The Consumer Finance Law Review

Third Edition

Editors

Rick Fischer, Obrea Poindexter and Jeremy Mandel

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THE CONSUMER FINANCE LAW REVIEW

THIRD EDITION

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Rick Fischer, Obrea Poindexter and Jeremy Mandel

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PREFACE

Consumer choice for financial products and services is proliferating 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 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 15 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 service companies providing a platform that enables lenders to more efficiently source capital. In other cases, regulators and courts have taken the view that the marketplace lender is using a bank partnership to take advantage of the special powers of the regulated bank, without itself being subject to such regulation. Courts and regulators are taking varying approaches to determine the rights and obligations of each entity participating in an increasingly disintermediated market.

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

In addition, increasing reliance on third-party service providers has led banking regulators to focus on banks' vendor risk management programmes. Many regulators have created an expectation that banks have 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. Now, there are a 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.

Recent 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 great 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
Washington, DC
January 2019

Chapter 1

AUSTRALIA

Andrea Beatty[1]

I OVERVIEW

Consumer financial services are heavily regulated in Australia. The laws impose licensing regimes on certain consumer financial services activities. These licensing regimes impose heavy upfront costs in order to achieve compliance prior to business or product launch.

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.

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

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.

d 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.[2]

There are no monetary or interest rate limits[3] – 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.

The NCCP Act also regulates consumer leases, which are defined as leases of goods under which:

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.[4]

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.[5] '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.[6] 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.[7] 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

2 NCC Section 5(1).

3 However, reg. 65C of the NCCP Regulations excludes credit provided to purchase, renovate or improve residential property for investment purposes (or to refinance credit provided for such purposes), where it is provided for the purpose of investment in more than one residence and is more than A$5 million in amount.

4 NCC Section 170(1).

5 Unless a specific exemption in the NCCP Regulations applies.

6 NCCP Act Sections 6 to 10.

7 NCCP Act Section 29(3).

otherSexemptions, including credit activities in connection with pawnbroking,[8] employee loans,[9] referral arrangements,[10] employment agencies providing temporary staff or locums,[11] and clerks' and cashiers' activities.[12]

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:

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

The NCC contains the following notable provisions:

a 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;[13]
b a right for consumer debtors and lessees to request variation of their credit contracts or leases if they are suffering financial hardship;[14]
c 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;[15] and
d the ability for a court to, on application by a consumer debtor or lessee, annul or reduce certain unconscionable fees and charges.[16]

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:

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

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.

f not enter into the credit contract or lease, or advise or assist the consumer to enter into the credit contract or lease, if the credit contract or lease is assessed as unsuitable.[17]

A credit contract or lease is unsuitable if it will not meet the consumer's requirements or objectives. This includes 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.[18] Responsible lending enquiries are scalable according to the nature of the credit obtained. However, in all cases, it requires at least some information about actual living expenses to be collected from the consumer, as opposed to mere reliance on benchmarks for living expenses.[19] 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.[20] 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'.[21] 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.[22] Banking deposit products, payment facilities (e.g., stored-value cards and purchased payment facilities) and most insurance contracts are 'financial products' within the meaning of the Corporations Act.[23] Credit facilities (both consumer and non-consumer) are expressly excluded from the definition of a financial product.[24]

17 NCCP Act Chapter 3.

18 *Australian Securities and Investments Commission v. Channic Pty Ltd* [No 4] [2016] FCA 1174 (*Channic*) at [1725].

19 *Channic* at [1736].

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.

23 Corporations Act Section 764A(1).

24 Corporations Act Section 765A(1)(h).

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.[25] 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).[26] 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.[27] 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.[28] 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.[29] 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. 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 laws, including the NCCP Act and the NCC (if applicable).[30] 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.

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.
30 Corporations Act Section 912A.

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:

a it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

b it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it; and

c 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[31] – 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).[32] 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.

From 4 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 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

31 Banking Act Section 5.

32 Banking Act Section 7.

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,[33] and at the time of writing one entity has successfully obtained a RADI licence.

The provision of purchased payment facilities (PPF) is banking business under Australian law and so requires 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.[34] 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.[35] The automated teller machine (ATM) system has also been designated and had an access regime imposed on it.[36]

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.[37] 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 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

33 APRA, 'Discussion Paper – Licensing: A phased approach to authorising new entrants to the banking industry', 15 August 2017, https://www.apra.gov.au/sites/default/files/Phased-licence-discussion-paper.pdf, at p. 18.

34 See http://rba.gov.au/payments-and-infrastructure/payments-system-regulation/regulations.html for links to the instruments designating, setting standards and imposing access regimes on the payment systems.

35 RBA, Standard No. 3 of 2016: Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions, Clause 4.

36 See https://www.rba.gov.au/payments-and-infrastructure/atms/regulatory-framework.html.

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.

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 regime[40] 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 others) 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]

d perform customer identification procedures on customers before starting to provide a designated service to them;[45]

e provide to AUSTRAC an annual report self-certifying compliance with the AML/CTF Act;[46]

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.
45 AML/CTF Act Section 32.
46 AML/CTF Act Section 47.

f report to AUSTRAC all international funds transfer instructions,[47] transactions involving the transfer of more than A$10,000 in physical currency[48] and certain suspicious matters;[49]
g appoint an AML/CTF compliance officer;[50]
h conduct pre- and post-employment screenings on employees;[51] and
i 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:

a the adoption of approved industry standards and codes of practice;
b the protection of consumer interests;
c community awareness of payments system issues; and
d 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[54] and to compel a person to attend an examination and answer questions under oath.[55]

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.[56]

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.

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.

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 members of 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 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

57 NCCP Act Section 47(1)(i); Corporations Act Sections 912A(1)(g) and 912A(2)(b).

58 Australian Financial Complaints Authority Complaint Resolution Scheme Rules – 1 November 2018, rule A14.2 (https://www.afca.org.au/public/download.jsp?id=6893).

59 http://www.apra.gov.au.

corporate penalty in Australian history when it imposed a 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 outlined 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 payment facilities, gift card, scheme facilities and prepaid mobile facilities.[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.[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.[68] The payment systems that have currently been designated and that

60 See *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Commonwealth Bank of Australia Ltd* [2018] FCA 930.
61 https://www.accc.gov.au/about-us.
62 See https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors.
63 See https://www.rba.gov.au/payments-and-infrastructure/payments-system.html for further information.
64 See https://www.nppa.com.au/ for more information about the NPP.
65 Corporations Act Section 763D(2).
66 ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211.
67 Corporations Regulations 2001 (Cth) regulation 7.1.07G.
68 PSR Act Section 11.

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.[69]

Standards issued by the RBA govern (1) 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[70] and interchange fees for debit card transactions must not exceed A$0.015 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);[71] and (2) merchant pricing – merchants are prohibited from imposing surcharges for card transactions greater than their cost of acceptance for those card transactions.[72]

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:

a the PPF may be a banking business under the Banking Act and Banking Regulations.[73] A provider of a PPF may only engage in ‘banking business’ if it is an ADI regulated by APRA; and

b the holder of stored value (as defined by the PSR Act)[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.[75]

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

a the facility is purchased by a person from another person;

b 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

c 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]

69 See https://www.rba.gov.au/payments-and-infrastructure/atms/regulatory-framework.html.

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.

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.

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

73 See Section 5 of the Banking Act and reg. 6 of the Banking Regulations.

74 PSR Act Section 9(1)(c).

75 PSR Act Section 22.

76 Payment Systems (Regulation) Act 1998 (Cth) (PSR Act) Section 9.

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 Code[78] 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]

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

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.

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 current direct entry system are:[82]

a speed – the NPP provides near instantaneous settlement;

b continuous availability – the NPP is available all day, every day (as opposed to settlement only during business hours);

c data capability – the NPP enables more information to be sent with payments; and

d 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.[83]

The NPP became publicly available in 2018.

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.[84] 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.

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 the global financial crisis, 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

82 NPP Australia Ltd, Frequently asked questions (webpage), http://www.nppa.com.au/more-information/frequently-asked-questions/.

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.

interest up to the date of the ADI being declared insolvent,[85] up to a limit of A$250,000 for all accounts held with that ADI.[86] 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.[87]

RADIs are not able to rely on the FCS[88] to exit the industry if they do not proceed to a full ADI licence within two years. However, 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'.[89] 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.

If the deposit terms include an obligation that the deposit account must always be in credit, fees imposed for incidental overdraft credit could risk being characterised as contractual penalties and be voided.[90] Therefore, deposit terms should not include an obligation to maintain a credit balance.

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.[91] The Commonwealth Treasury has published draft legislation setting out a consumer data right framework in which data 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 current plans being for the four major banks to be required to provide data about deposit, credit and debit card, and transaction accounts by 1 July 2019 and mortgages by 1 February 2020. Other

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).

90 See *Andrews v. Australia and New Zealand Banking Group Limited* (2012) 247 CLR 205, [79] to [82].

91 Commonwealth Treasurer, media release, 9 May 2017, http://sjm.ministers.treasury.gov.au/media-release/044-2017/.

banks will be required to provide data within 12 months after the four major banks for the relevant account type. After banking, telecommunications and energy have been flagged as the next sectors to be subject to a consumer data right.[92]

While the legislation to implement a consumer data right in banking is yet to be enacted, 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 reasoned that it will 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.[93]

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.[94]

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 contract[95] of the total number of repayments, frequency of repayments and the total amount of repayments, even if these amounts are ascertainable.

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.[96] The maximum period for a statement of account for a credit card contract is 40 days.[97]

92 See https://static.treasury.gov.au/uploads/sites/1/2018/05/t286983_consumer-data-right-booklet.pdf.
93 NCC Section 204.
94 NCC Section 6(5); NCCP Regulations regulation 51.
95 NCC Section 17(7).
96 NCC Section 32B(8).
97 NCC Section 33(2)(a).

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.[98] 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[99] – 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 2 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.*[100]

A guarantee in relation to a continuing credit 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 can only be increased at the request of or with the written consent of the debtor.[101] 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.[102]

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.[103]

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.[104] 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.[105]

The NCC requires that a credit advertisement[106] 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

98 NCC Section 33(2).
99 NCC Section 13A.
100 NCC Section 33(3).
101 NCC Section 67(4).
102 See NCCP Act Part 3-2.
103 NCC Section 46.
104 NCC Section 91. See pp. 13, 387 and 388 of Annotated National Credit Code by Andrea Beatty and Andrew Smith, LexisNexis, 5th edition, 2014.
105 NCC Section 91(2)(a).
106 As defined in NCC Section 159.

and other fees and charges. It is to enable consumers to compare the costs of competing loan products.[107] However, advertisements for continuing credit contracts need not provide a comparison rate.[108]

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'.[109] 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;[110]

b a credit provider must not enter into a credit card contract unless a Key Facts Sheet has been provided to the prospective debtor;[111]

c a credit provider must not invite a debtor to request an increase in the credit limit of a credit card contract;[112] 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;[113]

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;[114]

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;[115]

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[116] (this is best done by including those fees and interest in the contract document provided to the debtor);

h 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.[117]

107 See [157.10] of Annotated National Credit Code by Andrea Beatty and Andrew Smith, LexisNexis, 5th edition, 2014.
108 NCC Section 158.
109 NCCP Act Section 133BA.
110 NCCP Act Section 133BC; NCCP Regulations Schedule 6.
111 NCCP Act Section 133BD.
112 NCCP Act Sections 133BE.
113 NCCP Act Sections 133BF and 133BFA.
114 NCCP Act Section 133BFB.
115 NCCP Act Section 133BH.
116 NCCP Act Section 133BI.
117 NCCP Act Section 133BQ.

i 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;[118] and

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

ii 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) commence 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.[119] ASIC has determined the prescribed period to be three years.[120]

VI INSTALMENT CREDIT

i Overview

Instalment credit contracts under the NCCP Act and NCC are regulated credit contracts other than continuing credit contracts.[121] 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.[122] The contract document must contain the following information:[123]

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;

d 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;

118 NCCP Act Sections 133BT and 133BU.

119 NCCP Act Sections 131(3AA), 133(3AA) and 160F.

120 ASIC Credit (Unsuitability – Credit Cards) Instrument 2018/753.

121 See definition of 'continuing credit contract' in NCC Section 204.

122 NCC Section 14.

123 NCC Section 17; NCCP Regulations regulation 74, Forms 6 and 7.

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.[124] 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.[125] 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.[126] 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.

124 NCCP Act Section 16; NCCP Regulations.
125 NCCP Regulations reg. 72.
126 NCC Section 32B.

Calculating interest

Generally, interest must be calculated by applying a daily percentage rate to the unpaid balance.[127] 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:[128]

$$\text{unpaid daily balance} \times \frac{\text{APR}}{365}$$

The unpaid daily balance for a day under a credit contract is the unpaid balance under the contract at the end of that day.[129] 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.[130]

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:[131]

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

Interest can be calculated at monthly, quarterly or biannual rests using the average daily balance during the period.[132]

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).[133]

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.[134]

Unpaid interest charges for a period may be added to the unpaid daily balance immediately after the end of that period.[135] 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.[136]

127 NCC Section 28.
128 NCC Section 28(1)(a).
129 NCC Section 27.
130 NCC Section 27.
131 NCC Section 28(1)(b).
132 NCC Section 28(2).
133 NCC Section 29.
134 NCCP Regulations reg. 78.
135 NCC Section 29.
136 NCC Section 34(6)(a).

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.[137]

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.[138] 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.[139]

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.[140] 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.[141]

Security interests

The NCC defines 'mortgage' to include any interest in, or power over, property to secure obligations under a credit contract.[142] 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).[143]

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.[144] 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.[145] Further, security interests in property to be owned by the provider of the security

137 NCC Section 30.
138 NCC Section 28(1).
139 NCC Section 28(2).
140 NCC Section 30.
141 NCC Section 93.
142 NCC Section 204.
143 NCC Sction 42.
144 See Personal Property Securities Act 2009 (Cth) Part 2.2.
145 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.[146]

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.[147]

Security interests may not be taken over the following types of property:

a employees' remuneration or employment benefits;

b superannuation benefits;

c essential household property;

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

e a cheque, bill of exchange or promissory note endorsed or issued by the debtor or guarantor.[148]

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.[149]

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.[150] 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.[151]

146 NCC Section 45.

147 NCC Section 48.

148 NCC Section 50.

149 See NCC Part 5 Division 4.

150 NCCP Act Section 133AD; NCCP Regulations regulation 28LB, Schedule 5.

151 For example, Section 57(3)(d) of the Real Property Act 1900 (NSW) requires one month's notice to be allowed.

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.[152]

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.[153] 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.[154]

Loan serviceability

Before entering into a credit contract or increasing the credit limit of a credit contract, a credit provider must make reasonable enquiries into the consumer's financial situation and verify information about it. 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.[155]

Student loans

For Australian citizens,[156] the government makes available the Higher Education Loan Program,[157] 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$51,957 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.

ii Recent developments

Commission arrangements in car finance

For some time, ASIC had expressed concerns about flex-commission arrangements in car finance – arrangements whereby a broker (usually the car dealer) is empowered to vary the interest rate on a vehicle finance loan and the amount of commission receivable by them depends on the interest rate charged to the borrower. ASIC was concerned that flex-commission arrangements have an inherent conflict of interest that disadvantages consumers because brokers will be inclined to maximise the interest rates charged to consumers in order to maximise their own commissions. Following recent law reform, credit providers (and certain other persons) are prohibited from giving benefits to an intermediary in circumstances where

152 NCC Sections 82-83.
153 NCC Section 88.
154 NCC Section 93.
155 NCCP Act Part 3-2.
156 And also holders of a New Zealand Special Category Visa or permanent humanitarian visa.
157 Under the Higher Education Support Act 2003 (Cth).

the intermediary can determine, propose or influence the interest rate payable on the credit contract.[158] Credit providers (and certain other persons) are also prohibited from paying benefits to intermediaries where the intermediaries are empowered to charge consumers fees for procuring the credit greater than an amount determined by the credit provider (or other relevant person).

While the prohibition on flex-commissions is phrased generally and applies to all credit other than home loans, the reform is clearly targeted at commission arrangements in the car finance market.[159]

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 and 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 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.[160] 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 proposed product intervention power (discussed in Section VII) if such a power is successfully legislated for. 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.

158 ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 (Cth).

159 ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 Explanatory Statement.

160 ASIC, 'Report 600: Review of buy now pay later arrangements' (November 2018).

VII OTHER AREAS

The NCCP Act and the NCC were amended with effect from 2013 to introduce concepts of small amount credit contracts (SACCs),[161] medium amount credit contracts (MACCs)[162] and reverse mortgages.[163] SACCs are credit contracts that are:

a not provided by an ADI;

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.[164]

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.[165]

A reverse mortgage[166] 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. Reverse mortgages are relatively new in Australia. The NCCP Act and the NCC prescribed different requirements for reserve mortgages in relation to precontractual conduct, contract disclosures and procedures during the loan term.[167]

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.[168] 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.[169] 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).[170]

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

161 NCCP Act Section 5(1).

162 NCC Section 204.

163 NCC Section 13A.

164 NCCP Act Section 5(1); NCCP Regulations regulation 4D.

165 NCC Section 204.

166 NCC Section 13A. See [13A.05] to [13A.80] of Annotated National Credit Code by Andrea Beatty and Andrew Smith, LexisNexis, 5th edition, 2014.

167 See [13A.30] to [13A.45] of Annotated National Credit Code by Andrea Beatty and Andrew Smith, LexisNexis, 5th edition, 2014.

168 Section 31A(3).

169 NCC Section 32A(4).

170 NCC Section 39B.

the consumer would exceed 20 per cent of the consumer's gross income for a payment cycle during the life of the loan;[171] (2) has been a debtor under two or more SACCs within the 90 days preceding the preliminary responsible lending assessment;[172] or (3) is in default under another SACC.[173]

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 amount of credit, a credit contract is deemed to be unsuitable for a consumer if it forms part of an arrangements under which that amount of credit is provided by two or more SACCs or MACCs.[174]

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.[175]

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.[176]

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.[177] 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.[178] 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.

171 NCCP Regulations regulation 28S.
172 NCCP Act Sections 118(3A)(b), 119(3A)(b), 131(3A)(b).
173 NCCP Act Sections 118(3A)(a), 119(3A)(a), 131(3A)(a).
174 NCCP Regulations regulation 28XXF.
175 NCC Section 127.
176 NCC Sections 128 and 129.
177 NCC Section 130.
178 NCC Sections 131 and 133.

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).[179]

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 particular insurer or make unreasonable requirements as to the terms on which the debtor or guarantor is required to obtain insurance.[180] It also prevents a credit provider from financing insurance premiums for more than one year at a time.[181]

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.[182]

Facilitating innovation in consumer finance

ASIC has issued two legislative instruments[183] 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:

a 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

b providing financial product advice about or dealing in:
- a non-cash payment facility issued by an ADI;
- a home contents insurance product where the sum insured under the product does not exceed A$50,000;
- a personal and domestic property insurance product where the sum insured under the product does not exceed A$50,000;
- a managed investment product in relation to a simple managed investment scheme;

179 See ASIC Report 492, 'A market that is failing consumers: The sale of add-on insurance through car dealers' (September 2016).

180 NCC Section 133.

181 NCC Section 144.

182 NCC Section 148.

183 ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 and ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176.

- a quoted security; or
- Commonwealth (federal) government securities (i.e., bonds).

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.

In October 2017, draft legislation and regulations were published by the Commonwealth treasury for public comment and feedback that, if enacted, would increase the length of the regulatory sandbox exemption to two years and expand the range of credit activities and financial services that would qualify for the exemption.[184] At the time of writing, the consultation period has closed but no action has been taken to enact the draft legislation and regulations.

Financial product design and distribution obligations

There is currently legislation[185] before the Commonwealth Parliament which, if enacted, 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.

If enacted, this would represent a significant change in the approach to the regulation of financial services in Australia. Historically, and still to a large extent today, financial services regulation was concerned with ensuring adequate disclosure so that clients could make properly informed decisions about financial products and services, rather than the design of financial products and services. These new obligations require issuers of financial products to design products that are appropriate for their target market, rather than leaving it to clients to determine what is appropriate for them.

Product intervention power

The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Cth) also contains a power for ASIC, in relation to credit products regulated by the NCCP Act and financial products available 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. ASIC will be required to consult before making a product intervention order. Product intervention

184 See https://treasury.gov.au/consultation/c2017-t230052/.

185 Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers Bill 2018 (Cth).

orders can remain in force for a maximum of 18 months, unless extended by the Minister (including for an indefinite period of time). As with the design and distribution obligations discussed above, the product intervention power, if enacted, will signal a change in the principles underlying financial services regulation from simply ensuring that consumers are able to make properly informed decisions to preventing consumers from being able to make decisions that may be harmful to them.

Royal commission inquiry

A royal commission – a commission of inquiry by the executive government with extensive powers to compel the production of documents and examine witnesses – into misconduct in the financial services industry is in progress at the time of writing.[186] Its terms of reference require it to investigate not only contraventions of the law, but also conduct and practices which 'fall[s] below community standards and expectations'. The royal commission's hearings throughout 2018 exposed a number of instances of misconduct in the financial services industry, which its interim report attributed to 'greed – the pursuit of short term profit at the expense of basic standards of honesty'.[187] The royal commission's final report is due to be released in February 2019, and it appears that it will recommend more vigorous enforcement of existing laws rather than the creation of new laws which would further complicate the regulation of consumer financial services.[188]

VIII 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 royal commission inquiry, it is likely that regulators will adopt a more aggressive approach to enforcing the laws regulating consumer financial services.

186 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

187 id., Interim Report (Executive Summary), https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-exec-summary.pdf.

188 ibid..

Chapter 2

AUSTRIA

Gerhard Dilger and Mimo Hussein[1]

I OVERVIEW

Consumers – in particular borrowers – are very well protected in Austria. The rules protecting consumers directly and indirectly are enforced by the Austrian Financial Market Authority (FMA). The FMA's consumer protection activities in 2018 generally focused again on digitalisation aspects and integrated supervision of companies.[2] 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:

a Federal Act concerning the Distance Marketing of Consumer Financial Services implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

b Federal Act Establishing Provisions for the Protection of Consumers (KSchG) implementing: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council; and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

c Federal Act on Off-Premises and Distance Contracts (FAGG) implementing Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

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1 Gerhard Dilger is a consultant and Mimo Hussein is a senior associate at Wolf Theiss.

2 Supervisory and Audit Priorities 2018. FMA. Page 12 et seq.

d Federal Act concerning Consumer Credits (VKrG) implementing Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

e Federal Act concerning Consumer Credits with respect to Mortgages (HiKrG) implementing Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

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)[3] 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

3 The Federal Act on the Provision of Payment Services 2018 has come into force on 13 January 2018 – implementing Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (Payment Services Directive II – PSD2).

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

Financial technology start-ups (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.[5]

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

4 https://www.bankenverband.at/presse/presseinformationen/presseaussendungen/die-zukunft-ist-in-wien-internationale-fintech-szene-trifft-sich-vom-16-23.11.2018-zur-vienna-fintechweek/; download 2.12.2018.

5 https://diepresse.com/home/wirtschaft/boerse/5441741/Zum-ersten-Mal-erhaelt-ein-FinTech-in-Oesterreich-eine-FMALizenz; download 2.12.2018.

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.[6] 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.[7]

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).[8]

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.

6 Explanation to the Government Proposal for Deposit Guarantee and Investor Compensation Act, 686 of the attachments, 25th period page 2 of 21 et seq.

7 https://derstandard.at/2000090990688/Einlagensicherung-Austria-startet-2019-mit-einer-halben-Milliarde; download 3.12.2018.

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 invalid[11] 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.

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

The 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.[13] 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.

13 C-375/15.

Another important case[14] 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 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.

14 4R 129/15t.

Chapter 3

BELGIUM

Pierre E Berger and Pauline Kustermans[1]

I OVERVIEW

Consumer finance law generally refers to all laws and regulations governing the retail financial services industry. They cover a broad range of financial products and services for consumers, such as payments, savings, credit, investments and insurance.

The Belgian legislator (as well as legislators worldwide) has long been of the opinion that protective and corrective legislative measures should be put in place to address a consumer's inferior position (as opposed to businesses) with regard to knowledge, expertise and experience in the financial sector. Particularly in the aftermath of the financial crisis of 2007–2008, Belgian policymakers have been focusing on stronger consumer protection, together with better financial education, in order to achieve financial stability.[2] Considering the significant potential detriment that financial services can cause to individual consumers and to the financial markets, improved protection for consumers in financial markets is also a key preoccupation of the European Union.[3]

For the past decade, the traditional consumer finance landscape has been challenged by new digital technologies. In particular, constant developments in the area of financial technology (fintech) are fundamentally changing the financial services industry.[4] Fintech uses technology to provide products and services in the financial sector and reshapes the way these products and services are structured, provisioned and consumed.[5] Fintech offers many advantages: it enhances customer experience (faster, better, cheaper); it introduces new ways to provide and make use of financial products and services (e.g., mobile payments, online lending platforms and automated advice); it enhances the availability and accessibility of financial products and services (24/7 via the internet, the cloud); it improves efficiency, etc. The fintech evolution has also opened the door to new players in the financial sector (i.e., fintech companies) that are challenging the traditional players (particularly banks) and their monopoly in the financial sector. While some of these fintech companies disrupt the

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1 Pierre E Berger is a partner and Pauline Kustermans is an associate at DLA Piper.

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

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

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

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

traditional European financial market (the disruptors), there are also many fintech companies that act as enablers and can thus be of service to the traditional financial players. There are more and more initiatives in the Belgian and European market involving cooperation between the traditional financial players and fintech companies. This allows fintech companies to benefit from the traditional players' extensive customer base and expertise with complex regulation, while the traditional players can get an insight into new findings in the field of technology and consumer experience in order to improve their products and services. Some authors, regulators and governments (including the Belgian ones) therefore prefer to refer to 'tech for fin' instead of 'fintech'.

While the traditional financial players and the fintech companies have shifted their focus to cooperation instead of competition, a bigger threat for the banks may be posed by the tech giants such as the GAFA (Google, Amazon, Facebook and Apple). Historically these companies have stayed away from offering (regulated) financial services. However, over the past few years, they have surely entered the financial services sector. For example, Amazon offers various services enabling payments, lending and cash deposits and only recently, in 2018, Apple launched Apple Pay in Belgium. The solutions offered by these big technology companies are also referred to as 'techfin'.

Belgium has historically led the way in new technologies supporting the financial sector, particularly with regard to electronic banking (Bancontact, Isabel, Swift, MasterCard). However, in January 2016, the Belgian High Level Expert Group on the Future of the Belgian Financial Sector expressed the need for Belgium to foster an environment that stimulates the growth of fintech in order for Belgium to maintain its leading position.[6] As such, the High Level Expert Group invited the Belgian financial regulators[7] to assess the desire for a light-touch regulatory regime in order to lower the barriers to entry for new players. The Financial Services and Markets Authority (FSMA) and the National Bank of Belgium (NBB) have also recognised the benefits of fintech and identified it as an important focus of their supervisory activities. In this regard, the FSMA and the NBB have opened a fintech portal on their websites in order to support a direct dialogue between the regulators and companies in the innovative financial technology sector (whether start-ups or established firms).[8] Moreover, since 2015, the FSMA has been chair of the Financial Innovation Standing Committee of ESMA.[9] One of the other recommendations of the High Level Expert Group resulted in B-Hive, the successor of Eggsplore (founded by Jürgen Ingels and with Wim De Waele as CEO). B-Hive, supported by the Belgian government, is a European collaborative innovation fintech platform that brings together major banks, insurers and market infrastructure players. B-Hive aims to put Brussels on the map as the smart gateway to Europe and leverages on the opportunities offered by the digital transformation for the financial services industry.[10]

Given the many benefits and opportunities that come with the digital transformation, the Belgian regulator is keen to promote the development of the fintech sector. However, the area of financial services (including consumer finance) remains complex and measures to ensure consumer protection and financial stability are still required. Moreover, legislation

6 Report of the High Level Expert Group, The Future of the Belgian Financial Sector, Brussels, 13 January 2016, 53.
7 The Financial Services and Markets Authority (FSMA) and the National Bank of Belgium.
8 www.fsma.be/en/Supervision/finbem/fintech.aspx.
9 European Securities and Markets Authority.
10 https://b-hive.eu/about-us.

is often not yet adapted to new technologies. Hence, the regulator is challenged to ensure sufficient regulation and supervision. Digital innovations in the financial services sector also raise new concerns with regard to security (particularly in terms of fraud, identity theft and cybercrime). The Belgian regulator faces the challenge of finding a balance between a supportive approach, (i.e., encouraging digital innovation in the financial industry) and a protective approach (i.e., ensuring consumer protection and financial stability).[11]

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The regulatory framework for financial services is largely harmonised at the European level by means of directives and regulations. Hereinafter, the focus will be on consumer payment, deposit and lending services.

Payment services

For some time, the main piece of EU legislation governing the retail payments market was the Payment Services Directive[12] (PSD1). This directive established the same set of rules on payments across the whole European Economic Area, covering all types of electronic and non-cash payments such as credit transfers, direct debits, card payments, and mobile and online payments. The directive also laid the groundwork for the single euro payments area, which allows consumers and businesses to make payments under the same conditions across the euro area.[13]

PSD1 has been repealed and replaced by the Second Payment Services Directive[14] (PSD2), which entered into force on 13 January 2018. PSD2 is complemented by Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transaction. PSD2 aims to respond to the significant technical innovations in the retail payments market and the emergence of new types of payment services. It includes provisions to make it easier and safer to use internet payment services, better protect consumers against fraud, abuse, and payment problems, and promote innovative mobile and internet payment services.[15]

PSD2 has been transposed into Belgian law by means of the Payment Services Regulations:

a Title 3 'Payment Services' of Book VII 'Payment and Credit Services' of the Code of Economic Law; and

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

12 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2017 on payment services in the internal market.

13 https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/payment-services/payment-services_en.

14 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

15 https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/payment-services/payment-services_en.

b the Act of 11 March 2018 on the status and supervision of payments institutions and electronic money institutions, access to the activity of payment service provider and the issuance of electronic money and the access to payments systems.

Deposit-taking

The business of taking deposits or other repayable funds from the public is regulated at the EU level by the Capital Requirements Directive.[16] This directive has primarily been transposed into Belgian law by means of the Act of 25 April 2014 on the status and the supervision of credit institutions and listed companies (the Banking Act).

Persons or undertakings that are not (duly authorised) credit institutions are generally prohibited from taking deposits or other repayable funds from the public. Credit institutions are undertakings whose business is to take deposits or other repayable funds from the public and to grant credits for their own account. Attention is drawn to the two cumulative criteria, taking deposits and granting credit, which represent the core activities of credit institutions.

Consumer lending services

Consumer credit is any credit, regardless of the name or form, that is being granted to a consumer, except mortgage credit. For a long time consumer credit laws and regulations were only partially harmonised at the EU level by means of Directive 2008/48 on credit agreements for consumers. Differences in national laws regulating consumer credit led to distortions of competition among creditors in the European Union and created obstacles to the internal market. In order to facilitate the emergence of a well-functioning EU market in consumer credit, the Consumer Credit Directive[17] was adopted and entered into force on 11 June 2011.

Mortgage credit generally refers to any credit secured by a mortgage security. Due to its specific nature and differences in national and regional immovable property markets, it was long considered appropriate to exclude mortgage credit from the scope of EU legislation and have this regulated at national level. The financial crisis, however, has shown that irresponsible behaviour by market participants can undermine the foundations of the financial system, leading to a lack of confidence among all parties, in particular consumers, and potentially severe social and economic consequences with potentially significant macroeconomic spill-over effects. In order to facilitate the emergence of a smoothly functioning EU market with a high level of consumer protection in the area of credit agreements relating to immovable property and in order to ensure that consumers looking for such agreements are able to do so confident in the knowledge that the institutions they interact with act in a professional and responsible manner, the Mortgage Credit Directive[18] was adopted which entered into force on 21 March 2016.

The Consumer Credit and the Mortgage Credit Directives have been transposed into Belgian law by means of Title 4 'Credit Agreements' of Book VII 'Payment and Credit Services'

16 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

17 Directive 2008/48 of the European Union and of the Council of 23 April 2008 on credit agreements for consumers.

18 Directive 2014/17 of the European Union and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

of the Code of Economic Law (the Credit Regulations). The rules on consumer credit can be found in Chapter I of the Credit Regulations (the Consumer Credit Regulations). The rules on mortgage credit can be found in Chapter II of the Credit Regulations.

ii Supervision

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

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

The NBB is responsible for ensuring the macro- and microeconomic stability of the financial system. As such, the NBB is also responsible for the individual prudential supervision of the financial actors that may hold client money (including credit institutions and payment institutions).

The FSMA is responsible for:

a overseeing financial markets and supervising company information;
b supervising financial products;
c supervising compliance by financial institutions with the rules of conduct;
d supervising a wide range of financial service providers and intermediaries;
e contributing to the financial education of savers and investors; and
f supervising supplementary pensions.[19]

Among others, the FSMA is responsible for the supervision of consumer and mortgage credit providers.

The NBB and the FSMA have wide powers and competences for the purposes of carrying out their supervisory tasks:[20]

a The NBB and the FSMA can issue regulatory instruments, such as circulars and communications, to explain and interpret legislation. With these regulatory instruments, the NBB and the FSMA indicate how they will apply the rules.
b The NBB and the FSMA can impose a variety of preventive and corrective measures.
c The NBB and the FSMA can ask undertakings under their supervision to provide relevant documentation and information, and can conduct on-site inspections in order to verify compliance with all the rules (including by the use of mystery shoppers).
d Where a financial service provider (e.g., payment institution or creditor) offers services without the required registration or authorisation, the NBB and the FSMA can publish a warning to advise the public.
e If the NBB and the FSMA determine that a financial service provider no longer fulfils the conditions for registration or authorisation, they may take administrative measures. The most severe measure is revoking the authorisation (whereby the undertaking may no longer carry out its activities).
f The NBB and the FSMA can also impose administrative sanctions (such as fines and other penalties) for infringements of financial legislation.

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

The FPS Economy

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

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

III PAYMENTS

i Overview

The provision of payment services is a regulated activity. First, this means that providers of payment services need to obtain authorisation from the NBB (or the competent authority of the home Member State). Such authorisation is valid for the whole of the European Economic Area. In addition, the Payment Services Regulations lay down rules about the information that providers have to give to consumers and about the rights and obligations linked to the use of payment services.

The Payment Services Regulations provide for a limited list of regulated payment services:

a services enabling cash to be placed on a payment account and all the operations required for operating a payment account;

b services enabling cash withdrawals from a payment account and all the operations required for operating a payment account;

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

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

e issuing of payment instruments or acquiring payment instruments;

f money remittance;

g payment initiation services; and

h account information services.

The last two services (payment initiation services and account information services) have been newly introduced by PSD2 in order to keep up with technological developments in the payments area:

a Payment initiation services play a part in e-commerce payments by establishing a software bridge between the website of the merchant and the online banking platform of the payer's account servicing payment service provider in order to initiate internet payments on the basis of a credit transfer. They enable the payment initiation service provider to provide comfort to a payee that the payment has been initiated in order to provide an incentive to the payee to release the goods or to deliver the service without undue delay.

b Account information services provide the payment service user with aggregated online information on one or more payment accounts held with one or more other payment service providers and accessed via online interfaces of the account servicing payment service provider. The payment service user is thus able to have an overall view of its financial situation immediately at any given moment.

These services raise a series of legal issues, such as consumer protection, security and liability as well as competition and data protection issues, in particular regarding protection of the payment service users' data. In order to address those issues, these services are now also included within the scope of PSD2, which allows the competent authorities to better monitor and supervise the activities.

In order to enable payment service providers to provide payment services, it is indispensable that they have the possibility to open and maintain accounts with credit institutions. Under PSD2, credit institutions are required to grant payment institutions access to their payment accounts services on an objective, non-discriminatory and proportionate basis. Such access must be sufficiently extensive as to allow payment institutions to provide payment services in an unhindered and efficient manner.

ii Recent developments

Merchants are no longer permitted to charge an additional cost for payments with a debit or a credit card. The Act of 19 July 2018 amends Book VII of the Code of Economic Law 'Payment and Credit Services' *inter alia* to completely ban the surcharge for the use of payment instruments (with effect from 9 August 2018).[21] The surcharge prohibition applies, regardless of the type of payment instrument, to both in-store and online purchases, including transactions using debit cards, credit cards, payment cards issued by three-party schemes and other means of payment (e.g., non-EUR direct debits).

21 P Berger, Attention! The implementation of PSD II in Belgium is now final, https://inform.dlapiper.com/20/864/uploads/psdii.pdf.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Access to banking services

In modern society, having a payment account is indispensable for consumers' day-to-day lives. A payment account enables consumers to make and receive payments, purchase goods or services online, pay bills, obtain credit, etc.[22] Hence, when people are excluded from having a payment account, they are isolated from society.

In 1996, the banks in Belgium already adopted the 'Charter regarding a basic banking service'. With this Charter the banks (voluntarily) agreed that any person who is domiciled in Belgium could open an account and engage themselves to offer the 'basic banking service'. This basic banking service included the execution of transfers, enabling cash deposits and withdrawals, and issuing bank statements.[23]

In 2001, the Belgian legislator considered that the right to financial services, in particular the access to financial banking services, is a fundamental right and that it should be guaranteed by law.[24] Consequently, on 24 March 2003 the Act on the implementation of a basic banking service was adopted, which ensured the offering of basic banking services free of charge.

Today the rules on the basic banking service can be found in Chapter 8 'Basic Banking Service' of Title 3 'Payment Services' of Book VII 'Payment and Credit Services' of the Code of Economic Law. In accordance with Article VII.57 of the Code of Economic Law, every credit institution is required by law to offer the basic banking service and every consumer is entitled to the basic banking service. The basic banking service includes:

a services enabling cash to be placed on a payment account and all the operations required for operating a payment account;

b services enabling cash withdrawals from a payment account and all the operations required for operating a payment account; and

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

The annual fee charged for the basic banking service may not exceed €16.20.[25]

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

a already has a basic banking service;

b already has a payment account (even with another credit institution);

c already has an account or accounts for a total amount exceeding €6,000 per year; or

d has committed fraud, misuse of trust, fraudulent bankruptcy, forgery or money laundering.

22 Directorate General for Internal Policies, Basic banking service, Brussels, European Union, 2011, 8 (www.europarl.europa.eu/activities/committees/studies).

23 Memorie van Toelichting, Parl. St. Kamer, Doc 50 1370/001, 4.

24 id.

25 Subject to indexation.

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

Deposit guarantees

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

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

Overdrafts

Overdrafts allow consumers to draw down funds that exceed the current balance in the consumer's current account. If the overdraft has been explicitly agreed, it is called an 'overdraft facility'. If the overdraft has been tacitly accepted (without an explicit agreement) it is called 'overrunning'. Qualifying as a consumer lending service, overdrafts fall within the scope of application of the Credit Regulations,[26] albeit under a light-touch regime.

In case of overrunning, the law requires a creditor to notify the consumer when the overrunning exceeds €1,250 and lasts more than a month. If the overrunning has not been repaid within three months, the creditor is obliged to suspend any drawdowns under the credit facility and put an end to the credit agreement, or conclude a new credit agreement providing for a higher total amount of credit.

ii Recent developments

Access to banking services

On 22 December 2017, the Act amending and implementing provisions regarding payment accounts and payment services in various books of the Code of Economic Law was adopted. This act transposes Directive 2014/92/EU of the European Parliament and of the Council

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

of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. Chapter 8 'Basic Banking Service' has been amended with a view to transposing Chapter IV of the directive into Belgian law. Among other things, there is now an explicit requirement for credit institutions not to discriminate against consumers on the grounds of their nationality or place of residence, or by reason of racism or xenophobia. Furthermore, the requirements for holding a payment account with basic features should be in no way discriminatory. This means that access to basic banking services should be ensured irrespective of the consumers' financial circumstances, such as their employment status, level of income, credit history or personal bankruptcy.

PSD2

In order to enable payment institutions to provide payment services, it is an indispensable requirement that they can open and maintain accounts with credit institutions.[27] Under PSD2, credit institutions are required to grant payment institutions access to their payment accounts services on an objective, non-discriminatory and proportionate basis. That access must be sufficiently extensive to allow payment institutions to provide payment services in an unhindered and efficient manner.

V REVOLVING CREDIT

i Overview

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

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

The Credit Regulations require the implementation of a 'zero setting' for both revolving consumer credit and revolving mortgage credit agreements of indefinite duration or with a term of more than five years. In particular, such credit agreements will have to provide for a term by which the total amount of the credit facility must be repaid.[28] The zero setting term will restart upon the first drawdown following the last zero setting.

27 Recital 39 PSD2.

28 Article 14, Section 3 of the Royal Decree of 16 September 2016 on the costs, percentages, duration and repayment methods of credit agreements subject to Book VII of the Code of Economic Law sets the

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

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

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

VI INSTALMENT CREDIT

i Overview

Instalment credit is defined as any credit agreement, regardless of the name or form, whereby a creditor makes available to a consumer money or any other payment means and the consumer has to repay the credit in periodic payments. A typical example is a car financing agreement whereby the consumer obtains a credit that allows the consumer to purchase a car and stretch out the repayment over a longer period of time by instalments. Another example of an instalment credit is a student loan that allows students to pay their tuition fees in instalments. However, student loans are less common in Belgium because of the low tuition fees. Mortgage credits will generally have to be repaid by instalments and thus qualify as instalment credit. For example: traditional home loans (i.e., a credit intended for purchasing a house whereby the credit has to be repaid by monthly payments over a period of 30 years).

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

maximum terms for zero setting.

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

ii Recent developments

Peer-to-peer lending

Peer-to-peer lending (P2P lending), a major trend in the fintech industry, generally refers to the practice whereby lenders and borrowers are directly matched through an online platform (without the need for an intermediary financial institution). In Belgium, however, P2P lending as such is still prohibited. First, persons or undertakings that are not credit institutions are generally prohibited from taking deposits or other repayable funds from the public. In addition, in accordance with current case law, persons who regularly borrow money to consumers by means of P2P lending will likely be subject to the specific licensing and registration requirements for creditors.[29]

VII UNFAIR PRACTICES

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

First there is Book VI Market practices and consumer protection of the Code of Economic Law (Book VI), which implements Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and Directive 2011/83/EU on consumer rights. Book VI can be considered to constitute the *lex generalis* in relation to specific consumer finance laws and regulations. Book VI has provisions on advertising, (pre-contractual) information requirements, misleading and aggressive commercial practices and unfair contractual terms.

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

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

29 Gilis, D, 'Online peer-to-peer lending: op zoek naar een passend wetgevend kader', RBF-BFW, 2016/2, pp. 161 to 174.

VIII RECENT CASES

i Enforcement actions

There is no publicly available information about any recent enforcement actions by the FSMA or the NBB against institutions for breach of consumer finance laws and regulations.[30]

ii Disputes before the regulator

There is no publicly available information about any significant recent complaints brought by or on behalf of consumers before the regulator or Ombudsfin. Ombudsfin's annual report for 2017[31] shows that most of the complaints Ombudsfin receives, relate to payment accounts, payment cards, and the conclusion and execution of credit agreements (both consumer and mortgage credit).

iii Litigation

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

IX OUTLOOK

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

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

31 https://www.ombudsfin.be/sites/default/files/JV-Ombudsfin%202017_0.pdf.

Chapter 4

BRAZIL

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

I INTRODUCTION

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

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

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

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

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

i 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. The information contained in this chapter was accurate as of January 2018.

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.

II LEGISLATIVE AND REGULATORY FRAMEWORK

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

i Banking legal and regulatory framework

General aspects

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

3 Celebrating Five Years of Advancing Global Financial Inclusion: 2016 Maya Declaration Progress Report.
4 I Fórum de Cidadania Financeira: 4 and 5 November 2015.
5 II Fórum de Cidadania Financeira: 21 and 22 November 2016. III Fórum de Cidadania Financeira: 7 and 8 November 2017.
6 Presentation of the President of the Central Bank Ilan Goldfajn – Agenda BC+: 20 December 2016.

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

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

a the Capital Markets Law (Law 4728/65);
b the Securities Law (Law 6385/76);
c the White Collar Crime Law (Law 7492/86);
d the Anti-Money Laundering Law (Law 9613/98);
e the Liquidation Law (Law 6024/74);
f the RAET Law (Decree-Law 2321/87);
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.[11]

Performance of consumer financing activities

The Banking Law and ancillary legal and regulatory framework do not provide for a legal definition of the word 'bank'. The individuals or legal entities (either private or public) that have as their primary or ancillary activity the raising, intermediation or investment,

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.

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

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.

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 recognise 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 2017, the Central Bank made public its intention to create 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 the SCDs will operate in the credit market using their own capital, while the SEPs will operate as peer-to-peer platforms linking lenders and borrowers. None of these financial institutions will be authorised to receive deposits from the public. This is expected to be the first fintech regulatory framework in Brazil for credit operations. Central Bank submitted the draft of the rules creating such entities to public comments throughout 2017, and the final rules were expected to be issued in the first semester of 2018.

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.

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 end user of the respective supplies.

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

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

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

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

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

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

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

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

Ombudsman, complaints and dispute resolution

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

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

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

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

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

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

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

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

Any breach of 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 system – the Brazilian Payments System (SPB) – which includes all entities, systems and procedures for processing and settlement of transactions involving transfer of funds, foreign currency, financial assets, or securities. Wire transfers may be processed in real time or within two days, depending on the volume of funds being transferred and the transfer system selected by the transferor.

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

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

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

13 Currently, the minimum wage amounts to 937 reais.

14 Decree-Law 857/69.

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

ii Recent developments

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

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

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

c definition of arrangements excluded from the SPB;

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

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

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

15 Carta-Circular 3802/17.

IV DEPOSIT ACCOUNTS AND 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 1993[16] and, although updated in 2000 and 2002, it was structured considering only personal transactions. As a result, certain provisions of this rule became a source of debate especially in light of the evolution of branchless banking and remote access to financial services and products.

As a result, banking correspondents (or banking agents as they are more commonly known outside Brazil) were created in 1999 to promote the access of the Brazilian population to banking services. To the extent the costs of setting up branch offices and placing 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.

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

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

16 CMN Resolution 2025/93.

17 CMN Resolution 3954/11.

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

ii Recent developments

The growing use of electronic channels in the Brazilian banking industry, coupled with an increasing presence of fintech in the development of new financial products and services 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, above, 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, above)[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.

V FINANCING TRANSACTIONS: REVOLVING CREDIT AND INSTALMENT CREDIT

i Overview

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

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

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

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

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

Revolving credits usually convey the same treatment of lines of credit, as both have the same nature. Revolving credit in credit card financings has been under extensive discussions in Brazil 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.

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

20 CMN Resolution 3694/09.

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

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

23 Federal Constitution, Consumer Protection Code.

24 CMN Resolution 3919/10.

25 CMN Resolution 2682/99.

26 Consumer Protection Code.

27 Consumer Protection Code.

VI UNFAIR PRACTICES

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

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

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

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

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

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

VII RECENT CASES

i Disputes before the regulator

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

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

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

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

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

Another relevant case refers to a lawsuit filed by a leading bank against a fintech. Based on access to a consumer's bank accounts and investments, this fintech offers analyses and suggestions about allocation of funds and investment strategy to consumers. To provide 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

The level of usage of banking essential services in Brazil reached 89.6 per cent in 2015 compared with 77.8 per cent in 2010, an increase of 11.8 base points in five years.[30] Although 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 customers' evaluation, opinions shared on social media as well as the institution's role in consumer-related rankings and complaint centres.

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

29 Special Appeals Nos. 1.457.199 and 1.419.697.

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

Chapter 5

CANADA

Alison Manzer and Suhuyini Abudulai[1]

I OVERVIEW

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

The Financial Consumer Agency of Canada (FCAC) promotes the adoption of policies designed to implement laws, voluntary codes of conduct and public commitments by federally regulated financial institutions; it is also responsible for educating and protecting consumers of financial products and services. The Office of Consumer Affairs, part of the federal government department responsible for industry matters – Innovation, Science and Economic Development Canada – uses policy instruments to support consumer protection regulation in Canada, working with the public and private sector. Each of the provinces and territories has a consumer affairs office.

In recent years, government policy emphasis on consumer protection has increased with the introduction of new laws, principles and codes. The federal government has enhanced consumer protection through (1) credit card reforms, requiring summary information boxes, mandatory 21-day interest-free grace periods and consent for credit limit increases; (2) the introduction of a Code of Conduct for the Credit and Debit Card Industry in Canada, which

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contains 10 elements that apply to credit and debit card networks and their participants (e.g., card issuers and acquirers); (3) changes to mortgage prepayment fee disclosure and prepaid card rules; (4) an expanded mandate for the FCAC; (5) the passing of the Financial Literacy Leader Act and the designating of November as Financial Literacy Month; and (6) the formalisation of complaint processes.

Recent developments also include proposed amendments, introduced in October 2018, to the Bank Act, adding a new consumer protection framework that consolidates provisions of the Bank Act and introduces new measures to strengthen provisions that apply to banks and authorised foreign banks in relation to consumer protection. Further, the Competition Bureau published its final report on fintech on 14 December 2017, which explores the competitive landscape for new, technology-led innovation and emerging services in Canada's financial services sector. During the summer of 2017, the Department of Finance also released its consultation paper titled 'A New Retail Payments Oversight Framework', which proposes new federal oversight for retail payments in Canada. At the provincial and territorial level, amendments have been proposed to certain consumer laws addressing payday loans, door-to-door sales, alternative financial services and unfair practices. Concerns about the trends in consumers' use of payday loans brought amendments to consumer protection laws and a 2016 study launched by the FCAC on payday loan users across Canada. The results led to the FCAC updating its website content on payday loans and plans to develop new consumer education materials to foster greater consumer awareness of their high cost. The FCAC is also working with stakeholders across Canada to promote awareness. Addressing electronic commerce, Canada's Anti-Spam Law (CASL) came into effect on 1 July 2014 (sections relating to unsolicited installation of computer programs or software came into force on 15 January 2015). General prohibitions under CASL include bans on sending commercial electronic messages without the recipient's consent or permission, on using false or misleading representations online when promoting products or services and on collecting personal information in violation of federal law.

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

On 13 April 2017, Bill 59 in Ontario, titled the 'Putting Consumers First Act', received royal assent. Bill 59 establishes a new act with respect to home inspections and also amends the Ontario Consumer Protection Act 2002, the Collection and Debt Settlement Services Act, and the Payday Loans Act 2008, among others.[2] With respect to the consumer finance aspects, Bill 59 expands on prohibited practices relating to credit agreements, payday loans and debt collection.[3] Bill 59 proposes to expand regulation-making powers relating to credit agreements, including lender disclosure of credit processes, limiting the amount of credit or money to be lent, prohibiting lender-initiated contact to offer refinancing of a credit agreement and prescribing maximum amounts for charges not included in the cost of borrowing.

2 Bill 59, Putting Consumers First Act (Consumer Protection Statute Law Amendment), received royal assent on 13 April 2017, available online at: http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b059ra_e.pdf.

3 ibid.

Bill 59 significantly amended the door-to-door provisions (direct agreements) of the Ontario Consumer Protection Act 2002). With certain exemptions, suppliers (e.g., persons engaging in transactions with consumers) are prohibited from soliciting or entering into agreements at a consumer's home (or any other place as may be prescribed) for certain goods and services (primarily heating, ventilation, and air conditioning systems).

Amendments to the Payday Loans Act 2008 (Ontario) under Bill 59 are in force, and, among other changes, lenders cannot lend more than 50 per cent of the borrower's net income per loan, must show the cost of borrowing a payday loan as an annual percentage rate, and must offer an extended payment plan. Additionally, as of 1 January 2018, the maximum cost of borrowing a payday loan is C$15 for every C$100 that is borrowed. Under a City of Toronto bylaw, payday lending businesses must have a payday loan licence by 1 October 2018 to operate in Toronto.

Bill 59 amended the Collection and Debt Settlement Services Act (Ontario) to, among other things, expand its application to the collection of purchased or assigned overdue debts and introduce administrative penalties for violations. Certain transactions are exempt from the application of the law, including (1) persons who enter into agreements and assign payment rights to a third party but continue to collect payments on behalf of the third party; (2) persons who acquire debt through the seizure of accounts receivable under a security agreement; and (3) persons who purchase financing agreements and the payments due thereunder.

On 13 December 2017, Bill 31, A Better Deal for Consumers and Businesses Act (Bill 31), received royal assent in Alberta, with significant amendments to Alberta's Fair Trading Act. Some amendments are in force and regulations are still being developed for other amendments. Changes were made to the Fair Trading Act in the areas of ticket sales, high-cost credit, and auto sales and repairs.

The Quebec government introduced Bill 134 on 2 May 2017 and it received royal assent on 15 November 2017.[4] Draft regulations were released in the summer of 2018, and Bill 134 will come into force in 2019. Significant changes include new rules and obligations in respect of consumer credit, advertising and loyalty programmes.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Federal and provincial legislation govern payments, deposits and lending. Legislation regulates entities by type or is specific to the nature of the product or service offered to consumers. The Bank Act is the primary federal legislation respecting banks, federal credit unions and banking. Products and services offered by trust and loan companies to consumers are regulated under the federal Trust and Loan Companies Act. Provincial and territorial legislation addresses disclosure of the cost of credit in consumer agreements (e.g., lease agreements, credit agreements and credit card agreements), prescribing the disclosure

4 Bill 134: An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs, received royal assent on 15 November 2017, available online at: www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-134-41-1.html.

requirements applicable in advertising and in consumer agreements, as well as setting out the rights and obligations of borrowers and lenders and lessors. Legislation regulating lending practices in each Canadian province or territory include:

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

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

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

ii Regulation

The FCAC Compliance and Enforcement Branch administers the consumer provisions in federal financial institution legislation (including the Bank Act) and monitors compliance by federally regulated financial institutions, payment card network operators and external complaints bodies with voluntary codes of conduct and public commitments. The FCAC utilises various methods to gather information on current issues in the financial sector, identifying compliance concerns that may lead to investigation and the application of compliance or enforcement methods. Federally regulated entities have reporting deadlines to report received complaints to the FCAC. Consumer complaints directly received by the

FCAC are reviewed, and information concerning third-party dispute resolution, if applicable, is provided to consumers. In some instances, complainants are directed to go through the respective entity's complaint procedure, and, where necessary, the FCAC may direct the consumer to a provincial regulator or another government agency or department.

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

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

The Canadian Radio-television and Telecommunications Commission (CRTC), the Competition Bureau and the Office of the Privacy Commissioner of Canada (OPC) collectively regulate and enforce compliance with CASL. The CRTC takes primary enforcement responsibility to investigate, take action against, and issue monetary penalties to companies who fail to send compliant electronic messages to consumers, alter transmission data without consent, and install computer programs or software without consent. The OPC enforces CASL with respect to the collection of personal information from consumers and electronic address harvesting.

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

III PAYMENTS

i Overview

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

ii Recent developments

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

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

A market study was launched by the Competition Bureau on 19 May 2016, to examine the competitive landscape for technology-led innovation and emerging services in the Canadian financial services sector. The Competition Bureau is not examining all consumer financial services related to technological innovations (cryptocurrencies, for instance, are excluded from the study). The results of the study were subsequently published in a draft consultation report on 6 November 2017, which was open for public comment. After the consultation and comment period, the Competition Bureau published its final report on 14 December 2017. The report recognises the significance of innovative technologies that exist in the financial services sector and focuses on the areas of retail payments and retail payment systems, lending and equity crowdfunding, and investment dealing and advice. Ultimately, the Competition Bureau's report provides recommendations and guidance to financial sector regulators and other authorities to ensure that innovation and competition in this area is not impeded by regulation.

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

In July 2017, the Department of Finance released a consultation paper on the proposed establishment of a retail payments oversight framework.[5] The consultation period has ended, but given the nature of the framework, it is anticipated that there will be ongoing consultation before the framework is anchored in federal legislation. The framework would apply to payment services providers performing any one of five core functions in an electronic funds transfer: (1) provision and maintenance of a payment account; (2) payment initiation; (3) authorisation and transmission; (4) holding of funds; and (5) clearing and settlement. Certain transactions would be excluded. Measures proposed to implement the oversight include requiring payment services providers to segregate end user funds in a trust account, a registration requirement for certain payment services providers, and disclosure and operational requirements.

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

5 Department of Finance Canada, A New Retail Payments Oversight Framework (last modified 7 July 2017) online: fin.gc.ca <https://www.fin.gc.ca/activty/consult/rpof-cspd-eng.asp>.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

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

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

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

ii Recent developments

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

V REVOLVING CREDIT

i Overview

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

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

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

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

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

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

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

ii Recent developments

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

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

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

VI INSTALMENT CREDIT

i Overview

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

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

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

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

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

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

ii Recent developments

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

There is also increasing regulation on the part of regulated financial institutions, banks and trust companies participating in the mortgage market. Requirements under a guideline known as B-20 are increasing the underwriting requirements for these regulated financial institutions.[6] Banks and trust companies in Canada provide the bulk of residential mortgage lending, and accordingly these increased requirements will decrease access to consumer credit and increase cost.

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

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

VII OTHER AREAS

i Fintech advances and legislation

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

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

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

Fintech in Canada is relatively undeveloped. Fintech providers may provide back-office, supplemental or private label services for the traditional financial institutions, banks and trust

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

companies. In doing so the fintech provider will be subject to the usual consumer protection requirements, including on privacy, cost of credit disclosure, anti-money laundering and anti-terrorist financing.

Fintech advances within the traditional sectors, such as banks now using mobile phone and similar types of banking delivery, is increasing. This type of fintech product is not the subject of significant legislation, and it is considered that this is merely the delivery of traditional financial services, using alternative means, which will be subject to the usual consumer protection legislation. As discussed above, the Competition Bureau released its report based on a market study on the fintech sector at the end of 2017.

ii Harmonisation projects

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

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

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

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

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

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

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

iii Rewards points and loyalty programmes

Three provinces have proposed legislation to prohibit the expiration of reward points under consumer agreements.

Ontario's Bill 47, Protecting Rewards Points Act, amended the Consumer Protection Act 2002 (Ontario) (CPA) to, among other things, primarily prohibit the expiry of reward points based solely on the passage of time (subject to any limits prescribed in the legislation, as summarised below).[7] Bill 47 received royal assent on 6 December 2016 and amended

7 Bill 47, Protecting Rewards Points Act (Consumer Protection Statute Law Amendment), received royal assent on 8 December 2016, available online at: www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b047ra.pdf.

the CPA, including the general regulation, with such amendments coming into force on 1 January 2018.[8] The definition of 'consumer agreement' in the CPA will be amended to refer to an agreement where a 'supplier agrees to provide rewards points to the consumer, on the supplier's own behalf or on behalf of another supplier, when the consumer purchases goods or services or otherwise acts in a manner specified in the agreement'. The term 'supplier' will also include persons in the business of supplying rewards points. 'Rewards points' are defined as 'points provided to a consumer under a consumer agreement that can be exchanged for money, goods, or services'.

The amended regulations also stipulate that the 'rewards points' as defined in the CPA must be points earned and accumulated by the consumer across multiple transactions; that is, they do not apply to rewards offers that provide a consumer with a specific good or service after the consumer achieves a certain amount of progress, if the goods or services are identified at the outset of the offer (e.g., coffee stamp cards). The regulations also carve out low-value reward programmes, which exist if no one good or service, or one single set of goods or services, can be redeemed by a consumer for a value of more than C$50. The key provision of these amendments prohibits the expiry of rewards points 'due to the passage of time alone'. However, this still allows consumer agreements that provide for the expiry of rewards points because of account inactivity, and free rewards points (i.e., those earned without having to make a purchase) may expire because of the passage of time alone, as long as the supplier gives notice to the consumer of this at the time of issuing the points and the expiry occurs at least 30 days after they are issued.

Prince Edward Island introduced Bill No. 105, Rewards Points Protection Act, on 27 April 2017.[9] The proposed law contains substantially similar, and in some cases verbatim, provisions to the amendments included in the Ontario consumer protection act and regulations, including a prohibition for the expiry of reward points resulting from the passage of time alone, subject to any limits that may be prescribed. The proposed law also has a retroactive effect that requires suppliers to credit back to consumers any reward points that expired because of the passage of time alone on or after 1 April 2017, including certain terminated reward agreements. A consumer also has a right of action to sue a supplier for restitution, damages and costs. Bill No. 105 empowers the Lieutenant Governor in Council to make further regulations to, among other things (1) clarify the definition of 'rewards points', (2) govern the transfer of reward points, (3) govern the inactivity of reward agreements and reward points, and (4) govern the termination of such agreements and reward points.

On 22 February 2017, a private member bill was introduced in Quebec to amend Quebec's Consumer Protection Act (QCPA) to prohibit the expiry of rewards points – Bill 791.[10] Bill 791 is fairly short, and provides for the following amendments: (1) inclusion of a defined term for 'rewards program'; (2) clarification that the QCPA applies to rewards programme contracts; (3) the requirement that merchants provide disclosure to a consumer prior to entering into a rewards program contract; (4) prohibition of any stipulation of or

8 O Reg 388/17 amending O Reg 17/05 General at ss 43.1 to 43.9; the CPA contemplates additional regulations relating to transfer of rewards points (including upon death), inactivity of rewards points, and the termination of rewards points programmes.

9 Bill No. 105, Reward Points Protection Act, (First Reading) available online at: http://www.assembly.pe.ca/bills/pdf_first/65/2/bill-105.pdf.

10 Bill 791: An Act to amend the Consumer Protection Act in order to regulate rewards program contracts, (First Reading), available online at: www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-791-41-1.html.

amendment to the contract providing for the expiry date of rewards points obtained by a consumer; (5) prohibition of any stipulation that a merchant may retroactively change the value of rewards points accumulated by a consumer; and (6) allowance for the prescribing of additional rules regarding rewards programme contracts and rewards points.

The Quebec government introduced Bill 134 on 2 May 2017 and it received royal assent on 15 November 2017.[11] Draft regulations were released in the summer of 2018, and Bill 134 will come into force in 2019. Bill 134 includes amendments relating to credit and leases, as well as provisions relating to loyalty programmes in Quebec that are substantially similar to Bill 791, and refer to 'exchange units', which are granted to consumers who enter into loyalty programme agreements and have an exchange value. Bill 134 prohibits the expiry of exchange units on a set date or by lapse of time.

iv Ticket sales

Two provinces, Alberta and Ontario, have released proposed rules regarding ticket sales to consumers, with a focus on online ticket sales, resale through scalpers, and the use of ticket bots.

Alberta's Bill 31, A Better Deal for Consumers and Business Act, was proposed in 2017 to amend the Fair Trading Act and make legislative improvements to protect Albertans who seek to purchase tickets to events.[12] The new rules will, among other things (1) ban the use of ticket bots to purchase tickets, and (2) ensure secondary sellers and ticketing platforms are required to provide guaranteed full refunds in certain instances (e.g., if the event is cancelled before the ticket is used, or if the ticket turns out to be counterfeit). Ticket sellers and buyers will also have a private right of action to sue if ticket bots are used.

In Ontario, the Ticket Sales Act was introduced in the summer of 2017 to protect consumers of event tickets (whether a sporting event, concert or theatre) and, with the exception of the cap on the resale price described below, is currently in force.[13] Similar to Alberta, the Ontario law (1) bans ticket bots and the sale of tickets purchased using ticket bots; (2) caps the resale price of tickets at 50 per cent above face value; (3) requires businesses to disclose more information to consumers; and (4) establishes new enforcement measures to ensure ticket sellers and resellers are following the law.

VIII UNFAIR PRACTICES

Across Canada, provinces have enacted consumer protection legislation that addresses unfair, deceptive or abusive practices relating to all consumer goods and services, including those in the consumer finance context. Each province's ministry for consumer services (or equivalent) investigates and enforces the applicable jurisdiction's consumer protection legislation against organisations or individuals that have contravened the provincial law. At the federal level,

11 Bill 134: An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs, received royal assent on 15 November 2017, available online at: www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-134-41-1.html.

12 Bill 31, A Better Deal for Consumers and Business Act, (Second Reading), available online at: www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_3/20170302_bill-031.pdf.

13 Bill 166, Strengthening Protection for Ontario Consumers Act, 2017, (Third Reading), available online at www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b166rep_e.pdf.

these practices are scrutinised by Canada's Competition Bureau (the Bureau), an independent law enforcement agency that investigates and enforces the Competition Act, which protects consumers against false and misleading representations, and the FCAC. Both the Bureau and FCAC also release consumer alerts, provide resources and guidelines for consumers and businesses, and evaluate complaints that are submitted by the public.

Currently, nine of the 13 provinces and territories in Canada have consumer protection legislation that explicitly describes or provides lists of acts or practices deemed to be unfair, deceptive or abusive.[14] On 8 June 2017, Nunavut amended its consumer protection legislation to include a number of consumer finance-related provisions, such as relief from unconscionable loan transactions, an enumerated list of unfair business practices and provisions related to cashing fees for government cheques.[15]

Based on alerts, investigations and enforcement actions issued by the provincial ministries, the majority of recent unfair practices related to consumer finance involve payday lenders and precautions when completing transactions online. During 2016, a number of companies and individuals were investigated for practices including granting payday loans on terms and for amounts not permitted by legislation, failing to state material facts about financial products being sold to consumers and engaging in improper debt collection practices contrary to legislation. In many instances, enforcement action and administrative monetary penalties were levied, including the suspension of a licence to operate as a collector or lender in the applicable jurisdiction. Neither the Bureau nor the FCAC has investigated any complaints in 2017 related to unfair, deceptive or abusive practices relating to consumer finance goods and services. However, both the Bureau and the FCAC have released consumer alerts relating to managing debt (particularly home equity lines of credit) and being aware of investment fraud. In 2017, the Ontario provincial court continued to examine the area of consumer finance products involving prepaid cards, and whether or not they could be considered financial services products. For more details on these investigations and enforcement actions, as well as litigated cases, see Section IX.

IX RECENT CASES

i Enforcement actions

In Alberta, the Director of Fair Trading entered into an undertaking with a debt collection company that was engaging in activities in contravention of the Fair Trading Act, namely pursuing a debt that had not been acknowledged in the past six years and continuing to pursue collections even after receiving a written dispute from the debtor.[16]

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

15 Chapter 18, An Act to Amend the Consumer Protection Act, (Assented to June 8, 2017) available online at https://www.nunavutlegislation.ca/fr/download/file/fid/11391.

16 Government of the Province of Alberta, Undertaking under Section 152 of the Fair Trading Act between Credit Bureau of Canada Collections o/a Collectcents and the Director of Fair Trading (17 January 2017) online at servicealberta.ca/pdf/undertakings/Credit_Bureau_of_Canada_Collections_o-a_

The Director of Consumer Protection in British Columbia released two decisions and three letters with director's orders relating to payday lenders in 2017. Both enforcement decisions resulted in administrative monetary penalties and dealt with improper disclosures in payday loan agreements, namely including incorrect annual percentage rates (APR).[17] In one of these decisions, a compliance order was issued against payday lender Cash Central Financial Services Inc, which not only included incorrect APR, but failed to review the payday loan agreement with borrowers and also issued two loans to the same customer in violation of the Business Practices and Consumer Protection Act (BPCPA). With respect to the three director's orders, each order was the result of a compliance inspection of various payday lenders across British Columbia who improperly required borrowers to insure their payday loans.[18] These investigations were a part of a joint investigation between Consumer Protection BC and the Financial Institutions Commission.[19] In addition, an undertaking was entered into with another lender to ensure each loan agreement contains terms of extended repayment options where applicable.[20] A debt collection agent and bailiff based in British Columbia also had its licence suspended for engaging in prohibited activities such as failure to provide information required under the BPCPA, hindering and obstructing an inspection, failure to account for and pay money in a timely manner, and accounting to creditors.[21]

ii Disputes before the regulator

Manitoba's Consumer Protection Office has released alerts relating to consumers' activities online, including using online payday lenders, and reminds consumers of what payday lenders can and cannot request from borrowers.[22] As discussed above, Consumer Protection BC also released a variety of consumer alerts during 2017 relating to unfair and deceptive practices of payday lenders.

A variety of other provincial regulators including those in Alberta and Ontario maintain up-to-date consumer tip sheets including information about debt collection agencies, payday lenders, credit reports and consumer rights related to each of those consumer finance-related products.

Collectcents_-_Jan-4-17.pdf/.

17 Consumer Protection BC, Recent Enforcement Actions – Case 29559 (1 June 2017), online at https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29559; and Case 29713 (5 October 2017), online at https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29713.

18 Consumer Protection BC, Recent Enforcement Actions – Case 29738 (15 September 2017), online at https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29738; see also Case 29675 https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29675; see also Case 29678 https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29678.

19 Consumer Protection BC, Joint investigation by watchdogs takes aim at insurance & payday lending practices, (20 September 2017), online https://www.consumerprotectionbc.ca/news/joint-investigation-watchdogs-takes-aim-insurance-payday-lending-practices/.

20 Consumer Protection BC, Recent Enforcement Actions – Case 29397 (25 May 2017), online at https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29397.

21 Consumer Protection BC, Recent Enforcement Actions – Case 29705 (18 September 2017), online at https://www.consumerprotectionbc.ca/recent-enforcement-actions-details/?cpbc_caseNumber=29705.

22 Consumer Protection Office of Manitoba, Media Bulletin – Manitoba (6 January 2017), online at http://news.gov.mb.ca/news/index.html?item=40330&posted=2017-01-06.

iii Litigation

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

In *Bank of Montreal v. Marcotte* and two companion cases (*Amex Bank of Canada v. Adams* and *Marcotte v. Fédération des Caisses Desjardins du Québec*),[23] the Supreme Court of Canada (SCC) ruled that the Quebec Consumer Protection Act applies to federally regulated financial institutions, including their credit card businesses. The SCC confirmed the continued exclusive federal jurisdiction over banking, while clarifying that provincial consumer protection laws may nonetheless still apply.

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

In *Sankar v. Bell Mobility*,[24] the Ontario Court of Appeal (ONCA) did not rule on the province's jurisdiction over prepaid wireless phone cards, nor did it specifically address whether they were subject to the Ontario Consumer Protection Act's gift card regulations (the Regulations). The ONCA did confirm that the Regulations do not strictly prohibit time-limited contracts, which it differentiated from the prohibition on the expiry of contracts of future performance. Similarly, the British Columbia Supreme Court determined that open-loop stored-value cards issued by entities, including credit unions, were subject to the Business Practices and Consumer Protection Act (British Columbia).

In 2017, the Ontario Superior Court released a recent decision certifying a class action for prepaid payment cards, *Bernstein v. Peoples Trust Company*.[25] The defendant in this case argued that the prepaid cards it issued were exempt from the applicable consumer protection laws because they were considered 'financial service products' and not gift cards. Although the superior court declined to engage in a full analysis for the purposes of the certification, it cited and referred to another case from 2016 involving a defendant in British Columbia, *Jiang v. Peoples Trust Co*,[26] where the defendant's prepaid cards were subject to the BPCPA, which is similar to Ontario's Consumer Protection Act 2002.[27]

On 24 November 2017, a statement of claim was filed to the Ontario Superior Court of Justice by Toronto law firm Paliare Roland Rosenberg Rothstein LLP against PayPal CA Limited, Paypal Canada Co and PayPal Holdings Inc (Paypal) on behalf of an Ontario resident Leonid Kaplan. The statement of claim seeks certification by the court for the action to proceed as a class action. In the statement of claim, Mr Kaplan alleges that PayPal charges Canadians currency conversion fees that are not disclosed to consumers, in violation of PayPal's user agreements.

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

24 *Sankar v. Bell Mobility*, 2015 ONSC 632 (CanLII) affirmed in 2017 ONCA 295.

25 *Bernstein v Peoples Trust Company*, 2017 ONSC 752.

26 2016 BCSC 368.

27 Note 30 at 63.

X OUTLOOK

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

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

Chapter 6

CHILE

León Larrain and José Ignacio Berner[1]

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, last September a new bill of law was published – coming into force on March 2019 – that strengthens 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 that is clearly reflected in the small amount of manuals, research and papers available in national literature at this moment.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Consumer finance law in Chile is governed by Act No. 20,555 of 2011 (the Consumer Finance Act), which modified the Protection of Consumer Rights Act. Other legislation particularly relevant for consumer law on financial issues includes: the Decree with Force of Law (DFL) No. 3 of 1997 (the General Banking Act); Act No. 18,840 of 1989 (the Organic Constitutional Act of the Central Bank of Chile); Act No. 21,000, which creates the Commission for the Financial Market (which replaced 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; Act No. 20,855 of 2015, which regulates the release of mortgages and pledges granted to secure loans; Act No. 20,575 of 2012, establishing the

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principle of finality on treatment of personal data; the Data Privacy Protection Act (see above); Act No. 19,659 of 1999 on illegal collection procedures; DFL No. 707 of 1982 on current accounts and cheques; the Civil Code; and the Commercial Code.

ii Regulation

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

III PAYMENTS

i Overview

Cash

Cash remains the default legal payment method in Chile.

Credit card

The UDR 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.[3] Credit cards are widely accepted as a payment method in Chile.

The SBIF supervises all institutions that issue and operate banking and non-banking credit cards.[4] In addition, Chilean law limits the liability of credit card holders in case a card is lost or stolen, once the cardholder has notified the issuer.[5]

Debit card

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

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 catchment; Chapter 2-4 on savings accounts; Chapter 2-5 on savings accounts for housing; Chapter 2-6 on deposits accounts; Chapter 2-9 on term deposits; Chapter 2-15 on debit cards; Chapter 8-1 on overdrafts on current accounts; Chapter 8-3 on credit cards; Chapter 16-4 on people who cannot sign documents; Chapter 18-8 on state guarantee of deposits; Chapter 18-9 on information available to public in bank offices; and Chapter 20-1 on exhibition of Chilean ID Card.

3 UDR, Chapter 8-41.

4 Article 2, General Banking Act and Compendium of Financial Rules of the Chilean Central Bank, Chapter III.J.1.1.

5 Act No. 20,009.

Prepaid card

According to the Compendium of Financial Rules of the Central Bank, 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.[6] A cheque is always payable on demand, at its submission before a bank.

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

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

Electronic transfer

This method refers to any money transaction performed by electronic devices (e.g., PCs, mobile phones). It is mostly regulated by the UDR.[7] The Protection of Consumer Rights Act makes clear that consumers may make electronic transfers to any bank and that banking institutions may not restrict this right.

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

ii Recent developments

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

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

Legal regime

Deposit accounts are jointly regulated by the Compendium of Financial Rules of the Chilean Central Bank[8] and the UDR.[9] Deposit accounts may be opened by both individuals and legal entities (even by residents abroad), and shall always be operated in Chilean pesos.

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

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

State guarantee of deposits

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

Overdrafts

Bank customers can agree on overdraft lines of credit. Banks allowing overdrafts must notify clients about the maximum overdraft amount, the rate of interest, guarantees of the operation and date and term of the overdraft.[10]

According to the Compendium of Financial Rules of the Chilean Central Bank,[11] 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.[12]

V REVOLVING CREDIT

i Overview

Chilean law regulates revolving credit with regard to credit cards. According to the regulation in force, card issuers must inform customers whether or not the line of credit is revolving.[13] Besides, 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 SBIF, identifying the dates of the operation, amount of the credit, monthly interest rate, contractual term and other charges.[14]

ii Recent developments

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

10 UDR, Chapter 8-1.
11 Compendium of Financial Rules, Chapter III.G.3.
12 UDR, Chapter 8-1.
13 Article 3, No. 13, Decree 44 of 2012, of the Ministry of Economy, on information to consumer on credit cards.
14 SBIF (2014), Circular No. 1.

VI INSTALMENT CREDIT

General rules

Instalment credit as opposed to revolving credit is the general rule in Chile. The Protection of Consumer Rights Act 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.

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.[15] Also, mortgage grantors can limit their liability to a determined sum. The Protection of Consumer Rights Act prohibits the execution of loan agreements, including mortgages, that guarantee credits other than the one agreed, without the prior written request of the debtor.[16]

- 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: notwithstanding that there are no specific rules for this, SERNAC made a statement about these contracts in 2014, pointing out that customers were suffering abuses by paying excessive amounts.[17] For automotive loans secured by non-possessory pledge over the purchased vehicle, once the credit is discharged, the creditor must

15 Civil Code, Article 2415.

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

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

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

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.

Furthermore, on 13 March 2019, the Act No. 21.081 will enter into force, which among other things: strengthens SERNAC's oversight powers and doubles its staffing to improve inspection; reinforces collective voluntary procedures and complaints; and increases fines by up to six times (US$161,000 approximately).

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.

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.

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[18] (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[19] at the time of the agreement, as determined by the SBIF for each type of credit operation, and the current interest rate at the time of the agreement increased by 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 Chilean pesos), plunged from 55 per cent in 2013 to 35 per cent in 2016.

Use of personal data

Act No. 20,575 established the principle of finality in the usage and treatment in financial operations. This new legislation was aimed to protect due confidentiality of financial consumers' data for evaluations on commercial risks, particularly, the consolidated record of debt defaults. It is forbidden for financial institutions to share or use this information for the purposes of applications for schools, emergency medical care, job selection and applications for public employment.[20] 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.[21]

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:

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

b establishing price increases for services, accessories, financing or surcharges, unless such increases correspond to additional benefits that the consumer can accept or reject in each case;

c making consumers liable for omissions or deficiencies that are not imputable to them;

d reversing the burden of proof so that it falls on the consumer;

18 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.

19 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).

20 Act No. 20,575, Article 1

21 Act No. 20,575, Article 3.

e containing absolute limitations of liability that may deprive consumers of the right to compensation;
f clauses contrary to good faith; and
g including blank spaces that have not been filled or used.[22]

IX RECENT CASES

SERNAC v. Cencosud Retail[23]

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 Chilean pesos.

SERNAC v. Beneficios Chile and Solución[24]

In 2012, SERNAC filed a class action against two issuers of credit cards on contracts that contained several abusive provisions, such as enabling the card issuer to modify or suspend the contract unilaterally, restraining the amount available in the line of credit if the income of consumers varied. In 2013, the parties reached a settlement where the card issuers agreed to 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.

SERNAC v. Banco Santander-Chile[25]

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.

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

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.

SERNAC v. Banco Consorcio[26]

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.

SERNAC v. Financiera La Elegante SAC Limitada[27]

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 compensation for losses. The Court of Appeals of La Serena confirmed the ruling. SERNAC presented a *cassation* resource against the decision of the Court of Appeals of La Serena, which is currently pending in the Supreme Court of Justice.

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.[28]

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.

26 25th Civil Court of Santiago, docket No. 1553-2015.

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

28 These lawsuits can be followed online, at www.sernac.cl/proteccion-al-consumidor/juicios-colectivos/iniciados-por-sernac-2/#bancosyfinancieras.

Chapter 7

CZECH REPUBLIC

Michaela Ericssonová, Viktor Glatz and Martin Frolík[1]

I OVERVIEW

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

The year 2018 was the first year of entry into force of a number of new, or rather updated, European directives and regulations which overlap into consumer finance in the Czech Republic, namely the MiFID II, PSD2 packages, and since December 2018, the IDD implementation. During 2017 and 2018, the new consumer credit regulation began to be reflected in practice, with one of the main effects being a decrease in non-bank entities providing consumer credit because of the obligation to obtain a licence under the CCA (as defined below). The Czech National Bank (CNB) has decided nearly all requests for granting a licence filed by non-bank consumer credit providers and most of the requests filed by independent intermediaries.

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

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

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

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

a Act No. 257/2016 Coll. on Consumer Credit (the CCA) implementing:
- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (CCD);

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- Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 (MCD);[2]

b Act No. 634/1992 Coll. on Consumer Protection (CPA) implementing:
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council;
- Directive 2011/83/EU of the European Parliament and of the Council of 11 May 2005 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council;

c Act No. 284/2009 Coll. on the Payment System (PSA) implementing Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC, and repealing Directive 97/5/EC (in force until 13 January 2018);

d Act No. 370/2017 Coll. on Payment System (New PSA), implementing Directive 2015/2366/EU on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC (entry into force on13 January 2018);

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

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

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

h Act No. 256/2004 Coll. on financial market undertaking, implementing, among others, Directive 2014/65/EU on markets in financial instruments; and

i Act No. 170/2018 Coll. on insurance and assurance distribution, implementing Directive 2016/97/EU on insurance distribution (recast).

ii Regulation

The Czech parliament adopts laws in the Czech Republic, but individual implementing regulations are generally issued by relevant authorities; for example, the CNB issues implementing regulations regarding the consumer financing market. The powers of the CNB have been recently broadened in connection with the implementation of the CCA, which became effective on 1 December 2016. The CNB now supervises the consumer credit market instead of individual trade offices (which formerly granted trade licences to non-bank

2 The CCA replaces Act No. 145/2010 Coll. on Consumer Credit (the old CCA) implementing the CCD.

providers of consumer credit) and the Czech Trade Inspection Authority (CTIA) (which carried out inspections of non-bank providers). The CNB now decides who will be entitled to operate on the market and maintains a register of licensed persons in the area of consumer credits. It also oversees the fulfilment and observation of the conditions stipulated by the CCA and may impose sanctions for non-compliance with the CCA.

After the expiry of the transitional period set down by the CCA (until 31 May 2018), during which the CTIA has supervised certain non-bank providers, the CNB became the sole supervising authority within the consumer financing market.

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

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

III PAYMENTS

i Overview

As of 13 January 2018, payment methods became regulated by the New PSA, which establishes conditions under which payment service providers may provide their services. Consumer protection in this respect consists of, in particular, information obligations of the payment system providers towards the consumers and the setting of deadlines for the processing of payment transactions.

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

The Czech Republic remains the leading country in the EU for contactless payments. The use of contactless payment cards has seen a sharp increase in the Czech Republic over the past few years, with all the major banks offering contactless payment cards. According to statistics from 2018, 91 per cent of Czech citizens own a contactless payment card and 69 per cent of them prefer contactless payments.[3]

ii Recent developments

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

3 The statistics were presented by the Czech Bank Card Association which are available here in Czech only: https://zpravy.aktualne.cz/ekonomika/pocet-platebnich-karet-v-cesku-loni-klesl-10-7-milionu-bezko/r~8a6448c8470b11e8b8310cc47ab5f122/?redirected=1546950496.

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

As of 13 January 2018, the New PSA came into force, implementing the Second Payment Services Directive. This New PSA will introduce various new measures aimed at stronger protection of consumers (including mandatory two-factor identification, and lowering the participation for losses caused by unauthorised payments and stolen payment instruments from €150 to €50).

The Act No. 297/2016 Coll. on Trust Services for Electronic Transactions (TSA) was adopted in 2016 and implemented Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. The TSA regulates only the aspects which the Regulation expressly determines are to be regulated at national level, such as certain practices of, and requirements imposed on, trust service providers and rules regarding electronic signatures, electronic seals and the preservation of documents using electronic time stamps. It further establishes the Ministry of Interior as the trust service providers' supervising authority. The Act does not regulate electronic identification as this is governed by Act No. 250/2017 Coll., which came into effect on 1 July 2018.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

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

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

ii Recent developments

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

V REVOLVING CREDIT

i Overview

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

ii Recent developments

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

VI INSTALMENT CREDIT

i Overview

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

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

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

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

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

ii Recent developments

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

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

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

During 2018, the CNB finished deciding all licence applications filed by the non-bank providers of consumer loans that wished to continue their activities in this area under the new regulation and had therefore applied before 1 March 2017. In order to obtain a licence from the CNB, the non-bank providers had to prove that they comply with the strict requirements laid down in the CCA; these include certain corporate requirements (such as a special form of legal entity, minimum amount of capital, origin of capital), personal requirements (the non-bank providers and persons representing them in providing loans must be credible and professionally qualified, i.e., have a certain level of education and pass a professional exam provided by an accredited entity) and requirements regarding internal procedures (including anti-money laundering rules, remuneration policy, rules for creditworthiness assessment, rules for dealing with consumers' complaints and claims, rules for addressing consumers in default, rules for enforcing receivables, rules for external and internal communication, rules for verifying and controlling the activities of persons representing the lender, etc.).

Non-bank entities who were allowed to provide consumer loans before 1 December 2016 on the basis of a trade licence were allowed to do so until the CNB decided on their application for a licence for a non-bank provider, but not longer than 18 months after the CCA became effective, provided that the application for the relevant licence was submitted before 1 March 2017. Approximately 100 non-bank providers applied for the licence, which was granted to 86 of them.

The CNB continues to issue guidelines, benchmarks and other documents concerning the interpretation of the CCA, the submission of the application for the licence and details of the CNB's expectations on how the individual conditions set down by the CCA should be met.

Some banks in the Czech Republic have started offering a new service for payment cards. When paying with a card, the client has the choice to pay the purchase price straight away or to spread the payment across monthly instalments. The decision is made by the clients in their internet banking after the purchase. This step is the banks' reaction to the declining demand for credit cards. At first, this new option is expected to be available only in internet or mobile banking applications but there is the possibility that it will spread to card payments directly in shops.

VII OTHER AREAS

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

In order to maintain the current stability of the market and to prevent a dramatic increase of household indebtedness, the CNB issued a recommendation in June 2016 that after 1 April 2017 banks should not provide mortgages with the loan to value (LTV) indicator exceeding 90 per cent. Furthermore, mortgages with LTV ranging from 80 to 90 per cent should not exceed 15 per cent of mortgages provided for each quarter. As a result, households with insufficient capital will not be able to afford a mortgage. The CNB issued this recommendation in response to fears that the increasing demand for mortgages leading to an increase in the market price of real estate will result in the inability of many households to pay off their mortgages. The increase in real estate prices is still ongoing, however, although it has gradually slowed down during 2018. In 2017, the real estate prices compared to 2016 have risen by 12.8 per cent. In 2018 the prices have been rising by approximately 7.5 per cent compared to 2017. With another recommendation issued in June 2017, the CNB has expanded the LTV limitation onto other types of consumer credit. The CNB also officially recommended that starting from 1 October 2018 both banks and non-bank loan providers take into account the debt to income and debt service to income (DSTI) indicators, showing the clients' income compared with their indebtedness. According to recent reports, the CNB is working on an amendment to the Act on CNB, which would allow the CNB[4] to set legally binding LTV, DTI and DSTI limits instead of the current form of mere recommendations.

4 Act No. 6/1993 Coll.

VIII UNFAIR PRACTICES

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

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

IX RECENT CASES

i Enforcement actions

In 2014, the CTIA imposed fines on loan companies for wrongly calculating the annual percentage rate (APR) in consumer loan agreements. The disputes arising out of these decisions have led to a major decision of the Supreme Court of the Czech Republic[5] regarding the effect of a wrongly calculated APR in consumer loan agreements. According to the old CCA, the consumer loan agreement has to include certain information, including the APR. However, if the consumer loan agreement does not include all the required information and the consumer informs the creditor thereof, the consumer loan is deemed to have been granted with the interest rate in the amount of the annual discount rate published by the CNB (which has been within the range of 0.05 per cent to 2.5 per cent per annum over the last decade)[6] with effect from the date of the relevant consumer loan agreement and any provisions on any other payments under the consumer loan agreement are invalid. Prior to the discussed decision, Czech courts have claimed that a wrongly calculated APR in a consumer loan agreement does not cause the aforementioned effect, because – as long as the agreement includes the APR (whether calculated correctly or incorrectly) – the information requirements set out by applicable legislation have been met. In July 2016, however, the Supreme Court decided that

5 32 Cdo 4838/2015.

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

if any of the information provided by a creditor is wrong, it constitutes a violation of the law causing the aforementioned effect on the interest rate and on the validity of any provisions regarding any other payments under the consumer loan agreement. The Supreme Court decision was issued only a few months before the enactment of the CCA, which contains more specific rules to deal with this issue. The rules under the CCA are: (1) if the consumer loan agreement does not include the APR at all, the interest rate is equal to the repo rate published by the Czech National Bank as of the date of the agreement, unless the originally agreed interest rate was lower (in which case that interest rate applies), and (2) if the APR set out in the consumer loan agreement is lower than it actually is, the interest rate and the entire amount that the consumer is obliged to pay are lowered so that they correspond to the APR provided in the consumer loan agreement. As a result of this decision of the Supreme Court, the loan companies that had been wrongly calculating the APR under the old legislation may be ordered to return a vast majority of interest that they have received from consumer loans resulting in potential losses in the range of billions of koruna.

Most recent enforcement actions include (1) failings in proper handling of damaged coins and banknotes (banks and payment services providers – fines ranging from 300,000 to 1 million koruna), and (2) providing false information in applications according to the CCA (credit providers and intermediaries failing to provide information about previous fines according to the old CCA – fines around 30,000 koruna).

ii Disputes before the regulator

As of December 2016, the CNB has become the regulator and supervising authority for non-bank providers of consumer loans. Currently the main agenda of the CNB in this regard is the granting of licences to companies intending to provide or intermediate consumer loans. As the CNB has only been acting as the regulator in this area for a short period of time any significant disputes are yet to come.

In the Czech Republic, the equivalent of an ombudsman for consumer finance is the financial arbitrator. The financial arbitrator provides free resolution of disputes between consumers and financial institutions; the proceedings are commenced on the application of the consumer. In 2018, the financial arbitrator issued a series of controversial decisions in disputes concerning an 'investment life insurance agreement' that could affect the validity of hundreds of thousands of agreements between insurance companies and consumers. The type of agreement in question is quite common in the Czech Republic and can be described as an agreement with an insurance component and an investment component. One of the problematic aspects was the inclusion of uncertain provisions concerning administrative and other fees charged to the consumers, which led to the decision of the financial arbitrator that such agreements are invalid in their entirety from the very beginning and that the insurance companies have to return all payments as unjust enrichment. Another problematic aspect was that the insurance component in some of these agreements was basically suppressed, meaning that the sum insured in the event of the consumer's death was zero. In the dispute, the consumer demanded that the agreement be deemed invalid from the very beginning because the insurance company did not assume any insurance risk and basically only provided an investment service. Although the consumer was duly informed about the whole concept of the disputed agreement by the insurance company, the financial arbitrator declared the agreement invalid as being contrary to the Act on Insurance Agreements,[7] in particular because the insurance company did not assume any insurance risk. Again, the insurance company was ordered to return all payments made by the consumer.

The financial arbitrator's decisions concerning those disputes will be reviewed by the courts. Should the decisions prevail, hundreds of thousands of similar agreements may be deemed invalid, which brings a lot of uncertainty for both the insurance companies and the consumers who may have already increased the value of their assets through such agreements and may also be forced to return any such proceeds. In recent years the financial arbitrator has also been resolving disputes related to wrongly calculated APRs in consumer loan agreements. The financial arbitrator has repeatedly decided that one of the loan companies has been wrongly calculating the APR in its consumer loan agreements and has adhered to the opinion confirmed by the Supreme Court in July 2016 that a wrongly calculated APR means that the consumer loan is deemed to have been agreed with an interest rate in the amount of the annual discount rate published by the CNB. Prior to the discussed decision of the Supreme Court, however, some of the decisions of the financial arbitrator had been overturned by courts, which have been dealing with appeals against the decisions of the financial arbitrator.

iii Litigation

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

For the purposes of this chapter, one particular case can be used as an example as it is the only one that has been reviewed by the Czech Constitutional Court. In this case the claimant had entered into a loan agreement with the bank, and the agreement contained a clause requiring the consumer to pay a loan account management fee in the amount of 150 koruna per month (the clause). The claimant had been paying the fee for over five years without any objections before coming to the conclusion that the fees had been charged illegally and suing the bank to return the fees paid in the amount of 7,200 koruna on the grounds of unjust enrichment. The claimant argued that the bank had not specified what services were being provided for the account management fee and that, therefore, the clause was invalid due to being uncertain and incomprehensible. In addition, the claimant asserted that the clause was in violation of the prohibition of deviations from the law to the detriment of the consumer , as well as in breach of good faith, resulting in a significant imbalance in the rights and obligations of the parties. The District Court in Prague 4 dismissed the action on the following grounds: (1) the clause was a sufficiently specific declaration of will and the subsequent behaviour of the parties indicates that both parties knew what the fee was being charged for as the claimant had been paying the fee for five years without any objections; (2) the clause did not constitute an

7 Act No. 37/2004 Coll.

invalid deviation from the law to the detriment of the consumer as the purpose of consumer protection is mainly to provide consumers with sufficient information enabling them to make free decisions on the market rather than limiting their contractual freedom to such an extent as to prevent them from undertaking obligations other than those specifically set out by law for certain types of contracts; (3) the clause specified the price for performance, therefore, according to Section 56(2) of the Civil Code, it is exempt from being reviewed by courts in terms of being unfair towards the consumer; and (4) charging fees related to the management of consumer loan accounts is a common practice in the banking world and is supported by legal regulations.

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

X OUTLOOK

After the recent trend of decreasing interest rates in mortgages, which led to a dramatic increase in demand in this area, interest rates have gone up. One of the main reasons for this change is the adoption of the CCA, which increased the banks' costs of providing mortgages by imposing stricter administrative requirements and giving consumers more options to make early repayments. The adoption of the CCA caused a slight increase in the price of consumer loans in general. The demand for consumer loans consequently slightly decreased. Along with an increase in consumer loan interest rates, the demand for loans could also have dropped because of low interest rates in savings accounts, which could encourage consumers to use their savings before applying for a loan. The drop in demand may also have been caused by the LTV, DTI and DSTI limits set out by the CNB recommendations, which reduced the number of people eligible for mortgages. Furthermore, the amount of available real estate on the market has been reducing.

However, it is expected that the CNB will continue its interference in response to the real estate and mortgage bubble that the Czech Republic is currently experiencing as a result of high demand for mortgages. It remains to be seen whether the CCA will become an effective instrument of consumer protection in the area of consumer loans.

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

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

Chapter 8

HUNGARY

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

I OVERVIEW

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

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

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

a Act CCXXXV of 2013 on Payment Service Providers;
b Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises;
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;

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p Government Decree 361/2009 (XII.30.) on the conditions of circumspect public credit providing and the inspection of creditworthiness;

q Government Decree 154/2009 (VII.23.) on the detailed rules of the requisition and redemption of the government joint and several guarantor related to housing loans;

r Government Decree 153/2009 (VII.23.) on issues prevailing in the financial sector and required for increasing the effectiveness of consumer protection;

s MNB Decree No. 58/2014 (XII.17.) on the required settlement regarding void contractual conditions of loan contracts and on the provisions of the consumer protection connected to the modifying of consumer loan contracts;

t MNB Decree No. 32/2014 (IX.10.) on the regulation of income prorated instalment payment and collateral instalments; and

u MNB Decree No. 28/2014 (VII. 23.) on the rules on the complaints management of financial organisations.

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

ii Regulation

National Bank of Hungary

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

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

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

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

Dispute resolution

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

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

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

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

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

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

III PAYMENTS

The most frequent payment methods in Hungary are:

a money transfer;

b authorisation for the execution for the transfer (collective, single, bill of exchange);

c cash substituting tools (debit card, cheque); and

d cash payment.

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

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

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

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

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

6 Subject to the exceptions in Chapter V of MNB Decree No. 18/2009 (VIII.6.).

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

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

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

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

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

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

a In the case of fixed-term deposits, the bank must repay the funds held on the account upon maturity or as instructed by the depositor.

b The depositor may request repayment of the funds held in the account before the expiry of the term specified in the contract. In the absence of the depositor's request, the bank shall not be entitled to repay the funds held on the account before expiry.

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

d In the case of deposits for a non-fixed term the bank must promptly repay the funds held in the account as instructed by the depositor.

Although the Civil Code identifies only fixed and non-fixed terms, in market practice a distinction is made between deposit accounts on the length of the term of the deposit, the interest rate provided, and the break fees to be incurred in case of early termination, etc. The deposits for non-fixed terms are usually simple payment accounts, where the account holder bank provides interest.

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

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

7 Section 6:390 of the Civil Code.

8 Act CXVII of 1995 on personal income tax.

i Protection of deposits

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

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

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

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

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

V REVOLVING CREDIT

Revolving credits are frequently used within the retail sector. These kinds of loans are provided for undefined purposes. The consumer may use the credit at his or her sole discretion. In 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 (1) the respective internal policies, (2) the information provided by the consumer, (3) the creditworthiness of the consumer, and (4) the information received from KHR, the official credit bureau system. The result of the examination shall not be based only upon the collateral (if any) provided by the consumer.[11]

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

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

10 Section 214 A of Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises.

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

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 the 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.[12]

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.[13] 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.

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.

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

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

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: (1) the rate and type of the interest; (2) the remuneration, fees, costs and tax included in the total consideration of the loan; (3) the maximum amount of the loan; (4) the term of the loan; (5) the annual percentage rate; (6) the total amount to be paid by the consumer and the amount of the instalments; and (7) if any further undertaking is required from the borrower (e.g., insurance), this obligation shall be indicated in the advertisement.[14]

In addition, an example related to the loan shall be introduced in the advertisement, the figures to be used in such example are prescribed by the respective government decree[15] and currently correspond to a three-year term loan of 500,000 forints.

ii KHR

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

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

VIII UNFAIR PRACTICES

In 2017, the Supervisory Authority conducted inspections of market players to verify compliance, especially with the requirements applicable in the following fields:

a criteria regarding the 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.

14 Section 4 of Act CLXII of 2009 on consumer loans.
15 Section 9 of Decree 83/2010 (III.25.) on the calculation of the annual percentage rate.

With respect to the rules regarding the APRC, the Supervisory Authority typically found violation of rules related to (1) the maximum level of the APRC, and (2) the indication of and communication regarding the 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.

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 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. Because of the significant media coverage, market players are incentivised to offer qualified consumer-friendly home mortgage. It is expected that this programme will contribute to compliance with the statutory standards in terms of the prohibition of unfair commercial practices.

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 31 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 of 31 million and 6 million forints on market players. The fine for excessive default interest amounted to 8.5 million forints in one case, while a market player had to pay a fine of 10 million forints owing to an excessive APRC.

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 2017, the FCB published seven (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 2017 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 2017. 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 calculation method regarding interests and fees to the detriment of the consumer. The Curia of Hungary (the Supreme Court) found that the calculation method does not need to be based on an abstract formula. Accordingly, the court found that if the change in the calculation method always results in a less advantageous outcome for the consumer, charging a capped fee based on the combination of a lump sum and a percentage fee, instead of a simple lump sum in accordance with the terms and conditions applicable prior to the unilateral amendment of the agreement, amounts to a breach of the aforementioned prohibition.

X OUTLOOK

The qualified consumer-friendly home mortgage was a hot topic in the summer and first half of autumn of 2017, gaining significant media coverage. Since the big market players, as well as several smaller financial institutions, already offer this mortgage, it was expected that media coverage would be more limited if an additional market player were to offer this mortgage as well. Under these circumstances, it needs to be considered that financial institutions would require additional incentives to join this programme. Finally, it is an open issue as to whether in the case of qualified consumer-friendly home mortgages eventual non-compliance would be considered to be 'qualified' and result in the imposition of higher fines; for example, for violation of the rules prohibiting unfair commercial practices.

Chapter 9

MEXICO

Federico De Noriega Olea, Maria Aldonza Sakar Almirante and Carlos Eduardo Romero Sotelo[1]

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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2 More information on this topic is available at: https://www.centerforfinancialinclusion.org/client-protection-in-mexico.

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.[3] The key changes from a consumer finance perspective were the following: (1) CONDUSEF was vested with powers to issue and publish recommendations to financial institutions; (2) CONDUSEF was authorised to represent financial users in class actions against financial institutions; (3) a Bureau for Financial Institutions was created under the supervision of CONDUSEF to provide consumers with information on the performance of financial institutions including claims initiated against them and sanctions imposed; (4) CONDUSEF was vested with powers to determine which clauses are abusive under standard-form contracts and to order institutions to remove them; and (5) 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. Mexico is one of Latin America's leaders on the financial technologies market, with the second highest number of fintech start-ups in Latin America. According to official figures, there are currently 238 fintech platforms operating within Mexico, while other reliable sources reveal the existence of nearly 334 fintech platforms which represents a 40 per cent increase from 2017's figures.[4]

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 (1) encourage the development of innovative financial services, (2) increase the level of competition and financial inclusion, and (3) place Mexico at the forefront of the fintech industry.[5]

The LITF regulates two types of financial technology institutions (FTIs): (1) 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 (2) institutions dedicated to e-money, offering issuance, management, accountability and transfer of electronic payment services.[6]

3 Full text at: www.dof.gob.mx/nota_detalle.php?codigo=5329408&fecha=10/01/2014. A brief summary of such reform is also available at: http://www.banxico.org.mx/marco-normativo/resumen-de-las-principales-reformas-al-sistema-fin/%7B70AD6E5C-D7A1-FFA5-AE7D-47F6F69C6623%7D.pdf.

4 Official figures from the 2018 Financial System Report: https://www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20IF/Reporte%20de%20Inclusion%20Financiera%209.pdf. Unofficial figures from: https://www.finnovista.com/actualizacion-finnovista-fintech-radar-mexico-agosto-2018/ and https://expansion.mx/emprendedores/2018/06/06/mexico-es-el-segundo-pais-con-mas-empresas-fintech-en-america-latina.

5 More information available at: https://www.gob.mx/shcp/articulos/el-sector-fintech-y-su-regulacion-en-mexico?idiom=es.

6 Full text of the LITF is available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LRITF_090318.pdf.

Moreover, the LITF also 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 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.

Finally, the LITF also introduces 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.

On a final note, in December 2018 a new president took office from a radical left-wing party, which also won majority in Congress. One of their first moves was to pass a bill to regulate and prohibit certain banking fees. The mere introduction of the bill had a significant impact on the value of the stock of most Mexican banks and caused a lot of turmoil. The bill has not been passed but it 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.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

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

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

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

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

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

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

f 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, in terms of Article 23 of the LTOSF on which the consumer has 90 days to file the claim, the financial institution has 45 days to submit its answer and 45 days to submit documentation.[8]

The other three may be filed directly before CONDUSEF:

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

7 Full text of the LPDUSF that regulates CONDUSEF is available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/64_090318.pdf.

8 Full text of the LTOSF can be found at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LTOSF_090318.pdf.

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, 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 last decade have made considerable efforts to increase banking penetration in Mexico. Some of these measures have included launching simplified bank accounts with transactional and balance limits but that may be opened remotely, such as first and second level accounts that are addressed in Section IV. Others regard facilitating mobile payments. At the same time, cash payments are being limited and controlled under anti-money laundering and counterterrorism provisions. It is expected that the LITF will

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.

10 Data obtained from: https://www.gob.mx/cms/uploads/attachment/file/414831/Cuadr_ptico_2018_verimpresa.pdf.

11 idem.

increase bank penetration by introducing consumers to simple technology to save and raise money, which may eventually lead the unbanked population to trust banking institutions and open bank accounts.

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.

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.[12] 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.

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.[13]

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.

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

13 Full text of the CNBV's 9th financial inclusion report found at https://www.cnbv.gob.mx/Inclusi%C3%B3n/Documents/Reportes%20de%20IF/Reporte%20de%20Inclusion%20Financiera%209.pdf.

14 Full text of General Provisions Applicable to Credit Institutions issued by CNBV is available at: https://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 Mexican pesos). The regulation of mobile payments is lighter than the regulation of mobile banking to foster financial inclusion by simplifying low-value payments.

ii Recent developments

As a result of the current regulations and according to the CNBV's figures, the use of mobile banking and mobile payments is on the rise. During June 2017, the accounts linked with a mobile number were 13 million, which represents a 43 per cent increase on the previous year's figures. The aggregate growth rate for the period between 2013 and 2017 was 71 per cent.[15]

Another recent development was the establishment of security measures applicable to both credit and debit cards to avoid their cloning by replacing the use of the magnetic stripe on cards with a chip. This led to the issuance of new cards and several modifications made by the institutions in order to adapt all their automated teller machines (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]

a 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.

b 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.

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

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15 idem.

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

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]

But without a doubt the most recent development that will change consumer finance dramatically is the LITF, and all secondary regulations that have followed and will follow from the SHCP, the CNBV, CONDUSEF, the Mexican Central Bank and other regulators. Some of these regulations have already been issued, for instance, the General Provisions Applicable to Financial Technology Institutions (the FTI General Provisions) issued by CNBV on September 2018, establishing a legal framework for FTIs' organisation, which includes provision for documents and information that need to be submitted to request authorisation to act as an FTI, minimal capital requirements, limits to receive cash and transfer resources, and applicable accounting criteria, among others.

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.[18] 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 4,642 pesos). The balance of these accounts can never exceed 1,000 UDIs (approximately 6,190 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 18,570 Mexican pesos)

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

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

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 61,900 pesos) without any limit on their balance. These have fewer know-your-customer requirements than level four accounts but more than level-two accounts.

Accounts in levels 2, 3 and 4 are entitled to use all withdrawal means except 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. Only these accounts are current accounts, 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 2.37 million Mexican 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.

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 21 different commercial banks have agents. Banks require certain authorisations to engage a non-financial institution as an agent.

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

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.[19] Moreover, important rules for the protection of consumer interests were set out in the Disposition, such as: (1) entities can execute credit facility agreements with banks or lending institutions but credit cards can only be issued to individuals; (2) credit cards are non-transferable and must only be issued and delivered upon request of the holder; (3) all credit cards must be delivered inactivated; and (4) 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.

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

Another topic to be discussed with respect to credit cards is regulation on interest rates contained in the LTOSF and the general provisions contained in Disposition 14/2007 issued by the Mexican Central Bank.[20] 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.

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

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

Similar to the regulations for interest rates mentioned above, according to the general provisions contained in Dispositions 22/2010[21] and 36/2010[22] issued by the Mexican Central Bank there are also several principals that need to be observed regarding fees:

a institutions can only charge one fee per event;
b alternative fees are forbidden;
c no fees can be charge for the cancelation of financial services;
d fees must be properly registered and published; and
e in order to modify fees a special process has to be observed.

ii Recent developments

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. In the first half of 2018, more than 3.5 million claims were filed before the CONDUSEF in respect of possible frauds and identity theft.[23]

At present, identity theft is prosecuted as criminal fraud under the Federal Criminal Code. However, a bill that will introduce special rules and distinguish identity theft 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.[24]

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.[25]

21 Full text available at: http://www.anterior.banxico.org.mx/disposiciones/normativa/circular-14-2017/%7B68EC294E-C3F9-43F7-633F-7FB8C3CB754E%7D.pdf.

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

23 Mexican Financial Fraud Portal is available at: https://www.gob.mx/cms/uploads/attachment/file/400983/PORTAL_DE_FRAUDES_FINANCIEROS_vers7.pdf.

24 Full text of this bill is available at: http://www.senado.gob.mx/64/gaceta_del_senado/documento/74998.

25 Further information regarding these modifications can be found at: https://www.internationallawoffice.com/Newsletters/Banking/Mexico/Hogan-Lovells-BSTL-SC/National-Banking-and-Securities-Commission-amends-general-rules-for-credit-institutions-to-curb-identity-theft.

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.[26]

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.

Loan agreements executed through a standard-form contract (as such 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 that were discussed earlier, 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 2018 CONDUSEF issued 1,133 sanctioning resolutions against SOFOM ENR companies. This proves that CONDUSEF is taking its enforcement and regulatory powers seriously with respect to SOFOM ENRs.[27]

26 Article 65 of LIC, full text available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/43_220618.pdf.

27 Full Article is available at: https://www.eleconomista.com.mx/sectorfinanciero/Sofomes-mas-sancionadas-que-los-bancos-por-Condusef-20181022-0103.html.

During the past year, 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.[28]

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.[29] It is also noteworthy that not only did the numbers increase, but 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.[30]

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:

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

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

30 Statistics available at: https://www.condusef.gob.mx/transparencia/IA_enero_dic_2017.pdf.

(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:[31]

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

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

c clauses that unreasonably restrict consumers' rights;

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

e clauses allowing the modification or restriction of the contract without the prior consent of the consumer, unless such modification is in 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 2018, 5,333 sanctions were imposed on financial institutions with an estimated total amount of 241 million pesos, from which: 98.7 million pesos were imposed as a result of violations to LPDUSF; 142.1 million pesos were imposed as a result of violations to LTOSF; and 100,000 pesos were imposed as a result of violations of the LIC.[32]

Regarding online banking, the figures for the first half of 2018 show that 452 claims were filed before CONDUSEF by users arguing unrecognised charges, from which 61.6 per cent received a favourable resolution, while around 2 million claims were filed by users directly before financial institutions for the same issue and from which 91.7 per cent received a favourable resolution.[33]

Regarding abusive clauses, figures obtained from the Bureau for Financial Institutions show that around 1,594 abusive clauses were detected as of July 2018, from which 1,486 have already been eliminated, while only 108 are currently in the elimination process.[34]

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

32 Figures available at: https://www.condusef.gob.mx/gbmx/documentos/estadistica/estad2018/multasporley2018.pdf.

33 Figures available at: https://www.condusef.gob.mx/gbmx/?p=estadisticas.

34 Figures available at: https://www.condusef.gob.mx/gbmx/documentos/transparencia/IA_ene_jun_2018.pdf.

ii Disputes before the regulator

In the first half of 2018, CONDUSEF performed around 1,083,547 defence actions, which shows a 22.58 per cent increase in contrast with the figures obtained during last year. From the grand total of defence actions performed during that period, 938,366 were related to advisory actions and 145,181 were related to claims.[35]

iii Litigation

The Mexican Supreme Court of Justice ruled[36] that judges may exercise a discretion to reduce interest rates considered inequitable and notoriously usury. 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 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.

X OUTLOOK

The final draft for the new North American treaty – to replace NAFTA – has now been signed by the Presidents of the United States, Canada and Mexico. The United States–Mexico–Canada Agreement (USMCA) further promotes a healthy, competitive financial market between the three countries. Nevertheless, 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 CONDUSEF to increase its defence actions, continue its supervision duties and extend its regulation, especially on the fintech sector. According to the aforementioned figures, we also expect the free legal defence programme of CONDUSEF to keep increasing its scope and ensuring positive results.

Moreover, after the LITF's enactment, we can also expect secondary fintech regulations from SHCP, CNBV, CONDUSEF, the Mexican Central Bank and other regulators. These are some of the topics to be on the lookout for.

Finally, the new ruling political party (Morena) recently presented a bill to regulate banking commissions before the Mexican Senate. This new bill aims to prohibit, among other payments, commission payments for interbank transfers and cash dispositions, the issuance of additional bank statements, and card replacement in cases of loss or theft. Although this bill was remitted for further review and debate, it will surely require deeper analysis and close collaboration from the regulators of the Mexican financial system, and will provoke further discussions on consumer protection.

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35 Figures available at: https://www.gob.mx/condusef/prensa/condusef-alcanza-cifra-historica-de-acciones-de-defensa-en-el-mes-de-marzo-de-2017?idiom=es.

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

Chapter 10

PORTUGAL

Hélder Frias[1]

I OVERVIEW

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

As for its key financial indicators, by the end of the first quarter of 2017, they showed that the banking industry had a total asset value of €386 billion, while on the other hand, the value of credit granted to customers amounted to a total of €232.8 billion and the value of deposits amounted to a total of €246.6 billion.

1 Hélder Frias is a senior associate at Uría Menéndez – Proença de Carvalho. The information contained in this chapter was accurate as of January 2018.

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. 317/2009 of 30 October, as amended.

In particular, Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers was implemented into Portuguese law by Decree-Law No. 133/2009 of 2 June, 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 51/2007 of 7 March, 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,[2] which establishes the Portuguese unfair contract terms regime applicable to contractual terms that have not been individually negotiated.

It is also important to note that 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 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, there are also bodies responsible for consumer protection that must be taken into account, as they

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

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 general public. Furthermore, the BdP has the power to enforce Portuguese banking laws and regulations through (1) fines and ancillary penalties, (2) injunctions for the fulfilment of certain duties, (3) seizure of documents and valuables, and (4) 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 that the institution remedies the damages or the makes a payment of compensation to the consumer. This level of legal protection is only guaranteed by courts and similar judicial entities.

Finally, it is also worth mentioning that 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.

Prior to the entry into force in Portugal of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (the Payment Services Directive), the issuance and management of debit cards was mainly governed by the Bank of Portugal Notice (Aviso) No. 11/2001 of 20 November on credit and debit cards and corresponding terms of use (BoP 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, as amended (DL 317/09), 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, BoP Notice 11/01 has not been amended or revoked in light of the new rules on the provision of payment services. Consequently, at present DL 317/09 provides for rules on the issuance of debit cards applicable to entities that may provide payment services – credit institutions, financial companies and payment institutions – and BoP 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 BoP Notice 11/01 are also provided for in DL 317/09, although there are some differences worth highlighting, such as: (1) whereas in DL 317/09, 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 BoP Notice 11/01 are mandatory; and (2) BoP Notice 11/01 requires the agreements to be written in Portuguese, it expressly provides that the information on charges and rates of interest cannot be inserted in the agreement by reference to a list of costs and charges available in the branches or by another medium (such as the website) and the issuer is entitled to change the agreement by giving a 15-day notice period to the client.

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

ii Recent developments

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 declined further, while recourse to electronic payment instruments continued to increase.

Lastly, Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (PSD2 Directive) was implemented in 2018, but no proposal of implementation law has yet been published.

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 (Aviso) No. 4/2009 of 20 August, while the details of the information for indexed deposits are set out in BdP Notice (Aviso) 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 it exceeds their current balance.

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

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

ii Recent developments

Law No. 66/2015 of 6 July has brought some changes to the 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 a 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: (1) terminate the credit agreement, (2) take legal actions in order to claim those credits, and (3) 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: (1) personal credit, which may include student and health loans; and (2) 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: (1) the non-payment of two consecutive instalments that exceed 10 per cent of the total amount of credit; and (2) 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 (Aviso) 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 (Aviso) 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 we 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 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 competences of Portuguese Securities Exchange and 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.

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: (1) the interest rate applicable to a contract should result from the arithmetic average between the fixed and the variable interest rate; and (2) 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 recently discussed crowdfunding as an alternative way of financing. Please refer to our comments in Section VI above 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.

Note that 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.

b 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.

c 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

d 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: (1) the principal amount; (2) the accrued compensatory interest; and (3) 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.

Credit institutions and financial companies have increased advertising on consumer finance products that, in some cases, offer considerably higher yields than other financing products. This trend was expected to continue in 2018.

Car loans played an important role in the 2016 growth, probably because of the anticipation of car vehicle acquisitions in response to the scheduled increase in the vehicle tax for 2018.

In 2016, Law 13/2016 of 23 May introduced new rules for tax debt enforcement procedures. Since mid 2016, family houses with a tax valuation of up to €574,323 may not be seized or judicially sold to pay tax debts. Prior to its approval, there were some indications that the prohibition might have been more inclusive and also be extended to cover other debts – such as housing credit debts to banks – which ultimately were not part of the version adopted. Nevertheless, there might be some developments in 2018 regarding this subject.

Moreover, it was expected that the key legal framework of the Portuguese financial market would be strengthened in 2018, as MiFID II and PSD2 were expected to be transposed and Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investments products entered into force.

Chapter 11

SOUTH AFRICA

Ina Meiring[1]

I OVERVIEW

In South Africa, the National Credit Act 34 of 2005 (NCA) regulates consumer finance and is primarily aimed at protecting consumers and making credit services more accessible. In this chapter, we focus mainly on the NCA.

In addition to the NCA, the Consumer Protection Act 68 of 2007 (CPA) is also aimed at protecting consumers. The CPA does not apply to credit agreements but to the goods and services that are the subjects of credit agreements. The exemptions under the CPA include any transaction with consumers who are juristic persons whose asset value or annual turnover, at the time of the transaction, equals or exceeds 2 million rand. The CPA will therefore apply to all transactions with individuals, and to all transactions with juristic persons whose asset value or annual turnover at the time of the transaction is below 2 million rand.

The CPA provides for certain fundamental consumer rights, including the rights to:

a protection against discriminatory marketing;
b restrict unwanted direct marketing;
c choose;
d disclosure and information;
e fair and responsible marketing;
f fair and honest dealing;
g fair, just and reasonable terms and conditions; and
h fair value, good quality and safety.

The Financial Sector Regulation Act 9 of 2017 (FSRA) established a 'twin peaks' model of financial sector regulation for South Africa by means of two regulators, namely a Prudential Authority, operating within the administration of the South African Reserve Bank (SARB), and a new Financial Sector Conduct Authority (FSCA). The Prudential Authority supervises the safety and soundness of banks, insurance companies and other financial institutions, while the FSCA supervises how financial services firms conduct their business and treat customers.

The objectives of the FSCA include enhancing and supporting the efficiency and integrity of the financial system and protecting financial customers. As a market conduct regulator, the FSCA has particular focus on the most vulnerable customers, namely retail clients or consumers. The outcomes-focused market conduct regulatory and supervisory

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approach of the FSCA seeks to protect consumers by ensuring that financial institutions demonstrate that they consistently treat their customers fairly in their provision of financial products and services.[2]

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The NCA in general applies to all credit agreements between parties dealing at arm's length and made or having an effect in South Africa.[3] An agreement is a credit agreement if it is a credit facility, credit transaction, credit guarantee or a combination of these.[4] Such agreements generally have two main elements: credit is granted (e.g., a loan is provided) and a fee, charge or interest is imposed in respect of the deferred payment.

The NCA will always apply to a credit agreement entered into with an individual or sole proprietor. Among others, the NCA will not apply to a credit agreement in which the consumer is a juristic person[5] whose asset value or annual turnover, together with that of all its related juristic persons, equals or exceeds 1 million rand, nor to a large credit agreement[6] concluded with a juristic person whose asset value or annual turnover is less than 1 million rand.

Credit providers must provide consumers with pre-agreement statements and quotations in the prescribed form. The content of credit agreements is also prescribed.[7]

The cornerstone of the NCA is the prevention of reckless credit granting and debt relief measures to deal with the problem of over-indebted customers.[8] The NCA requires peremptory pre-assessment of consumers and imposes severe sanctions in certain instances of reckless credit granting.

In terms of Section 80(1)(b)(ii), a credit agreement is reckless if the credit provider, having conducted an assessment, entered into an agreement with the consumer even though the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over-indebted. The regulations under the NCA contain provisions prescribing the criteria to conduct an affordability assessment, the assessment of existing financial means and prospects and the calculation of financial obligations.

A consumer may apply to a debt counsellor to be declared over-indebted. The debt review process, as set out in Section 86 of the NCA, read together with applicable regulations is quite detailed and comprises various phases. In addition, the NCA also provides for debt-reorganisation in cases of over-indebtedness.

2 2018 Annual Report of the FSCA p.11.
3 Section 49(1) of the NCA.
4 See the definitions in Section 8 of the NCA.
5 The NCA has limited application if the credit agreement is entered into with a juristic person who falls within the thresholds. See Section 6 of the NCA.
6 A large credit agreement is either a credit transaction in terms of which the principal debt is 250,000 rand or more, or a mortgage agreement.
7 See Sections 92 and 93 of the NCA.
8 See Section 3 on the purposes of the NCA.

A credit provider is not allowed to charge an amount or impose a monetary liability on a consumer in respect of credit fees or charges prohibited by the NCA, or an amount of a fee or charge or an interest charge under a credit agreement exceeding the amount that may be charged under the NCA.

In terms of Section 101 of the NCA, a credit agreement can only require from the consumer payment of the principal debt, an initiation fee, a service fee, interest, cost of credit insurance, default administration charges and collection costs. All these fees and charges are either prescribed or limited in their application. The credit provider may further charge default administration charges and collection costs, as defined.

A credit provider may also, in terms of Section 106 of the NCA, require a consumer to maintain, during the term of their credit agreement, credit life insurance not exceeding, at any time during the life of the credit agreement, the total of the consumer's outstanding obligations to the credit provider in terms of their agreement. There are detailed requirements for such insurance.

Note that the cost of credit must be disclosed in detail in the pre-agreement statement and quotation. If the credit provider charges a prohibited fee, this will be an offence under the NCA.[9]

The NCA prescribes a two-stage approach to a credit provider's debt enforcement by distinguishing between procedures that must be complied with before debt enforcement and further procedures that are dealt with as debt procedures in a court. The required procedures before debt enforcement are contained in Section 129, and the debt procedures in a court are found in Section 130.

ii Regulation

The NCA provides for the establishment of the National Credit Regulator (NCR)[10] and the National Credit Tribunal (NCT).[11]

The NCR was established as the regulator under the NCA and is responsible for (among others) the regulation of the credit industry, the registration of industry participants, investigation of complaints and ensuring the enforcement of the NCA.

The NCT is an independent body distinct from the NCR. It may adjudicate any application that may be made to it in terms of, and make any order provided for in, the NCA in respect of such an application. In addition, it may also adjudicate on allegations of prohibited conduct and impose remedies provided for in the NCA.

Any person who complains of a contravention of the NCA may submit a complaint to the NCR, which may investigate the complaint or initiate one in its own name.[12] The NCR may refer the matter to a consumer court, the NCT or the National Prosecuting Authority (if an offence in terms of the NCA is committed).

In terms of Section 55 of the NCA, the NCR may issue a compliance notice to a person who it, on reasonable grounds, believes has failed to comply with a provision of, or is engaging in an activity in a manner inconsistent with, the NCA. If a person fails to comply with the compliance notice, or if a person objects to the notice, the matter will be referred to the NCT.

9 Section 100(3) of the NCA.
10 See Sections 12 to 25 of the NCA.
11 See Sections 26 to 34 of the NCA.
12 See Sections 26 to 34 of the NCA.

Section 57 of the NCA provides that, if a registered credit provider repeatedly contravenes the NCA, the NCR may request the NCT cancel the credit provider's registration. If a credit provider is also a regulated financial institution, the NCR may impose conditions on the registration of that person; refer the matter to the regulatory authority that licensed the financial institution, with the request that the authority review that licence; or at the request or with the consent of the regulatory authority that licensed the financial institution, request the NCT to cancel the registration.

A person affected by a decision of the NCR to impose conditions on the registration of a credit provider may apply to the NCT to review the decision. A decision of the NCT is subject to appeal or review by the High Court.

In addition to suspending or cancelling a credit provider's registration, in terms of Section 150 of the NCA, the NCT may make the following orders (among others) in relation to prohibited or required conduct in terms of the NCA: declaring conduct to be prohibited, interdicting any prohibited conduct, and imposing an administrative fine or requiring payment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement.

The amount of an administrative fine may not exceed the greater of 10 per cent of the credit provider's annual turnover during the preceding financial year or 1 million rand. The annual turnover of a credit provider is the total income of that credit provider during the immediate preceding year under all credit agreements to which the NCA applies, less the amount of that income that represents the repayment of principal debt under those credit agreements. Any decision, judgment or order of the NCT may be served, executed and enforced as if it were an order of the High Court.

III PAYMENTS

i Overview

The National Payment Systems Act 78 of 1998 (NPS Act) provides for the management, administration, operation, regulation and supervision of the payment, clearing and settlement systems in South Africa. The SARB is the overseer of the national payment system.

Apart from the Bills of Exchange Act 34 of 1964, payment methods are not specifically regulated by legislation. Payment methods include electronic transfers, cards, cheques, debit orders and ATMs or mobile devices. The NCA specifically allows debit order payments and regulates their content.[13]

The SARB issued a position paper on virtual currencies in December 2014,[14] which highlighted several risks associated with the virtual currencies landscape, particularly digital currencies, and provided a cautionary note to users. The SARB remains of the view that currently virtual currencies (VCs) pose no significant risks to financial stability, price stability or the national payment system (NPS).[15]

13 Section 124 of the NCA.

14 No. 2/2014.

15 Annual Regulatory and Oversight Report, National Payment System Department 2016/17.

ii Recent developments

The National Payment System Department of the SARB published a policy paper on the 'Review of the National Payment System Act 78 of 1998' in 2018 (the NPS Policy Paper).[16] The NPS Policy Paper contains several recommendations, including:

a The NPS Act should enable the ability to consider and adopt, where appropriate, international standards and principles to the extent that it is appropriate to South Africa and does not stifle innovation.

b The primary objects should be stated as promoting the financial stability, safety, efficiency (including interoperability), transparency and integrity of the NPS; the safety and soundness of payment institutions and activities; and confidence in the NPS.

c The secondary objects should be stated as the prevention of financial crime, promotion of financial inclusion and support of the FSCA in its consumer protection objective.

d The SARB should be responsible for licensing all entities that provide payment services and operate payment systems, after consultation with the FSCA.

e It is recognised that in future the SARB may wish to allow or require settlement of other emerging currencies, such as central bank digital currencies and VCs, or designate other settlement systems, and the NPS Act should be enabling in this regard, with specific requirements being provided for in subordinate legislation.

f The provision of retail payment services and activities (e.g., remittance services, e-money, mobile money) where money is not due to a third party should be allowed, whether the entities providing such services are banks or non-banks. Such entities should be exempted from the definition of the business of a bank in the Banks Act 94 of 1990 and be subject to a risk-based and proportionate regulatory, supervisory and oversight framework. This could also be effected through an amendment to the Banks Act and necessary provisions in the NPS Act, while at the same time maintaining financial stability.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

A large proportion of the South African population lacks access to financial services, mostly because they do not have a bank account and live in remote or rural areas. The Banking Association of South Africa refers to 'financial inclusion' and explains that it is a central aim of the banking sector, whereby the sector seeks to improve the range, quality and availability of financial services and products focusing on the unserved, underserved and financially excluded.[17] Principles of financial inclusion include access, affordability, appropriateness, usage, quality, consumer financial education, innovation and diversification, and simplicity.[18]

16 See http://www.treasury.gov.za/comm_media/press/2018/2018121001%20NPS%20Act%20Review%20 Policy%20Paper%20Release%201.pdf and https://www.resbank.co.za/RegulationAndSupervision/ NationalPaymentSystem%28NPS%29/Legal/Documents/Documents%20for%20Comment/NPS%20 Act%20Review%20Policy%20Paper%20-%20final%20version%20-%2013%20September%202018.pdf.

17 https://www.banking.org.za/what-we-do/overview.

18 https://www.banking.org.za/docs/default-source/financial-inclusion/fi-working-def/financial-inclusion-principles.pdf.

The Banking Association reports that the banking industry has set a target of improving financial inclusion in South Africa by raising the current levels of banked individuals from 67 per cent to 70 per cent by 2015 and reaching a target for financial inclusion of 90 per cent by 2030.[19]

Overdrafts are regulated as credit facilities under the NCA (see Section III above).

ii Recent developments

South Africa does not have explicit deposit insurance or deposit guarantee schemes. However, in a position paper issued by National Treasury in 2015, titled 'Strengthening South Africa's Resolution Framework for Financial Institutions',[20] it was proposed that a proper resolution strategy should include the protection of depositors in a manner consistent with deposit insurance arrangements. In addition, it was proposed that the SARB should have the power to invoke the deposit insurance scheme. This paper will form the basis of discussions in the industry towards the drafting of a special resolution bill.

The SARB has also published a discussion paper on 'Designing a deposit insurance scheme for South Africa'.[21] This discussion paper motivates the need for an explicit, privately funded deposit insurance scheme for South Africa.

Further, a draft Conduct of Financial Institutions Bill (CoFI) was published in December 2018. The object of CoFI is to establish a consolidated, comprehensive and consistent regulatory framework for the conduct of financial institutions that will:[22]

a protect financial customers;
b promote the fair treatment and protection of financial customers by financial institutions;
c support fair, transparent and efficient financial markets;
d promote innovation and the development of and investment in innovative technologies, processes and practices;
e promote trust and confidence in the financial sector;
f promote sustainable competition in the provision of financial products and financial services;
g promote financial inclusion;
h promote transformation of the financial sector; and
i assist the SARB in maintaining financial stability.

V REVOLVING CREDIT

i Overview

Revolving credit is regulated as a credit facility under the NCA.[23]

A credit provider is not allowed to make an offer to increase the credit limit under a credit facility, or induce a person to accept such an increase, on the basis that the limit will

19 See www.banking.org.za/what-we-do/overview.
20 2015 Resolution Framework Policy http://www.treasury.gov.za/publications/.
21 May 2017.
22 See clause 3 of CoFI.
23 See Section 8(3) of the NCA.

automatically be increased unless the consumer declines the offer.[24] When entering into a credit agreement, the credit provider must afford the consumer an opportunity to decline the option of pre-approved annual credit limit increases as set out in Section 119(4).[25]

Consumers must be provided with contact telephone numbers where they can report the loss or theft of a PIN or a card, and the consumer may not be held liable by the credit provider after the time that the consumer has reported the loss or theft of the card or PIN, unless the consumer's signature appears on the voucher, sales slip, or similar record evidencing that particular use of the credit facility; or the credit provider has other evidence sufficient to establish that the consumer authorised or was responsible for that particular use of the credit facility.[26]

A consumer may require the credit provider to reduce the credit limit under the facility and stipulate a maximum credit limit that he or she is prepared to accept. A credit provider may also reduce the credit limit under that credit facility to take effect on delivery of a written notice.[27]

Credit cards are not only issued by banks. If the card is a multi-function card that could also allow the cardholder to withdraw cash from the credit facility, the issuer will only be able to issue such a card in partnership with a bank, so as to avoid conducting the business of a bank as provided for under the Banks Act 94 of 1990.

VI INSTALMENT CREDIT

i Overview

Instalment credit in respect of movable goods, such as the financing of vehicles, is regulated as instalment agreements under the NCA. If the instalment agreement does not reserve ownership of the movable until the agreement is fully complied with, or does not have a provision authorising repossession of the movable goods in the event of a breach of the agreement, it will not be regarded as an instalment agreement for purposes of the NCA. It may then be regarded as a credit transaction as provided for in Section 8(4)(f) of the NCA (i.e., payment is deferred and a charge, fee or interest is payable).

A mortgage agreement is also regulated under the NCA as a credit agreement.[28]

If a credit agreement is an instalment agreement or a mortgage agreement, the credit provider may include in the principal debt deferred any of the following items to the extent that they are applicable in respect of goods that are the subject of the agreement:

a an initiation fee as contemplated in Section 101(1)(b) if the consumer has been offered and declined the option of paying that fee separately;

b the cost of an extended warranty agreement;

c delivery, installation and initial fuelling charges;

d connection fees, levies or charges;

e taxes, licence or registration fees; or

24 Section 74(2) of the NCA.

25 Section 74(6) of the NCA. See Section 119 for the circumstances under which the credit limit under a credit facility may be increased.

26 Section 94 of the NCA.

27 Section 118 of the NCA.

28 A mortgage is defined in Section 1 of the NCA as a mortgage bond registered by the registrar of deeds over immovable property that serves as continuing covering security for a mortgage agreement.

f subject to Section 106, the premiums of any credit insurance payable in respect of that credit agreement.[29]

Certain types of credit agreements are excluded from the application of Sections 81 to 84 of the NCA insofar as those provisions relate to reckless credit. The excluded agreements include a school loan or a student loan, and emergency loans. In the case of an emergency loan, the credit provider must obtain and retain proof of the existence of the emergency, as defined in Section 1 of the NCA.

VII OTHER AREAS

The Protection of Personal Information Act 4 of 2013 (POPI) has recently been promulgated, but is not yet fully effective.[30] Once POPI has come into full force (which may occur in 2019), it will govern the processing of personal information as defined. These obligations are placed on the responsible party, which is defined as a private or public body or any other person that, alone or in conjunction with others, determines the purposes of and means for processing personal information.

Therefore, to the extent that a responsible party company processes personal information of consumers (data subjects),[31] it must comply with all of the conditions for lawful processing.[32] There are eight conditions for lawful processing. The conditions relate to accountability,[33] processing limitations,[34] purpose specification,[35] further processing limitation,[36] information quality,[37] openness,[38] security safeguards[39] and data subject participation.[40]

The Financial Intelligence Centre Act 38 of 2001 (FICA) compels only accountable institutions listed in Schedule 1 to identify and verify the identity of a new client before any transaction may be concluded or any business relationship is established. Credit providers are currently not listed specifically as accountable institutions, but banks are. Amendments may be affected to FICA to include credit providers as accountable institutions.

FICA and the Prevention of Organised Crime Act 121 of 1998 (POCA) provides the primary legal foundation for combating money laundering in South Africa. Money laundering is described in Section 1(1) of FICA as an activity that has or is likely to have the

29 Section 102 of the NCA.

30 Certain sections of POPI became effective in 11 April 2014, and deal mainly with the establishment of the office of the Information Regulator and with the powers of the Minister to issue regulations. The 'Regulations Relating to the Protection of Personal Information, 2017' were published on 14 December 2018, but are not effective yet.

31 Data subject means in terms of Section 1 of POPI, the person to whom the personal information relates and includes individuals and juristic persons.

32 Sections 4 and 5 of POPI.

33 The responsible party must ensure that all of the conditions for processing are met.

34 Processing must be adequate, relevant and not excessive. It is not necessary to collect data directly from the data subject if the data subject provided consent to the collection of the information from another source.

35 The information must be collected for a specific, explicitly defined and lawful purpose.

36 Further processing must be compatible with the purpose of collection.

37 Information must be complete, accurate and updated where necessary.

38 The data subject must be aware that personal information is collected.

39 The integrity and confidentiality of personal information must be ensured.

40 Data subjects have the right to access personal information and to request correction of inaccurate, irrelevant, out of date, excessive or incomplete or misleading information.

effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest that anyone has in such proceeds, and includes any activity that constitutes an offence in terms of Section 64 of FICA or Sections 4, 5 or 6 of POCA (offences relating to the proceeds of unlawful activities).

FICA requires all suspicious and unusual transactions to be reported. This obligation is, however, more widely cast in that it applies not only to accountable institutions but to any person who carries on business in South Africa. The term 'business' has not been defined, and the ordinary meaning of the word will therefore apply, namely that of a commercial activity or undertaking.[41] Failure to report under Section 29 constitutes an offence. A person convicted of this offence will be liable to imprisonment for a period not exceeding 15 years, or to a fine not exceeding 10 million rand.

A person convicted of a money laundering offence under Sections 4 to 6 of POCA is liable to a maximum fine of 100 million rand or to imprisonment for a period not exceeding 30 years. Also, the proceeds as well as the instrumentalities of the crime may be lost to the state in terms of the confiscations and forfeiture powers under POCA.

Section 4 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 also creates various offences associated with the financing of or economic support for 'specified offences'. Specified offences include the offence of terrorism and offences associated or connected with terrorist activities. The offences listed in Section 4(1) focus on the committing of terrorist acts or acts that benefit a terrorist or terrorist organisation.

VIII UNFAIR PRACTICES

The NCT reported the following two notable judgments in its Annual Report 2017/2018[42] that are illustrative of the manner in which unfair practices are deal with:

In *NCR v. Gauteng Motors CC*,[43] the respondent was allegedly involved in extending credit while not registered as a credit provider and entering into reckless credit agreements with consumers. An investigation by the NCR was prompted by a complaint related to the repossession of a consumer's vehicle by the respondent, allegedly without following the required enforcement procedures. The NCT found that the respondent had engaged in prohibited conduct by engaging in reckless credit, charging extra charges without disclosing their nature and failing to adhere to lawful debt enforcement procedures. The respondent was ordered to pay an administrative fine of 800,000 rand within 30 days of the date of the judgment.

In *NCR v. Murphy and Sons Cash Loans CC*,[44] the allegation by the NCR was that the respondent had inadequately assessed the ability of consumers to receive and repay the credit extended to them; had entered into reckless credit agreements with consumers; had failed to keep proper documentation for conducting affordability assessments; had charged interest on the principal debt in excess of the prescribed amount; and had failed to provide consumers with pre-agreement statements and quotations in contravention of the NCA. The NCT declared the conduct of the respondent to be prohibited and cancelled its registration

41 See Guidance Note 4 on Suspicious Transaction Reporting issued in terms of Section 4(c) of FICA.

42 See www.thenct.org.za.

43 NCT-78954-2017-140 (1).

44 NCT-82548-2017-57 (1).

as a credit provider. The NCT further ordered a refund to all affected consumers who were charged excess amounts in the form of fees or amounts that exceeded the prescribed maximum allowed by the NCA within 30 days of the date of judgment. The respondent was further ordered to pay an administrative fine of 250,000 rand.

IX RECENT CASES

The two most notable recent cases, both of which are under appeal, concern the charging of club fees by retailers who either offer credit facilities or enter into instalment agreements with consumers: *Edcon Holdings Limited v. the National Consumer Tribunal and the National Credit Regulator* (*Edcon* case)[45] and *National Credit Regulator v. Lewis Stores (Pty) Ltd* (*Lewis* case).[46]

These cases both dealt with the question whether a credit agreement may require the payment of money or other consideration, other than the fees and charges listed in Section 101 of the NCA. The credit providers (Edcon and Lewis Stores) charged a club fee for club membership. The NCR contended that the fees were prohibited since the NCA does not allow a credit agreement to contain any fee or charge other than that permitted by the NCA.

In the *Edcon* case, Louw J found that the word 'require', in the context of Section 101 of the NCA, can only mean to demand from a consumer who applies for credit, or to impose an obligation on that consumer to pay for something that is not permitted in terms of the Section. If the credit agreement does not place an obligation on a consumer to pay a fee, if the customer has a choice whether or not to subscribe to a product or service, then the credit agreement itself does not require payment of such fees. The court held that the club fee charged is clearly not a cost of credit since the notion of a cost of credit is the cost of lending money or extending a credit facility.[47] In addition, the court found that the fee for the product (the club membership) entitled the customer to various benefits. It can therefore not be a cost of credit, or in consequence of or pursuant to the conclusion of a credit agreement. The court was of the view that the fact that membership of the club can be cancelled by the customer at any time, negates that contention.[48] Accordingly, the court found that the tribunal had erred in finding that Edcon had engaged in conduct that was prohibited by the NCA.

The facts in the *Lewis Stores* case are somewhat different to those in the *Edcon* case. In this case, club membership is agreed to in a separate agreement and not on the credit application form. In addition, the credit agreement is an instalment agreement as opposed to the credit facility in the *Edcon* case. The court agreed that the NCA does not seek to regulate the goods and services that a credit provider offers to its customers, but only seeks to regulate the fees and charges that can be charged when a customer elects to pay for goods in accordance with a credit agreement (which includes a credit facility). It deals with credit and the cost of credit. Therefore, the NCA does not prevent a credit provider from offering services that are not part of the cost of credit.[49] Accordingly, the NCR's appeal was dismissed with costs.

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45 Case No: A237/2017.

46 Case No: A333/2017.

47 *Edcon* case, para 7.

48 ibid.

49 *Lewis* case, paras. 15 and 16.

X OUTLOOK

CoFI (see Section IV) is regarded as the next phase of the legislative reforms to strengthen the regulation of how the financial services industry treats its customers. The provisions of this bill are in accordance with the FSRA (see Section I). The FSRA sets out the mandates of the two regulators, namely the SARB and FSCA, while CoFI aims to streamline the framework for the regulation of the conduct of the financial institutions, and to give legislative effect to the market conduct policy approach, including implementing the 'treating customers fairly' principles.

Chapter 12

SPAIN

Leonor de Osma[1]

I OVERVIEW

Consumer finance has been one of the business areas most affected in Spain by the economic downturn following the financial crisis. Unemployment increased by over 4 million, 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 have led to the government's introduction of new legislation to protect the most vulnerable segments of society.

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. Non-performing loans are gradually declining from their peak levels in early 2014, while production of new loans has been picking up.

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. However, although this was especially true during past years in the motor sector, where for example vehicle registrations in November 2017 were 12.4 per cent higher than the same month the previous year, in November 2018 the number of registrations of vehicles in Spain decreased by 12.6 per cent in comparison with the year before.[2] It remains to be seen whether this reduction is a passing trend or if the tendency will continue in 2019. In any event, the levels of vehicle registration in Spain have not reached the pre-crisis figures: 1.22 million vehicle registrations were filed from January to November 2018, compared with the 2.35 million vehicles registered in 2007.

Excluding credit cards, consumer lending is the fastest-growing segment in household lending and, according to Bank of Spain data, it was growing in mid-2018 at a rate of 14 per cent (and up to 21 per cent with regards to the financing of durable goods). The cumulative growth of consumer lending since 2014 amounts to 47 per cent, the main reason for the increase being the recovery of the Spanish economy. It seems that the level of consumer lending in Spain is reaching pre-crisis figures: in 2017 more than €43 billion in consumer lending loans were granted to Spanish households by financial institutions, overcoming the amounts granted in mortgage loans. With most observers expecting economic growth to be above 2 per cent in 2018–2019, growth in this segment should continue. New entrants in the financial technology space are also likely to necessitate ongoing reviews of legislation.

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2 According to the Spanish Vehicles and Trucks Manufacturers Association.

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.

Directive 2008/48/EC was recently modified by Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No. 596/2014. Regulation (EU) 2016/1011 primarily establishes a specific obligation of the credit entity to, in a separate document, inform the consumer of the name of the benchmark index, identity of its administrator and potential implications for the consumer. Regulation (EU) 2016/1011 entered into force in June 2016, but started applying as from 1 January 2018.

Law 2/2009 of 31 March[3] 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

3 It should be noted that certain provisions of Law 2/2009 will be amended by the future Law on Real Estate Credit referred to below.

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[4] of 16 November, approving 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 the 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 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 governing contracting with consumers through the adherence to general terms in contracts (the Law on General Terms in Contracts), which regulates standard terms in contracts.

Law 22/2007 of 11 July on distance marketing of consumer financial services, which 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, the related Order EHA/2899/2011 of 28 October on transparency and protection of banking services consumers and the Bank of Spain Circular 5/2012 of 27 June, addressed to credit entities and payment services providers, on transparency of banking services and lending responsibility.

Law 5/2015 of 27 April on promoting corporate financing (Law 5/2015), which deals with crowdfunding for the first time in Spain and lays out the requirements with which platforms providing these services must comply.

4 It should be noted that certain provisions of Royal Decree 1/2007 will be amended by the future Law on Real Estate Credit referred to below.

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, both Law 7/1998 of 13 April and Law 22/2007 of 11 July contain provisions whereby abusive clauses or misleading or obscure provisions that are detrimental to consumers should be considered void.

In addition to the aforementioned general regulations, certain regional provisions also apply.[5]

Special attention should be drawn to the future Law on Real Estate Credit the draft of which was approved on 11 December 2018 by the Economy and Business Commission of the Spanish Parliament and which is expected to be definitely approved during the first quarter of 2019.

The Law on Real Estate Credit will partially transpose Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 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 the legal transparency in the granting of real estate financing and decrease the level of litigiousness related to abusive clauses.

Among other matters, the Law on Real Estate Credit (as currently drafted) will (1) harden the requirements for lenders to accelerate unpaid mortgage loans; (2) increase the standards of conduct applicable to creditors; (3) define the amount of information that financial entities have to provide to borrowers and reinforce such entities' transparency obligations; (4) establish an obligation on the banks to evaluate the solvency of potential clients; and (5) include 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.

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: (1) financial services users' right to submit complaints and enquiries; (2) the medium and content of such complaints and enquiries; (3) 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; (4) the filing of collective complaints; (5) the conditions and procedure for the rejection of complaints; and (6) the handling of complaints.

5 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.

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, Equality and Social Policy. 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.[6]

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.

III PAYMENTS

i Overview

As mentioned in Section II.i, payment services 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, the recently approved 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, 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).

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, the legislation will need to be adapted.

Fintech is continuously evolving, however, and in the future more areas will need to be addressed through regulation. An example of this is the wider use of blockchain technology in the banking system. Although still in its infancy, it could be used for shared databases with applications to international payments and securities settlements, which could raise consumer protection and data privacy issues.

6 A list of the different consumer bodies currently existing in Spain is available here: www.msssi.gob.es/en/organizacion/ccaa/directorio/home.htm.

ii Recent developments

Mobile payments

New payment technologies, including both contactless cards and new mobile payments, are increasingly present in Spanish purchasing processes. These payment methods have certain advantages for consumers, such as their convenience and the intentional increase in the security of daily transactions.

Although fintech and mobile payments are not yet regulated in Spain, final guidelines on the security of online payments, published by the European Banking Authority on 19 December 2014, were approved by the executive committee of the Bank of Spain on 24 March 2015.

Limits on cash payments

A 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.

The previous Spanish government was considering the reduction of the limit to €1,000, but this modification was not formalised and the new Spanish government has not taken a position on this 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. This is not yet specifically regulated, although the European Banking Authority launched a public consultation on 19 December 2016 regarding the potential benefits and risks of big data for consumers and financial firms, to determine whether any further regulatory or supervisory action may be needed.

Likewise, the European Commission launched a public consultation on 23 March 2017 entitled 'Fintech: a more competitive and innovative European financial sector', the main purpose of which was to seek input from stakeholders to further develop the Commission's policy approach towards technological innovation in financial services.[7]

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

7 A summary of the contributions to the referred public consultation can be found at https://ec.europa.eu/info/sites/info/files/2017-fintech-summary-of-responses_en.pdf.

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 2018 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.

V REVOLVING CREDIT

i Overview

Credit card use in Spain is not particularly widespread. The amount credited is usually paid at the end of the month, and instalments rarely continue for more than three months.

However, Spanish consumers are increasingly using credit cards: the number in circulation in Spain in 2017 was 52.35 million (compared to 48.75 million in 2016) and increased up to 53.76 million by June 2018.[8]

Credit lines for consumers are being introduced by some financial institutions, taking the commercial name ‘revolving credit’. The 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.

ii Recent developments

The Bank of Spain publishes the interchange and discount fees received by payment companies from the use of cards in point of sale terminals (POS) when the payment service provider and beneficiary are both located in Spain. Publication of this information is 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.

In 2014, the European Parliament established new 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. The new law establishes 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).

8 https://www.bde.es/f/webbde/SPA/sispago/ficheros/es/estadisticas.pdf.

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.

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 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 which 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 (1) defines the target population to be protected; (2) stabilises a limit on late payment interest that can be charged to that population; (3) 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); (4) establishes certain tax or fiscal measures to support these mechanisms; and (5) introduces some flexibility into out-of-court repossessions of the mortgage collateral.

Both Royal Decree 6/2012 and Law 1/2013 were recently 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 (1) 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 (2) 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, as previously discussed, the future Law on Real Estate Credit is expected to amend the existing regulations applicable to mortgage debtors.

VII OTHER AREAS

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

Law 5/2015 addresses crowdfunding from three perspectives: (1) the legal framework governing crowdfunding platforms; (2) the authorisation, registration and setting aside of the activity of the platforms; and (3) 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 has made the Law obsolete. Among other things, more clarity is required in the definitions of the activities subject to Law 5/2018 and 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.[9]

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[10] 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 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,[11] the Court of Justice of the European Union 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

9 Supreme Court ruling of 3 June 2016, available at: http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7693401&links=28079119912016100009&optimize=20160608&publicinterface=true.

10 Supreme Court ruling of 9 May 2013, available at: http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6703660&links=28079119912013100009&optimize=20130510&publicinterface=true.

11 Judgment of the Court of Justice of the European Union of 21 December 2016, joined cases C-154/15, C-307/15 and C-308/15, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186483&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=561464.

recently 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,[12] the Spanish Supreme Court amended its own criteria to conform with the Court of Justice of the European Union'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.

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 (1) 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 (2) 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 iure* 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.[13] As of 15 November 2018, Spanish banks had returned €2,292 million to borrowers as reimbursement of excess interest paid on the basis of floor clauses.

iii Acceleration clauses

The Spanish Supreme Court also 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 are 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

12 Supreme Court ruling of 24 February 2017 available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7946094&lin s=%22123%2F2017%22&optimize=20170228&publicinterface=true.

13 Supreme Court ruling of 11 April 2018 available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8348440&links=clausula%20suelo%20%22205%2F2018%22&optimize=20180413&publicinterface=true.

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 in the existence of unfair contract clauses can be raised both by the debtor or the judge himself in the course of the foreclosure proceedings until the physical repossession of the asset is obtained by the creditor.

The upcoming ruling of the European Court of Justice (ECJ) will answer a number of preliminary questions raised by several Spanish courts on certain aspects of the mortgage foreclosure proceedings, especially in relation to the unfairness of acceleration clauses in foreclosed mortgage loans. In his conclusions, the Advocate General adopted a firm position in favour of declaring the unfairness of acceleration clauses and argued that the effects of such unfairness should be more burdensome for lenders. It remains to be seen whether the ECJ will adopt the Advocate General's view in connection with the preliminary questions raised by the Spanish courts. In the meantime, most of Spanish enforcement proceedings are suspended.

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.

IX RECENT CASES

In 2016, the Bank of Spain's Complaints Department dealt with 48,230 new cases filed by users of financial services. Claims peaked in 2013, with a gradual decrease since then but the number remaining above pre-crisis levels. Twenty-seven per cent of claims received in 2016 related to mortgage-floor disputes, 28.3 per cent referred to other forms of lending and 21.2 per cent related to deposits.

According to the Bank of Spain's 2016 Claim Report,[14] the number of decisions issued in favour of the claimant in claims unrelated to floor clauses remains extremely high. This underlines the inadequate attention paid by credit entities to customer service in the settlement of claims, since in 60.4 per cent of cases the Bank of Spain's Complaints Department upheld claims, which, as stated before, had already been filed in the first instance with the corresponding credit entity.

14 Bank of Spain's 2016 Claim Report available at: https://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/16/Ficheros/MSR2016_Documento_completo.pdf.

In relation to claims dealing with floor clauses, 62.8 per cent of decisions issued by the Bank of Spain's Complaints Department found in favour of the claimant (similar to the 66.6 per cent figure from the year before). This indicates weaker performance by credit entities' customer service departments when handling this kind of claim, even though the percentage of decisions in favour of the claimant slightly decreased in 2016 in comparison with 2015.

Finally, the corrections carried out by the corresponding credit entities as a result of decisions issued in favour of the claimant amounted, on average, to 36.8 per cent in claims unrelated to floor clauses and 31 per cent in claims that did deal with floor clauses – a reduction of the corrections in both categories in comparision with the previous year.

According to the Bank of Spain's 2017 Claims Report,[15] the number of claims filed by users of financial services has significantly grown in 2017, while it had been continuously decreasing during the previous years. The total number of claims submitted to the Bank of Spain in 2017 was 40,176, in comparison with the 14,462 claims filed in 2016.

It seems, however, that the sudden notable increase in the number of claims filed in 2017 is a passing trend since, according to the information provided by the Bank of Spain, the number of claims filed with the Complaints Department by the end of October 2018 only reached 15,530.[16] In any event, the Bank of Spain has experienced difficulties in resolving all the filed claims, the majority of which are related to controversies with financial entities. In 2017, only around 25 per cent (10,428) of the 40,176 complaints filed were decided upon. This has contributed to the judicialisation of banking disputes, as many customers eventually decide to file a claim before the Spanish courts.

Overall, the total average of decisions issued in 2017 in favour of the claimant, in relation to all matters, amounted to 73.07 per cent of cases while, at the end of October 2018, 61.16 per cent of the total average of decisions were issued in favour of the claimant.

The corrections carried out by the corresponding credit entities as a result of decisions issued in favour of the claimant amounted, on average, to 62.4 per cent in 2017, experiencing a significant increase in comparison with 2016, where the figure was 36.8 per cent.

In 2017, 81.4 per cent of the claims filed before the Bank of Spain's Complaints Department were related to mortgage loans and, in particular, to disputes in connection with the costs and fees of formalisation of those loans.

X OUTLOOK

The economic outlook and the need to address the aftermath of the real estate bubble suggests that consumer lending will continue as the fastest-growing type of loan in Spain, at least in the medium term.

However, the digital economy is transforming the traditional consumer lending space, with new channels such as crowdfunding, new entrants into the payment segment, and even the creation of virtual currencies.

15 Bank of Spain's 2017 Claim Report available at: https://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/17/MSR2017_Documento_completo.pdf.

16 Market Conduct and Complaints Department Statistics, available at: https://clientebancario.bde.es/pcb/es/menu-horizontal/actualidadeducac/actualidad/estadisticas/.

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 as they come to play a bigger role in the consumer sector, either with payments or lending, more legislation will prove necessary.

Chapter 13

THAILAND

Sui Lin Teoh and Saroj Jongsaritwang[1]

I OVERVIEW

Consumer finance in Thailand has been growing steadily in recent years. According to statistics from the Bank of Thailand (BOT), there are more than 2 million personal loan accounts and more than 21 million credit cards issued to consumers as at June 2018.[2] While financial services are mostly provided to consumers by financial institutions under the supervision of the BOT, certain services may also be provided by non-financial institutions. These non-financial institutions, however, are regulated under rules and regulations issued by the BOT to control the provision of restricted services, such as personal loans, credit cards and e-payment services.

With the emergence and increased use of the social media, online shopping and online trading platforms, channels of financial services have become broader so as to provide consumers access to the most convenient and up-to-date range of services. Financial services are currently available to and accessible by consumers through various channels, both online and offline. Traditional payment systems such as over-the-counter and cash payments are expected to be gradually reduced while usage of online channels like mobile applications and e-Money are expected to increase. This is in accordance with the National e-Payment Master Plan initiated and implemented by the Thai government since 2015.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

The main pieces of legislation regulating consumer payment, deposit and lending services in Thailand are the Financial Institutions Act 2008 (FIA), the Bank of Thailand Act 1915 (BOTA) and the Civil and Commercial Code (CCC). The FIA and the BOTA, including 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

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2 Detailed statistics can be found at www.bot.or.th.

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,[3] 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[4] 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.[5]

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Deposit accounts and overdrafts held by consumers with service providers fall within the scope of the provisions on deposit under the CCC. In particular, the CCC sets out general provisions on deposit contracts, which govern and are applicable to deposits of all kinds of property, including money; and specific rules for the deposit of money (for example, the provision prohibiting depositors from demanding the return of the deposited money before the contractually agreed time).

Financial institutions (as depositories) are required to comply with the FIA and other rules and regulations concerning deposit accounts and overdrafts as may be imposed by the BOT from time to time. For instance, they are required to apply the same interest rates for the same category or type of consumers, and announce updated terms and conditions for deposit contracts for general consumers, interest rates, discounts, fees, penalties, formulae and calculation method, in a prominent place at their head office and all branches, to inform the public and consumers who contract with or use services at such office or branch.[6]

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

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

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.

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 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. ThorPorTor. ForKorNgor. Wor. 1666/2559 ThorPorTor. ForKorNgor. Wor. 1667/2559, and ThorPorTor. ForKorNgor. Wor. 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 14

UNITED KINGDOM

Arun Srivastava and Nina Moffatt[1]

I OVERVIEW

Consumer finance, and retail banking and payments, are accessible and established industries in the UK. The regulatory environment is mature and is derived from both domestic and European legislation. Fast-paced innovation has diversified the market in recent years, with many new products and providers, although the availability of credit has in recent years become more restricted in some respects owing to the response of regulators and lenders to the financial crisis and other developments. For the most part, regulators have sought to facilitate innovation as the UK government tries to keep the jurisdiction competitive, while increasing consumer protection in a number of areas.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

In the UK, consumer lending, deposit-taking and payments are regulated under a number of vertical (i.e., product-specific) and horizontal (non-product-specific) regulatory regimes, which to a large extent derive from EU laws. There is therefore a large degree of consistency of regulation across the European Economic Area (EEA)[2] 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).[3] The FCA Handbook includes, among other things, the Consumer Credit sourcebook (CONC) and the Mortgage and Home Finance Conduct of Business sourcebook (MCOB). The CCA and FSMA implement and supplement the EU Consumer Credit Directive and Mortgage Credit Directive (MCD).[4] The FSMA sets out the licensing regime for different types of lending, as well as a range of intermediary and ancillary activities.

1 Arun Srivastava is a partner and Nina Moffatt is an associate at Paul Hastings (Europe) LLP. The authors would like to give special thanks to Harriet Russell, Ben Regnard-Weinrabe, Nikki Johnstone and Sophie Wood, authors of the chapter in the previous edition. The information contained in this chapter was accurate as of January 2018.

2 Made up of the countries of the EU plus Norway, Iceland and Liechtenstein. EU financial services laws tend to be 'single market' measures that also apply to the additional EEA countries.

3 The FCA Handbook is available at: www.handbook.fca.org.uk/handbook/.

4 Respectively, Directives 2008/48/EC and 2014/17/EU.

The consumer credit regimes are also highly prescriptive of conduct matters, such as the format and content of advertising and the information to be provided before, during and after entering into credit agreements; consumer rights; and required or prohibited practices, in areas such as underwriting, charging or collecting on loans. Failure to comply can in many cases have an impact on the enforceability of loan agreements and result in customer remediation and enforcement action. In many cases the consumer credit regime protects not only consumers, but also 'quasi-consumer' borrowers such as sole traders and certain small partnerships and unincorporated associations in the case of non-mortgage lending (certain business mortgages are also regulated). We discuss the consumer credit regime in more detail below.

FSMA also includes the licensing regime for deposit-taking, namely provision of banking products such as current and savings accounts, as well as a range of related conduct requirements protecting 'banking customers' (consumers and quasi-consumers)[5] under the Banking Conduct of Business sourcebook (BCOBS) in the FCA Handbook. BCOBS sets out a variety of obligations on banks (and rights for customers) in relation to bank accounts, for example:

a rights for banking customers to switch their accounts from one bank to another, where they do not already have such rights under the Payment Accounts Regulations (see below);[6]

b cancellation rights;[7]

c information requirements, which in many respects mirror those under the Payment Services Regulations 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]

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. The PSRs implemented the second EU Payment Services Directive (PSD2)[11] with effect from 13 January 2018 – replacing the Payment Services Regulations 2009, which had implemented the first EU Payment Services Directive[12] (PSD1). The PSRs include both a licensing regime for 'payment institutions' and a registration regime for account information service providers (AISPs), which are forms of non-bank financial institution, and extensive

5 Namely, micro-enterprises, charities with an annual income below £1 million and certain trustees – see BCOBS 1.1.1 and the definition of 'banking customer' in the glossary to the FCA Handbook.

6 BCOBS 5.1.5 to 5.1.8.

7 BCOBS Chapter 6.

8 BCOBS Chapters 2 to 4, in particular. Certain information requirements apply with respect to consumers only.

9 BCOBS 5.1.12 and 5.1.14 to 5.1.19.

10 BCOBS 1.1.3 and 1.1.4.

11 Directive 2015/2366/EC.

12 Directive 2007/64/EC.

conduct requirements, which apply not only to payment institutions (and, to a limited extent, to AISPs) but also to other types of financial institution such as banks and electronic money institutions (EMIs) when providing payment services in relation to their products.

We describe the PSRs in more detail later in this chapter.

Closely related to the payments regime is the electronic money (or e-money) regime under the Electronic Money Regulations 2011 (EMRs), which implement the EU Electronic Money Directive.[13] 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.[14] The conduct requirements generally apply to all customers, although there is a partial opt-out from the refund provisions available for non-consumers[15] (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:

a the EU Interchange Fee Regulation,[16] which caps interchange fees, potentially requires reorganisation of card schemes (such as Visa and MasterCard), and requires changes to card scheme rules and customer agreements to provide, in particular, merchants with new rights when taking payments through the card schemes;

b the EU Payment Accounts Directive,[17] 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;[18] and

c 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).

There are, additionally, a variety of horizontal requirements generally applicable across all the consumer lending, retail banking and payment services referred to above, including, for example:

a the anti-money laundering, terrorist finance and sanctions regimes under legislation such as the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Proceeds of Crime Act 2002, Terrorism Act 2000, EU Wire Transfer Regulation[19] and Consolidated List of HM Treasury and the Office of Financial Sanctions Implementation;[20]

13 Directive 2009/110/EC.

14 EMRs 39 to 45.

15 EMR Section 44.

16 Regulation (EU) 2015/751.

17 2014/92/EU.

18 For regulatory guidance on which payment accounts are subject to the UK regulations, see www.fca.org.uk/publication/policy/ps16-20.pdf.

19 Regulation (EC) 1781/2006.

20 www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets.

b fairness requirements under the Consumer Rights Act 2015 (CRA) and (other than for payment institutions, AISPs and EMIs only providing regulated payment and e-money services) the FCA's 'treating customers fairly' regime;[21]

c consumer cancellation rights and information requirements for financial services contracts entered into remotely with consumers (e.g., online or through a phone, under the Financial Services (Distance Marketing) Regulations 2004);

d information requirements and provisions on the placing and confirmation of orders under the Electronic Commerce (EC Directive) Regulations 2002, which also apply in part to non-consumers;

e prohibitions on a range of inappropriate practices with respect to consumers, including, for example, misleading omissions from advertising, under the Consumer Protection from Unfair Trading Regulations 2008;[22] and

f restrictions and requirements regarding use of individuals' personal data, including for marketing purposes, under legislation such as the Data Protection Act 1998 (deriving from the EU Data Protection Directive 1995,[23] which was replaced by the EU General Data Protection Regulation[24] with effect from May 2018) and the Privacy (Electronic Communications) Regulations 2003 (deriving from the Privacy and Electronic Communications Directive).[25]

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

As regards the impact of the Brexit referendum on 23 June 2016, resulting in a vote for the United Kingdom to leave the EU, the general approach of the UK financial services regulators appears to be that it is business as usual[26] and that financial institutions should continue to comply with EU laws or UK laws deriving from EU laws unless and until they are amended following implementation of Brexit.

Finally, although it falls outside the discussion in this chapter, it is worth noting that payment service providers (PSPs) and others involved in the issue or acceptance of credit 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

21 Principles 6 and 7 in Section 2.1 of the FCA's Principles for Businesses (PRIN) in the FCA Handbook.

22 There is similar protection for non-consumers under the Business Protection from Misleading Marketing Regulations 2008.

23 Directive 95/46/EC.

24 Regulation (EU) 2016/679.

25 Directive 2002/58/EC.

26 For example, the FCA has stated that consumers' 'rights and protections, including any derived from EU legislation, are unaffected by the result of the referendum and will remain unchanged unless and until the Government changes the applicable legislation'.

policymaking powers of the PRA have since been transferred to a Bank of England Prudential Regulation Committee, from March 2017)[27] 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.[28]

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 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. 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, 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

27 Under the Bank of England and Financial Services Act 2016.

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).

29 The Dispute Resolution: Complaints Manual 3.6.1.

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. We discuss some of the main areas of change below.

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,[30] 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

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).[31]

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

The commercial agent exemption is available for 'payment transactions 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 exemption, with the general sense being that it will now be harder to fall within scope of the exemption.[32]

The limited network exemption 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.*

30 Under Article 4(44) PSD2 – Regulation 2(1)PSRs.

31 The full list of regulated payment services (and related exemptions) is set out in Part 1 of Schedule 1 to the PSRs.

32 See for example the FCA's guidance in Q33A of Chapter 15 of their perimeter guidance (PERG).

This exemption lends itself to products such as certain fuel, restaurant or store cards – although some providers have sought to rely on it for broader networks of service providers, or wider ranges of goods and services, so requiring an exercise of judgement (and potentially engagement with local regulators) as to how far it is appropriate to do so.[33]

Authorisation and passporting

Where a PSP provides a regulated payment service in the UK, and an exemption does not apply, the PSP needs to be suitably licensed by the FCA or another relevant authority including in another EEA country. Typically, the PSP will be licensed as a bank, EMI or payment institution, or registered as an AISP.

The PSRs set out the licensing regime for payment institutions and registration regime for AISPs.[34] 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 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).[35]

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,[36] 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.[37]

Other key areas of focus under the licensing regime are: the robustness of a payment institution's systems and controls,[38] particularly its IT systems; and the need for any functions outsourced by a payment institution – including intra-group outsourcings – to be appropriately overseen by the payment institution and to meet a number of other requirements[39] (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,[40] for example, by issuing credit cards, but may need to obtain additional consumer credit permissions under the FSMA in order to do so.[41]

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33 The full list of exemptions is in Part 2 of Schedule 1 to the PSRs; the commercial agent and limited network exemptions are in Paragraphs (2)(b) and (k) of Part 2, respectively. See also the FCA guidance in Q40 of PERG 15.

34 See Regulation 5-21 PSRs. The EMRs set out a similar licensing regime for EMIs.

35 See Regulation 23 PSRs for further details of the safeguarding requirements.

36 Regulations 17 and 18 PSRs.

37 Regulation 6(7)(e) and (f) and Paragraph 19, Schedule 2 of the PSRs.

38 Regulation 6(6) PSRs.

39 Regulation 25 PSRs.

40 Regulation 32 PSRs.

41 See for example Q20A in PERG 15.

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.[42]

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 currency[43] (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.[44]

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 time frames in which payments must be executed, after being initiated by a customer, in order to reduce the scope for PSPs to retain float (i.e., to keep hold of funds for their own purposes rather than putting them at the disposal of their customers).

For transfers in euros (and domestic transfers in the domestic currency, such as sterling transfers within the UK), the payer's PSP usually needs to ensure that cleared funds are received by the payee's PSP by the end of the business day after the transfer was initiated. For other transfers in EEA currencies within the EEA, up to four business days are usually permitted.[45]

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).[46]

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.[47] 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

42 Regulations 13 to 16 and 27 PSRs.
43 Article 2 PSD and Article 2 PSD2 / Regulations 40 and 63 PSRs.
44 Article 2 PSD2 / Regulations 40 and 63 PSRs.
45 Regulation 86 PSRs.
46 Regulations 88 and 89 PSRs.
47 Regulations 75 to 77 and 91 and 92 PSRs.

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.[48]

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)[49] can be asked to opt out of many of the conduct requirements.[50]

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]'.[51] It is anticipated as a 'software bridge between the website of the merchant and the online banking platform of the payer's account servicing [PSP] in order to initiate internet payments on the basis of a credit transfer',[52] 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.[53] 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.*[54]

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.[55]

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

48 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.

49 As defined in Regulation 2(1) PSRs.

50 Regulations 40 and 63 PSRs.

51 Article 4(14) PSD2/Regulation 2(1) PSRs.

52 Recital (27) PSD2.

53 See also Q25B in PERG 15.

54 Article 4(16) PSD2/Regulation 2(1) PSRs.

55 See also Q25A in PERG 15.

payment initiation and account information services.[56] 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.[57]

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.

iii Security

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

a a requirement for PSPs to establish a framework of appropriate mitigation measures and control mechanisms to manage the operational and security risks relating to the payment services they provide, and to submit a comprehensive assessment of such operational and security risks to their regulators on an annual basis;[58]

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;[59] and

c a requirement for customers to undergo strong customer authentication when, for example, accessing their payment accounts or initiating electronic payment transactions.[60] 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'.[61] Failure to apply strong customer authentication can affect a PSP's liability for unauthorised transactions.[62]

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

56 Articles 36 and 66 to 68 PSD2 / Regulations 105 and 69 to 71 PSRs.

57 Article 98, PSD2 and Commission Delegated regulation on Regulatory Technical Standards specifying requirements on strong customer authentication and common and secure communication under PSD2, available at: http://ec.europa.eu/finance/docs/level-2-measures/psd2-rts-2017-7782_en.pdf.

58 Article 95 PSD2/Regulation 98 PSRs.

59 Article 96 PSD2/Regulation 99 PSRs. See also Section 15.14.20 of the FCA's supervision manual (SUP).

60 Unhelpfully, the term 'electronic payment transactions' is not defined, creating some uncertainty of scope.

61 Articles 4(30) and 97 PSD2/Regulations 2 and 100 PSRs.

62 See in particular Articles 74(2) and 92 PSD2/Regulations 77 and 95 PSRS.

at the end of a transitional period, probably likely to end in the second quarter of 2019. 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.[63]

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, with some of the latest announcements indicating that the United Kingdom may seek to stay in the single market for a transitional period after Brexit takes effect and have some form of equivalence thereafter, 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, which came into force on 18 September 2016, has, among other things, obliged certain UK banks[64] 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.[65]

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.[66] 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).[67]

63 Articles 10-21 of the Commission Delegated Regulation.

64 Under Regulation 21.

65 For example, asylum seekers and 'consumers who have not been granted a residence permit but whose expulsion is impossible for legal or practical reasons' may be among those eligible, and it may not be straight forward to establish their status. See Regulation 23.

66 The PRA Rulebook is available at: www.prarulebook.co.uk.

67 Rule 4 (Limits on compensation payable), Depositor Protection rules, PRA Rulebook.

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

ii Recent developments

Open banking

On 9 February 2016, the Open Banking Working Group[69] published a detailed framework for delivering an Open Banking Standard in the United Kingdom.[70] It has been designed to 'help improve competition and efficiency, and stimulate innovation in the banking sector'.[71]

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'.[72] The intention is that customers can procure access to their own private banking data, so that they may better manage their finances and make better decisions about the financial products they chose. The Open Banking Standard also promotes open data exchange between financial institutions.

Accordingly, Open Data API specifications have been published online,[73] 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'.[74]

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[75] was published in August 2016, and introduced a package of binding remedies, including the following.

68 Most notably, *Office of Fair Trading v. Abbey National plc* [2009] UKSC6, [2010] 1 AC 696.

69 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.

70 https://theodi.org/open-banking-standard.

71 'Introducing the Open Banking Standard', Open Data Institute 2016, page 5.

72 ibid.

73 https://www.openbanking.org.uk/open-data-apis/.

74 https://openbanking.atlassian.net/wiki/spaces/DZ/pages/16320694/Open+Data+API+Specifications.

75 'Retail banking market investigation: Final report', CMA, 9 August 2016, https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf.

It included the CMA requiring the largest retail banks[76] 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.*[77]

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.[78]

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 Ireland[79] to make up-to-date personal current account and business current account transaction data sets available without charge and in accordance with certain standards,[80] from 13 January 2018.[81]

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.[82]

V REVOLVING CREDIT

In this section, we discuss credit cards (as illustrative of revolving credit) and some related areas of regulation and recent developments.

76 RBS, Lloyds, Barclays, HSBC, Santander, Nationwide, Danske Bank, Band of Ireland and AIB.

77 Paragraph 166.

78 As summarised in Figure 15.1 of the final report.

79 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.

80 Article 14, the Order.

81 Article 2.10, the Order.

82 https://www.gov.uk/government/publications/retail-banking-order-2017-directions-issued-to-5-banks.

Like overdrafts, credit cards involve provision of both payment services and credit facilities, and as such are subject to both the payment services regime (discussed above) and the consumer credit regime. Where these regimes overlap, the consumer credit regime usually takes priority.

i Overview

As noted above, the consumer credit regime derives largely from the CCA and FSMA, including CONC and other aspects of the FCA Handbook. They include both a licensing regime and detailed conduct requirements.

As regards conduct requirements, the regime is highly prescriptive of matters such as the format and content of advertising and information needing to be provided before, during and after entering into credit agreements; consumer rights; and required or prohibited practices, in areas such as underwriting, charging or collecting on loans. The conduct requirements vary depending on the type of consumer credit activity being carried on, with the heaviest burden falling on lenders themselves. We provide a more detailed description of some of the requirements below.

Failure to comply with the consumer credit regime can in many cases have an impact on the enforceability of loan agreements or related charges, and result in customer claims, customer remediation and enforcement action.

Licensing

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.[83]

Such activities are generally regulated if the lending is to:

a individuals, whether consumers or sole traders; or

b 'relevant recipients of credit' (or in the case of lending through an electronic system, 'relevant persons'), being partnerships of two or three partners (of which at least one partner is a natural person) or unincorporated associations (of which at least one member is a natural person).[84]

There are a variety of exemptions from the regulated activities, perhaps most notably the business borrowing exemption and the charge card exemption.

The business borrowing exemption is where the borrowing is for business purposes and exceeds £25,000 – so, for example, a business credit card with a credit limit of £26,000.

The charge card exemption applies to credit cards or other forms of revolving credit where all the credit drawn down over a period of three months or less is repayable in one go, and where no interest or other significant charges apply (or where the credit is secured on land).[85]

83 Respectively, Articles 36A, 36H, 39D, 39E, 39F and 39G of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO). See the RAO for the full list of regulated activities.

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

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

Generally, the above UK credit-related licences cannot be passported (i.e., cannot be used in other EEA countries), although banks and (as noted above) payment institutions and EMIs can passport certain lending activities.

Pre-contractual information

Before a customer enters into a credit agreement, the lender must provide certain pre-contractual information, including:

a an 'adequate explanation' of various specified features of the credit agreement, in order to put the customer in a position to assess whether the agreement suits their needs and financial situation;[86]

b the Standard European Consumer Credit Information, which contains detailed information relating to the credit agreement;[87] and

c a summary box, designed to set out key information about the credit card product in a simple, standard format, in order to make it easy for customers to understand and compare credit cards.[88]

Creditworthiness

Before entering into a credit card agreement, the lender must undertake an assessment of the creditworthiness of the customer. The assessment should take into the account not only the customer's ability to repay the proposed credit within a reasonable period but also the potential for the commitments under the credit agreement to adversely impact the customer's financial situation. The assessment has to be based on 'sufficient information' obtained from the customer 'where appropriate' and a credit reference agency 'where necessary'.[89]

The lender must carry out a fresh creditworthiness check before significantly increasing a customer's credit limit,[90] and must not increase it if the customer is opposed to the increase or is at risk of financial difficulties.[91]

The creditworthiness assessment, as a safeguard against over-indebtedness post-financial crisis, is a key area of regulatory scrutiny. CONC contains detailed rules and guidance, which, while fairly prescriptive, do allow some flexibility as to the information to be gathered and assessed. Industry guidance is also available.[92]

Failures in the creditworthiness assessment can lead to regulatory or other action (resulting potentially in customer remediation and other sanctions).

In July 2017, the FCA consulted[93] on proposed changes to CONC rules and guidance about assessing creditworthiness and affordability, with the aim of clarifying what it expects

86 Under CONC 4.2.5.

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

88 Further information, including an example of the standard summary box, is provided by the UK Cards Association: www.theukcardsassociation.org.uk/individual/credit-card-summary-box.asp.

89 CONC 5.2 (Creditworthiness assessment: before agreement).

90 CONC 6.2.1.

91 CONC 6.7.7.

92 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.

93 FCA Consultation Paper: Assessing creditworthiness in consumer credit – Proposed changes to our rules and guidance.

of firms (but without fundamentally changing its approach to creditworthiness). The consultation closed in October 2017, and the FCA aims to finalise and publish the changes to CONC in the first half of 2018.

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'.[94] As at the end of 2017, the bill is due for a third reading in the House of Lords before going to the House of Commons for consideration.

Form and content of the agreement

The CCA and underlying regulations[95] 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).[96]

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.

94 Creditworthiness Assessment Bill [HL] 2017-19, see https://services.parliament.uk/bills/2017-19/creditworthinessassessment.html.

95 Most notably the Consumer Credit (Agreements) Regulations 2010.

96 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'.[97]

The FCA published its final report on 16 July 2016.[98] 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.[99]

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 paper[100] 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 paper[101] on 14 December 2017. These papers propose a number of changes to FCA rules and guidance, including new requirements on credit card companies to:

a intervene and help customers whose credit card debt persists over 18 to 36 months; and

b 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.

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.

By 1 April 2019, the FCA must review the retained CCA provisions and submit a report to HM Treasury, setting out any recommendations for legislative change. The aim

97 'FCA announces competition review into credit cards – particular focus on how industry works with those in difficult financial situations', 3 April 2014, www.fca.org.uk/news/press-releases/fca-announces-competition-review-credit-cards-particular-focus-how-industry.

98 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.

99 Paragraph 1.30, FCA Market Study MS14/6.3.

100 FCA Consultation Paper: Credit card market study – consultation on persistent debt and earlier intervention remedies (CP17/10)

101 FCA Consultation Paper: Credit card market study – Persistent debt and earlier intervention remedies - feedback on CP17/10 and further consultation

of the review is to consider the appropriateness of repealing the remaining provisions of the CCA, taking into account the proportionality of the consumer credit regime and the extent to which retained provisions of the CCA could be replaced by FCA rules or guidance.[102]

Accordingly, in February 2016, the FCA launched a 'call for input' on the retained provisions in the CCA.[103] Many players in the consumer finance market used this as an opportunity to make submissions about aspects of the consumer credit regime that they believe need to be amended (not just simplified), such as moderating the stringent sanctions for certain breaches, for example, of the NOSIA requirements.

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 FCA's credit card market study above), the FCA stated that it is 'currently progressing the review and will publish an interim report in 2018'.[104]

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;[105] and

b in addition to NOSIAs, a key area for enforcement action and customer remediation is incorrect annual statements.[106]

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.[107] 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.

102 Part 5 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014.

103 www.fca.org.uk/publication/call-for-input/call-for-input-review-retained-provisions-consumer-credit-act.pdf.

104 FCA Consultation Paper: Credit card market study – Persistent debt and earlier intervention remedies – feedback on CP17/10 and further consultation.

105 Article 60F(2) RAO.

106 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).

107 Section 105 CCA.

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'.[108]

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.[109]

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.[110]

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.[111]

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.[112]

There are various legislative provisions in place to enable student loans to fall outside the consumer credit regime in the CCA and FSMA.[113]

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.

ii Recent developments

High-cost short-term credit

High-cost, short-term credit (HCSTC) is defined as unsecured credit made available to individuals (or 'relevant recipients of credit') in relation to which the APR is at least 100 per cent and which is advertised as being provided for at most a year (or similar) or under which

108 Paragraph 3.4 Hire-Purchase and Instalment Sale, Goode: Consumer Credit Law and Practice.
109 Section 189 CCA.
110 Section 189 CCA.
111 Sections 99 and 100 CCA.
112 See the student loans regime under the Teaching and Higher Education Act 1998.
113 See for example Section 8 of the Sale of Student Loans Act 2008.

the credit is due to be substantially repaid within a year.[114] 'Payday lending' is the example cited most often, and has been one of the FCA's top priorities since it took over responsibility for regulating consumer credit. Of particular note:

a the FCA has granted lending permissions to very few payday lenders, compared with the previous licensing regime under the OFT; and

b CONC has introduced rules that apply specifically to HCSTC firms, including specific conduct standards and price caps: interest and charges must not exceed 0.8 per cent of the amount borrowed per day over the contractual period of the loan; default fees must not total more than £15; and the total cost of the credit cannot exceed 100 per cent of the amount borrowed.[115]

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.[116] 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.[117] The FCA is particularly concerned about rent-to-own, home-collected credit and catalogue credit, and has wider concerns about consumers' long-term indebtedness. It plans to investigate these issues further, with the aim of consulting on proposed solutions in Spring 2018.

Peer-to-peer lending

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

Firms (P2P platforms) that operate an electronic system in the UK must be authorised by the FCA if they facilitate lending or investment by individuals and relevant persons[118] or borrowing by individuals and relevant persons, provided that the P2P platform:

a is capable of determining which credit agreements should be made available to each of the borrowers and lenders;

b undertakes to receive and pay out amounts of interest or capital due to lenders; and

c either takes steps to collect (or arrange for the collection) of repayments or exercises, or enforces rights under the credit agreement.[119]

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

114 See the glossary to the FCA Handbook.

115 CONC Rule 5A.2.

116 FCA Call for Input: High-cost credit – Including review of the high-cost, short-term credit price cap.

117 FCA Feedback Statement: High-cost credit – Including review of the high-cost short-term credit price cap.

118 '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.

119 Article 36H RAO.

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.[120] An interim feedback statement published in December 2016 announced that the FCA has identified areas of specific concern, including the improvement of wind-down plans to allow existing P2P loans to be administered in the event of the P2P platform's failure, cross-investment (i.e., investment in loans originated on other P2P platforms), the application of mortgage-lending standards where the funds raised through the P2P platform is to finance the acquisition of property, and rules on the content and timing of disclosures (including financial promotions) to persons lending or investing through the platform.[121]

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.[122]

The MCD was implemented in the UK on 21 March 2016, although certain provisions are subject to later implementation including transitional arrangements. The implementing measures were – with a view to minimising disruption – in effect added on top of the existing UK regulated mortgages regime under FSMA, particularly through changes to MCOB (with the exception of consumer buy to let mortgages which, as noted above, are regulated under a separate Mortgage Credit Directive Order 2015).

Among the key changes under the MCD were:

a bringing second charge mortgages (in many cases previously regulated under the CCA) within the FSMA mortgage regime;

b changes to exemptions from mortgage-related regulated activities;[123]

c amended advertising rules;[124]

d restrictions on bundling mortgages with the sale of other financial products;[125]

e additions to the affordability assessment requirements;[126]

f 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;[127]

g introduction of a new step involving making a binding mortgage offer and a related cooling-off period;[128]

120 www.fca.org.uk/publication/call-for-input/call-input-crowdfunding-rules.pdf.

121 www.fca.org.uk/publication/feedback/fs16-13.pdf.

122 Article 3 MCD.

123 Article 4(4B) RAO.

124 Chapter 3A of MCOB.

125 MCOB 2A.2.

126 Chapter 11A of MCOB.

127 Chapter 5A of MCOB, and MCOB TP 1 MCD Transitional Provisions.

128 MCOB 6A.3.

h 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);[129] and
i new early repayment rights.[130]

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.

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.[131] 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[132] broadly applies to unfair practices across the financial services described in this chapter (although, notably, not generally to payment institutions and EMIs). The regime also applies with respect to business customers.

Key areas of scrutiny and challenge in this area include 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[133] to an HCSTC provider, Wage Payment and Payday Loans Ltd, and its director, in which the FCA:
a cancelled Wage Payment and Payday Loans Ltd's interim permissions to provide regulated activities including consumer credit lending;
b refused Wage Payment and Payday Loans Ltd's application for full permission; and
c banned the director from carrying out any regulated activity carried on by an authorised firm.

In related matters, on 24 January 2017 and 1 February 2017, the FCA issued decisions not to approve applications by Nationwide Debt Consultants Limited[134] and Steven Maoudis,[135] 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

129 Chapter 10A of MCOB.
130 MCOB 2A.4.
131 Sections 140A to 140C CCA.
132 Principles 6 and 7 in Section 2.1 of PRIN.
133 www.fca.org.uk/publication/decision-notices/wage-payment-payday-loans-limited.pdf.
134 https://www.fca.org.uk/publication/decision-notices/nationwide-debt-consultants-limited-2017.pdf.
135 https://www.fca.org.uk/publication/final-notices/steven-maoudis-montana-debt-management-2017.pdf.

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.

In November 2015, in another enforcement case, the PRA issued a fine of more than £1.2 million[136] to a bank, R Raphael & Sons Plc, which outsourced certain functions to another group company without putting in place an appropriate outsourcing agreement or adequately overseeing the outsourcing. The PRA fine illustrated the importance of having robust arrangements in place even for an intra-group outsourcing.

Finally, after Northern Rock (in December 2012) and Barclays Bank (in September 2013) announced that errors in their NOSIAs had been identified, the OFT asked all retail banks to perform a detailed review of their consumer statements and notices, and as a result 17 banks and building societies have agreed to refund interest incorrectly charged following the delivery of incorrect NOSIAs.[137] This industry-wide remediation process is likely to be ongoing, and will probably involve many millions of pounds.

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, 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

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.[138]

Unfair relationships

In the 2014 *Plevin* case[139] 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

136 www.bankofengland.co.uk/pra/Documents/supervision/enforcementnotices/en271115.pdf.

137 http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2014/18-14.

138 For FCA guidance on durable medium, see for example paragraph 8.75 of the PSD2 Approach Document and the Durable Medium website.

139 *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (12 November 2014).

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,[140] 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.

140 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési* (Case C-472/10, judgment given 26 April 2012) and *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen e.V.* (Case C-92/11, judgment given 21 March 2013).

Chapter 15

UNITED STATES

Rick Fischer, Obrea Poindexter and Jeremy Mandell[1]

I OVERVIEW

The US consumer financial services marketplace is competitive and heavily regulated. Advances in technology and significant capital investment have attracted technology firms, including established firms and start-ups, to compete in the financial services market with traditional providers, including banks and the card networks. The Consumer Financial Protection Bureau (CFPB) has matured into a strong enforcement agency, alongside the federal banking regulators, including 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. The CFPB has considered and adopted significant 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. 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, provide consumer protections. Consumer credit also is heavily regulated under federal and state law. The Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA) provide the backbone for federal consumer protections related to the various forms of consumer credit. State law, including state usury protections, may also apply. Finally, the CFPA and the Federal Trade Commission (FTC) Act set forth prohibitions on unfair, deceptive and, in some cases under the CFPA, abusive acts or practices (UDAP/UDAAP).

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In addition to these substantive statutes covering consumer payments, deposits and credit, there is an overlay of federal statutes covering law enforcement objectives (e.g., the Bank Secrecy Act) and consumer financial privacy (e.g., the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act (FCRA)), among other key statutes and regulations targeting public policy objectives. This overlay is the subject of extensive review and analysis in other treatises or law journals and is referred to herein only in passing.

ii Regulatory framework

Entities that provide consumer financial products or services are subject to regulation and enforcement by 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 144 billion non-cash retail payment transactions in the US, with a value of almost US$178 trillion.[6] According to the Federal Reserve, the most common payment methods are card-based (debit, credit and prepaid), while ACH transactions have the highest dollar value for non-cash retail payments.[7]

Although there is a great deal of industry interest and activity around online and mobile payments, to date, most online and mobile payments are processed using traditional payment infrastructures. Nevertheless, emerging payment solutions can leverage a number of enhancements over traditional payment methods, including improved customer interfaces, increased use of customer data, and integration with customer loyalty or reward programmes

2 12 U.S.C. Section 5481.
3 id. Section 5531.
4 id. Sections 5512, 5561 to 5567.
5 id. Section 5536.
6 See Federal Reserve, The Federal Reserve Payments Study 2016 at 2 (22 Dec. 2016) (triennial study).
7 id. at 3.

or other third-party services used by consumers. These enhancements have the potential to lessen friction and promote consumer conversion and usage rates. Many of the novel legal and regulatory issues surrounding emerging payments are related to these enhancements.

ii Recent developments

On 16 August 2017, the Department of Justice (DOJ) announced the end of Operation Chokepoint, a 2013 initiative of the DOJ that held banks and payment facilitators liable for dealing with 'high risk' merchants, such as pawnbrokers and payday lenders.[8] Nonetheless, other federal agencies, such as the FTC and the CFPB, continue to hold payment service providers responsible for the actions of their merchants.[9] For example, on 26 July 2018, the FTC testified before subcommittees of the US House Committee on Oversight and Government Reform that the FTC would continue to focus on payment processors who facilitate consumer fraud.[10]

On 31 July 2018, the Department of Treasury (the Treasury) released a report identifying potential improvements to the regulatory landscape that could better support nonbank financial institutions, embrace financial technology, and foster innovation.[11] The report made key recommendations to improve current US payment systems, specifically recommending that (1) states work to harmonise money transmitter requirements for licensing and supervisory examinations; (2) the CFPB provide more flexibility regarding 'the issuance of remittance disclosures'; and (3) the Federal Reserve facilitate a faster retail payments system, such as through the development of a real-time settlement service. The Treasury cited a report published by the Federal Reserve in 2017, which detailed strategies for improving the US payment system.[12] The Treasury also noted that the increasing digitisation of payments is expected to reduce costs in payment processes for businesses and firms.

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.[13]

On 3 October 2018, the Board of Governors of the Federal Reserve System (the Federal Reserve Board) invited public comment on two potential actions that the Federal Reserve

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8 Letter from Stephen E Boyd, Assistant Attorney General, U.S. Department of Justice, to the Honorable Bob Goodlatte, Chairman, Committee on the Judiciary, U.S. House of Representatives (16 Aug. 2017).

9 For example, the CFPB's Compliance Management System Examination Manual, updated August 2017, instructs supervision personnel to ensure that financial services providers maintain robust systems for vetting third-party service providers who may cause harm to consumers.

10 Press Release, Federal Trade Commission, FTC Testifies Before Two House Oversight and Government Reform Subcommittees About the Agency's Work to Combat Payment Processors Who Facilitate Fraud (26 July 2018).

11 U.S. Dep't of the Treasury, A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovations (July 2018).

12 See Federal Reserve, Strategies for Improving the U.S. Payment System: Federal Reserve Next Steps in the Payments Improvement Journey (8 Sept. 2017).

13 Press Release, NACHA–The Electronic Payments Association, Same Day ACH Will Be Enhanced to Meet ACH End-User Needs (14 Sept. 2018).

could take to support faster payments in the United States that would 'promote ubiquitous, safe, and efficient faster payments in the United States by facilitating real-time interbank settlement of faster payments'.[14] The Federal Reserve Board's request for comment was borne out of the recommendations of the Faster Payments Task Force, which was established in 2015 to support efforts to improve the speed, safety and efficiency of payments; the Task Force made specific recommendations for creating an ecosystem conducive to the development and adoption of faster payments solutions.[15] Specifically, the Federal Reserve Board's request for comment asked whether the development of either of two services, which would be available 24 hours a day, seven days a week, 365 days a year, would help achieve this goal: (1) a service for real-time interbank settlement of faster payments; and (2) a liquidity management tool that would enable transfers between Federal Reserve accounts to support services for real-time interbank settlement of faster payments. The Federal Reserve Board noted the growing expectation of consumers and businesses to be able to send and immediately receive payments 'at any time of the day, any day of the year.'[16]

On 25 January 2018, the CFPB finalised amendments to its prepaid accounts rule (prepaid rule), which was published in November 2016.[17] The prepaid rule amends key provisions of the CFPB's Regulation E (Electronic Fund Transfers) and Regulation Z (Truth in Lending).[18] It 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.[19] The prepaid rule will significantly alter the way prepaid card programmes are offered and managed in the United States.

The 2018 amendments addressed certain concerns about the prepaid rule raised by industry and delayed the general effective date for the prepaid rule until 1 April 2019.[20] Specifically, the amendments finalise an exception to the requirements for a prepaid account issuer to provide error resolution and liability limitations for certain unverified prepaid accounts, provide additional flexibility with respect to the pre-acquisition disclosure requirements, and create a narrow exception to the credit-related provisions.[21] While further amendments may be forthcoming from the CFPB, the prepaid rule is expected generally to take effect on 1 April 2019.

14 Potential Federal Reserve Actions to Support Interbank Settlement of Faster Payments, Request for Comments, 83 Fed. Reg. 57,351 (15 Nov. 2018).

15 Faster Payments Task Force, The U.S. Path to Faster Payments, Final Report Part Two: A Call to Action 36 (July 2017).

16 Press Release, Federal Reserve Board, Federal Reserve Board Seeks Public Comment on Potential Actions to Facilitate Real-Time Interbank Settlement of Faster Payments (3 Oct. 2018).

17 Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 83 Fed. Reg. 6,364 (13 Feb. 2018); see also 81 Fed. Reg. 83,934 (22 Nov. 2016).

18 12 C.F.R. pts. 1005 and 1026.

19 Pub. L. No. 111-24, 123 Stat. 1734 (2009).

20 Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 83 Fed. Reg. 6,364 (13 Feb. 2018).

21 id.

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 15 November 2017, the CFPB announced a plan to seek the approval of the Office of Management and Budget to conduct online testing of consumer comprehension and decision-making in response to automated teller machine and debit card overdraft disclosure forms with 8,000 individuals.[22] The notice follows the CFPB's August 2017 release of four prototype model overdraft disclosure forms, which it is in the process of testing, and an accompanying report on checking account overdraft services.[23]

On 2 April 2018, the CFPB published its 2017 Consumer Response Annual Report.[24] According to the report, the 24,600 checking or savings account complaints received by the CFPB in 2017 represent about 8 per cent of total complaints received. The CFPB also reported that the most common consumer complaints about deposit accounts (71 per cent) involved account management, such as technological innovations in account management displacing traditional practices. Less frequent complaints related to checking and savings products involved problems associated with low funds in a consumer's account, closing a consumer's account, opening an account, and charges posted to an account.

Recent statements from the CFPB signal a shift in regulatory interest in overdrafts. On 10 May 2018, the CFPB published a blog post announcing the agency's 2018 rule-making agenda.[25] While the CFPB had been studying overdraft practices and fees since 2012 in preparation for a possible rule-making proceeding, the agenda redesignated its overdraft services rule-making from the pre-rule stage to 'inactive' status. According to the blog post, Acting Director Mulvaney's decision to reclassify the rule-making was made 'in the expectation that final decisions on whether and when to proceed with such projects will be made by the Bureau's next permanent director'.[26]

22 Information Collection Activities: Comment Request, New Collection—Web-based Quantitative Testing of Point of Sale/ATM Overdraft Disclosure Forms, 82 Fed. Reg. 52,894 (15 Nov. 2017).

23 See Press Release, Consumer Financial Protection Bureau, CFPB Unveils Prototypes of 'Know Before You Owe' Overdraft Disclosure Forms Designed to Make Costs and Risks Easier to Understand (4 Aug. 2017).

24 See Consumer Financial Protection Bureau, Consumer Response Annual Report (Mar. 2018).

25 See Blog Post, Consumer Financial Protection Bureau, Spring 2018 Rulemaking Agenda (10 May 2018).

26 id.

V REVOLVING CREDIT

i Overview

According to the Federal Reserve, the total revolving consumer credit outstanding in the United States as of October 2018 was more than US$1 trillion.[27] By some estimates, credit card debt may make up approximately 80 per cent of all revolving consumer credit outstanding.[28] 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 December 2017, the CFPB released its biennial report on the credit card market, as required by the CARD Act.[29] The report, entitled 'The Consumer Credit Card Market', is informed by public responses to a March 2017 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 'quantitative and qualitative indicators . . . suggest a positive picture for consumers in the credit card market'.[30]

On 29 June 2018, the CFPB announced a settlement with a large bank for allegedly failing to re-evaluate and reduce the annual percentage rate ('APR') for about 1.75 million customer credit card accounts as required by the CARD Act and Regulation Z; and failing to maintain reasonable written policies and procedures to conduct the APR re-evaluations consistent with the regulations.[31] Under the terms of the consent order, the bank must correct these practices and pay US$335 million in restitution to consumers affected by improper credit card account management practices. The CFPB did not assess civil money penalties, in part because the card issuer had identified and reported the issues, and had initiated remediation to affected consumers.

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

27 See Federal Reserve Board, G.19 Consumer Credit, October 2018 (7 Dec. 2018).
28 See, e.g., Consumer Financial Protection Bureau, The Consumer Credit Card Market 32 (27 Dec. 2017).
29 Consumer Financial Protection Bureau, The Consumer Credit Card Market (27 Dec. 2017).
30 Id. at 14.
31 Consent Order, *In re Citibank, N.A.*, No. 2018-BCFP-0003 (29 June 2018).

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 recently focused on the student lending, loan servicing and small-dollar lending markets, while its rule-making arm is reconsidering the agency's sweeping rule to regulate the short-term instalment loan market.[32]

Beyond traditional instalment loan products, online lending platforms, or 'marketplace lenders', have proliferated rapidly in the US. Marketplace lenders, which are generally non-bank platform providers, typically partner with banks, which originate loans and sell either the loans or the receivables to the marketplace lender, private investors, or 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.[33]

ii Recent developments

On 17 November 2017, the CFPB published a rule to regulate the short-term instalment loan market.[34] 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.[35] On 6 November 2018, a Texas federal court stayed the rule's August 2019 compliance date pending further order of the court.[36] The future of this rule is uncertain; however, the subject remains on the CFPB's regulatory agenda.

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.[37] 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 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. While the law establishes a general framework for the disclosure requirements, it requires the California Department of Business Oversight (DBO) to establish details through the adoption of implementing regulations. There remain open issues that will need to be addressed by regulation, and whether the DBO takes an approach similar to that of the federal Truth in Lending Act or opts to take a different approach remains to be seen.

32 See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (17 Nov. 2017).

33 See, e.g., U.S. Dep't of the Treasury, Opportunities and Challenges in Marketplace Lending (10 May 2016); Press Release, Cal. Dep't of Bus. Oversight, California Online Lending Grows by More Than 930% Over Five Years (4 Apr. 2015); Press Release, New York Dep't of Financial Services, DFS Issues Online Lending Report (11 July 2018).

34 Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (17 Nov. 2017).

35 Consumer Financial Protection Bureau, Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date (26 Oct. 2018).

36 Order, *Community Financial Services Association v. Consumer Financial Protection Bureau*, No. A-18-CV-0295 (6 Nov. 2018).

37 Cal. Stats. 2018, Ch. 1011, Sec. 2 (adding Cal. Fin. Code Div. 9.5, §§ 22800–22805).

On 11 July 2018, the New York Department of Financial Services (NYDFS) released a report on online lenders, which stemmed from a recently enacted state law that required the NYDFS to study and prepare a report on online lending in New York.[38] The report compiles survey responses from 35 online lenders addressing topics that include the business models and operations of online lenders, the number of consumers and small businesses in New York served by online lenders, loan terms, and complaints and investigations. Based on the online lenders' responses, the NYDFS recommended that consumer protection laws should apply equally to all consumer lending and small business lending activities; that state usury limits must apply to all New York lenders; and that online lenders should be subject to direct supervision and oversight.

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.[39] In contrast, other federal district courts have refused to dismiss 'true lender' actions on pre-emption grounds,[40] and have analysed whether a marketplace lender holds the 'predominant economic interest' in the loan and, thus, is the 'true lender'.[41] California district courts have come to divergent conclusions on the issue.[42]

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, remains relevant 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*.[43] By declining to review *Madden*, the Supreme Court let stand the Second Circuit's controversial holding that Section 85 of the National Bank Act,[44] 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.[45] 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.[46]

On 8 June 2017, the US House of Representatives passed legislation that would add 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

38 Press Release, New York Dep't of Financial Services, DFS Issues Online Lending Report (11 July 2018).

39 *Sawyer v. Bill Me Later Inc.*, 23 F. Supp. 3d 1359 (D. Utah 2014).

40 See, e.g., *Meade v Marlette Funding LLC,* No. 1:17-cv-00575 (D. Colo. 21 Mar. 2018); *Meade v. Avant of Colorado LLC*, 307 F. Supp. 3d 1134 (D. Colo. 1 Mar. 2018).

41 *Commonwealth of Pennsylvania v. Think Finance, Inc., et al.*, No. 14-cv-7139 (E.D. Pa. 14 Jan. 2016).

42 Compare *Consumer Financial Protection Bureau v. CashCall Inc.*, No. 2:15-cv-07522 (C.D. Cal. 31 Aug. 2016), with *Beechum v. Navient Solutions Inc.*, No. 2:15-cv-08239 (C.D. Cal. 20 Sept. 2016).

43 *Midland Funding, LLC v. Madden*, 136 S. Ct. 2505, 579 U.S. __ (2016).

44 12 U.S.C. Section 85.

45 *Madden v. Midland Funding, LLC,* 786 F.3d 246 (2d Cir. 2015).

46 *Eul v. Transworld Systems, Inc.*, No. 1:15-cv-7755 (N. D. Ill. Mar. 30, 2017).

third party . . . notwithstanding any State law to the contrary.'[47] On 14 February 2018, the House of Representatives passed additional legislation that would amend the National Bank Act with language virtually identical to the 'valid when made' language.[48] While a similar bill was introduced in the US Senate in July 2017,[49] no further action was taken prior to the adjournment of the 115th Congress at the end of 2018.

VII OTHER AREAS

Regulators and courts have focused on other areas related to consumer financial services, including fair access, privacy and cybersecurity, credit reporting, anti-money laundering and use of third-party service providers. The developments identified below are representative, not exhaustive.

i Fair access to financial services

On 30 January 2018, CFPB Acting Director Mulvaney announced the transfer of the agency's Office of Fair Lending and Equal Opportunity (the Fair Lending Office) from the Division of Supervision, Enforcement and Fair Lending to the Office of Equal Opportunity and Fairness, which is housed in the Office of the Director.[50] The Fair Lending Office now has no independent supervisory or enforcement authority, and focuses on advocacy, coordination and education. Fair lending supervision and enforcement activities remain in that Division. It is anticipated that the CFPB and state attorneys general will continue to enforce fair lending violations, as well as private litigants.

On 21 May 2018, the President signed into law a congressional resolution to nullify a 2013 CFPB bulletin regarding compliance with the ECOA and Regulation B by certain entities.[51] Members of Congress were of the view that the bulletin exceeded the CFPB's statutory authority. In a subsequent statement, Acting Director Mulvaney said: 'I want to make it abundantly clear that the Bureau will continue to fight unlawful discrimination at every turn. We will vigorously enforce fair lending laws in our jurisdiction, and will stand on guard against disparate treatment of borrowers.'[52]

The Community Reinvestment Act (CRA) and its implementing Regulation BB require periodic evaluations of each insured depository institution's record related to the investments in the communities in which the institution conducts business. On 28 August 2018, the OCC issued an advance notice of proposed rule-making on modernising the CRA regulations, including: (1) encouraging increased lending and services to people in low- and moderate-income areas; (2) clarifying and expanding the types of CRA-eligible activities; (3) making bank CRA performance more transparent; and (4) establishing metric-based thresholds for CRA ratings.[53]

47 Financial CHOICE Act of 2017, H.R. 10, 115th Cong. Subtit. Q, § 581 (2017).
48 Protecting Consumers' Access to Credit Act of 2017, H.R. 3299, 115th Cong. (2018).
49 Protecting Consumers' Access to Credit Act of 2017, S. 1642, 115th Cong. (2017).
50 Email from Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, to all Bureau staff (30 Jan. 2018).
51 Pub. L. No. 115-172, 132 Stat. 1290 (21 May 2018).
52 Consumer Financial Protection Bureau, Statement on enactment of S.J. Res. 57 (21 May 2018).
53 Reforming the Community Reinvestment Act Regulatory Framework, 83 Fed. Reg. 45,053 (5 Sept 2018).

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.[54] Effective 1 January 2020, the California Consumer Privacy Act (CCPA) provides California residents with four 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).

For cybersecurity, the trend is towards more prescriptive requirements, as well as aggressive enforcement. For instance, on 28 August 2017, the primary provisions of the new NYDFS cybersecurity rule went into effect.[55] These provisions include requirements that covered entities subject to NYDFS jurisdiction designate a chief information security officer, maintain a cybersecurity programme and implement a written cybersecurity policy.[56] The first certification of compliance with the rule was required by 15 February 2018 and additional requirements were phased in on 1 March 2018 and 3 September 2018.[57]

The 7 September 2017 announcement by Equifax Inc., one of the Big Three credit reporting agencies (CRAs) in the United States, that criminals had gained access to certain files in a cybersecurity incident that the company said affected approximately 143 million US consumers[58] has led to a number of lawsuits and legislation before Congress to further regulate CRAs. In addition, the NYDFS finalised a regulation, discussed below, that subjects CRAs to New York's cybersecurity rule, giving the NYDFS the power to examine CRAs and refuse to renew, revoke or suspend their registration for failure to comply with the cybersecurity rule.[59]

iii Credit reporting

Regulatory agencies and courts are actively considering matters related to credit reporting. As discussed above, the data breach of record-breaking proportions suffered by Equifax has resulted in increased scrutiny of the industry. On 25 June 2018, the NYDFS issued a rule that requires CRAs that handle consumer report information relating to New York residents (Covered CRAs) to comply with a host of requirements, including the New York cybersecurity rule, and otherwise regulates the credit reporting business in New York.[60] Under the rule, a Covered CRA must register with the NYDFS beginning on 15 September 2018, and annually beginning on 1 February 2019, and is subject to examination by the NYDFS.[61]

54 Cal. Civ. Code §§ 1798.100–1798.199.

55 See N.Y. Comp. Codes R. & Regs. tit. 23, pt. 500.

56 N.Y. Comp. Codes R. & Regs. tit. 23, § 500.02-.04, .07, .10,. 16, .17.

57 See N.Y. Comp. Codes R. & Regs. tit. 23, § 500.22.

58 Press Release, Equifax, Inc., Equifax Announces Cybersecurity Incident Involving Consumer Information (7 Sept. 2017).

59 N.Y. Comp. Codes R. & Regs. tit. 23, pt. 201.

60 Press Release, New York Governor Andrew M. Cuomo, Governor Cuomo Announces Action to Protect New Yorkers' Private Information Held by Credit Reporting Companies (25 June 2018).

61 N.Y. Comp. Codes R. & Regs. tit. 23, pt. 201.

On 13 June 2018, the CFPB announced a settlement finding that a company and its subsidiaries violated the FCRA and its implementing Regulation V.[62] It alleged that the companies, which regularly furnished consumer credit information to CRAs, failed to establish reasonable policies and procedures regarding either credit reporting or the accuracy and integrity of the information furnished.[63] In addition, it alleged that the companies failed to update and correct inaccurate furnished information or made updates and corrections very slowly, re-furnishing the inaccurate information to CRAs.[64]

iv Anti-money laundering

Legislation to modernise the Bank Secrecy Act regime has been under consideration in Congress because the current anti-money laundering (AML) system is viewed as not keeping pace with the evolving challenges presented by terrorist organisations, international traffickers and criminal enterprises.[65] A number of provisions are aimed at increasing the dollar thresholds that trigger financial institutions' obligations to file suspicious activity reports and currency transaction reports with the Financial Crimes Enforcement Network (FinCEN). However, FinCEN has testified before Congress that this information is very valuable to law enforcement and that raising the reporting thresholds would reduce its availability.[66]

On 23 October 2018, the OCC announced an assessment of a US$100 million penalty against a bank for alleged deficiencies in its AML programme.[67] The OCC found that the bank 'failed to achieve timely compliance' with the provisions of a 2015 OCC consent order, which outlined shortcomings in the bank's AML programme.[68] These alleged shortcomings included weaknesses in the bank's compliance programme and related controls; deficiencies in its risk assessment, remote deposit capture and correspondent banking processes; and failure to file suspicious activity reports.

Finally, on 8 November 2018, the DOJ and the FTC announced that a major international money transmitter agreed to extend its 2012 deferred prosecution agreement (DPA) with the DOJ and forfeit US$125 million because of alleged significant weaknesses in the company's AML programme during the term of its DPA, putting the company in breach of the DPA.[69] The DOJ found that while the company had made progress, it 'has not implemented all of the required enhanced compliance undertakings [and] experienced

62 Consent Order, *In re Security Group, Inc.*, No. 2018-BCFP-0002 (13 June 2018).

63 id. at 12 and 13.

64 id. at 13 and 14.

65 See, e.g., the Counter Terrorism and Illicit Finance Act, H.R. 6068, 115th Cong. (2018); the Bank Secrecy Innovation Act, H.R. 6849, 115th Cong. (2018).

66 Testimony for the Record, Kenneth A Blanco, Director, Financial Crimes Enforcement Network before the Committee on Banking, Housing and Urban Affairs, United States Senate (29 Nov. 2018).

67 Press Release, Office of the Comptroller of the Currency (OCC), OCC Assesses $100 Million Civil Money Penalty Against Capital One (23 Oct. 2018).

68 Consent Order, *In re Capital One, N.A.*, No. AA-EC-2018-62 (23 Oct. 2018); Consent Order, *In re Capital One, N.A.*, No. AA-EC-2015-48 (10 July 2015).

69 Press Release, U.S. Dep't of Justice, MoneyGram International Inc. Agrees to Extend Deferred Prosecution Agreement, Forfeits $125 Million in Settlement with Justice Department and Federal Trade Commission (8 Nov. 2018).

significant weaknesses in its [AML] and anti-fraud program . . . which caused a substantial rise in consumer fraud transactions'.[70] The FTC found that the company failed to take steps required under a 2009 FTC order to reduce fraudulent money transfers.[71]

v Use of partners and third-party service providers

Bank regulators have increased their scrutiny of the use of partners and third-party service providers. Both the OCC and the CFPB have issued guidance on the use of service providers, including the expectation of comprehensive and rigorous service provider oversight and management, and continue to take related enforcement actions.[72] On 7 June 2017, the OCC issued frequently asked questions (FAQs) that supplement the OCC's 2013 guidance, setting forth its expectation for banks' due diligence and ongoing monitoring of third-party service providers, including enhanced diligence and monitoring for third parties that support critical activities.[73] While the FAQs affirm the prior guidance, they provide more flexibility for banks to adjust their approach to third-party risk management based on the level of risk and complexity of the third-party relationship. The FAQs also provide for flexibility with respect to banks' structuring of their third-party risk management process; indicate that a bank, while maintaining its own effective third-party risk management process tailored to its specific needs, can collaborate with other banks to address the OCC's expectations for managing third-party relationships; state that banks may engage in information sharing to better understand cyber threats to the bank itself or to service providers; and state that a bank may 'outsource some or all aspects of their compliance management systems to third parties, so long as the bank monitors and ensures that third parties comply with current and subsequent changes to consumer laws and regulations'.[74]

On 11 September 2018, five federal financial regulatory agencies issued a joint statement on the role of supervisory guidance for regulated institutions.[75] The agencies (the Federal Reserve, FDIC, National Credit Union Administration, OCC and CFPB) emphasised that supervisory guidance 'does not have the force and effect of law' and that 'the agencies do not take enforcement actions based on supervisory guidance'.[76] Instead, the role of supervisory guidance is to outline the agencies' supervisory expectations or priorities or to articulate the agencies' general views regarding appropriate practices in a given subject area, including in response to industry requests for such guidance. Supervisory guidance may also provide 'examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to

70 Joint Motion to Amend and Extend the Deferred Prosecution Agreement, *United States v. MoneyGram International, Inc.*, No. 1:12-cr-291 (M.D. Pa. 8 Nov. 2018).

71 Press Release, Federal Trade Commission, Moneygram Agrees to Pay $125 Million to Settle Allegations that the Company Violated the FTC's 2009 Order and Breached a 2012 DOJ Deferred Prosecution Agreement (8 Nov. 2018).

72 See OCC Bulletin 2013-29, Third Party Relationships: Risk Management Guidance (30 Oct. 2013); CFPB Bulletin 2012-3, Service Providers (13 Apr. 2012).

73 OCC Bulletin 2017-21, Frequently Asked Questions to Supplement OCC Bulletin 2013-29 (7 June 2017).

74 id.

75 Joint Press Release, Agencies Issue Statement Reaffirming the Role of Supervisory Guidance (11 Sept. 2018).

76 Interagency Statement Clarifying the Role of Supervisory Guidance (11 Sept. 2018).

protect consumers'.[77] The agencies contrast supervisory guidance with regulations, which 'generally have the force and effect of law [and] generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document'.[78]

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. CFPB enforcement actions have slowed somewhat in the past year under the leadership of Acting Director Mulvaney. 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.[79] 'Deception' generally exists where there is a material representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances.[80] 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.[81]

i Unfair practices

The following are examples of recent CFPB allegations of unfair practices:

a Forwarding of payments. The CFPB found that a retailer who, due to operational errors, had substantially delayed transmission of payments made directly to the retailer to third-party debt buyers after having sold the accounts, had engaged in an unfair practice.[82]

b Debt collection. The CFPB found that a company had engaged in unfair debt collection practices by making (1) in-person collection visits to consumers' homes and workplaces, (2) collection calls to work, and (3) calls to third parties with some relation to the consumer.[83]

c Auto loans. The CFPB found that a bank had acted in an unfair manner by forcibly placing unnecessary auto insurance on the vehicles of certain borrowers or failing to remove such insurance when the bank's service provider had incorrectly determined that borrowers had inadequate insurance on their vehicles.[84]

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77 id.

78 id.

79 12 U.S.C. Section 5531(c).

80 Federal Trade Commission, Policy Statement on Deception (14 Oct. 1983), appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984).

81 12 U.S.C. Section 5531(d).

82 Consent Order, *In re Bluestem Brands, Inc.*, No. 2018-BCFP-0006 (4 Oct. 2018).

83 Consent Order, *In re Security Group, Inc.*, No. 2018-BCFP-0002 (13 June 2018).

84 Consent Order, *In re Wells Fargo Bank, N.A.*, No. 2018-BCFP-0001 (20 Apr. 2018).

d Mortgage loans. The CFPB found that a bank unfairly charged borrowers for time extensions on the interest rate locks for their pending mortgages in situations where the bank should have absorbed the fees.[85]

ii Deceptive practices

The following list includes examples of recent CFPB allegations of deceptive practices:

a Auto loans. The CFPB found that an auto lender deceptively overstated to borrowers the amount of coverage that its gap insurance product would provide in certain situations and understated the impact of obtaining a loan extension.[86]

b Debt collection. The CFPB found that a debt purchaser used a group of debt collection companies to collect debt using practices that were deceptive.[87] The CFPB alleged that the companies falsely told consumers that their debt was higher than was the case and threatened legal action that they had no intention or authority to take.

c Loan origination. The CFPB alleged that a loan servicer acted in a deceptive manner by misrepresenting that, and drafting loan agreements with language stating that, tribal law applied to loans to consumers in states where state law rendered the loans void.[88]

d 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.[89]

iii Abusive practices

Below are examples of recent CFPB allegations of abusive practices:

a Check-cashing services. The CFPB found that a small-dollar lender abusively withheld funds during check-cashing transactions to satisfy outstanding amounts on prior loans, without disclosing this practice to the consumer during the initiation of the transaction.[90]

b Deposit accounts. A bank agreed to settle CFPB claims that the bank engaged in abusive conduct because the bank's account-opening process allegedly interfered with the ability of consumers to consider disclosures regarding overdraft services and included oral disclosures that made overdraft services seem mandatory.[91]

c Loan origination. The CFPB alleged that a loan servicer acted in an abusive manner by administering the origination and collection of loans to consumers in states where state law rendered the loans void or uncollectable.[92]

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85 id.

86 Consent Order, *In re Santander Consumer USA Inc.*, No. 2018-BCFP-0008 (20 Nov. 2018).

87 Consent Order, *In re National Credit Adjusters, LLC,* No. 2018-BCFP-0004 (13 July 2018).

88 First Amended Complaint, *Consumer Financial Protection Bureau v. Think Finance, LLC,* No. 4:17-cv-00127 (D. Mont. 28 Mar. 2018). See also *FTC v. WV Universal Management, LLC,* 877 F.3d 1234 (11th Cir. 2017) (holding that a payment processor that processed transactions related to fraudulent debt servicing was jointly and severally liable with the merchant for deceptive practices in the amount of the total fraud perpetrated).

89 Complaint, *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC,* No. 3:17-cv-6484 (N.D. Cal. 8 Nov. 2017).

90 Consent Order, *In re Cash Express, LLC,* No. 2018-BCFP-0007 (24 Oct. 2018).

91 Order, *Consumer Financial Protection Bureau v. TCF National Bank*, No. 17-166 (D. Minn. 1 Aug. 2018).

92 First Amended Complaint, *Consumer Financial Protection Bureau v. Think Finance, LLC*, No. 4:17-cv-00127 (D. Mont. 28 Mar. 2018).

d 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.[93]

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.[94] The coming year will also see continued evolution of the body of case law surrounding the 'true lender' and credit card surcharging issues, and perhaps resolution of the *Madden* issue, whether through judicial or legislative action.

93 Complaint, *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC,* No. 3:17-cv-6484 (N.D. Cal. 8 Nov. 2017).

94 As an example, the OCC announced that it will begin accepting applications from financial technology companies, including marketplace lenders and non-bank payment providers, to become special purpose national banks. OCC, OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies (July 2018).

Appendix 1

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Andrea Beatty is considered one of Australia's leading consumer financial services lawyers. She is recognised in *Chambers Asia-Pacific* 2016 for her expertise, and has been listed in Australia's *Best Lawyers* every year since 2011. Andrea is a former partner of Mallesons Stephen Jaques (now King & Wood Mallesons) and K&L Gates, and is the author of five editions of the leading consumer law text *Annotated National Credit Code* published by LexisNexis.

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 the Australian Transaction Reports and Analysis Centre.

Andrea also advises on associated commercial transactions including new product development, fintech developments, electronic banking, peer-to-peer lending, crowdfunding, digital currencies, loyalty programmes, outsourcing, white labelling, alliances, restructures, acquisitions and disposals. Andrea is a member of the law council of Australia Financial Services, e-commerce and privacy committees. Andrea's financial services blog and published articles can be found at www.andreabeatty.com.au.

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Pierre Berger is a corporate, financial services and insurance partner in the Antwerp office of DLA Piper. He advises Belgian and foreign multinationals on all aspects of banking, funds, financial services and insurance law. His core areas of practice concern complex regulatory issues; regulatory driven strategic projects, transactions and restructurings; as well as Brexit and fintech-related assignments. Pierre has been awarded with the Client Choice Award 2017 and 2018 for Banking in Belgium. He is also ranked as a leading individual by *Legal 500*, and highly regarded by *Chambers* and *IFLR*. *Who's Who Legal* mentions him as a global fintech expert.

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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 Pontificia Universidad Católica de 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 2019). He speaks Spanish and English.

DIÁNA BOROSS-VARGA

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Diána Boross-Varga is an associate in the banking and finance practice group. Prior to joining Wolf Theiss in 2013, she worked at Noerr & Partner and also gained experience at Luther's Budapest and Berlin offices. Diána assists clients in project financing, capital market transactions and banking regulatory issues. Diána completed her legal studies at the University of Szeged and gained her LLM in German and European economic law from the University of Potsdam. At the University of Szeged she also gained her special translator qualification in German.

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Gerhard Dilger is admitted as an attorney-at-law to the Austrian Bar and consultant at Wolf Theiss, where he is a member of Wolf Theiss' banking and finance and energy practice groups. Previously Gerhard worked as head of a legal department for an international organisation in Sarajevo and as chief legal officer for the largest private energy trading company in Austria. There he gained substantial experience in finance, regulatory and contractual projects. Prior to that, Gerhard worked for another well-known international law firm in Austria. Gerhard is a frequent lecturer at seminars and universities in Austria. In addition to his doctorate in law and his master's degree in business administration, Gerhard also graduated from the Austrian Defence Academy (international legal adviser) and holds a communication trainer degree.

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Michaela Ericssonová – an attorney at PRK Partners Prague, Czech Republic – specialises in banking and finance, and general corporate law. Michaela graduated in 2010 from Charles University Law School in Prague. That same year she joined PRK Partners as an associate and in 2014 she became an attorney-at-law of the Czech Bar Association. She has extensive experience in providing legal services to banks and financial institutions related to loans and leasing transactions. She has worked on projects related to the recodification of Czech private law. She gives lectures in consumer financing regulation. Michaela also focuses on the regulation of non-profit institutions, education and healthcare systems. Michaela is fluent in Czech, Swedish and English, and has a working knowledge of Russian.

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Rick Fischer is co-chair of the financial services practice group at Morrison & Foerster LLP. Mr Fischer's practice focuses on retail financial services, privacy and data security. His practice 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.

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Hélder Frias joined the Lisbon office of Uría Menéndez – Proença de Carvalho in 2006 and became a senior associate in 2015. Hélder worked in the London office of the firm from September 2010 to August 2011. His practice is focused on banking, finance and insurance. Notably, he advises on M&A transactions involving financial institutions, bancassurance joint ventures, the transfer of insurance portfolios and on other regulatory matters related to these markets, including insurance and reinsurance intermediation.

Hélder frequently advises on regulatory and supervisory aspects of financial and insurance activities (including banking and financial intermediation services and payment services), such as lending, creation of security, factoring, sale and purchase of receivables, money laundering, venture capital and financial products and investment and retail banking and insurance instruments (capital redemption transactions and unit-linked life insurance agreements).

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Martin Frolik graduated in 2004 from the Faculty of Law of the University of West Bohemia in Pilsen in 2004, and also has a bachelor's degree in Japanese studies from the Faculty of Arts of Charles University. Since 2005, Martin has specialised in banking and capital markets. Over the course of his career, Martin garnered experience in financial markets legislation at the Czech Securities Commission, the Czech National Bank and the Ministry of Finance. Martin gained particular insight in compliance and regulatory issues management in the highly regulated environment of financial institutions, while with one of the three largest financial groups in the Czech Republic – first, beginning in 2011, as a compliance specialist and team leader with a bank, and from 2014 to 2017 as the head of the legal and compliance department in a brokerage firm. Martin joined PRK Partners in August 2017. Martin is fluent in Czech, English and has an intermediate command of Japanese.

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Viktor Glatz graduated from the Charles University Law School in Prague in 2017. He has been working at PRK Partners as a legal assistant since 2014 and is now a junior associate. Viktor is a member of the litigation team. He has also worked on the creation of an interactive application that provides a user-friendly overview of Czech civil procedure law. Viktor is fluent in Czech and English.

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Saroj Jongsaritwang is a partner of 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.

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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 is 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 in the Universidad de Chile's Law School. He also studied the international tax programme of Harvard University's Law School He speaks Spanish and English.

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INA MEIRING

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Ina Meiring is an executive at ENSafrica and a member of the banking and finance team. She previously held the position of group legal counsel at Absa. She actively participated in various banking industry forums and has been appointed by the SARB to serve as a member of the expert group for review of the National Payment System Act. Ina has delivered many papers and contributed to various publications throughout her career. She holds a BA (Law) LLB as well as an LLM from RAU and an LLD from the University of South Africa (UNISA). She was a highly regarded lecturer at both RAU and UNISA law faculties for 22 years.

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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.

FEDERICO DE NORIEGA OLEA

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With more than 10,000 hours of experience in corporate transactions, Federico De Noriega Olea is widely recognised for his deep experience in the financial sector. As a partner in the Mexico City office, he advises clients on financial transactions, mergers and acquisitions, and data privacy issues, including data processing, data transfers and security breaches. His approach combines a robust knowledge of the legal issues with practical solutions and risk-mitigation strategies. Federico is also widely recognised for his work with entrepreneurs and in financing innovative new ventures and start-ups, an area he has focused on extensively since 2008. Federico was a foreign associate at a global law firm's New York office in 2007 and 2008, after which he rejoined Barrera, Siqueiros y Torres Landa (BSTL) (now Hogan Lovells). He was awarded academic excellence by the Universidad Iberoamericana for scoring the highest GPA of his graduating class. He received a master of laws degree from Harvard Law School.

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Leonor de Osma joined Uría Menéndez in Madrid in 2013. Her practice focuses on M&A, banking, finance and corporate law. She has been involved in some of the most significant transactions in Spain in recent years.

MELINDA PELIKÁN

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Melinda Pelikán is a senior associate leading the banking and finance practice group at Wolf Theiss' Budapest office. Prior to joining Wolf Theiss in 2014, she gained valuable experience in the area of banking and finance working at CIB Bank as a senior legal counsel and in the Budapest offices of international law firms. She has more than 12 years of experience, and she assists clients in project, real estate and acquisition finance, and restructuring, as well as cross-border financing and factoring projects. Melinda completed her legal studies at the Eötvös Loránd University in Budapest. She speaks English and Spanish.

OBREA POINDEXTER

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Obrea Poindexter is co-chair of the financial services practice group at Morrison & Foerster LLP, heads the firm's mobile payments group and is co-chair of the fintech group. Ms Poindexter's practice focuses on financial services regulation, including financial privacy issues relating to the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act; consumer lending issues under the CARD Act, the Truth in Lending Act and the Equal Credit Opportunity Act; debit cards, prepaid cards, electronic banking and payment system issues under the Electronic Fund Transfer Act (Regulation E) and the E-SIGN Act. She also advises clients extensively on issues related to emerging payments systems such as mobile payment systems and person-to-person payments.

ZSÓFIA POLYÁK

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Zsófia Polyák is an associate in the banking and finance practice group in Wolf Theiss, Budapest office. She holds a law degree and an LLM degree in capital markets and banking law. She specialises in project, real estate and acquisition finance, restructuring, cross-border financing and corporate financing. Prior to joining Wolf Theiss, she gained valuable work experience at ING Bank as a supervisor legal counsel; in this role she was responsible for monetary circulation matters, in addition to lending.

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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. Before joining Hogan Lovells, Carlos began his legal practice at a Mexican law firm focusing on corporate governance and contracts.

MARIA ALDONZA SAKAR ALMIRANTE

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Maria Aldonza Sakar Almirante specialises in the structured finance, banking and corporate sectors. During the last 13 years she has participated in the finance and banking sector as well as in prestigious international law firms, to identify and solve clients' needs and interests related to corporate and finance restructures, including M&A transactions. As senior associate in the Mexico City office, she advises clients on credit transactions, including collateral agreements and mergers and acquisitions, as well as securitisation transactions. Prior to joining Hogan Lovells as a senior associate, she was an associate in other prestigious international law firms. Aldonza Sakar obtained her law degree in 2004 from the Escuela Libre de 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.

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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 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.

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Sui Lin Teoh is a partner of 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.

Appendix 2

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