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Consumer choice for financial products and services is continuing to proliferate across global markets. The ability to reach consumers at any time on their mobile phones, tablets or other devices has helped attract substantial capital investment in consumer financial services. 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, wave 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 substantial capital investments have, in turn, attracted non-traditional providers to the consumer financial services marketplace. From garage-based start-ups to billion-dollar valuation technology firms, companies that previously focused on delivering smartphones, social media platforms or internet-browsing capabilities are now developing innovative approaches to meet consumers’ rapidly evolving demands. Traditional market participants, including banks and other non-bank financial services providers, have responded by innovating to improve their product and service offerings in order to retain and strengthen their customer relationships.

At the same time, the political landscape in various global markets continues to evolve, and this evolution 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 long-standing 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 11 jurisdictions across the globe, with particular attention to payments, deposits, and revolving credit and instalment credit arrangements.

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 either 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 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 using a bank partnership to take advantage of the special powers of the regulated bank, without itself being subject to similar 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.

Another defining characteristic of global consumer financial products and services is an increasing reliance on third-party service providers. This characteristic has led many banking regulators to focus on banks’ vendor risk management programmes. Many regulators have created an expectation that banks have a hands-on, risk-based approach to managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and contractual provisions related to regulatory compliance. Notwithstanding the risk-based approach, these regulatory 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-settled legal issues, 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.

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. There is an evergrowing number of apps and other tools by which consumers can aggregate account information and receive financial advice and personal wealth management services. These services present significant legal issues for market participants and regulators, including issues related to privacy, data security, data ownership, liability, and consumer choice and control.

High-profile cyberattacks and data security incidents underscore a continuing focus on cybersecurity and data security issues, as they relate to consumer financial services, however delivered. Regulators in many jurisdictions are trending towards 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 who might not otherwise meet the underwriting criteria of traditional lenders. This data may not be as thoroughly tested or as demonstrably statistically sound as the credit data used by traditional lenders. As a result, in addition to evaluating whether use of such data affects the lender’s credit risk, lenders also 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.
Consumer protection authorities continue to focus on combating unfair trade practice, 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 practice have been enforced against 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 expanding choice for consumers and an exciting opportunity for consumer 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. Thus, 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.

Rick Fischer, Obrea Poindexter and Jeremy Mandell
Morrison & Foerster LLP
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I OVERVIEW

Australian laws impose licensing regimes and conduct obligations on certain consumer financial services activities.

The policy underpinning the regulation of consumer financial services in Australia has evolved in recent years. Laws regulating consumer financial services initially focused on ensuring that consumers were adequately informed about financial products and services offered to them. Recent law reforms impose obligations on providers of financial services to prevent unsuitable financial services being offered to consumers, and grant the regulator a power to intervene to prevent consumers from suffering significant detriment.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The Australian regulatory framework recognises two types of financial services: consumer credit, including consumer leases of goods; and ‘other’ financial services.

Consumer credit and leases

Consumer credit in Australia is regulated by the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) and the National Credit Code (NCC) set out in Schedule 1 to that Act.

For credit to be covered by the NCC, it must have four elements:

a the debtor is a natural person or strata corporation;

b the credit is to be provided or intended to be provided wholly or predominantly:

  • for personal, household or domestic purposes (i.e., not businesses or investment purposes);
  • to purchase, renovate or improve residential property for investment purposes; or
  • to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes;

c a charge (interest or otherwise) is or may be made for providing the credit; and

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1 Andrea Beatty is a partner at Piper Alderman. This chapter was written with the assistance of Gabor Papdi and Chelsea Payne, lawyers at Piper Alderman.
the credit provider provides the credit in the course of carrying on a business or providing credit in Australia or as part of or incidentally to any other business it carries on in Australia.

There are no monetary or interest rate limits – credit that has the four elements described above will be regulated regardless of the amount of the credit provided and of the interest rate charged, unless a specific exemption applies. Once credit is regulated by the NCC, it is subject to a 48 per cent annual cost rate limit.

The NCCP Act also regulates consumer leases, which are defined as leases of goods under which the hirer does not have a right or obligation to purchase the goods and:

a. the goods are hired wholly or predominantly for personal, household or domestic purposes;

b. a charge is or may be made for hiring the goods and the charge, together with any other amount payable under the lease, exceeds the ‘cash price’ (i.e., retail price) of the goods; and

c. the lessor hires the goods in the course of a business of hiring goods or as part of or incidentally to any other business it carries on in Australia.

The NCCP Act has four key limbs. The first creates a licensing regime with respect to consumer credit. Under this licensing regime, any person who wishes to engage in ‘credit activities’ must hold an Australian Credit Licence (ACL) authorising them to engage in those credit activities, or be an employee, director or authorised representative of such a person. ‘Credit activities’ is defined to include providing credit, exercising the rights and obligations of a credit provider, taking the benefit of a mortgage or guarantee, exercising the rights and obligations of a mortgagee or beneficiary of a guarantee, or providing broker or intermediary-type services in relation to consumer credit or consumer leases. The Australian Securities and Investments Commission (ASIC), the general corporations, markets and financial services regulator in Australia, is responsible for granting ACLs.

There are several exemptions from the requirement to hold an ACL. These are provided for in the NCCP Act and the National Consumer Credit Protection Regulations 2010 (Cth) (the NCCP Regulations). Employees of an ACL holder and directors of a body corporate ACL holder are exempt from obtaining an ACL and can act as representatives of the ACL holder, when acting within the scope of their authority. A temporary employee is treated in the same manner as an employee who replaces another employee who is absent from work, or where they are performing substantially the same duties as that employee and are subject to similar controls or directions by the employer. There are also several other exemptions,
including credit activities in connection with pawnbroking, employee loans, referral arrangements, employment agencies providing temporary staff or locums, and clerks’ and cashiers’ activities.

The second key limb under the NCCP Act is set out in the NCC, which contains operational provisions relating to credit contracts and consumer leases. It prescribes:

- the form and content of credit and lease contract documents;
- disclosure requirements for fees and charges;
- procedures for varying consumer credit and lease contracts;
- the circumstances in which interest may be debited to a loan account;
- rights to terminate consumer credit and lease contracts;
- procedures that must be followed by a credit provider or lessor when enforcing rights under a credit or lease contract or associated security interest;
- matters relating to mortgages and guarantees;
- advertising and marketing requirements; and
- related sales and issuance contracts.

The NCC contains the following notable provisions:

- a maximum annual cost rate (an effective interest rate taking into account non-interest charges payable) of 48 per cent per annum for consumer credit contracts;
- a right for consumer debtors and lessees to request variation of their credit contracts or leases if they are suffering financial hardship;
- the ability for a court to, on application by a consumer debtor or lessee, reopen and set aside or revise a transaction that is found to be unjust; and
- the ability for a court to, on application by a consumer debtor or lessee, annul or reduce certain unconscionable fees and charges.

The third key limb under the NCCP Act is the ‘responsible lending’ regime. It requires credit providers and persons who advise or assist a consumer to enter into a credit contract or consumer lease to:

- provide a credit guide to the consumer setting out their fees, dispute resolution processes and other information required by the regulations;
- make reasonable enquiries about the consumer’s financial situation and requirements and objectives in relation to the proposed credit contract or lease;
- take reasonable steps to verify the consumer’s financial situation;
- assess whether the proposed credit contract or lease is unsuitable for the consumer;
- provide the consumer with a copy of the assessment on request; and

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8 NCCP Regulations reg. 25(3).
9 NCCP Regulations reg. 25(3).
10 NCCP Regulations regs. 25 and 24(6).
11 NCCP Regulations reg. 23D.
12 NCCP Regulations reg. 24(9).
13 NCC Section 32A.
14 NCC Section 72.
15 NCC Sections 76 and 77.
16 NCC Section 78.
A credit contract or lease is unsuitable if it will not meet the consumer’s requirements or objectives, or if the consumer will not be able to comply with his or her obligations under the credit contract or lease or if the consumer could only comply with their obligations with substantial hardship. Whether or not a credit contract or consumer lease is unsuitable depends on the particular circumstances of each consumer. A separate assessment will need to be made with respect to each consumer who applies for credit or seeks advice or assistance in obtaining credit. Responsible lending enquiries are scalable according to the nature of the credit obtained. In all cases, however, it is necessary to collect at least some information about the consumer’s income and expenditure. The use that must be made of the information collected, and the weight to be given to particular information items, is currently the subject of appellate court consideration – the Federal Court of Australia recently held that this is at the credit provider’s discretion, as long as they make an assessment of whether or not the credit contract will be unsuitable, and ASIC has appealed this decision. The responsible lending provisions in the NCCP Act also contain miscellaneous rules about the need to give Key Facts Sheets in relation to credit card contracts and standard home loans, and conduct in relation to credit cards.

The fourth key limb under the NCCP Act is the imposition of criminal and civil penalties for failure to comply with an obligation in the NCCP Act or the NCC (including licensing conditions). ACLs have a general condition obliging their holder to comply with the credit legislation. This includes ancillary legislation discussed later in this chapter, dealing with privacy, anti-money laundering and counter-terrorism financing, and consumer protection. ASIC may take administrative action in response to non-compliance with the NCCP Act or NCC by banning a person from engaging in credit activities or imposing conditions on the person’s ACL.

‘Other’ financial services

The provision of financial services (excluding credit) in Australia is regulated by Chapter 7 of the Corporations Act 2001 (Cth) (the Corporations Act). A person provides a financial service if they deal in, make a market for or provide advice with respect to a ‘financial product’. A financial product is a facility through which, or through the acquisition of which, a person makes a financial investment, manages a financial risk or makes non-cash payments. Banking deposit products, payment facilities (e.g., stored-value cards and

17 NCCP Act Chapter 3.
18 Australian Securities and Investments Commission v. Channic Pty Ltd [No 4] [2016] FCA 1174 (Channic) at [1725].
20 NCC Section 47.
21 Corporations Act Section 766A. Other activities that amount to providing a financial service, such as providing a custodial or depository service, operating a registered managed investment scheme and providing a crowdfunding platform, exclusively concern investment activities and are therefore beyond the scope of this chapter.
22 Corporations Act Section 763A.
purchased payment facilities) and most insurance contracts are ‘financial products’ within the meaning of the Corporations Act. Credit facilities (both consumer and non-consumer) are expressly excluded from the definition of a financial product.

Chapter 7 of the Corporations Act creates a licensing regime for the provision of financial services. Under that regime, any person who carries on in Australia a business of providing financial services must hold an Australian Financial Services Licence (AFSL) covering the provision of the particular financial services being provided, be an employee or director of a holder of an AFSL, or be the authorised representative of the holder of an AFSL. AFSLs are granted by ASIC.

The Corporations Act distinguishes between retail and wholesale clients in relation to financial services. A person is a retail client unless they satisfy one of the conditions that qualify them to be a wholesale client. Broadly speaking, a retail client is the equivalent of a consumer (although the concept captures other persons, such as small businesses) and a wholesale client is someone who, because of their experience in financial services or the value of the transaction, is taken to be better able to protect their interests with regard to providers of financial services.

The Corporations Act imposes additional obligations when offering financial services to retail clients, rather than wholesale clients. A provider of financial services is required to give a retail client their Financial Services Guide, which sets out information about the kinds of financial services provided, the remuneration of the provider, relationships of the provider that may give rise to conflicts of interest and other matters prescribed by the Corporations Act or the Corporations Regulations 2001 (Cth) (the Corporations Regulations). A provider of personal financial advice to a retail client must give that client a Statement of Advice setting out the advice, the basis on which the advice is given and other matters prescribed by the Act or the Corporations Regulations. A provider of financial advice to a retail client is also required to act in the best interests of the client and is prohibited from being a party to particular remuneration arrangements that are taken to carry a higher risk of creating conflicts of interest. A person issuing or (in certain circumstances) selling a financial product to a retail client, or advising a retail client to acquire a financial product in such circumstances, is required to give the client a Product Disclosure Statement containing information about the benefits, risks, costs, returns and other significant characteristics of the financial product.

The objective of these and other provisions in the Corporations Act is to ensure that retail clients have adequate information to make decisions in their interest about financial products and services. In practice, this means that some financial services are made available only to wholesale investors in order to reduce the costs of complying with the additional obligations arising from transactions with retail clients.

Failure to comply with an obligation in the Corporations Act may attract criminal or civil penalties. AFSL holders have a general obligation to comply with financial services

23 Corporations Act Section 764A(1).
24 Corporations Act Section 765A(1)(h).
25 Corporations Act Section 761G.
26 Corporations Act Part 7.7 Division 2.
27 Corporations Act Part 7.7 Division 3.
28 Corporations Act Part 7.7A.
29 Corporations Act Part 7.9 Division 2.
laws, including the NCCP Act and the NCC (if applicable). ASIC may take administrative action in response to non-compliance with the Corporations Act by banning a person from engaging in financial services or imposing conditions on the person’s AFSL.

**Consumer protection under the ASIC Act**

Division 2 of Part 2 of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act) contains further consumer protections with respect to financial services – defined in substantially the same way as in the Corporations Act but including credit facilities. Consequently, the protections in the ASIC Act apply to financial services regulated by the Corporations Act and consumer credit and leases regulated by the NCCP Act. The ASIC Act prohibits unconscionable conduct (the unconscientious exploitation of a disadvantage suffered by another person), conduct that is misleading, deceptive or likely to mislead or deceive, and other unfair practices in connection with financial services.

The ASIC Act also provides that a term of a consumer or small business standard form contract for the supply of financial services is void if it is ‘unfair’. A term of a contract is unfair if:

- it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it; and
- it would cause detriment to a party if it were to be relied on.

A contract is a standard form contract if it was prepared entirely by one party with no effective opportunity for the other party to negotiate the terms of the contract. In proceedings seeking a declaration that a contractual term is void, a contract is presumed to be a standard form contract unless a party to the proceedings proves otherwise.

**Banking regulation**

Banking business – the taking of money on deposit from customers and making advances of money – is regulated by the Banking Act 1959 (Cth) (the Banking Act). Under the Banking Act, a person must not carry on banking business unless they are authorised to do so by the Australian Prudential Regulation Authority (APRA). The Banking Act is not primarily concerned with conduct towards consumers, but rather with the protection of consumers’ deposited funds. Consequently, the chief obligation for an authorised deposit-taking institution (ADI) under it is to comply with prudential standards issued by APRA.

Since May 2018, entities wishing to commence carrying on banking business can obtain, subject to meeting APRA’s standards, a restricted ADI (RADI) authorisation from APRA, as opposed to a full or standard ADI authorisation. RADI authorisation imposes less stringent obligations than full ADI authorisation, including minimum capital requirements of only A$3 million plus a reserve for costs of winding down of 20 per cent of adjusted assets. RADIs are subject to a protected deposit limit of A$250,000 per customer and A$2 million in aggregate. RADIs are also subject to a two-year time limit to achieve the requirements for

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30 Corporations Act Section 912A.
31 Banking Act Section 5.
32 Banking Act Section 7.
full ADI authorisation or to exit the industry. The purpose of the RADI licence is to enable the holder to build resources and capability in a restricted environment. During this stage, the holder is expected to progress to fully meet the prudential requirements to ultimately secure a full ADI licence. The RADI licence regime is likely to reduce a major barrier to entry into the banking market in Australia, resulting in greater competition and choice in relation to deposit account products. The restricted ADI licence is expected to assist those with traditional and non-traditional business models and start-up institutions, and at the time of writing two entities have obtained RADI licences and successfully transitioned to full ADI licences.

The provision of purchased payment facilities (PPF) is banking business under Australian law and so requires an authority or an exemption from the Payment Systems Board (PSB) of Australia’s central bank, the Reserve Bank of Australia (RBA) or a limited form of ADI authorisation from APRA. This is dealt with in further detail in Section III.i.

**Payment systems**

Providers of payments systems – funds transfer systems that facilitate the circulation of money – are subject to the Payment Systems (Regulation) Act 1998 (Cth) (the PSR Act). Under the PSR Act, the RBA through the PSB may designate a payment system if it considers it to be in the public interest to do so. The RBA may then impose access regimes and standards on participants in a designated payment system, and arrange for the arbitration of disputes between participants in a designated payment system. At the time of writing, the major credit, debit and prepaid card payment systems (Mastercard, Visa, American Express and EFTPOS) have been designated by the RBA and have had standards imposed on them. The Mastercard and Visa payment systems have also had access regimes imposed on them. Since 1 September 2017, all merchants have been prohibited from imposing surcharges on card transactions that exceed their cost of acceptance of cards for that payment system. The automated teller machine (ATM) system has also been designated and had an access regime imposed on it.

**The Privacy Act**

Providers of consumer financial services in Australia are subject to the Privacy Act 1988 (Cth) (the Privacy Act) if they have, or have ever had, annual turnover greater than A$3 million. This is subject to certain exemptions, including in relation to media acts, employment records, political acts and practices, and related body corporate disclosures. In addition, there

37 The Australian Privacy Principles (APP) apply to agencies and organisations: Privacy Act Section 6. The definition of an agency is in Section 6 of the Privacy Act and the definition of an organisation is in Section 6C of the Privacy Act. The definition of organisation excludes small business operators, who are operators of a business that have an annual turnover of A$3 million or less in a financial year: Privacy Act Section 6D.
are some types of businesses to which the Privacy Act applies, irrespective of the size of the business. These include businesses providing health services, businesses that collect or disclose personal information for profit and contractors under contracts with the Commonwealth government.

The Privacy Act requires regulated entities to have and publish a privacy policy setting out how they deal with personal information; give certain disclosures when collecting personal information (called a privacy statement); use personal information only for the purposes for which it was collected and related secondary purposes; take reasonable steps to protect personal information and to ensure that it is correct and up to date; and give access to a person’s personal information on request by the person.38

The Privacy Act, together with the Privacy (Credit Reporting) Code 2014, also regulates credit providers’ abilities to provide information to credit reporting bodies (CRBs) and to use information obtained from CRBs. The types of information – ‘credit information’ – that credit providers may provide to CRBs are narrowly defined and, in the case of information about a person’s default on a debt, a credit provider is required to give a grace period and at least two notices to the debtor before reporting the information to a CRB.39

The Privacy Act also contains a mandatory data breach notification regime40 requiring entities subject to the Privacy Act to investigate and notify both the regulator and affected individuals about ‘eligible data breaches’. An ‘eligible data breach’ occurs if:

a. there is unauthorised access to, or unauthorised disclosure of, information and a reasonable person would conclude that the access or disclosure would be likely to cause serious harm to any of the individuals to whom the information relates; or

b. information is lost in circumstances where unauthorised access or disclosure is likely to occur and a reasonable person would conclude that the access or disclosure would be likely to cause serious harm to any of the individuals to whom the information relates.

Anti-money laundering and counter-terrorism financing

The lending of money, provision of a deposit account and provision of certain financial services (among other things) are ‘designated services’ under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act).41 Consequently, providers of such services are required to:

a. become enrolled on the Reporting Entities Roll maintained by the Australian Transaction Reports and Analysis Centre (AUSTRAC);42

b. adopt and maintain an anti-money laundering and counter-terrorism financing programme (the AML/CTF programme);43

c. ensure that the board and senior management approve and oversee the operation and implementation of the AML/CTF programme.44

38 Privacy Act Schedule 1.
39 Privacy Act Sections 6Q and 21D, the Privacy (Credit Reporting) Code 2014 Clause 9.3.
40 Privacy Act Part IIIC.
41 AML/CTF Act Section 6.
42 AML/CTF Act Section 51B.
43 AML/CTF Act Section 81.
44 AML/CTF Rules Parts 8.4 and 9.4.
Australia

perform customer identification procedures on customers before starting to provide a designated service to them; 45  
provide to AUSTRAC an annual report self-certifying compliance with the AML/CTF Act; 46  
report to AUSTRAC all international funds transfer instructions, 47  transactions involving the transfer of more than A$10,000 in physical currency and certain suspicious matters; 48  
appoint an AML/CTF compliance officer; 49  
conduct pre- and post-employment screenings on employees; 50  and  
comply with document retention obligations.

ii Regulation

ASIC is the primary regulator of financial services in Australia, responsible for administering the NCCP Act, the Corporations Act and the ASIC Act. In addition to administering the statutes for which it is responsible, ASIC also has the function of promoting:

- the adoption of approved industry standards and codes of practice;
- the protection of consumer interests;
- community awareness of payments system issues; and
- sound customer–banker relationships, including through monitoring the operation of industry standards and codes of practice and monitoring compliance with such standards and codes. 52

Under the NCCP Act and Corporations Act respectively, ASIC is responsible for granting ACLs and AFSLs.

ASIC has a wide range of investigative powers at its disposal, including the power to conduct investigations of its own motion, 53  to compel the production of documents and to compel a person to attend an examination and answer questions under oath. 54

ASIC has standing to commence proceedings against persons whom it believes have contravened the NCCP Act or the Corporations Act in relation to consumer financial services. Only ASIC can seek civil penalties for contraventions of these statutes. Consumers’ remedies in private proceedings are limited to compensation for losses actually suffered and injunctive and declaratory relief to restrain further contraventions of the law. 55

45 AML/CTF Act Section 32.  
46 AML/CTF Act Section 47.  
47 AML/CTF Act Section 45.  
48 AML/CTF Act Section 43.  
49 AML/CTF Act Section 41.  
50 AML/CTF Rules Parts 8.5 and 9.5.  
51 AML/CTF Rules Parts 8.3 and 9.3.  
52 ASIC Act Section 12A(3).  
53 ASIC Act Section 13; NCCP Act Section 248.  
54 ASIC Act Section 33; NCCP Act Section 267.  
55 ASIC Act Sections 19, 21; NCCP Act Sections 253, 255.  
56 Section 114 of the NCC states that for proceedings commenced on the application of the debtor or guarantor, a court may impose a penalty not exceeding the amount of interest charges payable. Section 118 of the NCC permits a court to order compensation for any loss suffered by a debtor or guarantor.
As an alternative to court proceedings, ASIC may issue infringement notices if it has reasonable grounds to believe that a person has contravened a legislative provision eligible to be dealt with by way of infringement notice. Payment of an infringement notice is not taken to be an admission of guilt, does not amount to a conviction for an offence and bars further proceedings against the recipient in relation to the conduct to which the infringement notice relates.

ASIC may also impose conditions on a person’s ACL or AFSL, or make orders banning a person from engaging in credit activities or providing financial services.

All ACL holders and AFSL holders who are authorised to provide financial services to retail clients must be a member of the Australian Financial Complaints Authority (AFCA) scheme.57 The AFCA scheme is a non-judicial external dispute resolution scheme established under legislation to replace the pre-existing private schemes – the Financial Ombudsman Service, and the Credit and Investments Ombudsman and Superannuation Complaints Tribunal. External dispute resolution offers a less formal and more consumer-friendly means of resolving disputes with financial services providers, as it is not constrained by the rules of evidence and may look to legal principles, applicable industry codes or guidance, good industry practice, previous decisions and fairness in all the circumstances when deciding disputes.58

Providers of electronic payment facilities may voluntarily subscribe to the ePayments Code administered by ASIC. The ePayments Code provides additional protections to consumer users of electronic payment facilities, beyond those provided for by the law (e.g., rights to require the payment facility provider to recover mistaken payments on the consumer’s behalf). Being voluntary, the ePayments Code does not have legal force, though its terms are usually incorporated into subscribers’ agreements with customers and so have contractual force.

APRA is responsible for administering the Banking Act. It is empowered to authorise corporations to carry on banking business and to issue prudential standards. It also oversees credit unions, building societies, general insurance and reinsurance companies, life insurance, private health insurance, friendly societies, most entities in the superannuation industry and purchased payment facility providers. All financial institutions regulated by APRA have attendant reporting obligations. For example, most banks are required under the Financial Sector (Collection of Data) Act 2001 (Cth) (FSCODA) to provide statistical information to APRA (though FSCODA also imposes reporting obligations on some financial institutions not otherwise subject to APRA supervision). APRA is funded largely by the industries that it supervises.59

The RBA is responsible for administering the PSR Act, including designating payment systems, imposing access regimes and standards on participants in designated payment systems, and arranging the arbitration of disputes between participants in designated payment systems.

The Office of the Australian Information Commissioner (OAIC) is responsible for administering the Privacy Act. The Privacy Act confers on the Information Commissioner a

57 NCCP Act Section 47(1)(i); Corporations Act Sections 912A(1)(g) and 912A(2)(b).
range of privacy regulatory powers. These include powers that allow the OAIC to work with entities to facilitate legal compliance and best privacy practice, as well as investigative and enforcement powers to use in cases where a privacy breach has occurred.

AUSTRAC is responsible for administering the AML/CTF Act. Like ASIC, it may commence court proceedings seeking penalties for contraventions of the AML/CTF Act. In recent times, AUSTRAC appears to have increased its enforcement efforts and has enjoyed some success in civil penalty proceedings. In 2018, it achieved by far the largest corporate penalty in Australian history when it imposed an A$700 million penalty against the Commonwealth Bank of Australia for contraventions of AML/CTF programme compliance and transaction reporting obligations under the AML/CTF Act.60

The Australian Competition and Consumer Commission (ACCC) is responsible for protecting consumer, business and communal interests through promoting competition and fair trade in the market.61 It ensures that all individuals and businesses comply with the Competition and Consumer Act 2010 (Cth), including the Australian Consumer Law (the Consumer Law). It also issues debt collection guidelines in conjunction with ASIC.62

III PAYMENTS

All the regulators identified above play a role in relation to payments.

i Overview

The primary day-to-day payment methods are currently physical currency, cards, cheques and electronic funds transfers. Australian Payments Network Ltd (AusPayNet), a corporation owned by payment system participants, coordinates the clearing and settlement of payments by cheque, direct entry payments, ATMs, debit cards and high-value payments. The major card payment schemes and the BPAY system for the payment of bills operate with their own membership and rules independently of AusPayNet.63 The domestic card system is managed by eftpos Payments Australia Limited. The New Payments Platform (NPP), operated by NPP Australia Ltd, commenced operation in 2018, allowing near instantaneous direct electronic funds transfers.64

Licensing requirements

Providers of facilities by which persons can make non-cash payments must hold an AFSL authorising them to provide such a facility. However, there are exemptions from this requirement – including for providers of facilities used to make payments to one person only,65 loyalty schemes, road toll payment facilities, low value (i.e., up to A$1,000) non-cash

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64 See https://www.nppa.com.au/ for more information about the NPP.
65 Corporations Act Section 763D(2).
payment facilities, gift card, scheme facilities and prepaid mobile facilities.\textsuperscript{66} Electronic funds transfer facilities offered by ADIs are deemed not to be financial products by the Corporations Regulations and so do not require an AFSL to provide to consumers.\textsuperscript{67}

The PSR Act does not itself impose any licensing scheme. It allows the RBA to designate a payment system and impose access regimes and standards if it considers it to be in the public interest.\textsuperscript{68} The payment systems that have currently been designated and that have had standards or access regimes imposed on them are identified in Section II.i, under the subheading ‘Payment systems’. The ATM system is also designated and subject to an access regime.\textsuperscript{69}

Standards issued by the RBA govern:

\begin{itemize}
  \item \textit{a} interchange fees in Mastercard, Visa, American Express and EFTPOS credit card and debit card schemes – interchange fees for credit card transactions must not exceed 0.8 per cent of the value of the transaction\textsuperscript{70} and interchange fees for debit card transactions must not exceed A$0.15 per transaction or 0.2 per cent of the value of the transaction (depending on whether a fixed fee or proportion of value is charged),\textsuperscript{71} and
  \item \textit{b} merchant pricing – merchants are prohibited from imposing surcharges for card transactions greater than their cost of acceptance for those card transactions.\textsuperscript{72}
\end{itemize}

Otherwise, the scheme rules of each payment system function as a contract between members of that payment system and between each member and the operator of the payment system.

### PPF as a banking business

If a payment product is likely to be a PPF under the PSR Act, two regulatory issues are raised:

\begin{itemize}
  \item \textit{a} the PPF may be a banking business under the Banking Act and Banking Regulations.\textsuperscript{73} A provider of a PPF may only engage in ‘banking business’ if it is an ADI regulated by APRA; and
  \item \textit{b} the holder of stored value (as defined by the PSR Act)\textsuperscript{74} that makes payments in relation to a PPF that has been determined to be a banking business must be an ADI or authorised or exempted from the requirement to be an ADI before it can be the holder of the stored value.\textsuperscript{75}
\end{itemize}

A PPF is a facility (other than cash) in relation to which the following conditions are satisfied:

\begin{itemize}
  \item \textit{a} the facility is purchased by a person from another person;
\end{itemize}

\textsuperscript{66} ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211.

\textsuperscript{67} Corporations Regulations 2001 (Cth) regulation 7.1.07G.

\textsuperscript{68} PSR Act Section 11.


\textsuperscript{70} Standard No. 1 of 2016: The Setting of Interchange Fees in the Designated Credit Card Schemes and Net Payments to Issuers Clause 4.1.

\textsuperscript{71} Standard No. 2 of 2016: The Setting of Interchange Fees in the Designated Debit and Prepaid Card Schemes and Net Payments to Issuers Clause 4.1.

\textsuperscript{72} Standard No. 3 of 2016: Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions Clause 4.1.

\textsuperscript{73} See Section 5 of the Banking Act and reg. 6 of the Banking Regulations.

\textsuperscript{74} PSR Act Section 9(1)(c).

\textsuperscript{75} PSR Act Section 22.
the facility is able to be used as a means for making payments up to the amount that, from time to time, is available for use under the conditions applying to the facility; and those payments are to be made by the provider of the facility or by a person acting under an arrangement with the provider (rather than by the user of the facility).76

A PPF will be a ‘banking business’ if APRA determines that the facility:

a is of a type for which the purchaser of the facility is able to demand payment, in Australian currency, of all, or any part, of the balance of the amount held in the facility that is held by the holder of the stored value; and

b is widely available as a means of payment, having regard to:

• any restrictions that limit the number or types of people who may purchase the facility; and

• any restrictions that limit the number or types of people to whom payments may be made using the facility.77

If a PPF falls within Declaration No. 2 2006 regarding Purchased Payment Facilities (the PPF Declaration), the provider will not be required to become an ADI. The PPF Declaration states that the PSR Act does not regulate facilities where the total amount of obligations to make payments does not exceed A$10 million or the number of people to whom payments may be made using the facility does not exceed 50 people.

A PPF provider is a special kind of ADI. It must only conduct ‘banking business’ as specified in Regulation 6 of the Banking Regulations. It cannot hold out that it is a fully authorised ADI. Its business activities are restricted to PPF business operations and closely related services and must be incorporated in Australia (unless APRA determines otherwise). It must also provide APRA with financial data on periodically as specified in its ADI authority.

ePayments Code

The ePayments Code78 includes consumer protections exceeding those found in legislation, including:

a at least 20 days’ advance written notice of changes to the terms and conditions of the facility that may be adverse to the consumer;79

b no liability for the consumer as a result of an unauthorised transaction occurring after the consumer informed the provider that a device used to make payments (e.g., a card) has been misused, lost or stolen or that the security of a passcode has been breached;80 and

c requiring their ADI to investigate and take steps to recover internet payments made mistakenly by the consumer, and to cooperate with other ADIs in recovering mistaken payments for their customers.81

77 Banking Regulations reg. 6.
78 See Section II.ii above for further information.
79 ePayments Code Clause 4.11.
80 ePayments Code Clause 10.1(e).
81 ePayments Code Clauses 24 to 34.
While the ePayments Code is voluntary, it gains legal force by being incorporated into the contracts between the payment facility provider and the consumer.

ii Recent developments

NPP Australia Ltd, a company formed and owned by the major ADI participants in the payments system, had been developing the NPP payment system since 2014. The NPP is intended to enable consumers, businesses and government agencies to make simply addressed payments in real time, with the continuous availability of the payment system. The material differences between the NPP and the direct entry system it will eventually replace are:

- **speed** – the NPP provides near instantaneous settlement;
- **continuous availability** – the NPP is available all day, every day (as opposed to settlement only during business hours);
- **data capability** – the NPP enables more information to be sent with payments; and
- **simple addressing** – payers are able to address payments to recipients by a unique, commonly known identifier, such as a mobile phone number or email address. This new form of identification, which is called PayID, is expected to facilitate more consumer-to-consumer payments by simplifying identification requirements.

The NPP became publicly available in 2018, allowing real-time payer-initiated payments. Additional capabilities, such as third-party initiated payments, are currently being developed for the NPP.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

*Access to banking services*

Deposit-taking is the defining feature of banking business in Australia. Consequently, all providers of deposit accounts must be authorised as ADIs by APRA. Further, deposit products are financial products and so their providers must, subject to some exceptions in the Corporations Act, hold an AFSL if they wish to provide such products to retail clients.

Opening a deposit account and allowing transactions to be conducted on a deposit account are designated services under the AML/CTF Act. Consequently, an ADI must carry out customer identification procedures and verify information about the identity of the customer before opening a deposit account for them or allowing them to conduct transactions on a deposit account. If customer identification procedures and the circumstances of the case indicate a high risk that the account will be used to facilitate money laundering or terrorism financing, the ADI may, in accordance with its AML/CTF programme, refuse to provide an account to the customer.

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83 Currently in Australia, two items of information are required to make a payment to a deposit account held with an ADI. These items of information are a recipient’s Bank State Branch number, which is a centrally assigned number identifying the branch of the ADI at which the account is held, and their account number, which is a number assigned by the ADI to identify the account.
84 AML/CTF Act Section 6, Table 1 Items 1 and 3.
Otherwise, there is no law preventing ADIs from providing deposit accounts to consumers, nor is there any law compelling them to provide a deposit account to every consumer.

**Deposit guarantee**

Since 2008, the Banking Act has provided for the Financial Claims Scheme (FCS). The FCS allows deposit account holders at a declared insolvent ADI to be paid an amount by APRA equal to the balance of their account and accrued but uncredited interest up to the date of the ADI being declared insolvent, up to a limit of A$250,000 for all accounts held with that ADI. The A$250,000 limit applies in respect of accounts held with a particular ADI, meaning that a person who holds deposit accounts with multiple declared insolvent ADIs can potentially recover more than A$250,000 in total FCS payments.

Upon payment of an amount to a deposit account holder under the FCS, APRA is subrogated to the deposit account holder’s rights against the ADI.

In applying for authorisation, RADIs are required to demonstrate to APRA that they will not need to rely on the FCS to exit the industry if they do not proceed to a full ADI licence within two years. During the RADI licence phase, RADIs are subject to FCS-eligible deposit limits of no more than A$250,000 per account holder and no more than A$2 million in aggregate.

**Overdrafts**

The NCCP Act and NCC generally regulate overdraft facilities, as they are credit provided to a consumer for personal, household or domestic purposes and for which a charge is imposed. However, the NCCP Act and NCC do not apply to ‘the provision of credit if, before the credit was provided, there was no express agreement between the credit provider and the debtor for the provision of credit’. Deposit account terms should allow the ADI, in its absolute discretion, to choose to honour or decline a transaction for which the account has insufficient credit balance, with the terms of any credit provided being those notified on its website at the time the transaction is made. This will ensure that any incidental overdraft credit provided is not subject to the NCCP Act and the NCC, as it is not expressly agreed in advance.

**ii Recent developments**

**Consumer data right – open banking**

Following the lead of the United Kingdom, the Australian government announced in 2017 that it will introduce an ‘open banking’ regime in Australia. The Treasury Laws Amendment (Consumer Data Right) Act 2019 amended the Competition and Consumer Act 2010 (and, incidentally, other legislation) to create a consumer data right framework in which data

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85 Banking Act Section 16AF.
86 Banking Act Section 16AG; Banking Regulation 2016 (Cth) regulation 11.
87 Banking Act Section 16AI.
88 See Section IV.i under the heading ‘Deposit guarantee’.
89 NCC Section 6(4).
holders in designated sectors will be required to provide a consumer with certain data about him or her in machine-readable format or to transfer that data to an accredited data recipient, at the consumer’s direction. Banking is the first sector to be designated, with energy and other sectors to follow. After an ambitious initial implementation timeline, the Commonwealth government has settled on a phased implementation. Since 1 July 2019, three of the four major banks have voluntarily participated in sharing basic product information data as part of a pilot. It is currently expected that the four major banks will be required to provide data about deposit accounts, credit and debit cards and transaction accounts by February 2020, with mortgage product data to be provided from February 2020 and other account product data to be provided from July 2020. Other banks will be required to provide data within 12 months after the four major banks for the relevant account type.

The objective of introducing an open banking regime is to increase competition in consumer financial services markets, leading to better outcomes for consumers. It is expected to improve competition by reducing switching costs for consumers and by reducing barriers to entry for providers of financial services that rely on account data (such as credit providers, who will be able to use the newly available data to better assess credit risk).

V REVOLVING CREDIT

i Overview

Continuing credit contracts

The NCC defines a ‘continuing credit contract’ as a credit contract in which multiple advances of credit are contemplated, and the amount of available credit ordinarily increases as the amount of credit is reduced.91

This definition covers consumer line of credit facilities, regardless of whether they are for a fixed or indefinite term.

The NCCP Act and NCC apply to all continuing credit contracts on which interest is charged. They do not regulate continuing credit contracts for which the only charge is a fixed periodic fee that does not vary according to the amount of credit provided. However, the fixed fee must be no more than A$200 for the first 12 months of the contract and no more than A$125 for any subsequent 12-month period while the contract is on foot. If the consumer is already party to a continuing credit contract with the credit provider or an associate of the credit provider, then the imposition of any periodic fee brings the continuing credit contract within the scope of the NCCP Act and NCC.92

Continuing credit contracts are subject to largely the same obligations as ordinary principal and interest repayment contracts, with some modifications to suit the nature of continuing credit contracts. This includes contract documents and precontractual disclosure requirements discussed in Section VI.i below, under the subheading ‘Contract documents and precontractual disclosure’.

Continuing credit contracts do not require disclosure in the credit contract93 of the total number of repayments, frequency of repayments and the total amount of repayments, even if these amounts are ascertainable.

91 NCC Section 204.
92 NCC Section 6(5); NCCP Regulations regulation 51.
93 NCC Section 17(7).
When calculating the annual cost rate (a measure of the effective interest rate) of a continuing credit contract, it must be assumed that the consumer at the commencement of the contract will draw down the entire credit limit of the contract. The maximum period for a statement of account for a credit card contract is 40 days.

The NCC requires statements of account to be given no less frequently than every three months for a continuing credit contract, or every 40 days if there is no express agreement about statement frequency between the credit provider and debtor. However, if a continuing credit contract is a ‘reverse mortgage’ credit contract — a credit contract secured by a mortgage over real property for which there is no obligation on the debtor to make repayments — then statements of account need to be given only every 12 months. Also, a statement of account need not be given for a continuing credit contract if:

the debtor was in default . . . during the preceding 120 days, or during the statement period and the two immediately preceding statement periods, whichever is the shorter time, and the credit provider has, before the commencement of the statement period, exercised a right not to provide further credit under the contract and has not provided further credit during the period.

A guarantee in relation to a continuing credit contract subject to the NCC cannot be irrevocable, even if consideration was given for it to not be revoked. Section 60(4) of the NCC allows a guarantor, at any time, to limit his or her liability to credit previously provided to the debtor by providing written notice to the credit provider.

The credit limit of a continuing credit contract (other than a credit card contract) can only be increased at the request of or with the written consent of the debtor. This prevents a credit provider from making unsolicited credit limit increase offers. However, before providing any increase in the credit limit of a continuing credit contract, the credit provider must undertake responsible lending enquiries to determine whether the increase is unsuitable for the debtor.

Continuing credit contracts may not be secured over all goods supplied under the contract (if the credit is provided by supplying goods rather than advancing money). Rather, they may only be secured over specifically identified goods.

The NCC provides that a credit provider may not take possession of mortgaged goods if the amount owing under the credit contract is less than 25 per cent of the initial amount of credit provided or A$10,000, whichever is the lesser. This is to protect debtors so that if they have substantially repaid their debt, the right to repossess mortgaged goods can only be exercised with court consent. However, this debtor protection does not apply to continuing credit contracts.

94 NCC Section 32B(8).
95 NCC Section 33(2)(a).
96 NCC Section 33(2).
97 NCC Section 13A.
98 NCC Section 33(3).
99 NCC Section 67(4).
100 See NCCP Act Part 3-2.
101 NCC Section 46.
103 NCC Section 91(2)(a).
The NCC requires that a credit advertisement\(^{104}\) that contains an annual percentage rate (APR) must also contain the relevant comparison rate, and an advertisement that does not contain an APR may also contain the relevant comparison rate. A comparison rate is a tool intended to help consumers identify the true cost of credit arising from interest charges and other fees and charges. It is to enable consumers to compare the costs of competing loan products.\(^{105}\) However, advertisements for continuing credit contracts need not provide a comparison rate.\(^{106}\)

**Credit cards**

The NCCP Act imposes additional regulations on credit card contracts. It defines a credit card contract as ‘a continuing credit contract under which credit is ordinarily obtained only by use of a credit card’.\(^{107}\) Credit card contracts are a type of continuing credit contract and are subject to the following additional requirements:

- \(a\) an application form for a credit card contract must be accompanied by a Key Facts Sheet setting out key information about the contract in a standardised table format;\(^{108}\)
- \(b\) a credit provider must not enter into a credit card contract unless a Key Facts Sheet has been provided to the prospective debtor;\(^{109}\)
- \(c\) a credit provider must not invite a debtor to request an increase in the credit limit of a credit card contract;\(^{10}\) the credit limit can only be increased pursuant to a request made on the debtor's own motion;
- \(d\) a credit provider must not enter into a credit card contract unless the contract allows the credit limit to be reduced and the credit provider must provide an online facility for the debtor to request a reduction of his or her credit limit;\(^{111}\)
- \(e\) a credit provider must not suggest to a consumer that they not reduce the credit limit of his or her credit card contract or reduce it by a smaller amount than the consumer requested;\(^{112}\)
- \(f\) if a debtor uses his or her credit card in a transaction that results in him or her exceeding the credit limit on their credit card contract, the credit provider must notify the debtor that they have exceeded their credit limit within two business days of becoming aware of that fact;\(^{113}\)
- \(g\) a credit provider may not impose any fees or a higher rate of interest on the debtor for exceeding the credit limit of a continuing credit contract, unless it has obtained the debtor's express consent in advance of charging the fees or imposing the higher rate of interest\(^{114}\) (this is best done by including those fees and interest in the contract document provided to the debtor);

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104 As defined in NCC Section 159.
106 NCC Section 158.
107 NCCP Act Section 133BA.
108 NCCP Act Section 133BC; NCCP Regulations Schedule 6.
109 NCCP Act Section 133BD.
110 NCCP Act Sections 133BE.
111 NCCP Act Sections 133BF and 133BFA.
112 NCCP Act Section 133BFB.
113 NCCP Act Section 133BH.
114 NCCP Act Section 133BI.
repayments made by a debtor must be applied first to the part of the amount owing to which the highest rate of interest applies, then to the part of the amount owing with the next highest rate of interest, and so on, unless the debtor requests that a repayment be applied to a specific part of the amount owing.115

a credit provider must not enter into a credit card contract unless the contract allows the contract to be terminated by the debtor and the credit provider must provide an online facility for the debtor to request termination of their contract;116 and

a credit provider must not suggest to a consumer that they refrain from terminating their credit contract.

Recent developments

Credit card reforms

The provisions described in points (d), (e), (i) and (j) under the subheading ‘Credit cards’ in Section V.i were inserted into the NCCP Act by the Treasury Laws Amendment (Banking Measures No. 1) Act 2018 (Cth). Points (d) and (e) commenced operation on 1 July 2018 and points (i) and (j) commenced operation on 1 January 2019.

The Treasury Laws Amendment (Banking Measures No. 1) Act 2018 also amended the NCCP Act to provide that a credit card contract will be unsuitable for a consumer, and therefore unable to be provided to the consumer, if the consumer will not be able to repay the fully drawn down credit limit within a prescribed period determined by ASIC.117 ASIC has determined the prescribed period to be three years.118

VI INSTALMENT CREDIT

Overview

Instalment credit contracts under the NCCP Act and NCC are regulated credit contracts other than continuing credit contracts.119 They are contracts with repayment obligations, where the amount of available credit does not increase as the amount of credit is reduced. They may require periodic payments of principal and interest, interest only, or interest only for a period followed by principal and interest.

Contract documents and precontractual disclosure

The NCC requires credit contracts to be in the form of a written document signed by at least the credit provider.120 The contract document must contain the following information:121

a the amount of credit to be provided or the credit limit;

b the interest rates that apply under the contract, or their method of calculation;

c the method of calculating interest;

115 NCCP Act Section 133BQ.
116 NCCP Act Sections 133BT and 133BU.
117 NCCP Act Sections 131(3AA), 133(3AA) and 160F.
118 ASIC Credit (Unsuitability – Credit Cards) Instrument 2018/753.
119 See definition of ‘continuing credit contract’ in NCC Section 204.
120 NCC Section 14.
121 NCC Section 17; NCCP Regulations regulation 74, Forms 6 and 7.
the total amount of interest payable, if ascertainable and if the loan is to be fully repaid within seven years;
e the number and total amount of repayments over the life of the contract;
f credit fees and charges that are payable or may be payable;
g if the interest rate and any fees or charges can be changed during the life of the contract, a statement of that fact;
h the frequency with which statements of account are given;
i any default interest rate that may become payable;
j if enforcement expenses are payable on breach of the contract, a statement of that fact;
k if there is any mortgage or guarantee securing obligations under the contract, a statement of that fact;
l a description of any property subject to a security interest securing obligations under the credit contract;
m information about any ascertainable commissions to be received or paid by the credit provider for the introduction of credit business or business financed by the contract (including insurance);
n information about any insurance financed by the credit contract and any commissions payable; and
o warnings prescribed by the NCCP Regulations.

The NCC also requires the matters required to be disclosed in the credit contract to be provided to the debtor prior to entry into the credit contract. The NCCP Regulations require select items of the information to be provided in the form of a table (the financial table) at the beginning of the precontractual disclosure. It is common practice for the precontractual disclosure to be incorporated into the contract document, which is given to the debtor prior to their entry into the contract.

**Interest charges**

The NCC prescribes the maximum amount of interest that may be charged under a credit contract. It introduces the concept of ‘annual cost rate’, which is the effective interest rate taking into account ascertainable interest charges and non-interest fees and charges. The annual cost rate does not take into account interest rates and fees that are contingent on the occurrence of an event other than the passage of time (for example, default or a late payment), as they are not ascertainable at the time of contract formation. The annual cost rate is a point in time calculation as at the time of contract formation.

The maximum annual cost rate for a credit contract is 48 per cent per annum. A credit provider is forbidden from entering into a credit contract if its annual cost rate exceeds 48 per cent per annum, or varying a contract in a manner that causes its annual cost rate to exceed 48 per cent per annum.

122 NCCP Act Section 16; NCCP Regulations.
123 NCCP Regulations reg. 72.
124 NCC Section 32B.
Calculating interest

Generally, interest must be calculated by applying a daily percentage rate to the unpaid balance.\textsuperscript{125} For all contracts where only one annual percentage rate (APR) applies to the unpaid balances, interest charged for each day must not be more than:\textsuperscript{126}

\[
\text{unpaid daily balance} \times \frac{\text{APR}}{365}
\]

The unpaid daily balance for a day under a credit contract is the unpaid balance under the contract at the end of that day.\textsuperscript{127} A credit contract may specify, for the purposes of payments or any other purposes under the contract, when a day ends. Different times of the day may be specified for different purposes.\textsuperscript{128}

If more than one APR applies to the unpaid balances, interest charges must not be more than the sum of each amount determined by applying:\textsuperscript{129}

\[
\text{each daily percentage rate} \times \text{that part of the unpaid daily balance to which the daily percentage rate applies}
\]

Interest can be calculated at monthly, quarterly or biannual rests using the average daily balance during the period.\textsuperscript{130}

Interest must not be debited before the end of the day to which the interest relates (except for the first payment of interest under the contract, if it is for a period of less than the normal interest period under the contract; i.e., there is a broken first interest period).\textsuperscript{131}

However, on the last day of an interest period, interest can be debited to an account provided that it is not included in the balance for the interest calculations on that day.

The prohibition that interest cannot be debited before the end of the day to which it applies does not apply to credit provided to purchase, renovate or improve residential investment property; or to refinance credit if, at the time the credit contract was entered into, the residential property was used for investment purposes.\textsuperscript{132}

Unpaid interest charges for a period may be added to the unpaid daily balance immediately after the end of that period.\textsuperscript{133} The NCC thus permits a credit provider to capitalise interest daily (or at another longer interval such as weekly or monthly). However, every debit for interest charges must be separately itemised on the account statement so that the debtor can see the effects of the capitalisation.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{125} NCC Section 28.
  \item \textsuperscript{126} NCC Section 28(1)(a).
  \item \textsuperscript{127} NCC Section 27.
  \item \textsuperscript{128} NCC Section 27.
  \item \textsuperscript{129} NCC Section 28(1)(b).
  \item \textsuperscript{130} NCC Section 28(2).
  \item \textsuperscript{131} NCC Section 29.
  \item \textsuperscript{132} NCCP Regulations reg. 78.
  \item \textsuperscript{133} NCC Section 29.
  \item \textsuperscript{134} NCC Section 34(6)(a).
\end{itemize}
**Default interest**

Default interest cannot be charged unless the debtor defaults in payment and can be charged only on the amount in default and while the default continues. There are limited circumstances in which the balance of the amount owing may be accelerated and default interest charged on that accelerated amount.\(^{135}\)

The default method is by dividing the annual percentage rate (the quoted or nominal interest rate) by 365 to obtain the ‘daily percentage rate’ and applying that daily percentage rate to the unpaid daily balance each day.\(^{136}\) This results in daily compounding of interest, but the NCC allows for interest to be compounded monthly, quarterly or biannually using the same principle of calculation.\(^{137}\)

A higher rate of interest may be imposed in the event of default, but only in respect of the amount in default and not the entire amount owing under the credit contract.\(^{138}\) Default interest may only be imposed if the contract permits, if the debtor defaults in payment, on the amount in default, and while the default continues. This applies to both a default in paying an instalment and an accelerated amount.

Additional provisions apply before a credit provider can accelerate any part of the debt and, consequently, before default interest can become payable on the accelerated amount. In particular, an acceleration clause can only operate if a default notice explaining the effect of the acceleration clause is given and the default is not remedied within the time (at least 30 days) specified in the notice. There are limited exceptions.\(^{139}\)

**Security interests**

The NCC defines ‘mortgage’ to include any interest in, or power over, property to secure obligations under a credit contract.\(^{140}\) The interest must be in the form of a written document signed by the consumer, unless the interest involves the credit provider being lawfully in possession of the goods (i.e., by way of pledge).\(^{141}\)

Security interests in personal property (i.e., not land) must be perfected either by registration of a financing statement on the Personal Property Securities Register or by the secured party having possession or control of the property in order to obtain the maximum level of enforceability and priority.\(^{142}\) The NCC imposes additional requirements for security interests in personal property to be enforceable; it does not displace the Personal Property Securities Act 2009 (Cth) in this respect.

Security interests securing credit subject to the NCC must be in respect of specific property. A purported charge over all assets of a person to secure credit subject to the NCC is void.\(^{143}\) Further, security interests in property to be owned by the provider of the security

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135 NCC Section 30.
136 NCC Section 28(1).
137 NCC Section 28(2).
138 NCC Section 30.
139 NCC Section 93.
140 NCC Section 204.
141 NCC Section 42.
142 See Personal Property Securities Act 2009 (Cth) Part 2.2.
143 NCC Section 44.
interest are void unless the property in question is acquired with the credit it secures, relates to the property or class of property described in the document creating the security interest or relates to goods acquired in replacement of specific goods subject to the security interest.\textsuperscript{144}

Third-party security interests – that is, security interests provided by persons who are neither the debtor nor a guarantor of a debtor’s obligations – are not permitted in respect of credit subject to the NCCP Act and NCC. A person providing a security interest must either be the debtor or a guarantor of the debtor’s obligations. A purported third-party security interest with respect to credit regulated by the NCC is unenforceable.\textsuperscript{145}

Security interests may not be taken over the following types of property:
\begin{itemize}
\item[a] employees’ remuneration or employment benefits;
\item[b] superannuation benefits;
\item[c] essential household property;
\item[d] goods used by the person granting the security interest in earning income from personal exertion, if the goods are worth less than a prescribed amount; and
\item[e] a cheque, bill of exchange or promissory note endorsed or issued by the debtor or guarantor.\textsuperscript{146}
\end{itemize}

The NCC also imposes additional obligations on credit providers when enforcing security interests securing credit subject to the NCC. In summary, a credit provider is required to provide a default notice and allow the debtor or guarantor 30 days to remedy the default, and to keep the debtor or guarantor informed throughout the process of disposing of the secured goods and realising their value.\textsuperscript{147}

**Home mortgage loans**

The requirements described above with respect to security interests apply to a mortgage over real estate securing a loan to purchase that real estate.

Credit providers under standard form home loan contracts must provide prospective debtors with a Key Facts Sheet setting out material features of the credit contract in a table format specified by the NCCP Regulations.\textsuperscript{148} If a credit provider’s website enables a consumer to enquire about or apply for a standard form home loan, the credit provider must also provide functionality on their website for the consumer to be able to generate a Key Facts Sheet for the home loan products offered by the credit provider.

Further, mortgages over real estate are subject to state and territory real property legislation. This means that the mortgage should be registered on the relevant state or territory land titles register to enjoy priority over unregistered and later registered security interests. Some state and territory real property legislation requires a longer grace period for a debtor to remedy a default.\textsuperscript{149}

\begin{itemize}
\item[144] NCC Section 45.
\item[145] NCC Section 48.
\item[146] NCC Section 50.
\item[147] See NCC Part 5 Division 4.
\item[148] NCCP Act Section 133AD; NCCP Regulations regulation 28LB, Schedule 5.
\item[149] For example, Section 57(3)(d) of the Real Property Act 1900 (NSW) requires one month’s notice to be allowed.
\end{itemize}
**Ending credit contracts**

A debtor under a credit contract has a right to be given a payout figure at any time and to end a credit contract by paying to the credit provider the amount owing under the credit contract.\(^{150}\)

In the event of a default, a credit provider must provide the debtor with a notice in respect of the default and allow a 30-day period to remedy the default before the credit provider can commence court proceedings to enforce the credit contract.\(^{151}\) If the credit contract contains an acceleration clause, the default notice must set out how the debtor’s liabilities will be affected by any acceleration clause enlivened by the default in order for that acceleration clause to be enforceable.\(^{152}\)

**Loan serviceability**

Before entering into a credit contract or increasing the credit limit of a credit contract, a credit provider must make reasonable inquiries into the consumer’s financial situation (among other things), verify information about it and assess whether the credit contract will be unsuitable for the consumer. A credit contract is unsuitable for a consumer if the consumer is unable to comply with his or her obligations under the contract, or could only comply with substantial hardship. A credit provider is prohibited from entering into a credit contract with a consumer if that contract is unsuitable for the consumer.\(^{153}\)

**Student loans**

For Australian citizens,\(^{154}\) the government makes available the Higher Education Loan Program,\(^{155}\) under which students in eligible courses of study can borrow the cost of their tuition fees from the government. The loans are income-contingent and repaid through the income tax system once the borrower earns a minimum level of income (A$45,881 at the time of writing) and at a rate increasing with the borrower’s income.

Private loans taken out to finance one’s own education are for personal, household or domestic purposes and therefore subject to the NCCP Act and NCC. However, such loans are not afforded any special status under the NCC or any other legislation.

**Recent developments**

**Buy now, pay later arrangements**

One of the requirements for credit to be regulated by the NCCP Act and NCC is that a charge is or may be made for providing the credit. Recently, there has been a proliferation of providers offering short-term finance for the purchase of goods or services at the point of sale with no charge made for providing the credit. Instead, revenue is derived from retailers who are charged a fee for purchases financed by such credit or from exception fees charged when consumers fail to make a scheduled repayment. Other providers offer continuing credit contracts with only a periodic account charge within limits that qualify for the exemption in

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\(^{150}\) NCC Sections 82–83.

\(^{151}\) NCC Section 88.

\(^{152}\) NCC Section 93.

\(^{153}\) NCCP Act Part 3–2.

\(^{154}\) And also holders of a New Zealand Special Category Visa or permanent humanitarian visa.

\(^{155}\) Under the Higher Education Support Act 2003 (Cth).
Section 6(5) of the NCC. As there is no charge for providing the credit, or the charge is less than the amount prescribed by the NCCP Regulations, such credit is not regulated by the NCCP Act and NCC.

This has led to concerns that consumers are being denied key protections in relation to credit and are at a greater risk of being provided credit that is unsuitable for them (as responsible lending obligations do not apply to credit that is not regulated by the NCCP Act). Throughout 2018, ASIC conducted a review of buy now, pay later arrangements and reported its findings in November 2018. ASIC’s report found that users of such arrangements are overwhelmingly young people (18 to 34 years old) and flagged a number of risks inherent in such products, including the lack of consumer protections under the NCCP Act, overcommitment and higher total indebtedness, potentially unfair contract terms, and hidden costs in the form of higher prices charged by merchants for goods or services to cover the fees paid to the providers of these arrangements.

ASIC’s report also suggests that buy now, pay later arrangements should be subject to ASIC’s product intervention power (discussed in Section VII). Otherwise, ASIC’s report does not propose any specific regulation (a task for the legislature and not ASIC) but rather states that ASIC will continue to monitor the buy now, pay later industry for misconduct and consumer harm.

**Short-term credit product intervention order**

On 12 September 2019, ASIC exercised its new product intervention power for the first time by making an order targeting short-term credit arrangements whereby an associate of the credit provider charges consumers fees under a separate service contract for collateral services provided in relation to the credit contract, resulting in the total amount payable to the credit provider and their associate exceeding the limits of the short-term credit exemption in the NCC. Such credit is not regulated by the NCCP Act and therefore is not subject to the consumer protections in the NCC (including, in particular, the responsible lending regime in the NCCP Act). The product intervention order prohibits a credit provider in such circumstances from providing short-term credit, its associate from charging for collateral fees under a collateral service contract and directors of either from causing their corporate entities to provide short-term credit or charge collateral fees, unless the total cost to the consumer is less than or equal to the maximum amount chargeable under the credit contract under Section 6(1) of the NCC.

**VII OTHER AREAS**

The NCCP Act and the NCC were amended with effect from 2013 to introduce concepts of small amount credit contracts (SACCs), medium amount credit contracts (MACCs) and reverse mortgages. SACCs are credit contracts that are:

- not provided by an ADI;

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158 NCCP Act Section 5(1).
159 NCC Section 204.
160 NCC Section 13A.
b for an amount or credit limit not more than A$2,000 (plus the establishment fee and first monthly fee) or less;
c for a term of at least 16 days but not longer than one year; and
d unsecured.161

MACCs are credit contracts that are:
a not provided by an ADI;
b for an amount of credit limit of at least A$2,001 and not more than A$5,000; and
c for a term of at least 16 days but not longer than two years.162

A reverse mortgage163 is a financial instrument aimed at seniors to allow them to access equity in their home and remain living there. The key difference from a traditional real property mortgage is that, generally, there are no principal or interest payments required to be made by the debtor while he or she continues to live in his or her home. The NCCP Act and the NCC prescribed different requirements for reserve mortgages in relation to pre-contractual conduct, contract disclosures and procedures during the loan term.164

SACCs differ from other credit contracts as the NCC tightly defines their terms. Notionally, interest cannot be charged on SACCs. Rather, a permitted monthly fee equal to 4 per cent of the first amount of credit provided (excluding fees capitalised in that amount) may be charged each month on a SACC.165 Apart from the monthly fee, a permitted establishment fee not exceeding 20 per cent of the first amount of credit provided (excluding fees capitalised in that amount) may be charged in relation to a credit contract. The effect of these fees is to allow for an effective interest rate greater than 48 per cent per annum – SACCs are excluded from the annual cost rate cap in the NCC.166 Default fees may be charged in relation to a SACC, but total default fees charged cannot exceed twice the first amount of credit provided (excluding fees capitalised in that amount).167

Additionally, for responsible lending purposes, it is presumed that a SACC will be unsuitable for a consumer if he or she (1) receives at least 50 per cent of his or her gross income from social security payments, and repayments under all SACCs entered into by the consumer would exceed 20 per cent of the consumer’s gross income for a payment cycle during the life of the loan;168 (2) has been a debtor under two or more SACCs within the 90 days preceding the preliminary responsible lending assessment;169 or (3) is in default under another SACC.170

The NCCP Regulations prevent credit providers from providing credit to consumers by a series of SACCs or MACCs. If a consumer’s requirements are to obtain a particular

161 NCCP Act Section 5(1); NCCP Regulations regulation 4D.
162 NCC Section 204.
165 Section 31A(3).
166 NCC Section 32A(4).
167 NCC Section 39B.
168 NCCP Regulations regulation 28S.
170 NCCP Act Sections 118(3A)(a), 119(3A)(a), 131(3A)(a).
amount of credit, a credit contract is deemed to be unsuitable for a consumer if it forms part of an arrangement under which that amount of credit is provided by two or more SACCs or MACCs.171

**Linked credit providers and tied credit contracts**

A credit provider is a linked credit provider of a supplier of goods or services if, pursuant to an agreement or arrangement between the credit provider and the supplier:

a the credit provider finances consumers’ purchases of goods or services from the supplier;

b the supplier regularly refers consumers to the credit provider to obtain credit;

c the credit provider’s contract documents or application forms are made available to consumers at the supplier’s premises; or

d the contract documents, applications or offers for credit from the credit provider may be signed by consumers at the supplier’s premises.172

A credit contract provided by a linked credit provider of a supplier to finance the purchase of goods or services from the supplier is termed either a tied loan contract or tied continuing credit contract, depending on whether it is an instalment loan or line of credit.

A linked credit provider is vicariously liable for the following misconduct on the part of the supplier of goods or services financed by a tied credit contract: misrepresentations in relation to the tied credit contract; and misrepresentation, breach of contract or failure of consideration in relation to the contract for sale of the goods or services financed by the tied credit contract that results in loss or damage for the debtor.173

A linked credit provider’s liability does not diminish the supplier’s direct liability for the above misconduct, and proceedings must be brought jointly against both the supplier and linked credit provider unless the supplier is insolvent or a court is satisfied that it would not be able to satisfy any judgment ordered against it.174 A linked credit provider is entitled to be indemnified by the supplier in respect of its liability for the supplier’s misconduct and to be subrogated to the consumer’s rights against the supplier.175 Therefore, in effect, the NCC puts a linked credit provider in the position of a guarantor of the supplier’s obligations in relation to the sale of goods or services to be financed by credit.

**Related insurance contracts**

A credit provider may require a consumer to take out insurance in relation to the consumer debtor’s capacity to repay the loan or over property that secures the loan. The NCC regulates credit providers’ actions in relation to that insurance. Care must be taken to ensure that any insurance is of benefit to the debtor (e.g., they satisfy any preconditions, such as not being unemployed).176

The NCC limits a credit provider’s ability to require a consumer debtor or guarantor to pay for insurance arranged by it, require a debtor or guarantor to obtain insurance from a

171 NCCP Regulations regulation 28XXF.
172 NCC Section 127.
173 NCC Sections 128 and 129.
174 NCC Section 130.
175 NCC Sections 131 and 133.
176 See ASIC Report 492, ‘A market that is failing consumers: The sale of add-on insurance through car dealers’ (September 2016).
particular insurer or make unreasonable requirements as to the terms on which the debtor or guarantor is required to obtain insurance.\textsuperscript{177} It also prevents a credit provider from financing insurance premiums for more than one year at a time.\textsuperscript{178}

If a credit contract is terminated (such as by being repaid early), any insurance contract insuring the debtor’s capacity to repay the loan automatically terminates and the credit provider is liable to provide to the debtor a proportionate refund of any premiums paid. The credit provider’s liability exists regardless of the term of the insurance contract. The credit provider may recover from the insurer any amount paid to the debtor.\textsuperscript{179}

\textbf{Facilitating innovation in consumer finance}

ASIC has issued two legislative instruments\textsuperscript{180} providing limited exemptions from the need to hold an ACL or AFSL to test new credit activities or financial services. Under those legislative instruments, eligible persons – persons who do not hold an AFSL or ACL and are not a related body corporate or authorised representative of the holder of an AFSL or ACL – may, on giving written notice to ASIC about their intention to rely on the exemption, provide eligible credit activities and financial services for a period of up to 12 months without holding an ACL or AFSL or being an authorised representative of a holder of an ACL or AFSL. This exemption has been colloquially termed the ‘regulatory sandbox exemption’.

The regulatory sandbox exemption is only available in respect of:

\begin{enumerate}
  \item providing credit services in respect of credit contracts not exceeding A$25,000 in amount, 24 per cent per annum interest rate and other conditions set out in the instrument; and
  \item providing financial product advice about or dealing in:
    \begin{enumerate}
      \item a non-cash payment facility issued by an ADI;
      \item a home contents insurance product where the sum insured under the product does not exceed A$50,000;
      \item a personal and domestic property insurance product where the sum insured under the product does not exceed A$50,000;
      \item a managed investment product in relation to a simple managed investment scheme;
      \item a quoted security; or
      \item Commonwealth (federal) government securities (i.e., bonds).
    \end{enumerate}
\end{enumerate}

Additionally, a person relying on the regulatory sandbox exemption may only provide the credit services or financial services to no more than 100 consumers or retail clients and, in the case of financial services, the value of all financial products in relation to which financial services have been provided does not exceed A$5 million.

\textsuperscript{177} NCC Section 133.
\textsuperscript{178} NCC Section 144.
\textsuperscript{179} NCC Section 148.
\textsuperscript{180} ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 and ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176.
Product intervention power

The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth) also amended the Corporations Act and the NCCP Act to grant a power to ASIC. This power is in relation to credit products regulated by the NCCP Act and financial products available for acquisition by issue to retail clients, to order persons to do something or refrain from doing something in order to prevent significant detriment to consumers or retail clients (product intervention order). ASIC will only be able to exercise the power if it considers that a credit or financial product has resulted in, or will or is likely to result in, significant detriment to consumers or retail clients, and will not be able to make product intervention orders against consumers and retail clients in that capacity. ‘Financial product’ is defined broadly so as to include credit products that are not subject to the NCCP Act.

ASIC will be required to consult before making a product intervention order, though failure to consult does not invalidate a product intervention order. Product intervention orders can remain in force for a maximum of 18 months, unless extended by the Minister (including for an indefinite period of time). At the time of writing, the only product intervention order made was in relation to short-term credit (see Section VI.ii), though draft orders have been released for consultation in relation to over-the-counter derivatives and add-on insurance products offered to retail clients.181

Financial product design and distribution obligations

The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth) also contained amendments to the Corporations Act imposing design and distribution obligations on issuers of financial products. These obligations are due to commence on 5 April 2021. They will require issuers of financial products under a disclosure document (essentially financial products issued to retail clients) to, among other things:

a determine the target market for the financial product;
b supervise distribution channels to ensure that the financial product is issued or sold only to persons within the target market; and
c design the financial product so that it is reasonably likely to be consistent with the likely objectives, financial situation and needs of a retail client in the target market.

As with the product intervention power discussed above, ‘financial product’ is defined broadly to include credit facilities that are not otherwise regulated by the Corporations Act.

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VIII RECENT CASES

i Litigation

Australian Securities and Investments Commission v. Kobelt [2019] HCA 18

This case concerned whether the particular system of book-up credit provided by Mr Kobelt constituted unconscionable conduct in contravention of the ASIC Act. Book-up credit is a system of credit whereby the credit provider provides credit to customers to be repaid from their social security income. The credit provider is usually a retailer who provides groceries and other essential goods to customers on credit, and takes possession of their bank debit cards and associated PINs and withdraws the funds from customers’ accounts as social security payments are deposited in them, in repayment of credit provided or in advance of goods being supplied. Book-up credit is prevalent in remote indigenous communities. In addition to operating the general store in a remote indigenous community, Mr Kobelt also sold used vehicles to indigenous persons on book-up credit. Further, Mr Kobelt’s records of book-up credit transactions were found to be so rudimentary as to make it near-impossible to determine the amount that each person owed. The book-up credit was provided without a credit licence in contravention of the NCCP Act and at a higher cost than the annual cost rate limit in the NCC (this issue was determined at first instance and not a subject of the appeal).

At first instance, the Federal Court held that Mr Kobelt had engaged in unconscionable conduct in contravention of the ASIC Act. On appeal, the Full Court of the Federal Court held that Mr Kobelt had not engaged in unconscionable conduct. On appeal from the full Federal Court, the High Court, by four-to-three majority, held that Mr Kobelt did not engage in unconscionable conduct in contravention of the ASIC Act. Material to the majority’s conclusion was that Mr Kobelt was not unconscientiously exploiting the vulnerability of his indigenous customers, but rather fulfilling a demand for book-up credit in that community. Customers voluntarily obtained credit from Mr Kobelt and could end the relationship at any time by changing their card PIN or having social security payments deposited in a new account, and the book-up system of credit had the benefit of preventing the practice of ‘humbugging’ (relatives pressuring a person to share their money with them) by depriving customers of the means to withdraw cash from their accounts.

This case turns on its unique facts and the manner in which it was pleaded. It does little to clarify the meaning of unconscionable conduct under the ASIC Act, and how it differs from unconscionable conduct at general law (which is also separately prohibited by the ASIC Act).


This case concerned a marketing campaign by two Westpac subsidiaries (the defendants) to persuade customers to consolidate their superannuation holdings in their Westpac superannuation account. The marketing campaign involved calls being made to customers in which they were asked about their objectives and concerns in relation to superannuation, reassured that their objectives and concerns are widely shared and persuaded to agree on the call to consolidate their superannuation accounts. The Corporations Act distinguishes between personal advice, which is given where the adviser considered or might reasonably have been expected to consider the recipient’s objectives, financial situation and needs, and
general advice, which is any advice that is not personal advice. Personal advice to retail clients carries additional obligations that the defendants did not comply with as it believed that it was providing general advice.

At first instance, the Federal Court held that the defendants did not provide personal advice. On appeal, the Full Court of the Federal Court allowed the appeal on this issue and held that the defendants provided personal advice because they gave financial product advice in circumstances where a reasonable person might have expected them to take into account the customer’s relevant circumstances. The Full Federal Court reached this conclusion because the defendants asked the customers about their relevant circumstances. The ostensible purpose of the call was to help the customer in managing their financial affairs, and there was an existing relationship between each customer and one of the defendants. Superannuation is a significant financial matter for most people and no reasonable person would expect their current superannuation provider to recommend a course of action that is contrary to their interests. Consequential breaches of the Corporations Act provisions imposing obligations on the provision of personal advice to retail clients – to provide a statement of advice and to act in the client’s best interests – therefore followed as a matter of course.

Australian Securities and Investments Commission v. Westpac Banking Corporation (Liability Trial) [2019] FCA 1244

This case concerned alleged breaches of responsible lending laws by Westpac in its home loan approval process. While Westpac did collect information about customers’ living expenses, a particular serviceability calculation within its credit assessment process used a statistical benchmark value in place of the amount for living expenses that the applicant declared in their loan application in determining whether the applicant could afford repayments on the loan. Also, for interest-only loans, Westpac determined serviceability by amortising the principal amount over the entire term of the loan rather than only the residual term after the expiry of the interest-only period. ASIC commenced civil penalty proceedings, alleging a failure to assess whether or not a credit contract is unsuitable before entering into the credit contract.

After a A$35 million penalty agreed between ASIC and Westpac was rejected by the Federal Court as the proposed orders did not disclose any contravention of the NCCP Act, the case was argued on its merits and the Federal Court held that Westpac did not contravene the NCCP Act. It was held that the obligation to assess whether or not a credit contract will be unsuitable for a consumer simply requires the credit provider to turn their mind to the criteria for unsuitability; it does not prescribe the manner in which the assessment must be carried out, what information must be used and how it must be used, or the decision rules that must be followed. How the assessment is carried out is left to the credit provider’s discretion. Hence, Westpac did assess whether or not the credit contract will be unsuitable for each applicant, and therefore discharged its obligation in this respect.

The decision is significant as it is the first contested litigation concerning the responsible lending obligations in the NCCP Act. It also represents a construction of the NCCP Act more favourable to credit providers than the prevailing industry sentiment was at the time the litigation was commenced. Material to the outcome in this case was that ASIC did not allege that any of the credit contracts entered into were unsuitable; only that Westpac’s assessments

were defective and therefore invalid. The case is also significant for the judge’s comments that consumers can be expected to reduce discretionary expenditure in order to make loan repayments, with the implication that a cash-flow deficit based on the consumer’s current income and expenditure levels does not necessarily mean that a consumer will be unable to afford to repay the loan. At the time of writing, this decision is being appealed to the Full Federal Court.

IX OUTLOOK

The Australian regulatory framework for consumer financial services is complex. The NCCP and the NCC regulate credit. Financial products (excluding credit) are regulated under the Corporations Act. The Corporations Act, the Payment Systems Act and the ePayments Code regulate payment systems and electronic payments. In addition, further obligations are set out in various pieces of legislation, including the AML/CTF Act, the ASIC Act, the Consumer Law and the Privacy Act. In addition, much guidance is published by the regulators, including APRA, RBA, ASIC, ACCC, OAIC and AUSTRAC. Following the 2018/19 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission), it is likely that there will continue to be law reform to implement the Royal Commission’s recommendations and regulators will adopt a more litigious approach to enforcing the laws regulating consumer financial services.
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 2018 generally focused again on digitalisation aspects and integrated supervision of companies. In 2018, FMA focused on the extension of collective consumer protection in three aspects: product transparency and client information; proper advice and complaints management; and market surveillance (the special protection of small and retail investors).

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:


1 Mimo Hussein is a senior associate at Wolf Theiss. Gerhard Dilger has now left Wolf Theiss.
2 Supervisory and Audit Priorities 2018. FMA. Page 12 et seq.
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 are 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 resolution procedures require the consent of the defendant and are not mandatory, meaning that 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 Federal Act on the Provision of Payment Services 2018 (ZaDiG) sets forth the rules under which payment service providers may operate and service users are protected. Payment service providers are not able to opt out of various transparency, information and other
obligations when providing their services to consumers. Direct cash transactions between payer and payee, under Section 3(3)(1) ZaDiG, are, however, exempted. The general civil law rules apply to direct 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 rapidly, in part because of the developing fintech culture and good mechanisms for start-ups. 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 (fintechs) 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 is continuously updated and includes the option of contacting the regulator directly if the company does not already have a licence. The first fintech firm received a MiFID 2 licence in 2018.

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). Most of the regulations are seen as protective laws allowing the consumer – if a bank breaches its obligations – to claim damages from the bank.

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, 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

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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 the option will be chosen by Austrian market participants. However, it seems that the Erste Bank sector will develop its own scheme, while all other institutions will become part of the Einlagensicherung AUSTRIA GmbH’s deposit guarantee scheme.

V REVOLVING CREDIT

i Overview
Issuing credit cards and providing loans to consumers each requires the bank to have the relevant banking licence (either payment instrument business or lending business) 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, the FAGG and the general civil law rules.

ii Recent developments
In recent years the topic of negative interest rates and the banks’ obligation to let borrowers benefit from them dominated the discussion of market participants. However, the Austrian Supreme Court has in the meantime developed a standard practice that with respect to ‘old’ loans, which have no limitations, wording or clauses on negative interest rates, negative interest rates must be passed on to the consumer (but capped at zero).

VI INSTALMENT CREDIT

i Overview
Lenders require the banking licence for the lending business under the BWG to commercially 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, the FAGG and the general civil law rules.

ii Recent developments
Austria has implemented Directive 2014/17/EU into Austrian national law (HiKrG). As this implementation 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.

8 9 Ob 35/17p as most recent decision.
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 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.9

VIII UNFAIR PRACTICES

The Austrian Supreme Court and inferior courts throughout the past few years 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, especially under the KSchG. Although few cases have captured the public interest or been taken up by media or consumer 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;10 and (2) a case in which the court held that the consumer must have precise information on potential cost with respect to a loan and its securitisation; the Supreme Court confirmed the court’s view that unclear provisions are invalid11 and that unspecified debt collection costs that – in the worst case – might lead to unjustified cost transfers to consumers are also invalid.12

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

9 10 Ob 51/16x.
10 57 Cg 14/16h.
11 6 Ob 17/16t.
12 43 Cg 8/16y.
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 Austrian 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 Austrian 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 will do so in certain situations where publishing is justified for reasons of investor protection. 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 non-authorised entities providing licensable banking, payment or investment services or activities to Austrian investors, especially consumers;

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

c an authorised credit institution not implementing sufficient procedures to identify politically exposed persons infringing the credit institution’s obligation under Article 40(b) of the BWG, resulting in administrative fines for the managing directors;

d an authorised credit institution not implementing sufficient procedures to identify the ultimate beneficial owner, infringing the credit institution’s obligation under Article 40(a) of the BWG, resulting in administrative fines for the managing directors;

e an authorised credit institution not informing consumers properly on the risks of their transactions; and

f an authorised credit institution has not implemented proper measures under relevant laws.

Relating to infringements by authorised entities (such as licensed credit institutions), the FMA in certain cases does not impose administrative fines, but instead orders the entity to change its management board, holding that certain directors are no longer fit and proper. That action is not made public according to current law but is one of the regulator’s most powerful tools.

ii Disputes settled 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 consumer protection cannot be derived from Austrian regulatory provisions and disputes cannot be settled before the FMA, but consumers can protect their rights before the alternative dispute resolution institutions or the competent Austrian 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 of out-of-court settlement prevails, while 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 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 recent cases for the protection of consumers (apart from the above-mentioned negative interest decisions by the Austrian Supreme Court) has been decided before the European Court of Justice.  

In this 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 had 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 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 (such as email) for customers regarding messages in their e-banking mailbox.

Another important case dealt with a bank that calculated the cost for reminder fees in cases 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

13 C-375/15.  
14 4R 129/15t.
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 expenses can be recovered, and the costs in this case were 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 (especially in the virtual currency area) 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 very interesting to see how laws and regulators such as the FMA will keep pace with the amazingly rapid developments in these fields and be able to exercise a sustainable supervisory practice. Undeniably there is a high risk that supervisory authorities might want to regulate any and all development in the fintech sector, regardless of whether the financial market rules are fitting to the relevant fintech service or activity.

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 who are above 60 years, who have not grown up with the internet and therefore might require even more user-friendly solutions.
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 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.

Overview

In recent 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

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.
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 and 2017, 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:

- a more financial citizenship;
- b more modern laws;
- c a more efficient financial system; and
- d cheaper credit.⁶

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. Central Bank implemented several measures listed in Agenda BC+ throughout 2017.

In 2018, the Central Bank published a review of the pros and cons of the implementation of Agenda BC+ in the preceding years, and the results of analysis reinforced commitment to its pillars. As such, the Central Bank continues to guide its actions and measures around those pillars. There has been a wave of reviews and updates to the regulations, including to foreign exchange principles, the payments system and data ownership.

II LEGISLATIVE AND REGULATORY FRAMEWORK

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

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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.
⁶ Presentation of the President of the Central Bank Ilan Goldfajn – Agenda BC+: 20 December 2016.
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), the Brazilian Central Bank (the Central Bank) and the Securities Exchange Commission (CVM) 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.

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);

g. the Joint-Liability Law (Law 9447/97); and

h. the Administrative Procedures Law (Law 13506/17).

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 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.

7 The Monetary Council (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 Securities Exchange Commission (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.


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.
**Performance of consumer financing activities**

The Banking Law and ancillary legal and regulatory framework do not provide 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 recognises 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 movable assets and real estate.

Additionally, in 2018, the Central Bank issued the first fintech regulatory framework in Brazil, pursuant to which it created two new types of financial institutions designed to grant credit through online channels: the direct credit companies (SCDs) and the credit-among-individuals companies (SEPs). The main difference between the entities is that SCDs operate in the credit market using their own capital, while the SEPs operate as peer-to-peer platforms linking lenders and borrowers. None of these financial institutions are authorised to receive deposits from the public.

The high levels of acceptance of this new regulatory framework resulted in the Central Bank taking additional steps towards discussing, reviewing and updating financial services regulatory frameworks affected by new technologies. The Central Bank has submitted to the
public proposed regulations aiming at implementing an instant payments system that will use technology to effect and clear payment transactions 24/7. The proposed regulations also concern:

a  open banking principles and regulatory guidelines and obligations intended to empower customers in respect of their financial data, and to allow sharing of customer data between institutions upon the customer’s request; and

b  a regulatory sandbox infrastructure that will work as an experimental environment for innovative models using technology that may require regulatory waivers for appropriate testing.

**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.

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.

In this sense, the Central Bank has been working towards an open banking regulatory framework and guidelines, with the objective of empowering the customers in respect of the ownership, use and transfer of their data. This regulation follows the enactment of the Brazilian General Data Privacy Act in 2018.

**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, that entity or person should be considered an end user of the 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 the 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 the end user of the supplies.

According to this second school, this relationship should be considered as being 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.

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 a 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 amount 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 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 the small claims courts. Small claims courts 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 fulfilment 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

13 Currently, the minimum wage amounts to 937 reais.
14 Decree-Law 857/69.
The Brazilian payments structure is currently under review by the Central Bank. The regulatory agency has submitted to public consultation the general principles and guidelines for a reform of the Brazilian payments system and implementation of an instant payments system that will enable payments and transfers to be completed and cleared 24/7.

**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 12,685 (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:

- 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

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

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 199316 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 automated 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 merely a 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.

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15 Carta-Circular 3802/17.
16 CMN Resolution 2025/93.
17 CMN Resolution 3954/11.
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 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, that mostly comprises actions aiming to reduce the cost of credit and banking spread.

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 since 2015 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, which 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, to consumer relations carried out exclusively by electronic means.

Concurrently, with the above-mentioned 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)19 have become 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 automated teller machines, transferring 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 a bad credit history that may face difficulties in opening a conventional deposit account.

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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.

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

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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.
24 CMN Resolution 3919/10.
25 CMN Resolution 2682/99.
26 Consumer Protection Code.
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.

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, 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\(^\text{28}\) 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.

\(^\text{28}\) 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.
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, the 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 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 this 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 accounts.

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

Although use 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 customer evaluations and opinions shared on social media, as well as the institution’s role in consumer-related rankings and complaint centres.

29 Special Appeals Nos. 1.457.199 and 1.419.697.
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.
I OVERVIEW

The legal framework for consumer finance in Chile has been strengthened during the past 10 years and this was certainly owing to Chile's admission to the Organisation for Economic Co-operation and Development, among other factors. 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. Additionally, in March 2019, Act No. 21,081 came into force, strengthening SERNAC's oversight powers, increasing its endowment and resources and granting Chilean consumer associations new faculties. Similar efforts had been conducted to protect the confidentiality of debtors' personal data by supplementing the provisions of Act No. 19,628 (the Data Privacy Protection Act).

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

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. 21,000 of 2017, which creates the Commission for the Financial Market (replacing the Securities and Insurance Superintendence);
- Act No. 20,715 of 2013 on protection 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;

1 León Larrain is a partner and José Ignacio Berner is an associate at Baker McKenzie.
g Act No. 20,855 of 2015, which regulates the release of mortgages and pledges granted to secure loans;

h Act No. 20,575 of 2012, establishing the principle of finality on treatment of personal data;

i the Data Privacy Protection Act (see above);

j Act No. 19,659 of 1999 on illegal collection procedures;

k DFL No. 707 of 1982 on current accounts and cheques;

l the Civil Code; and

m the Commercial Code.

ii Regulation

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

III PAYMENTS

i Overview

Cash

Cash remains the default legal payment method in Chile.

Credit card

Chapter 8-41 of the UDR and Chapter III.J.1 of the Compendium defines payment cards – credit, debit and prepaid cards – as:

any instrument or any physical, electronic or computing device that has a unique identification system of the payment method, and whose support contains the information and security conditions proper of such payment method, which allows its owner or user to use a credit or, as the case may be, to use cash deposited in an account, to acquire goods, pay for services or extinguish other payment obligations with entities that are affiliated with the cards system.

Credit cards are widely accepted as a payment method in Chile.

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2 The main chapters for consumer law in the Updated Digest of Rules (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 money 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 8-1 on overdrafts on current accounts; Chapter 8-41 on payment 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; and Chapter 20-8 on operational incident information.
The CMF supervises all institutions that issue and operate banking and non-banking credit cards. In addition, Chilean law limits the liability of credit card holders if a card is lost or stolen, once the cardholder has notified the issuer.

**Debit card**

According to Chapter III.J.1.2 of the Compendium of Financial Rules of the Central Bank, only banks and credit unions established in Chile and supervised by the CMF may issue debit cards. Debit cards are widely accepted as a payment method in Chile.

**Prepaid card**

According to Chapter III.J.1.3 of the Compendium, prepaid cards allow the holder or bearer to have funds deposited in an account called a Fund Provision Account, which has the exclusive purpose of receiving funds to provision the respective cards. The resources in these accounts will be in national currency, will not accrue readjustments or interest, and cannot be overdrawn. Prepaid 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. 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 and tablets). It is mostly regulated by the UDR. 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 and money laundering operations.

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4 Act No. 20,009.
5 DFL No. 707, Article 10.
6 UDR, Chapter 1-7.
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 CMF is continuously developing new rules applicable to electronic devices.

DEPOSIT ACCOUNTS AND OVERDRAFTS

Legal regime
Time deposit accounts and sight deposits are jointly regulated by the Compendium of Financial Rules of the Chilean Central Bank and the UDR. Time deposit and sight deposit accounts may be opened by both individuals and legal entities (even by residents abroad), and can be operated in Chilean pesos or in any other currency (in which case they can only be opened by banks established in the country).

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 individuals are subject to a regime of state guarantee. No person may benefit from this guarantee in a single bank for obligations exceeding 200 unidades de fomento (approximately US$6,950) per calendar year. The total benefit amount per beneficiary person may not exceed 400 unidades de fomento (approximately US$13,900) 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 CMF.

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.

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

7 Compendium of Financial Rules of the Chilean Central Bank, Chapter III E.
8 UDR, Chapters 2-4 and 2-6.
9 UDR, Chapter 8-1.
11 UDR, Chapter 8-1.
V RE VOLVING 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. Besides this, card issuers must inform customers 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, it must inform the CMF, identifying the dates of the operation, amount of the credit, monthly interest rate, contractual term and other charges.

ii Recent developments
Maximum interest rates have been substantially reduced over the past years through a new calculation formula (see Section VII).

VI INSTALMENT CREDIT

i General rules
Instalment credit as opposed to revolving credit is the general rule in Chile. The Protection of Consumer Rights Act stipulates some rights that debtors will always have. These 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 be listed 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 from registers.
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 affect the consumers’ personal home or employment situation.
g Confidentiality: banks may not inform family members or other related persons of the consumer’s debt.

ii 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. Also, mortgage grantors can limit their liability to

12 Article 3, No. 13, Decree 44 of 2012, of the Ministry of Economy, on information to consumer on credit cards
14 Civil Code, Article 2415.
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.  

- 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 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 do so, 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: although there are no specific rules for this, for years SERNAC has been conducting studies, pointing out that customers may experience abuses in these kind of credits. For automotive loans secured by non-possessory pledge over the purchased vehicle, once the credit is discharged, the creditor must provide and pay for the public deed (or private instrument notarised before a notary public) declaring the release of the pledge, and register it with the non-possessory pledge registry within 45 days of the debt being discharged.

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 loan: This is a loan 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. Repayment starts two years after the end of studies, paying a fee equivalent to 5 per cent of the annual incomes of the consumer;
- state guaranteed loan: this is a loan granted by financial institutions, with a maximum annual interest rate of 2 per cent. The state guarantees up to 90 per cent of the loan. Repayment starts 18 months after the end of studies. Consumers can request to pay fees equal to or lower than 10 per cent of their income. It is possible to request the suspension of the repayment of the loan, in cases of unemployment or postgraduate studies abroad; and
- CORFO loan for degree students: CORFO (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

i The Consumer Finance Act

Before 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.

On 13 March 2019, Act No. 21.081 entered into force, which strengthened SERNAC’s oversight powers, doubling its staff to improve inspection; reinforced collective voluntary procedures and complaints; and increased fines by up to six times (approximately US$161,000).

ii 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 the main clauses of the contract, in order to facilitate their comparison.

iii Equivalent annual cost

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, interest and all expenses and costs of the credit, whatever the term agreed for the payment of the obligation.

iv 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\(^\text{16}\) (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 one and a half times the current interest rate\(^\text{17}\) at the time of the agreement, as determined by the CMF for each type of credit operation, and the current interest rate at the time of the agreement increased by two 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 pesos), plunged from 55 per cent in 2013 to 35 per cent in 2016.

v 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

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\(^{16}\) 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.

\(^{17}\) 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).
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 applications for public employment.\textsuperscript{18} 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.\textsuperscript{19}

\textbf{VIII UNFAIR PRACTICES}

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

\begin{itemize}
\item[a] granting a party the right to suspend performance of, or to modify, the contract, notwithstanding legal exceptions;
\item[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;
\item[c] making consumers liable for omissions or deficiencies that are not imputable to them;
\item[d] reversing the burden of proof so that it falls on the consumer;
\item[e] containing absolute limitations of liability that may deprive consumers of the right to compensation;
\item[f] clauses contrary to good faith; and
\item[g] including blank spaces that have not been filled or used.\textsuperscript{20}
\end{itemize}

\textbf{IX RECENT CASES}

i \textbf{SERNAC v. Cencosud Retail}\textsuperscript{21}

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 in 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, reimbursing undue charges. The total amount of the compensation to which Cencosud Retail was ordered to pay amounted to approximately 26.4 billion pesos.

ii \textbf{SERNAC v. Beneficios Chile and Solución}\textsuperscript{22}

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

\textsuperscript{18} Act No. 20,575, Article 1
\textsuperscript{19} Act No. 20,575, Article 3.
\textsuperscript{20} The Protection of Consumer Rights Act, Article 16.
\textsuperscript{22} Third Civil Court of Coquimbo, docket No. 2820-2011; appeal on Court of Appeal of La Serena, docket No. 669-2016, still pending.

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of consumers varied. In 2013, the parties reached a settlement where the card issuers agreed to reimburse 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 both fined.

iii SERNAC v. Banco Santander-Chile

In 2012, 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. If the audit showed that the level of customer satisfaction was below 74 per cent and over 50 per cent, the bank 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 customers were satisfied with its service. Since SERNAC disagreed with the survey, the procedure resumed. A civil court in Santiago ruled in favour of SERNAC. On appeal, the Court of Appeals of Santiago revoked that decision. Currently, there is a cassation resource pending in the Supreme Court of Justice.

iv SERNAC v. Banco Consorcio

In 2015, 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 reimburse consumers the amounts paid for 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.

v SERNAC v. Financiera La Elegante SAC Limitada

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 the silence of the consumers as acceptance; and that the clauses 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 had not been demonstrated at trial that the company had ultimately applied the abusive clauses, even though the court declared that they existed and imposed a fine on La Elegante. SERNAC submitted an appeal against the ruling because of the denial of

23 14th Civil Court of Santiago, docket No. 1391-2012.
24 25th Civil Court of Santiago, docket No. 1553-2015.
25 Third Civil Court of Coquimbo, docket No. 2820-2011.
compensation for losses. The Court of Appeals of La Serena confirmed the ruling. SERNAC presented a cassation challenge against the decision of the Court of Appeals of La Serena, which is currently pending in the Supreme Court of Justice.

vi 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.26

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.
Chapter 5

HUNGARY

Melinda Pelikán, László Lovas and András Mozsolits

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:

a Act CCXXXV of 2013 on Payment Service Providers;
b Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises (the Banking Act);
c Act CXXXIX of 2013 on the National Bank of Hungary;
d Act CXVI of 2012 on Financial Transaction Duty;
e Act CLXII of 2009 on Credit Provided to the Consumer;
f Act LXXXV of 2009 on the Pursuit of Payment Services Business;
g Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices;
h Act CLV of 1997 on Consumer Protection;
i Act XXV of 2005 on the Remote Selling of Financial Services;
j NGM Decree No. 56/2014 (XII.31.) on the information rules for consumer loans;
k NGM Decree No. 61/2013 (XII.17.) on the maximum technical interest rate;
l Government Decree 536/2013 (XII.30.) on the detailed rules of the conditions of supplementary financial servicing;
m Government Decree 535/2013 (XII.30.) on the protection of IT systems of financial institutions, investment ventures and commodity exchange service providers;
n Government Decree 163/2011 (VIII.22.) on the disproportionately high monthly instalment payment in credit limit contracts connected to bank account credit;
o Government Decree 82/2010 (III.25.) on yield calculation and disclosure of deposit interest and securities;

1 Melinda Pelikán is a senior associate and László Lovas and András Mozsolits are associates at Wolf Theiss.
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 guidelines are non-binding legal sources, they could be significant when the regulations of laws are vague or controversial. 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.

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

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.

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.

III PAYMENTS

The most frequent payment methods in Hungary are:

- money transfer;
- authorisation for the execution for the transfer (collective, single, bill of exchange);
- cash substituting tools (debit card, cheque); and
- 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; thus domestic money transfers are fulfilled within four hours. From 2 March 2020, the time limit of domestic money transfers will decrease to seconds, as all Hungarian banks must correspond with Single Euro Payments Area (SEPA) requirements.

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 a 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.

6 Subject to the exceptions in Chapter IV of MNB Decree No. 35/2017 (XII. 14).
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. However, according to a report from the National Bank of Hungary, cash payments are still significant in their everyday use.

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. 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:

- 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.
- 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.
- The funds not collected upon maturity shall be converted into a deposit of indefinite period.
- 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 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.

Since the base interest rate for the forint has decreased continuously from 2011 (currently it is 0.9 per cent), the deposit account has become less significant in the past few years.

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7 Section 6:390 of the Civil Code.
8 Act CXVII of 1995 on personal income tax.
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, 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:

- the sale of residential property, or the sale of lease rights or any right of tenancy;
- benefits received upon the termination of employment or upon retirement;
- insurance benefits; or
- compensation received for criminal injuries or wrongful conviction.

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 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 relevant internal policies;
- the information provided by the consumer;
- the creditworthiness of the consumer; and
- 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.

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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 of the Banking Act.

11 Section 214 A of the Banking Act.

12 Section 14 (1)–(3) of Act CLXII of 2009 on consumer loans; and Section 3 of Decree 361/2009 (XII.30) on the responsible examination of creditworthiness.
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 the 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 of charge (APRC) 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.

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 the lawful currency of the territory of the consumer’s residence at the time of entering into the mortgage loan agreement.

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¹³ Section 19 of Act CLXII of 2009 on consumer loans.
¹⁴ Some exceptions are listed in Section 14/A of Act CLXII of 2009 on consumer loans.
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 is 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:

- the rate and type of the interest;
- the remuneration, fees, costs and tax included in the total consideration of the loan;
- the maximum amount of the loan;
- the term of the loan;
- the annual percentage rate;
- the total amount to be paid by the consumer and the amount of the instalments; and
- 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 decree16 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 CXXII 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 2019) 149,000 forints per month. This data will be registered and available in the 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 the case of default, the lender must provide data to the KHR.

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.
VIII UNFAIR PRACTICES

In 2019, the Supervisory Authority conducted inspections of market players to verify compliance, especially with the requirements applicable in the following fields:

a criteria regarding APRC;
b pre-contractual information duties of credit institutions in connection with consumer loan agreements;
c unilateral change on interest rates charged; and
d handling of complaints.

With respect to the rules regarding APRC, the Supervisory Authority typically found violation of rules related to the maximum level of APRC; and the indication of and communication regarding APRC.

Concerning the pre-contractual information duties of the credit institutions in connection with consumer loan agreements, the Supervisory Authority found several times that financial institutions had violated the applicable rules.

Furthermore, some of the financial institutions had also breached the rules regarding the unilateral change on interest rates charged.

In 2017, the Supervisory Authority introduced the certification mark ‘qualified consumer-friendly home mortgage’ to enhance competition, to procure for transparency as well as for lower interest rates, and to enable the consumers to compare the home mortgages offered by the different market players. The Supervisory Authority grants non-exclusive licence to financial institutions to use the certification mark if the tender of the respective market players was successful. For granting a licence, the home mortgage needs to meet several criteria, including terms and conditions applicable to the duration of the agreement, interest rates, fees, and information duties. The statistics showed that four out of 10 housing loans are qualified consumer-friendly home mortgage in 2018.

IX RECENT CASES

i Enforcement actions

The Supervisory Authority sanctioned the institutions by imposing a consumer protection penalty for infringements, detailed in Section VIII above, in a range between 300,000 and five million forints, depending on the seriousness of the infringement, and ordered them to satisfy the obligations immediately. For several irregularities found in connection with payment services, the Supervisory Authority imposed fines totalling 91.3 million forints on market players. The fine for excessive default interest and excessive APRC amounted to 13.9 million forints in one case.

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 2019, the FCB published six (binding) decisions and (non-binding) recommendations regarding cases where it found that the applications of the consumers were well-founded. The decisions and recommendations adopted by the FCB in 2019 have not been subject to judicial review.
iii Litigation

Settlement, conversion into forints and contract modification were still issues in connection with foreign currency-denominated loans before the Hungarian courts in 2018. The Court of Justice of the European Union made a decision under which the relevant Hungarian court is entitled to assess whether the information on conditions regarding the exchange rate risk was understandable and adequate. Although the interpretation of the Curia of Hungary (the Supreme Court) is that such decision does not change current court practices (including that the exchange rate risk is to be borne by the debtors), for the time being, it is uncertain how this judgment will affect future practice. Additionally, the private enforcement of the prohibition of unilateral fee increases resulted in litigation and noteworthy court rulings. Under the respective rules it is especially prohibited to unilaterally alter the interests and fees to the detriment of the consumer without a reason. The Supreme Court found that the alteration needs to be based on objective criteria.

X OUTLOOK

In the autumn of 2018, the Hungarian parliament adopted the amendment to the Act on Home Savings and Loan Associations, which terminated the state subsidy for these associations. Prior to that, the home savings account holders benefited annually from state subsidies of 30 per cent of the amount deposited by them, and at the end of the contracted term a fixed-interest loan was available for supplementing the accrued amount to facilitate the purchasing of a house. The government emphasised that the money saved by this measure will be spent on the Family Housing Allowance, which includes a non-repayable grant up to 10 million forints and a state-supported credit facility for families who have at least two children. In the summer of 2019, the Hungarian government added extra support by providing a Family Housing Allowance to village family housing as well. The range of eligible settlements includes those villages with a population of less than five thousand whose populations decreased between 2003 and 2018, as well as villages that are situated in the most disadvantaged areas of Hungary.

Another significant programme launched in November 2019 – named ‘consumer-friendly home insurance’ – to enhance competition and transparency in the home insurance market after the success of the ‘consumer-friendly home mortgage’ programme. The National Bank of Hungary implemented strict requirements regarding claims, price changes, costumer information and minimum standards of sufficient basic insurance.
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 the 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 whereas the value of Mexico’s currency fell steeply, resulting in many abusive practices by financial institutions. As financial institutions grew again and the system recovered, the authorities became aware of the abusive practices 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

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 standard-form 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.

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1 Federico De Noriega Olea is a partner, Maria Aldonza Sakar Almirante is a senior associate and Carlos Eduardo Romero Sotelo is an associate at Hogan Lovells.

In 2007, a new Transparency and Financial Order Law was enacted. It created several registries including those for fees and standard-form 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.

The financial reform of 2014 brought about many changes, and it was the most important reform in the evolution of the consumer protection process. The key changes from a consumer finance perspective were the following:

a. CONDUSEF was vested with powers to issue and publish recommendations to financial institutions;
b. CONDUSEF was authorised to represent financial users in class actions against financial institutions;
c. 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;
d. CONDUSEF was vested with powers to determine which clauses are abusive under standard-form contracts and to order institutions to remove them; and
e. a general prohibition against tied sales was included.

Fintech continues to be one of the hot topics for consumer finance in Mexico – as in many other parts of the world. On 8 March 2018, Mexico became the seventh country in the world to regulate fintech by enacting LITF (as defined in Section II). This law aims to build a regulatory framework that will:

a. encourage the development of innovative financial services;
b. increase the level of competition and financial inclusion; and
c. place Mexico at the forefront of the fintech industry.

The LITF regulates two types of financial technology institutions (FTIs):

a. crowdfunding institutions, which connect people so that investors can fund investment seekers through mobile applications, interfaces, websites or any other means of electronic or digital communication; and
b. institutions dedicated to e-money, offering issuance, management, accountability and transfer of electronic payment services.

Moreover, the LITF regulates virtual assets, which are defined to be account units that are electronically recorded and used by the public as a payment method for all types of legal

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5 Full text of the LITF is available at: www.diputados.gob.mx/LeyesBiblio/pdf/LRITF_090318.pdf.
transaction, and can be implemented only through electronic means. The Mexican Central Bank will determine, through general provisions, the virtual assets that fintech institutions can use.

The LITF also introduced a temporary authorisation plan for entities wishing to perform financial services under new methods. These temporary authorisations aim to promote a low-risk environment for investors using tactics similar to the sandbox schemes that have been deployed in other locations such as the United Kingdom, Australia and Singapore.

Under the LITF and its secondary regulations, all new fintech entities in Mexico require operational authorisation from the CNBV, and any existing fintech entities operating in Mexico at the time LITF was enacted were bound to complete their filing before 25 September 2019. Although, in 2018, there were approximately 238 fintech platforms operating within Mexico, only 85 of them filed an authorisation request to the CNBV before the deadline. Operating without a licence may result in severe civil and criminal penalties that include fines up to 150,000 units of measure and update (UMA) (approximately 12.5 million Mexican pesos).

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

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

- 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;
- 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;
- 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;
- the Secured Credit Transparency Law, 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);
- the General Law of Negotiable Instruments and Credit Transactions, the main objective of which is to regulate all negotiable instruments and credit transactions including, among other things, deposits and lending transactions; and

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the Financial Technology Institutions Law (LITF), the main objective of which is to regulate the financial services, organisation and operation of FTIs, and any financial services foreseen by special regulations that are offered or rendered through innovative models.

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, including FTI. 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, whether through traditional means or by new technologies. It also protects consumers’ interests through regulation and supervision of financial institutions – including FTIs – and provides assessment and legal services for the defence of their rights.7

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 standard-form 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 complaints 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 standard-form 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, under the terms of Article 23 of the LTOSF whereby the consumer has 90 days to file the claim, the financial institution has 45 days to submit its answer and 45 days to submit documentation.8

7 Full text of the LPDUSF that regulates CONDUSEF is available at: www.diputados.gob.mx/LeyesBiblio/pdf/64_090318.pdf.
8 Full text of the LTOSF can be found at: www.diputados.gob.mx/LeyesBiblio/pdf/LTOSF_090318.pdf.
The other three may be filed directly before CONDUSEF:

a. Electronic procedure. The customer 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.

b. Conciliation procedure. In terms of Article 60 and the subsequent provisions 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.

c. 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 financial system, regulating intermediation and financial services and determining alongside the SHCP the Mexican exchange policy. The Mexican Central Bank has two types of powers regarding consumer protection.9 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 standard-form contracts that are applicable to alternative lenders (non-financial institutions).

III PAYMENTS

i Overview

Even though financial inclusion has increased 37 per cent since 2012,10 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 survey published by the CNBV in 2018, only 47 per cent of the population have an account with a financial institution.11 The CNBV and the Mexican Central Bank are very much concerned with this and over the past 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.

9 All 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.


11 id. Mexican authorities have not yet publish the official financial inclusion results for 2019.
Others regard facilitating mobile payments and the inclusion of new payment methods such as CoDi, which will be addressed below. 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. Stored-value cards, similar to debit cards, may now be issued by FTIs, specifically by e-money institutions.

To date, 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, including FTIs.

Cheques are also used as payment methods although the new banking generation is relying more on electronic payments and card payments. In Mexico, the number of transactions involving cheques suffered a 7 per cent decrease between 2010 and 2017, according to the statistics of the most recent financial inclusion report published by the CNBV. 12

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. 13 SPEI is a system developed and managed by the Mexican Central Bank that allows the public 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 (known as a CLABE) and the account number of the receiver’s debit card or their mobile phone number (if the account has been previously linked). FTIs may also provide electronic-transfer services outside the SPEI system.

Mobile banking is a payment method regulated under the General Provisions Applicable to Credit Institutions (the General Provisions) issued by the CNBV, which defines it as an electronic banking service accessed through a mobile phone number linked with the account. 14 This payment method is subject to the limitations set forth on account levels referred to in Section IV. 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.

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12 Full text of the 2018 CNBV’s 9th financial inclusion report found at: www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20Inclusion%20Financiera%209.pdf.
14 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.
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 9,285 pesos). The regulation of mobile payments is lighter than the regulation of mobile banking to foster financial inclusion by simplifying low-value payments.

Moreover, digital collection (known as CoDi) is the latest electronic payment method developed by the Mexican Central Bank. It is designed to reduce the use of cash and promote competition, while incorporating larger sections of the population into the formal financial sector. CoDi is a system that applies QR codes and near-field communication technologies to operate immediate cashless money transactions between buyers and sellers for the purchase of low-cost goods and services, using the existing SPEI platform.

In order to partake in CoDi, buyers need an account with a financial entity (which is a SPEI participant) and a smartphone connected to the user’s bank’s application. Correlatively, sellers require either physical QR codes next to their products or digital ones and a smartphone to send those codes. CoDi’s operation is designed to be initiated by sellers that will generate and send buyers a charge for goods or services through electronic messages. Buyers will then receive these messages on their mobile devices – through their own bank’s applications – and will identify, verify and, if applicable, accept the charges. Once accepted, the buyer’s bank will immediately validate the transfer and liquidate the amounts for the transaction.

Unlike most electronic money transactions, transfers made through CoDi are:

- free of banking commissions;
- can be done at any time of the day and any day of the year; and
- will be processed almost immediately.

The downside is that this payment method only processes transactions up to a maximum of 8,000 pesos.15

On a final note, it is expected that both the application of LITF and the implementation of CoDi will increase bank penetration by introducing consumers to simple technology to save, raise money and pay for their everyday needs, which may eventually lead to the unbanked population having greater trust in banking institutions.

**ii Recent developments**

As a result of the current regulations, security measures were imposed 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.

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:16

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16 Full text of the General Rules for Payment Networks is available at: www.cnbv.gob.mx/Normatividad/Disposiciones%20de%20cart%C3%A1cter%20general%20aplicables%20a%20las%20redes%20de%20medios%20de%20 disposici%C3%B3n.pdf.
The terms and conditions of the payment networks, which among other things:

- permit the inclusion of new participants in networks on a non-discriminatory and competitive basis in respect to pricing, operational, technical and contractual conditions;
- permit the resolution of conflicts of interest between the participants in networks;
- allow transparency of the content available to potential participants in networks; and
- guarantee the integrity of the payment networks, the continuity of the operation and security of the information without creating barriers to entry.

Participants in networks, by establishing the inclusion of certain provisions on the agreements executed among them, such as:

- an itemised description of the services, conditions and standards of the services provision;
- terms and conditions (including economic terms and consideration) of the services provided in the agreement;
- equal and non-discriminatory treatment; and
- production of account statements.

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 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 the regulations, all exclusivities, discriminatory practices and charging of fees not authorised by the Mexican Central Bank were forbidden.17

Undoubtedly, CoDi will dramatically impact financial inclusion and change consumer finance. Although CoDi was just fully released at the end of September 2019, by 16 December 2019 it had already surpassed 1.4 million validated accounts and had over 120,000 operations.18 According to the Mexican Banks Association forecast, it is expected to have over 2 million accounts linked to its system by the end of 2019.19

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

The Mexican Central Bank in exercise of its regulatory powers issued the general provisions contained in Disposition 3/2012.²⁰ 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 4,790 pesos). The balance of these accounts can never exceed 1,000 UDIs (approximately 6,387 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 19,162 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 63,875 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 two, three and four are entitled to use all withdrawal means except cheques.

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. These are current accounts only, allowing for all withdrawal methods, including by cheques.

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 organisation that, subject to certain restrictions, guarantees the amounts of deposits and credits up to 400,000 UDIs per account holder (approximately 2.5 million pesos).

Another important topic is what are known as basic products. Every bank that receives local currency sight deposits is required 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.

²⁰ Full text available at www.anterior.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, the number of banking agents exceeds 44,809 with a municipal coverage of 72 per cent and a demographic coverage of 97 per cent.\(^{21}\) 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.

Finally, it is noteworthy that during 2017 the provisions regarding basic deposit products, contained in Disposition 22/2010 issued by the Mexican Central Bank, were amended to include a procedure to cancel accounts on which the minimum amounts are not being observed, and certain know-your-customer requirements.

V REVOLVING CREDIT

i Overview

Credit cards are means to withdraw from a credit facility. An individual or entity that is granted 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 regulations 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, which was modified to include important security measures and benefits to credit card users.\(^{22}\) Moreover, important rules for the protection of consumer interests were set out in the Disposition, such as:

\begin{enumerate}
\item entities can execute credit facility agreements with banks or lending institutions but credit cards can only be issued to individuals;
\item credit cards are non-transferable and must only be issued and delivered upon request of the holder;
\item all credit cards must be inactive when delivered; and
\item the institution issuing the credit card must take out insurance that covers the amount of the debt in the event of the holder’s death.
\end{enumerate}

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

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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.

Another topic to be discussed with respect to credit cards is regulation on interest rates contained in the LTO SF and the general provisions contained in Disposition 14/2007 issued by the Mexican Central Bank. 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.

As with the regulations for interest rates mentioned above, according to the general provisions contained in Dispositions 22/2010 and 36/2010 issued by the Mexican Central Bank there are also several principles 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 charged 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

Mexico has been rated by private institutions as having one of the highest rates of credit card fraud in the world. The number of claims in this regard has rapidly increased and, despite preventative efforts, the reported number of cases is still high and increasing. In the first half of 2019, more than 4.3 million claims were filed before the CONDUSEF in respect of possible frauds and identity theft. This figure reflects a 35 per cent increase against the same period in 2018.

At present, identity theft is prosecuted as generic criminal fraud under the Federal Criminal Code. However, a bill that will introduce special rules and distinguish identity theft

26 Data obtained from: www.condusef.gob.mx/gbmx/?p=estadisticas.
from fraud has been approved by the House of Representatives and is still under review by the Senate. This bill contemplates a penalty of one to six years in prison and a fine of 400 to 600 times the minimum daily wage for persons found guilty of identity theft.27

Furthermore, on 29 August 2017, the CNBV published the Resolutions that Modify the General Rules Applicable to Financial Institutions. These resolutions require financial institutions to verify information and documentation filed by users and customers with different government bodies in order to assure the identity of each prospective customer.

The modified rules provide the criteria for customer identification. These know-your-customer guidelines are independent from existing anti-money laundering regulations.

The modified rules are divided into:

a. Section A, which contains provisions regarding the identification and performance of on-site transactions;
b. Section B, which contains provisions regarding identification means for remote transactions; and
c. Section C, which contains supplementary provisions regarding the general identification of transactions.28

In December 2019, a new bill was presented to the Senate for the regulation of certain banking fees intending to increase transparency and to limit excessive charges. This bill also proposes to increase the authorities of the Mexican Central Bank and CONDUSEF, providing them with monitoring authorities to ensure that banking fees remain competitive, avoiding market distortions. The bill has not been passed but is something to continue monitoring, along with other possible bills and changes that the party may undertake with respect to financial consumer laws and regulations. 29

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, a 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: the borrower’s payment capacity; the borrower’s solvency and assets; level of debt; credit history; and job stability.30

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

27 Full text of this bill is available at: www.senado.gob.mx/64/gaceta_del_senado/documento/74998.
28 Further information regarding these modifications can be found at: www.internationallawoffice.com/Newsletters/Banking/Mexico/Hogan-Lovells-BSTL-SC/National-Banking-and-Securities-Commission-ends-general-rules-for-credit-institutions-to-curb-identity-theft.

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Loan agreements executed through a standard-form contract (as the term is defined in Section VIII) 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.

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

ii Recent developments

As a result of the new supervision powers of CONDUSEF over the multiple SOFOM ENR companies, in 2015, CONDUSEF revoked 1,449 registrations of these institutions for violations of transparency and anti-money laundering regulations, while during the first half of 2019 CONDUSEF issued 1,471 sanctioning resolutions against SOFOM ENR companies. This proves that CONDUSEF is taking its enforcement and regulatory powers seriously with respect to SOFOM ENRs.31

During the past few years, the number of credits granted by financial institutions under the supervision of the CNBV slightly increased. In contrast, for the period ending June 2016, the total number of executed agreements was 52.8 million, whereas for the period ending June 2017, this number was of 5.5 million. These figures show a 1 per cent increase.32

Mortgage credit in Mexico has greatly increased between 2009 and 2017. For the first semester of 2017, almost 1.5 million mortgage credits were granted.33 It is also noteworthy that not only did the numbers increase, but also the results of the evaluations of the financial institutions with regard to transparency matters for these products improved – the overall result for the period went from a 5.0 to a 9.0.34

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32 Statistics available at: www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20IF/Reporte%20de%20Inclusion%20Financiera%209.pdf.
33 Statistics available at: www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20IF/Reporte%20de%20Inclusion%20Financiera%209.pdf.
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.

b RECA – the registry implemented for financial institutions to submit all their standard-form 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 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 standard-form contracts of financial institutions and to order financial institutions to remove them. For such effects, CONDUSEF defines: (1) a standard-form 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:35

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

c clauses allowing the modification or restriction of the contract without the prior consent of the consumer, unless such modification is in the 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 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 CONDUSEF figures for the first 10 months of 2019, 9,385 sanctions totalling an estimated 435 million pesos were imposed on financial institutions, of which 186.6 million pesos in fines were imposed as a result of violations to LPDUSF; 247.4 million pesos in fines were imposed as a result of violations to LTOSF; and 100,000 pesos in fines were imposed as a result of violations of the LIC.36

Regarding online banking, the figures for the first half of 2019 show that 773 claims were filed before CONDUSEF by users arguing unrecognised charges, from which 50.4 per cent received a favourable resolution, while around 2.7 million claims were filed by users directly before financial institutions for the same issue and from which 90.4 per cent received a favourable resolution.37

Regarding abusive clauses, figures obtained from the Bureau for Financial Institutions show that around 1,678 abusive clauses were detected as at July 2018, of which 1,462 have already been eliminated, with only 216 still to be eliminated.38

ii Disputes before the regulator
In the first half of 2019, CONDUSEF performed around 1,098,114 defence actions, which shows a 1.3 per cent increase in contrast with the figures obtained during last year. From the grand total of defence actions performed during that period, 936,445 were related to advisory actions and 161,669 were related to claims.39

iii Litigation
The Mexican Supreme Court of Justice ruled that judges may exercise their discretion to reduce interest rates considered inequitable and notoriously usurious.40 In that precedent, the Supreme Court determined that the usury financing prohibition provided by the third paragraph of Article 21 of the American Convention on Human Rights allowed Mexican

39 id.
40 Resolution by the First Chamber of the Mexican Supreme Court issued regarding the contradiction between two precedents number 350/2013.
judges to exercise their discretion to order the reduction of any interest rate considered excessive or abusive, even if the reduction is not requested by the parties involved in the proceedings.

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.

Moreover, in January 2019, the Mexican Supreme Court of Justice issued a new ruling that clarifies use of choice-of-jurisdiction clauses in standard-form contracts.41 This precedent privileged consumer protection over contractual jurisdiction covenants. It establishes that, under the constitutional right for effective judicial protection, any litigation could be resolved in a jurisdiction of the consumer’s choosing – regardless of whether a jurisdiction clause had been established in the applicable standard-form contract – provided that the bank’s domicile was in the same jurisdiction and the contract had been signed there.

These Supreme Court precedents are a good example of how Mexico is advancing its consumer protection regulations. The precedent is binding for all Mexican courts (except the Supreme Court).

X OUTLOOK

Although the United States, Canada and Mexico agreed on a new North American treaty on 30 September 2018 – to replace NAFTA – these three countries decided to amend the draft; they finally reached an understanding in their negotiations and the treaty has been signed by their representatives. The United States–Mexico–Canada Agreement (USMCA) further promotes a healthy, competitive financial market between the three countries. Nevertheless, the USMCA has still to be ratified by its signatories, and while its future remains uncertain, we can expect the Mexican finance sector to continue to grow.

As for consumer protection, we can expect the Mexican Supreme Court to continue ruling in favour of consumer protection, issuing similar precedents to continue eliminating or reducing abusive practices. Moreover, CONDUSEF is expected to continue increasing its defence actions and its supervision duties, and extend its regulation, especially in the fintech sector.

Likewise, after the LITF’s enactment, we can also expect secondary fintech regulations from the SHCP, the CBNV, CONDUSEF, the Mexican Central Bank and other regulators. These are some of the topics to watch out for.

Finally, it is expected that through the implementation of CoDi – and without the cost of usual banking commissions – small and local businesses will actively participate in more cashless transactions, which will, therefore, encourage competition and lead to broader financial inclusion. It is also hoped that, by removing cash from day-to-day transactions, money laundering and tax evasion will decrease.

41 Resolution by the First Chamber of the Mexican Supreme Court issued regarding the contradiction between two precedents number 460/2017.
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 the payment systems and the issuing of banknotes are now controlled by the ESCB.

Thus, 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. Furthermore, not only has the direct influence of EU law provided the Portuguese banking industry with a high level of protection regarding consumer finance, but recent national government policies have also contributed to this high level of protection. This has been achieved through the reinforcement of the information disclosure duties of credit institutions and financial companies and the imposition of maximum interest rates in certain types of financing agreements.

Further to the Economic and Financial Assistance Programme, the Portuguese banking industry has undergone significant adjustments that have led to an asset contraction as well as to a change in its funding structure, giving preference to consumers’ 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 (who acquired Banco Popular Portugal following the resolution measure applied over Banco Popular Española).

As for its key financial indicators, by the end of the first semester of 2019, they showed that the banking industry had a total asset value of €396.5 billion, while on the other hand, the value of credit granted to customers amounted to a total of €237.5 billion and the value of deposits amounted to a total of €269.2 billion.

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1 Hélder Frias is a counsel at Uría Menéndez – Proença de Carvalho.
II LEGISLATIVE 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 contains principles regarding the national financial system as a whole as well as other provisions governing the regulatory role of the BdP. Following it is the Basic Law of the BdP, enacted by Law No. 5/98 of 31 January, as amended. This law establishes the basic structure of the BdP and relevant aspects of banking supervision. Both the Portuguese Commercial and Civil Codes must be considered when referring to the relevant legal framework governing consumer finance.

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. 91/2018 of 12 November.

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, as amended. 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:

a Decree-Laws Nos. 381/77 of 9 September, and 454/91 of 28 December, regarding payments by means of bank cheques and other debt securities;
b Decree-Laws Nos. 220/94 of 23 August, and 74-A/2017 of 23 June, as amended, regarding lending agreements (the applicable information disclosure duties, interest rates, etc.);
c Decree-Law No. 349/98 of 11 November, regarding housing credit; and
d Decree-Law No. 446/85 of 25 October, as amended, which establishes the Portuguese unfair contract terms regime applicable to contractual terms that have not been individually negotiated.

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 was partially implemented into Portuguese law by Decree-Law No. 81-C/2017 of 7 July, which establishes the requirements for the taking-up and pursuit of the credit intermediation activity.

ii Regulation

As for the body in charge of implementing and enforcing the regulation of consumer finance services, the BdP, as the Portuguese central bank, plays a central role. Notwithstanding this, there are also bodies responsible for consumer protection that must be taken into account, as

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2 DL 446/85 has been amended, inter alia, by Decree-Law No. 220/95 of 31 August as a result of Directive 93/13/EEC of the Council of 5 April on unfair terms in consumer contracts.
they not only support consumers in general but also in some circumstances offer legal advice to their members, notably the Portuguese Association of Consumer Law and the Consumer’s Directorate-General, from the Ministry of Economics.

The BdP is responsible for the prudential and market conduct supervision of credit institutions, financial companies and payment institutions with a view to ensuring the stability, efficiency and soundness of the financial system, as well as the compliance with rules of conduct and transparency requirements towards bank customers, thereby ensuring the safety of deposits and depositors, and the protection of consumer interests. Likewise, whenever credit institutions or financial companies pursue financial intermediation activities, they will be 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 the customer’s rights.

Among the different aspects of its actions, of the utmost importance is the BdP’s powers to issue notices, instructions and circular letters, which set out rules and conduct for the banking industry to comply with regarding the services to be provided to the general public. Furthermore, the BdP has the power to enforce Portuguese banking laws and regulations through:

a. fines and ancillary penalties;
b. injunctions for the fulfilment of certain duties;
c. seizure of documents and valuables; and
d. special audits through on-site inspections.

Each consumer has the right to file complaints against banks or other institutions (credit institutions, financial companies, payment institutions, etc.) within the scope of the marketing of consumers’ banking services (e.g., deposits, home credit, consumer finance, credit cards). These entities are required to present their complaints book when solicited to do so. These complaints may also be filed directly before the BdP, but the latter only has powers to verify whether the institution is complying with its duties or not, and is incapable of demanding the institution to remedy the damages or to pay a compensation to 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, as amended, 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 international best 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.

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 the enactment of Decree-Law No. 317/2009 of 30 October, which has been repealed and replaced by Decree-Law No. 91/2018 of 12 November (DL 91/2018), the RGICSF has been amended in order 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 – which include 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 91/2018 provides for rules on the issuance of debit cards applicable to entities that may provide payment services – credit institutions, financial companies and payment institutions – and BdP Notice 11/01 provides for rules on the issuance of debit cards for credit institutions and financial companies.

The large majority of rules provided for BdP Notice 11/01 are also provided for in DL 91/2018, although there are some differences worth highlighting, such as:

a whereas in DL 91/2018, when the client is not a consumer or a micro-enterprise, parties may provide 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; and

b BdP Notice 11/01 requires the agreements to be written in Portuguese and 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 that the issuer is entitled to change the agreement by giving a 15-day notice period to the client.


ii Recent developments

Up until now, the BdP has only issued some guidelines on its official 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 on the matter, 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 Articles 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 registered a further decline, both in value and in volume.


IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

In Portugal, only credit institutions duly authorised by the BdP are allowed to 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 of time, 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 of these types of contracts, which are frequently set out by means of 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, leading to an unbalanced legal relationship. As mentioned above, these contracts are subject to the Portuguese unfair contract terms regime, which has a significant role in avoiding unfair and unfavourable conditions.

Credit institutions must comply with certain information disclosure duties in order for consumers to have correct knowledge of the contracts. The content of the information provided therein, 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 overrunning, which refers to the situation where there is no prior agreement; instead, the credit institution tacitly allows consumers to make use of funds even if their current balance is exceeded.

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, notably:

a opening and holding of minimum banking services accounts;
b provision of a debit card;
c access to the accounts through cash machines, home banking services and service over the counter; and
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 2018 the Portuguese DGS had a capitalisation level of 1.16 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 deposits’ legal framework. First, credit institutions cannot offer overdraft facilities or overrunning under the regime of Minimum Banking Services. Second, 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 and conditions of the contractual relationship between the cardholder and the entity that has issued it. Very often a credit agreement is executed through the use of a credit card that has the provision of a line of credit underlying it, as opposed to the lending of a certain amount. As the terms and conditions of a credit card are linked to the respective 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 are obliged to provide the customer with the respective 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 and conditions, as the card’s sole purpose is to serve as a means of payment.

As for servicing burdens 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 applicable, the calculation method and the reference date used in determining the applicable interest or exchange rate.

It is also worth mentioning Decree-Law No. 227/2012 of 25 October, which establishes the set of principles and rules that credit institutions must follow on the management and monitoring of the risk of default in consumer finance. This statute provides that all credit institutions must create a Plan of Action for the Risk of Default in order to prevent situations of default by their customers. More importantly, this statute creates and defines the Out-of-Court Procedure of Default Situations’ Regularisation (PERSI), which consists of a debt restructuring procedure designed 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 the debt restructuring negotiations under the PERSI, the consumer has a set of legal guarantees, three of them being the impossibility that credit institutions may terminate the credit agreement; take legal actions in order to claim those credits; and assign those credits to a third party.
Finally, a brief reference must be made to contactless cards, which have recently been introduced to the Portuguese banking industry. Usually, the issuer entity establishes both the maximum amount allowed for single payments as well as an overall maximum amount for successive transactions without the use of the card’s PIN (personal identification number) code. The BdP issued a circular letter on the subject, thus publishing the good practices regarding the information duties that the issuer entities must provide to their customers, including the obligation for those entities to provide said information by means of a paper document or other 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 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 housing credit regime applies to contracts for the purpose of the purchase, construction, maintenance or improvements of privately owned property or the purchase of land for its 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 have the right to terminate both consumer and housing credit contracts. For the purpose of consumer credit, credit institutions may terminate the contract if the following two requirements are met:

a) the non-payment of two consecutive instalments that exceed 10 per cent of the total amount of credit; and

b) in the case that the creditor has given additional time of a minimum of 15 days for the consumer to pay the delayed 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 housing credit contracts, credit institutions may terminate the contract in the case that the consumer fails to pay at least three overdue and unpaid instalments.

For both types of credit contracts, consumers have the right to request a partial or total early repayment, upon providing a prior notice to the bank. If the consumer decides upon an advanced repayment, it could result in extra costs. For consumer credit contracts, credit institutions are not authorised to charge any fees when this concerns the early repayment of loan agreements with a variable interest rate. On the other hand, they are entitled to do so in the case of the early repayment of loan agreements with a fixed interest rate. Concerning housing credit contracts, 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 housing credit, is entitled to clear, complete and updated 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 housing credit contracts provided by credit institutions.

Under Portuguese law, lending (secured or otherwise) is considered a banking activity. Accordingly, any short-term consumer lending activity that is carried out, on a professional basis, by an entity that is not duly authorised or registered with the BdP, shall be deemed a very serious administrative offence, subject to a fine of up to €5 million, plus ancillary sanctions.

As mentioned above, although the banking activity may only be carried out by credit institutions or financial companies that are duly authorised, crowdfunding is emerging within the scope of the sharing economy. Crowdfunding, as a channel of financing, allows matching investors directly with the contributors and projects in need of funds, mainly in the early stages, by means of electronic platforms. Law No. 102/2015 of 24 August, as amended, has established the rules on crowdfunding. Said law addresses the:

a models of crowdfunding;
b key features and duties of the owners of digital platforms;
c key features and duties of the parties;
d conditions of entry to the activity;
e registration procedure;
f terms of open call to the public to raise funds for a specific project; and
g competence of the Portuguese Securities Market Commission, as the Portuguese authority responsible for supervising and monitoring proper decisions of managing bodies of platforms.

Law 102/2015 of 24 August is encouraged by European interest on this form of financing, though with limited cross-border activity for the moment.

There is a recent regulatory change that will have an impact on banking lending activities. Decree-Law No. 144/2019 of 23 September was recently enacted and it establishes, among other changes, the creation of loan funds as an alternative financing instrument, especially designed to accommodate the difficulties felt by small and medium-sized enterprises in obtaining financing through banking loans. The purpose of these loan funds is to lend directly to debtors, to participate in loan syndicates or to acquire loans originated by banks or other entities, through credit assignments. Therefore, loan funds represent a new way of boosting the capital markets, in an attempt to follow the trends observed in other reference European markets that admit loan funds.

Additionally, Decree-Law No. 144/2019 also transferred from the Bank of Portugal to the Portuguese Securities Market Commission supervisory powers over management companies of collective investment schemes and management companies of securitisation funds. This statute will enter into force on 1 January 2020.

VII OTHER AREAS

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

The first widely discussed issue is related to the effects of a potential negative interest rate on lending agreements. This was because of European financial policies, which have led
to the lowest interest rates in years, with direct effects on the Euro Interbank Offered Rate (EURIBOR), which in the first semester of 2015 reached negative values for the first time (when considering the three-month rate). 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, in which, in general terms, it stated that:

a. the interest rate applicable to a contract should result from the arithmetic average between the fixed and the variable interest rate; and

b. if no specific provision exists regulating the negative value event, credit institutions may hedge said event by means of financial instruments.

This means that the clients would benefit from the negative value of the EURIBOR. More than one year later and after much controversy, the Governor of the BdP stated before the Parliament, and by means of 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 equal to zero. This is now a matter in the hands of political parties, as a new legislative proposal is being drafted.

Second, the Portuguese banking industry has discussed crowdfunding as an alternative way of financing. See Section VI on the regulated nature of the lending activity and the recent developments in crowdfunding.

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 the following decisions:

a. prohibition of clauses under which the customer expressly authorises the bank, without fulfilling any formality of any nature whatsoever, 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;
prohibition of 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 Risk Users of the Bank of Portugal;

prohibition of 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

prohibition of clauses, as contrary to the requirements of good faith, that allow the predisposing bank to set-off its credit over a customer with a joint bank account balance of which the customer is the holder 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 rules governing consumer finance. 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 default of the financial consumer. 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:

a  the principal amount;

b  the accrued compensatory interest; and

c  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 latter entails the termination of the former. In this context, it is important to note that the court decided that it was abusive for the creditor to fill in and execute an unfilled promissory note issued by the consumer for the purposes of securing the consumer loan.

X  OUTLOOK

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

When compared to 2018, the companies’ demand for credit did not suffer substantial changes, whereas the consumer credit is expected to suffer a slight increase. In a context of accelerating performing loans and sharp reduction in non-performing loans, bank credits granted to non-financial companies (NFCs) registered a positive adjusted annual rate.
of change (1.3 per cent) over the first half of 2019, but lower than at the end of 2018 (1.9 per cent). Similarly, new loans to NFC also decelerated in the third quarter of 2019, recording a growth of 5.1 per cent.

With the introduction of loan funds, the sources of financing in the Portuguese economy are expected to become more diverse and competitive. These funds address market failures in the supply and demand for funding, improving the dynamic between the banking sector and the sectors of venture capital and securitisation. Loan funds are expected to contribute to the development of the credit market, not only in a direct way, by making a new financing line available to companies, but also indirectly, through the acquisition of credit, including overdue credit, held by the banks, which, in turn, will be able to resume their credit granting activity.

Also expected in 2020 is the entry of more fintech players in the regulated credit granting Portuguese market, in direct competition with the incumbent Portuguese banking sector.

Moreover, the key legal framework of the Portuguese financial market was strengthened in 2018, with the enactment of Law No. 35/2018 of 20 July, which transposed Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, and with the enactment of DL 91/2018, that transposed the PSD2 Directive.
Chapter 8

SPAIN

Jaime Pereda and José Félix Velasco

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 four million, eroding the net wealth of the country and triggering a surge in non-performing loans. The length and severity of the downturn and the discovery of cases of malpractice among financial institutions led to the government’s introduction of new legislation to protect the most vulnerable segments of society, and a number of landmark rulings concerning consumer lending.

Spanish financial institutions’ balance-sheet problems also contributed to the decrease in credit availability in the system. However, since 2013, this trend has slowly been reversing. Since that time, credit entities have activated growth strategies, particularly in the consumer-lending segment, which has benefited from an increase in household spending on consumer goods. Excluding credit cards, consumer lending is the fastest-growing segment in household lending and, according to Bank of Spain data, it grew in mid-2019 at a rate of 12 per cent. The cumulative growth of consumer lending since 2015 amounts to 61 per cent, the main reason for the increase being the recovery of the Spanish economy.2

Still, the positive growth trend of the Spanish economy in recent years may be slowing down as a consequence of the appearance of uncertainties surrounding the global economy. For example, vehicle registrations in November 2018 were 12.5 per cent lower than the same month the previous year, and were just 1.45 per cent higher in November 2019.3 Additionally, recent figures have shown a surge in the number of non-performing loans in the consumer lending segment, with figures for 2019 estimated to be the highest in the past six years.4

With most observers expecting economic growth to be around 2 per cent in 2019, and decreasing just below that figure for 2020, it remains to be seen whether past years’ growth can be sustained in the medium term.

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1 Jaime Pereda is a partner and José Félix Velasco is an associate at Uría Menéndez Abogados, SLP.
4 id.
II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Broadly speaking, Spanish consumer finance regulations follow the European rules and are built upon 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 Spanish consumer finance industry, in order of relevance.

Law 16/2011 of 24 June on consumer credit (LCC), which regulates the granting of credit to consumers, transposed Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers into the domestic legal system.

The LCC applies to loans and credit granted 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) by an entity as part of its commercial or business activity. 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 deals with various matters related to consumer credit, such as pre-contractual information that must 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:

a the information and actions required prior to entering the credit agreement – including publicity;

b the information provided to consumers;

c the content, form and events or circumstances under which the agreements become null and void;

d the right of withdrawal; and

e 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 under which the agreement must be amended.

In relation to the agreements expressly linked to credit financing entered into by consumers, failure to provide the credit results in the ineffectiveness of the agreement. This preserves the consumers’ rights both against the supplier of the goods and services and against the lender.


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, into the Spanish legal system. The main purpose of Directive 2014/17/EU is to harmonise the regulations on consumer protection with regards to the procurement of mortgage loans, as well as to strengthen legal transparency in the granting of real estate financing and decrease the level of litigiousness related to abusive clauses.

Among other things, the LREC:

\[ a \] hardens the requirements for lenders to accelerate unpaid mortgage loans;
\[ b \] increases the standards of conduct applicable to creditors;
\[ c \] defines the amount of information that financial entities have to provide to borrowers and reinforces such entities’ transparency obligations;
\[ d \] establishes an obligation on the banks to evaluate the solvency of potential clients; and
\[ e \] includes a number of requirements related to the levels of knowledge and competence of borrowers, credit intermediaries or representatives designated to carry out activities regulated in the draft Law.

Law 2/2009 of 31 March\(^5\) on the contracting of mortgage loans and credit with consumers and the brokering of execution of loans and credit, 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 financial 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 of 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.

Legislative Royal Decree 1/2007\(^6\) of 16 November approves the revised text of the general law for the protection of consumers and users and other supplementary laws (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, rights of withdrawal, clauses deemed abusive and the vendor’s liability). The Legislative Royal Decree was recently modified by Law 7/2017 of 2 November, which transposes into Spanish law 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. It was also modified by Royal Decree-Law 9/2017 of 26 May, which transposes EU directives on the finance, corporate and health sectors and on the displacement of employees into the Spanish legal system.

Royal Decree-Law 19/2018, of 23 November, on payment services and other urgent financial measures, partially incorporates into the Spanish legal system Directive

\(^{5}\) Articles 1 and 5 of Law 2/2009 have been amended by the LREC to expressly exclude certain aspects that have been regulated by the LREC, mainly: the contracting of any mortgage loans and credit (1) where the collateral is a residential property and (2) that are granted to acquire or retain ownership rights over land or properties, both finalised or not, insofar as the borrower or guarantor is a consumer.

\(^{6}\) Article 83 of Royal Decree 1/2007 has been amended by the LREC so as to regulate the nullity of any conditions incorporated into contracts with consumers in a non-transparent manner to the detriment of the consumer.
Spain

2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, together with Regulation 2015/751/EU of the European Parliament and of the Council of 29 April 2015 on interchange fees for card payment transactions. The main objectives of this new European framework and of Royal Decree-Law 19/2018 are to facilitate the use of online payment systems while improving their security, to strengthen the level of protection of users against fraud and potential abuses, as well as to promote innovation in payment services through mobile phones and the internet.

Law 7/1998 of 13 April governs contracting with consumers through the adherence to general terms in contracts (the Law on General Terms in Contracts), which regulates standard terms in contracts.7

Law 22/2007 of 11 July, on distance marketing of consumer financial services, applies to contracts for financial services entered into by regulated entities (such as credit entities and branches of credit entities in Spain) and consumers, where the services are rendered and the contract has been formalised by 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.

Law 10/2014 of 26 June on organisation, supervision and solvency of credit entities,8 the related Order EHA/2899/2011 of 28 October on transparency and protection of banking services consumers9 and the Bank of Spain Circular 5/2012 of 27 June are addressed to credit entities and payment services providers, on transparency of banking services and lending responsibility.10

7 Articles 5 and 11 of Law 7/1998 have been amended by the LREC. In essence, the amendments regulate (1) as stated immediately above, the nullity of any conditions incorporated into contracts with consumers in a non-transparent manner to the detriment of the consumer and (2) the mandatory deposit by the lender within Spain’s General Terms in Contracts Registry of any forms prepared in relation to the contracting of any mortgage loans and credit regulated by the LREC prior to carrying out any marketing activities in connection with them.

8 Articles 5, 90 and 103 of Law 10/2014 have been amended by the LREC. In brief, such amendments focus on: reinforcing the obligations of indexes providers, regulating that they must keep historical records of such indexes while stating that these indexes will have to be clear, accessible, objective and verifiable; transferring disciplinary competences from the Bank of Spain to the corresponding body within each Autonomous Community in relation to any infractions deriving from the regulations of the LREC whenever the services provider only renders its services in the territory of said Autonomous Community; and, lastly, including as aggravating circumstance for the determination of sanctions the fact that the debtors or guarantors are considered vulnerable or socially excluded.

9 In October 2019, the Spanish Ministry for Economy and Business published a proposal to amend Order EHA/2899/2011 focusing on measures relating to revolving credits associated with payment instruments. At the time of writing, the current draft focused mainly on two areas: (1) creditworthiness or scoring assessment, by introducing guidelines for potential lenders in order to ensure sufficient customer payment capacity and (2) new transparency obligations, both in the pre-contractual phase and during the term of the contract.

10 Certain provisions of Circular 5/2012 have been amended by the Bank of Spain Circular 2/2019 of 29 May on the requisites of the fee information document and the statement of fees, and payment account comparison websites. Circular 2/2019 completes the transposition into Spanish law of Directive 2014/92/EU, on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, initiated by Royal Decree-Law 19/2017 and Order ECE/228/2019, and implements certain aspects related to the fee information document and the statement of fees regulated by these two regulations.
Law 5/2015 of 27 April on promoting corporate financing (Law 5/2015) deals with crowdfunding for the first time in Spain, and lays out the requirements with which platforms providing these services must comply.

All these regulations aim at protecting consumers and impose several obligations on the lenders contracting with them, including exhaustive duties of information and transparency. Furthermore, Law 7/1998 of 13 April, as amended, Law 22/2007 of 11 July and Legislative Royal Decree 1/2007 of 16 November contain provisions whereby abusive clauses or misleading or obscure provisions that are detrimental to consumers should be considered void.

In addition to the aforementioned general regulations, certain regional provisions also apply.\(^{11}\)

ii Regulation

The Bank of Spain is the main body in charge of implementing and enforcing regulation of consumer finance services in Spain.

In addition to executing the guidance and instructions of the Eurosystem’s monetary policy in Spain, 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, among others, the procedure for filing claims before the Bank of Spain’s Complaints Service. In particular, the Order sets out:

a. financial services users’ right to submit complaints and enquiries;
b. the medium and content of such complaints and enquiries;
c. other procedural aspects such as the need to file a prior complaint or claim with the credit entity’s customer service or, where applicable, with the consumer ombudsman;
d. the filing of collective complaints;
e. the conditions and procedure for the rejection of complaints; and
f. the handling of complaints.

Notwithstanding the above, consumers may raise their complaints and submit suggestions through Spain’s regional consumer associations. Once the relevant form has been filed, the Complaints and Suggestions Unit will inform the consumer within the next 20 business days of the actions to be taken. If there is no reply, the consumer may address his or her complaint to the General Services Inspectorate of the Ministry of Health, Consumption and Social Welfare. Because of the structure of regional governments, there are 17 different consumer protection bodies in Spain, one per region. Some municipalities and cities have also created their own bodies.\(^{12}\)

All clauses considered abusive by a court ruling are filed in Spain’s General Terms in Contracts Registry, 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.

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\(^{11}\) 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 credit, financial vulnerability and consumer relations.

\(^{12}\) A list of the different consumer bodies currently existing in Spain is available at: http://www.cec-msssi.es/CEC/web/noticias/Organismos_de_consumo.htm.
III PAYMENTS

i Overview

The payment industry has evolved substantially over the past decades, from traditional channels using cash and cheques to a much greater use of digital channels such as online banking and mobile payments. Payment services can be defined as activities relating to payment transactions (transfers of funds 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, ranging from large technology companies to specialised start-ups within the fintech sector, the legislation will need to be adapted.

As mentioned in Section II.i, payment services in Spain are regulated by Royal Decree-Law 19/2018, of 23 November, on payment services and other urgent financial measures and Order EHA/1608/2010 of 14 June on transparency and payment services. In particular, Royal Decree-Law 19/2018 partially transposes into the Spanish legal system Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (PSD2), together with Regulation 2015/751/EU of the European Parliament and of the Council of 29 April 2015 on interchange fees for card payment transactions. These regulations govern the performance of payment transactions by any means (dealing with issues such as, among others, consent and withdrawal of consent in payment transactions, limitations on payment methods, information to be provided to the payer and beneficiary of a payment transaction, authentication, expenses derived from payment transactions, and the notification procedure for unauthorised transactions) and the provisions of services framework agreements (content, amendment and termination).

In addition to the above, the Bank of Spain publishes the interchange and discount fees received by payment companies from the use of cards in point of sale terminals when the payment service provider and beneficiary are both located in Spain, pursuant to Article 13 of Law 18/2014 of 15 October on urgent measures for growth, competitiveness and employment and the Bank of Spain Circulars 1/2015 and 1/2016 of 24 March and 29 January, respectively, which expand on it. The law specifies that the information will be available on the websites of both the Bank of Spain and the payment service provider.

ii Recent developments

Digital transformation

On 22 February 2019, the Spanish Counsel of Ministers adopted the Draft Law for the Digital Transformation of the Financial System, which was sent to the Spanish Parliament for the corresponding parliamentary procedure, proposing a comprehensive response to the implications of the digital transformation of the financial system and introducing a regulatory sandbox that would allow safe conditions to be created so that technology-based financial

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13 The maximum fees for consumer card payments, which were enacted into Spanish legislation through Royal Decree 8/2014 of 4 July and reiterated in Law 18/2014, are established at a maximum fee of 0.3 per cent 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 a debit. In addition, for payments with debit cards, the maximum fee will be €0.07 and will apply to all payments of an amount greater than €35.
innovations can be tested under the control of supervisors (Bank of Spain, CNMV and the Directorate-General of Insurance and Pension Funds), but this Draft Law was not approved and the new Spanish government has yet to take a position on the issue.

**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 intentional increase in the security of daily transactions.

Although PSD2 entered into force as of 14 September 2019, the Bank of Spain extended the deadline for completing the migration to strong consumer authentication payment transactions in line with other European regulators until 31 December 2020, following the opinion published by the European Banking Authority on 16 October 2019.

**Limits on cash payments**

A limit on cash payments to prevent tax fraud came into force in 2012 when the Spanish government passed Law 7/2012 of 29 October. Under this regulation, cash payments of €2,500 or more cannot be made 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 alternative means of payment.

On 19 October 2018, the Spanish Council of Ministers adopted a draft law on measures to prevent and counter fiscal fraud, which was sent to the Spanish Parliament for the corresponding parliamentary procedure. However, this draft law was not approved and the new Spanish government has yet to take a position on the issue.

**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, the provision of other financial services or cross-selling. Even though this area is not yet specifically regulated, on 15 March 2018, the European Banking Authority (EBA) published its Fintech Road Map, setting out the main conclusions deriving from the public consultation launched on 19 December 2016 regarding the potential benefits and risks of big data for consumers and financial organisations, and detailing the indicative milestones of the actions to be taken by the EBA throughout 2018 and 2019. Such document was published following in the footsteps of the European Commission’s Fintech Action Plan, published on 3 March 2018, which was to seek input from stakeholders to further develop the Commission’s policy approach towards technological innovation in financial services.14

Both documents aim to set out the next regulatory steps to be taken by the European Union in this area, underlining the difficulty of fostering a proactive regulatory approach that stimulates new solutions in fintech while at the same time guaranteeing financial stability and consumer protection.

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 encounters any other problem preventing it from meeting its payments and complying with its obligations. The guaranteed amount is limited to cash deposits 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, as well as for the branches of banking institutions registered in a country outside the European Union if the guaranteed deposits and securities held by that branch are not covered by a guarantee system in the country of origin, or if the coverage is insufficient. Membership of branches of financial institutions registered in another country within the European Union is voluntary, because the deposits and securities are already covered in the country of origin.

ii  Overdrafts

With regard to overdrafts, the law specifies that the client must pay the amount back immediately, as well as the interest on the overdrawn amount and the corresponding banking fees. In the case of consumers, the cost of the overdraft (including interest and fees) is limited by law. The annual percentage rate of the overdraft in a current account cannot – at any point in time – be higher than 2.5 times the legal interest rate. For 2019, this limit was 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 and correct manner, of 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 of the overdraft and its amount, the rate applied, and the penalties, expenses or late payment interest applied. Order EHA/2899/2011 and Bank of Spain Circular 5/2012 complete the above-mentioned regulation mandating entities that allow for implicit overdrafts to publish the maximum applicable overdraft rates and to facilitate a detailed breakdown of any amounts charged to the consumer on such account.

In relation to this, the Spanish Supreme Court ruled, on 25 October 2019, the nullity of a €30 overdraft commission that accrued repetitively and automatically, finding it in breach of the applicable legislation.15

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15 Supreme Court ruling of 25 October 2019, available at: www.poderjudicial.es/search/AN/openCDocument/9ca3b37c84304484b8072b28c6b92a203d2820487d00c. The Spanish Supreme Court took the opportunity to restate the four requirements established by the Bank of Spain in order for overdraft commissions to be valid: (1) that its amount be linked to the real cost of the collection management; (2) that it not be reiterated for any additional costs incurred by the entity to the same end, even if the negative balance is prolonged in successive settlements; (3) that its amount be a single one, without percentage fees; and (4) that it not be applied automatically.
V REVOLVING CREDIT

i Overview

Although credit card use in Spain is not particularly widespread, the number of Spanish consumers using credit cards is increasing: the number in circulation in Spain in 2018 was 36.64 million (a 6.57 per cent increase over 2017) and increased up to 36.97 million by June 2019. The amount credited is usually paid at the end of the month, and instalments rarely continue for more than three months.

Another form of consumer credit that can be linked to credit cards is credit lines for consumers taking the commercial name ‘revolving credit’. The main difference from a credit card is that the client is given a maximum spending amount over a certain period that the individual can choose when to pay off. Furthermore, the amounts credited that the cardholder repays periodically are automatically renewed at maturity, resembling a permanent credit line. This increase in the repayment time, and the lack of a corresponding increase in any related guarantees, determine that interest rates are far superior to any other form of consumer credit, averaging nearly 20 per cent for 2019.

ii Recent developments

Since 25 November 2015, when the Spanish Supreme Court declared null a 24.6 per cent interest rate applicable to a revolving credit granted by a Spanish credit entity to a consumer, applying the Usury Law of 23 July 1908, the litigation associated with revolving credit in Spain has been on the rise.

For an interest rate to be declared null in accordance with the Usury Law, it has to be both ‘notoriously superior to the average for money’ and ‘manifestly disproportionate to the circumstances of the case’. As such, many lower courts have struggled in the past years to rule whether or not rates applicable to revolving credits complied with these two requirements, particularly taking into account that the Bank of Spain only started publishing revolving credit-specific interest rates in 2017. While average rates for this type of credit are, as stated above, abnormally high, many courts have ruled nullity out stating that the difference in rates can be explained taking into account the repayment conditions under which such credits are granted and, therefore, that the rates for these credits can only be judged considering the revolving credit-specific interest rates.

VI INSTALMENT CREDIT

i Overview

Mortgages

Conditions of mortgage loans vary depending on the type of asset to be mortgaged: primary residence, secondary residence, etc. In general, financial institutions offer better terms for primary residences. Virtually all mortgages in Spain are amortising mortgages with variable

16 The latest available data can be found at www.bde.es/f/webbde/SPA/sispago/ficheros/es/estadisticas.pdf.
17 The latest available data can be found at https://clientebancario.bde.es/pcb/es/menu-horizontal/productosServicios/financieros/creditos/tipoInteres/guia-textual/tipoInteresPractica/Tabla_de_tipos__a0b053c6940f51.html.
rates with a fixed spread over 12-month EURIBOR, although more recently fixed-rate mortgages have been on the increase. The maximum term allowed is 30 years, and the loan-to-value ratio of the loan can only exceed 80 per cent in certain exceptional cases.

In the event of default, repossession of the asset can be executed through court proceedings or an out-of-court agreement (attested by a notary), depending on what was agreed in the contract.

**Car financing**

One of the most popular consumer finance products, in which there has been significant increase after the crisis, is car financing.

According to Law 10/2014 of 26 June on organisation, supervision and solvency of credit institutions, contracts will be considered operating leases when their exclusive purpose is to loan the use of an asset that was acquired for that purpose with the future beneficiary's specifications, in exchange for compensation consisting of periodic payment by instalments. When there is a call option, the price must be the market price.

**Personal loans**

This type of financing has traditionally been easier to obtain, given the higher remuneration of the loan and its relatively short term (e.g., compared with a mortgage loan). The financial institution assesses the client’s repayment capacity and does 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, depending on the frequency of the instalments (normally monthly) and how the amounts change over time (constant, increasing or decreasing). Another option 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 of periodic instalments of equal amounts that include both interest and repayment of principal.

**ii Recent developments**

Royal Decree 6/2012 of 9 March promulgated urgent measures for the protection of mortgagors lacking resources. The regulation aims to offer protection to families that, because of the long duration of the crisis, cannot meet their mortgage obligations; it:

a. defines the target population to be protected;

b. stabilises a limit on late payment interest that can be charged to that population;

c. includes a code of good practice in its annex (regulated by Law 1/2013 of 14 May) with which financial institutions can comply to assist the renegotiation of loans to the target population and, if this is not possible, introduce payment in kind in favour of the lending institution (in practice, eliminating the full recourse nature of the loan);

d. establishes certain tax or fiscal measures to support these mechanisms; and

e. introduces some flexibility into out-of-court repossessions of the mortgage collateral.

Both Royal Decree 6/2012 and Law 1/2013 were amended by Royal Decree-Law 5/2017 of 17 March, which implements certain measures to strengthen the protection of mortgage debtors who are in a vulnerable position. Among other things, Royal Decree-Law 5/2017 increases the scope of protection of the measures established in the code of good practice set out in Royal Decree 6/2012 and Law 1/2013 so as to include families with children.
who are minors and those who are victims of gender violence; and extends the suspension of eviction of vulnerable groups of individuals from their permanent residences (regulated by Law 1/2013) by an additional three years (i.e., until May 2020). Likewise, the LREC has recently introduced minor amendments to both regulations so as to clarify or repeal certain aspects that have been regulated by it.

VII OTHER AREAS

As stated in Section II.i, Law 5/2015 regulates crowdfunding, an area previously unregulated by Spanish law.

Law 5/2015 addresses crowdfunding from three perspectives:

a. the legal framework governing crowdfunding platforms;

b. the authorisation, registration and setting aside of the activity of the platforms; and

c. the regulations applicable to each of the three sides involved (the project owner requiring the financing, the investors interested in participating financially, and the platform through which the project owner announces the project and raises funds), including restrictions on activities permitted and rules to protect non-qualified investors, as defined in Law 5/2015.

Specific restrictions apply to how the platforms can raise funds (i.e., only through issuance of shares in public limited companies, bonds or other equity securities; issuance of shares in limited companies; and loans, pursuant to Law 5/2015). The use of the funds is regulated (limited to purposes of entrepreneurialism, education or consumption), as are the services that can be rendered by the platforms (primarily marketing and communication services, not investment services or activities reserved to credit institutions).

The activities of crowdfunding platforms are subject to approval from the National Securities Market Commission (CNMV) and registration in the CNMV’s registry, pursuant to the procedures established in Law 5/2015. In collaboration with the Bank of Spain, the CNMV is in charge of the supervision, inspection and penalisation of platforms and any other natural or legal person violating Law 5/2015 in relation to crowdfunding.

With regard 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 as a qualified investor. In the latter instance, if it is a natural person the crowdfunding platform must analyse the request on a case-by-case basis. In projects published through a single crowdfunding platform, non-qualified investors may not invest more than €3,000 per project or more than €10,000 within any 12-month period. The platform must also warn investors of specific risks associated with the investment.

Subject to specific particularities, regulations on the protection of consumers apply to relationships between project owners and investors, as well as to relationships between platforms and project owners, in the event that the project owner is considered a consumer.

In any event, parties in the relevant sectors are demanding an update of Law 5/2015 based on recent developments that they believe have made the Law obsolete. Among other things, the lack of access of foreign investors and promoters to services offered by a Spanish crowdfunding platform is being criticised.
VIII UNFAIR PRACTICES AND LITIGATION

In addition to the aforementioned practices and the regulation of usury, we would highlight the following unfair practices that have recently drawn attention.

i The limitation on late payment interest

A maximum rate of 2 per cent applies to the interest rate agreed on consumer loans, and for mortgages the maximum rate for late payments is three times the legal interest rate.\(^\text{18}\)

ii Mortgage interest rate floor clauses declared unfair due to a lack of transparency

In recent years, Spanish mortgage loan agreements have often included floor clauses providing that, if the interest rate falls below a certain threshold, the client must nevertheless 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, numerous individuals have initiated judicial proceedings seeking a court ruling declaring floor clauses unfair and not binding. In this regard, the Supreme Court’s ruling on 9 May 2013\(^\text{19}\) declared some floor clauses void (i.e., those establishing a minimum variable interest rate for mortgages) for lack of transparency.

Owing to considerations of financial stability and the public interest, the Supreme Court also obliged financial institutions to pay clients back all the overcharged amounts as from May 2013 (the date of the ruling).

Several Spanish courts asked the Court of Justice of the European Union (CJEU) whether limiting the effects of the invalidation to cases after the Supreme Court’s judgment 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.

On 21 December 2016,\(^\text{20}\) the CJEU ruled against the limitation on retroactivity, deciding that the overcharged amounts had to be returned not only from May 2013, but also from their original start date. The Spanish government has announced its intention to pass a Royal Decree in the near future. This will set out the terms for credit entities’ return of the amounts overpaid in relation to floor clauses and provide consumers with an extrajudicial process that is quicker and less costly than court proceedings.

In its ruling on 24 February 2017,\(^\text{21}\) the Spanish Supreme Court amended its own criteria to conform with the CJEU’s judgment of 21 December 2016. The Supreme Court recognised the invalidity of floor clauses with retroactive effect, not only from 9 May 2013 (as established initially), but from their original start date.


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In relation to the above, the Spanish government passed Royal Decree-Law 1/2017 of 20 January, on urgent measures for the protection of consumers in floor clause matters, which among other things, implements measures expediting the recovery process for amounts unduly paid by consumers to credit entities as a result of floor clauses contained in loan or credit agreements guaranteed by chattel mortgage; and establishes a preliminary procedure for out-of-court settlement of disputes that is voluntary for the consumer, establishing the obligation of the banking entities to implement this procedure and ensure that consumers who have floor clauses in their loan or credit agreements have been properly informed about their existence.

Royal Decree-Law 1/2017 was expanded upon by Royal Decree 536/2017 of 26 May, the main purpose of which was to create and regulate the monitoring, control and evaluation commission established by Royal Decree-Law 1/2017.

In addition, the Spanish General Council of the Judiciary issued a resolution of its Permanent Commission, dated 25 May 2017, assigning certain courts exclusive competence over all disputes relating to general conditions included in financing agreements with in rem guarantees where the borrower is a natural person.

Several subsequent rulings from the Spanish Supreme Court (including, among others, the ruling of 16 October 2017) have confirmed the de jure nullity of floor clauses, pointing out the impossibility of parties agreeing to validate those types of clauses, which are automatically voided. However, on 11 April 2018, the Spanish Supreme Court issued a ruling where it seemed to accept the possibility that extrajudicial agreements could be reached among the parties in relation to floor clauses.22

On 10 September 2019, the Supreme Court decided to temporarily suspend pending appeals in floor clause matters in light of the CJEU’s upcoming ruling on the matter. As of 30 September 2019, Spanish banks had returned €2,254 million to borrowers as reimbursement of excess interest paid on the basis of floor clauses.23

### iii Acceleration clauses

The Spanish Supreme Court declared in its ruling on 23 December 2015 that mandatory early-repayment clauses in mortgage loans in the event of non-payment of fewer than three instalments were to be considered null and abusive. In this regard, in order for Spanish financial entities to initiate mortgage foreclosure proceedings there must be a material breach by the debtor of its payment obligation under the loan agreement (i.e., mainly only payment defaults of more than three instalments); and the acceleration event must be registered with the Land Registry. Likewise, since 2013, the new ground for challenging foreclosure proceedings consisting of the existence of unfair contract clauses can be raised by the debtor or the judge in the course of the foreclosure proceedings until the physical repossession of the asset is obtained by the creditor.

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23 The latest available data can be found at http://www.mineco.gob.es/portal/site/mineco/menuitem.32ac44f94b634f76f2fb910026041a0/?vgnextoid=ccbe2d55e0c70610VgnVCM1000001d04140aRCDR.
iv Other nullified clauses
In addition, in its ruling on 23 December 2015, the Spanish Supreme Court also declared that, among others, the following clauses in financing agreements with consumers are to be considered null and abusive:

a clauses imposing an obligation on the consumer to pay pre-procedural and procedural expenses or legal fees for the creditor’s lawyers and legal representatives in the event of a payment default;

b clauses prohibiting the borrower from modifying the use of the building without the creditor’s express authorisation;

c clauses equating the consumer’s acceptance of a telephone offer with his or her written signature and of the special terms and conditions of the agreement; and

d clauses imposing an obligation on the consumer to cover all costs and expenses related to the formalisation of the agreement that should instead be borne by the bank, such as notarial fees, registry fees and taxes.

v Mortgage loan reference index (IRPH)
Introduced by Bank of Spain Circular 8/1990, partially repealed by Bank of Spain Circular 5/2012, the mortgage loan reference index (IRPH) was marketed in Spain for years as a less volatile alternative to EURIBOR for mortgage loans. In fact, it is estimated that as many as one million mortgage loans exist in Spain – between 10 per cent and 20 per cent of the total number. However, litigation has grown over the years as consumers claimed that the index lacked transparency.

On 14 December 2017, Supreme Court Ruling 669/2017 confirmed the validity of clauses that establish IRPH as a reference index, concluding that it could not be subject to control of abuse in accordance with Directive 93/13/EEC, owing to IRPH’s official nature as an index published by the Bank of Spain. The ruling was seen as controversial and, on 29 January 2018, a preliminary ruling from the CJEU was requested on the matter.

On 10 September 2019, the Advocate General of the CJEU concluded that such index fell under the scope of Directive 93/13/EEC and that, therefore, the Spanish courts would have to evaluate on a case-by-case basis whether or not commercialisation had complied with the applicable regulations. However, such conclusions are not binding for the CJEU, which, at the time of writing, has not yet ruled on the matter.

IX RECENT CASES
In 2018, the Bank of Spain’s Complaints Department dealt with 49,708 new cases filed by users of financial services; 19,695 were complaints and 30,013 were enquiries. As such, the number of new cases in 2018 decreased by 39 per cent in relation to 2017, but the number remains above pre-crisis levels. The top three areas of dispute in 2018 were mortgages (54 per cent and, out of this, 57.2 per cent were related to disputes in connection with the costs and fees of formalisation), deposits (14.5 per cent) and cards (9.5 per cent). As highlighted by the Bank of Spain’s 2018 Claim Report,24 the number of complaints remains highly variable, correlated with certain landmark judicial rulings.

According to the above document, out of the 19,695 complaints, 6,708 (34.05 per cent) were decided by the Complaints Department, with 70.15 per cent of the decisions issued in favour of the claimant and only 29.84 per cent in favour of the credit entity. Although the percentage in favour of the credit entities has slightly improved from the previous 2017 figure (26.9 per cent), the data underlines the inadequate attention paid by credit entities to customer service in the settlement of claims, which, as stated before, had already been filed in the first instance with the corresponding credit entity. Finally, the corrections carried out by the corresponding credit entities as a result of decisions issued in favour of the claimant amounted to 70.6 per cent.

The number of complaints to the Bank of Spain peaked in 2017, with 40,176 complaints and 41,056 enquiries, in contrast to the continuous decrease observed during the previous years. In addition, in 2017, only around 25 per cent (10,428) of the 40,176 complaints filed were decided upon, which contributed to the judicialisation of banking disputes, as many customers eventually decide to file a claim before the Spanish courts.

**OUTLOOK**

As the Bank of Spain highlights in the 2019 Financial Stability Report, the global economic slowdown and geopolitical uncertainty will have an impact on consumer spending that is yet to be determined. However, it seems the level of indebtedness may increase in the consumer sector because of the forecasted decrease in revenues.25

Additionally, the digital transformation that the financial sector is experiencing, with new channels such as crowdfunding, new entrants into the payment segment, and even the creation of virtual currencies, implies that more legislation is necessary.

These new entrants are largely unregulated entities from the technology sector, often already with a well-known consumer brand. They are targeting the consumer-lending segment because of its relatively high profitability and healthy growth prospects and, lacking the legacy and capital requirements of banks, new entrants can be faster to market and more competitive in pricing, offering lower rates.

This will result in a higher degree of disintermediation in the future. The fact that the new entrants are largely unregulated entities from the fintech sector means that they will play a bigger role in the consumer sector, with regard to payments or lending.
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 21 million credit cards issued to consumers as at June 2018. 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 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 Consumer Protection Board (OCPB) 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 OCPB for its determination, or request that the OCPB 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 Payment Systems Act 2017 (PSA) was enacted to ensure additional security and credibility for services provided by electronic means. The PSA 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.

From January 2017, corporate entities have been able to apply for PromptPay by registering its 13-digit corporate registration number with one savings account or current 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.
**QR Code Payment System**

The BOT has approved the launch of the Quick Response Code payment service (QR Code Payment) by five commercial banks in November 2017, and for three other commercial banks in December 2017. Under this system, customers are able to use mobile phone applications to scan standardised merchant QR codes for cashless purchases and payment for products and services. The payment would then be charged to the customer’s credit card, savings account or e-wallet, by his or her choice for each purchase.

**The Payment Systems Act 2017**

The PSA was published in the government gazette on 18 October 2017 and came into effect on 16 April 2018. The PSA consolidates and reforms existing payment laws to bring them in line with international standards of governance. The PSA classifies e-payment related businesses into three categories; namely, important payment systems, regulated payment systems and regulated payment services.

The Ministry of Finance has issued two notifications, which set out details of specific activities that would fall under the category of the designated payment systems, and designated payment services. Moreover, the BOT has issued several notifications that set out the rules, procedures and conditions for the process of licensing and registration, as well as rules relating to the supervision of the operation of each type of payment system and service.

**IV  DEPOSIT ACCOUNTS AND OVERDRAFTS**

**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.

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.

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3 Notification of the Ministry of Finance Re: Stipulation on Designated Payment Systems and Notification of the Ministry of Finance Re: Stipulation on Designated Payment Services.

4 Notifications of the BOT Nos. SorNorChor. 3/2561, SorNorChor 5/2561, SorNorChor 16/2561 and SorNorChor. 17/2561.

5 Notifications of the BOT Nos. SorNorChor. 2/2561, SorNorChor. 4/2561 and SorNorChor. 10/2561.

6 Notifications of the BOT Nos. SorNorSor. 80/2551, SorNorSor. 81/2551 and SorNorSor. 82/2551.
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-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 2017 to 2020, as follows:

a  from 11 August 2017 to 11 August 2018, the coverage limit will be 15 million baht;
b  from 11 August 2018 to 11 August 2019, the coverage limit will be 10 million baht;
and
c  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.7

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

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7 Notifications of the BOT Nos. SorNorSor 12/2560 and SorNorSor 13/2560 (replacing Nos. SorNorSor 16/2552, SorNorSor 17/2552 and SorNorSor 18/2552).
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 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, 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

New Notifications on credit cards business

In 2017, the BOT issued new Notifications regulating the credit cards business conducted by commercial banks and non-financial institutions. Although the content of the new Notifications is essentially the same as those in the old Notifications, there are certain changes, for example, a reduction in the maximum interest rate chargeable on credit card bills.

The Payment Systems Act 2017

Credit cards businesses are categorised as regulated payment services businesses under the PSA, and would be subject to the relevant licence application process to be announced by the BOT, as discussed in Section III.ii, above.

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.8

**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.9 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, above), 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 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

**New Notifications on personal loans**

In 2017, the BOT issued new Notifications regulating the personal loans business conducted by commercial banks and non-financial institutions. Although the content of the new Notifications is essentially the same as those in the old Notifications, there are additional requirements, for example, restrictions on the granting of additional personal loans.

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8 Notification of the BOT No. SorNorSor. 01/2551.
9 Notifications of the BOT Nos. SorNorSor 14/2560 and SorNorSor 15/2560.
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 of the default and prohibiting creditors from demanding payment of the debt during that 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, reduced after the enactment of the DCA.

IX RECENT CASES

i Enforcement actions

The BOT has investigated 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
Thailand

had been distributed by the commercial banks as claimed. The BOT circulated a letter to all banks and non-financial institutions to instruct that consumers’ information must be treated as confidential and not be disclosed in a manner that would cause damage to any person.\(^{10}\)

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 the first and second quarters of 2017 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, personal loans, and deposits and bills.\(^{11}\)

Cross-selling is an issue of utmost concern given the gradual increase in the number of complaints. For example, certain service providers try to bundle insurance products with other products or services that customers wish to acquire, or cause misunderstanding between insurance products and savings accounts by referring to life insurance as savings, and referring to paying an insurance premium as making a deposit. The BOT has issued a letter to all branches of commercial banks instructing that insurance products must be sold in accordance with relevant rules and regulations issued by the BOT in 2008, and that certain improper behaviour must be avoided (e.g., forcing or misleading customers into buying insurance products).

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 2017, the most common claims relate to personal loans, credit cards and education loans.\(^{12}\)

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.\(^{13}\) 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.\(^{14}\) 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 or not the supplementary cardholder 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 cardholder.

\(^{10}\) Letters of the BOT No. ThorPorTör. ForKorNgör. Wór. 1666/2559 ThorPorTör. ForKorNgör. Wór. 1667/2559, and ThorPorTör. ForKorNgör. Wór. 1668/2559, all dated 21 December 2016.

\(^{11}\) Detailed statistics can be found at www.1213.or.th (information available in Thai only).

\(^{12}\) Detailed statistics can be found at www.coj.go.th.

\(^{13}\) Supreme Court Decision No. 21063/2556.

\(^{14}\) Supreme Court Decision No. 1297/2542.
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 10

UNITED KINGDOM

Arun Srivastava and Nina Moffatt

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 (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 and guidance (the FCA Handbook). 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).

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 the conclusion of a consumer credit agreement.

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1 Arun Srivastava is a partner and Nina Moffatt is an associate at Paul Hastings (Europe) LLP.
2 Made up of the countries of the European Union (EU) plus Norway, Iceland and Liechtenstein. EU financial services laws tend to be 'single market' measures that also apply to these additional EEA countries.
3 The FCA Handbook is available at: www.handbook.fca.org.uk/handbook/.
4 Respectively, Directives 2008/48/EC and 2014/17/EU.
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.

The 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) 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 2017 (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 similar to 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

Certain rules on communicating with customers contained in Chapter 2 of BCOBS of the FCA Handbook on communicating with customers (which were originally designed for credit institutions) now also apply to firms providing payment services and electronic money services. The overarching requirement is that firms communicate information to customers that is fair, clear and not misleading and also now applies to the activities connected with the provision of electronic money and payment service activities.

The payments regime is set out primarily in the PSRs, supplemented by detailed guidance in the FCA’s ‘Payment Services and Electronic Money: Our Approach’ document.11 The PSRs implemented the second EU Payment Services Directive (PSD2)12 with effect

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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 and 7 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.
12 Directive 2015/2366/EC.
from 13 January 2018 – replacing the Payment Services Regulations 2009, which had implemented the first EU Payment Services Directive\(^\text{13}\) (PSD1). The PSRs include both a licensing regime for ‘payment institutions’ and a registration regime for account information service providers (AISPs), both of which are forms of non-bank financial institutions, as well as extensive conduct requirements, which apply not only to payment institutions (and, to a limited extent, to AISPs) but also to other types of financial institutions 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 Second Electronic Money Directive\(^\text{14}\). 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\(^\text{15}\). The conduct requirements generally apply to all customers, although there is a partial opt-out from the refund provisions available for non-consumers\(^\text{16}\) (similar to the way in which (as discussed below) larger business customers can opt out of certain provisions in the PSRs).

Other areas of payments regulation include:

- the EU Interchange Fee Regulation\(^\text{17}\), which caps interchange fees, requires separation of card scheme activities (such as Visa and MasterCard) and processing activities, and affords merchants with rights when taking payments through the card schemes. The Payment Card Interchange Fee Regulations 2015 were implemented in the UK to comply with the obligations to designate competent authorities, lay down rules on penalties and take measures for the settlement of disputes under the EU Interchange Fee Regulation;

- the EU Payment Accounts Directive\(^\text{18}\), 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;\(^\text{19}\) and

- a purely UK regime under the Financial Services (Banking Reform) Act 2013, 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).

\(^{13}\) Directive 2007/64/EC.

\(^{14}\) Directive 2009/110/EC.

\(^{15}\) EMRs 39 to 45.

\(^{16}\) EMR Section 44.

\(^{17}\) Regulation (EU) 2015/751.

\(^{18}\) 2014/92/EU.

\(^{19}\) 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, counterterrorist finance and sanctions regimes under legislation such as the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Proceeds of Crime Act 2002, Terrorism Act 2000, EU Wire Transfer Regulation\(^{20}\) and Consolidated List of HM Treasury and the Office of Financial Sanctions Implementation;\(^{21}\)

\( b \) fairness requirements under the Consumer Rights Act 2015 (CRA). The FCA is the regulator under the CRA and as such, it has the power to consider complaints and challenge firms on unfair contract terms;

\( c \) the FCA’s Principles for Businesses, including specifically, the ‘fair treatment of customers regime’.\(^{22}\) It is important to note the recent extension from 1 August 2019 of the application of the FCA’s Principles for Businesses (including the requirement under Principle 6 to ‘treat customers fairly’) to the provision of payment services, the issuance of e-money and other connected activities by payment institutions and e-money issuers;

\( d \) prohibitions on surcharging contained in the Consumer Rights (Payment Surcharges) Regulations 2012;

\( e \) 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);

\( f \) 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;

\( g \) 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;\(^{23}\) and

\( h \) 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,\(^{24}\) which was replaced by the EU General Data Protection Regulation\(^{25}\) with effect from May 2018) and the Privacy (Electronic Communications) Regulations 2003 (deriving from the Privacy and Electronic Communications Directive).\(^{26}\)

Again, to a large extent those requirements derive from EU legislation.

As regards the impact of Brexit, even though many rules relating to consumer finance are based on EU directives, most are also enshrined in UK law. Despite the uncertainty


\(^{21}\) www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets.

\(^{22}\) This regime is comprised of consumer outcomes set out by the FCA, available at https://www.fca.org.uk/firms/fair-treatment-customers, and Principles 6 and 7 in Section 2.1 of the FCA’s Principles for Businesses (PRIN) in the FCA Handbook.

\(^{23}\) There is similar protection for non-consumers under the Business Protection from Misleading Marketing Regulations 2008.

\(^{24}\) Directive 95/46/EC.


\(^{26}\) Directive 2002/58/EC.
around how the UK will exit the EU, EU law will continue to apply until the UK actually leaves the EU. On the day the UK leaves the EU, the European Union Withdrawal Act will come into force. This will retain existing EU law.

By way of example, the Interchange Fee (Amendment) (EU Exit) Regulations 2019 will ensure that the EU Interchange Fee Regulation can continue to operate effectively as directly retained EU law after the UK’s withdrawal from the EU. Moreover, the Payment Systems Regulator has adopted the EU Exit Instrument for onshoring the regulatory technical standards Regulation supplementing Article 7(1)(a) of the EU Interchange Fee Regulation.

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 cards, debit cards and similar products under the aegis of a payment 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 2007–2008, 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 (certain strategic and policymaking powers of the PRA have since been transferred to a Bank of England Prudential Regulation Committee, from March 2017) and the FCA became the licensing authority for non-bank mortgage lenders and intermediaries, payment institutions and EMIs. The FCA also became the lead conduct regulator for banks as well as most mortgage lenders, intermediaries, payment institutions (and, now, AISPs) 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 the Financial Services (Banking Reform) Act 2013 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 ill-gotten profits, customer restitution, imposition of conditions on licences (or their revocation), injunctions and, in some cases, criminal prosecution.

Finally, it is worth noting the out of court disputes resolution regime presided over by the Financial Ombudsman Service. This is governed by the Dispute Resolution: Complaints


28 See, for example, the FCA’s Enforcement Guide and Decision Procedure and Penalties Manual in the FCA Handbook; and the PSR’s Powers and Procedures Guidance (March 2015) in relation to the Financial Services (Banking Reform) Act 2013 and Guidance on the PSR’s approach as a competent authority for the EU Interchange Fee Regulation (October 2016).
Manual in the FCA Handbook, and generally provides consumers and quasi-consumers with a free channel for bringing complaints against banks, lenders, payment institutions, AISPs and EMIs (with those providers typically having to pay case fees to the Financial Ombudsman Service). The Financial Ombudsman Service 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’.29 If the Financial Ombudsman Service upholds a complaint, as it often does, it can make a substantial financial award against the provider.

III PAYMENTS

The payment services regime was introduced under the UK Payment Services Regulations 2009 on 1 November 2009, which implemented PSD1.30 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.

To reflect the rapid expansion of the payments market, the regulatory regime was updated by PSD2,31 which was required to be implemented in all EU Member States by 13 January 2018. In addition to capturing the newly regulated payment services of account information services (AIS) and payment initiation services (PIS), together often referred to as third-party payment services provided by third-party providers (TPPs), PSD2 has widened the territorial scope of the payments conduct of business regime and introduced detailed security requirements and access rights for TPPs, which are likely to have a substantial impact on account providers. PSD2 was implemented in the UK by the PSRs.

i Overview

In the following paragraphs, we summarise some of the main obligations on PSPs.

Regulated payment services

The PSRs regulate 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);

c acting as merchant acquirers or some other forms of payment processor (a definition of ‘acquiring of payment transactions’ was introduced for the first time in PSD2,32 which means that some payment processors who previously had unregulated relationships with merchants may now have regulated relationships, and have to seek authorisation accordingly); and

29 The Dispute Resolution: Complaints Manual 3.6.1.
30 Directive 2007/64/EC.
31 Directive 2015/2366/EU.
32 Under Article 4(44) PSD2 – Regulation 2(1)PSRs.
d acting as a TPP, by – in broad terms – providing access to account information (i.e., AIS) or initiating payments at a customer’s request from their account held with a third party (i.e., PIS).33

There are also a number of exclusions from those regulated payment services, perhaps most notably the following.34

The commercial agent exclusion is available for ‘payment transactions between the payer and the payee through a commercial agent authorised in an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of either the payer or the payee but not both the payer and the payee’. There has been much discussion over whether and when online marketplaces (and other payments providers) should be able to rely on this exclusion, with the general sense being that it will now be harder to fall within scope of the exclusion.35

The limited network exclusion most notably applies to:

services based on specific payment instruments that can be used only in a limited way and meet one of the following conditions . . . (ii) are issued by a professional issuer and allow the holder to acquire goods or services only within a limited network of service providers which have direct commercial agreements with the issuer; [or] (iii) may be used only to acquire a very limited range of goods or services.

This exclusion 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 judgement (and potentially engagement with local regulators) as to how far it is appropriate to do so.36

Authorization and passporting

Where a PSP provides a regulated payment service in the UK, and an exclusion 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, or registered as an AISP.

The PSRs set out the licensing regime for payment institutions and registration regime for AISPs.37 Licensed payment institutions are required to maintain a certain level of regulatory capital, and to safeguard customer funds (although safeguarding is not applicable to PIs only providing PIS, as they do not handle 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

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33 The full list of regulated payment services (and related exclusions) is set out in Part 1 of Schedule 1 to the PSRs.
34 The FCA has provided more guidance on the commercial agent exclusion and other activities excluded from regulated payment services here: https://www.fca.org.uk/commercial-agent-exclusion-cae.
35 See for example the FCA’s guidance in Q33A of Chapter 15 of their perimeter guidance (PERG).
36 The full list of exclusions is in Part 2 of Schedule 1 to the PSRs; the commercial agent and limited network exclusions are in Paragraphs (2)(b) and (k) of Part 2, respectively. See also the FCA guidance in Q40 of PERG 15. Further clarity on the limited network exclusion is provided by the FCA in https://www.fca.org.uk/firms/limited-network-exclusion.
37 See Regulation 5-21 PSRs. The EMRs set out a similar licensing regime for EMIs.
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).38

AISPs (providing only AIS and not other regulated payment services) are not subject to the full licensing regime; rather they are subject to a lesser registration regime,39 the most notable feature of which is the need to hold professional indemnity insurance against the risks of conducting their activities. Similar insurance also needs to be held by payment institutions and EMIs who provide PIS.40

Other key areas of focus under the licensing regime are: the robustness of a payment institution’s systems and controls,41 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 requirements42 (some of these requirements also apply to AISPs).

As well as payment institutions being permitted to provide regulated payment services, they can also provide credit in limited circumstances,43 for example, by issuing credit cards, but may need to obtain additional consumer credit permissions under the FSMA in order to do so.44

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 other EEA states, although it may need to comply with other local law requirements.

Finally, a small payment institution regime also exists but with restrictions on total monthly transaction amounts, and without the ability to passport.45

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 and (to a lesser extent) AISPs. How those requirements apply depends on whether or not a transaction is executed in an EEA currency46 (such as the euro or sterling) and whether one or both of the payer’s PSP and payee’s PSP are operating from a location in the EEA.47

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.

The PSRs govern the timeframes 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).

38 See Regulation 23 PSRs for further details of the safeguarding requirements.
39 Regulations 17 and 18 PSRs.
40 Regulation 6(7)(e) and (f) and Paragraph 19, Schedule 2 of the PSRs.
41 Regulation 6(6) PSRs.
42 Regulation 25 PSRs.
43 Regulation 32 PSRs.
44 See for example Q20A in PERG 15.
45 Regulations 13 to 16 and 27 PSRs.
46 Article 2 PSD and Article 2 PSD2 / Regulations 40 and 63 PSRs.
47 Article 2 PSD2 / Regulations 40 and 63 PSRs.
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 transfers in EEA currencies within the EEA, up to four business days are usually permitted.48

Once the payee’s PSP receives cleared funds, it must immediately put them at the disposal of the payee (except for certain currency conversions involving non-EEA currencies).49

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 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.50 These requirements bring important protections to customers, whose rights were – prior to introduction of PSD1 – less well defined in these areas, with delayed refunds of unauthorised transactions having been a particular concern of regulators.

The PSRs also set out detailed and rigorous requirements on payments security and access for TPPs (which we discuss below), and constraints on certain charges and charging practices. Of particular note was the introduction of a new general prohibition on surcharging by payees (typically merchants) when they are paid by consumers, with non-consumer payments being limited to cost.51

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)52 can be asked to opt out of many of the conduct requirements.53

ii Third-party payment services

Two new third-party payment services were introduced by PSD2, namely PIS and AIS, 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 PIS is an ‘online service to initiate a payment order at the request of the payment service user with respect to a payment account held at another [PSP]’.54 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

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48 Regulation 86 PSRs.
49 Regulations 88 and 89 PSRs.
50 Regulations 75 to 77 and 91 and 92 PSRs.
51 For the exact details, see regulations 6A and 6B of the Consumer Rights (Payment Surcharges) Regulations 2012, which were introduced by Part 3 to Schedule 8 of the PSRs with effect from 13 January 2018, in accordance with Articles 62(3)–(5) PSD2.
52 As defined in Regulation 2(1) PSRs.
53 Regulations 40 and 63 PSRs.
54 Article 4(14) PSD2/Regulation 2(1) PSRs.
transfer’, 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 might 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 AIS is:

an online service to provide consolidated information on one or more payment accounts held by the payment service user with another payment service provider or with more than one payment service provider, and includes such a service whether information is provided (a) in its original form or after processing; (b) only to the payment service user or to the payment service user and to another person in accordance with the payment service user’s instructions.

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.

TPPs are entitled to 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. The European Commission adopted a Delegated Regulation in November 2017 setting regulatory technical standards, based on regulatory technical standards drafted by the EBA with some amendments (discussed further below), covering the basis on which the account providers and TPPs will securely communicate with each other in order to facilitate delivery of those third-party services, and which will come into effect after a transitional period probably likely to end in the second quarter of 2019.

The new provisions are intended to encourage introduction of new, competing services. The example of how PIS may benefit merchants has been given above; in the case of AIS (potentially offered in conjunction with PIS), there is an opportunity for TPPs to obtain transactional data, provide customers with added value services and potentially cross-sell them other products.

### Security

The other major impact of PSD2 has been to introduce detailed and rigorous security requirements, by comparison to PSD1. The new regime includes:

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55 Recital (27) PSD2.
56 See also Q25B in PERG 15.
57 Article 4(16) PSD2/Regulation 2(1) PSRs.
58 See also Q25A in PERG 15.
59 Articles 36 and 66 to 68 PSD2 / Regulations 105 and 69 to 71 PSRs.
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;61

b. obligations around notification of any 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;62

c. a requirement for customers to undergo strong customer authentication when, for example, accessing their payment accounts or initiating electronic payment transactions.63 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’.64 Failure to apply strong customer authentication can affect a PSP’s liability for unauthorised transactions.65

The European Commission’s Delegated Regulation referred to above also sets regulatory technical standards on the application of strong customer authentication. Banks and other PSPs will have to put in place the necessary infrastructure for strong customer authentication at the end of a stated transitional period. The regulatory technical standards allow for exemptions from strong customer authentication in recognition of the fact there may be alternative authentication mechanisms that are equally safe and secure.66

Implementation of the Strong Customer Authentication – Regulatory Technical Standards (SCA – RTS) occurred on 14 September 2019, and contains heightened rules on the way payment services providers verify the identity of a customer and validate specific payment instructions.67 However, in response to concerns about industry readiness to apply SCA to e-commerce card transactions, the European Banking Authority accepted that the FCA may give firms under its supervision extra time to implement SCA.

The FCA has stated that it will not take enforcement action against firms simply for not meeting the relevant requirements for SCA from 14 September 2019 in areas covered by the plan coordinated by UK Finance,68 where there is evidence that they have taken the necessary steps to comply with the plan. The FCA has stated that, after 14 March 2021, any firm that fails to comply with the requirements for SCA will be subject to full FCA supervisory and enforcement action as appropriate. The FCA has also made it clear that implementation of SCA is not affected by the current plan for the UK to leave the EU.

61 Article 95 PSD2/Regulation 98 PSRs.
62 Article 96 PSD2/Regulation 99 PSRs. See also Section 15.14.20 of the FCA’s supervision manual (SUP).
63 Unhelpfully, the term ‘electronic payment transactions’ is not defined, creating some uncertainty of scope.
64 Articles 4(30) and 97 PSD2/Regulations 2 and 100 PSRs.
65 See in particular Articles 74(2) and 92 PSD2/Regulations 77 and 95 PSRs.
66 Articles 10-21 of the Commission Delegated Regulation.
iv  **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 equivalence or mutual recognition of financial services licences), then a UK payment institution or AISP (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, but we must emphasise that the outcome is uncertain as it will depend on political negotiations that are yet to take place.

IV  **DEPOSIT ACCOUNTS AND OVERDRAFTS**

i  **Overview**

**Access to banking services**

The Payment Accounts Regulations 2015 (PAR), which came into force on 18 September 2016, has, among other things, obliged certain UK banks 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.

**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. Among much else, the PRA’s rules set out that the maximum compensation payable for the aggregate eligible deposits of each depositor is £85,000 (except, in certain circumstances, where the maximum compensation is £1 million or unlimited in connection with personal injury or incapacity).

**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, and are also under scrutiny by various organisations, such as the UK Competition and Markets Authority (CMA) (see below).

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69  Under Regulation 21 PAR.
70  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 straightforward to establish their status. See Regulation 23 PAR.
71  The PRA Rulebook is available at: www.prarulebook.co.uk.
72  Rule 4 (Limits on compensation payable), Depositor Protection rules, PRA Rulebook.
ii Recent developments

Open banking

On 9 February 2016, the Open Banking Working Group\(^{74}\) published a detailed framework for delivering an Open Banking Standard in the United Kingdom.\(^ {75}\) It has been designed to ‘help improve competition and efficiency, and stimulate innovation in the banking sector’.\(^ {76}\)

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’.\(^ {77}\) 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 choose. The Open Banking Standard also promotes open data exchange between financial institutions.

Accordingly, Open Data API specifications have been published online,\(^ {78}\) with the stated aim of allowing ‘API providers (e.g. banks, building societies and automated teller machine providers) to develop API endpoints which can be accessed by API users (e.g. third-party developers) to build mobile and web applications for banking customers’. The specifications ‘allow API providers to supply up to date, standardised, information about the latest available products and services so that, for example, a comparison website can more easily and accurately gather information, and thereby develop better services for end customers’.\(^ {79}\)

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\(^ {80}\) was published in August 2016, and introduced a package of binding remedies, including the below.

It included the CMA requiring the largest retail banks\(^ {81}\) 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.\(^ {82}\)

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74 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.
77 ibid.
78 www.openbanking.org.uk/open-data-apis/.
81 RBS, Lloyds, Barclays, HSBC, Santander, Nationwide, Danske Bank, Band of Ireland and AIB.
82 Paragraph 166.
It also included implementing a set of remedies to increase customers’ awareness of their overdraft usage and help them manage it. These remedies included:

a requiring banks to alert customers that they have exceeded, or are about to exceed, their credit limit; and

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.83

It is worth noting that, for many customers, banks had already offered such alerts and grace periods for some time.

On 2 February 2017, the CMA made the Retail Banking Market Investigation Order 2017 (the Order). Among other things, the Order requires nine banks in Great Britain and Northern Ireland84 to make up-to-date personal current account and business current account transaction data sets available without charge and in accordance with certain standards,85 from 13 January 2018.86

Five of those banks notified the CMA that they would not be able to release all these data sets by the specified date, and on 19 December 2017 the CMA issued each of these five banks with directions stipulating the timeline for the delivery of the outstanding data sets and the arrangements that each must make for reporting progress to the CMA in the meantime.87

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 the 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

83 As summarised in Figure 15.1 of the CMA’s *Retail banking market investigation: Final report*.
84 Namely: Royal Bank of Scotland Group plc, Lloyds Banking Group plc, Barclays Bank plc, HSBC Group, Nationwide Building Society, Santander UK plc, Northern Bank Limited, Bank of Ireland (UK) plc and AIB Group (UK) plc.
85 Article 14, the Order.
86 Article 2.10, the Order.
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**

The 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.88

Such activities are generally regulated if the lending is to:

- *individuals, whether consumers or sole traders; or*
- *‘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).*89

There are a variety of exemptions and exclusions 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).90

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:

- *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;*91
- *the Standard European Consumer Credit Information, which contains detailed information relating to the credit agreement;*92 and

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89 Articles 60L and 36H of the RAO, respectively.

90 The business borrowing and charge card exemptions are in Articles 60C(3) and 60F(3) of the RAO respectively.

91 Under CONC 4.2.5.

92 Most notable under the Consumer Credit (Disclosure of Information) Regulations 2010.
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.93

Creditworthiness

Before entering into a credit card agreement, the lender must undertake a reasonable assessment of the creditworthiness of the customer. The assessment should take into 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’.94 The lender must carry out a fresh creditworthiness check before significantly increasing a customer’s credit limit.95

In July 2017, the FCA consulted96 on proposed changes to CONC rules and guidance about assessing creditworthiness and affordability, with the aim of clarifying what it expects of firms. The consultation closed in October 2017. New rules were introduced on creditworthiness assessments through the FCA’s Policy Statement in July 2018, and came into effect on 1 November 2018.97 The changes clarify the FCA’s existing rules and guidance in CONC 5 (Responsible lending) and 6 (Post contractual requirements), and the application of the general requirements on firms in the FCA’s Senior Management Arrangements, Systems and Controls sourcebook (SYSC). The creditworthiness assessment, as a safeguard against over-indebtedness post-financial crisis, is a key area of regulatory scrutiny. CONC still 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.98

The new FCA rules reinforce the proportionality aspects of the old rules by stating that creditworthiness assessments, and the steps taken to ensure the assessment is reasonable, should be proportionate to the circumstances of the individual. There is no indicative list of factors to consider, and the FCA has taken a principled approach to proportionality. However, there is guidance on the factors to assist when a firm is deciding how much information is sufficient for the purposes of the creditworthiness assessment as well as the accuracy of that information.99 The new CONC rules highlight that the creditworthiness assessment must consider the credit risk to the lender of the consumer not making repayments; and

93 Further information, including an example of the standard summary box, is provided by the UK Cards Association: http://www.theukcardsassociation.org.uk/wm_documents/Credit%20Card%20Summary%20Box%20Final%20Version%20July%202012%20.pdf.
94 CONC 5.2A (Creditworthiness assessment).
95 CONC 5.2A.5(4) and CONC 5.2A.6.
98 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.
99 CONC 5.2A.20R to 5.2A.25G.
the affordability risk and effects on the customer of not making repayments. Failures in the creditworthiness assessment can lead to regulatory or other action (resulting potentially in customer remediation and other sanctions).

The UK government has also proposed a new creditworthiness bill, which, if passed, would require the FCA to make further changes to its rules to ‘ensure that firms carrying on credit-related regulated activities and connected activities and [firms] entering into or varying a regulated mortgage contract or home purchase plan take into account rental payment history and council tax payment history when assessing a borrower’s creditworthiness’ \(^{100}\). As at the end of 2019, the bill has had its first reading in the House of Commons.

**Form and content of the agreement**

The CCA and underlying regulations \(^{101}\) 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 that 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 a 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) \(^{102}\).

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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\(^{100}\) Creditworthiness Assessment Bill [HL] 2017-19, see: https://services.parliament.uk/bills/2017-19/creditworthinessassessment.html.

\(^{101}\) Most notably the Consumer Credit (Agreements) Regulations 2010.

\(^{102}\) 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’.103

The FCA published its final report on 16 July 2016.104 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.105

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.

Following the publication of its final findings report from the credit card market study, the FCA published a consultation paper106 on 3 April 2017 on persistent credit card debt and earlier intervention remedies, and then subsequently published feedback on this consultation and a further consultation paper107 on 14 December 2017. These papers propose a number of changes to FCA rules and guidance, including new requirements on credit card companies to:

- intervene and help customers whose credit card debt persists over 18 to 36 months; and
- use data they hold to assess whether customers are at risk of potential financial difficulties, and take appropriate action to help customers – even though they may not have missed a payment.

The FCA published its policy statement with final rules in February 2018.108 The final rules and guidance are aimed at helping customers in persistent credit card debt, and require firms to intervene earlier to identify customers at risk of financial difficulties. The FCA estimates that customers ‘will save between £310 million and £1.3 billion per year in lower interest charges’.109

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104 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.
105 Paragraph 1.30, FCA Market Study MS14/6.3.
106 FCA Consultation Paper: Credit card market study – consultation on persistent debt and earlier intervention remedies (CP17/10).
107 FCA Consultation Paper: Credit card market study – Persistent debt and earlier intervention remedies - feedback on CP17/10 and further consultation.
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 the FSMA. However, a range of provisions have been retained in the CCA and its subordinate legislation.

In accordance with legislation, the FCA was required to arrange for a review of the CCA and to report to Her Majesty’s Treasury by 1 April 2019. The review was required to consider whether repeal of CCA provisions would adversely affect the appropriate degree of protection for consumers and, in particular, which CCA provisions could be replaced by FCA rules or guidance under the FSMA.

In February 2016, the FCA launched a ‘call for input’ on the retained provisions in the CCA. Many players in the consumer finance market used this as an opportunity to make submissions about aspects of the consumer credit regime that they believed should be amended (not just simplified), such as moderating the stringent sanctions for certain breaches, for example, of the NOSIA requirements. The call for input has since closed, and in the consultation published by the FCA on persistent debt and earlier intervention remedies in December 2017 (see the FCAs credit card market study above), the FCA stated that it would submit an Interim Report in 2018.

In March 2019, the FCA published its Final Report on the CCA. It sets out the FCA’s views and takes into account the views of stakeholders from roundtable discussions and the earlier call for input.

Decisions about the future of CCA provisions will fall on the government, and the Final Report does not include formal recommendations to the Treasury, but provides analysis and evidence around various areas and themes. The Final Report is aligned with the Interim Report and sets out the following:

a) the FCA believes the rights and protections currently afforded to borrowers are important and should be maintained in some form. According to the FCA, a significant number of these rights and protections are ill-suited to FCA rules and cannot be moved into the FCA Handbook with the same level of protection. Accordingly, the FCA recommend retaining these provisions but also acknowledges that there are a number of issues with these provisions and these issues merit further consideration to ensure they continue to provide an appropriate degree of protection for borrowers without imposing an undue burden on firms;

b) the FCA believes information requirements may be better suited to FCA rules, which would allow a more principles-based, outcomes focused approach and greater flexibility. However, the FCA believes that the current sanctions from the CCA should be retained for breaches of the proposed rules; this will require primary legislation to amend the existing sanctions to refer to the new rules; and

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111 FCA Consultation Paper: Credit card market study – Persistent debt and earlier intervention remedies – feedback on CP17/10 and further consultation.
the FCA recognises that there are some problems with the current sanctions framework, which can lead to draconian sanctions for minor infringements. The FCA suggests that this merits further consideration, whether or not provisions are moved or replicated in FCA rules. One option raised in the Report is an expansion of the FCA’s rulemaking powers to allow for unenforceability and disentitlement to interest.

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 fewer, with no significant charges for credit applying; 113 and

b in addition to NOSIAs, a key area for enforcement action and customer remediation is incorrect annual statements. 114

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. 115 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’. 116

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. 117

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113 Article 60F(2) RAO.
114 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).
115 Section 105 CCA.
116 Paragraph 3.4 Hire-Purchase and Instalment Sale, Goode: Consumer Credit Law and Practice.
117 Section 189 CCA.
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.\textsuperscript{118}

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 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.\textsuperscript{119}

\section*{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.\textsuperscript{120}

There are various legislative provisions in place to enable student loans to fall outside the consumer credit regime in the CCA and FSMA.\textsuperscript{121}

\section*{Mortgages}

Mortgages largely fall outside the CCA. They are nonetheless subject to a similar licensing regime and conduct requirements under the 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.

\section*{Recent developments}

\subsection*{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.\textsuperscript{122} ‘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:

\begin{enumerate}
  \item the FCA has granted lending permissions to very few payday lenders, compared with the previous licensing regime under the OFT; and
  \item 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
\end{enumerate}

\textsuperscript{118} Section 189 CCA.

\textsuperscript{119} Sections 99 and 100 CCA.

\textsuperscript{120} See the student loans regime under the Teaching and Higher Education Act 1998.

\textsuperscript{121} See for example Section 8 of the Sale of Student Loans Act 2008.

\textsuperscript{122} See the glossary to the FCA Handbook.
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.123

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.124 The FCA published feedback in July 2017 in which it confirmed its decision to maintain the price cap on HCSTC and identified a number of issues about other forms of high-cost credit that could cause consumer harm.125 The FCA is particularly concerned about rent-to-own, home-collected credit and catalogue credit, and has wider concerns about consumers’ long-term indebtedness.

The FCA stated in its 2018/19 Business Plan that it intended to conduct a review into the HCSTC market with a focus on complaints, arrears and default rates. In January 2019, the FCA (for the first time) published new findings about the HCSTC market drawing on regulatory return data. This data showed that over 5.4 million loans were made in the year ending 30 June 2018. The FCA also observed that the market is concentrated, with 10 firms accounting for around 85 per cent of new HCSTC loans.

Following an increase in customer compensation claims, and the collapse of Wonga, the FCA sent a ‘Dear CEO’ letter to providers of HCSTC in October 2018. In the letter, FCA director of supervision, Jonathan Davidson, asked these firms to assess their lending activities to determine whether their creditworthiness assessments are compliant, and whether borrowers should be reimbursed. The letter also asked these lenders to tell the FCA if the cost of compensating customers with grievances will leave the firm unable to meet their financial commitments. The warning came amid an increase in complaints about unaffordable lending, including the risks in relation to repeat borrowing and a pattern of dependency on HCSTC.

Since October 2018, additional HCSTC lenders have exited the UK market. Most recently, in October 2019, CashEuroNet UK LLC, trading as QuickQuid, Pounds to Pocket and Onstride, was placed into administration. Other HCSTC providers that have exited the market include the Money Shop, Cash Genie and Wageday Advance.

**Claims management**

On 1 April 2019, the FCA became the supervisory authority of claims management companies (CMCs). CMCs were previously regulated by the Claim Management Regulator.

The focus of the FCA regulation in this area is on driving up standards of conduct and boosting consumer protection. The FCA has stated that it expects CMCs to be trusted providers providing high-quality, good value services. This is a significant shift in the kind of regulation CMCs will now face.

CMCs had to register for temporary permission with the FCA by 31 March 2019. Firms were then asked to apply for authorisation in two application periods.

The FCA has already started to focus resources on this industry. For example, in August 2019, the FCA reviewed various CMC adverts and found widespread poor practice. Jonathan Davidson, executive director of Supervision – Retail and Authorisations at the FCA, said:

123 CONC Rule 5A.2.
124 FCA Call for Input: High-cost credit – Including review of the high-cost, short-term credit price cap.
125 FCA Feedback Statement: High-cost credit – Including review of the high-cost short-term credit price cap.
Many CMCs play a significant role in helping consumers to secure compensation. But CMCs using misleading, unclear and unfair advertising practices to get business is completely unacceptable. We won’t hesitate to take action where we consider that customers are being misled or otherwise treated unfairly by poor advertising…Firms should also understand that we will take their compliance with our rules on financial promotions into account when considering applications for full authorisation.

As a result of this review, the FCA fined Professional Personal Claims Limited £70,000 for misleading consumers through its websites and printed materials.126

Peer-to-peer lending

On 1 April 2014, the UK introduced a new regulatory framework for ‘peer-to-peer’ lending, also known as loan-based crowdfunding, which included the introduction of a new regulated activity: ‘Operating an electronic system in relation to lending’.

Firms (i.e. peer-to-peer (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 persons127 or borrowing by individuals and relevant persons, provided that the P2P platform:

- is capable of determining which credit agreements should be made available to each of the borrowers and lenders;
- undertakes to receive and pay out amounts of interest or capital due to lenders; and
- either takes steps to collect (or arrange for the collection) of repayments or exercises, or enforces rights under the credit agreement.128

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.129 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

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127 ‘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.
128 Article 36H RAO.
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.130

Following this, the FCA published a Consultation Paper in July 2018131 on P2P and investment-based crowdfunding platforms. In this Paper, the FCA observed some poor business practices in this sector, which led the FCA to the conclusion that the regulatory framework needed updating with further rules and guidance.

As a result, in June 2019, the FCA published a Policy Statement132 implementing new rules. The new rules and guidance came into force on 9 December 2019, with the exception of applying MCOBs to P2P platforms that offer home finance products, which came into force on 4 June 2019.

Under the package of new rules and guidance, the FCA has, among other things, introduced:

a. more explicit requirements to clarify what governance arrangements, systems and controls platforms need to have in place to support the outcomes these firms advertise;

b. rules on plans for the wind-down of P2P platforms;

c. marketing restrictions to P2P platforms, designed to protect new or less-experienced investors; and

d. a requirement that an appropriateness assessment (to assess an investor’s knowledge and experience of P2P investments) be undertaken, where no advice has been given to the investor.

**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.133

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 the 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;134

c. amended advertising rules;135

d. restrictions on bundling mortgages with the sale of other financial products;136

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133 Article 3 MCD.
134 Article 4(4B) RAO.
135 Chapter 3A of MCOB.
136 MCOB 2A.2.
additions to the affordability assessment requirements;  
introduction of standard pre-contractual information in the form of a European Standardised Information Sheet, 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;  
introduction of a new step involving making a binding mortgage offer and a related cooling-off period;  
an amended APR calculation and introduction of a requirement to have an additional APR in the European Standardised Information Sheet for certain mortgages (particularly variable rate mortgages); and  
new early repayment rights.

In March 2019, the FCA published its Final Report, which sets out the FCA’s vision for the mortgages market as one in which borrowers who can afford a mortgage can choose suitable and good value products and services. Firms should have a culture of treating all customers fairly, and competition and proportionate regulation should empower consumers to make effective choices before taking out, and throughout the life of, a mortgage.

To achieve this, the FCA has amended its responsible lending rules and guidance with the aim of removing potential barriers to consumers switching to a more affordable mortgage, and to reduce the time and costs of switching for all relevant consumers.

The changes will mean that, among other things, mortgage lenders can choose to carry out a modified affordability assessment where a consumer:

- has a current mortgage;
- is up to date with their mortgage payments (and has been for the past 12 months);
- does not want to borrow more, other than to finance any relevant product, arrangement or intermediary fee for that mortgage; and
- is looking to switch to a new mortgage deal on their current property.

The FCA is also proposing to change its rules to make it clear that tools that allow customers to search and filter available mortgages are not necessarily giving advice. It will also be clearer that some forms of interaction, such as firms helping consumers with their applications, do not require advice.

VII UNFAIR PRACTICES

The CRA sets out a detailed fairness regime that applies to both terms in consumer contracts and notices given to consumers. It generally applies in relation to all finance, payments and retail banking relationships with consumers.

137 Chapter 11A of MCOB.
138 Chapter 5A of MCOB, and MCOB TP 1 MCD Transitional Provisions.
139 MCOB 6A.3.
140 Chapter 10A of MCOB.
141 MCOB 2A.4.
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.\(^{144}\) It also applies to business borrowers falling within scope of the CCA (as described above) irrespective of the amount borrowed.

In addition, the FCA’s ‘treating customers fairly’ regime\(^{145}\) broadly applies to unfair practices across the financial services described in this chapter. The regime applies to both consumer and business customers.

Key areas of scrutiny and challenge in this area include mis-selling, 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\(^{146}\) to an HCSTC provider, Wage Payment and Payday Loans Ltd, and its director, in which the FCA:

\(\begin{align*}
a & \text{cancelled Wage Payment and Payday Loans Ltd’s interim permissions to provide regulated activities including consumer credit lending;} \\
b & \text{refused Wage Payment and Payday Loans Ltd’s application for full permission; and} \\
c & \text{banned the director from carrying out any regulated activity carried on by an authorised firm.}
\end{align*}\)

In related matters, on 24 January 2017 and 1 February 2017, the FCA issued decisions not to approve applications by Nationwide Debt Consultants Limited\(^{147}\) and Steven Maoudis,\(^{148}\) respectively, for permission to carry on the regulated activities of debt adjusting and debt counselling, which revoked the interim permissions that they both had that allowed them to undertake these activities.

These cases illustrate the FCA’s tough regulatory stance on HCSTC described above, and specifically reflect its concerns about excessive sums being charged to customers (or even removed from some customers’ accounts), failures in assessing whether customers could afford loans before lending to them, and a lack of knowledge and skills among debt management practitioners, particularly in relation to the debt solutions available to customers.

There have been various fines issued by the FCA in 2019 in the retail banking sector. These include fines against Bank of Scotland Plc (relating to failing to be open and cooperative with its regulators), R. Raphael & Sons Plc (relating to culture/governance) and Standard Chartered Bank (relating to breaches of the Money Laundering Regulations 2007 and financial crime).

In 2018, Vanquis Bank Limited (Vanquis) received a fine from the FCA in the amount of £1,976,000 for breaches of PRIN 6 and PRIN 7 related to unfair treatment of customers in the consumer credit sector. According to the FCA, Vanquis failed to make sure customers were informed about the full cost of its repayment option plan (ROP) when it was offered to customers. Most Vanquis customers chose the ROP to help manage their credit without

\(^{144}\) Sections 140A to 140C CCA.

\(^{145}\) Principles 6 and 7 in Section 2.1 of PRIN.


realising instead that the product might lead to their indebtedness increasing. Customers are entitled to be told all relevant information when being offered financial products. The firm was also required to repay an estimated £168,781,000 in compensation, which constitutes the amount of the charges not disclosed to customers when they bought the ROP.

Recently, there have also been various packages of consumer redress announced involving consumer lenders. By way of example, in March 2018, PerfectHome agreed with the FCA a package of customer redress totalling over £2.1 million. PerfectHome (a trading name of Temple Finance Limited) is a rent-to-own firm that provides household goods to customers on hire purchase agreements. The FCA previously identified that the firm’s affordability assessments did not adequately take into account customer circumstances that led to customers being issued with loans they could not afford. In addition, the FCA considered that the collections processes did not always deliver good outcomes for customers, with some customers being charged late fees for arrears on their insurance contracts, contrary to the firm’s own policy, customers paying for insurance before receiving goods and customers not always receiving a refund of their first payment where the agreement was cancelled before goods were delivered. In response to these concerns, PerfectHome conducted a programme of improvements and identified customers that may have been treated unfairly in the past that will be paid redress.

There has also been enforcement action in respect of data breaches. For example, credit rating agency Equifax was fined £500,000 by the Information Commissioner’s Office (ICO) in 2018 after it failed to protect personal data. A 2017 cyberattack exposed information belonging to 146 million people around the world, mostly in the United States. The ICO concluded that Equifax’s UK branch had ‘failed to take appropriate steps’ to protect UK citizens’ data. It added that ‘multiple failures’ meant personal information had been kept longer than necessary and left vulnerable. It is worth noting that the ICO worked with the FCA on the investigation.

ii Litigation

Durable medium

PSD2 (and previously PSD1) 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 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 has been some uncertainty as to whether and how those alternatives can meet the requirements.

In the BAWAG case,149 the Court of Justice of the European Union (CJEU) was asked to consider whether and how e-banking mailboxes can be used to provide information in a durable medium under PSD1. The CJEU found that for information on an e-banking portal or other website to be considered as being in a durable medium:

a the website must allow the user to store information addressed to him or her personally, in such a way that he or she may access it and reproduce it unchanged for an adequate period of time, without any unilateral alteration of its content by that service provider or by another professional being; and

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b where the 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 PSP, aimed at drawing the user’s attention to the existence and availability of the information on the website.\(^{150}\)

**Unfair relationships**

In the 2014 *Plevin* case\(^ {151}\) 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,\(^ {152}\) 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.

The FCA has published the *Unfair Contract Terms and Consumer Notices Regulatory Guide* (UNFCOG) as part of its Handbook, which explains the powers the FCA has, and provides guidance on the approach the FCA may take when handling unfair terms and notices under the CRA and the *Unfair Terms in Consumer Contracts Regulations 1999*.\(^ {153}\)

The FCA also published guidance\(^ {154}\) in December 2018 on the fairness of variation terms in financial services consumer contracts under the CRA. This guidance outlines a number of non-exhaustive areas that the FCA believes firms should have regard to when drafting and reviewing variation terms. These include and are not limited to the validity of the reasons for using the variation term, the transparency of the variation term and the provision for notice in the variation term.

\(^{150}\) For FCA guidance on durable medium, see for example paragraph 8.75 of the PSD2 Approach Document and the Durable Medium website.


\(^{152}\) *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).


At a European level, in July 2019, the European Commission adopted a Guidance Notice on the interpretation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (UCTD), which, for consumer contracts entered into on or after 1 October 2015, is implemented in the UK by Part 2 of the CRA. The Guidance Notice provides a snapshot of the substantial body of case law from the CJEU on the meaning of the UCTD.

**Default Notices – CCA**

In 2019, the Court of Appeal confirmed that service of a compliant default notice under Section 87(1) of the CCA is not merely a procedural precondition to issuing proceedings but is required to start time running for the purposes of the six-year limitation period under Section 5 of the Limitation Act 1980.

In *Doyle v. PRA Group (UK) Ltd* [2019] EWCA Civ 12,155 Doyle entered into a credit card agreement subject to the CCA with the card issuer. The agreement provided for payment of the whole outstanding balance in certain circumstances. Doyle defaulted and in December 2009 the card issuer served a default notice as required under Section 87(1) of the CCA requiring part payment of the debt by a specified time. No payment was made. The debt was ultimately sold and this debt purchaser commenced proceedings to recover the entire amount outstanding on 31 October 2015, being within six years of the date specified in the default notice but more than six years since Doyle’s last payment.

The Court of Appeal upheld the High Court decision that the claim had been issued within the limitation period. It held that the effect of Section 87(1) of the CCA is that the cause of action arises from the date the default notice expires. Section 87(1) of the CCA is not merely a procedural requirement providing that a default notice is required before proceedings can be commenced. Further, the court found that Sections 88 and 89 of the CCA provide that the creditor can take no action until the end of the period mentioned in the default notice, and that the debtor can remedy the breach specified in the default notice by the date stated in it. If it does so, the breach will then be treated as not having occurred, reversing the substantive legal rights and obligations of both parties. These sections had to be read together and interpreted consistently.

**Interchange fees**

In the card sector, the Supreme Court will rule on a landmark case involving Mastercard that will test the standards applied to a Collective Proceedings Order in a major competition claim.

The action against Mastercard concerns allegedly inflated multilateral interchange fees charged between Mastercard and banks, and passed on to merchants, for providing card acceptance services in stores. Former financial services ombudsman Walter Merricks CBE brought the claim on behalf of 46 million consumers who used Mastercard. The power to bring collective proceedings was introduced into the Competition Act 1998; claims are eligible for inclusion in collective proceedings only if the tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

This follows a series of cases involving multilateral interchange fees involving Visa and Mastercard under competition laws.

155 www.bailii.org/ew/cases/EWCA/Civ/2019/12.html
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. While there has been some slowing of enforcement activity, focused enforcement agencies, including the Consumer Financial Protection Bureau (CFPB), the federal banking regulators, which include the Federal Reserve System (Federal Reserve), the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC), as well as state regulatory authorities are still active in enforcing consumer financial services laws. The CFPB has considered and adopted significant rule-makings, including rule-makings based on its authority under the Consumer Financial Protection Act of 2010 (CFPA), its founding statute, and other federal consumer financial protection laws. Looking forward, the rate of innovation and evolving regulatory climate 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 LEGISLATIVE 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 the entities that provide electronic fund transfer services, while other federal laws, including the Expedited Funds Availability Act, provide additional consumer protections. 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, while other federal laws, including the Truth in Savings Act, and state laws, 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, also apply. Finally,
the CFPA, the Federal Trade Commission (FTC) Act, and state law set forth prohibitions on unfair, deceptive and, in some cases under the CFPA, abusive acts or practices (UDAP/UDAAP).

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), consumer financial privacy (e.g., the Gramm-Leach-Bliley Act (GLBA) and the Fair Credit Reporting Act (FCRA)), and data security (e.g., GLBA), 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 both 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 In addition, the CFPB has rule-making and enforcement authority under the federal consumer financial protection statutes, including those listed above (such as 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, prepaid card, cheques and ACH transactions. The Federal Reserve estimates that in 2015 alone there were more than 174 billion non-cash retail payment transactions in the US, with a value in excess of US$97 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

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3 id. Section 5531.
4 id. Sections 5512, 5561 to 5567.
5 id. Section 5536.
7 id. at 2.
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.

Recent developments

On 14 September 2018, NACHA announced the approval of three rules to improve same-day ACH capabilities of financial institutions: (1) as of 18 September 2020, same-day ACH transactions may be submitted to the ACH network for an additional two hours each business day; (2) as of 20 March 2020, the same-day ACH per-transaction dollar limit is increased to US$100,000; and (3) as of 20 September 2019, the speed of funds availability for certain same-day and next-day ACH credits will be increased by expanding the window of time for which funds from same-day ACH credits are processed.8

On 1 April 2019, the CFPB prepaid accounts rule (prepaid rule) took effect.9 The prepaid rule significantly alters the way prepaid card programmes are offered and managed in the United States by amending key provisions of the CFPB’s Regulation E (Electronic Fund Transfers) and Regulation Z (Truth in Lending).10 The prepaid rule establishes a prescriptive ‘pre-acquisition’ disclosure regime, provides an alternative to written periodic statements, and contains modified error resolution procedures and cardholder liability limitations. It also extends modified versions of certain requirements under the Credit Card Accountability Responsibility and Disclosure Act (the CARD Act) to prepaid accounts, including a requirement to submit to the CFPB, and to post to a public website, certain prepaid account agreements.11

On 9 August 2019, the Federal Reserve published a notice and request for comment on its plan for the Federal Reserve Banks to develop a new interbank faster payments system, called the ‘FedNow’ service, with a targeted launch date of 2023 or 2024.12 Under the proposal, FedNow would be a real-time gross settlement (RTGS) system that would allow payments to settle in a matter of seconds, under which settlement entries would be final and irrevocable after a transaction is processed. The Federal Reserve noted that while a private-sector RTGS is already in place in the United States, the existence of a competing publicly provided RTGS may enhance efficiency and safety issues that could arise in a single-provider market, including by promoting competition, spurring innovation, lowering prices, and creating buffers against a single point of failure in the payment system.

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10 12 C.F.R. pts. 1005, 1026.
On 19 December 2019, the Federal Reserve issued its most recent triennial Federal Reserve Payments Study. The study shows that, between 2015 and 2018, US debit card and credit card payments increased by 8.9 per cent per year, ACH payments grew 6 per cent per year and cheque payments fell by more than 7 per cent per year. The study also found that in 2018 the value of remote general-purpose card payments nearly equalled the value of in-person card payments. Finally, the study found a significant shift in the usage of chip-based EMV cards, as the number of chip-authenticated payments for general-purpose cards increased from 2 per cent in 2015 to over 50 per cent in 2018.

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 allegedly 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 29 March 2019, the CFPB published its 2018 Consumer Response Annual Report. According to the report, the 25,900 checking or savings account complaints received by the CFPB in 2018 represent about 8 per cent of total complaints received. The CFPB also reported that the most common consumer complaints about deposit accounts (63 per cent) involved account management, and most of these complaints identified issues regarding depositing and withdrawing funds and using a debit card or ATM card. For example, some consumers described difficulties in accessing their funds, reported financial institutions placing holds on deposits, and stated that financial institutions extended the release date of the funds without notice.

On 15 May 2019, despite an earlier indication by the CFPB that it did not plan to consider an overdraft services rule-making, the agency published a notice stating that it is conducting a review of its 2009 overdraft rule, which limits the ability of financial institutions to charge overdraft fees for paying ATM and one-time debit card transactions that overdraw a consumer’s account unless the consumer has affirmatively consented, or opted in, to the payment of such fees. The CFPB noted that while the number of consumers who have opted in to overdraft services varies widely by financial institution, considerably fewer than half of consumers do so. The CFPB also referenced its 2013 conclusion that the overdraft rule led to a material decrease in the amount of overdraft fees paid by consumers. In response, on 1 July 2019, 25 state attorneys general sent a joint comment letter to the CFPB urging

15 See Blog Post, Consumer Financial Protection Bureau, Spring 2018 Rulemaking Agenda (10 May 2018).
the agency not to amend the rule. The state attorneys general asserted that the overdraft rule, in its current form, ‘sensibly focuses on the type of transactions where the benefits of overdraft services to consumers are smaller relative to the costs and where the risk of inadvertent overdrafts is the highest’, and that any decision to roll back the rule would cause harm to consumers.

V REVOLVING CREDIT

i Overview

According to the Federal Reserve, the total revolving consumer credit outstanding in the United States as of October 2019 was more than US$1 trillion. Revolving credit transactions are subject to a variety of statutes and regulations, including TILA and the 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 27 August 2019, the CFPB released its fourth biennial report on the credit card market, as required by the CARD Act. The report, entitled ‘The Consumer Credit Card Market’, is informed by public responses to a January 2019 request for information, in which the CFPB solicited information about a number of aspects of the consumer credit card market. The report summarises key findings on topics including the cost and availability of credit, credit card issuer practices related to digital account servicing and credit score access, balance transfers and the complexity of credit cards, rewards programmes, deferred interest products, products marketed to non-prime borrowers, third-party comparison sites, credit card debt collection, and product innovation. In the report, the CFPB notes that:

> Market conditions remain stable, in large part because of low unemployment, modest wage growth, and higher consumer confidence in the past two years.

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 credit 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 too are regulated at...
the federal and state levels. Moreover, the CFPB’s enforcement arm has focused on student lending, loan servicing and small-dollar lending, while its rule-making arm reconsidered the agency’s sweeping 2017 rule to regulate the short-term instalment loan market.21 The CFPB decided to propose rescission of certain provisions of its short-term instalment loan rule and delayed the compliance date of others.22

Beyond traditional instalment loan products, online lending platforms, or ‘marketplace lenders’, have proliferated rapidly in the United States. According to the Federal Reserve, the total non-revolving consumer credit outstanding in the United States as of October 2019 was more than US$3 trillion.23 Marketplace lenders, which are generally non-bank platform providers, often partner with banks, which originate loans and sell either the loans or the receivables to the marketplace lender, private investors, or 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 have been intently focused on marketplace lending.24

ii Recent developments

On 17 November 2017, the CFPB published a rule to regulate the short-term instalment loan market.25 While the rule was to take effect on 16 April 2018 for certain provisions, the CFPB delayed the effective date of the entire rule until 19 August 2019. Subsequently, on 26 October 2018, the CFPB stated that it would reconsider the rule and address the rule’s compliance date.26 On 14 February 2019, the CFPB published a proposed rule to rescind certain aspects of the 2017 rule, including the provision that it would be an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan, including payday and vehicle title loans, without reasonably determining that the consumer has the ability to repay the loan according to its terms.27 On 17 June 2019, the CFPB published a rule delaying the compliance date for the mandatory underwriting provisions of the 2017 rule to November 2020.28 The CFPB subsequently said that it plans to finalise its proposal to amend the 2017 rule in April 2020.29

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26 Consumer Financial Protection Bureau, Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date (26 Oct. 2018).
28 See Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments, 84 Fed. Reg. 27,907 (17 Jun. 2019).
29 See Blog Post, Consumer Financial Protection Bureau, Fall 2019 Rulemaking Agenda (20 November 2019).
On 22 November 2019, the CFPB published a request for information on its 2013 integrated mortgage disclosures as part of the CFPB's five-year assessment of the rule.\(^{30}\) The mortgage disclosure rule, known as the TILA-RESPA Integrated Disclosures (TRID) Rule, combined certain mortgage disclosures that consumers receive under TILA and the Real Estate Settlement Procedures Act (RESPA). To ensure that homebuyers receive clear and factual information about the terms and costs of their home loans, the TRID Rule mandates that creditors use standardised forms for most transactions and provide borrowers loan estimates and closing disclosures within three business days. The CFPB sought comments to inform its assessment, as well as other information about the implementation of the TRID Rule and its effect on innovation in the mortgage market.

On 30 September 2018, the California governor signed into law an act that requires disclosure of key terms in connection with certain commercial financing by non-banks.\(^{31}\) The law is the first US state law to require consumer-style disclosures for commercial financing and is intended to facilitate comparisons of financing options by recipients of covered commercial financing offers. The law applies to commercial financing offers of US$500,000 or less to entities in California by any entity that extends a specific offer of commercial financing, including non-depository institutions that arrange commercial financing as part of a bank partnership arrangement. ‘Commercial financing’ includes commercial loans of US$5,000 or more, commercial open-end credit plans, lease financing transactions, account receivable purchase transactions, asset-based lending transactions, and factoring.

On 4 December 2018, the California Department of Business Oversight (DBO) requested public comment in developing regulations to implement the law.\(^{32}\) On 26 July 2019, the DBO issued a second request for comment, which was accompanied by draft regulations.\(^{33}\) The draft regulations contain general formatting and content requirements, as well as unique requirements for closed-end transactions, commercial open-end credit plans, factoring, accounts receivable purchase transactions, lease financing, and asset-based lending transactions. The draft regulations also detail how certain estimates for factoring, accounts receivable purchase transactions, and asset-based lending transactions are to be calculated. In addition, the draft regulations would expressly permit a provider in a commercial financing transaction via the internet to obtain the recipient's signature electronically after making the required disclosures. As of this writing, the regulations have yet to be finalised.

A series of cases have questioned whether a bank is the ‘true lender’ in a partnership with a marketplace lender. If the marketplace lender is the ‘true lender’ instead of the bank, it could be required to obtain state licences and conform its loans to state usury laws. Outcomes of these cases have varied. One federal district court held that federal law expressly pre-empts state usury laws for bank-partner programmes where the bank initially holds the loan.\(^{34}\) In contrast, other federal district courts have refused to dismiss ‘true lender’

\(^{30}\) Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment, 84 Fed. Reg. 64,436 (22 Nov. 2019).


actions on pre-emption grounds, and have analysed whether a marketplace lender holds the ‘predominant economic interest’ in the loan and, thus, is the ‘true lender’. For example, California district courts have come to divergent conclusions on the issue.

While distinguishable from the ‘true lender’ line of cases, and a revolving credit case on the facts, the question of whether a loan is subject to state usury laws after it is sold to a non-bank lender, is particularly significant for lenders in the Second Circuit (which includes Connecticut, New York and Vermont) in the wake of the US Supreme Court’s 2016 denial of certiorari in Midland Funding LLC et al v. Madden. By declining to review Madden, the Supreme Court let stand the Second Circuit’s controversial holding that Section 85 of the National Bank Act, which pre-empts state laws governing the rate of interest a national bank may charge on a loan, does not have pre-emptive effect after a national bank sells a loan to a non-bank.

A federal district court has considered whether the National Bank Act pre-empted state usury law when applied to a non-bank assignee of loans originated by a national bank; while the court recognised that state law would be pre-empted as to the national bank that originated the loan, it cited Madden in dicta in noting that it was ‘not persuaded’ that National Bank Act pre-emption applied to assignees of national banks.

On 8 June 2017, the US House of Representatives passed legislation that would have added the following language to Section 85 of the National Bank Act: ‘A loan that is valid when made as to its maximum rate of interest . . . shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party . . . notwithstanding any State law to the contrary.’ On 14 February 2018, the House of Representatives passed additional legislation that would have amended the National Bank Act with language virtually identical to the ‘valid when made’ language. While a similar bill was introduced in the US Senate in July 2017, no further legislative action has been taken.

On 18 November 2019, the OCC issued for comment a notice of proposed rule-making to clarify that when a bank sells, assigns, or otherwise transfers a loan, the interest permissible prior to the transfer would continue to be permissible following the transfer. On 19 November 2019, the FDIC issued a notice of proposed rule-making seeking to reaffirm the authority for assignees of loans originated by state banks to enforce the contractual interest rate terms of those loans. The OCC proposed rule would apply to all national banks and state and federal savings associations, while the FDIC proposed

40 Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015).
45 Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 84 Fed. Reg. 64,229 (proposed 21 Nov. 2019).

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rule would extend this parity to state banks. Neither the OCC nor the FDIC proposed rule would address the issue of who is the ‘true lender’ in the context of the sale or assignment of a bank-originated loan or receivables to the third party; however, the FDIC indicated in its proposed rule that it would view unfavourably entities attempting to evade lower interest rates by partnering with state banks.\(^{47}\)

**VII OTHER AREAS**

Regulators and courts have focused on other areas related to consumer financial services, including regulatory enforcement, privacy and cybersecurity, debt collection, anti-money laundering and innovation. The developments identified below are representative, not exhaustive.

i **Regulatory enforcement**

On 6 December 2018, Kathleen Kraninger was confirmed as Director of the CFPB by the US Senate. In one of her first major policy speeches, she noted that the emphasis of the CFPB will be prevention of consumer harm through supervision and rulemaking, rather than enforcement and the imposition of penalties.\(^ {48}\) Consistent with this emphasis, on 23 April 2019 the CFPB announced changes to its policy regarding civil investigative demands (CIDs).\(^ {49}\) The CFPB uses CIDs to investigate potential violations of law for which the CFPB may bring an enforcement action. According to the CFPB, under the new CID policy, the CFPB will provide recipients of CIDs with more information on the potentially applicable provision of law that may have been violated and will identify the business activities that are subject to the CFPB’s authority.

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’.

With respect to privacy, on 28 June 2018, the California governor signed into law what is arguably the most expansive privacy legislation in US history.\(^ {50}\) With effect from 1 January 2020, the California Consumer Privacy Act (CCPA) provides California residents with several core individual rights: (1) the right to request deletion of personal information that a business has collected from the consumer; (2) the right to request that a business provide information about, and copies of, personal information; (3) the right to opt out of the sale of personal information; and (4) the right to be free from discrimination (in other words, businesses are prohibited from charging different prices or rates to consumers, providing different services, or denying goods or services to consumers who exercise their rights under the CCPA). The specific requirements under the CCPA continue to change as

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47 id.
48 Speech by Kathleen Kraninger, Director, Consumer Financial Protection Bureau, at the Bipartisan Policy Center (17 Apr. 2019).
the California legislature has enacted six different amendments to the CCPA before the law has even taken effect,\(^{51}\) and the California attorney general is promulgating regulations to implement the statute.\(^ {52}\)

On 24 July 2019, the FTC announced a US$5 billion settlement with Facebook, Inc. for allegedly violating an earlier FTC order by misrepresenting users’ ability to control the privacy of their data and the extent to which Facebook made user data available to third parties.\(^ {53}\) The FTC also alleged that Facebook engaged in unfair acts or practices with regard to how it allowed information provided by users in connection with setting up their account security to be used by third parties. As part of the settlement, the FTC required Facebook to make significant changes to its privacy compliance system, including significant oversight by the FTC.

For cybersecurity, the trend is towards more prescriptive requirements, as well as aggressive enforcement. For instance, on 4 April 2019, the FTC published a request for comment on proposed regulations\(^ {54}\) that would move away from the risk-based approach established by the FTC’s 2002 data security standards\(^ {55}\) known as the Safeguards Rule. The FTC proposed rules would impose prescriptive requirements, many of which appear to be based on the NYDFS cybersecurity regulations that went into effect in 2017.\(^ {56}\) For example, the FTC proposed rule would require covered financial institutions to implement an information security programme that meets technical requirements, such as encryption and multi-factor authentication. It would also impose specific training and assessment obligations, such as annual penetration testing and biannual vulnerability assessments, and would require annual reports to the institution’s Board of Directors on its information security programme.

On 22 July 2019, the CFPB, FTC and attorneys general from 48 states, the District of Columbia, and Puerto Rico announced a global settlement with Equifax Inc., one of the Big Three credit reporting agencies (CRAs) in the United States, in connection with the company’s 2017 cybersecurity incident in which criminals gained access to certain files that reportedly affected approximately 147 million US consumers.\(^ {57}\) The settlement requires Equifax to provide up to US$425 million in monetary relief to affected consumers and to pay a US$100 million civil money penalty.\(^ {58}\)


\(^{54}\) Privacy of Consumer Financial Information Rule under the Gramm-Leach-Bliley Act, 84 Fed. Reg. 13,150 (proposed 4 Apr. 2019).


\(^{56}\) See N.Y. Comp. Codes R. & Regs. tit. 23, pt. 500.


Debt collection

On 21 May 2019, the CFPB published proposed regulations to implement the Fair Debt Collection Practices Act (FDCPA). Although the FDCPA was enacted in 1977, substantive implementing regulations have never been promulgated. The proposed regulations, if implemented, would create bright line rules, particularly with regard to how the FDCPA applies to newer communication technologies, such as voicemail, email, text messaging and social media. In 2013, the CFPB published an advance notice of proposed rulemaking that raised the possibility that the CFPB would promulgate regulations that would apply to first-party debt collection (i.e., the collection of debts by the person to whom such debt is owed), even though first-party debt collection is not generally covered by the FDCPA. However, the proposed regulations would apply only to debt collectors currently subject to the FDCPA.

Although the FDCPA prohibits debt collectors from repeatedly calling debtors with the intent to harass or abuse them, the proposed regulations would limit debt collectors to making no more than seven telephone calls per consumer per debt in any seven-day period or within seven days after making contact with the consumer about the debt. The limitations on the number of telephone calls would not apply to other forms of communication, such as text messages or emails. The proposed regulations would, however, require debt collectors to maintain reasonable procedures to avoid errors in sending emails or text messages to consumers. The proposed regulations would also prohibit a debt collector from communicating with debtors via a social media platform if such communications would be viewable by third parties. In addition, the proposed regulations would allow consumers to opt out of a debt collector’s use of any medium of communication.

Because many of the substantive restrictions under the FDCPA apply when a debt collector engages in communication with a debtor, the proposed regulations would allow debt collectors to make ‘limited-content messages’ that would not be deemed to be a communication under the FDCPA. The message would need to contain only the information required or permitted by the proposed regulations to qualify as a limited-content message. Such limited-content messages would be subject to the call restrictions described above, but would allow debt collectors to make contact with debtors without triggering the regulatory requirements that apply when engaging in a communication with a debtor.

Additionally, the proposed regulation would expressly prohibit a debt collector from suing or threatening to sue a consumer to collect a debt that the collector knows or should know is time-barred under the applicable statute of limitations. Debt collectors would be prohibited from reporting information about a debt collector to a consumer reporting agency before communicating with a consumer about the debt, a practice sometimes referred to as ‘passive debt collection’. The proposed regulation would prohibit a debt collector from

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62 id. at 23,403.
63 id.
selling, transferring or placing for collection a debt if the collector knows or should know that
the debt has been paid or discharged in bankruptcy or that an identity theft report was filed
with respect to the debt.64

iv Anti-money laundering

On 3 December 2018, the federal prudential regulators and the Financial Crimes
Enforcement Network (FinCEN) issued a joint statement on innovative approaches to
anti-money laundering (AML) and counter-financing of terrorism (CFT) programmes.65 In
the joint statement, the agencies encouraged financial institutions to use innovative tools and
technologies, such as artificial intelligence and digital identity technologies, to help identify
and report money laundering, terrorist financing and other illicit activities.

On 18 April 2019, FinCEN announced the first enforcement action against a peer-to-
peer virtual currency exchanger for alleged violations of the Bank Secrecy Act (BSA).66
FinCEN assessed a civil money penalty in connection with allegations that the individual, as
an operator of a virtual currency exchange, failed to register with FinCEN as a money services
business, failed to establish and implement an effective written AML programme, failed to
detect and report suspicious transactions, and failed to file currency transaction reports.67

v Innovation

US financial services regulators and financial services providers are interested in the ways
in which innovative technologies, such as artificial intelligence and machine learning, can
be applied to financial services. Although many of these new technologies have potential
benefits such as expanded access to credit, they may also present risks such as unintended
discrimination, also referred to as disparate impact discrimination.

US financial services regulators have focused on how policies and regulations can be
changed to encourage responsible innovation. On 10 September 2019, the CFPB issued
three new or updated policies to reduce regulatory uncertainty and promote innovation: a
no-action letter (NAL) policy, trial disclosure programme (TDP) policy, and compliance
assistance sandbox (CAS) policy.68 The new NAL and TDP policies69 replace previous
under-utilised policies, with the CFPB approving no trial disclosure programmes in nearly
six years and issuing only one no-action letter in three years.70 The new policies aim to
increase industry utilisation by streamlining the review and approval processes and reducing
the ongoing reporting requirements. Concurrent with the release of the new policies, the
CFPB issued a no-action letter to the US Department of Housing and Urban Development

64 id.
65 Federal Reserve, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National
Credit Union Administration, Office of the Comptroller of the Currency, Joint Statement on Innovative
66 Press Release, Financial Crimes Enforcement Network, FinCEN Penalizes Peer-to-Peer Virtual Currency
68 Press Release, Consumer Financial Protection Bureau, CFPB Issues Policies to Facilitate Compliance and
Promote Innovation (10 Sept. 2019).
70 Press Release, Consumer Financial Protection Bureau, CFPB Announces First No-Action Letter to Upstart
under the new NAL policy. The CAS policy is a new policy under which persons offering an innovative product or service may be granted a statutory safe harbour under TILA, the ECOA or the EFTA.

On 30 April 2019, the OCC requested public comment on a proposed Innovation Pilot Program. The proposed programme would allow OCC-supervised institutions, including those using third-party service providers, to apply to take part in a three-to-24-month small-scale pilot to test the feasibility of new or unique products or services where regulatory uncertainty is perceived to be a barrier to the development and implementation of the product or service.

VIII UNFAIR PRACTICES

The CFPB has continued to issue public consent orders related to a broad range of consumer financial products and services, including debt collection, deposit accounts, auto loans and loan origination. A brief review of UDAAP standards and key orders is provided below.

Generally, ‘unfairness’ means substantial injury to the consumer that the consumer could not have reasonably avoided, which is not outweighed by consumer or competitive benefits. ‘Deception’ generally exists where there is a material representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances. Finally, ‘abusiveness’, which was established under the CFPA, means 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, the consumer’s inability to protect his or her own interests, or the consumer’s reasonable reliance on a covered person to act in the interests of the consumer.

i Unfair practices

The following are examples of recent CFPB allegations of unfair practices:

- Reopening accounts. The CFPB found that a federal savings association engaged in unfair practices when it reopened previously closed deposit accounts without obtaining consumers’ prior authorisation or without providing timely notice. The CFPB found that the bank reopened the account when it received certain types of debits and credits to the accounts, which potentially resulted in negative balances and the accumulation of fees.

75 12 U.S.C. Section 5531(c).
77 12 U.S.C. Section 5531(d).
b Credit cards. The CFPB alleged that a retailer that issued store credit cards engaged in unfair practices when its employees enrolled consumers with credit card accounts into an optional payment protection insurance plan offered by a third-party insurer without the consumers’ knowledge or consent.79

c Automatic debits. The CFPB found that an online lender engaged in unfair practices when:

- it electronically debited payments from consumers’ bank accounts without obtaining authorisation to debit the accounts; and
- a software error resulted in the lender debiting consumers’ bank accounts for full loan payment amounts after the consumer had been approved for an extension on the loan payment.80

d Student loan servicing. The CFPB found that a student loan servicer engaged in unfair acts or practices when it failed to process adjustments to the principal balances of some student loans after the loans were placed in deferment, forbearance, or income-based repayment plans.81

e Data breach. The CFPB found Equifax, a CRA, acted unfairly by failing to provide reasonable security for the sensitive consumer personal information that was compromised in a 2017 data breach.82

ii Deceptive practices

The following list includes examples of recent CFPB allegations of deceptive practices:

a Mortgage loan refinancing. The CFPB alleged that a non-bank mortgage company engaged in deceptive practices when its employees made inaccurate ‘apples-to-apples’ comparisons of consumers’ current mortgage to the company’s refinancing offer during in-home sales pitches.83

b Credit cards. The CFPB alleged that a retailer that issued store credit cards engaged in various deceptive practices, including that the retailer’s employees deceived consumers into providing personal information and completing credit card applications without the consumers’ knowledge or consent and that the employees misrepresented the credit card financing terms, including the interest rate, monthly payment amount and promotional financing eligibility terms.84

c Mortgage assistance services. The CFPB alleged that a company offering mortgage assistance relief services engaged in deceptive acts or practices when it made misleading claims about the effectiveness of documents and materials that it sold to consumers as a solution to consumers’ mortgage problems.85

d Debt collection. The CFPB found that a debt collection company falsely:
• threatened consumers with legal action that they had no intention of taking;
• represented to consumers that their employees were attorneys when they were not; and
• represented to consumers that their credit reports would be negatively affected if they did not make payments on the debt, even though the company did not report the consumer debts to credit reporting agencies.86

e Funds transfers. The CFPB found that a remittance transfer provider deceived consumers when the company provided consumers with a disclosure stating that the company would not be responsible for errors made by its payment agents even though applicable law would hold the company liable for such errors.87

f Debt settlement services. The CFPB alleged that a debt settlement services provider engaged in deceptive behaviour by misrepresenting its ability to negotiate with creditors and charging fees to consumers without settling their debts as promised.88

g Privacy. The FTC found that a large social network violated a previous consent order when the company made misrepresentations regarding the ability of users to control the privacy of their data and the extent to which the company made user data available to third parties.89 The FTC also found that the company was deceiving consumers with regard to how account security information would be used.

iii Abusive practices

Below are examples of recent CFPB allegations of abusive practices:
a Mortgage assistance services. The CFPB alleged that a company offering mortgage assistance relief services engaged in abusive acts or practices when it took advantage of consumers’ lack of understanding of residential mortgage and foreclosure laws and marketed and sold to consumers boilerplate documents and materials that lacked merit as a solution to consumers’ mortgage problems.90

b Debt settlement services. The CFPB alleged that a debt settlement services provider abusively made some customers negotiate their own settlements and instructed borrowers to mislead lenders by concealing the fact of their enrolment in the debt settlement programme in order to negotiate their debt.91

91 First Amended Complaint, Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC, No. 3:17-cv-6484 (N.D. Cal. 1 June 2019).
IX OUTLOOK

The climate of deregulation and the influence of non-traditional financial services providers on the US consumer financial services market will continue to be the dominant forces shaping the country’s consumer financial services regulatory landscape in the coming year. Financial technology firms continue to deploy innovative technological solutions and develop new uses for a rapidly expanding universe of consumer data, and supervisory and regulatory authorities continue to try to keep pace. The coming year will also see continued evolution of the body of case law surrounding the ‘true lender’ issue, and perhaps resolution of the Madden issue, whether through judicial or regulatory action.
ABOUT THE AUTHORS

MARIA ALDONZA SAKAR ALMIRANTE
Hogan Lovells
Maria Aldonza Sakar Almirante specialises in the structured finance, banking and corporate sectors. During the past 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 Derecho (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.

PEDRO PAULO BARRADAS BARATA
Pinheiro Neto Advogados
Pedro Paulo Barradas Barata is a partner in the São Paulo office of Pinheiro Neto Advogados, within the litigation department. He advises Brazilian and foreign companies and his practice focuses on consumer law, product liability, data privacy, advertisement and e-commerce. Mr Barata graduated with an LLB from the São Paulo Catholic University (Pontifícia Universidade Católica de São Paulo – PUC/SP) in 2003 and has an LLM in consumer law from the São Paulo Catholic University in 2009. He was admitted to the Brazilian Bar Association in 2004.

ANDREA BEATTY
Piper Alderman
Andrea focuses on regulatory and financial services advice including consumer credit, financial services licensing, corporate advisory, payment systems, retail and electronic banking, privacy and banking law and regtech/fintech.

Andrea is considered one of Australia’s leading consumer financial services lawyers. She is recognised in Chambers and Partners for financial services regulation and has been listed in Best Lawyers in Australia every year for the past eight years.
About the Authors

Andrea is widely published and her authorships include six editions of the leading consumer law text Annotated National Credit Code the most recent edition published in November 2019 by LexisNexis, the ‘Australia’ chapters in The Consumer Finance Law Review and The Banking Regulation Review (The Law Reviews, Law Business Research Ltd, UK).

Andrea advises large corporates, financial institutions, financial services providers and new fintech companies on financial products regulation, licensing and compliance, consumer credit, banking and payment systems regulation, e-commerce, margin lending, finance and mortgage broking, anti-money laundering laws, privacy and spam regulation, personal property and securities law, consumer protection, regulatory breaches, critical incident management and dealing with regulators, including APRA, ASIC, the Reserve Bank of Australia and AUSTRAC.

Andrea also advises on associated commercial transactions including new product development, fintech developments, electronic banking, peer to peer lending, crowdfunding, digital currencies, loyalty programmes, payment systems, outsourcing, white labelling, restructures, acquisitions and disposals.

Andrea is a member of the Law Council of Australia’s Privacy, Financial Services and E-Commerce Committees, a member of the Financial Services Institute of Australia, and numerous other committees. Andrea has also recently been appointed as one of the three members of the Australian Finance Industry Association (AFIA) Code Compliance Committee.

She is a regular keynote speaker at many of the leading legal conferences, including Legalwise credit seminars, the Informa (formerly LexisNexis) Annual Credit Law Conference, the Australian Retail Credit Association (ARCA) National Conference and various industry summits. She also regularly conducts training programmes and full-day workshops for clients including Australian Credit Licence and Australian Financial Services Licence compulsory responsible manager training, privacy training, regulatory law updates and Back to Basics credit law training workshops.

JOSÉ IGNACIO BERNER
Baker McKenzie
José Ignacio Berner is a transactional lawyer with extensive experience in the areas of banking and finance, project finance, and mergers and acquisitions. He graduated from the Pontifical Catholic University of Chile Law School in 2013, and in 2014 earned the highest evaluation from the Republic of Chile for his postgraduate public internship service. He was nominated by members of the Latin American Corporate Counsel Association (LACCA) as being among the region’s leading business lawyers for corporate and M&A (LACCA Approved) for 2019 and 2020. He speaks Spanish and English.

FEDERICO DE NORIEGA OLEA
Hogan Lovells
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 received an award for academic excellence from the Ibero-American University for scoring the highest GPA of his graduating class, and received his Master of Laws from Harvard Law School.

**RICK FISCHER**

*Morrison & Foerster LLP*

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 also has a special emphasis on 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.

**HÉLDER FRIAS**

*Uría Menéndez – Proença de Carvalho*

Hélder Frias joined the Lisbon office of Uría Menéndez – Proença de Carvalho in 2006 and became a counsel in 2019. 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).

**MIMO HUSSEIN**

*Wolf Theiss*

Mimo Hussein is admitted as an attorney-at-law to the Austrian Bar and is a senior associate at Wolf Theiss, where he is a member of the banking and finance team. He specialises in banking, investment funds and capital markets law with a focus on advising national and international clients in regulatory questions. Before joining Wolf Theiss, Mimo worked with the Austrian Financial Market Authority (FMA) in the integrated supervision department, where he actively participated in the supervision practice of the FMA.
SAROJ JONGSARITWANG
R&T Asia (Thailand) Limited

Saroj Jongsaritwang is a partner at R&T Asia (Thailand) Limited. He was a founding member of the Bangkok office. Saroj has more than 19 years of experience in the 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.

LEÓN LARRAIN
Baker McKenzie

León Larrain is a transactional lawyer with extensive experience in mergers and acquisitions, banking and finance, and project finance. He also practises in telecommunications, securities and real estate projects. Mr Larrain has served in several committees of Baker McKenzie and provides pro bono work for several institutions. He has been admitted to the bar in Chile since 1980. He was a conciliator at the International Centre for Settlement of Investment Disputes (ICSID) in Washington, DC, appointed by the Chilean government. In addition, he was a consultant with the Harvard Institute for International Development in respect of tax reform in Bolivia in 1991, and in respect of customs reform in Peru. He is a member of the Chilean Bar Association; a mentor for Endeavor Chile, a non-profit organisation promoting entrepreneurship; and a member of the Latin American council for the David Rockefeller Center of Harvard University. Mr Larrain studied law at the University of Chile School of Law, and also at Harvard Law School (ITP). He speaks Spanish and English.

LÁSZLÓ LOVAS
Wolf Theiss

László Lovas is an associate in the banking and finance practice group in Wolf Theiss’ Budapest office. He has been involved in cross-border and domestic acquisitions, real estate and project finance deals and has experience in portfolio transfers and establishment of collaterals. László completed his legal studies at the University of Pécs, Hungary.

JEREMY MANDELL
Morrison & Foerster LLP

Jeremy Mandell is a partner 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.

ALESSANDRA CAROLINA ROSSI MARTINS
Pinheiro Neto Advogados

Alessandra Carolina Rossi Martins is an associate in the corporate area of the Pinheiro Neto Advogados office in São Paulo. Her fields of expertise are banking and credit card regulation,

**NINA MOFFATT**

*Paul Hastings (Europe) LLP*

Nina Moffatt is an associate in the London office of Paul Hastings, providing legal and commercial advice on regulatory requirements across Europe. She assists regulated firms to comply with evolving regulatory obligations and has particular expertise in large cross-border offerings and product design in the consumer finance and payments area. She also regularly assists clients with their relations with the UK regulators, including applications for authorisation and supervisory issues. Ms Moffatt has spent time on secondment at a UK retail and investment bank and a multinational financial services company.

**ANDRÁS MOZSOLITS**

*Wolf Theiss*

András Mozsolits is an associate in the banking and finance practice group. Prior to joining Wolf Theiss in 2019, he worked at the European Court of Human Rights as legal trainee at Strasbourg. András completed his legal studies at the Eötvös Loránd University in Budapest, Hungary and has studied in Bergen, Norway within the EEA Grants Scholarship.

**MELINDA PELIKÁN**

*Wolf Theiss*

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 14 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.

**JAIME PEREDA**

*Uría Menéndez Abogados, SLP*

Jaime Pereda joined Uría Menéndez in Madrid in 1998. His practice focuses on M&A, banking, finance and corporate law. He has been involved in some of the most significant transactions in Spain in recent years.
OBREA POINDEXTER  
*Morrison & Foerster LLP*

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; and debit card, prepaid card, 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 payment systems such as mobile payment systems and person-to-person payments.

CARLOS EDUARDO ROMERO SOTELO  
*Hogan Lovells*

Carlos Eduardo Romero Sotelo 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, graduating within the top 10 per cent of his class. Before joining Hogan Lovells, Carlos began his legal practice at a Mexican law firm focusing on corporate governance and contracts.

ARUN SRIVASTAVA  
*Paul Hastings (Europe) LLP*

Arun Srivastava is a partner in the London office of Paul Hastings. He provides sound and comprehensive legal advice on regulatory requirements across Europe. Mr Srivastava helps regulated firms to comply with evolving regulatory obligations, particularly in relation to innovation in the fintech space. He has particular expertise in advising clients on the cross-border offering of products and services across the European Union, including in relation to the use of national private placement regimes. He also advises clients on complex contentious financial services matters including regulatory investigations and disputes. He spent a year on secondment to the UK Financial Services Authority between April 1999 and April 2000.

SUI LIN TEOH  
*R&T Asia (Thailand) Limited*

Sui Lin Teoh is a partner at R&T Asia (Thailand) Limited (a member firm of the Rajah & Tann Asia network). She was a founding member of the Bangkok office and its former managing partner. She graduated with a Bachelor of Laws from the University of London and is a qualified solicitor in England and Wales. She has more than 24 years’ experience in Thailand, acting for a broad range of corporate and financial clients, and advising on general corporate and commercial, consumer protection, insurance and employment matters in Thailand. She straddles the Thai and international business communities effectively as a result of her bilingual skills and her training in England. She also possesses the unique ability to communicate Thai law advice in a way that is accessible and comprehensible to international clients.
José Félix Velasco joined Uría Menéndez in Madrid in 2017. His practice focuses on M&A, financial regulatory and corporate law. He has been involved in some of the most significant transactions in Spain in recent years.
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

BAKER MCKENZIE
Avenida Andrés Bello 2457, Piso 19
Providencia, 7510689
Santiago
Chile
Tel: +56 2 2367 7000
leon.larrain@bakermckenzie.com
joseignacio.berner@bakermckenzie.com
www.bakermckenzie.com

PAUL HASTINGS (EUROPE) LLP
100 Bishopsgate
London EC2N 4AG
United Kingdom
Tel: +44 20 3023 5100
Fax: +44 20 3023 5109
arunrsrivastava@paulhastings.com
ninamoffatt@paulhastings.com
www.paulhastings.com

HOGAN LOVELLS
Paseo de Tamarindos 150, Piso 1
Col. Bosques de las Lomas
Cuajimalpa de Morelos
Mexico City 05120
Mexico
Tel: +52 55 5091 0000
Fax: +52 55 5091 0123/4
federicodenoriega@hoganlovells.com
aldonza.sakar@hoganlovells.com
carlos.romero@hoganlovells.com
www.hoganlovells.com

PINHEIRO NETO ADVOGADOS
Rua Hungria, 1100
01455-906 São Paulo
Brazil
Tel: +55 11 3247 6160
Fax: +55 11 3247 8600
pbarata@pn.com.br
acmartins@pn.com.br
www.pinheironeto.com.br

MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Suite 6000
Washington, DC 20006-1888
United States
Tel: +1 202 887 1500
Fax: +1 202 887 0763/4
lfischer@mofo.com
opoindexter@mofo.com
jmandell@mofo.com
www.mofo.com

PIPER ALDERMAN
Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
Australia
Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
abeatty@piperalderman.com.au
www.piperalderman.com.au

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Contributors’ Contact Details

R&T ASIA (THAILAND) LIMITED
973 President Tower, 12th Floor
Units 12A–12F
Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
Tel: +66 2 656 1991
Fax: +66 2 656 0833
sui.lin.teoh@rajahtann.com
saroj.jongsaritwang@rajahtann.com
th.rajahtannasia.com

URÍA MENÉNDEZ
Uría Menéndez – Proença de Carvalho
Praca Marquês de Pombal, 12
1250-162 Lisbon
Portugal
Tel: +351 21 030 86 00
Fax: +351 21 030 86 01
helder.frias@uria.com

Uría Menéndez Abogados, SLP
c/Príncipe de Vergara, 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 915 860 400
Fax: +34 915 860 403/4
jaime.pereda@uria.com
josefelix.velasco@uria.com
www.uria.com

WOLF THEISS
Schubertring 6
1010 Vienna
Austria
Tel: +43 1 51510 5063
Fax: +43 1 51510 665063
mimo.hussein@wolftheiss.com

Kálvin tér 12–13
1085 Budapest
Hungary
Tel: +36 1 4848 800
Fax: +36 1 4848 825
melinda.pelikan@wolftheiss.com
laszlo.lovas@wolftheiss.com
andras.mozsolits@wolftheiss.com
www.wolftheiss.com