CFPB alleged that filing declarations in collection lawsuits that were either based on summary data or altered post execution was 'deceptive'.[71] Allegedly impersonating law enforcement officials, falsely threatening prosecution, and adding unauthorised collection fees to the debts was also considered 'deceptive'.[72]

e Deposit accounts. The CFPB alleged that misrepresenting the benefits and costs of overdraft protection, including representing that an overdraft programme was a free service, when the consumer could incur multiple fees if they overdrew their account was 'deceptive'.[73]

f Payday loans. The CFPB alleged that a lender representing that it did not charge fees for extending the repayment date was 'deceptive' if, when the repayment date was extended, the lender reversed a previously applied discount for early repayment.[74]

g Student loans. The CFPB also continued its scrutiny of companies offering student loan repayment relief, finding that practices such as misrepresenting the amount of savings achievable, pre-approval status, and government affiliation were all 'deceptive'.[75]

iii Abusive practices

Below are some examples of CFPB allegations of abusive practices:

a Auto loans. The CFPB found that a lender's practice of not including sticker prices on vehicles and only disclosing the purchase price of the vehicle after the consumer agreed to purchase the vehicle, combined with the lender's practice of failing to

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69 Complaint, *Consumer Financial Protection Bureau v. Prime Marketing Holdings, LLC*, No. 2:16-cv-7111 (C.D. Cal. 22 Sept. 2016).

70 Consent Order, *In the Matter of Dwolla, Inc.*, File No. 2016-CFPB-0007 (2 Mar. 2016).

71 Consent Order, *In the Matter of Pressler & Pressler, LLP et al.*, File No. 2016-CFPB-0009 (25 Apr. 2016); Consent Order, *In the Matter of New Century Financial Services, Inc.*, File No. 2016-CFPB-0010 (25 Apr. 2016).

72 Complaint, *Consumer Financial Protection Bureau v. Douglas MacKinnon, et al.*, No. 1:16-cv-00880 (W.D.N.Y. 2 Nov. 2016).

73 Consent Order, *In the Matter of Santander Bank, N.A.*, File No. 2016-CFPB-0012 (14 July 2016).

74 Consent Order, *In the Matter of Flurish, Inc., d/b/a LendUp*, File No. 2016-CFPB-0023 (27 Sept. 2016).

75 See Consent Order, *In the Matter of Student Aid Institute, Inc., et al.*, File No. 2016-CFPB-0008 (30 March 2016).

disclose certain 'finance charges', was 'abusive'.[76] The CFPB further found that a lender's practice of using a 'payback guide' that showed the amount of potential monthly payments for different repayment periods, but failed to disclose the total cost of the transaction, and that all loans are 30-day transactions that would renew with additional fees if a longer repayment period is selected was 'abusive'.[77]

b Credit cards. Submission of credit card, debit card and deposit account applications using consumers' information without their knowledge or consent was alleged to be 'abusive'.[78]

c Lead aggregators. Failure to correct misrepresentations by lead generators regarding loan terms while effectively steering consumers to less favourable loans than would otherwise be available to them, including loans that violated state usury statutes was alleged to be 'abusive'.[79]

d Payday loans. The CFPB alleged that a lender's practice of pressuring or coercing consumers to cash their pay cheques by retaining custody of the cheque to prevent consumers from leaving, processing the cheque without consumers' consent, and misrepresenting consumers' ability to cancel or reverse the cheque-cashing transaction was also 'abusive'.[80]

IX OUTLOOK

The change in the US presidential administration will be the dominant force shaping the country's consumer financial services regulatory landscape in the coming year. As a result of the changing administration, as well as a landmark decision in the *PHH* case,[81] the priorities of and momentum behind the CFPB could see significant change. In addition, the influence of non-traditional financial services providers on the US consumer financial services market will continue to grow. Financial technology firms are deploying innovative technological solutions and developing new uses for a rapidly expanding universe of consumer data. In recognition of this growing influence, the OCC has announced that it intends to consider applications from financial technology companies, including marketplace lenders and non-bank payment

76 Consent Order, *In the Matter of Y King S Corp, d/b/a Herbies Auto Sales*, File No. 2015-CFPB-0001 (21 Jan. 2016).

77 Consent Order, *In the Matter of TMX Finance, LLC*, File No. 2016-CFPB-0022 (26 Sept. 2016).

78 Consent Order, *In the Matter of Wells Fargo Bank, N.A.*, File No. 2016-CFPB-0015 (8 Sept. 2016).

79 Complaint, *Consumer Financial Protection Bureau v. D and D Marketing, Inc., d/b/a T3Leads, et al.*, No. 2:15-cv-9692 (C.D. Cal. 17 Dec. 2015).

80 Complaint, *Consumer Financial Protection Bureau v. All American Check Cashing, Inc., et al.*, Docket No. 3:16-cv-00356-WHB-JCG (S.D. Miss. 11 May 2016).

81 See *PHH Corp., et al. v. Consumer Financial Protection Bureau*, 836 F.3d 1 (D.C. Cir. 2016), reh'g granted en banc, No. 15-1177 (Feb. 16, 2017) (vacating a $109 million disgorgement remedy for alleged violations of the Real Estate Settlement Procedures Act, and holding that the provision of law establishing the CFPB's single director, removable only 'for inefficiency, neglect of duty, or malfeasance in office', was unconstitutional).

providers, to become special purpose national banks.[82] This new option potentially could relieve fintech companies of the regulatory burden of partnering with a bank or maintaining licences on a state-by-state basis, while subjecting such charters to direct supervisory and enforcement jurisdiction of the OCC. The coming year will also see continued evolution of the body of case law surrounding the 'true lender' and *Madden* issues.

82 Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for FinTech Companies (Dec. 2016).

Appendix 1

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Pierre Berger is a corporate, financial services and insurance partner in the Antwerp office of Baker McKenzie, and he is a member of Baker McKenzie's EMEA financial services and insurance steering committee, as well as an EMEA point of contact for fintech matters. He advises Belgian and foreign multinationals on all aspects of banking, funds, financial services and insurance law, and he also advises on restructuring and insolvency matters, and mergers and acquisitions. His principal area of expertise is in the banking, funds and insurance industry, with a focus on complex regulatory and fintech matters. He is also a seasoned litigator and arbitrator in corporate and financial services matters. Also, Pierre Berger has been awarded with the Client Choice Award 2017 for Banking in Belgium: www.clientchoice.com (www.bakermckenzie.com/en/people/b/berger-pierre).

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Diána Boross-Varga is an associate in the banking and finance practice group. Prior to joining Wolf Theiss in 2013, she worked at Noerr & Partner and also gained experience at Luther's Budapest and Berlin offices. Diána assists clients in project financing, capital market transactions and banking regulatory issues. Diána completed her legal studies at the University of Szeged and gained her LLM in German and European Economic Law from the University of Potsdam. At the University of Szeged she also gained her special translator qualification in the German language.

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Belinda Chiu is an associate in Cassels Brock & Blackwell's business law and competition, antitrust and foreign investment groups. Belinda's experience in competition law includes merger and acquisition review, compliance, and marketing and advertising. Belinda also routinely assists in foreign investment matters relating to the Investment Canada Act. As a business law associate, her experience in corporate and commercial drafting encompasses IT agreements and is complemented with regulatory advice relating to privacy and data protection laws, including Canada's anti-spam legislation. Prior to joining Cassels Brock as an associate, Belinda was a summer student in 2012 and 2013, and completed her articles at the firm during 2014–2015. Throughout her summers and articling, Belinda gained a broad range of experience among different practice groups including securities law, business law (including tax) and litigation. Belinda received her JD from Queen's University Faculty of Law in 2014. Prior to law school, Belinda obtained a bachelor of commerce degree from the University of Toronto, specialising in commerce and finance and majoring in economics. Before joining Cassels Brock, Belinda interned at an accounting firm, worked as a research assistant for the Rotman School of Management and was a private tutor for middle school students.

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Gustavo Delgado is a member of the dispute resolution and public law practice groups of Baker McKenzie in Santiago. In his five years of experience, Mr Delgado has focused his practice on public, constitutional and administrative law litigation and counselling. He served the Chilean government between 2012 and 2014, advising the Chief of the Ministry of Education's Legal Division on regulatory disputes and other contentious legal matters. He joined Baker McKenzie in 2014.

Mr Delgado studied law at the Pontificia Universidad Cátolica de Chile Law School. Mr Delgado has been a teaching assistant on constitutional law since 2007, and administrative law since 2010 at the same university. He is a member of the Chilean Bar Association. He speaks Spanish and English.

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Gerhard Dilger is admitted as an attorney-at-law to the Austrian Bar and consultant at Wolf Theiss, where he is a member of Wolf Theiss' banking and finance and energy practice groups. Previously Gerhard worked as head of a legal department for an international organisation in Sarajevo and as chief legal officer for the largest private energy trading company in Austria. There he gained substantial experience in finance, regulatory and contractual projects. Prior to that, Gerhard worked for another well-known international law firm in Austria. Gerhard is a frequent lecturer at seminars and universities in Austria. In addition to his doctorate in law and his master's degree in business administration, Gerhard also graduated from the Austrian Defence Academy (international legal adviser) and holds a communication trainer degree.

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Michaela Ericssonová – an attorney at PRK Partners Prague, Czech Republic – specialises in banking and finance, and general corporate law. Michaela graduated in 2010 from Charles University Law School in Prague. That same year she joined PRK Partners as an associate and in 2014 she became an attorney-at-law of the Czech Bar Association.

She has extensive experience in providing legal services to banks and financial institutions related to loans and leasing transactions. She has worked on projects related to the recodification of Czech private law. She gives lectures in consumer financing regulation. Michaela also focuses on the regulation of non-profit institutions, education and healthcare systems.

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Michael Fischer, an associate at Wolf Theiss Vienna, is specialised in banking and finance transactions, capital markets, corporate M&A and energy projects. Prior to joining the firm, Michael worked for other international law firms in Austria and Romania, for an international major bank in the field of capital markets as well as for a foreign trade consulting company in Bulgaria, where he gained valuable experience. Michael graduated from the Universities of Vienna and St Gallen with a focus on banking and financing law, as well as corporate and contract law.

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Rick Fischer is co-chair of the financial services practice group at Morrison & Foerster LLP. Mr Fischer's practice focuses on retail financial services, privacy, and data security.

His practice has a special emphasis on privacy, data security, e-commerce, technology, and financial services joint ventures, as well as compliance and enforcement matters involving the Consumer Financial Protection Bureau and the Federal Trade Commission. Mr Fischer has worked closely with clients on every major legislative and regulatory initiative affecting financial services and payment systems since the mid 1970s.

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Uría Menéndez – Proença de Carvalho

Hélder Frias joined the Lisbon office of Uría Menéndez – Proença de Carvalho in 2006 and became a senior associate in 2015. Hélder worked in the London office of the firm from September 2010 to August 2011.

His practice is focused on banking, finance and insurance. Notably, he advises on M&A transactions involving financial institutions, bancassurance joint ventures, the transfer of insurance portfolios and on other regulatory matters related to these markets, including insurance and reinsurance intermediation.

Hélder frequently advises on regulatory and supervisory aspects of financial and insurance activities (including banking and financial intermediation services and payment services), such as lending, creation of security, factoring, sale and purchase of receivables, money laundering, venture capital and financial products, and investment and retail banking and insurance instruments (capital redemption transactions and unit-linked life insurance agreements).

VIKTOR GLATZ

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Viktor Glatz is currently finishing his studies at Charles University Law School in Prague. He has been working at PRK Partners as a legal assistant since 2015 and will continue as a junior associate after graduating from law school.

Viktor is a member of the litigation team. He has also worked on the creation of an interactive application that provides a user-friendly overview of Czech civil procedure law.

Viktor is fluent in Czech and English.

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Nikki Johnstone is a senior associate in the global banking and payment systems practice at Paul Hastings, based in its London office. Her practice focuses on advising clients on payments, e-money and consumer credit regulation including the formation and operation of crowdfunding and peer-to-peer lending platforms both in the retail and business sectors. Nikki was included in Innovate Finance's 'Women in Fintech 2016 Powerlist', and has in the past been seconded to Apple Europe and acted as legal assistant for the Financial Markets Law Committee.

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Saroj Jongsaritwang is a partner of R&T Asia (Thailand) Limited. He was a founding member of the Bangkok office. Saroj has more than 17 years of experience in legal field in Thailand, acting for a broad range of corporate and financial clients, acting as a legal counsel for a group of companies (consisting of 10 companies) representing the largest consumer finance business (including credit card and personal loans) in Thailand including advising various commercial banks in various banking and project finance matters. Saroj is recognised as a recommended lawyer in *The Legal 500* (2016 edition) in banking and finance and technologies, and media and telecommunications.

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Pauline Kustermans is an associate in the Antwerp office of Baker McKenzie. She advises Belgian and foreign multinationals on all aspects of banking, financial services, insurance and funds law. She also advises on corporate legal issues and insolvency matters. She is also active in litigation in her field of practice. Her main focus is on advisory and transactions in banking and finance law, particularly regulatory matters.

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Leon Larrain is a transactional lawyer with extensive experience in the areas of mergers and acquisitions, banking and finance, and project finance. Mr Larrain practises also in telecommunications, securities and real estate projects. He is ranked as a 'Recommended Individual' in Corporate/M&A and also in Banking & Finance by *PLC Which Lawyer 2012*. He has also been recognised by Chambers and Partners for his work in Banking & Finance and M&A. Mr Larrain has served in several committees of Baker McKenzie. He provides pro bono work for several institutions. He has been admitted to the bar in Chile since 1980. He is a conciliator at the International Centre for Settlement of Investment Disputes (ICSID) in Washington, DC, appointed by the Chilean government.

Mr Larrain studied law in the Universidad de Chile's Law School. He also studied the international tax programme of Harvard University's Law School.

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Laura Machuca Menéndez joined Uría Menéndez in Madrid in 2012. Her practice focuses on M&A, banking and finance and corporate law. Laura has been involved in some of the most significant transactions in Spain in recent years.

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Jeremy Mandell is a senior associate in the financial services practice group at Morrison & Foerster LLP. Mr Mandell's practice focuses on consumer financial services regulation, with particular attention to payments and emerging payments issues. Mr Mandell has extensive experience working on matters related to retail and interbank payment system issues.

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Alison Manzer is a partner at Cassels Brock & Blackwell LLP in the financial services practice group. Her practice includes a broad range of practice specialties in finance and regulation of financial services. Alison chairs the Project Finance and Development Committee and the Programmes Committee of the ABA Business Law Section, and is a Fellow of the American College of Commercial Finance Lawyers and American Bar Foundation and president of The Association of Commercial Finance Attorneys. She is an adjunct professor at Osgoode

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INA MEIRING

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Ina Meiring is a director at Werksmans Attorneys and the head of its financial services regulation practice area. Prior to Werksmans, she held the position of group legal counsel at Absa. She actively participated in various banking industry forums and still serves as a member of the standing committee for review of the National Payment System Act. Ina has delivered many papers and contributed to various publications throughout her career. She holds a BA (Law) LLB as well as an LLM from RAU, and an LLD from the University of South Africa (UNISA). She was a highly regarded lecturer at both RAU and UNISA law faculties for 22 years.

FEDERICO DE NORIEGA OLEA

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With more than 10,000 hours of experience in corporate transactions, Federico De Noriega Olea is widely recognised for his deep experience in the financial sector. As a partner in the Mexico City office, he advises clients on financial transactions, mergers and acquisitions, and data privacy issues, including data processing, data transfers and security breaches. His approach combines a robust knowledge of the legal issues with practical solutions and risk-mitigation strategies.

Federico is also widely recognised for his work with entrepreneurs and in financing innovative new ventures and start-ups, an area he has focused on extensively since 2008. Federico was a foreign associate at a global law firm's New York office in 2007 and 2008, after which he rejoined Barrera, Siqueiros y Torres Landa (BSTL) (now Hogan Lovells).

He was awarded academic excellence by the Universidad Iberoamericana for scoring the highest GPA of his graduating class. He received a Master of Laws degree from Harvard Law School.

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Melinda Pelikán is a senior associate leading the banking and finance practice group at Wolf Theiss' Budapest office. Prior to joining Wolf Theiss in 2014, she gained valuable experience in the area of banking and finance working at CIB Bank as a senior legal counsel and in the

Budapest offices of international law firms. She has more than 12 years of experience, and she assists clients in project, real estate and acquisition finance, and restructuring, as well as cross-border financing and factoring projects. Melinda completed her legal studies at the Eötvös Loránd University in Budapest. She speaks English and Spanish.

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Obrea Poindexter is co-chair of the financial services practice group at Morrison & Foerster LLP, heads the firm's mobile payments group and is co-chair of the fintech group. Ms Poindexter's practice focuses on financial services regulation, including financial privacy issues relating to the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act; consumer lending issues under the CARD Act, the Truth in Lending Act and the Equal Credit Opportunity Act; debit cards, prepaid cards, electronic banking and payment system issues under the Electronic Fund Transfer Act (Regulation E) and the E-SIGN Act. She also advises clients extensively on issues related to emerging payments systems such as mobile payment systems and person-to-person payments.

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Zsófia Polyák is an associate in the banking and finance practice group in Wolf Theiss Budapest office. She holds a law degree and an LLM degree in capital markets and banking law. She specialises in project, real estate and acquisition finance, restructuring, cross-border financing and corporate financing. Prior to joining Wolf Theiss, she gained valuable work experience at ING Bank as a supervisor legal counsel; in this role she was responsible for monetary circulation matters, in addition to lending.

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Ben Regnard-Weinrabe is a partner in the global banking and payment systems practice at Paul Hastings, based in its London office. He has extensive experience of the commercial and retail banking and payments industries, advising on EU and UK law and regulation, products, commercial contracts and transactions. *Chambers UK* 2017 lists Ben as a leading individual in Band 1 for payments and Band 3 for consumer finance, with clients describing him as an 'innovative guru on financial services regulations and emerging fintech markets' and 'very knowledgeable in his subject and he relays that knowledge in a pragmatic, commercial manner'.

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Carlos Romero focuses his practice on corporate law, providing clients with practical and concise advice. He joined the firm in 2016, the same year in which he finished his law studies at Escuela Libre de Derecho.

Prior to joining Hogan Lovells, Carlos began his legal practice at a Mexican law firm focusing on corporate governance and contracts.

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Aldonza Sakar is specialised in structured finance, banking and corporate. During the last 13 years she has participated in the finance and banking sector as well as in prestigious international law firms, to identify and solve clients' needs and interests related to corporate and finance restructures, including M&A transactions. As senior associate in the Mexico City office, she advises clients on credit transactions, including collateral agreements and mergers and acquisitions, as well as securitisation transactions. Prior to joining Hogan Lovells as a senior associate, she was an associate in other prestigious international law firms. Aldonza Sakar obtained her law degree in 2004 from the Escuela Libre de Drecho (ranked among the top three law universities in Mexico City), and obtained several law certificates for postgraduate and professional study issued by the Barra Mexicana, Colegio de Abogados, AC the Escuela Libre de Derecho and the Universidad Iberoamericana.

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