INNOVATION AND CONSUMER PROTECTION: THE CASE OF MOBILE PAYMENTS

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Abstract

The ubiquitous nature of mobile devices coupled with a promise of speed and convenience makes mobile payments an attractive innovation. However, mobile payments also raise concerns with regards to consumer protection. This thesis evaluates how selected jurisdictions address these concerns. The discussion is premised on the argument that mobile payments may prove counter-productive if there are no clear regulatory rules protecting the end users. This is particularly significant for jurisdictions hoping to exploit this service to address financial exclusion problems. The thesis adopts a typology of consumer policy tools which could be used to address the identified consumer concerns. This typology guides the enquiry into how the selected jurisdictions address the consumer issues in m-payments. The purpose of this enquiry is to identify what best practices Nigerian authorities can emulate from the regulatory approach in other jurisdictions. Building on the findings of the enquiry, the thesis puts forward certain recommendations which are intended to address the shortcomings observed in the Nigerian regime.

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List of Abbreviations

ACH	Automated Clearing House
ADR	Alternative Dispute Resolution
AML	Anti-Money Laundering
APA	Advertising Practitioners (Registration, Etc.) Act 1998
ASP	Advertising Standards Panel
ATM	Automated Teller Machine
BPCPA	Business Practices and Consumer Protection Act 2004
BOFIA	Banks and Other Financial Institutions Act 1991
CAK	Communications Authority of Kenya
CBA	Canadian Banking Association
CBK	Central Bank of Kenya
CBN	Central Bank of Nigeria
CCA	Canadian Competition Act 1985
CCPRs	Consumer Code of Practice Regulations 2007
CCRs	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
CDD	Customer Due Diligence
CFEB	Consumer Financial Education Body
CFT	Combatting the Financing of Terrorism
CIN	Consumer Information Network of Kenya
CMA	Competition and Markets Authority
COBRs	Cost of Borrowing Regulations 2001
CPC	Consumer Protection Council
CPCA	Consumer Protection Council Act 1992
CPD	Consumer Protection Department of the Central Bank of Nigeria

CPF	Consumer Protection Framework
CPUTRs	Consumer Protection from Unfair Trading Regulations 2008
CRA	Consumer Rights Act 2015
DFID	Department for International Development
DISP	Dispute Resolution Complaints Sourcebook
DRC	Dispute Resolution Centre
ECB	European Central Bank
EMI	E-money Institution
EMRs	E-money Regulations 2011
EU	European Union
ExCB	External Complaints Body
FATF	Financial Action Task Force
FCA	Financial Conduct Authority
FCAC	Financial Consumer Agency of Canada
FEPP	Financial Education and Protection Program
FI	Financial Institution
FIC	Financial Inclusion Commission
FOS	Financial Ombudsman Service
FRFIs	Federally Regulated Financial Institutions
FSA	Financial Services Authority
FSD	Financial Sector Deepening Trust
FSMA	Financial Services and Markets Act 2000
FSRs	Financial Services (Distance Marketing) Regulations 2004
GSMA	Global System for Mobile Communication Association
GTBank	Guaranty Trust Bank Plc
KICRs	Kenya Information and Communications (Consumer Protection) Regulations 2010

KYC	Know Your Customer
Manitoba BPA	Manitoba Business Practices Act 1990
MAS	Money Advice Service
ML	Money Laundering
MMO	Mobile Money Operator
MNOs	Mobile Network Operators
M-payments	Mobile payments
NCA	Nigerian Communications Act 2003
NCC	Nigerian Communication Commission
NFC	Near Field Communication
NFIS	National Financial Inclusion Strategy
NFLF	National Financial Literacy Framework
NOBRs	Negative Option Billings Regulations 2012
NPSA	National Payment System Act 2011
NPSRs	National Payment Systems Regulations 2014
OBSI	Ombudsman Service for Banking Services and Investments
OCPA	Ontario Consumer Protection Act 2002
ODR	Online Dispute Resolution
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
OSFI	Office of the Superintendent of Financial Institutions
PBs	Payment Banks
PDAs	Personal Digital Assistants
PGCP	Prudential Guidelines on Consumer Protection
PHA	Protection from Harassment Act 1997
PIN	Personal Identification Number
PIs	Payment Institutions
POS	Point of Sale

PSD2	Second Payments Services Directive 2015
PSPs	Payment Service Providers
PSR	Payment Systems Regulator
PSRs	Payment Services Regulations
RBI	Reserve Bank of India
RFID	Radio Frequency Identification
SCs	State Committees
SIM	Subscriber Identity Module
SMS	Short Message Service
TF	Terrorist Financing
UK	United Kingdom
UKSC	UK Supreme Court
UN	United Nations
USSD	Unstructured Supplementary Service Data

"What the iPod did for music, the mobile phone will do for money"[1]

[1] Carole Realini, CEO Obopay, quoted in A Angelovska-Wilson & J Fetault, 'M-payments: The Next Payment Frontier: Current Developments and Challenges in International Implementation of M-payments' (2007) JIBLR 575.

CHAPTER 1 - MOBILE PAYMENTS: THE EVOLUTION OF A NEW PAYMENT METHOD

PART 1

1.1. INTRODUCTION

1.1.1. RESEARCH BACKGROUND

Payment services represent structures set up for moving money around the economy.[1] Although payment services come in different packages, they are essentially variations on a theme as they all involve fund transfers using book entries[2] maintained by one or more intermediaries.[3] Throughout history, people have developed systems to aid in transferring value among themselves. These systems have ranged from the use of barter to precious metals to paper-based systems and in recent years to electronic value transfer systems.[4]

Globalisation has increased the flow of finance both domestically and internationally. There is a continuous quest to find the most convenient, safe and cost-effective method to exchange value. This quest has been further propelled by technological developments. Owing to the growth of electronically mediated self-service technologies,[5] there has also been a growing shift, over the decades, in how banks serve their customers. In the

[1] R Bollen, 'A Discussion of Best Practice in the Regulation of Payment Services: Part 1' (2010) 25(8) JIBLR 370, 370.
[2] That is a record of transactions.
[3] Bollen (n 1) 370.
[4] Ibid.
[5] H Hoehle, E Scornavacca, S Huff, 'Three Decades of Research on Consumer adoption and Utilization of Electronic Banking Channels' (2012) 54 DSS 122, 122.

1970s, Automated Teller Machines (ATMs) sprang up and were followed by telephone banking services in the 1980s. By the 1990s, internet banking became a viable medium for serving customers. All these developments, supported by the proliferation of mobile technologies, have arguably prepared the stage for the entry of mobile banking and payments. [6]

Mobile payments (m-payments) represent the intersection between finance, telecommunications and technology,[7] a merger which could introduce a major shift in the financial and payment services landscape. Statistics show that the number of mobile phones in circulation far exceeds any other technical device that could be used to market, sell, or deliver products and services to consumers.[8] Although credit and debit cards dominate the retail payment landscape,[9] internet and m-payments remain the fastest growing payment methods owing to an increase in electronic and mobile commerce.[10]

There are also interesting trends and statistics which support the rise of m-payments. With a global population of 7 billion people, there were an estimated 4 billion mobile phone subscriptions

[6] Ibid.
[7] V Jabbour, 'Mobile Money: Is this Industry's Chance to show a more Socially Responsible Attitude?' (2011) 17(7) CTLR 181,184.
[8] T Dahlberg, N Mallat, J Ondrus, A Zmijewska, 'Past, Present and Future of Mobile Payments Research: A Literature Review' (2008) 7 ECRA 165,165.
[9] Despite being costly, prone to fraud and unsuitable for micropayments and person to person transfers. YA Au, RJ Kauffman, 'The Economics of Mobile Payments: Understanding Stakeholder Issues for an emerging Financial Technology application' (2007) 7 ECRA 141, 156.
[10] European Commission (Green Paper) 'Towards an integrated European Market for Card, Internet and Mobile Payments' (2011) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0941&from=EN> accessed 23 March 2017, p5.

worldwide as at 2016.[11] The number of registered mobile money accounts worldwide also grew by 31% to a total 411 million in 2015.[12] As at December 2016, there were about 277 mobile money services in 92 countries[13] which processed more than $22 billion in transactions.[14]

Statistics from the developing world tell an even more compelling story. The World Bank estimates that Sub-Saharan Africa leads the world in mobile money accounts: while just 2 percent of adults worldwide have a mobile money account, 12 percent[15] in Sub-Saharan Africa have one.[16] As at December 2016, there were about 227 million registered mobile money accounts in sub-Saharan Africa which is more than the total number of bank accounts in the region.[17]

Despite the impressive statistics, the development and acceptance of m-payments remain at differing levels in several parts of the world. This disparity has been explained by various factors such as cosmopolitanism, population mobility, the extent of existing banking and electronic payment infrastructure, access costs and

[11] <https://www.gsmaintelligence.com/ > accessed 14 March 2017.
[12] <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2016/04/SOTIR_2015.pdf> accessed 14 March 2016.
[13] Global System for Mobile Communications Association (GSMA), 'State of the Industry Report on Mobile Money' (Decade edn, 2006-2016) <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2017/03/GSMA_State-of-the-Industry-Report-on-Mobile-Money_2016.pdf> accessed 15 March 2017; these statistics show steady growth because by the end of 2013, there were 219 mobile money services in 84 countries compared to 179 services in 75 countries at the end of 2012 <http://www.mobilepaymentstoday.com/news/mwc14-active-mobile-money-users-up-64-percent-worldwide-in-2013-gsma-says/> Accessed 12 May 2014.
[14] With the total revenue for top providers surpassing $1 billion. GSMA (n 13).
[15] This represents about 64 million adults in the region <http://www.worldbank.org/en/programs/globalfindex> accessed 15 March 2017
[16] <http://datatopics.worldbank.org/financialinclusion/region/sub-saharan-africa> accessed 15 March 2017.
[17] GSMA (n 13).

entry regulations.[18] This is evident in the unique adoption patterns worldwide. For example, in developed countries such as Japan and South Korea, m-payments were introduced alongside contactless cards as a convenient way to pay for mass transit and gradually became accepted by other merchant sectors.[19]

In contrast, several developing countries have seen the adoption of m-payments grow because consumers lack access to traditional bank accounts and other non-cash payment services like credit cards.[20] Thus, it has been easier for developing countries in comparison to developed ones to embrace m-payments as "they can jump directly to that technology [m-payments] without having to work around an existing payment infrastructure as in more developed countries."[21] In many of these countries, the steady growth in mobile phone ownership[22] has spurred interest in the enormous potential that these devices present in extending financial/payment services to excluded persons.[23] It is expected that mobile phones will provide a practical and cost-effective

[18] Au & Kauffman (n 9) 148.
[19] F Hayashi, 'M-payments: What's in it for Consumers?' (2012) 1 Econ.Rev. 35, 35.
[20] Ibid
[21] A Angelovska-Wilson, J Fetault, 'M-payments: The next Payments Frontier - Current Developments and Challenges in International Implementation of M-payments' (2007) JIBLR 575, 589.
[22] This growth has also been facilitated by the fact that there has been a direct implementation of mobile infrastructures rather than a progression from landline technologies to mobile technology. S Rosenberg, 'Better than Cash? Global proliferation of Payment Cards and Consumer Protection Policy' (2006) 60 Consumer FinLQ Rep, 426 at 437 cited in Angelovska-Wilson & Fetault, (n 21) 585.
[23] S Martindale, G Hillebrand, 'Pay at your own Risk? How to make every way to pay safe for Mobile Payments' (2012) 27(2) BFLR 265, 268; see also C Alexandre, LC Eisenhart, 'Mobile Money as an Engine for Financial Inclusion and Lynchpin of Financial Integrity' (2013) 8(3) Wash.JLT & A 285, 288.

channel for extending basic financial services to unbanked persons.[24]

While m-payments are expected to develop rapidly, there are wider implications involved in adopting them. The issues raised by m-payments cover broad subject areas and could affect socio-economic, legal and regulatory policies. In the legal world alone, m-payments raise a wide spectrum of issues relating to consumer protection, data protection and security, money laundering, intellectual property, competition and cybercrime, to name a few.[25] Narrowing it down to consumer policy, m-payments will raise issues on the allocation of liability for unauthorised transactions, unfair contract terms and misleading advertisements amongst others. Furthermore, m-payments may present regulatory challenges[26] because the traditional line of demarcation between financial institutions and non-financial institutions will be further blurred.[27]

[24] JK Winn, L De Koker, 'Introduction to Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity' (2013) 8(3) Wash.JLT & A 155, 162; See also RE Hinson, 'Banking the Poor: The Role of Mobiles' (2011) 15 JFSM 320.

[25] GM De Almeida, 'M-Payments in Brazil: Notes on How a Country's Background may determine the timing and design of a Regulatory Model' (2013) 8(3) Wash.LJT & A 347, 352. See also See R Zhang, JQ Chen, CJ Lee, 'M-Commerce and Consumer Privacy Concerns' (2013) 53(4) JCIS 31; Hayashi (n 19); Martindale & Hillebrand, (n 23) 266; OECD, 'Report on Consumer Protection in Online and Mobile Payment' OECD Digital Economy Papers (no. 204) <http://dx.doi.org/10.1787/5k9490gwp7f3-en> accessed 11 July 2015.

[26] These challenges will be in addition to other risks inherent in any payment method such as credit, liquidity fraud and transactional risks; see MC Stephens, 'Promoting Responsible Financial Inclusion: A Risk-based Approach to Supporting Mobile Financial Services Expansion' (2011) 27 BFLR 229, 336-37.

[27] V Lawack-Davids, 'The Legal and Regulatory Framework of Mobile Banking and Mobile Payments in South Africa' (2012) 7 JICL&T 318, 325.

Unlike in developed countries where there are relatively well-established laws to deal with these issues,[28] many developing countries are constrained by the underdevelopment of effective regulatory frameworks that maintain financial integrity and consumer protection. These factors may prevent m-payments from reaching their full potential.[29] Consequently, it is not surprising that there is a growing consensus[30] that appropriate legal/regulatory frameworks ought to be developed in countries seeking to adopt m-payments. Such frameworks must be based on consumer protection[31] and efficient risk allocation.[32]

1.1.2. RESEARCH OBJECTIVE

Subsequent discussions in this thesis will show that there are enormous opportunities presented by m-payment services, especially in emerging markets where a significant percentage of the population remains unbanked. It is recognised that for this new tide to remain "credible and sustainable," it must function within a clear regulated framework where parties involved (especially consumers) are protected.[33]

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[28] Jabbour (n 7) 183.
[29] N Kshetri, S Acharya, 'Mobile Payments in Emerging Markets' (2012) 14(4) IEEE IT Professional 9, 11.
[30] Angelovska-Wilson & Fetault, (n 21) 591; ME Budnitz, 'Mobile Financial Services: The Need for a Comprehensive Consumer Protection Law' (2012) 27(2) BFLR 213, 213.
[31] Hughes suggests 4 baseline consumer protections that must be present to support any payment service - initial disclosure, appropriate verification methods for authorising transactions, accessible dispute resolution and loss limits for cases of lost or stolen devices or unauthorised transactions; SJ Hughes, 'Regulation for Electronic Commerce: A Case for Regulating Cyber payments' (1999) 51 Admin LR 809, 824-25.
[32] R Bollen, 'Recent Developments in Mobile Banking and Payments' (2009) 24(9) JIBLR 454,468.
[33] Stephens (n 26) 330.

In recognition of the fact that consumer protection is a critical function of regulation,[34] this thesis investigates what lessons Nigeria may learn from how identified consumer issues in m-payments are regulated in other jurisdictions. This research is premised on the argument that consumer adoption of m-payments, despite its touted benefits, may be hampered by the lack of a clear framework for consumer protection.[35] The two main objectives of this thesis and the relevant research questions flowing from them are summarised in ***figures 1*** and ***2***

Objective 1 – Evaluate how selected jurisdictions address the consumer issues associated with m-payment services. 1a) What are m-payments and how do they benefit consumers? 1b) What are the consumer issues in m-payments? 1c) What consumer policy tools are relevant to m-payments? 1d) How are the identified consumer policy tools used to address the consumer issues in the selected jurisdictions?

Figure 1

[34] MS Velmurugan, 'An Empirical Analysis of Consumer Behavioural Intention toward Mobile Service in Malaysia' (2011) 26(2) JIBLR 82.
[35] Budnitz (n 30) 220-1.; see also RH Weber, A Darbellay, 'Legal Issues in Mobile Banking" (2010 11(2) JBR 129, 139.

Objective 2 - Identify what best practices Nigeria can emulate from the regulatory approach in other jurisdictions.

2a) What is the current regulatory framework for consumer issues in m-payments in Nigeria?

2b) Is there a problem with the current framework?

2c) What are the possible options for improving the current framework in light of regulatory practices in selected jurisdictions?

Figure 2

1.1.3. RELEVANCE

Scholars like Dahlberg et al confirm that research on m-payments is relatively new and fragmented.[36] Many published works address science and technology-related issues with few investigating legal/regulatory frameworks. The limited studies that focus on legal/ regulatory issues mostly focus on some developed countries[37] and a few developing countries like Brazil[38] and India.[39] Studies on developing countries in Africa have focused mainly on

[36] Dahlberg et al (n 8) 168-169.
[37] For examples of studies covering western jurisdictions see J Ondrus, Y Pigneur, 'Towards a Holistic Analysis of Mobile Payments: A Multiple Perspectives Approach' (2006) 5 ECR & A 246 (Switzerland); N Mallat, 'Exploring Consumer adoption of Mobile Payments - A Qualitative Study' (2007) 16 JSIS 413 (Finland); S Trites, C Gibney, B Levesque, 'Mobile Payments and Consumer Protection in Canada' (2013) (Canada) <http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/FCAC_Mobile_Payments_Consumer_Protection_accessible_EN.pdf> accessed 7 April 2016.
[38] P Cruz, 'Mobile Banking Rollout in Emerging Markets: Evidence from Brazil' (2010) 28(5) IJBM 342.
[39] P Makin, 'Regulatory issues around Branchless Banking: New Initiatives to bank the Poor are straining the World's Financial Regulatory Systems' <https://www.oecd.org/ict/4d/44005585.pdf> accessed 4 April 2016, p4

the 'M-pesa' m-payment service in Kenya which is currently the most successful example on the continent.[40]

A review of existing literature on m-payments, however, shows a paucity of studies covering developing countries in the West African region. Nigeria has been chosen as the focus of this study because it is the largest mobile market in the West African region[41] and one of the biggest economies in Africa.[42] By filling the knowledge gap on the region, this research will make a major contribution to the important body of knowledge on m-payments regulation in developing countries. It is also hoped that the research findings will have a major positive impact by making a case for law reform in developing countries based on convincing critique and evidence.

Given the importance of financial inclusion in developing countries, it is vital that adequate protection is available to consumers, many of whom are vulnerable and poor. This research will draw the attention of relevant policy makers and regulators in these countries to the need for effective consumer protection frameworks that support innovative financial/payment services. It is hoped that the research will lay a foundation for future research projects, particularly empirically-based ones.

[40] R Duncombe, 'An Evidence based framework for accessing the potential of Mobile Finance in Sub-Saharan Africa' (2009) 30(7) TWQ, 1252.

[41] GSMA, 'The Mobile Economy: Sub-Saharan Africa' (2014) 20 <http://www.gsmamobileeconomyafrica.com/GSMA_ME_SubSaharanAfrica_Web_Singles.pdf> accessed 3 April 2016.

[42] <http://www.africaranking.com/largest-economies-in-africa/> accessed 15 March 2017.

1.1.4. METHODOLOGY AND FOCUS

Throughout the thesis, it is argued that consumer adoption of m-payments, despite its touted benefits, may be counterproductive where a clear framework for consumer protection is lacking.[43] To support this position, the research analysis mainly relies on traditional doctrinal legal research. Doctrinal research seeks to understand the law through a detailed examination of authoritative legal texts.[44] This method concerns itself with a search for meaning within legal documents,[45] adopting the language and concepts that are internal to the law.[46] This approach is appropriate as this thesis relies heavily on primary sources of law[47] from selected jurisdictions and secondary sources of law in academic literature. It is also an important approach because it aids in the description and analysis of legal text.

Good doctrinal research covers both the systemic reconstruction of existing norms and the evaluation of these norms against identified normative standards.[48] Bearing this in mind, the discussion in the thesis looks to international soft law instruments[49] to determine the objective normative standards that will guide the evaluation and analysis in the thesis. Accordingly, in

[43] Budnitz, (n 30) 220-21.; see also Weber & Darbellay (n 35) 139.
[44] DW Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) JL & Soc'y 163, 178.
[45] S Cammiss & D Watkins, 'Legal Research in the Humanities' in D Watkins, M Burton (eds), *Research Methods in Law* (Routledge 2013) 72.
[46] SA Smith, 'Taking Law Seriously' (2000)50 U.Toronto LJ 241, 255.
[47] Such as legislation (statutes and statutory instruments) and case law.
[48] Vick (n 44).
[49] E.g., the UN Guidelines on Consumer Protection <http://www.un.org/esa/sustdev/publications/consumption_en.pdf> accessed 23 March 2017; The OECD Consumer Policy Toolkit <http://www.oecd-ilibrary.org/governance/consumer-policy-toolkit_9789264079663-en> accessed 23 March 2017.

the second chapter of the thesis, a typology[50] of consumer policy tools relevant to m-payments is discussed.

The use of case studies has also been adopted in the thesis. The case study method is helpful in addressing a key part of the thesis' research question which involves discovering the approach to consumer protection in innovative payments in other jurisdictions. This introduces a slight comparative element in the thesis. However, the use of the case studies is primarily to show converging and diverging regulatory practices in order to make a case for reform. The methodology is not strictly comparative because the data from these jurisdictions are used to illustrate certain points and not to provide comparative explanations.[51] The typology adopted in the thesis is used as the basis for enquiry in each selected jurisdiction. This approach is based on the premise that consumer problems are quite similar around the globe,[52] a point reinforced by the fact that consumer markets are becoming globalised.[53]

Three countries, namely Canada, Kenya and the United Kingdom (UK) have been chosen as case studies. The regulatory practices identified from the case studies will be juxtaposed with that of

[50] These themes include the provision of information, control of business practices, allocation of liability, dispute resolution and financial inclusion.
[51] This approach is what Lemmens describes as "deliberate self-restraint rather than the application of methodological imperative" K Lemmens, 'Comparative law as an act of modesty: A pragmatic and realistic approach to Comparative legal scholarship' in in M Adams, J Bomhoff (eds), *Practice and theory in Comparative Law* (Cambridge University Press 2012) 310.
[52] G Howells, I Ramsay, T Wilhelmson, 'Consumer law in its International Dimension' in G Howells, I Ramsay, T Wilhelmson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 1.
[53] Ibid.

Nigeria and will form the basis for further discussions in the thesis. The three countries have been selected for specific reasons. First, and on a more general note, they are "legal-culturally"[54] similar. Except for Canada's Quebec,[55] all the countries are common law jurisdictions. Keeping in mind the need to capture diversity in country selections, it is believed that it is pragmatic that countries from a similar legal tradition with Nigeria be discussed. This is because one of the aims of the research is to discover what lessons Nigeria may learn from the experience in other countries. It is believed that focusing on countries from the same legal tradition provides a more meaningful context within which practical lessons may be deduced.

Specifically, the choice of Kenya was inevitable because it is a trailblazer in m-payments. It accounts for one of the most successful m-payment platforms in Africa and it is believed that key lessons can be deduced from Kenya's success.[56] Additionally, Kenya shares similar socio-economic realities with Nigeria and both are classified as "lower middle income" economies by the World Bank.[57]

The two other countries to be reviewed, being more developed, are "high income" economies.[58] The United Kingdom was chosen

[54] E Orucu, 'Methodological Aspects of Comparative Law' (2006) 8 Eur. JLR 29, 32.
[55] And to a certain extent, United Kingdom's Scotland.
[56] K Monks, 'M-pesa: Kenya's mobile money success story turns 10' (CNN, 24 February 2017) <http://edition.cnn.com/2017/02/21/africa/mpesa-10th-anniversary/index.html> accessed 12 July 2017.
[57] <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519> accessed 23 November 2016.
[58] Ibid.

for two reasons. First, the UK has a mature consumer protection framework that extends to financial services. Second, owing to historical colonial ties, the UK's legal system forms the basis of the Nigerian legal system. These two points make the UK an appropriate choice for discussion.

Although different from the approach of the UK in certain areas, Canada represents another jurisdiction with a mature consumer protection framework. Like Nigeria, Canada operates a federal multi-lingual system.[59] Owing to its history, two legal traditions co-exist in its legal system.[60] While most provinces are largely English speaking common law jurisdictions, French-speaking Quebec adopts a civil law legal system. The federal and provincial governments have the authority to make laws on issues legally recognised as being within their jurisdiction.[61] This approach applies to regulation on many issues including consumer protection. It is believed that there are lessons to be learned from the delicate interplay between federal and state consumer statutes.

Finally, it is important to make a few remarks about the focus of the thesis. First, while acknowledging that regulation has different equally important goals,[62] this thesis focuses on consumer

[59] It has ten provinces- Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan. It also has three Territories-Northwest Territories, Nunavut, and Yukon.
[60] <http://www.justice.gc.ca/eng/csj-sjc/> accessed 18 December 2015.
[61] Part VI of the Canadian Constitution 1867.
[62] Llewellyn reports that the regulation of these services has 3 principal objectives. The first is to sustain systemic stability, the second to maintain the safety and soundness of financial institutions and the third to protect the consumer; D Llewellyn

protection which is one of the objectives of financial regulation.[63] Thus, the thesis centres on conduct of business regulation. This approach is in line with the attention the thesis places on the consumer side of the payments market. It is necessary to limit the scope of the thesis as it would be impossible to do justice to matters falling within the scope of prudential regulation.

1.1.5. THESIS OUTLINE

Following this introductory section, chapter one introduces the concept of m-payments and provides a working definition that is adopted in the thesis. The chapter also highlights the parties involved in the transaction process and the technology used to facilitate it. The chapter further highlights the potential benefits that consumers may enjoy in adopting m-payments.

Chapter two discusses the general justification for regulatory interventions. This sets the background for why regulatory intervention is necessary with regards to m-payments. The chapter further identifies and discusses a typology of consumer policy tools relevant to the consumer issues in m-payments. This typology is adapted from policy principles contained in the UN Guidelines for Consumer Protection[64] and the G-20 High-Level

'The Economic Rationale for Financial Regulation' (FSA Occasional Paper Series 1, April 1999) 9.

[63] Broadly speaking, it could be argued all objectives/techniques of regulation aid in protecting the consumer.

[64] <http://www.un.org/esa/sustdev/publications/consumption_en.pdf> accessed 10 October 2014.

Principles of Consumer Financial Protection.[65] The discussions in this chapter provide in-depth theoretical analysis of the selected consumer policy tools with the aim of providing a clearer explanation of their relevance in achieving consumer protection. Thus, the analysis of the tools identified in this chapter sets out the rationale for the discussion and recommendations in the chapters that follow.

Chapter three discusses how the selected jurisdictions regulate consumer issues in m-payments. The typology created in chapter two is used as the basis for enquiry in each jurisdiction. This ensures that there is consistency in the discussion which makes it easier to identify converging and diverging regulatory trends.

Chapter four examines the present consumer framework available to m-payment consumers in Nigeria. The same typology used in examining the selected jurisdictions in chapter three is also adopted in this chapter.

Chapter five puts forward certain recommendations that should be considered by Nigerian regulators. The recommendations are intended to address the shortcomings observed in the Nigerian regime discussed in Chapter four. They also reflect some of the best practices observed in the jurisdictions reviewed and supported in the wider academic literature.

[65] <https://www.oecd.org/g20/topics/financial-sector-reform/48892010.pdf> accessed 10 October 2014.

PART 2

1.2. WHAT ARE MOBILE PAYMENTS?

This thesis adopts the definition put forward by Au and Kauffman[66] who define m-payments as representing any payment in which a mobile device is used to initiate, authorize and confirm an exchange of financial value.[67] Mobile devices envisaged in this definition include mobile phones, personal digital assistants (PDAs),[68] wireless tablets and any other portable device that can be connected to a mobile telecommunications network to make it possible for payment transactions to be made.[69]

In staying true to the payment services process, the mobile device may be used as a means of communicating payment instructions and/or as a means of storing and transmitting digital cash.[70] M-payments cover person to person transfers[71] initiated using a mobile device, contactless payments at physical Points of Sale (POS) using a mobile device, as well as the use of software applications on mobile devices to support funds transfer.[72]

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[66] Au & Kauffman, (n 9) 141.
[67] M-payments are a subset of mobile banking which is an umbrella term for banking activities performed through a mobile device. Bollen (n 32) 455.
[68] This represents any "handheld device that combines computing, telephone/fax, Internet and networking features. A typical PDA can function as a cellular phone, fax sender, Web browser and personal organizer. PDAs may also be referred to as a palmtop, hand-held computer or pocket computer." To an extent, these have been rendered obsolete by smartphones. <http://www.webopedia.com/TERM/P/PDA.html> accessed 25 January 2017.
[69] Au & Kauffman (n 9) 141.
[70] De Almeida (n 25) 351.
[71] This may include non- commercial payments from one consumer to another or commercial transfers from a consumer to a small-scale merchant.
[72] B Regnard-Weinrabe, M Taylor, R Shepherd, 'Mobile Payments and the new E-money Directive' (2011) 17(5) CTLR 117,117.

Apart from providing access to account based payment instruments such as money transfers and direct debit assignments,[73] m-payments will also compete with and complement payments made with cash, cheques or cards.[74] Still, the novelty in m-payments lies in both the method of giving instructions to execute financial transactions and the identity of new intermediaries involved.[75] Underneath this novelty, however, is still a basic payments framework where there is a payer and payee accepting variations to their balance, vis-a-vis a third party, as payment.[76] As with traditional payment methods, it still involves three basic steps in payment processing - authorization, settlement and funding.[77]

1.2.1. THE MOBILE PAYMENTS STRUCTURE AND TECHNOLOGY

The parties involved in the m-payment transaction process are the m-payment service providers (which may include financial institutions and mobile network operators (MNOs)) and their customers (merchants and individual consumers). These parties are set out in ***Figure 3***. Additional parties such as vendors of

[73] Dahlberg, et al, (n 8) 166.
[74] Ibid.
[75] Bollen (n 32) 454.
[76] Ibid.
[77] <https://www.chasepaymentech.com/the_basics.html> accessed 31 January 2017.

handsets, software, networks and technology may also be involved.[78]

Parties on the supply side may choose to adopt different business models when providing m-payment services.[79] One model could see a collaboration between a financial institution such as a bank and a non-financial institution such as an MNO. In this model, the primary customer account relationship lies with the bank. This is often called a "*bank-led*" model. The major advantage of this model is that banks leverage their wealth of expertise in managing payment transactions.[80] Another model is where a bank is only used as a safe keeper of surplus funds while the MNO performs all the key functions in providing the service and maintains the customer account. In this model, the primary customer account relationship lies with the MNO. This is called an "*MNO-led*" model. The major advantage of this model is that MNOs can tap into their existing customer base as they are already the main providers of mobile telecommunication services.[81] The difference in both models lies with who the primary service provider or account keeper is vis-à-vis the customer.

[78] Dahlberg et al (n 8) 166; See also R Kemp, 'Mobile Payments and Emerging Regulatory and Contracting Issues' (2013) 29 CLSR 175,176. It is also possible for one party to take on multiple roles in the transaction chain.
[79] Bollen (n 32) 462.
[80] T Lerner, *Mobile Payment* (Springer Science & Business Media 2013) 25.
[81] Ibid *2*9.

MAJOR PARTIES IN THE M-PAYMENT PROCESS.[82]

THE MOBILE NETWORK OPERATORS (MNOs)	The MNOs have a huge customer base because they control the Subscriber Identity Module (SIM) and/or the Wireless Identity Module Card (WIM) of the mobile device and, therefore, stand as the major contact point with consumers who need a mobile network platform to engage in m-payments.
THE FINANCIAL INSTITUTION	The financial institutions are a key party in most schemes because they have decades of experience with payment services. Since the MNOs have limited experience in payment services and the accompanying risks, cooperation between the MNOs and financial institutions is inevitable.
THE DEVICE MANUFACTURERS	They control the technology and capabilities of the mobile device which is central to implementing the m-payment service.
THE SOFTWARE MANUFACTURERS	They produce the standard compliant software that will connect the different parts of the payment process.
THE SERVICE PROVIDERS	The service providers will bring this service to the market and adapt it to users' needs. Banks and/or MNOs may take up this role. This is often who the consumer has a primary contractual relationship with.
THE MERCHANTS	Merchants will use the platform to process payment transactions initiated by consumers and other merchants.
THE CONSUMERS	These are the main beneficiaries of m-payments who will use the platform to engage in payment transactions.

Figure 3

[82] Adapted from J Rinearson, 'The next new thing: Mobile Payments' (2007) 3 JPSL 82, 85-86.

Several technological models also exist to support the m-payment options adopted by consumers and these have been highlighted in ***Figure 4***. These technological models allow m-payments to be used for remote or proximity payments. Remote payments connote payments made from a distance, without the payer and payee being present at the same physical location.[83] These would include the use of mobile devices for internet or SMS based payments. Proximity payments represent payments made where the payer and the payee are in the same physical location.[84] These will include payments made with a mobile device at a physical Point of Sale (POS) machine using technologies such as Near Field Communication (NFC) which require specifically equipped phones and data readers.[85]

Technological Models for M-Payments[86]

1) Short Message Service (SMS) & Unstructured Supplementary Service Data (USSD) based Payments

M-payments can be made by sending text messages. Users send a payment request to an SMS Short Code. The transaction value is charged to the user's phone bill or account and the merchant will then be informed of the payment's success and will subsequently release the goods. Payments may also be made via USSD. This is similar to SMS based payments. The difference lies in the fact that

[83] European Central Bank 'Glossary of Terms Related to Payment, Clearing and Settlement Systems' <https://www.ecb.europa.eu/pub/pdf/other/glossaryrelatedtopaymentclearingandsettlementsystemsen.pdf> accessed 19 March 2017.
[84] Ibid.
[85] TR McTaggart, DW Freese, 'Regulation of Mobile Payments' (2010) 127 BLJ 485, 486.
[86] Adapted from J Long, M Taylor, 'Mobile Payments: Part 1' (2011) 17(4) CTLR 105.

USSD creates a real-time connection which remains open so that there can be a 2-way data exchange between parties as opposed to the SMS system in which data is stored at a Short Message Service Centre before being sent to the recipient. The real-time connection provided by the USSD reduces delays.

2) Direct Mobile Billing

Some e-commerce sites offer direct billing from a mobile account as an alternative to paying with a card. Users shopping on such sites will find a mobile billing option on the usual "check out" page of the website. If this option is selected, payment can be made through a mobile device by entering a mobile number in the relevant box. The mobile owner then receives an SMS message asking them to confirm the payment and upon confirmation, the transaction is charged to their mobile phone bill.

3) Near Field Communication (NFC)

This enables wireless communication between devices over a short distance. With the NFC technology, all a consumer needs to do is to simply tap or wave their mobile device at an NFC enabled POS to complete a transaction.[87] The Radio Frequency Identification (RFID) technology is like the NFC but with a longer transmission range which is considered less secure.

4) 2D Barcodes

This is another available technology which supports purchases made from a prepaid account with a merchant. The consumer's mobile device displays a downloaded barcode or one received through a multimedia message which may be scanned at a cash register to complete a transaction.[88]

Figure 4

[87] The payment is actually processed and settled using the same process as those used when paying with a physical debit or credit card. See J Long, M Taylor, 'Mobile Payments: Part 2 - Contactless Near Field Communication' (2011) 17(5) CTLR 132,132.
[88] Hayashi (n 19) 36.

1.3. HOW DO MOBILE PAYMENTS BENEFIT CONSUMERS?

A 2006 survey of 800 consumers by Visa found that respondents were twice as likely to carry mobile phones as they were to carry cash.[89] This demonstrates the pervasive influence mobile phones have today. Their ubiquity and impressive technological capacity make m-payments an attractive service for several reasons.

First, m-payments are attuned to customer needs.[90] Findings suggest that the relative advantage of m-payments is tied to the specific benefits provided by mobile technology.[91] With the aid of their mobile device, a customer can remotely perform domestic and international bill payments and execute peer to peer transfers[92] without the limitation of time and location. These advantages are more significant where there is an unexpected need to make a payment.[93]

Second, m-payments are also well suited for micro-payment[94] transactions which attract high costs when made with traditional non-cash alternatives.[95] This will assist consumers with everyday

[89] The survey showed that with 18-34-year-olds, this was four times as likely; Rinearson (n 82) 82-83.
[90] Au & Kauffman (n 9) 142.
[91] Mallat (n 37) 425.
[92] Bollen (n 32) 455.
[93] Mallat (n 37) 425.
[94] These are payments that involve small amounts of money such as parking and transport fares. PayPal defines micropayments as payments below $12 while Visa classifies payments below $20 as micropayments. <https://www.mobiletransaction.org/what-are-micropayments/> accessed 15 March 2017.
[95] Such as bank cards; Bollen (n 32) 454.

transactions eliminating the inconvenience of carrying coins[96] and loose change. Thus, m-payments will be conveniently used at vending and ticketing machines and to effect other micro-payments for digital content like ringtones, logos, music or games.[97]

Third, m-payments present a high degree of flexibility because they may be funded in several ways.[98] Funding may be from a bank account[99] or a pre-paid account held with a non-bank payment provider such as an MNO. M-payment transactions may also be funded through a debit, credit or prepaid card. Another funding option is to pay for purchases by including it in the consumer's monthly phone bill.[100] These funding options are not mutually exclusive and a consumer may choose to consolidate all of them on a mobile device via a mobile application called a "mobile wallet."[101]

M-payments can serve as a complementary and/or alternative payment instrument to cheques and payment cards. Consumers will generally carry their payment cards and mobile devices wherever they go and will have the increased choice of using whichever instrument they feel is most appropriate for an intended transaction.[102] Even with this increased menu of choices, the

[96] Hayashi (n 19) 43.
[97] Dahlberg et al (n 8) 165-66.
[98] Hayashi (n 19) 37; see also B Regnard-Weinrabe, M Taylor, et al 'Offering a Mobile Payments account across the E.U' (2012) 18(1) CTLR 1.
[99] When funded from a bank account, payments are processed over the Automated Clearing House (ACH) which is an electronic network system that processes debit and credit transactions between bank accounts.
[100] This is often known as "direct mobile billing." See *figure 4*
[101] Hayashi (n 19) 37.
[102] Au & Kauffman (n 9) 157.

potential benefits of m-payments to consumers can also be evaluated by drawing a comparison between traditional payment methods and m-payments. While it can be argued that m-payments share attributes such as convenience, cost, security and acceptance by merchants with bank cards,[103] it can also be argued that the degree and extent of these advantages may be the differentiating factor. This argument is further strengthened by the degree of flexibility that m-payments can introduce because they can link various physical card accounts and payment platforms[104] to a single m-payment application.[105]

Apart from speed,[106] convenience, ease of use, short processing time and ubiquitous availability, mobile devices also offer many features that bank cards do not. These include telecommunication capabilities and screen interfaces that can be used to support many different applications.[107] In terms of portability, mobile devices arguably have an edge over traditional payment methods as they will eliminate the inconvenience of carrying multiple plastic cards in a physical wallet as these cards can be linked to a single mobile device.

Furthermore, m-payments are also expected to play a significant role in helping consumers manage their finances in ways

[103] Hayashi (n 19) 36.
[104] e.g. PayPal
[105] Hayashi (n 19) 43.
[106] For example, a typical NFC transaction can be 15-30 seconds faster than swiping a traditional card and punching in a PIN, this might seem insignificant but for a consumer on the go needing to catch a bus or an appointment, this will be invaluable. Hayashi (n 19) 44.
[107] Au & Kauffman (n 9) 151-2.

traditional bank cards cannot. Because consumers have access to multiple payment platforms on their mobile device, they can check and compare their account balances before initiating any transaction.[108] This will enable them to choose the payment platform with the most favourable financial impact.[109] M-payments can also help consumers develop financial discipline if they are able to set purchase thresholds on their device for different categories of spending. This functionality allows them to be notified when these thresholds are met, regardless of which payment platform is being used.[110]

Commentators also argue that if used in a secure manner, m-payments have the potential to reduce fraudulent POS transactions by allowing for dynamic authentication at the POS enabled by a chip embedded in a mobile device.[111] Additionally, it is expected that password protection of the mobile device and the m-payment application will aid in providing greater security.

Finally, one of the biggest arguments made in favour of mobile-based financial services like m-payments is their capacity to expand the reach of banking and non-cash payment services in a cost-effective manner to financially excluded persons. Access to banking services in regions like sub-Saharan Africa is limited.[112]

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[108] Hayashi (n 19) 55.
[109] Ibid.
[110] Ibid.
[111] Ibid 49.
[112] P Dupas, S Green et al, 'Challenges in Banking the Rural Poor: Evidence from Kenya's Western Province' (2012) <https://web.stanford.edu/~pdupas/Challenges_DupasEtAl2011.pdf> accessed 17 March 2017, p1.

One of the reasons banks have failed to serve rural communities is because of the high costs of providing services and low-profit margins.[113] M-payments bridge a gap as they provide incentives in the form of greater revenue streams for banks and other providers such as MNOs.[114]

1.4. CONCLUSION

In this chapter, we have seen that the globalization of trade propelled by significant technological milestones has led to substantial changes in the nature and form of available payment services.[115] The chapter has introduced the concept of m-payments highlighting the parties involved in the transaction process and the technology used to facilitate it. Discussions have also covered the potential benefits that consumers will enjoy in adopting with m-payments.

Although m-payments can increase the choices available to consumers when completing transactions, one must note that the lines between payment categories are often blurred.[116] This is more so as a single transaction may combine two or more payment methods for increased efficiency. There are still arguments as to whether m-payments are just a new access channel to existing

[113] 'Access to Financial services in developing countries: The Rabobank view' (2005) <https://economie.rabobank.com/PageFiles/3584/access_tcm64-75165.pdf> accessed 12 March 2017
[114] Hayashi (n 19) 55.
[115] Bollen (n 1) 372.
[116] 'Commission seeks to break down barriers to the development of innovative Card, Internet and Mobile Payment Mechanisms' (2012) 293 EU Focus, 24, 24.

services or a new payment method or both.[117] Whichever side of the divide one aligns with, it is increasingly clear that m-payments are a step forward in the quest to bring financial services closer to the consumer. They present us with a reality where consumers can leave their wallets at home and still have the confidence to carry out essential financial transactions.[118]

Despite the potential benefits that m-payments provide, their adoption may also raise significant concerns with respect to the protection of its primary beneficiaries- the consumers. The next chapter identifies these potential issues and discusses key consumer policy tools which are capable of addressing them. The chapter also provides a background for regulatory intervention in consumer markets. This background provides a contextual explanation for the regulatory tools discussed.

[117]Dahlberg et al (n 8) 178.
[118] MA Rajan, 'The Future of Wallets: A look at the Privacy Implications of Mobile Payments' (2012) 20 CLC 445, 445.

CHAPTER 2 - CONSUMER POLICY AND MOBILE PAYMENTS

2.1 INTRODUCTION

Governments play significant roles in ensuring that economic actors adhere to set regulatory standards. These efforts aim at safeguarding economic interests[1] while pursuing other socially driven goals such as encouraging the fair distribution of resources and protecting vulnerable members of the society. Authorities rely on the interaction of identified policies in different sectors to achieve these broad objectives. Consumer policy is one such policy area on which authorities may concentrate. Although there is no single definition of the term, consumer policy focuses on ensuring that market outcomes do not fall short of their potential which may result in welfare losses for the consumer.[2] It may also focus on ensuring that there is fair and equitable distribution of resources[3] between market participants. It is on this basis that the Organisation for Economic Cooperation and Development (OECD) asserts that protection and empowerment lie at the core of

[1] UN Guidelines for Consumer Protection (as expanded in 1999) <http://www.un.org/esa/sustdev/publications/consumption_en.pdf> accessed 10 October 2014. 'Economic interest' here would cover both that of consumers and businesses.

[2] OECD Consumer Policy Toolkit <http://www.oecd-ilibrary.org/governance/consumer-policy-toolkit_9789264079663-en> accessed 23 March 2017, pp.11-12.

[3] G Howells, S Weatherill*, Consumer Protection Law* (2nd edn, Ashgate 2005) 32.

consumer policy.[4] How jurisdictions achieve these objectives may differ as shall be seen in the third chapter of this thesis.

Developing an appropriate consumer policy is not an easy task. In recognition of this, international bodies such as the United Nations (UN)[5] and the OECD[6] have released guidelines intended to support policymakers involved in this area. There has also been growing international support for dedicated regimes that focus on enhancing financial consumer protection.[7] It has been canvassed that financial consumer protection be included as a core part of general consumer protection frameworks.[8] This is because consumer confidence in a well-functioning financial services market is bound to promote stability, efficiency, growth and innovation in the long-term.[9]

Although innovative financial/payment services offer certain advantages, they also contribute to existing consumer challenges[10] while introducing new ones. These challenges are mostly attributable to the complex nature of these services.[11] They are even more significant because the consumer class is also

[4] OECD (n 2) 112.
[5] UN (n 1).
[6] OECD (n 2)
[7] In 2011, the OECD released a set of principles on consumer financial protection which has been endorsed in many jurisdictions; S Trites, C Gibney, B Levesque, 'Mobile Payments and Consumer Protection in Canada' (Research Division, Financial Consumer Agency Of Canada) <http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/FCAC_Mobile_Payments_Consumer_Protection_accessible_EN.pdf> accessed 7 April 2016, p25; D Collins, N Jentzsch, R Mazer, 'Incorporating Consumer Research into Consumer Protection Policy Making' (2011) CGAP Focus Note No. 74.
[8] G20 Principles on Consumer Financial Protection (2011) <https://www.oecd.org/g20/topics/financial-sector-reform/48892010.pdf> accessed 23 May 2015, p4.
[9] Ibid.
[10] OECD (n 2) 16.
[11] ibid 20.

experiencing changes that see younger and older persons becoming more significant actors.[12] In addition, exogenous factors such as the lack of financial education and the use of unfamiliar new technologies[13] places the consumer in a more vulnerable position.[14]

It is, thus, not surprising that there is an increasing focus on the consumer issues associated with the use of innovative services like m-payments. International bodies such as the OECD, Financial Action Task Force (FATF) and the European Central Bank (ECB) have in recent years released policy guidelines which focus on m-payments.[15] In countries like the UK and Canada, there have also been specific thematic reviews by regulatory authorities focusing on the consumer issues that may arise in the use of m-payments.[16]

[12] ibid 7.
[13] Which may be heightened by other factors such as age.
[14] Committee on the Internal Market and Consumer Protection, 'Report on a Strategy for Strengthening the rights of Vulnerable Consumers' (2012), Explanatory Statement, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0155&language=EN#title2> accessed 12 May 2016 ; L Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (2013) 38(6) EL.Rev 757, 767.
[15] In 2008, the OECD released the 'Policy Guidance for addressing Consumer Protection and Empowerment Issues in Mobile Commerce' (2008) OECD Digital Economy Papers (No. 149) <http://dx.doi.org/10.1787/230363687074 p4> accessed 10 March 2017; the Financial Action Task Force (FATF) has released at least two Guidance documents that have covered m-payment related issues, see, FATF, 'Guidance for a Risk-Based Approach: Prepaid Cards, Mobile Payments and Internet-Based Payment Services' (2013) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-RBA-NPPS.pdf> accessed 2 March 2017;The ECB also released 'Recommendations for the Security of Mobile Payments Draft Document for Public Consultation" <http://www.ecb.europa.eu/paym/cons/pdf/131120/recommendationsforthesecurityofmobilepaymentsdraftpc201311en.pdf> accessed 7 November 2014.
[16] See the FCA Thematic Review 'Mobile Banking and Payments' (2014) <https://www.fca.org.uk/publication/thematic-reviews/tr14-15.pdf> accessed 3 February 2016; see also Trites et al (n 7) for the thematic review carried out in Canada.

This chapter discusses key consumer policy tools that are relevant to m-payments. As stated in the introductory section,[17] these identified policy themes draw inspiration from principles contained in the UN Guidelines for Consumer Protection and the G-20 High-Level Principles of Consumer Financial Protection.

This chapter is divided into three parts: Part 1 discusses the rationale for government intervention in consumer markets. Part 2 then covers key consumer policy tools relevant in m-payments while part 3 concludes the chapter.

PART 1 - CONSUMER PROTECTION: WHY INTERVENE?

Justifications for consumer protection are usually understood against the background of the consumer's role in the economy which inevitably attracts differing interpretations.[18] As Howells and Weatherill put it, "different perspectives contain their own truths".[19] Some of these perspectives will be discussed in this part.

[17] See section 1.1.5.
[18] Consumers are a heterogeneous group, thus Howells and Weatherill argue that each theory justifying protection is not completely correct or incorrect. Howells & Weatherill (n 3) 5.
[19] Ibid.

2.2. ECONOMIC RATIONALES

2.2.1. NEO-CLASSICAL ECONOMICS AND THE PERFECT MARKET

Neo-classical economic theory explains the perfectly competitive market as one where certain conditions exist to maintain equilibrium in the allocation of resources.[20] In such a perfect market, there are numerous buyers and sellers such that the activity of one economic actor will have a negligible effect on the price or output of the market.[21] There is also free entry into and exit from the market. In addition, the commodity sold in the market is homogeneous.[22] The economic actors have access to perfect information about the nature and value of the commodities being traded[23] and of their potential substitutes. There are also no externalities as the cost of producing commodities are borne by the producer alone while the benefits of consuming them are borne by only the consumer.[24]

Neo-classical economics suggests that in a perfect market, buyers and sellers who act in their own self-interest are perfectly informed about all products in the market and, therefore, make the best

[20] AM Pacces, RJ Van Den Bergh, 'An Introduction to the Law and Economics of Regulation' in RJ Van Den Bergh, AM Pacces (eds), *Regulation and Economics* (Edward Elgar Publishing 2012) 4-5.
[21] P Cartwright, 'Consumer Protection in Financial Services: Putting the Law in Context' in P Cartwright (ed), *Consumer Protection in Financial Services* (Kluwer Law Int'l 1999) 8.
[22] Ibid; this suggests that they are perfect substitutes of each other; JL Schroeder, *The Triumph of Venus: The Erotics of the Market* (University of California Press, 2004) 137.
[23] Cartwright (n 21) 8.
[24] Ibid; C Scott, J Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths 2000) 27.

choices that suit their needs.[25] Consumers also play an active role in maintaining market discipline as they are able to use their purchasing decisions to ensure that suppliers act in their best interest.[26] This idea projects consumer sovereignty with a high distrust for paternalism.[27] It assumes the rationality of consumers who are the best judges of their interests and who maximise their utility with the limited resources available.[28]

Any deviation from this ideal results in market failure. In this light, market failure is identified as the prima facie[29] justification[30] for government intervention.[31] Two market failures are conspicuous in consumer markets. First are information failures which occur when parties do not have perfect information as envisaged in a perfect market.[32] This lack of perfect information may deprive consumers of the knowledge needed to make optimal economic decisions.[33] This is significant as consumer choice plays a central role in the economic notion of allocative efficiency.[34]

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[25] OECD (n 2) 33.
[26] Howells & Weatherill (n 3) 1.
[27] I Ramsay, *Consumer Law and Policy* (3rd edn, Hart Publishing 2012) 62.
[28] I Ramsay, 'Rationales for intervention in the Consumer Marketplace' (London, Office of Fair Trading 1984) cited in Ramsay, ibid 47.
[29] Ogus contends that these reasons are not necessarily conclusive because the regulatory solution may not be more successful than the market or private law in correcting market inefficiencies. AI Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing 2004) 30.
[30] Leading advocates of economic freedom such as Milton Friedman concede that regulation could be justified although there would always be a presumption in favour of free markets. M Friedman, *Capitalism and Freedom* (University of Chicago Press 1962); contrast Friedman's position with that of JK Galbraith, *The Affluent Society* (4th edn, Andre Deutsch 1984). Galbraith, amongst other things, argued for the need of government interference to maintain market stability and equality.
[31] OECD (n 2) 32; Ramsay (n 27) 42.
[32] Information may simply not be available or it may be incomplete, inaccurate and/or misleading; C Bamford, S Walton, *Economics* (Pearson Education Ltd, 2008) 57
[33] Ramsay (n 27) 43.
[34] In economic theory, this connotes that existing resources be put to their most efficient use; U Schwalbe, D Zimmer, *Law and Economics in European Merger Control* (OUP 2009) 3.

To make well-informed decisions as envisaged in a perfect market, consumers need up-to-date information on the price, characteristics and quality of a commodity[35] and the terms on which they are purchasing it.[36] Such information must also be understandable, readily available and verifiable.[37] However, the perfect information characteristic of a perfect market is rarely found.[38] In reality, obtaining perfect information is costly and usually impossible[39] for consumers.[40]

Information failures may take different forms, such as imperfections in the provision of market information[41] or situations where suppliers withhold information or put out misleading information to enhance their profits.[42] In some cases, suppliers may not even have the full information required.[43] In addition, suppliers may choose to emphasize certain information that distracts consumers from other key features of a product.[44] Information may also be presented in a way that is deliberately complex and confusing or deceptively simple.[45] These scenarios

[35] And its substitutes.
[36] And its substitutes or alternatives; Scott & Black, (n 24) 30.
[37] Ibid.
[38] There is significant literature focusing on information asymmetry as an example of market failure. See, for instance, J Den Hertog, 'Economic theories of Regulation' in Van Den Bergh & Pacces ((n 20); G Hadfield, R Howse and M Trebilcock, 'Information based Principles for Rethinking Consumer Protection Policy' (1998) 21 JCP 131; Office of Fair Trading, "Consumer Detriment Under Conditions of Imperfect Information" (OFT Research Paper 11, 1997); H Beales, R Craswell & S Salop, 'The Efficient Regulation of Consumer Information' (1981) 24 JLE 491; WC Whitford, 'The Functions of Disclosure Regulation in Consumer Transactions' (1973) WL.Rev. 400.
[39] Especially for goods/services purchased on a "credence basis" whose value only becomes apparent with the passing of time. M Donnelly, 'The Financial Services Ombudsman: asking the existential question' (2012) 35 DULJ 232, 234.
[40] Scott & Black (n 24) 31.
[41] Ramsay (n 27) 49.
[42] Ogus (n 29) 40.
[43] As in the case of credence goods.
[44] Scott & Black (n 24) 31; G Akerlof, 'The Market For "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) QJE 488.
[45] Scott & Black (n 24) 32.

result in a situation where suppliers and sellers have an uneven amount of information.[46] This asymmetry[47] consequently contributes to the inequality of bargaining power between consumers and suppliers.[48]

Information failures, therefore, inform government intervention in consumer markets. It is such a central issue that one commentator has stated that "the economics of consumer protection is the economics of information."[49]

Information failures may result in a situation where consumers misallocate their resources and fail to or incorrectly exercise their market power to discipline firms.[50] It may also encourage artificial product differentiation and make consumers susceptible to misleading claims.[51] In addition, it may channel competition based on more observable traits like price, leading to a fall in quality which consumers may be unable to observe.[52] Regulatory

[46] E Rubin, 'The Internet Consumer Protection and Practical Knowledge' in JK Winn (ed) *Consumer Protection in the Age of the Information Economy* (Ashgate Publishing 2013) 37. Information deficits may also occur where neither party has the required information.
[47] Earlier works have documented the effect of these asymmetries, see notably Akerlof (n 44).
[48] Ramsay reports that this idea appeared in the Molony Report and the Crowther Report on Consumer Credit which eventually formed the basis of the UK Consumer Credit Act 1974; Ramsay (n 27) 41.
[49] C Shapiro, 'Optimal Pricing of Experience Goods' (1983) 14(2) Bell Journal of Economics 497 cited in OECD (n 2) 34; see also Hadfield, Howse and Trebilcock (n 38) 131.
[50] Ramsay (n 28) 51.
[51] Ibid.
[52] This phenomenon was identified by Akerlof (n 44) where he explained that in situations where it is not possible to establish the quality of certain goods and services in advance, purchasers may be prepared to pay an average price corresponding to the average expected quality. Sellers of high-quality products will be unwilling to sell at that asking price and will withdraw from the market. The result of this is that the quality of products will decline as will the price buyers are willing to pay. See also Den Hertog (n 38) 39.

intervention may thus be introduced to mitigate these problems and to encourage fair competition among suppliers.[53]

A second market failure prominent in consumer markets is the perceived inability of the institutional framework (private law rules and market forces) to secure the efficiency[54] of the market.[55] The efficiency of the market is dependent upon private institutional frameworks that secure the performance of economic transactions. Ramsay argues that private law mechanisms such as individual litigation are believed to be inadequate in deterring socially wasteful activity or compensating violations of rights.[56] From this perspective, Cartwright[57] states that it could be argued that the role of regulatory intervention may be to correct the perceived limitations of private law institutions[58] while recreating as much as possible the conditions of a perfect market.

In summary, neo-classical economics succeeds in postulating the ideal market arrangement in which consumer welfare is best protected.[59] Against this background, authorities can evaluate real-world departures from this ideal in order to determine how

[53] Howells & Weatherill (n 3) 64.
[54] Efficiency here is interpreted from an economic angle. Efficiency from this perspective would connote a well-functioning market that puts its resources to their most valuable use. Such a market will have players involved in utility maximising behaviour driven by access to the necessary information needed to make optimal choices. The market will also be highly competitive taking into account all external costs and benefits. Using economic theory, efficiency may further be interpreted using the Pareto test (i.e. allocation of resources is efficient when it is impossible to make any one individual better off without at the same time making someone worse off) or the Kaldor-Hicks test (i.e. a policy is efficient where it results in sufficient benefits for those who gain such that potentially they can compensate fully all the losers and still remain better off) Ogus (n 29) 23- 25.
[55] Ramsay (n 27) 43.
[56] Ibid.
[57] Cartwright (n 21) 8.
[58] See the discussion on pp.98-99.
[59] OECD (n 2) 33.

and when to intervene.[60] Market failure analysis is usually an initial step in policy making because it assists with diagnosing the source of market failure.[61] This assists in choosing appropriate interventions and evaluating their success when implemented.

2.2.2 BEHAVIOURAL ECONOMICS AND MARKET REALITIES

Behavioural economics, on the other hand, shows that in real-life situations, many of the assumptions of neo-classical economic theory on consumer rationality,[62] unbounded willpower and unbounded self-interest may not hold.[63] It emphasizes that "regulators and policymakers have to take into account the way consumers actually behave rather than the way the economics textbooks say they should behave."[64]

Behavioural economics demonstrates that there are behavioural biases which influence consumers[65] which are not taken into

[60] Ibid.
[61] Ramsay (n 27) 42.
[62] The idea of bounded rationality was first introduced by Herbert Simon in his work HA Simon, 'A Behavioural Model of Rational Choice' (1955) 69(1) The Quarterly J of Econ. 99; see also D Kahneman, *Thinking Fast and Slow* (Penguin 2012); CR Sunstein, RH Thaler*, Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008); A Tversky & D Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 Science New Series 453; A Tversky & D Kahneman, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47(2) Econometrica 263; HA Simon, 'Theories of decision-making in Economics and Behavioural Science' (1959) 49(3) AER 253.
[63] Ramsay (n 27) 56; HA Simon, *Models of Bounded Rationality* (Cambridge MIT Press, 1982).
[64] M Kuneva, 'Consumers and Competition: The Quest for Real Choice Opportunities' Competition Law International (2012) 10.
[65] The most formal attempt to incorporate this into a choice model is called the Prospect Theory attributed to the work of Tversky & Kahneman (n 62); OECD (n 2) 44.

consideration by neo-classical economics.[66] These behavioural biases may be attributed to different factors. They may be as a result of heuristics[67] where consumers use shortcuts and rules of thumb to assess risks.[68] Accordingly, consumers may make quick purchasing decisions or overlook superior ones due to too many options or the complexity in assessing them.[69] Information overload may worsen this situation as consumers are forced to settle on simple shortcuts that justify the choices they make.[70] Biases may also be fuelled by hyperbolic discounting. This suggests that in making intertemporal choices on whether to consume now or in the future, consumers may not have preferences that are consistent over time.[71] This debunks the assumption that consumers weigh present and future costs and benefits when making decisions.[72] In fact, consumers may be myopic in the short term but more rational in the long-term.[73] This

[66] Posner argues that some of these biases have been over-exaggerated and contends that it should not be impossible to educate people out of their irrationalities. He argues that legal reform influenced by behavioural economics should aim at dispelling irrationalities rather than getting around them; RA Posner, 'Rational Choice, Behavioural Economics, and the Law' (1997-1998) 50 Stan. L.Rev. 1551, 1575. This is in contrast to Blumenthal who argues that the clear-headed objective individual who identifies and seeks to correct his decision-making flaws is rarer than anti-paternalists think. This is because an individual must identify bias and be motivated to change it. This is difficult since individuals reject or downplay the existence of bias in their decision making and may be over-confident about their skills. JA Blumenthal, 'Emotional Paternalism' (2007) 35 FSULR 1 52.

[67] This implies that consumers may use convenient shortcuts in reaching a decision; Ramsay (n 27) 59.

[68] Ibid.

[69] OECD (n 2) 116.

[70] Ramsay (n 27) 59-60; Better Regulation Executive & National Consumer Council, 'Warning: Too much Information Can Harm' (2007) <http://www.eurofinas.org/uploads/documents/policies/NCB-BRE-Report.pdf> accessed 29 July 2015.

[71] Ramsay *(*n 28) 57. Ibid.

[72] Ibid.

[73] Ibid.

may lead them to make decisions today which they will regret in the future.[74]

Another bias is fuelled by overconfidence. Consumers may sometimes believe that in carrying out an action, they will enjoy an outcome better than the average expected outcome.[75] This will, for instance, cause a consumer to ignore generic warnings because they assume that the problem will not affect them.[76] Behavioural economics also demonstrates that consumer decision-making may be influenced by the way information is presented.[77] Framing information in a certain way may influence how the consumer makes decisions.[78]

Consumers may also evaluate decisions to be made from a particular perspective or reference point.[79] This is known as anchoring. Consumer choice may thus be influenced by an available or convenient piece of information which serves as an arbitrary reference point or anchor.[80] Where a choice is presented as a default option, consumers may regard them as the reference

[74] People who suffer from hyperbolic discounting may have self-control problems such as procrastination and may be reluctant about changing the status quo if it requires efforts in the present to gain larger benefits gradually in the future; OECD (n 2) 45.
[75] Ibid.
[76] Ramsay (n 27) 58; consumers may also suffer from illusory superiority where they believe they are above average and overestimate their abilities.
[77] This suggests that consumers may respond to the same problems in multiple ways depending on how information is framed. This is relevant to the use of default mechanisms. Ramsay (n 27) 58; OECD (n 2) 116.
[78] J Mehta (eds), *Behavioural Economics in Competition and Consumer Policy* (ESRC Centre for Competition Policy 2013) 20
[79] OECD (n 2) 46; see also A Tversky, D Kahneman, 'Loss Aversion in Riskless Choice: A Reference Dependent Model' (1991) 106 QJE 1039; D Kahneman, D Knetsch and R Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' (1990) 98(6) JPE 1325.
[80] Mehta (n 78) 59.

point and may be induced to choose them.[81] Commentators[82] point out that these biases may be exploited by suppliers to manipulate consumer decision-making.

Consequently, and despite access to information, these biases may prevent consumers from exercising their choices in a rational manner.[83] This is worsened by market practices which take advantage of these biases.[84] This suggests that although markets may be competitive, they may not be optimal for consumer welfare.[85] In essence, these findings demonstrate that consumers may "have a voice which is much louder in theory than in practice."[86]

Therefore, regulatory responses may be developed to deter specific manipulations that may distort consumer decision-making.[87] Behavioural economics thus provides invaluable insights that assist authorities in formulating and implementing effective policies.[88] This is imperative for regulators who may have based previous policy responses on the assumption that consumers are rational decision makers.[89]

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[81] Consumer inertia may be for several reasons. For instance, choosing the default option may be seen as a way of avoiding the cost of making a decision. Consumers may also feel that whoever has set the default knows more about making the right decision than they do. OECD (n 2) 46.
[82] J Hanson, D Kysar, 'Taking Behaviouralism Seriously: Some Evidence of Market Manipulation' (1999) 74(3) NYU LRev. 630; E Fatas, B Lyons, 'Consumer Behaviour and Market Competition' in Mehta (n 78) 33-34.
[83] T Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services' (2007) 29 Law & Pol'y 226, 245.
[84] D Pridgen, 'Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws' (2013) 13(2) Wyo.LRev. 405, 437.
[85] Ramsay (n 27) 62.
[86] Howells & Weatherill (n 3) 2.
[87] Pridgen (n 84) 437.
[88] OECD (n 2) 46.
[89] Ramsay (n 27) 61.

2.3. NON-ECONOMIC RATIONALES

Beyond economic rationales, there are other more socially or politically motivated reasons justifying regulatory intervention in consumer markets.[90] Consumer protection is sometimes viewed as a response to 'the limitations of contractual freedom as a basis for delivering a fair and just distribution of resources.'[91] Thus certain government interventions may be sustained from a standpoint that emphasises 'social concerns rooted in equality and the protection of human dignity.'[92] These social concerns may not be adequately addressed under an exclusive private law system hence necessitating regulatory intervention.[93]

This suggests that in some situations regulation is justified on the belief that resources need to be 'distributed on the basis of what is just rather than what is economically efficient.'[94] Ogus submits that the balance between these two ideals,[95] i.e., distributive justice and economic efficiency will be determined by the ideology of the relevant State.[96]

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[90] Howells & Weatherill (n 3) 7.
[91] Ibid, 32; note that the terms "fair and just" are both very subjective and their interpretation will be dependent on the school of thought one favours. Liberal theories will interpret resource distribution as fair where the process by which resources acquired is just. Socialist theories, on the other hand, will use equality and justice as standards to judge how fair and just resource distributions are. Contrast R Nozick, Anarchy, *State and Utopia* (1974) with V George, P Wilding, *Ideology and Social Welfare* (rev. edn. 1985) both cited in Ogus (n 29) 22.
[92] Howells & Weatherill (n 3) 33.
[93] ibid 49.
[94] Cartwright (n 21) 12.
[95] There are other ideals that may justify regulation such as promoting community values and sustainable consumption. See Ramsay (n 27) pp.79-80; 82-83.
[96] Ogus (n 29) 46-54.

These non-economic justifications are even more important when it is understood that some consumers are more vulnerable than others. The concept of vulnerability is relative[97] and it may be argued that all consumers are potentially vulnerable at one point or another. A detailed examination of this is beyond the scope of this thesis but it is important to note that several factors contribute to vulnerability.[98] Cartwright[99] provides a useful taxonomy which incorporates some significant causes of vulnerability. Following this taxonomy, consumers may be vulnerable because they do not have access to the relevant information needed to make well-informed decisions.[100] Consumers may also be affected where they are put under pressures that deprive them of the ability to make voluntary economic decisions.[101]

Furthermore, where consumers are deprived of a wide range of choices, especially for commodities that may be classed as necessities, they may suffer from vulnerability.[102] This is also the

[97] There is significant literature covering this issue; See P Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation* (Financial Services Research Forum 2011); T Wilhelmsson, 'The Informed Consumer v The Vulnerable Consumer in European Unfair Commercial Practices Law- A Comment' in G Howells, A Nordhausen, D Parry, C Twigg-Flesner (eds), *Yearbook of Consumer Law 2007* (Ashgate, 2007) 211; S Menzel Baker, JW Gentry, TL Rittenberg, 'Building Understanding of the Domain of Consumer Vulnerability" (2005) 25(2) Journal of Macromarketing 1; 'What do we mean by Vulnerable and Disadvantaged Consumers?' (Consumer Affairs Victoria Discussion Paper, 2004); R Burden, 'Vulnerable Consumer Groups: Quantification and Analysis' (OFT Research Paper 1998); DJ Ringold, 'Social Criticisms of Target Marketing: Process or Product' (1995) 38 American Behavioural Scientist 578.

[98] With regards to the susceptibility to detriment, some commentators draw a distinction between "vulnerable", "disadvantaged" and "less privileged" consumers. For instance, the Consumer Affairs Victoria Discussion paper argues that a consumer is better described as "disadvantaged" where the characteristics of vulnerability persist; See Consumer Affairs Victoria Discussion Paper (n 97) p3; see Wilhelmsson (n 97) 211.

[99] Cartwright (n 97) 2

[100] i.e. information vulnerability.

[101] i.e. pressure vulnerability.

[102] i.e. supply vulnerability.

case when consumers face difficulty in obtaining redress where their rights are breached.[103] Some consumers may feel the impact of poor decision-making more than others for reasons such as low income and/or wealth.[104] This situation may reinforce vulnerability. In many cases, these vulnerabilities can co-exist. This reality suggests that even where market failures are addressed, consumers who are vulnerable owing to the aforementioned factors may still suffer detriment. Regulatory intervention can thus be justified on grounds which go beyond purely economic considerations.

2.4. CRITICISM OF EXTERNAL INTERVENTION IN CONSUMER MARKETS

Intervention in consumer markets can take different forms. Those aimed at correcting only market failures are described as market-based interventions which are not concerned with achieving broader social goals.[105] Although these are perceived to be less intrusive, they have been described by some commentators as unnecessary and counter-productive since the market itself is capable of correcting its failures.[106] Particular criticism is, however,

[103] i.e. redress vulnerability.
[104] i.e. impact vulnerability.
[105] This differentiation can be controversial as there is sometimes no clear distinction between interventions with pure market-based goals and those with social goals. P Cartwright, *Consumer protection and the Criminal law: Law, Theory and Practice in the UK* (Cambridge University press 2001) 1, 158.
[106] See, for instance, G Benston, *Regulating Financial Market*s: A Critique and Some Proposals (IEA 1998).

reserved for intervention that is considered more intrusive.[107] Such interventions are described as paternalistic because they often involve government or third-party intervention in individual decision-making.[108] Critics of such interventions argue that consumers will be best protected by the operation of the market and the private law system.[109]

A distinction is usually drawn between hard and soft paternalism.[110] While hard paternalism suggests a more direct intrusion on consumer decision-making,[111] soft paternalism involves the deliberate design of choice frameworks which ensures that cognitively restrained individuals are nudged to make optimal

[107] The most notable critics are usually referred to as the Chicago School of economics who believe that government intervention in the market is an undesirable departure from the common-law principle of *caveat emptor*. Leading works from this School include Friedman, *Capitalism and Freedom* (n 30); G Stigler, 'Theory of Economic Regulation' (1971) 2(1) BJE & MS 3; RA Posner, 'Theories of Economic Regulation' (1974) 5(2) BJE 335; RA Posner, *Economic Analysis of Law* (Little Brown and Company, 1973).

[108] JA Blumenthal, 'Expert Paternalism' (2012) 64 Fla.L.Rev. 721, 723. Paternalism may be classified as a non-economic rationale since intervention may be based on non-market information failures arising out of ignorance or lack of access to relevant facts. J Le Grand, B New, *Government Paternalism: Nanny State or Helpful Friend?* (Princeton University Press 2015) 112-113. See TM Pope, 'Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism' 20 (2004) GA.ST.U.L.Rev. 659, 661-62 for a fuller discussion. Howells et al argue that paternalism is usually used in a pejorative manner without a closer analysis of what the elements of protective legislation really mean. See G Howells, I Ramsay, T Wilhelmson, 'Consumer law in its International Dimension' in GG Howells, I Ramsay, T Wilhelmson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 3. Sunstein argues that the findings of behavioural economics unsettle some of the arguments discrediting paternalism in law, he explains however that these findings do not make an affirmative case for paternalism neither do they support anti-paternalism; CR Sunstein, 'Behavioural Analysis of Law' (1997) 64 U. Chi.L.Rev. 1175, 1178.

[109] See EL Glaeser, 'Paternalism and Psychology' (2006)73 U.CHi.L.Rev. 133; JD Wright, DH Ginsburg, 'Behavioural Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' (2012) 106 Nw.U.L.Rev 1033; MA Edwards, 'The FTC and New Paternalism' (2008) 60 Admin. L.Rev 323; G Mitchell, 'Libertarian Paternalism is an Oxymoron' (2005) 99(3) Nw.U.L.Rev. 1245.See Scott & Black (n 24) 26.

[110] Sometimes referred to as asymmetrical or libertarian paternalism; J Schnellenbach, 'Nudges and Norms: On the Political Economy of Soft Paternalism' (2012) 28 EJPE 266, 266. It is important to also note that other categories are sometimes used to differentiate conceptual issues relating to paternalism, e.g. differences in paternalism may be described as narrow v broad, pure v impure; moral v welfare; see G Dworkin, 'Paternalism' in EN Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (Spring 2017 Edition) <http://plato.stanford.edu/entries/paternalism/> accessed 6 September 2017.

[111] For a detailed discussion see Pope (n 108).

choices.[112] Some writers champion soft paternalism on the basis that it does not deprive individuals of their liberty to make decisions but rather nudges them towards making better ones,[113] indirectly ensuring that markets can operate more efficiently.

However, soft paternalism is often criticised on the basis that it could inevitably lead to hard paternalism.[114] Wright and Ginsburg,[115] for instance, argue that the use of behavioural economics as a justification for protecting consumers could effectively mean that consumer choices are controlled more by the government and less by consumers themselves.[116] Mitchell submits that this is because soft paternalism allows a central planner to make policies based on what they perceive enhances the welfare of individuals.[117] He argues that individuals ought to be given the liberty to make their own decisions and determine their preferred ends regardless of whether they are unwise.[118] He further argues that any mistakes made in decision-making and the

[112] Schnellenbach (n 110) 266.
[113] C Sunstein, R Thaler, 'Libertarian Paternalism is not an Oxymoron' (2003) 70 Uni.Chi.L.Rev 1182. Some commentators raise questions about nudging. They are particularly concerned with who decides what the best choices for consumers are especially since regulators are also subject to bias and may also adopt policies closer to the preferences of political overseers rather than consumers. See JC Cooper, WE Kovacic, 'Behavioural Economics: Implications for Regulatory Behaviour' (2012) 41(1) JRE 4, 421; S Littlechild, 'The CMA Energy Market Investigation, the Well-functioning Market, Ofgem, Government and Behavioural Economics' <http://www.eprg.group.cam.ac.uk/wp-content/uploads/2016/02/S.-Littlechild_CMA-energy-market-investigation-8-Feb-2016_web.pdf> accessed 22 September 2016; R Lythe, 'The hidden hand pulling your financial strings: But is the secretive government 'nudge unit' manipulating our behaviour a help - or sinister?' <http://www.thisismoney.co.uk/money/news/article-3202652/The-hidden-hand-pulling-financial-strings-secretive-government-nudge-unit-tries-manipulate-behaviour-help-sinister.html> accessed 22 September 2016.
[114] Blumenthal (n 108) 745.
[115] Wright & Ginsburg (n 109) 1075-9.
[116] Glaeser argues that this gives birth to a false idea that government can, in fact, determine and promote the true preferences of consumers. Policy makers are, in fact, human and may themselves become victims of behavioural biases undermining the rationality of regulatory choice. Glaeser (n 109) 133.
[117] Mitchell (n 109) 1260.
[118] Ibid, 1263.

consequences which follow should be seen as the price paid for the liberty to make choices.

Mitchell[119] also contends that a better alternative to soft paternalism would be to assist consumers in overcoming the biases that affect decision-making. This, he believes, will enhance their freedom and improve the quality of their choices.[120] The misgivings held about the usefulness of government intervention are further reinforced by the possibility that regulators themselves may also be subject to behavioural biases.[121]

In addition, critics argue that some regulatory responses may lead to regulatory backfiring[122] as they can introduce more problems by creating unintended consequences.[123] Some contend that paternalistic responses cannot be viable because of individual differences. This view opines that the one-size-fits-all nature of these responses creates the problem of under- and over-inclusion as regulators do not have the full information about the distribution of behavioural biases.[124] It has also been argued that

[119] Ibid.
[120] ibid 1245, 1258; Posner (n 66) 1575.
[121] For example, in one study, the US Security Exchange Commission was accused of demonstrating overconfidence and availability bias, i.e. being highly influenced by high profile matters covered by the media; see SJ Choi, AC Pritchard, 'Behavioural Economics and the SEC' (2003) 56 Stan.L.Rev 1, 27.
[122] Regulatory backfiring goes beyond paternalism and studies show that even market-friendly responses such as disclosure may also backfire. See G Loewenstein, CR Sunstein, R Golman, 'Disclosure: Psychology Changes Everything' (2014) 6 Annu.Rev.Econ 391, 405; O Ben-Shahar, C Schneider, 'The Failure of Mandated Disclosure' (2011) 159 U.Penn.L.Rev. 647; SM Davidoff, CA Hill, 'Limits of Disclosure' (2013) 36 Seattle Univ.L.Rev 599.
[123] L Von Mises, *Human Action: A Treatise on Economics* (Yale Uni. press 1949) cited in Pacces & Van Den Bergh (n 20) 4-5. See also Posner (n 66) 1551; P Grabosky, 'Counter Productive Regulation' (1995) 23 IJSL 347. C Sunstein, 'Paradoxes of the Regulatory State' (1990) 57 U Chicago L.Rev. 407, 407, 423.
[124] MJ Rizzo, DG Whitman, 'The Knowledge Problem of New Paternalism' (2009) BLR 905,960; contrast with Blumenthal (n 108) 738-9.

apart from overriding individual preferences,[125] it may conceal regulatory capture[126] by interest groups.[127]

Despite these criticisms, one may argue that the earlier discussions which exposed the deviations from the perfect market and the necessity to pursue certain socially-oriented goals strongly make a case for government intervention. Moreover, Howells and Weatherill contend that modern economic realities suggest that the contemporary debate on state intervention in the market has gone beyond whether the state should have a role in the market and now revolves around "the appropriate intensity of state participation in the economy…"[128] This is more so because modern economic relationships are affected by statutory intervention and their legal consequences enforced within the framework provided by the state.[129] While this view covers the theoretical debate on intervention, Ayres and Braithwaite state that the reality of actual

[125] Sunstein and Thaler suggest that one way to solve this problem is by introducing what they describe as "libertarian paternalism" which will be implemented by means of default rules and information regulation nudging consumers towards the right choice; see Thaler & Sunstein (n 62).

[126] Regulatory agencies may become captured by the regulated firms due to continuous contact and reliance on information from them. Regulators may not also want to antagonise these firms if they have an industry background or where they expect rewards such as future employment. This is commonly referred to as the "revolving door" phenomenon. E Dal Bo, 'Regulatory capture: A Review' (2006) 22(2) Oxford Rev. of Econ. Policy 203, 204; MA Bernstein, *Regulating Business by Independent Commission* (Princeton University Press 1955). Ayres and Braithwaite suggest that one way of dealing with regulatory capture is to encourage what they term 'tripartism'. Tripartism is a regulatory policy that fosters the participation of non–governmental organisations in the regulatory process to ensure that they operate as a "private attorney general" deterring capture; I Ayres, J Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 Law & Soc. Inquiry 435, 441. Writers like Blumenthal however argue that the capture theory might be overstated and is less worrisome than assumed. Blumenthal (n 108) 731.

[127] R Posner, 'Theories of Economic Regulation' (n 107); GS Becker, 'A Theory of Competition among Pressure Groups for Political Influence' (1983) 98 Q.J.Eco. 371; S Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 J.L. & Econ. 211; Stigler (n 106) 10-12.

[128] Howells & Weatherill (n 3) 4.

[129] Statutory rules under Contract law for instance, provide a platform that ensures the enforceability of obligations arising from economic transactions. Ibid, 8.

policy debate shows that focus centres more on how much intervention is needed and not whether intervention is needed at all.[130]

PART 2 - KEY CONSUMER POLICY TOOLS

Guru argues that a payment product must satisfy certain conditions for it to be successfully launched and for it to remain viable in the long run.[131] First, the service providers must recognise the financial feasibility of the service in the medium to long-term; products which will save costs and increase revenue streams are likely to generate interest from these parties. Second, regulators must be convinced that the security and stability of the financial system will not be compromised by the introduction of such products. Third, the consumer must be convinced that the product offers convenience, minimal cost and maximum security.[132]

Experience shows[133] that consumers play a major role in the development of new payment channels/instruments because they are the end beneficiaries. Economic theory also confirms that attracting consumers is key to successfully launching any

[130] I Ayres, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) p3.
[131] BK Guru, 'E-banking Developments in Malaysia: Prospects and Problems' (2000) 15(10) JIBL 250, 252-53.
[132] Ibid.
[133] For example, credit cards could take off successfully because consumers were willing to use it in place of the popular Eurocheque and despite the unwillingness of banks and merchants to leave a percentage of their revenue to card companies. See N Kreyer, K Pousttchi, K Turowski, 'Mobile Payment Procedures: Scopes and Characteristics' (2003) 2(3) E-service Journal 7, 9.

payments service as there must be a demand side.[134] M-payments will arguably not be an exception to these assumptions.

With m-payments, the benefit to consumers is increased choice while the downside is a paucity and uncertainty of regulation to protect them.[135] The latter is due to the lack of industry standards and the rapid pace of technological development.[136] As the Organization for Economic Cooperation and Development (OECD) points out, many countries do not have specific legislation governing m-payments.[137] The extent to which existing general consumer protection rules cover m-payments also remains largely untested.

There are several consumer issues involved in adopting m-payments which require close attention from stakeholders. First, there are concerns linked to the information asymmetry and power imbalance between m-payment service providers and consumers. Consumers may not have adequate information on m-payments and even where they have access to information, they may not be able to process it. This becomes a problem as effective competition in price and quality requires meaningful and comparable product disclosure that prevents poor purchasing decisions.[138] Second,

[134] YA Au, RJ Kauffman, 'The Economics of Mobile Payments: Understanding Stakeholder issues for an emerging Financial Technology application' (2007) 7 ECRA 141, 148.
[135] E Lumsden, 'Securing Mobile Technology and Financial Transactions in the U.S' (2012) 9 BBLJ 139, 153.
[136] E Eraker, C Hector, CJ Hoofnagle, 'Mobile Payments: The Challenge of Protecting Consumers and Innovation' (2011) P&S LR 212, 213.
[137] OECD, 'Report on Consumer Protection in Online and Mobile Payments' (2012), OECD Digital Economy Papers, (No. 204) <Http://Dx.Doi.Org/10.1787/5k9490gwp7f3-En> accessed 10 June 2014, p16.
[138] KJ Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 213.

consumers may also become victims of deceptive and fraudulent commercial practices partly owing to inadequate or misleading disclosures. Deceptive and fraudulent business practices distort consumer decision-making thereby affecting fair competition. Third, consumers may be subject to inconsistent liability regimes owing to the different funding sources that support m-payments. As we have seen in Chapter one,[139] m-payments may be funded in different ways and this has far-reaching consequences on how liability may be allocated.

Lastly, there is a lack of clarity with respect to dispute resolution frameworks applicable to m-payments. Owing to the numerous parties involved in providing the service, it is sometimes not clear who bears the primary responsibility for resolving consumer disputes. These consumer issues are considered in more detail in this chapter. Because of these concerns raised by m-payments, some consumer policy tools have been identified below which may help in addressing these issues.

2.5. PROVISION OF INFORMATION

Despite the concerns raised by behavioural economics, providing information plays an important role in protecting consumers as it lessens the asymmetric gap between suppliers and consumers. It is often stated that information has some of the characteristics of

[139] See section 1.3.

a public good.[140] A public good is a commodity which individuals benefit from without contributing to the cost of its provision.[141] Gartner[142] explains that "their benefits generally cannot be made excludable and their consumption generally cannot be made exclusive." This explains one of the reasons why there may be under-provision of product information in consumer markets. Thus, many remedial policies focus on providing market information[143] or aiding the consumer's ability to process complex information.[144] Consumers may be provided with information through information regulation initiatives[145] and consumer education.

2.5.1. MANDATORY DISCLOSURE

Mandatory disclosures are regulatory responses requiring firms to supply certain information.[146] These are classified as positive informational responses because they require that specific

[140] Although the concept of public goods is attributed to David Hume in his work *A Treatise of Human Nature* (1739), contemporary research on public goods is traced to PA Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 Rev.Econ.& Stat. 387. No one can be excluded from the enjoyment of such goods and their quality does not deteriorate the more it is used.

[141] Ramsay (n 28) 43. Other useful definitions can be found in J Atik, 'Complex Enterprises and Quasi-Public Goods' (1995) 16 U.Pa.J.Int'l Bus.L. 1, 5-6. It is important to note however that some organisations and businesses now monetise the supply of consumer information. E.g. Which, Trip Advisor.

[142] D Gartner, 'Global Public Goods and Global Health' (2012) 22 Duke J.Comp. & Int'l L. 303, 304.

[143] Information may be provided in many ways; by firms mandated to do so or in line with self-regulatory arrangements, regulators, trade associations, independent consumer bodies and other intermediaries including consumers themselves. See OFCOM, 'A Review of Consumer Information Remedies' (2013) <http://stakeholders.ofcom.org.uk/binaries/research/research-publications/information-remedies.pdf> accessed 25 September 2016, p9. The focus in this discussion is the first, i.e. information mandated by regulation.

[144] Ramsay (n 27) 49.

[145] Information regulation falls into 2 broad categories, viz. mandatory disclosure of information and the control of false or misleading information. Ogus (n 29) 121.

[146] P Latimer, P Maume, *Promoting Information in the Marketplace for Financial Services* (Springer 2014) 28.

information is provided.[147] Ideally, mandatory disclosure regimes ensure that consumers are provided with the accurate information necessary to make informed and independent decisions.[148] Disclosure mechanisms ensure that consumers know the benefits, risks and terms attached to the financial products and services they wish to make use of.[149] Information provided ought to be clear, concise, accurate, comparable and easily accessible.[150] It should also cover basic issues such as price, cost, charges, penalties, risks complaints/redress and termination procedures.[151] This helps to ensure that consumers and competitors focus on both visible elements like fees and other less visible elements that have a great impact on consumers.[152]

The time at which disclosures are made is also significant. The OECD[153] advocates that disclosures be made to consumers prior to contracting. This is expected to arm the consumer with enough information to determine if a transaction would be beneficial. Continuous on-going disclosures are also essential.[154] They ensure that consumers are informed[155] about changes that may affect

[147] Cartwright (n 97) 29.
[148] UN (n 1) Para 22; Trites et al (n 7) 57.
[149] Trites et al (n 7) 25.
[150] G20 (n 8) 5.
[151] Ibid.
[152] UK OFT Investigation under the Unfair Terms in Consumer Contracts Regulations into the fairness of personal current account contract terms providing for unarranged overdraft charges (2007) cited in A Arora, 'Unfair Contract Terms and Unauthorised Bank Charges: A Banking Lawyer's Perspective' (2012) 1 JBL 44, 54.
[153]OECD (n 137).
[154] This covers information on recent charges, current balance, records of recent transactions, and changes in the terms of the contract. Writers like Benston do not support mandatory disclosures arguing that they are unnecessary and may be against consumer interest. He contends that firms already have an incentive to disclose and that government intervention may lead to ineffective disclosures; G Benston, *Regulating Financial Market*s: A Critique and Some Proposals (IEA 1998).
[155] R Bollen, 'A Discussion of Best Practice in the Regulation of Payment Services: Part 2' (2010) 25(9) JIBLR 429, 434.

their interests as well as their right to make necessary adjustments.

Llewellyn argues that mandatory disclosures are useful in financial services because they lower consumer costs by easing the comparison between alternative products.[156] Mandatory disclosures also have a positive externality because standardised information makes decision-making relatively easier.[157] This is because consumers may be uncertain about what information is relevant in assessing complex products offered and standardised disclosures might reduce this problem. Comparison tools can be adopted to help consumers compare the attributes of alternatives. These tools may be provided by the government,[158] or third parties.[159]

Trites et al argue that where disclosure statements are consistent throughout the m-payment industry, it would make it easier for consumers to compare and choose the platform that suits their needs.[160] This will also assist in reducing search and switching costs.[161] This is true, provided that consumers are able to

[156] D Llewellyn, 'The Economic Rationale for Financial Regulation' (FSA Occasional Paper Series 1, 1999) <http://www.fsa.gov.uk/pubs/occpapers/op01.pdf> accessed 10 January 2016, p33.
[157] Ibid.
[158] For instance, the Italian Ministry of Economic Development runs a website that provides comparative information on different products. OECD (n 2) 83.
[159] Such as suppliers (e.g. UK retailer Tesco, for instance, runs a price check website where its prices may be compared with that of its competitors) or consumer organisations (e.g. Australian consumer body CHOICE conducts surveys that compare price) ibid, or independent businesses (such as Skyscanner and Uswitch).
[160] Trites et al (n 7) 27.
[161] S Lumpkin, 'Consumer Protection and Financial Innovation: A few Basic Propositions' (2010) 1 OECD Journal: Financial Market Trends 117, 138.

understand the information disclosed. As our discussions in part one show, this may not always be the case.

Providing these comprehensive disclosures may prove challenging owing to the technological constraints of mobile devices. These inherent technical limitations[162] include its relatively small screen, limited storage/memory capacity, battery life and limited processing power.[163] In recognition of these limitations, Trites et al[164] suggest that specific provisions be made which support optimized disclosure statements on mobile devices. Optimising disclosure statements on mobile devices is expected to make information more accessible. However, it may not tackle the behavioural limitations that can affect how consumers respond to information disclosed.

2.5.2. CONSUMER EDUCATION

Consumer education lies at the heart of consumer policy.[165] This is because the presence of strong substantive rules cannot benefit consumers if they are unaware of their existence and how they may be used.[166] Consumer education is expected to provide the

[162] Some of these limitations have been reduced by technological progress, for example, smartphones tend to have larger memory capacity and other mobile devices such as tablets have larger screens in comparison to smaller mobile phones. Some of these devices also have improved battery life in comparison to earlier models.
[163] OECD Guidance (n 15); See also Financial Conduct Authority, 'Mobile Banking and Payments- Supporting an Innovative and Secure Market' (2013) <http://www.fca.org.uk/static/documents/thematic-reviews/tr13-06.pdf> accessed 5 November 2014.
[164] Trites et al (n 7) 56.
[165] In many developed countries, there is the increasing recognition of the need to begin consumer education at an early age and to make it accessible at different life stages; G20 Principles (n 8) 6.
[166] Which?, 'Enhancing Consumer Confidence by Clarifying Consumer Law: Consultation on the Supply of Goods, Services and Digital Content' (Consultation Response, 2012) 2; S Wrbka, 'European Consumer Protection Law, Quo Vadis? - Thoughts on the compensatory collective redress debate' in S Wrbka, S Van Uytsel et

consumer with vital information on the core aspects of a consumer protection regime including relevant legislation, redress procedures and agencies/organisations involved in enforcement.[167]

It is important to state at this point that consumers require basic literacy[168] and numerical skills as a foundation[169] for more specialised financial literacy initiatives.[170] The absence of these skills presents a fundamental obstacle to achieving financial consumer education objectives.[171] This deficiency may also lead to vulnerability as discussed in section 2.3. Authorities will, therefore, need to tackle basic literacy problems in order to make significant inroads with their financial literacy programmes. Disclosure regimes will also be arguably more effective where consumers are educated. This is because consumers will require both literacy and numeracy skills to process information being disclosed.

Basic literacy and numerical skills will, however, be insufficient in situations requiring some form of specialised knowledge. For instance, in dealing with financial/payment services products like m-payments, specialised financial education is needed to augment

al (eds), *Collective Actions: Enhancing Access to Justice and reconciling Multi-Layer Interests* (Cambridge University Press 2012) 32; Howells & Weatherill (n 3) 45.

[167] UN (n 1) Paragraph 37.

[168] The OECD defines literacy as "the capacity to understand, use and reflect critically on written information, the capacity to reason mathematically and use mathematical concepts, procedures and tools to explain and predict situations, and the capacity to think scientifically and to draw evidence-based conclusions" OECD, 'The Case for Promoting Universal Basic Skills' in *Universal Basic Skills: What Countries Stand to Gain* (OECD Publishing Paris 2015) <http://hanushek.stanford.edu/sites/default/files/publications/Universal_Basic_Skills_WEF.pdf> accessed 10 June 2016, p21.

[169] P Cartwright, *Banks, Consumers and Regulation* (Bloomsbury Publishing 2004) 59-60.

[170] Such as financial literacy.

[171] Cartwright (n 169) 60.

basic literacy. Although basic literacy/numerical skills and financial literacy are two different things, they are related. As has been pointed out, basic literacy and numeracy skills provide the foundation on which financial literacy is developed.[172] Studies, however, show that financial literacy may not be substituted by general education or cognitive training (numeracy).[173] This is because financial literacy covers concepts which are different from those covered by basic education or pure mathematical abilities.[174]

Financial education provides the skills required to improve decision-making when using financial services.[175] Being more specialised, financial literacy is expected to enable consumers to have an "appropriate perspective on the financial system."[176] These initiatives also ensure that consumers learn about the products on offer and how these meet their needs and expectations.[177] Consumers are also informed about where to get information and advice about such products.[178] In addition, they are also alerted to the importance of shopping around for the best offerings.[179]

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[172] Cartwright (n 169) 59-60.
[173] CD Dick, LM Jaroszek, 'Knowing what not to do: Financial Literacy and Consumer Credit Choices' (2013) <https://www.fdic.gov/news/conferences/consumersymposium/2013/Papers/Jaroszek.pdf> accessed 15 July 2015, p21.
[174] Ibid 15,18.
[175] Williams (n 83) 227; Lumpkin (n 161) 138.
[176] Cartwright (n 169) 59.
[177] Ibid.
[178] Ibid 60.
[179] Studies suggest that consumers generally do not shop around for financial products; M Cook et al, 'Losing Interest: How much can Consumers save by shopping around for Financial Products' (FSA Occasional Paper 19, 2002) cited in Cartwright (n 169) 59.

The mandate to promote basic literacy skills and financial literacy may not always fall on the same regulatory authority. It appears that in some instances, improving basic numeracy skills will form part of a national educational policy which may be outside the direct supervision of financial regulatory authorities.[180] Despite this, it would be useful if efforts are coordinated between relevant agencies.

M-payment users will benefit from both basic and more focused financial literacy policies as this will help them assess disclosed information. This is an important consideration in developing countries where m-payment services are poised to be transformational. It will also be helpful if specific financial literacy initiatives cover themes relevant to m-payments. For example, it is necessary that consumer awareness is raised on the security and privacy risks involved in transacting with mobile devices.[181] Consumers must also be taught general and specific best practices that may help in mitigating these risks.[182] Given that m-payments operate with different business models, responsibility for educating consumers may be best achieved through a collaborative method. In such arrangement, regulatory authorities will be responsible for giving more generalised information on m-

[180] For instance, the UK Financial Services Authority (whose powers have now been inherited by the Financial Conduct Authority) stated that its financial capability strategy did not extend towards teaching more general numeracy skills. It believed that it would be better led by the government; Financial Services Authority, *Towards a National Strategy for Financial Capability* (FSA 2003) <http://www.fsa.gov.uk/pubs/other/financial_capability.pdf> accessed 15 July 2015, p12.
[181] OECD Guidance (n 15) 19.
[182] M Crowe, M Kepler, C Merritt, 'The U.S. Regulatory Landscape for Mobile Payments' <https://www.frbatlanta.org/-/media/documents/rprf/rprf_pubs/120730wp.pdf> accessed 29 August 2015, p10.

payments while providers (whether a bank or MNO) are given the responsibility of providing more specific information about their products.

Another area that may require a specific response is the risks posed to minors. Minors with access to mobile devices may also be at the risk of aggressive mobile marketing practices. The OECD[183] thus suggests that it is imperative that parents and guardians are educated about such practices and informed on ways to limit spending by minors on mobile devices. Parents would need to be informed of options such as blocking certain detrimental advertisements and solicitations. Other options include placing restrictions on internet content access and blocking mobile phone purchases on devices handled by minors.[184]

Finally, discussions so far suggest that consumer education and disclosure policies are geared towards empowering consumers and making them conscious of their rights and responsibilities.[185] Owing to the different categories of consumers, it is also important that the information provision strategies adopted are diverse, flexible and appropriate to the targeted audience.[186] Authorities may also rely on international guidelines that could assist them in implementing effective programmes.[187]

[183] OECD Guidance (n 15) 12.
[184] Ibid.
[185] UN (n 1) Paragraph 35.
[186] G20 (n 8) 6.
[187] Popular among them is the International Principles and Guidelines on Financial Education developed by the OECD International Network on Financial Education (INFE); ibid.

2.5.3. LIMITS OF INFORMATION REMEDIES

2.5.3.1. MANDATORY DISCLOSURE

The most apparent solution for information deficits is the provision of more information.[188] Most information interventions operate on the premise that consumers are better placed to make efficient decisions where they have adequate information on price, quality and other terms relating to a product and its substitutes and/or complements.[189] Obtaining information and understanding it introduces transaction and processing costs.[190] A rational consumer is expected to make a cost-benefit analysis of the amount of search that he should engage in and decisions made will be based on the results of the information that may be obtained.[191]

Howells and Weatherill argue that in evaluating disclosure regimes, the principal concern ought to centre on the effectiveness of these regimes in bridging information gaps that contribute to market failure.[192] In making this evaluation, authorities need to acknowledge a few salient points. First, in some cases consumers may not have a strong desire for information; this may be a result of habit and/or deficiency in consumer education.[193] Even when consumers access information,[194] there is a tendency not to

[188] Scott & Black (n 24) 35.
[189] Ramsay (n 28) 50.
[190] Ogus (n 29) 39.
[191] ibid 50.
[192] Howells & Weatherill (n 3) 25; Ramsay argues that the goal should be "adequate" rather than "perfect" information; Ramsay (n 28) 50.
[193] Scott & Black (n 24) 372.
[194] Reality suggests that in many cases consumers do not even read the terms contained in the fine print. Consumers will generally be bound by such terms where, in the court's opinion, the supplier has done enough to bring the terms to the

process such information correctly due to several reasons[195] including certain practices which may distort information presented.[196] Behavioural biases mentioned in section 2.2.2 may also prevent a consumer from making rational decisions despite the provision of information.[197]

Moreover, various consumers react differently to information.[198] Wealthier and better-educated consumers may arguably react to disclosures in a different way from poorer and uneducated consumers.[199] Cayne and Trebilcock[200] submit that this may be because disclosure regimes only benefit consumers who are psychologically and intellectually equipped to apply the information provided.[201] Scott and Black support this assumption as they argue that it is the middle-class consumers who are more aware of the need to pay attention to and take advantage of disclosures.[202] They conclude that vulnerable consumers will benefit the least from disclosure regimes.[203]

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consumer's attention. This is often a question of fact. See *Thompson v London Midland & Scottish Ry. Co* [1930] 1 KB 41; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433; Howells and Weatherill (n 3) 24.

[195] G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) J.L & S 349, pp.355-357; see also Howells, Ramsay et al (n 108) 11; 'Too Much Information Can Harm' (n 70).

[196] The way information is framed including the use of default options can influence how consumers respond to information.

[197] OECD (n 2) 43; Loewenstein, et al (n 122) 413.

[198] Scott & Black (n 24) 374.

[199] A more educated professional, for instance, may understand disclosures on Annual Percentage Rates (APR) and other warnings about home loss associated with consumer credit advertisements; Consumers' Appreciation of Annual Percentage Rates (AFT Research Paper 4, 1994) cited in Scott & Black ibid; Howells (n 195) 357.

[200] D Cayne, M Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 U.Toronto L.J 396 at 406.

[201] Ben-Shahar and Schneider thus argue that this leads to inequity as "mandated disclosure helps most those who need help least and helps least those who need help most." Ben-Shahar & Schneider (n 122) 60.

[202] Scott & Black (n 24) 372.

[203] Ibid.

One may argue in favour of this position because where a consumer is vulnerable owing to their lack of the basic literacy skills required to read and comprehend information disclosed, the disclosures made by suppliers will have no significant effect in assisting them to make the right choices.[204] This is especially so in the case of financial services like m-payments which will be used by a significant percentage of uneducated[205] users in developing countries. In light of this, Loewenstein et al submit that disclosure regimes should not be used as an alternative to more targeted regulatory responses needed to improve consumer welfare.[206]

The UK Consumers' Association,[207] in a consultation response, supports the contention that relying on information disclosure alone will be inadequate in protecting consumers.[208] The response puts forward several reasons (which echo what has been previously stated) to back this conclusion. First, consumers are not always rational and may not understand the significance of all the information put to them.[209] Second, consumer markets are complex with enormous marketing material available.[210] This may

[204] This will also be the case where a consumer lacks proficiency in the language that disclosures are made in.
[205] In this context, "uneducated" covers those lacking both basic education and financial education.
[206] Loewenstein et al (n 122) 412.
[207] Also known as "Which?"
[208] Which, 'Unfair Terms in Consumer Contracts: A New Approach: Which? Response' (2012) 6 <http://www.staticwhich.co.uk/documents/pdf/which-response-unfair-terms-in-consumer-contracts-a-new-approach-301590.pdf> accessed 9 October 2015.
[209] Ibid.
[210] E.g. from the internet. See Ben-Shahar & Schneider (n 122) 27

result in information overload which may create undesirable results.[211]

The response also introduces other reasons for the inadequacy of disclosure regimes. For instance, it argues that many transactions that are perceived as a single package by consumers are in reality multi-faceted from a legal perspective especially with the convergence of technology and industries. Despite disclosure, consumers may erroneously believe these transactions are a single package when, in fact, they may be comprised of different contracts.[212] This is particularly significant in m-payments. Our discussions in chapter one show that m-payments may be structured in a way that involves multiple contracts and parties.[213] Thus, consumers may be subject to several separate charges and risk allocation regimes of which they are unaware.[214]

The response also argues that consumers tend to use transaction value as a proxy for risk and are less likely to read the terms of a contract for small value purchases.[215] This may be significant in m-payments as one of its advantages is its potential in supporting micro-payments. It is possible that owing to the small amounts involved, consumers may not feel pressed to read contract terms. These issues corroborate the argument that authorities must look

[211] *Ibid;* "Too much Information Can Harm" (n 70). Studies also suggest that humans have a low short-term memory capacity; G Miller, 'The Magical Number Seven, Plus or Minus Two: Some limits on our Capacity for Processing Information' (1956) The Psychological Review 63.
[212] Which (n 208) 6.
[213] See pp.13-14.
[214] Which (n 208) 6.
[215] Ibid 7.

beyond disclosure regimes alone in dealing with consumer problems that may arise in m-payments.

Another argument against the over-reliance on disclosure regimes is the fact that such regimes are designed in a way that demands the active participation of the consumer. This is because they place a responsibility on consumers to respond to disclosures made.[216] This suggests that the success of disclosure regimes depends on consumers actively reacting to information disclosed. However, Scott and Black point out that one of the biggest problems with disclosures is ensuring that consumers are aware of and appreciate the significance of information disclosed and that they respond to it.[217] Thus disclosure regimes may fail to record any remarkable change where a significant number of consumers do not respond as expected. The inability to predict consumer response to disclosure somewhat points to the fact that it is not sensible to rely solely on it.

Despite these shortcomings, disclosures are still important and may have more impact when combined with rising consumer education levels.[218] It might also be a helpful aid to authorities who can easily identify discrepancies between the substance of business claims and their actual performance when this is a matter for investigation.[219]

[216] Cartwright (n 97) 22.
[217] A lack of response from consumers may be because of different factors such as ignorance, illiteracy and behavioural biases; Scott & Black (n 24) 372.
[218] Ibid 375.
[219] Ibid.

2.5.3.2. CONSUMER EDUCATION

Benn argues that the aim of consumer education is to increase critical consumer awareness and action competence.[220] Armed with information obtained through awareness campaigns, consumers are expected to be actively involved in policing businesses.[221] Consumers are thus seen as important actors who contribute to ensuring effective markets.[222] While this is the ideal, commentators like Ramsay argue that education goals within contemporary consumer policy tend to view consumers as regulatory subjects.[223] In this context, consumer education is seen as an attempt to reconstruct the consumer as a regulatory subject, a process often referred to as "responsibilisation."[224]

Criticisms of this approach are manifold. First, behavioural studies suggest that increased education and information disclosure may not necessarily result in increased rational choices.[225] Some commentators even argue that it is difficult and often unsuccessful to educate some behavioural biases away.[226] It is thus unsafe to place undue weight on the outcomes that may be achieved through these policies.[227] This is especially so because studies

[220] J Benn, 'Consumer Education between "Consumership" and Citizenship: Experiences from studies of young people' <http://www.mv.helsinki.fi/home/palojoki/english/nordplus/IJC_364%20Benn.pdf> accessed 13 December 2014, p1.
[221] Ramsay (n 27) 95.
[222] Ibid.
[223] Ibid.
[224] I Ramsay, 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation' (2006) 28 Sydney L.Rev. 9, 13. This is reminiscent of what Black describes as the enrolment of actors in regulatory networks, in this case, the consumer is the enrolled actor; J Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation" (2003) PL 63, 85-6
[225] N Howell, 'Developing a Consumer Policy for the 21st Century' (2008) 33(2) ALJ 80, 82.
[226] Blumenthal (n 66) 57-8.
[227] Ibid.

suggest that what consumers choose to know and what they do with knowledge acquired is heavily dependent on their intrinsic psychological attributes which result in varying outcomes.[228]

Second, Howells and Weatherill contend that improving consumer education is easier in theory than in practice.[229] For significant gains to be recorded, the better-educated consumer will also need to be more assertive. This requires a shift towards a "more complaining culture" which may be difficult to induce.[230] At best, one may argue that this "complaining culture" can only take root in the long-term. This suggests that significant gains may not materialise in the short term. This observation will be of particular significance in jurisdictions where m-payments are expected to cater to financially excluded persons who are mostly illiterates and where private/public institutions that may encourage a "complaining culture" are relatively weak, inexistent or expensive.

It could be argued that one way to encourage this complaining culture may be to adopt a rights-based approach in dealing with consumer rights.[231] It is possible that where certain entitlements are entrenched as rights, consumers may be more willing to assert them, resulting in a long-term assertive culture. This will, however, be subject to accessible and efficient institutions for

[228] D De Meza, B Irlenbusch, D Reyniers, 'Financial Capability: A Behavioural Economics Perspective' (Consumer Research Report CPR69, UK Financial Services Authority 2008) <https://www.fca.org.uk/publication/research/fsa-crpr69.pdf> accessed 4 August 2016, p2.
[229] Howells & Weatherill (n 3) 49.
[230] Ibid.
[231] See S Deutch, 'Are Consumer Rights Human Rights?' (1994) 34 Osgoode LJ 537.

enforcing such rights and the willingness on the part of consumers to use them.[232]

Additionally, Pearson argues that there is a general expectation that financial literacy will ensure consumers know more about the nature of financial/payment services offered and the risks involved.[233] She adds that emphasis on financial consumer education involves both the responsibilisation[234] and empowerment of the consumer.[235] In emphasizing the responsibilisation of consumers, it is assumed that literate well-informed consumers will exhaustively search the market, monitor firms attentively, switch providers effortlessly and exercise their consumer power to drive out businesses that are incompetent, dishonest and indifferent to their needs.[236] Williams[237] argues that this approach effectively makes the consumer a subject of regulation rather than a beneficiary. She adds that it "increases individuals' exposure to risk and acts on individual consciousness in ways that may conflict with traditional conceptions of consumer sovereignty."[238]

Although practicality demands that consumers bear some responsibility when using m-payments,[239] this approach may have

[232] There is, of course, no guarantee that a rights-based approach will spur assertiveness since it may be subject to the same limiting factors such as behavioural biases which affect other regulatory responses.
[233] G Pearson, 'Reconceiving Regulation: Financial Literacy' (2008) 8 MLJ 45, 45-6.
[234] This projects the financial consumer as a responsible self-regulating subject who does not look to the state for more help than it is willing to provide. See Williams (n 83) 233.
[235] Pearson argues that this is similar to industry self-regulation; Pearson (n 232) 53.
[236] Williams (n 83) 236.
[237] ibid 232.
[238] ibid 227.
[239] E.g. responsibility for keeping their device and personal security details.

far-reaching implications. This is because, for instance, in allocating risk for security breaches in m-payments, consumers may have more liability thrust on them on the basis that they have been well educated against such risks.

Williams[240] further warns that in adopting financial literacy objectives, regulators must be careful not to reverse the idea of market failure posing a risk to consumer welfare by focusing instead on the risk of consumer failure threatening the proper functioning of financial markets.

Pearson also adds that this responsibilisation approach relies on voluntary compliance, persuasion, and imbibing values.[241] This may prove ineffective because it depends on the assumptions of rational choice which has been demystified by behavioural economists.[242] Regulators must thus acknowledge abundant research showing that consumer rationality has its limits.[243] They must also realize that businesses are often involved in exploiting new ways in which consumer behaviour departs from economic rationality.[244] From the foregoing, it is clear that relying solely on the outcomes of financial literacy initiatives may be insufficient in protecting m-payment consumers.

[240] Williams (n 83) 243.
[241] Pearson (n 233) 53.
[242] Ibid 56.
[243] C Jolls, CR Sunstein, R Thaler, 'A Behavioural Approach to Law and Economics' (1998) 50 Stan. LR 1472; contrast with Posner (n 66). Posner argues that behavioural biases are exaggerated and do not represent "unalterable constituents of human personality," therefore, they can be removed through education and psychiatry.
[244] Williams (n 83) 244.

2.6. CANCELLATION RIGHTS AND COOLING-OFF PERIODS

Cooling-off periods represent legally prescribed time frames within which consumers may reconsider economic decisions made. Camerer et al[245] explain that cooling-off periods may take two forms. One form could compel consumers to delay action until after a time frame elapses.[246] Another form could permit immediate decisions but render them reversible during a specific time frame.[247] This thesis will focus on the latter, i.e., where cooling-off periods represent a time frame within which a consumer may cancel a contract without incurring any penalty.[248]

Cooling-off periods and attendant cancellation rights are important tools that support disclosure regimes. They are significant where consumers are involved in high-pressure sales and distance contracts.[249] In such contracts, consumers mostly rely on limited information before making a purchase.[250] Cooling-off periods are important because they give consumers the opportunity to seek out additional information during the prescribed time allowed.[251] With access to better information[252] during this period, consumers

[245] C Camerer, S Issacharoff, G Loewenstein, et al, 'Regulation for Conservatives: Behavioural Economics and the Case for "Asymmetric Paternalism"' (2003) 151(3) U.Penn. L.Rev. 1211, 1240.
[246] E.g., where a person signs a contract to purchase a good but must wait out a specific period before they can take possession of it. (Ibid) 1240.
[247] Ibid.
[248] OECD (n 2) 89. For more information see "Rights of withdrawal" in GG Howells, R Schulze, *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers 2009) 237; H Eidenmuller, 'Why withdrawal rights?' (2011) 7(1), ERCL 1.
[249] OECD (n 2) 35.
[250] P Houghton, C Warner et al, 'Consumer Law Review- Call for Evidence" Consultation Response by Which?' (July 30, 2008) para 5.19.
[251] Ramsay (n 27) 102.
[252] Particularly about substitutes or alternatives.

may withdraw from contracts already entered if they are not optimal.[253] These advantages will be of great benefit to consumers who may rethink decisions to sign up to particular m-payment providers. To ensure that the benefits of cooling-off periods are not missed, consumers must be informed about them.[254]

Cooling-off periods are frequently supported by those who believe that market-based solutions are the appropriate responses to consumer detriment. This is because cooling-off periods respect consumer choice and place little burden on business.[255] This approach is considered attractive as it avoids high-handed interference and requires low resource commitment to enforcement.[256]

Cooling-off periods, however, have some drawbacks. First, they may impose costs[257] upon traders[258] who then pass them on to all consumers.[259] Like other regulatory costs, this will mainly affect those who least can afford it.[260] Second, cooling-off periods may only benefit consumers who are relatively well-informed and willing to take advantage of them.[261] This suggests that some

[253] This is seen as a deviation from the norm of *pacta sunt servanda* (Latin for 'promises must be kept'). It is often argued that this right should be placed within carefully circumscribed policy justifications; see Ramsay (n 27) 102, 209.
[254] Houghton & Warner et al (n 250) 19.
[255] Cartwright (n 97) 35.
[256] Howells & Weatherill (n 3) 64-5; S Breyer, *Regulation and its Reform* (Harvard University Press, 1982) 184 cited in Cartwright (n 21) 11.
[257] The transaction cost includes uncertainty and delay as a seller can only be sure that a sale is firmly completed at the end of the cooling-off period. A Duggan & I Ramsay, 'Front-End Strategies for Improving Consumer Access to Justice' in MJ Trebilcock, L Sossin & A Duggan, *Middle Income Access to Justice* (University of Toronto Press, 2012) p.112
[258] To make the best use of cooling-off periods, consumers will also need to incur some costs in looking up information on alternatives and substitutes.
[259] Cartwright (n 97) 23.
[260] Ibid.
[261] Citizens Advice, 'Can You Cancel It' (CAB Evidence Briefing) cited in Cartwright (n 97) 36.

vulnerable consumers may not take the benefit of this protection as they may be unaware of it or unwilling to use it. This supports Wilhelmsson's arguments that a danger exists where consumer regimes place emphasis on helping consumers to protect themselves and discipline the market through the actions they take.[262] This concern was previously highlighted with respect to mandatory disclosures and consumer education.[263]

Finally, there is the argument that cooling-off periods might only be effective where the main problem for the consumers is a lack of time to go through all the information provided.[264] Where the problem relates to other issues such as a lack of transparency in the information provided, cooling-off periods may make no difference because the consumer may still be confused or misled by it, even if they have more time to consider it.[265]

2.7. REGULATING BUSINESS PRACTICES

M-payment users will be subject to different commercial practices before and during the course of using the service. There is the possibility that they may be exploited through advertising which misleads them on the suitability of the service or service provider.

[262] Wilhelmsson describes this as the "Individual Claim Paradigm" and argues that these measures requiring protection based on consumer action may, in fact, reinforce injustice as the vulnerable consumer will be the least likely to take action; T Wilhelmsson, *Twelve Essays on Consumer Law and Policy* (University of Helsinki 1996) 203 cited in Cartwright (n 97) 36.
[263] See section 2.5.3.
[264] CMA, 'Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (July 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> accessed 4 May 2016, para 5.20.6.
[265] Ibid.

Providers may also adopt the use of unfair contract terms which place consumers at a disadvantage. They may also unduly influence vulnerable consumers[266] or adopt other unconscionable practices to secure a contract. Regulation of these practices is imperative and premised on the need to preserve fair competition and protect market participants especially consumers.[267]

Enforcement of regulatory standards against unfair practices varies in approach. While one approach favours public enforcement where specific public agencies deal with complaints lodged by individuals[268] or organisations, another emphasizes private enforcement where aggrieved parties may launch civil claims for damages and/or injunctions.[269] In reality, many jurisdictions combine both approaches.

There is a thin line between smart and sharp commercial practices.[270] Where commercial practices affect consumer decision making in an unfair manner, regulatory intervention may become necessary.[271] These unfair practices can occur at the formation,

[266] Some consumers may be victims of high-pressure sales where agents of service providers or even bank representatives offer them m-payment contracts unexpectedly and on short notice in situations where they feel compelled to sign up for the service.
[267] AB Engelbrekt, 'An end to fragmentation? The Unfair Commercial Practices Directive from the perspective of new member states from Central and Eastern Europe' in S Weatherill, U Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Bloomsbury Publishing 2007) 54.
[268] Either consumers or businesses; British Institute of Commercial and Comparative Law, 'Unfair Commercial Practices: An analysis of the existing National Laws on Unfair Commercial Practices between Business and Consumers in the new Member States' (2005) <http://www.biicl.org/files/882_general_report_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf> accessed 24 September 2016, pp.12-13.
[269] Ibid.
[270] G Howells, HW Micklitz, T Wilhelmsson, 'Towards a better understanding of Unfair Commercial Practices' (2009) 51(2), Int.JLM 69, 69.
[271] Ibid.

performance or enforcement of consumer transactions.[272] They include and are not restricted to deceptive advertising, providing false and misleading information, omitting material information, high-pressure sales and the unfair use/enforcement of contractual terms.[273]

M-payment services may also be susceptible to other specific unfair commercial practices. For instance, where m-payments are provided by financial institutions, unfair practices may take the form of cross-selling where consumers are forced by their financial services provider to buy additional services from another provider with which it has an exclusive agreement.[274] Thus a financial service provider in exclusive partnership with a particular mobile network may indirectly force a consumer to use the MNO's services.[275] Consumers may also be offered an insurance package with certain firms to cover losses such as theft of mobile devices. Following this scenario, other unfair practices such as conditional sales,[276] tying[277] and pure bundling[278] may also occur.[279] The possibility of m-payment service providers adopting such practices makes regulatory intervention necessary to ensure that m-

[272] Ramsay (n 27) 152.
[273] Ibid.
[274] L Poro, 'Unfair Commercial Practices in Financial Services: Is the EU legal framework sufficient to protect consumers?' (2014) 29(7) JIBLR 422, 425.
[275] Such a situation will also lead to competition law concerns.
[276] Where service provision may also be made subject to certain conditions; Poro (n 274) 425.
[277] This occurs where two or more products are sold together. Ibid.
[278] Pure bundling occurs when none of the packages is available separately and the components are offered in fixed proportions. Poro (n 274).
[279] These practices are also linked to competition issues, a discussion of which is outside the scope of this thesis.

payment consumers are equipped for rational market behaviour[280] and that businesses are induced to behave responsibly.[281]

Regulation in this area is sometimes linked to regulating unfair competition. This is based on the premise that firms that do not get involved in such unfair practices should not be put at a disadvantage.[282] Thus, upholding honesty and integrity in the marketplace may spur regulatory oversight.[283] Regulation in this area may also be justified by the need to protect vulnerable consumers.[284] Persons who are vulnerable for reasons such as age, mental disability and poverty may be more susceptible to certain unfair commercial practices.

These practices may be deterred by traditional legal processes such as litigation. However, litigation will not be cost effective where losses are small individually but significant in aggregate.[285] This may be worsened in situations such as where "fly by night" traders are involved. In such cases, market discipline tools like reputation and repeat sales will be ineffective in providing adequate redress and litigation will also be difficult. All these problems will be magnified where the sharp practices are cross-border.[286]

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[280] This is significant as advertising/marketing use psychological techniques which may affect consumer behaviour. For instance, Galbraith argues that they may create a "dependence effect" where advertising is used by suppliers to create wants and not to respond to consumer needs. See Galbraith (n 30)
[281] Howells et al (n 270) 71.
[282] Ibid 77.
[283] Ibid 71.
[284] Ramsay (n 27) 152.
[285] Ibid 153.
[286] Ibid.

Additional problems consumers face with responding to unfair practices may be traced to other inadequacies of private law remedial mechanisms. For instance, in the absence of a direct contract, advertising claims may only be successful where a collateral contract[287] exists or where common law remedies for the tort of deceit or negligent misstatements are available.[288] Owing to these factors, it may become desirable that there be some form of public regulation in this area.

In addressing some of these concerns through public regulation, countries may rely on passing targeted legislation. Legislation may prohibit certain activities outright[289] and may have others regulated.[290] A selected agency may also be conferred with powers to monitor and sanction firm behaviour and to also make specific regulations targeted at certain markets.[291] The scope of the agency's mandate may be defined by broad standards set out in relevant legislation. Such broad standards usually aim at giving the enforcing agency the flexibility needed to respond to unforeseen unfair commercial practices.[292]

Two areas that will need specific attention in m-payments are the use of contract terms and the provision of false/misleading information.

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[287] See *Warlow v Harrison* [1859] 1 E & E 309; *Barry v Davies* [2001] EWCA Civ 235. Where a contract exists, remedies for negligent misrepresentation may apply.
[288] Ramsay (n 29)139.
[289] E.g. door to door selling.
[290] E.g. timeshares.
[291] Ramsay (n 27) 155.
[292] Ibid.

2.7.1. CONTRACT TERMS

2.7.1.1 CLASSICAL THEORY AND FREEDOM OF CONTRACT

The classical theory of contract law supports the enforcement of contracts that are freely entered.[293] This is based on the assumption that parties negotiate contracts on equal terms.[294] Freedom of contract allows parties to choose how they wish to allocate the obligations and risks arising from their agreements. It thus follows that where a contract is freely negotiated, it must be enforced even if it is substantively[295] unfair.[296] This theory is, however, unsustainable in reality as parties do not always have equal bargaining power[297] or full knowledge of the issues at stake. Some contractual terms may, therefore, be unfair due to this power asymmetry.[298]

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[293] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) pp1-7; D Nolan, 'The Classical Legacy and Modern English Contract Law' (1996) 59(4) MLR 603 for a detailed discussion.

[294] A Sims, 'Unfair Contract Terms: A New Dawn in Australia and New Zealand?' (2012-13) 39 Monash UL.Rev 739, 742.

[295] Under the classical theory contracts can only be challenged on procedural grounds; Cartwright (n 169) 153. There is an argument that procedural unfairness is a proxy for substantive unfairness. Courts are known to address substantive issues under the guise of procedural unfairness because they do not want to be seen as interfering with freedom of contract.

[296] Ibid*; see Printing & Numerical Registering Co v Sampson (*1875) LR 19 Eq. 462 where in restating this cardinal principle of contract law, Sir George Jessel MR famously stated that '[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice' [p.465].

[297] Atiyah (n 293) provides important historical insight into the foundations of freedom of contract. He also contends that certain propositions canvassed in supporting the concept of freedom of contract may have been based on certain misconceptions about the age of *laissez-faire* popularised by AV Dicey's *Law and Public Opinion.* See pp.231-137.

[298] Sims (n 294) 742.

In classical economic theory, terms that are freely adopted cannot be described as "unfair" because they represent the voluntary wishes of the parties.[299] The term "unfair" suggests that there may be some value judgment about the content of a bargain which is divorced from the perceptions of the parties at the time of contracting.[300] This implies that negotiation over terms is not simply a matter of contractual freedom because many factors obscure the purity of the individual bargain and contribute to the inability of parties to make informed choices.[301] Thus the justification for controlling unfair terms may lie in the perceived imbalance between supplier and consumer.[302] Legislating against unfair terms, in essence, recognises that a balance must be drawn between freedom of contract and protection of contracting parties.[303] Policy responses to unfair contract terms are thus targeted at ensuring that consumers are protected from unfair provisions hidden in contractual small print.[304]

2.7.1.2. STANDARD TERM CONTRACTS

Standard term contracts are contracts that have been drawn up in advance by the supplier and presented on a take it or leave it basis.[305] These contracts[306] have remained common because they

[299] Howells & Weatherill (n 3) 261.
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Arora (n 152) 45.
[304] Which? (n 208) 1.
[305] A McClafferty, 'Effective Protection for the E-Consumer in light of the Consumer Rights Directive?' (2012) 11 HLJ 85, 89.
[306] For a detailed discussion, see F Kessler, 'Contracts of Adhesion: Some thoughts about Freedom of Contract' (1943) 43 Columbia Law Rev 629.

reduce the cost[307] of negotiating individual contracts.[308] They also allow for reasonable expectations between parties if particular terms are used consistently in a given industry.[309] Accordingly, it is not surprising that these contracts are also popular within the m-payments market.

Kessler notes that standard term contracts, however, reflect a situation where the seller has a stronger bargaining power than the consumer.[310] This situation was captured by Lord Denning when he stated that –

> "…the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it'. The little man had no option but to take it…"[311]

These contracts are usually those of adhesion[312] and may put consumers in a position where they have risks and liabilities imposed on them that sellers do not wish to bear.[313] It could be argued that when confronted with unfair contract terms, consumers have the choice of rejecting them and opting for alternatives with fairer terms.[314] Zumbo,[315] however, contends

[307] In both time and money.
[308] C Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing Ltd 2007) p16; Howells & Weatherill (n 3) 77.
[309] Howells & Weatherill (n 3) 90.
[310] Kessler (n 306).
[311] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at p297.
[312] These are contracts written by one contracting party and presented to the other party on a take it or leave it basis. R Miller, G Jentz, *Business Law Today: The Essentials* (Cengage Learning 2007) 246.
[313] F Kessler (n 306).
[314] Sims (n 294) 742; McClafferty (n 305) 90.
[315] F Zumbo, 'Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 TPLJ 70, 71 Cited in Sims, ibid.

that in reality, the consumer might have "no choice"[316] at all because other businesses may have similar terms in the standard term contracts they offer. Even where some sellers offer favourable terms, they may be forced to reduce the quality of services/goods offered[317] in order to compete with competitors and meet their commercial targets.

2.7.1.3. FAIRNESS

Because the mere disclosure of contract terms may prove insufficient in protecting m-payment consumers, it is necessary that authorities put in place specific rules to prevent the use of unfair contract terms.[318] Fairness in this context applies to both the form and substance of contract terms.[319] In jurisdictions with strong laws prohibiting unfair contract terms, it is expected that contract terms used in m-payments will adhere to existing regulatory regimes.

In addressing the use of unfair terms in m-payments, authorities may adopt several approaches. One approach is to pass legislation that outrightly invalidates specific contract terms that are considered unfair.[320] A variant of this approach would be to put certain terms on a grey list placing the onus on suppliers to rebut

[316] It may be argued that choosing not to buy at all is also a choice. In fact, Posner argues that a purchaser who is offered a printed contract on a take it or leave it basis has a choice because he can refuse to sign it knowing that if better terms are possible, another seller would offer it to him; Posner, *Economic Analysis of the Law* (n 107) 85.
[317] M Schillig, 'Inequality of Bargaining Power Versus a Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2008) 33(3) EL.Rev 336, 341.
[318] Lumpkin (n 161) 134.
[319] CMA (n 264) p23.
[320] Scott & Black (n 24) 96.

the presumption of unfairness. The main advantage of invalidating specific terms is that it creates certainty.[321] This approach has, however, been criticised for being rather inflexible in dealing with unanticipated terms.[322] Unfair terms may also continue to be used as suppliers may exploit the use of disingenuous drafting to avoid falling within the scope of specific terms blacklisted.

A second approach is to require that the terms in standard form contracts satisfy a test of good faith.[323] This approach is encouraged on the premise that the broad standards adopted can cope with unforeseen situations.[324] Authorities are also given more flexibility unlike where legislation only focuses on an exhaustive list of blacklisted terms.[325] To have a successful impact, Scott and Black argue that a broad standard must focus on both the situation at the inception of a transaction and its subsequent performance. In other words, the focus ought to be on both procedural and substantive fairness.[326] Authorities may also decide to combine the aforementioned approaches. This appears to be a favoured method as it allows authorities to enjoy the advantages of both approaches- certainty and flexibility.

A third approach may see authorities mandating that standard form contracts are approved before they are adopted for use by

[321] Ibid*;* an example is found in Part 1, Schedule 2 of the UK Consumer Rights Act 2015.
[322] Scott & Black (n 24) 97.
[323] Ibid.
[324] Ibid 98.
[325] Ibid.
[326] Ibid 99.

m-payment service providers[327] It is submitted that this approach may create some form of uncertainty and inconsistency where there are no clear guidelines on what terms will be deemed problematic. It might also put a strain on regulatory authorities who will be expected to look at multiple contracts from different sectors to approve them before use. This process may also slow down business endeavours while increasing cost.[328]

Regulatory responses targeting unfair terms will be more meaningful if supported by effective monitoring and enforcement mechanisms.[329] To this end, legislation may entrust a selected public agency with the authority to monitor consumer contracts and to take legal actions to challenge offending terms being used.[330] Private individuals and consumer organisations may also be empowered to report such terms to the enforcing agency and/or to maintain independent actions challenging them.

2.7.1.4. TRANSPARENCY

Enhanced transparency is an important regulatory response adopted in jurisdictions to assist efforts in tackling unfair terms.[331] Efforts in this area are expected to increase consumer awareness of contract terms. The idea behind transparency is for contract

[327] For example, under Israel's Standard Contract Law (1982), businesses could apply to a Standards Contracts Tribunal to have restrictive terms in standard form contracts approved; S Deutch, 'Controlling Standard Contracts- The Israeli Version' (1985) 30 McGill LJ 458 cited in Scott & Black (n 24) 101-2.
[328] OECD, *China in the World Economy: An OECD Economic and Statistical Survey, Volume 1* (Kogan Page Publishers, 2003) 285.
[329] OECD (n 2) 99.
[330] Scott & Black (n 24) 99.
[331] Howells & Weatherill (n 3) 25.

terms to be put in simple, comprehensible language which may be easily understood by consumers. Transparency also requires that terms with far-reaching implications be brought to the notice of the consumer. This will be significant in m-payments because consumers may be unaware of unfair contract terms[332] owing to the lack of transparency at the point of concluding contracts.[333]

Enhanced transparency is thought to support fairness in the use of contract terms. Commentators like Willett, however, contend that transparency alone does not always translate to better protection from unfair terms. Thus, he argues that a term should not be enforceable simply because it is transparent; it must also be procedurally and substantively fair.[334] This view is supported by authors such as Sims, who reason that the inability of transparency to legitimise an unfair term is justified on the basis that most consumers do not read contracts.[335] Even where they read, he contends that it is not always pragmatic for them to read all the terms of a contract.[336] He further points out that with standard form contracts offered on a "take it or leave it" basis, consumers do not have the opportunity to negotiate to change the terms.[337] As we shall see subsequently, jurisdictions like the UK favour this line of thought.[338]

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[332] In some situations, a consumer may be referred to a separate document which contains further information about contractual terms as is popular in ticket purchases. Ibid, p261.
[333] Which? (n 207) 1; C Willett, 'The functions of Transparency in regulating Contract Terms: UK and Australian approaches' (2011) 60(2) ICLQ 357.
[334] Willet, (n 332) 384.
[335] Sims (n 293) 770.
[336] Ibid.
[337] Ibid.
[338] I.e. that transparency is incapable of legitimizing an unfair term.

2.7.2. FALSE AND MISLEADING INFORMATION[339]

Regulating the use of false and misleading information is significant in m-payments because of the relatively novel nature of the service. Regulation in this area is closely tied to the provision of information discussed previously.[340] The OECD argues that authorities need to pay attention to the content of the information being disclosed because consumers are expected to rely on them in decision-making.[341] Poor decision-making may not always be a result of consumer ignorance but may rather be due to misleading/fraudulent disclosures.[342] Consequently, authorities need to encourage fair disclosure practices in the advertising and marketing of m-payment services.

Businesses are known to use advertising/marketing campaigns to not only relay vital information on the price and characteristics of the services they offer but to also build reputational capital designed to communicate the quality and value of services they offer.[343] However, advertising as a source of information has its

[339] Regulatory issues sometimes overlap making it difficult to perfectly separate discussions on such issues. The regulation of false/misleading information manifests such difficulty as it is an information regulation initiative closely related to mandatory disclosures discussed in section 2.5.1. It also related to the regulation of unfair business practices aimed at exploiting a consumer's decision-making. Regulatory responses preventing the use of false/misleading information are often couched as negative informational responses which do not easily fit with the positive nature of mandatory disclosures. Hence the discussion on false/misleading information was included in the regulation of business practices.
[340] See section 2.5.
[341] OECD Toolkit (n 2) 35.
[342] Scott & Black (n 24) 374.
[343] Beales, Craswell & Salop (n 38); P Rubin, 'Regulation of Information and Advertising' in B Keeting, *A Companion to the Economics of Regulation* (Blackwell Publishing, 2004) cited in OECD (n 2) 35.

limitations because it might project biased or misleading information[344] which is in the interest of the firm.[345]

It is essential to note that not all deceptive information involves fraud or outright lies. Thus, the OECD argues that disclosures should also be regarded as deceptive if they leave out vital information or if they imply something that is untrue.[346] In such situations, authorities will have the task of determining the message actually received by consumers and what importance they attach to it.[347] This is a complex task as consumers are bound to construe information differently. Authorities may thus adopt objective standards or consumer categories against which such disclosures may be interpreted.[348]

In contrast to mandatory disclosures, prohibiting the use of false information is classified as a negative informational response.[349] Cartwright argues that this is significant because rather than specifying in detail what sort of information must be disclosed, as is done under a mandatory disclosure regime, the obligation is not to omit information which an average consumer would rely on to make an informed decision.[350] A combination of both responses

[344] Advertising may also depend on legitimate trade puffs which is the over-exaggeration of claims that rational consumers are not reasonably expected to act on. Where it is disguised as a factual statement, then it may qualify as deception. See BB Schlegelmilch, *Marketing Ethics: An International Perspective* (Cengage Learning EMEA, 1998) 107.
[345] OECD (n 2) 35.
[346] Ibid 37.
[347] Ibid.
[348] In the European Union, for instance, the concept of the "average consumer" is adopted under the Unfair Commercial Practices Directive (Directive 2005/29/EC) to deal with this problem.
[349] Cartwright (n 97) 29.
[350] Ibid; *see Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 (Ch); *Secretary of State for Business Innovation & Skills ("SoS") v. PLT Anti-Marketing Limited* ("PLT") [2015] EWCA Civ 76.

may provide a more balanced approach in regulating disclosures as it covers both ends of the information spectrum.

Finally, the OECD warns that regulatory responses tackling deceptive representations should not be excessively prescriptive and restrictive. This is because it may undermine competition and/or cause firms to be overly cautious in providing information that could assist consumers.[351] This warning may be based on the possibility that firms can become overly cautious because they are uncertain of how consumers will judge the information disclosed.

2.8. ALLOCATION OF LIABILITY

In every consumer transaction, there are several risks involved.[352] M-payment transactions are not an exception in this regard. As with most payment platforms, there is the risk of privacy/data breaches which may lead to unauthorised transactions. There is also the risk of transactional failure which may occur for several reasons.[353] Bollen thus argues that allocation of liability is an important area requiring attention from regulators.[354] If these risks materialise, it is important that parties are aware of how liability will be borne and if it can be shifted.

Allocation of liability in m-payments is significant for two principal reasons. First, as shown in chapter 1,[355] there are numerous

[351] OECD (n 2) 35.
[352] These may range from transaction risks to delivery risks, credit risks etc.
[353] This may occur where payments are not effected as intended owing to the wrong amount, payee or timing or technological problems; R Bollen, 'Recent Developments in Mobile Banking and Payments' (2009) 24(9) JIBLR 454**,**465-6.
[354] Bollen (n 155) 432.
[355] See figure 3, section 1.2.1.

parties involved in the transaction chain and clarity will be needed in deciding who bears liability in different situations. The second reason is connected to the fact that transactions are reliant on diverse funding sources which attract different protections for consumers under the law.[356] What this means is that, while m-payments create flexibility by allowing consumers to adopt the most convenient funding source at a given time, they may create greater uncertainty about which liability regime applies to their transaction.[357]

In many countries, the applicable liability regime depends on factors such as the underlying funding and payment instrument used, the nature of the problem, the product or services purchased and the payment providers involved.[358] Hence, for instance, if a credit or debit card is used, the liability regime is determined by the particular card used. Similarly, if a consumer opts for direct mobile billing or a prepaid fund with an MNO, the applicable liability regime may be significantly different from that applying to m-payment services offered by a traditional financial institution.[359] In other words, consumer "A" who makes an m-payment transaction funded by a credit card under a bank-led m-payment platform may enjoy different levels of protection when compared to consumer "B" who performs an m-payment transaction funded

[356] For example, only credit card users are covered by section 75 of the Consumer Credit Act (UK) 1974 which holds companies jointly responsible with suppliers for breaches of contract and misrepresentations.
[357] F Hayashi, 'M-payments: What's in it for Consumers?' (2012) 1 Econ.Rev. 35, p51.
[358] Trites et al (n 7) p54, accessed 7 April 2016.
[359] OECD Report (n 137) 21.

by a pre-paid account under an exclusive MNO-led service. This state of affairs has been criticised by Hillebrand who argues that basic consumer protections in payment systems should not be dependent on the payment method or the means of processing.[360]

This inconsistency in liability regimes will prove complex for consumers who do not understand the implications of using different funding sources.[361] This may be illustrated with the issue of unauthorised payments. Unauthorised payments occur when a third party performs transactions using the financial information of a consumer without his consent.[362] With the merger of several distinct parties in the m-payment process, it becomes confusing to pinpoint where liability lies.[363] This is captured in a question posed by De Almeida where he states that –

> "If a telecommunications-centred model of m-payments is adopted, should banks be considered liable for ultimately providing funds to a MNO that has commercialized electronic money? Conversely, should interruption of airtime availability by a MNO that has partnered with a bank in a joint venture for selling m-payment services be subject to the bank's liability in the event airtime is deemed to integrate the financial package of m-payments service?"[364]

[360] ICPEN also reports that the Norwegian ombudsman authorities hold this same view that consumers should enjoy the same level of protection for all types of m-payments. International Consumer Protection and Enforcement Network (ICPEN) Report on Mobile Payments (July 2014) <https://icpen.org/files/icpenDownloads/ICPEN_Mobile_Pays_Rpt_FINAL.pdf> accessed 7 November 2014, p22.
[361] Federal Trade Commission, 'Paper, Plastic or Mobile? An FTC Workshop on Mobile Payments' (2013) <https://www.ftc.gov/reports/paper-plastic-or-mobile-ftc-workshop-mobile-payments> assessed 8 September 2014, p6.
[362] OECD Report (n 137) 20.
[363] GM De Almeida, 'M-Payments in Brazil: Notes on how a Country's background may determine the timing and design of a Regulatory Model' (2013) 8(3) Wash. JLT & A 347, 369.
[364] Ibid.

Ebers explains that the economic goal of liability rules is to incentivize parties who influence the size of the expected loss to ensure they take care.[365] Thus, Weber[366] suggests that liability ought to be placed on the party that is best able to bear it.[367] This may be the party with the least risk-bearing costs[368] or the lowest insurance premium. He further submits that risk should also be allocated in a way that the threat of successful enforcement action exists.[369]

To achieve the economic goal Ebers refers to, clarity on applicable liability rules is vital. Clarity in allocating liability enables parties to take out appropriate insurance covers for risks they have elected to bear.[370] From this perspective, clear rules governing the allocation of risks help with increasing the efficiency of a market.[371] The efficient allocation of losses thus presents a strong case for intervention in the market.[372]

Liability may be allocated in different ways. The most obvious way would be based on the agreement entered between parties. In this context, contract terms such as exclusion and limitation clauses[373]

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[365] M Ebers (ed), *European Perspectives on Producer's Liability* (Walter de Gruyter 2009) 142.
[366] F Weber, *The Law and Economics of Enforcing European Law* (Ashgate Publishing 2014) 34.
[367] There are 3 major principles of economic efficiency affecting the design of allocation of liability rules. They include: the loss spreading principle, the loss reduction principle and the loss imposition principle; RD Cooter, EL Rubin, 'A Theory of Loss Allocation for Consumer Payment' (1987) 66 Texas L.Rev 6370.
[368] Weber (n 367) 34.
[369] Ibid.
[370] See S Shavell, 'On Liability and Insurance' for a detailed discussion. <http://www.law.harvard.edu/faculty/shavell/pdf/13_Bell_J_Econ_120.pdf> accessed 25 May 2015.
[371] Cooter & Rubin (n 367) 6370.
[372] Ibid.
[373] Exclusion clauses also affect the price of a product/service. Where the supplier is sure of where the risk falls, the price can be fixed accordingly. A consumer may be offered a lower price where they are prepared to assume the risk under a contract.

play a significant role. The usefulness of such clauses is, however, subject to their being utilized in a manner adjudged fair.[374] For instance, availability of insurance at a reasonable cost for the party bearing the risk may be a factor considered in judging the fairness of a term.[375] Thus, following our discussion on contract terms,[376] such exclusion clauses ought to be substantially and procedurally fair and must be used in a transparent manner. They should not be ambiguous and must be brought to the attention of the consumer. Failure to do so will damage the interests of consumers as they will be unaware of what risks they have agreed to assume.[377] Where exclusion clauses are judged unfair, they should be invalidated.

Allocation of liability may also be set under a statute. Some statutes like the EU Product Liability Directive[378] contain pro-consumer risk allocation rules.[379] Rules on the allocation of liability may also form part of industry's efforts in building consumer confidence. Hence, individual industry players may develop risk allocation rules. This is exemplified in the case of debit cards. Debit cards generally do not enjoy as much statutory protection as credit cards in many jurisdictions.[380] Nevertheless, many debit card companies offer chargebacks to customers where goods

Howells & Weatherill (n 3) 262. Parties may also rely on indemnities and warranties incorporated into their contract.

[374] In the UK, exclusion clauses in consumer contracts are subject to the Consumer Rights Act, 2015. Some clauses are invalidated outright while others are subject to a test of fairness. See s.62(5)(b) Consumer Rights Act 2015.

[375] See CMA (n 263) paragraph 5.31.1

[376] See section 2.7.1.

[377] Howells & Weatherill (n 3) 262.

[378] Directive 85/374 (as amended).

[379] S Weatherill, *EU Consumer Law & Policy* (Edward Elgar Publishing 2005) 137.

[380] The UK is an example and this will be discussed in more detail chapter 3.

purchased with debit cards do not arrive or do not fit their description or are faulty.[381] These chargeback provisions are mostly based on private scheme rules and not statutory provisions.[382]

It is important that whatever formula is adopted in allocating liability represents an objectively fair bargain[383] where the consumer's liabilities are reasonably limited.[384] Parties also ought to be informed of what liability rules apply to their transactions. In light of this, Hillebrand argues that m-payment regulation should require that rules on allocation of liability be incorporated into the disclosure framework.[385]

Liability rules may sometimes need to strike a balance between consumer interests (e.g. compensation) and the business interest (e.g. innovation).[386] This approach can benefit new services such as m-payments because it ensures that regulatory responses are balanced in a way that protects consumers and encourages innovation. This is significant as innovation will arguably benefit

[381] See, for instance, the Visa Consumer Protection Factsheet. 2010 <http://www.visaeurope.com> accessed 6 November 2014.
[382] <http://www.which.co.uk/consumer-rights/problem/how-do-i-use-chargeback> (accessed November 6, 2014.
[383] Bollen (n 155) 432; as has been noted, where the liability rules do not appear fair, they may be struck down by the courts.
[384] Consumers will bear liability where they have breached their contractual obligations or where they have contracted to bear the cost of certain occurrences such as the cost of returning unwanted/unsatisfactory goods to suppliers.
[385] G Hillebrand, 'Before the Grand Rethinking: Five Things to do Today with Payments Law and Ten Principles to guide New Payments Products and New Payments Law' (2008) 83 Chi.Kent L.Rev 769, 808.
[386] This is evident in the EU product liability regime, for instance. Article 7(e) of the Product Liability Directive 1985 includes an optional "development risk" defence for business so as not to stifle innovation. See cases that discuss this defence - *Abouzaid v Mothercare (UK) Ltd* [2000] EWCA Civ. 348; *Richardson v LRC Products Ltd* [2000] 59 BMLR 185; *A and Others v National Blood Authority and Another* [2001] 3 All ER 289. The need for a balancing act may sometimes influence the decision to support a strict liability regime or a fault-based liability regime; Howells & Weatherill (n 3) 43.

consumers in the long run by providing them with more qualitative options.

2.9. DISPUTE RESOLUTION

As with other payment services, it is anticipated that disputes will arise between consumers and providers of m-payments for several reasons. First, m-payment transactions are usually completed quickly and consumers may not be in the position to think thoroughly about the applicable terms and conditions before making a purchase.[387] Second, consumers may not be able to validate the integrity and identity of vendors nor do they always have the opportunity to inspect goods before completing purchase[388] transactions using m-payment platforms. Additionally, it is likely that there will be cases involving erroneous/unintended transactions which will need to be resolved.[389] Moreover, there is the possibility of transactional failure. This will cover situations where payments are not effected as intended[390] and where limitations in telecommunication infrastructure and mobile network coverage stall a transaction.[391] All these scenarios make

[387] OECD Report (n 137) 36.
[388] Ibid.
[389] E Saidi, 'Mobile Opportunities, Mobile Problems: Assessing mobile commerce implementation issues in Malawi' (2009) 14(1) JIBC 8.
[390] This may be due to imputing the wrong transaction amount or payee. It may also be due to product mismatch/failure and poor purchasing decisions owing to inadequate information disclosures. Bollen (n 353) 465-6.
[391] Saidi, for example, reports that an SMS may take up to 8 hours to be received in Malawi where there is poor network coverage. In such a situation, the transmission of information during a transaction process is delayed because a connection has been lost. See Saidi (n 389) 8.

it clear that an effective system for resolving consumer complaints will need to be put in place. [392]

It is generally believed that the ability to file complaints and obtain redress is an important part of consumer protection.[393] Consumers will only be able to exert the market discipline anticipated by neo-classical economics where they can make voluntary informed decisions and also take action where a service is unsatisfactory.[394] Consumer action in this context may involve switching supplier and/or holding a supplier accountable for breach of their legal obligations in order to receive redress.[395] Effective redress systems thus help in holding traders accountable by providing them with more incentives to supply quality products[396] and/or engage in ethical conduct.[397] Apart from having a deterrent effect on business, an effective redress framework may also increase consumer trust, satisfaction and confidence in authorities.[398] This is because they are assured that their claims are safeguarded.[399]

Consumer vulnerability may also be heightened if they are unable to pursue redress[400] or where redress mechanisms exclude them because they lack the knowledge, confidence and resources to

[392] C Alexandre, LC Eisenhart, 'Mobile Money as an engine of Financial Inclusion and Lynchpin of Financial Integrity' (2013) 8(3) Wash. JLT & A 285, 296.
[393] OECD (n 2) 99; UN (n 1) Para 26; Howells & Weatherill (n 3) 603.
[394] Cartwright (n 97) 43.
[395] Ibid.
[396] Effective dispute resolution mechanisms may also provide the incentive for consumers to enter contracts with the supplier as they are assured that if disputes arise, they will be resolved efficiently.
[397] Cartwright (n 97) 43.
[398] Wrbka, Uytsel et al (n 166) 32.
[399] Ibid 37.
[400] Cartwright terms this "Redress Vulnerability" and states that this form of vulnerability may exist in connection with other aspects of vulnerability, (n 97) 42.

act.[401] These consumers are the ones most likely to suffer the impact of not getting redress.[402] Thus, special consideration ought to be given to their needs so that they/their representatives can easily access advice and legal assistance to pursue redress.[403]

To ensure that redress mechanisms serve their purpose, it is desirable that information is publicised about the dispute resolution procedures available and the process for initiating a complaint.[404] Information disseminated should also cover the expected costs and duration of the procedures, the possible outcomes, avenues for appeal and the binding status (or otherwise) of the outcome.[405] Houghton, Warner et al[406] maintain that it might be practically impossible for consumers to have all these pieces of information at once. Therefore, it is important that there are mechanisms which ensure consumers are aware of their key rights and that they know where to get further advice.[407]

The OECD points out that there is often a lack of clarity as to which party in the m-payments transaction chain is responsible for handling consumer complaints.[408] This situation will be challenging for consumers who are accustomed to dispute resolution mechanisms affiliated with other established payment methods

[401] Ibid 43.
[402] Inability to access appropriate address on available redress mechanisms makes it more difficult for consumers to get redress thereby worsening redress vulnerability. Cartwright (n 97) 43.
[403] OECD Recommendation on Consumer Dispute Resolution and Redress (2007) <https://www.oecd.org/sti/consumer/38960101.pdf> accessed 11 February 2017, p10.
[404] UN (n 1) Para 34.
[405] OECD Recommendation (n 403) p9.
[406] Houghton, Warner et al (n 250) 29.
[407] Ibid.
[408] OECD Report (n 137) 26.

and who may erroneously believe that these apply to m-payments.[409] This confusing situation may make it difficult for consumers to have reasonable expectations about what their redress rights are or which entity in the transaction chain is responsible for dispute resolution.[410] This situation is often worsened by the fact that the different parties involved in the m-payment process are often subject to different regulators. Consumers may thus be confused about which regulator[411] to approach if a problem persists.[412]

To resolve disputes, the OECD recommends that m-payment participants cooperate with governments in establishing fair, transparent and effective self-regulatory mechanisms and procedures to address consumer complaints.[413] Owing to the complexity of m-payment transactions and the multiple parties involved, it must be clear on whom the responsibility for dispute resolution falls. Trites et al state that where this is left unclear, parties involved may be unwilling to take responsibility for resolving a complaint.[414] This situation may increase the possibilities of litigation which invites more costs.

Furthermore, dispute resolution frameworks ought to make provision for cross-border disputes as there is a possibility that m-payments may be used for cross-border transactions. To this end,

[409] Ibid 22.
[410] OECD Report (n 137) 35; Trites et al (n 7) 33.
[411] These regulatory bodies may themselves be confused about their competence in respect of m-payments.
[412] OECD Report (n 137) 35.
[413] OECD Guidance (n 15) 8.
[414] Trites et al (n 7) 33.

regulators may look to general suggestions by the OECD that countries participate in international and regional consumer complaint, advice and referral networks.[415] They also recommend that active steps should be taken to ensure that authorities are aware of the needs of foreign consumers who have suffered detriment at the hands of domestic wrongdoers.[416] Legal barriers should also be minimised to ensure that foreign consumers enjoy domestic redress procedures.[417] Multi-lateral and bilateral agreements could also be adopted to address conflict of laws concerns and to guarantee the enforcement of judgements in cross-border disputes.[418] M-payments consumers will benefit from the aforementioned arrangements where cross-border disputes arise.

It is important to note that redress policies are often comprised of multiple routes of action. These routes may be structured around formal or informal procedures which ought to be accessible, fair, expeditious, affordable and subject to independent review.[419] They may include simplified individual litigation procedures, efficient collective redress systems, alternative dispute resolution (ADR) procedures and enforcement actions on behalf of consumers by regulatory authorities. This variety of options can make it easier for consumers to access the most appropriate[420] route for

[415] OECD Recommendations (n 403) 9.
[416] Ibid 12.
[417] Ibid.
[418] Ibid.
[419] UN (n 1) Para 26; OECD (n 2); Houghton & Warner et al (n 250) 33-4.
[420] Appropriate in the sense of costs - time, money and expertise considerations.

resolving disputes that may arise. It might also ensure, to an extent, that the position of vulnerable consumers is not made worse owing to difficulties they face in obtaining redress.[421]

Traditionally, litigation (both individualised and collective procedures) serves as the primary platform for venting consumer grievances. However, the economic, organisational and procedural obstacles associated with litigation often discourage consumers from seeking redress.[422] This has led to more emphasis on ADR procedures. ADR procedures range from semi-formal mediation/negotiation services to official ombudsmen services. ADR procedures may be more attractive to m-payment consumers as they are relatively cheaper and less formal in comparison to litigation.

As previously stated, there are several routes for resolving disputes but all cannot be considered hence the focus of the discussion will be on ADR procedures.[423] This is for two reasons. First, m-payments are currently more suited for micro-payments and ADR platforms may be better placed to deal with disputes

[421] Cartwright (n 97) 42-3.

[422] See discussions on these themes here - R Pound, 'The Administration of Justice in the Modern City' (1913) 26 Harv. LR 302; M Galanter, 'Why the Haves Come Out Ahead: Speculations on The Limits of Legal Change' (1974) 9 Law&Soc'y Rev 95; D Caplovitz, *The Poor Pay More* (Press of Glencoe 1963); JE Carlin, J Howard, SL Messinger, *Civil Justice and the Poor* (Russell Sage foundation 1967); AA Leff, 'Injury, Ignorance and Spite -The Dynamics of Coercive Collection' (1970) 80 Yale LJ 1; S Talesh 'How the "Haves" Come out ahead in the Twenty-First Century' (2012-2013) 62 DePaul L.Rev. 519; AJ Duggan, 'Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics perspectives' in CEF Rickett, TGW Telfer, *International Perspectives on Consumer Access to Justice* (Cambridge University Press 2003); D Fairgrieve, G Howells, 'Collective Redress Procedures: European Debates' (2009) 58(2) The Int'l & CL. 379, C Hodges, 'From Class Actions to Collective Redress: A Revolution in approach to Compensation' (2009) 28(1) CJQ 41

[423] In the context of this thesis ADR, procedures will also cover less formal internal dispute resolution mechanisms provided by businesses.

arising from small value transactions in comparison to civil courts.[424] This is based on the assumption that consumers will be opposed to litigation as its cost in comparison to the loss suffered may not be worth it. Second, it is important to streamline the discussion as it will be challenging to provide an in-depth discussion of other equally important resolution mechanisms.

ADR services come in different forms and do not have to include formalised processes or institutions such as a government-sanctioned ombudsman. ADR can take the form of private or quasi-private mechanisms. In the context of m-payments, these mechanisms can take the form of advisory services provided by m-payments service providers and simple internal complaints procedures that provide assistance to consumers at the earliest possible stage.[425] Ideally, these mechanisms should not impose unreasonable costs, delays or burdens on consumers.[426]

There is also a growing interest in collective ADR. In jurisdictions like the European Union, there is a concerted effort towards encouraging the settlement of mass claims through ADR.[427] In encouraging collective ADR, Member States are urged to "ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution

[424] F Weber, 'Abusing Loopholes in the Legal System - Efficiency Considerations of Differentiated Law Enforcement Approaches in Misleading Advertising' (2012) 5 ELR 289, 298. This argument does not ignore the role of small claims procedures in civil court, however, ADR may still be relatively cheaper and less formal than them.
[425] UN (n 1) Para 33; OECD Recommendations (n 403) 12
[426] G20 Principles (n 8) 7
[427] See European Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in The Member States Concerning Violations of Rights Granted Under Union Law (2013/396/EU)

available to the parties before and throughout the litigation."[428] Collective ADR procedures may be significant in m-payments as consumers may not be willing to go through the hassle of individualised processes (whether litigation or ADR) to recover losses suffered. Where detriment is small, consumers may be unwilling to act individually. If this detriment is widespread then many consumers are effectively left without redress. Collective ADR procedures provide a sensible solution to this by allowing mass individual claims to be "combined in a procedure that delivers 'judicial economy' and thereby increases access to justice."[429]

Ombudsmen have become prevalent in financial and payment services.[430] These services seek to provide independent and impartial platforms for resolving disputes. In carrying out their responsibilities of investigating and adjudicating claims, ombudsmen are more interested in producing conciliated outcomes than declaring winners or losers.[431] One issue that may arise in the use of ombudsmen services in m-payments is the breadth of their jurisdiction. Where existing ombudsmen services in the financial sector are restricted to traditional financial institutions, consumer disputes with new parties in the m-payments transaction chain such as MNOs or other electronic money institutions may be excluded from their jurisdiction. Where

[428] Ibid, para 26.
[429] C Hodges, 'Current Discussions on Consumer Redress: Collective Redress and ADR' (Annual Conference on European Consumer Law 2011) 7.
[430] Scott & Black (n 24) 135.
[431] Ibid.

this is the case, m-payment consumers who sign up to services offered by non-traditional financial institutions may be put at a disadvantage since they are excluded from accessing the ombudsman service.

Ombudsman services like may be statutorily-backed or industry based. But there is some caution with these arrangements. For instance, commentators like Hirschman warn that there is a tendency over time for such industry based mechanisms to be transformed into "a method of institutionalising and domesticating dissent."[432] Authorities may address this concern by ensuring that consumers are able to access independent redress procedures should the industry based mechanisms[433] prove unsatisfactory.[434] In response to this, some countries like the United Kingdom allow consumers to approach civil courts if dissatisfied with an ombudsman's decision.[435]

Talesh[436] makes other key observations about "quasi-private and "quasi-public" dispute resolution regimes.[437] He argues that organizational repeat players first create dispute resolution

[432] AO Hirschman, *Exit Voice and Loyalty* (Harvard Uni. Press 1970) cited in Ramsay (n 27) 38; see also S Talesh, 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws' (2012) 46(3) L&S Rev. 463.
[433] These will include internal dispute resolution units in the firm, industry associations providing alternative dispute resolution and private dispute platforms approved by regulators.
[434] G20 (n 8) 7; Howells & Weatherill (n 3) 74
[435] The UK's financial services ombudsman is discussed in more detail in section 3.4.5.
[436] Talesh (n 422) 530
[437] He builds upon the works of Galanter (n 422) and L Edelman, M Suchman, 'When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law' (1999) 33 L & S Rev. 941. He argues that the haves do not just influence the public order as noted by Galanter, nor do they simply create a private legal order as argued by Edelman and Suchman, but that they also create a private legal order and then influence the public legal order to utilize and maintain the private legal order with state support. Talesh (n 422) 546.

structures[438] and then use the public system to move the disputing game to their private resolution regimes. Such private regimes are often certified by regulatory agencies. Although the private consumer "one shotter" may still approach the courts after seeking relief in such private forums, he argues that the consumer does so with fewer rights.[439]

In effect, Talesh contends that the "haves"[440] not only play for favourable rules in the public arena but also subtly remove the process from the public arena into the private arena.[441] This enables them to both create the terms of legal compliance and to reshape the meaning of consumer rights and remedies. Thus, Talesh argues that businesses may be better positioned in the redress framework[442] because they are able to establish private dispute resolution structures consequently raising the threshold of access for consumers.[443] This enables them to gain a significant advantage in the public and private legal systems.[444] Authorities will need to put these concerns into consideration and must find a balance that ensures that consumer complaints are not silenced.

In response to changing commercial norms, authorities may also encourage the adoption of Online Dispute Resolution (ODR)

[438] These structures are usually outside the direct oversight of the courts and also outside both the organisation and the direct contractual relationship between the organisation and consumer. Talesh (n 422) 529.
[439] Ibid 529.
[440] A term made with reference to discussions in Galanter (n 422).
[441] See the decision of the US Supreme Court in *AT & T v Concepcion* 131(2011) S. Ct. 1740, 179 L. Ed. 2d 742
[442] They are the "haves" who "come out ahead."
[443] Talesh (n 422) 547-8
[444] Ibid.

mechanisms.[445] ODR represents a synergy between ADR and Information and Communications Technology (ICT) in dealing with the increase of online disputes for which the traditional means of dispute resolution is inadequate.[446] Thus, they have been portrayed as "a reaction to the constraints of the offline world."[447] These online platforms are becoming popular because they allow for efficiency and convenience.[448] This is because they by-pass linguistic barriers and the need for the physical presence of disputing parties. In the European Union, this has been embraced[449] with a view to improving the internal retail market and enhancing redress for consumers.[450] As already mentioned, there is the possibility that m-payments may be used for cross-border transactions which makes cross-border disputes inevitable. ODR mechanisms may thus provide a platform for facilitating the resolution of such disputes in a convenient manner.

[445] The EU has adopted Regulation No 524/2013 on Online Dispute Resolution for Consumer Disputes, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.
[446] E Katsh, J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001), p9 cited in JP Cortes, 'Online Dispute Resolution Services: A Selected Number of Case Studies' (2014) 20(6) CTLR 172, 172.
[447] G Kauffman-Kohler, T Schultz, 'The State of Play in Online Dispute Resolution' in G Kauffman-Kohler and T Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer law International 2004) p7.
[448] Online dispute resolution adopts internet based processes, information management and communication tools to resolve complaints. The OECD lists SquareTrade as an example of this. SquareTrade allows parties to use online SquareTrade mediators to resolve their disputes. OECD (n 2) 101.
[449] Apart from the ODR Regulation, legislative measures in the EU have tended to favour the utilisation of ODR mechanisms. Examples include the Directive on Electronic Commerce (Directive 2000/31/EC) -Art.17 and the Directive on certain aspects of Mediation in Civil and Commercial Matters (Directive 2008/52/EC) - Recitals 8 and 9; JC Betancourt, E Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the way forward?' (2013) 79(3) Arbitration 256, 257.
[450] Ibid 258.

2.10. FINANCIAL INCLUSION

As stated in Part 1, regulatory intervention may be motivated by social objectives.[451] From this standpoint, governments may focus on ensuring that consumer policies are implemented in a way that benefits all groups particularly the rural population and those living in poverty.[452] Bollen[453] reports that many financial services regimes now include matters relating to "financial inclusion, equity or accessibility of regimes" as core policy considerations. This is informed by the belief that in the absence of intervention, the financial services market is unlikely to extend its services to some members of the society for reasons such as disability, poverty and geographic disadvantage.[454] This observation is significant as lack of access to basic financial products[455] may make consumers more vulnerable as it exacerbates poverty.[456]

2.10.1. FINANCIAL INCLUSION AND FINANCIAL INTEGRITY

A regulator's interest in financial inclusion is also fuelled by the need to protect the integrity of the financial system.[457] This requires that the largest range of transactions be brought within

[451] See section 2.3.
[452] UN (n 1) Para 8.
[453] Bollen (n 351) 432.
[454] Ibid.
[455] Domont-Naert lists examples of essential/basic financial services to include bank accounts, payment means, credit, insurance and protection against over-indebtedness; F Domont-Naert, 'The Right to Basic Financial Services: Opening the Discussion' (2000) CLJ 63, 67-9 cited in Cartwright (n 97) 39.
[456] Cartwright (n 95) 37
[457] FATF, 'Anti Money Laundering and Terrorist Financing Measures and Financial Inclusion' (2013) <http://www.fatf-gafi.org/media/fatf/documents/reports/AML_CFT_Measures_and_Financial_Inclusion_2013.pdf> accessed 6 April 2016, p7.

the regulated formal sector.[458] De Koker argues that a country's financial integrity objectives will be undermined if a large percentage of consumers are excluded from the formal financial sector.[459] This situation will allow informal institutions, which are beyond the reach of regulation, to flourish[460] leaving gaps that may be exploited for illicit activities.[461]

In driving financial inclusion using innovative services, there are some policy concerns that regulators need to address. First, authorities will need to strike a balance between financial inclusion and financial integrity policy objectives,[462] i.e. policies protecting against the misuse of the financial system. Both policies may sometimes appear to be conflicting.[463] This may be illustrated in the case of m-payments. On one hand, m-payments are expected to bring many transactions performed by excluded persons within the formal sector. This will boost the financial inclusion objectives in places with high mobile penetration. On the other hand, the velocity of transactions that will increase with m-payments coupled with the emergence of non-financial institutions as key players[464] suggest that there is an increased threat to the financial

[458] Ibid.
[459] L De Koker, 'Aligning Anti-Money Laundering, Combatting of Financing of Terror and Financial Inclusion' (2011) 18 (4) JFC 361, 363.
[460] L De Koker, 'Money Laundering Control and Suppression of Financing of Terrorism: Some Thoughts on the Impact of Customer Due Diligence on Financial Exclusion' (2006) 13(1) JFC 26, 27.
[461] Ibid.
[462] JK Winn & L De Koker, 'Introduction to Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity (2013) 8(3) Wash. JLT & A 155.
[463]Ibid.
[464] E.g. MNOs

system.[465] Many commentators[466] argue that in striking this balance, authorities should see financial inclusion as a core part of financial integrity policy. This assertion is made based on arguments already discussed above which suggest that increased inclusion signifies that more transactions are brought within the formal financial sector and under the direct scrutiny of regulators.

Second, there are concerns that the manner in which financial integrity policies are implemented may serve to worsen exclusion.[467] These arguments have not been lost on international bodies, such as the Financial Action Task force (FATF) which is concerned with matters relating to financial integrity.[468] In response to these concerns, the FATF released a report in 2013 aimed at supporting countries wishing to drive their financial inclusion objectives without compromising their financial integrity policies.[469]

Countries are advised by the FATF to adopt a risk-based approach in applying Anti-Money Laundering and Combatting the Financing

[465] Alexandre & Eisenhart (n 392) 287.
[466] De Koker (n 459) 363; Alexandre & Eisenhart (n 392) 287; Winn & De Koker (n 462); C Alexandre, M Almazan, 'From Cash to Electronic Money: Enabling new business models to promote Financial Inclusion and Financial Integrity' in J Osikena (ed), *The Financial Revolution in Africa: Mobile Payment Services in a New Global Age* (Foreign Policy Centre 2012) 11.
[467] Winn & De Koker (n 462) 155.
[468] The (FATF) is an inter-governmental body whose objectives are to set standards and promote the effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF has developed a series of Recommendations that are recognised as the international standard for combating of money laundering and the financing of terrorism. The Recommendations were first issued in 1990 and were subsequently revised. <http://www.fatf-gafi.org/pages/aboutus/> accessed 25 September 2016.
[469] FATF Guidance (n 15) p25, this is also supported by Principle 8 of the G20 Principles for Innovative Financial Inclusion (2010) <shttp://www.gpfi.org/sites/default/files/documents/G20%20Principles%20for%20Innovative%20Financial%20Inclusion%20-%20AFI%20brochure.pdf> accessed 25 September 2016.

of Terrorism (AML/CFT) supervision to m-payments as this will enable them to build a more inclusive financial framework.[470] This approach requires that countries must perform a risk analysis that seeks to identify and assess the Money Laundering (ML) and Terrorist Financing (TF) risks posed by m-payments.[471] This will enable them to adopt flexible and effective measures that support the maximum use of resources.[472] It will also ensure that AML measures applied to m-payments do not negatively affect innovation.[473]

The FATF also identifies several risk factors that authorities should take into consideration.[474] It also encourages the use of Simplified Customer due diligence (CDD)[475] where the risk of ML/TF is low.[476] Countries are also encouraged to adopt tiered CDD and Know-

[470] FATF (n 457) pp.15-18; Countries like Mexico have adopted tiered KYC requirements which require varying degrees of customer authentication depending on the level of transactions involved. See Alexandre & Almazan (n 466) 12.
[471] This is in line with Recommendation 15 of the FATF Recommendations; see the FATF Guidance (n 15) pp. 13-14; Note that m-payments providers fall within the scope of "financial institutions" as defined by the FATF. This is because they are either involved in conducting money, providing value transfer services or in the issuing and managing of a means of payment. See the definition of financial institution in the Glossary of the FATF Recommendations (2012) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf > accessed 25 May 2016, p.116-7.
[472] ibid 26.
[473] ibid 25.
[474] These risk factors cover m-payment processes that- (a) allow for anonymity in establishing relationships with providers; (b) support multi-jurisdictional use or have providers located in other jurisdictions outside the supervision of national authorities; (c) allow anonymous funding methods that obscure an audit trail; (d)are linked to prepaid cards that support access to cash through ATM networks; (e) depend on segmentation of services and reliance on third parties and other participants in sectors unfamiliar with traditional AML/CFT obligations. FATF Guidance (n 15) 16-18.
[475] To prevent the risk of ML/TF, the FATF recommends that firms embrace Customer Due Diligence (CDD). CDD requires that financial institutions identify and verify the identity of persons (and beneficiaries) they transact with at the time of establishing a relationship and during subsequent transactions. This may be achieved through information gathering, verification processes and on-going monitoring. However, where ML/TF risks are judged to be low, financial institutions may simplify their CDD measures appropriately. This simplification is termed 'Simplified CDD Measures.' See Recommendation 10 of the FATF Recommendations and its Interpretive Notes.
[476] FATF Guidance (n 15) 35.

your-customer (KYC)[477] policies that increase the functionality of payment instruments depending on the level of KYC done. It is submitted that this approach will be significant in developing countries where there are under-developed national identification systems which prevent persons from fully satisfying KYC/CDD requirements. A tiered KYC/CDD may ensure that they are provided with basic m-payment services although with limited functionality. It is argued that this will be better than being totally excluded from the use of the financial system. This, however, represents a temporary solution as the implementation of reliable national identification systems will be more helpful in the long run.

2.10.2. ILLITERACY AND FINANCIAL INCLUSION

Much discussion has been made on the need to tackle illiteracy through consumer education in section 2.5.2. It is, however, important to reiterate that financial inclusion objectives may be undermined by financial illiteracy and unfamiliarity with m-payment platforms. This is even more significant in light of empirical research which suggests that consumer financial education plays a key role in supporting financial inclusion objectives.[478] Based on this, it could be argued that some excluded persons may still be unable to enjoy the benefits of m-payments due to financial illiteracy. This informs the move in some developing countries to tackle this problem creatively. One

[477] KYC covers the processes involved in identifying and verifying a customer's identity. It falls under broader CDD efforts.
[478] E Gutierrez, S Singh, 'What Regulatory Frameworks are more Conducive to Mobile Banking? Empirical Evidence from Findex Data' (The World Bank 2013) 15, 15.

interesting example is Zambia, where the use of voice-based m-payment services is being adopted to tackle the digital and literacy divide. This voice-based service is expected to ensure that consumers enjoy the benefits of the technology irrespective of their literacy levels and familiarity with technology.[479] Although commendable, this move will need to be complemented by more targeted efforts aimed at improving both general literacy and financial literacy.

2.11. CONCLUSION

Discussions in this chapter have shown that consumer policy is concerned with responding to market failures that jeopardize consumer welfare and pursuing socially motivated objectives that encourage fairness. These goals are achieved by setting out rules that modify the behaviour of market participants and by providing redress where detriment has occurred.[480]

This chapter has also shown that the means of responding to consumer issues vary. Regulatory tools such as consumer education, information disclosures, cooling-off periods and contract terms regulations may be relied on in strengthening the position of consumers.[481] Authorities may also adopt other mechanisms to ensure that the supply side behaves in the interest

[479] ICPEN Report (n 360) 21.
[480] M Tulibacka, *Product Liability Law in Transition: A Central European Perspective* (Ashgate Publishing Ltd, 2013) 95.
[481] Referred to as 'demand side tools' by the OECD; OECD Toolkit (n 2) 119.

of consumers.[482] Furthermore, intermediate tools such as dispute resolution and redress mechanisms may be adopted as they could be potent on both sides of the value chain.[483]

The next chapter will discuss how selected jurisdictions may address the consumer issues in m-payments using the consumer policy tools identified in this chapter. The discussions in this chapter will provide the background and basis for enquiry in the next chapter.

[482] These are described as "supply side tools" and include licensing, accreditations, standards, moral suasion and codes of conduct. ibid.
[483] Ibid.

CHAPTER 3 – THE REGULATION OF CONSUMER ISSUES IN MOBILE PAYMENTS: COUNTRY CASE STUDIES

3.1. INTRODUCTION

This chapter discusses how selected jurisdictions regulate consumer issues that arise in m-payments. Three countries namely Canada, Kenya and the United Kingdom (UK) have been chosen as case studies.[1] The consumer policy tools highlighted in chapter two form the basis of enquiry in each country.

This chapter is divided into four parts. Following this brief introduction, part one discusses the approach to financial consumer protection in Canada and how this has been extended to m-payments. Part two explores the approach in Kenya while Part three discusses the United Kingdom. Part four concludes the chapter.

[1] See section 1.1.4 for an explanation on why these countries were selected.

PART 1

3.2 CANADA

Canadian consumers are gradually migrating away from branch-based banking towards online and mobile banking/payments.[2] Currently, the m-payments landscape in Canada is fragmented, with options that vary by bank, payment card, device and wireless carrier.[3] While PayPal leads the m-payments market in Canada, major Canadian banks are also offering the service as demand continues to rise.[4] Thus, it is not surprising that m-payments have come under the radar of Canadian regulators. In 2013, the Financial Consumer Agency of Canada (FCAC) conducted a comprehensive study[5] to discover whether its current laws could effectively protect m-payment consumers.

It is important to note that the regulation of some financial institutions is centralised and overseen by the Canadian federal government.[6] For instance, banks are overseen by two regulators: the national prudential regulator, the Office of the Superintendent of Financial Institutions (OSFI)[7] and the national market conduct

[2] S Trites, C Gibney, B Levesque, 'Mobile Payments and Consumer Protection in Canada' (Research Division, Financial Consumer Agency Of Canada) (2013) p.ii.
[3] i.e. MNOs. C Dobby, 'What mobile payment options are available to Canadians?' (The Globe and Mail, 28 October 2015) <http://www.theglobeandmail.com/report-on-business/what-mobile-payment-options-are-available-to-canadians/article27022924/> accessed 20 March 2017.
[4] C Powell, 'Mobile payments set to rise this year: Catalyst Canada' <http://www.marketingmag.ca/consumer/mobile-payments-set-to-rise-this-year-catalyst-canada-176794> accessed 9 December 2016.
[5] Trites et al (n 2).
[6] Banking, deposit insurance, securities are regulated at the Federal level while the provincial authorities regulate credit unions and *caisses populaires*.
[7] Ultimate responsibility for banking regulation lies with the Department of Finance. BL Gervais, JS Graham et al 'Canada' in R Bosch (ed), *Banking Regulation: Jurisdictional Comparisons* (Sweet & Maxwell 2012) 42. This is unlike jurisdictions such as the United States which operates a federal and state charter banking system.

regulator, the Financial Consumer Agency of Canada (FCAC). The FCAC supervises the consumer elements of federal financial services legislation.[8] Owing to its federal structure,[9] legislative powers on consumer protection are shared between the federal and provincial authorities.[10] Discussions in this part will focus mostly on federal legislation except where provincial laws address consumer issues not contained in federal legislation.

3.2.1. PROVISION OF INFORMATION

3.2.1.1. MANDATORY DISCLOSURE

Disclosures required in m-payments are largely dependent on the identity of the service provider and, to some extent, the underlying funding source. Where the service provider is a federally regulated financial institution (FRFI), they are subject to mandatory disclosure obligations under relevant regulatory laws.[11] Banks are bound by well-defined obligations under the Bank Act 1991 and other regulations governing credit and debit agreements. One example is the Cost of Borrowing Regulations (COBRs) 2001 which govern credit agreements.

[8] Ibid 43.
[9] See Section 1.1.4.
[10] <https://www.canada.ca/en/financial-consumer-agency.html> accessed 12 June 2016.
[11] Although FRFIs are subject to federal laws, the recent decision of the Canadian Supreme Court in *Bank of Montreal v. Marcotte* (2014) SCC 55 suggests that provincial laws on disclosure may also apply to them.

The COBRs require that key information on credit agreements[12] be provided in an information box at the beginning of the agreement or application form.[13] Thus, where an m-payment transaction is funded by a bank-issued credit card, the COBRs mandatory disclosure regime will apply. While the COBRs do not explicitly address disclosure requirements on a mobile device, Trites et al argue that to be consistent with the COBRs, an information box would need to appear at the beginning of a disclosure statement presented on a mobile device.[14]

The Disclosure of Charges (Banks) Regulations 1992 which covers disclosure requirements applicable to deposit accounts, similarly requires that all charges applicable to debit cards be disclosed.[15] Thus, where banks charge customers for m-payment services funded by a personal deposit account, such information must be disclosed in a manner compliant with the Regulations.[16]

With regards to offering existing customers new financial products/services such as m-payments, the Canadian Negative Option Billings Regulations (NOBRs) 2012[17] state that-

> "Before a person provides their express consent to receive an optional product or service from an institution, the institution must provide them, orally

[12] Such as the principal sum and annual interest, the total amount of all payments, the amount of the advance (or any advances) of the principal and when it is, or they are, to be made, the cost of borrowing over the term of the loan, the annual interest rate, the annual percentage rate if it differs from the annual interest rate, etc; Regulation 8(1) COBRs. Banks are also required to disclose consumer liability for stolen or lost credit cards; Regulation 12 COBRs.
[13] Regulation 6(1)(b) & Schedule1-5 COBRs.
[14] Trites et al (n 3) 36.
[15] Regulation 3 ibid.
[16] Trites et al (n 2) 36.
[17] Regulation 3. The NOBRs regulate disclosures made where new products/services are offered to existing FRFI customers. Provinces also regulate negative option practices; see, for instance, s. 22, Fair Trading Act of Alberta 2000.

> or in writing, with an initial disclosure statement that contains the information referred to in paragraphs 6(a) to (d) or a summary of that information."[18]

The matters to be disclosed under the aforementioned provision include information describing the product or service, the terms of the agreement, applicable charges, and conditions for cancellation.[19] The disclosure statement is also required to contain the date from which the product/service is available for use and, if different, the date from which the charges apply, and the steps required to use the product.[20] Consumers also have the right to be informed of any changes to terms and conditions at least 30 days before the date the change takes effect.[21] Such disclosures must be "presented in a manner, that is clear, simple and not misleading."[22]

Non-bank credit issuers are governed by provincial laws and are required to make disclosures similar to those made by banks.[23] Debit cards are generally subject to the Code of Practice for Consumer Debit Card Services. This suggests that users of m-payments funded through debit cards issued by both FRFIs and non-FRFIs are entitled to the same disclosures under the Code.[24]

[18] Regulation 5(1).
[19] Regulation 6.
[20] Ibid.
[21] Regulation 8.
[22] Regulations 4(1).
[23] Trites et al (n 2) 39.
[24] Ibid.

For m-payments funded by direct billing,[25] the relevant disclosure obligations under the Wireless Code apply.[26] The Code only applies to MNOs.[27] Under the Code, service providers are required to give the customer a permanent copy of the contract and other related documents that set out key terms and conditions, such as the services included in the contract, charges, and privacy policy.[28]

Two things are notable about the existing disclosure regime. First, as already stated, disclosure requirements applying to m-payments depend to a large extent on the existing obligations applicable to the m-payment service provider and the funding source used. This leads to inconsistency in the disclosure regime. An example of this is with regards to disclosures on consumer liability for loss. While the Wireless Code does not mandate disclosures on limits to consumers' liability against loss,[29] the COBRs do. Thus, MNOs are not obliged to make such disclosures while FRFIs offering m-payments are obliged.

The second point to note is that the disclosure requirements in most of the contexts described are not developed with mobile devices in mind. This observation leads Trites et al to argue that consumers may be disadvantaged if these disclosures are not easy to read on mobile devices. Thus, they suggest that optimizing

[25] See figure 4 in section 1.2.1 for an explanation of "direct billing."
[26] The Code is issued by the Canadian Radio-television and Telecommunications Commission (CRTC) <http://www.crtc.gc.ca/eng/archive/2013/2013-271.pdf <accessed November 18, 2016; 2:08pm>accessed 30 May 2016.
[27] CRTC, 'Telecom Regulatory Policy' (CTRC 2013-271) <http://www.crtc.gc.ca/eng/archive/2013/2013-271.htm> accessed 30 May 2016.
[28] Section B Wireless Code (n 28).
[29] Trites (n 2) 41.

disclosures for use on mobile devices may be helpful.[30] However, they do not elaborate on what "optimizing" connotes. One thing that is clear is that mobile devices often have relatively small screens which may make it difficult to process lengthy disclosure information. One may, therefore, interpret "optimizing" to mean providing a summary of information in a mobile-friendly manner and/or providing mobile links to lengthier disclosures which can be accessed through a more convenient medium by the consumer.[31]

Another related issue is that the disclosure provisions are often specific to the underlying funding source/payment instrument concerned. For instance, the COBRs are specific to credit agreements while the Code of Practice for Consumer Debit Card Services is specific to debit cards. One issue not considered in the FCAC's thematic review is whether these tailor-made provisions can be extended to m-payments without causing confusion or whether a separate disclosure regime for m-payments will be more appropriate. One may argue for a separate regime for m-payments or a technologically neutral regime applying to different electronic payment instruments as is the case in the UK.[32] This approach will allow for more consistency in disclosures.

[30] Ibid 36.
[31] For instance, a consumer may print out a lengthy disclosure document or may decide to open a link on a personal computer with a bigger screen.
[32] The UK is discussed in section 3.4.

3.2.1.2. CONSUMER EDUCATION

At the federal level,[33] the Financial Literacy Leader[34] and the FCAC[35] manage the implementation of Canada's financial literacy framework. The Financial Literacy Leader is charged with coordinating national efforts aimed at improving financial literacy[36] while the FCAC is tasked with promoting consumer awareness about all matters connected with protecting their interests in the use of financial services.[37]

The FCAC's Consumer Information and Development of Financial Skills program[38] focuses on two sub-activities in achieving its broad goal of increasing the financial capabilities of Canadians. The first is consumer education which aims to help consumers understand financial services and their rights and responsibilities in dealings with FRFIs. The second is the financial literacy programme which helps Canadians build their basic knowledge, skills and confidence in money management so that they can make sound financial decisions.[39] Thus the FCAC has the responsibility of educating consumers on the use of m-payments.

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[33] Provincial consumer authorities operate websites with information dedicated to educating consumers about the basics of finance and their keys right and obligations.
[34] This office is charged with developing and implementing Canada's National Strategy for Financial Literacy. It also chairs the Interdepartmental Committee on Financial Literacy, composed of representatives from interested federal government departments and agencies. <http://www.fcac-acfc.gc.ca/Eng/financialLiteracy/financialLiteracyCanada/Pages/Leader-Chef.aspx> accessed 2 February 2017.
[35] This agency is presided by the Minister of Finance. S.3(1) Financial Consumer Agency of Canada Act 2001.
[36] S. 4.1(1),5.01 of the FCAC Act *ibid*.
[37] S.3(2)(d) ibid.
[38] <http://www.fcac-acfc.gc.ca/Eng/about/planning/annualReports/Pages/Ourprogr-Nosprogr.aspx> accessed 2 December 2016.
[39] Ibid.

In its thematic review of m-payments, the FCAC raise many issues particularly the inconsistent protections consumers are faced with. This suggests that potential consumers need to be educated about these inconsistencies so that they understand how it affects them. Failing to educate consumers appropriately may lead to a situation where many will adopt m-payments believing that they will enjoy comparable protections with the established payments instruments they use. This leaves consumers vulnerable as they may only learn the true state of things when transactions go wrong.

In its thematic review, the FCAC rightly concludes that-

> "…Knowledgeable consumers are empowered and are better able to make informed decisions. Informed consumers are likely to be better prepared to seek out key information within disclosure statements, and to identify resources for assisting with comprehension of complex information…"[40]

Despite this conclusion and an additional assurance that it is "monitoring the m-payments ecosystem more broadly to support the Agency's consumer education and financial literacy objectives,"[41] there is currently no exclusive initiative targeted at educating consumers about m-payments. This may be explained on the basis that since the adoption of m-payments is still at a nascent stage,[42] targeted education initiatives may not be a

[40] Trites (n 2) p57.
[41] Ibid 10.
[42] Adoption has been reportedly slow due to factors such as consumer preference, merchant readiness and industry fragmentation. A Brown, 'Why mobile payments are set to go mainstream in Canada' (*The Globe and Mail*, 29 November 2016) <https://www.theglobeandmail.com/report-on-business/rob-commentary/why-mobile-payments-are-set-to-go-mainstream-in-canada/article33074336/> accessed 26 June 2017.

priority. However, it is argued that having identified important issues in its thematic review, an education initiative would have been helpful to address the FCAC's findings. Consumers may also be more receptive to m-payments if they receive unbiased information from a trusted source like the FCAC.

Industry also assists with financial education. For instance, the Canadian Banking Association (CBA) maintains a website[43] which provides consumers with user-friendly information about financial services to help them choose appropriate products that meet their needs. While the CBA's site contains information on m-payments, this information often focuses on industry news, research and statistics. This information may not be helpful to a potential m-payment consumer wishing to understand how to use m-payments and the consumer risks involved. Thus, the responsibility still falls on the FCAC to make more concerted effort in this area.

3.2.2. CANCELLATION RIGHTS AND COOLING-OFF PERIODS

Cooling-off periods apply at both federal and provincial levels and will benefit m-payment consumers. At the federal level, the NOBRs[44] apply to customers of FRFIs who change their minds after subscribing to m-payment services offered. The NOBRs state that-

> "Any disclosure statement made in relation to an optional product or service … must specify that the

[43] <www.cba.ca> accessed 28 November 2016.
[44] Regulation 1 lists the institutions falling within the scope of the NOBRs.

> person may cancel the product or service by notifying the institution that it is to be cancelled, that the cancellation will be effective as of the last day of the billing cycle or 30 days after the notification is received, whichever is earlier, and that on receipt of the notice, the institution must, without delay, refund or credit the person with the amount of any charges paid by the person for any part of the product or service that is unused as of the day the cancellation takes effect…"[45]

At the provincial level, cooling-off periods are dealt with under provincial consumer protection statutes. Thus, these periods differ from province to province. These cooling-off periods only apply to specific contracts, all of which cannot be strictly classified as financial/payment services contracts. For instance, under the Ontario Consumer Protection Act (OCPA) 2002 cooling-off provisions only apply to direct agreement contracts,[46] personal development contracts, pay-day loans, timeshares and contracts to purchase a condominium.[47] In Manitoba, cooling-off periods apply to retail sale and retail hire-purchase transactions.[48]

It was earlier stated that banking services are federally regulated and this may explain why the provincial statutes are silent on cooling-off periods for financial/payment services contracts.[49] This, however, creates an unpredictable situation because m-payments can be provided by non-FRFIs. The likely effect is that consumers served by non-FRFIs may be in a worse-off situation

[45] Regulation 7.
[46] where products are bought from a door to door salesperson.
[47] See Part IV of the OCPA.
[48] s.62(1) Manitoba Consumer Protection Act 1987 (as amended).
[49] Section 3.2.

than those dealing with FRFIs as it appears no cooling-off periods apply to them.

However, one possible interpretation of these provincial laws is that although consumers may not enjoy cooling-off periods for subscribing to the m-payment service itself, they may enjoy this right where m-payments are used to complete eligible contracts under the provincial laws. This leads to the conclusion that there is a need for clarity on this issue.[50] While there will be some form of uniformity with FRFIs offering m-payments, consumers dealing with providers regulated by provincial laws may be subject to unclear rules.

3.2.3. REGULATING BUSINESS PRACTICES

Business practices are regulated under the Canadian Competition Act 1985 (CCA) and the various provincial consumer protection statutes. It is expected that m-payment providers will be subject to existing regulatory regimes.[51] The CCA focuses on false and misleading representations which are discussed in section 3.2.3.2.

Provinces tackle unconscionable commercial practices in their respective consumer protection statutes. As can be expected, there are similarities and differences in their approach. Some provinces use general wide terms to define unfair practices while

[50] Compare to the UK's position in section 3.4.2.
[51] This is in addition to other federal packaging and labelling statutes, sector-specific regulations and the Antispam Law 2014. <http://www.ipvancouverblog.com/canadianadvertisinglaw/ > accessed 12 August 2016.

others simply list examples of prohibited practices. For instance, the Business Practices and Consumer Protection Act of British Columbia (BPCPA) 2004 does not include a definition of "unconscionable acts or practices" but rather it provides a list of circumstances that will guide a court in determining if a practice is unconscionable.[52] On the other hand, section 2(1) of the Manitoba Business Practices Act 1990 (Manitoba BPA) generally explains that-

> "It is an unfair business practice for a supplier-
>
> (a) to do or say anything or to fail to do or say anything if, as a result, a consumer might reasonably be deceived or misled or
> (b) to make a false claim or representation."

The Manitoba BPA further includes a number of factors that the court may consider when deciding if a business practice is unfair.[53] It also lists examples of unfair business practices.[54] One possible advantage of adopting such a wide definition as contained in s.2(1) of the Manitoba BPA is that it ensures that acts not expressly listed can still fall within the scope of the statute if they further the mischief sought to be prohibited.[55] Thus, a business practice not listed under the Manitoba BPA will still run afoul of the statute if it can be shown that its effect results in a situation where a "consumer might reasonably be deceived or misled." Alberta adopts a similar approach. However, in addition,[56] its Fair-Trading

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[52] S.8(3).
[53] s.3(3).
[54] Ss. 2(3); 3(1) & (2).
[55] A similar approach is found under ss.4 & 8 of the Business Practices and Consumer Protection Act of British Columbia (BPCPA) 2004
[56] S.6.

Act (FTA) 2000 further empowers the minister to make regulations specifying unfair practices.[57] This provision may allow for timely and flexible regulatory responses to changes in market behaviour.

Another similarity with some provinces is that the evaluation of unfair practices takes the multilingual nature of Canada into consideration. For instance, section 6(2)(b) of the FTA provides that-

> "It is an unfair practice… to take advantage of the consumer as a result of the consumer's inability to understand the character, nature, language or effect of the consumer transaction or any matter related to the transaction"[58]

This provision broadly prohibits practices which exploit a consumer's inability to appreciate the nature, language or effect of a transaction. The particular reference to language can be significant in multilingual societies such as Canada. One may argue that one of the aims of fair practices legislation is to enable consumers to make rational decisions not influenced by biased conduct or information. Like other unfair practices, exploiting linguistic barriers can distort informed decision making. Hence it is reasonable to prohibit practices which exploit these barriers to the consumer's detriment.

One significant difference between provinces lies in the enforcement instruments used. For instance, Alberta criminalises the use of unfair practices in a fashion similar to the old CCA

[57] S.12.
[58] See similar provisions in s.8(3)(b) of the BPCPA 2004, s.3(2) Manitoba BPA.

regime.[59] No distinction is drawn between situations where default is intentional or otherwise. In contrast, the Manitoba BPA does not criminalise unfair practices,[60] rather it only empowers the regulator with a wide range of administrative powers.[61] Criticisms of Alberta's style are similar to those applying to the old CCA regime discussed in section 3.2.3.2. Such criticisms emphasise issues such as the high cost of prosecution and the possible disproportionate use of criminal sanctions in less serious cases.[62] On the other hand, while Manitoba allows for a wide range of administrative/civil enforcement tools, it leaves no room for criminal sanctions. The major criticism, in line with views held by Ashworth[63] and Cartwright,[64] is that criminal sanctions may be an appropriate response in more severe cases.

Thus, with both approaches, one may argue that the sanctions available are not adequately balanced to respond to different degrees of non-compliance. This assertion is supported by arguments put forward by Ayres and Braithwaite who reason that the achievement of regulatory objectives is more likely when regulators adopt a hierarchy of sanctions and regulatory strategies

[59] S. 6(1.1) of the FTA; The Old CCA regime is discussed in more detail in section 3.2.3.2.
[60] British Columbia takes a similar approach.
[61] ss.18-20.
[62] P Cartwright, `Redress Compliance and Choice: Enhanced Consumer Measures and the retreat from punishment in the Consumer Rights Act 2015' (2016) 75(2) C.L.J. 271; RB Macrory, `Regulatory Justice: Making Sanctions Effective' (2006) <http://webarchive.nationalarchives.gov.uk/20070305105024/http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/penalties/index.asp> accessed 10 June 2017; see P Hampton, `Reducing Administrative Burdens: Effective Inspection and Enforcement' (2005) <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/prebud_pbr04_hampton.htm> accessed 10 June 2017.
[63] A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 250.
[64] P Cartwright, 'Crime, Punishment and Consumer Protection.' (2007) JCP 1,8.

of varying degrees of interventionism.[65] This is because regulators will be best positioned to encourage cooperation when they can escalate deterrence in a manner that is responsive to the degree of uncooperativeness of a firm.[66]

Despite differences in enforcement style, remedies available to consumers in different provinces are similar. In Manitoba for instance, a consumer may cancel a consumer transaction tainted by unfair practices. This right subsists whether the practice occurred before, during or after the time the transaction was entered.[67] Where cancellation is impossible, the consumer may recover "the amount by which the consumer's payment under the consumer transaction exceeds the value of the goods or services to the consumer, or to recover damages, or both."[68] A consumer may also sue for damages, rescission, injunction, specific performance and recovery of monies paid under a contract[69] secured through unfair practices.[70]

The director of business practices[71] may also bring actions on behalf of consumers affected by unfair practices.[72] The director may maintain court action already commenced by consumers or defend court actions brought by suppliers against consumers.[73]

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[65] I Ayres, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992 Oxford University Press) 5-6.
[66] Ibid 36.
[67] It is also in addition to any remedy that is available at law, including damages. 7(1) FTA Alberta (n 19). In British Columbia, transactions tainted by unfair practices are also not binding on the consumer. S.10 BPCPA.
[68] S.7(3) FTA.
[69] S.23(2).
[70] Similar rights accrue to consumers in Alberta S.13 FTA.
[71] This is the regulator designated to enforce the Act.
[72] s.24(1)(a) Manitoba BPA.
[73] S.24(1)(b) & (c) ibid.

Academic literature[74] lends support to this approach particularly where individual actions would be costly and where serious issues have been identified in a particular market.[75] However, relying solely on public enforcement is significantly limited. This is because it is dependent on the actions of public bodies which have limited resources and its intensity may be affected by political considerations.[76]

One response that addresses this limitation is found under the FTA. Accordingly, while the FTA empowers regulators to sue on behalf of consumers,[77] it goes a step further by empowering consumer organisations to take action against defaulting suppliers.[78] Thus, consumer organisations can step in where public agencies are unable to act.[79] Ayres and Braithwaite also argue that these organisations may provide useful checks against regulatory capture.[80]

Actions by consumer organisations will be relevant to m-payments where individual loss may be small but the provider in aggregate

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[74] OECD, 'Recommendation on Consumer Dispute Resolution and Redress' (2007) <https://www.oecd.org/sti/consumer/38960101.pdf> accessed 11 February 2017, p11; G Howells, S Weatherill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 601; There is also research raising a number of concerns about this method of protecting consumers. See J Peysner, A Nurse, *Representative Actions and Restorative Justice* (BERR 2008) 39; I Ramsay, *Consumer Law and Policy* (3rd edn, Hart Publishing 2012) 43.

[75] R Cranston, *Consumers and the Law* (2nd edn, Weidenfeld and Nicolson 1989) 25 cited in P Cartwright, 'Consumer Protection in Financial Services: Putting the Law in Context' in P Cartwright (ed.), *Consumer Protection in Financial Services* (Kluwer Law Int'l 1999) 16.

[76] Ramsay (n 74) 258.

[77] s.15.

[78] s.17.

[79] Inability to act may be for several reasons such as lack of resources (funds, time and expert personnel), regulatory capture and changing political tide.

[80] They refer to this as "tripartism" where consumer organisations become "fully fledged third player(s)" in the regulatory system; I Ayres, J Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 Law & Soc. Inquiry 435, pp.441 & 449; R Axelrod, 'An Evolutionary Approach to Norms' (1986) 80 APSR 1094.

may have caused significant detriment.[81] A large number of small-scale losses caused by one provider may be symptomatic of a bigger problem that requires regulatory attention.[82] However, this issue may go unnoticed as it may be unrealistic for all consumers affected to pursue redress.[83] Even where some consumers do seek redress, it may not get the desired publicity which will attract regulatory attention. This is where consumer organisations can make a huge difference if they are empowered to act.[84]

3.2.3.1. CONTRACT TERMS

3.2.3.1.1. STANDARD TERM CONTRACTS AND FAIRNESS

No federal legislation exclusively addresses the regulation of contract terms in Canada. In provinces other than Quebec,[85] protection from unfair contract terms is achieved through common law doctrines like the equitable doctrine of unconscionability with support from limited statutory provisions.[86] Leading cases show

[81] Howells and Weatherill (n 74) 17.
[82] Ibid 48.
[83] Ibid.
[84] This argument does not ignore the fact that in certain cases these groups may become compromised and may not be truly representative of consumer interests. Ramsay (n 74) 109.
[85] Quebec's civil law approach is outside the scope of this thesis (see section 1.1.4). For more insight on Quebec, see Section 1437 of the Civil Code of Quebec (1991); s. 8, 316 & 350 of the Quebec Consumer Protection Act 1971 (as amended). See also Union de Consummateurs, 'Ending Abusive Clauses in Consumer Contracts' (Final Report of the Project Presented to Industry Canada's Office of Consumer Affairs 2011) <http://uniondesconsommateurs.ca/docu/protec_conso/EndAbusiveClauses.pdf> accessed 23 March 2017.
[86] For instance, to protect consumers in loan transactions, most provinces have an Unconscionable Transactions Relief Act that allows the court to intervene when there is unconscionability. British Columbia Law Institute, 'Unfair Contract Terms: An Interim Report' (February 2005) <http://www.bcli.org/sites/default/files/Unfair_Contract_Terms_Interim_Rep.pdf> accessed 4 April 2016.

that review of contract terms for fairness is an important part of the unconscionability doctrine.[87]

Although canons of statutory construction are not directly concerned with fair terms, Canadian courts employ them where the fairness of a term is an underlying issue.[88] An example is the *contra proferentem* rule which allows ambiguities in a contract to be interpreted strictly against the drafter.[89]

Additionally, provincial authorities regulate contract terms by relying on general provisions in their consumer protection statutes prohibiting unfair practices. Thus, the regulation of contract terms is subsumed under the wider regulation of unfair practices. An example of this approach can be found in the BPCA. S.4(1) provides that-

> "deceptive act or practice" means, in relation to a consumer transaction,
>
> a) an oral, written, visual, descriptive or other representation by a supplier, or
> b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

The section further explains that the term "representation" includes "any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction." Based on the above provisions, contractual terms

[87] This doctrine is concerned with fairness in contracts and aims to ensure that one party does not take undue advantage of the other. See the Canadian supreme court decision in *Bhasin v Hrynew* [2014] SCC 71; See also the decisions of the Court of Appeal (British Columbia) in *Harry v. Kreutziger* (1979) 95 D.L.R. (3d) 231 (C.A.C.-B.) and *Morrison v. Coast Finance Ltd* (1965) 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.).
[88] BC Law Institute (n 86) 18-19.
[89] See *32262 B.C. Ltd. v. Balmoral Investments Ltd* (1999) BCCA 184.

which have the capacity to mislead or deceive a consumer may be declared unfair.

The problem with this approach is that unfair terms can come in several forms. Limiting the scope to situations where they may mislead or deceive suggests that many unfair terms may slip under the regulatory radar. Some respite is found in other provisions dealing with unconscionable practices in the BCPA. The BCPA lists certain circumstances which courts ought to consider in determining if a practice is unconscionable. One of the listed circumstances is whether-

> "…the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable…"[90]

The FTA offers a more direct approach. Section 6(3)(c) provides that-

> "…it is an unfair practice for a supplier…to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided…."

The Manitoba BPA adopts similar words to the BCPA but adopts the FTA's directness by stating that-

> "….it is deemed to be an unfair business practice…when the terms or conditions on which, or subject to which the consumer entered into the consumer transaction are so adverse or so harsh to the consumer as to be inequitable…."[91]

[90] S.8(3)(e). Ontario takes a similar approach, see S.15(2)(f) OCPA.
[91] S.3(2)(b)

The statutes do not, however, provide any criteria for determining when a term is "harsh, oppressive or excessively one sided" or when the term is "so adverse or so harsh…as to be inequitable." They do not also explain what "fairness" signifies in the context of the statutes. The FTA merely lists examples of practices considered unfair,[92] while the Manitoba BPA states that all relevant circumstances will be considered in making a determination on unfairness.[93]

It is possible to argue that these provisions are deliberately set out in imprecise terms so that courts are afforded the flexibility needed to address each case on its merits. However, the scope and criteria for determining unfairness are unclear. Particularly, terms such as "good faith" and "fairness" can mean slightly different things depending on the prevailing legal tradition.[94] One may discount this argument on the basis that since the provinces belong to the common law tradition, the application of these concepts may not be controversial. However, this proposition is weak as common law did not traditionally understand good faith in the way that civil law did.[95] Moreover, courts in common law jurisdictions embrace these concepts in varying degrees.[96] If it is, however, conceded

[92] s.6.
[93] S.3(3)
[94] S Saintier, 'The Elusive Notion of Good Faith in the Performance of a Contract, Why still a Bete Noire for the Civil and the Common Law?' (2017) 6 JBL 441; GC Moss, 'International Contracts between Common Law and Civil Law: Is Non-State Law to Be Preferred? The Difficulty of interpreting Legal Standards such as Good Faith' (2007) 7(1) Global Jurist, Article 3.
[95] See Bingham LJ's dictum in *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd* [1989] QB 433 at p439.
[96] See Legatt J's dictum in *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB) at paras. 124-130, 151 and Cromwell J in the Canadian case of *Bhasin v Hrynew* [2014] SCC 71 at para 32-33; ZX Tan, 'Keeping the Faith with Good Faith? The evolving trajectory post Yam Seng and Bhasin' [2016] JBL 420.

that the understanding of these concepts is relatively clear, there is still uncertainty on the scope of their application. For instance, in some jurisdictions, certain matters are exempt from a test of unfairness.[97] This issue is not addressed in the discussed statutes.

Where a contract is tainted by unfair terms, consumer remedies available are the same as those applying to contracts generally tainted by unfairness and unconscionability.[98] This is because as earlier stated, the regulation of contract terms is incorporated under the regulation of unfair practices.

3.2.3.1.2. TRANSPARENCY

Owing to the absence of a dedicated regime regulating contract terms, there is also no specific regime dealing with transparency in the use of contract terms both at federal and provincial levels.[99] In the absence of provisions dealing with transparency and the lack of clarity on the scope and criteria for determining unfairness, it is difficult to ascertain what role transparency plays in a determination of fairness. The statutes leave no clue as to whether transparency on its own would legitimise an otherwise unfair term or whether a lack of transparency will make an otherwise fair term unenforceable.

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[97] This is the case in the UK which is discussed in section 3.4.3.1.

[98] See section 3.2.3 for a discussion of these remedies.

[99] There is, however, attention placed on transparency in disclosures. See, for instance, Regulation 6(4) COBRs See, for instance, the FCAC's Clear Language and Presentation Principles and Guidelines<https://www.canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/guidance-3.html> accessed 12 December 2016; The Principles of Consumer Protection for Electronic Commerce (PCPEC). <http://strategis.ic.gc.ca/eic/site/cmc-cmc.nsf/eng/fe00113.html> accessed 30 March 2017.

One may, however, turn to judicial decisions to discover what approach may be likely favoured. Some cases suggest that the Canadian courts require that onerous[100] contract terms must be brought to the attention of a contracting party. In the leading case of *Tilden Rent-A-Car Co. v. Clendenning*,[101] the Ontario Court of Appeal stated that-

> "In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum."

To bring onerous terms to the attention of contracting parties, the British Columbia Law Institute considers that "placing such contract terms in a bold typeface, in capital letters, in a larger font, or in a different colour would, in most cases, meet the notice requirement.[102] However, this only addresses one part of transparency which involves bringing onerous terms to a party's attention. It does not address another arm of transparency which

[100] In Canada's common law jurisdictions, "onerous" is often used in the ordinary sense and connotes "burdensome" or "troublesome." In the Civil Law jurisdiction of Quebec, "onerous" is used in the sense of something that is based upon good consideration. M Hogg, *Obligations: Law and Language* (Cambridge University Press 2017) 213. The meaning of "onerous" being discussed here is that used in the common-law jurisdictions.
[101] (1978) 83 DLR (3d) 400 at 408-9 per Dubin J.A.
[102] (n 95) p9.

requires that terms are drafted in simple language. Transparency regulation will benefit from more specific requirements that complement the regulation of contract terms.

3.2.3.2. FALSE AND MISLEADING INFORMATION

The CCA prohibits the use of false and misleading representations which promote the supply/use of a product or which promote the business interest of a supplier.[103] The prohibition is divided into two categories. The first category covers the intentional/reckless use of false and misleading misrepresentations.[104] The second category covers the unintentional use of false representations which falls under deceptive marketing practices. These are classified under the category of what is termed "reviewable practices."[105] This distinction is significant with regards to the sanctions applied. All intentionally or recklessly made false/misleading representations are classified as competition offences[106] attracting criminal sanctions.[107] Reviewable matters such as the unintentional use of false/misleading representations[108] attract only civil sanctions. The civil and criminal sanctions are also mutually exclusive.[109]

[103] See ss.52(1) & 74.01.
[104] s.52(1) & (5).
[105] Part VII.1 CCA.
[106] See Part VI CCA.
[107] A person found to have made false representations is guilty of an offence and may be liable on conviction to a fine or to imprisonment or to both; S.52(5).
[108] 74.01(1)(a).
[109] ss. 52(7) & 74.16.

This distinction was introduced following amendments to the CCA in 1999.[110] Prior to this, the use of any deceptive business practice was a strict liability offence attracting criminal sanctions.[111] However, the old regime was criticised on the basis that -

> "…criminal prosecution as the sole legal instrument of government enforcement for misleading advertising and deceptive marketing practices has a number of shortcomings -- a lack of speedy decision-making, specialization and consistency in decisions…. criminal sanctions can be too severe a response for some instances of unintentional misleading advertising, even when the advertiser has failed to meet the due diligence standard. Invoking the criminal process can be unjustifiably expensive, and time and resource-intensive, for both the businesses involved and the Competition Bureau…"[112]

This old regime exemplifies situations in which regulatory offences backed by criminal sanctions are mainly relied on in regulating business conduct. The shortcomings of this approach have been the subject of academic discourse.[113] Cartwright chronicles its notable criticisms which include the expensive nature of prosecution, the possible disproportionate response it represents in many cases and the fact that they may be an inadequate deterrence where businesses believe that the likelihood of

[110] See D Johansen, `Bill C-20: An Act to Amend the Competition Act and To Make Consequential and Related Amendments to Other Acts' (Law and Government Division, Parliament of Canada, 27 November 1997 - Revised 9 March 1999). <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=C20&Parl=36&Ses=1> for background information on the amendments.

[111] This old regime is similar to Alberta's enforcement style under the FTA discussed in section 3.2.3.

[112] Johansen (n 109). This echoes arguments elsewhere on the disadvantages of criminal sanctions for less serious offences, see Hampton (n 62).

[113] Cartwright, 'Redress compliance and Choice' (n 62); Macrory (n 62); Hampton (n 62).

prosecution and the amount of penalties imposed is low.[114] This echoes the criticism of the old CCA regime highlighted above.

Although the new regime retains criminal sanctions for the most serious cases, i.e. where acts are intentional or reckless, it introduces civil sanctions for less serious offences. This approach is supported by Ashworth who contends that "in principle, the fullest enforcement, with the most frequent use of prosecution and the highest penalties, should be reserved for the most serious forms of criminality."[115] Supporting this position, Cartwright adds that "sanctions may sometimes be seen to be disproportionate, particularly where the trader lacks any moral fault."[116] Macrory further explains that-

> "In instances where there has been no intent or wilfulness relating to regulatory noncompliance, a criminal prosecution may be a disproportionate response, although a formal sanction rather than simply advice or a warning, may still be appropriate and justified." [117]

Thus, the current regime provides more alternatives in the available regulatory toolkit. This allows for more proportionate responses reflecting the different levels of non-compliance.

The CCA targets representations that are false or misleading in a material respect.[118] "Representations" can cover a wide range of statements whether they are made through direct mandated

[114] Cartwright, ibid, pp.274-6; see also Cartwright, 'Crime, Punishment and Consumer Protection.' (n 64).
[115] Ashworth, (n 63) 8.
[116] Cartwright (n 64) 9.
[117] Macrory (n 62) para 1.14.
[118] s.52(1) & s.74.01(1)(a).

disclosures or through advertising. The choice of the term also appears deliberate. Prior to amending the CCA, the conduct targeted was "misleading advertising." One may argue that the scope of the old regime was limited as misleading advertising only represents one of the numerous forms in which false/misleading information can be presented. The 1999 amendments change the CCA's focus to "misleading representations"[119] which arguably brings more practices under scrutiny.

While the CCA confirms that it is concerned with representations that are false/misleading in a "material respect," it does not define what the term "material respect" connotes. Although a direct explanation of what this phrase means would have been useful in understanding the scope of the provisions, one may, however, look to other provisions of the CCA to draw necessary inferences. For instance, the relevant provisions indicate that the CCA is concerned with representations which aim at "promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest."[120] Therefore, it is assumed that representations which seek to do either of the aforementioned will be treated as material.

Under the CCA it is not necessary to prove that any person was actually deceived or misled[121] by the intentional/reckless

[119] CS Goldman, JD Bodrug, *Competition Law of Canada: Volume 2* (Juris Publishing, Inc. 2013) s.6.01.
[120] S.52 and s.74.01(1) covering both intentional and unintentional acts of non-compliance are similarly worded.
[121] S.52(1.1)(a).

misleading representations.[122] This approach seems fair as it will ensure that unscrupulous suppliers do not escape sanctions by relying on the fact that no person has been misled (yet). While regulations prohibiting false representations generally help in protecting consumers, they also aim to encourage conscientious market practices. It is submitted that imposing sanctions even in the absence of actual consumer detriment ensures that the goal of encouraging conscientious behaviour is also given precedence.

Because the CCA is a federal statute of general application, it applies to all businesses in Canada. Thus, all m-payments providers will be bound by the regulatory regime irrespective of their status[123] and the province they operate in. Provincial consumer protection statutes augment the CCA's provisions.[124] M-payments providers will also be bound by them either because they will have a business presence in the provinces or because they will serve consumers resident in them.

3.2.4. ALLOCATION OF LIABILITY

As with disclosures, the liability rules applicable to m-payments depend on the entity offering the service and the underlying funding source of an m-payments transaction.[125] These rules are

[122] There is a similar provision with respect to unintentionally made representations in s.74.03(4).
[123] i.e. whether they are financial non-financial institutions.
[124] For example, see s.14 OCPA, s.6 BPCPA. Where conflict arises, the CCA being a federal statute will override a provincial legislation under what is known as the 'federal paramountcy rule' in Canadian constitutional law. See *Canadian Western Bank v Alberta* (2007) SCC 22; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161.
[125] Trites et al (n 2) 10.

often determined by the statutes and industry codes applying to the entity or funding instrument. For instance, m-payment transactions funded by credit cards are subject to the liability regime under the COBRs. Under the COBRs-

> "if a lost or stolen credit card is used in an unauthorized manner, the maximum liability of the borrower is the lesser of $50 and the maximum set by the credit agreement…"[126]

And-

> "if the bank has received a report from the borrower, whether written or verbal, of a lost or stolen credit card, the borrower has no liability to pay for any transaction entered into through the use of the card after the receipt of the report." [127]

The Canadian Code of Practice for Consumer Debit Card Services[128] also sets out consumer liability for unauthorized debit card transactions. Paragraph 5(3) of the Code provides that-

> "Cardholders are not liable for losses resulting from circumstances beyond their control. Such circumstances include, but are not limited to:
>
> 1. technical problems, card issuer errors and other system malfunctions
> 2. unauthorized use of a card and PIN where the issuer is responsible for preventing such use, for example after:
>   - the card has been reported lost or stolen
>   - the card is cancelled or expired
>   - the cardholder has reported that the PIN may be known to someone other than the cardholder

[126] Regulation 12(1)(c).
[127] Regulation 12(1)(e).
[128] This is a voluntary code outlining industry practices and consumer/industry responsibilities when debit card services are involved. <https://www.canada.ca/en/financial-consumer-agency/services/industry/laws-regulations/debit-card-code-conduct.html> accessed 12 December 2016.

3. unauthorized use, where the cardholder has unintentionally contributed to such use, provided the cardholder co-operates in any subsequent investigation"

The Code also defines the circumstances in which a cardholder may be deemed to have contributed to the unauthorized use. A cardholder contributes to unauthorized use by –

> "(1) voluntarily disclosing the PIN, including writing the PIN on the card, or keeping a poorly disguised written record of the PIN in proximity with the card
>
> (2) failing to notify the issuer, within a reasonable time, that the card has been lost, stolen or misused, or that the PIN may have become known to someone other than the cardholder"[129]

The Code indicates that a cardholder deemed to have contributed to an unauthorized use is liable for losses.[130]

The aforementioned provisions are, however, specific to the cards funding the m-payment transaction. This leaves many issues unclear particularly if and how they will apply where a mobile device is stolen, lost or otherwise compromised. For instance, if a mobile device housing a payment application is stolen and the payment application is used to process a payment funded by a credit card, it is unclear as to how the COBRs' liability regime will apply. One may argue that the COBRS should apply on the basis that, a credit card is still being used remotely. On the other hand, another argument is that the COBRs' regime is only triggered if a

[129] Paragraph 5(5).
[130] This loss will not exceed the established debit card transaction withdrawal limits except an account has a line of credit or overdraft protection or is linked with another account or other accounts or if a debit card transaction is made based on a fraudulent deposit at an ATM, paragraph 5(4).

card is actually lost or missing. Thus, even though unauthorised payments may be completed, the credit card will still be in the possession of the consumer.

Similarly, the criteria for determining whether a customer has contributed to the unauthorized use of a debit card is not specific to m-payments. This can also lead to some confusion. For instance, it is unclear whether a cardholder will be held responsible in situations where a PIN is not necessary to authenticate a debit payment made through a mobile device[131] Thus, clarification on how existing rules apply to m-payments is needed. Consequently, the FCAC rightly concludes that some modifications or further commitments may be required to ensure that existing obligations remain technologically relevant and appropriate given the introduction of new intermediaries.[132]

3.2.5. DISPUTE RESOLUTION

ADR is an integral part of dispute resolution in Canada's financial sector. FRFIs offering m-payments are mandated under the Bank Act to establish internal procedures for dealing with complaints.[133] In particular, banks are required to designate an officer with the

[131] E.g. in the use of contactless payment. There may be a precedent to follow under the Canadian Payments Association's Rule E4 which assigns liability for unauthorized PIN-less transactions to the "payer" financial institution. The rule's scope embraces "payment applications embedded in a device" (such as a debit card, key fob, or cellular phone). Trites et al (n 2) 49.
[132] Ibid 56.
[133] s.455 & s.456 Bank Act; In establishing internal dispute resolution processes, the FCAC encourages firms to adopt the three principles of effectiveness, efficiency and accountability. Commissioner's Guidance on Internal Dispute Resolution (2013) <https://www.canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/guidance-12.html> accessed 13 November 2016, para 1.1.

responsibility of implementing the internal redress procedures.[134] Officers are also to be appointed to receive and deal with any complaints.[135] Banks must demonstrate that these designated officers are adequately trained and that their skills and authority are appropriate for carrying out the tasks required.[136]

Available redress procedures must be disclosed to customers.[137] Such information is to be made publicly available in branches, websites or in written format.[138] Disclosures are also required to include information considered necessary to enable consumers to meet the requirements of the internal redress procedures.[139] This provision is important as it ensures that consumers have information on both the available redress procedures and the requirements for taking advantage of them. This is in line with the OECD's advice that-

> "Consumers should be provided with clear, comprehensible, and accurate information on the procedure, including the process for initiating a complaint and selecting a dispute resolution mechanism…."[140]

Apart from the internal redress procedures, m-payment consumers may approach a range of ADR platforms. Access to available platforms is determined by the status[141] of the provider and the province where the consumer resides. Although there is

[134] S.455(1)(b) Bank Act.
[135] S.455(1)(c).
[136] Commissioner's Guidance (n 132) para 1.3.
[137] S.455(1)(a), s.73(1)(a).
[138] S.455(3).
[139] S.3 Complaints (Banks, Authorized Foreign Banks and External Bodies) Regulations 2013.
[140] OECD (n 74) Paragraph A(4).
[141] Whether it is an FRFI or not.

no statutory financial ombudsman service, consumers transacting with FRFIs can access ADR platforms registered as an "External Complaints Body" (ExCB) if dissatisfied with the internal resolution of a complaint. In the dispute resolution framework for FRFIs, the ExCBs are designed to serve as a subsequent redress platform if the initial use of internal procedures fails. All FRFIs are required to be members of an ExCB.[142] They are also obliged to inform consumers of their right to approach these ExCBs where applicable.[143]

The ExCBs are positioned to enhance dispute resolution under the Bank Act as they represent external platforms that "are accessible, accountable, impartial and independent and that discharge their functions and perform their activities in a transparent, effective, timely and cooperative manner."[144] Reputable bodies corporate may apply for approval.[145] Once approved, these ExCBs can accept banks who apply for membership.[146] Banks must disclose[147] the name and contact information of the ExCB of which they are members.[148]

[142] S.455.01(2) Bank Act; Commissioner's Guidance (n 133) 5.
[143] Ibid, para 2.2.
[144] Regulation 5 Complaints Regulations (n 139).
[145] Regulation 6 *ibid*.
[146] Regulation 7(c) Complaints Regulations. If they wish to request membership of another complaints body, they are also mandated to notify the ExCB of which they are a member Regulation 10 ibid.
[147] Disclosure is in the form of a written statement made available at all of their branches and points of service and on their website. Regulation 8(1) Complaints Regulations.
[148] Regulation 8(1) ibid

Complaint-handling by the ExCB must be easily accessible and available at no cost to consumers.[149] Where a complaint is made, the body is obliged to inform the parties about its terms of reference and procedures for dealing with complaints. ExCBs are also bound on request to provide any further information and assistance necessary to enable parties to understand the requirements of those terms of reference and procedures.[150] Where a complaint made is in respect of a bank that is a member of another external complaints body, the ExCB is required to provide the complainant with the name of that other body and its contact information without delay.[151]

Consumers who use m-payment services provided by banks will enjoy access to ExCBs. In comparison to litigation, ExCBs provide a less formal atmosphere for dealing with unresolved disputes. As regards cost, the ExCBs also present huge advantages as access is free. There are currently two approved ExCBs, the Ombudsman Service for Banking Services and Investments (OBSI)[152] and the ADR Chambers Banking Ombuds Office (ACBO).[153]

[149]Application Guide for External Complaints Bodies <https://www.canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/guidance-13.html> accessed 6 September 2016, Paragraph 4.4.2.
[150] Regulation 7(j) Complaints Regulations.
[151] Regulation 7(e) ibid.
[152] <http://www.fson.org/en/index.html> accessed 6 September 2016.
[153]<https://www.canada.ca/en/financial-consumer-agency/services/industry/regulated-entities/external-complaints-bodies.html>

The OBSI is prominent[154] in dealing with dispute resolution in the financial sector.[155] It is a non-profit organisation with jurisdiction covering banks and investment firms that voluntarily subscribe to the service.[156] It is run by an independent board of directors and funded by fees levied on members.[157] The monetary jurisdiction of the OBSI is capped at $350,000. Where a consumer's claim is higher, they may voluntarily decide to reduce it so as to come within the OBSI's jurisdiction.[158] As a matter of practice, consumers are required to exhaust internal dispute resolution with firms before approaching the ombudsman. The ACBO operates similarly.

The recommendations of the OBSI and ACBO are non-binding and adherence to orders made is voluntary. Some advantages may be attributed to the non-binding nature of the recommendations. For one, proceedings may be more amicable and less costly if findings are accepted by both parties.[159] It also preserves the right of parties to appeal, unlike most binding arbitral awards which are often difficult to overturn. Despite these advantages, one wonders if the non-binding status indirectly increases the cost of dispute resolution especially if a case ends up in trial. For instance, in the

[154] Although the OBSI was only approved as an ExCB n 2015, it celebrated the 20th anniversary of its existence in 2016. It has also been in operation for much longer than the ACBO. Consequently, it has more members. For a background on the OBSI, see B Crawford, 'Financial Consumer Complaint Agencies' (2013) 54 CBLJ 68.
[155] Insurance claims are however handled by the General Insurance Ombudservice.
[156] <https://www.obsi.ca/en/resource-room/list-of-participating-firms> accessed 6 December 2016.
[157] <https://www.obsi.ca/en/about-us/organization-structure> accessed 6 December 2016.
[158] <https://www.obsi.ca/en/about-us> accessed 6 December 2016.
[159] A Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (Routledge 2013) 27.

context of m-payments where micro-payments are involved, a binding award may be more appropriate rather than an extended procedure for dispute resolution that may still end up in court. Fiadjoe notes that where a case ends up in trial, parties may acquire an unfair advantage by using the ADR proceedings to obtain a preview of the opponent's case.[160] Perhaps a better approach may be found in jurisdictions like the UK[161] where the recommendations are binding on the business but not on the consumer.

Another issue to consider is the jurisdiction of the OBSI. Since the OBSI's mandate covers banking services, disputes arising from m-payment services provided by banks will fall under its jurisdiction. However, m-payment providers who are not FRFIs fall outside its jurisdiction. This highlights the concern that the application of existing redress procedures tailored to FRFIs, may be insufficient for m-payment users served by non-FRFIs.

Where several parties collaborate to provide m-payments, there might be some confusion as to which party bears the responsibility for resolving disputes. The FCAC's thematic review confirms that a gap may exist in Canada as no legislation assigns responsibility within the transaction chain for communicating procedures to consumers and ensuring that appropriate redress is obtained.[162]

[160] Ibid.
[161] See section 3.4.5 for more discussion on this.
[162] Trites et al (n 2) 52.

As stated earlier, there is no national statutory financial ombudsman service as exists in jurisdictions like the UK.[163] Although there are only two ExCBs at the moment, nothing bars the registration of more bodies. Multiple platforms may adopt different approaches in carrying out their functions which may lead to inconsistency. Thus, one may argue that a single financial ombudsman service will be preferable as it allows for uniformity and consistency in resolving disputes. A single service may also better ensure that systemic problems deduced from complaints can be easily detected and communicated to relevant regulators. It will be easier to notice complaint patterns and draw necessary inferences as a single ADR platform will have a holistic picture of submitted complaints. Where several platforms are involved, this may be more difficult as information sharing will need to be coordinated amongst several platforms and the overseeing regulator.

Furthermore, it is arguable that a statutorily-backed service answerable to parliament may be more independent in its operations. Institutions registering as ExCBs are only sustainable if a considerable number of FRFIs decide to join them. FRFIS are also free to exit membership and join any ExCB platform of their choice. Owing to these, a possibility exists that these bodies may adopt a pro-industry approach in order to attract and retain their

[163] See section 3.4.5 for more discussion on the UK's approach.

memberships. If this occurs, it will be to the detriment of consumer interests.[164]

Apart from the ExCBs, consumers may file complaints with the FCAC or provincial consumer bureaux. Arbitration is also encouraged in the provinces, however, there appears to be no unified approach as to whether an arbitration clause is mandatory or not. In Alberta, the FTA protects the arbitration process and provides that-

> "Despite any provision of this Act, neither a consumer nor the Director may commence or maintain an action or appeal … if the consumer's cause of action … is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister"[165]

This contrasts with the position in Ontario where the OCPA states that-

> "…any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act…."[166]

[164] See S Talesh, 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws' (2012) 46(3) L&S Rev. 463; <http://blog.moneymanagedproperly.com/?p=1489> accessed 20 August 2017.
[165] S.16.
[166] S.7(2).

The OCPA's position reflects the approach under the Principles of Consumer Protection for Electronic Commerce[167] which provides that-

> "When internal mechanisms have failed to resolve a dispute, vendors should make use of accessible, available, affordable and impartial third-party processes for resolving disputes with consumers. However, vendors should not require consumers to submit to such processes"[168]

Some provinces have adopted ODR mechanisms. For instance, British Columbia offers an online dispute resolution service.[169] The service is only available to a few businesses that have agreed to use it.[170] The service has great potential and may prove helpful in resolving cross-border disputes in m-payments if it becomes widely accepted. It will circumvent difficulties such as language barriers and the cost of ensuring the physical presence of parties.

3.2.6. FINANCIAL INCLUSION

With statistics suggesting that about 96% of Canadians have bank accounts,[171] it is clear that the proportion of Canadians who are "banked" is high.[172] However, the rate of unbanked Canadians is

[167] This is a document containing voluntary principles applying to electronic commerce in Canada. It was developed by the Working Group on Electronic Commerce and Consumers in 1999. <http://strategis.ic.gc.ca/eic/site/cmc-cmc.nsf/eng/fe00113.html> accessed 30 March 2017.
[168] Ibid, principle 5.2
[169] <http://www.consumerprotectionbc.ca/odr> accessed 10 December 2016.
[170] <http://www.consumerprotectionbc.ca/images/Particpating_Businesses.pdf> accessed 10 December 2016.
[171] A Demirguc-Kunt & L Klapper, 'Measuring Financial Inclusion: The Global Findex Database' (The World Bank 2012) <https://openknowledge.worldbank.org/bitstream/handle/10986/6042/WPS6025.pdf?sequence=1&isAllowed=y> accessed 21 August 2016.
[172] S Rohan, 'Investor Brief: Promoting Financial Inclusion in Canada's Financial Services Sector' (2013)

disproportionately higher among first nation Canadians, refugees and low-income individuals.[173] Despite this and the keen interest in m-payments shown by Canadian regulators, the service has not been specifically singled out as a solution to financial exclusion.

Investment in m-payments in Canada appears to be spurred by two main factors. First, financial institutions seek to provide more payment choices for existing customers. Second, these institutions seek to gain new customer bases and generate revenue from higher volume products targeted at lower-income customers.[174] An interview with a former executive officer of the Royal Bank of Canada sheds some light on the mindset of industry. When asked what drove m-payment innovation in Canada, the response was that-

> "As the telecommunications, computing and consumer handset markets revolutionized with the emergence of LTE, cloud computing and the modern smartphone, we saw the opportunity for a mobile payments revolution. We created our solution to make mobile payments easy to use, give our clients choice in how they pay, and improve the overall security of commerce."[175]

This sheds some light on how a jurisdiction's socio-economic conditions can affect how stakeholders view the potential

<http://prospercanada.org/prospercanada/media/PDF/News/Financial-Inclusion-Investor-Brief.pdf> accessed 6 December 2016.

[173] J Robson, 'Financial Literacy in Canada: Setting a Baseline' (FCAC 2011); J Buckland, 'Strengthening Banking in Inner-cities: Practices & Policies to promote Financial Inclusion for Low-Income Canadians' (Canadian Centre for Policy Alternatives, 2008) 19.

[174] Ibid 6.

[175] PYMENTS, 'How Canada Sets the Foundation For Mobile Payments Success' (An interview with Linda Mantia, Former Executive Vice President, Digital, Payments & Cards at RBC) 2015 <https://www.pymnts.com/news/2015/how-canada-sets-the-foundation-for-mobile-payments-success-3/> accessed 22 July 2016.

presented by m-payments. As we will see in part two of this chapter, in developing countries with significant financial exclusion problems, investment in m-payments is mainly spurred by the desire to cater to unmet needs. Hence, m-payments are viewed as a transformative service which gives excluded persons a first entry into the formal financial system.

Unlike many developing countries, Canada boasts of a well-developed payment system and relatively impressive levels of financial inclusion. This suggests that that m-payments may only represent a convenient alternative payment platform which will appeal to some consumers. It is unlikely that it will be considered transformational. This is because of the availability of other established payment alternatives and the relatively lower rates of financially excluded persons. This line of thought is confirmed in the FCAC's thematic review. The FCAC acknowledges that m-payments have been significant in increasing financial inclusion in Kenya but notes that "in Canada, the model is not likely to be adopted to the same extent because the banking sector is well established and the unbanked make up a small proportion of the population."[176]

[176] Trites et al (n 2) p15.

PART 2

3.3. KENYA

Kenya's m-payment platform "M-pesa"[177] has been described as the poster child for m-payment success in Africa.[178] M-pesa was introduced in 2007 with support from the Financial Deepening Challenge Fund of the UK Department for International Development (DFID).[179] The service provides a low-cost SMS-based person-to-person money transfer platform which allows users to deposit, send and withdraw funds using their mobile phone.[180] Users may also purchase prepaid goods and services with the service. As at 2013, M-pesa was used by approximately 18 million Kenyans as opposed to the 7 million with a bank account.[181]

The Central Bank of Kenya (CBK) provided an enabling regulatory environment that allowed MNOs leverage on their technology, ubiquitous distribution networks and partnerships with banks to provide payment services to the under-served population.[182] The

[177] "M" stands for mobile while "pesa" means money in Swahili.
[178] 'Making Mobile Money Pay in Africa' <http://www.bbc.com/future/story/20120920-making-mobile-money-pay> accessed 23 November 2016.
[179] <http://www.policyinnovations.org/ideas/innovations/data/m_pesa/:pf_printable> accessed 23 November 2016.
[180] International Finance Corporation, 'M-Money Chanel Distribution Case – Kenya (Safaricom M-pesa)' <http://www.ifc.org/wps/wcm/connect/4e64a80049585fd9a13ab519583b6d16/Tool%2B6.7.%2BCase%2BStudy%2B-%2BM-PESA%2BKenya%2B.pdf?MOD=AJPERES> accessed 21 May 2017, p1.
[181] Mobile Money Association of India (MMAI) & Global System for Mobile Communications Association (GSMA), 'Mobile Money: The Opportunity for India' (2013) <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/12/MMAI-GSMA-on-Mobile-Money-in-India-for-RBI-Financial-Inclusion-Committee_Dec13.pdf> accessed 11 February 2016, p5.
[182] Ibid.

CBK did not issue overly prescriptive requirements that discouraged investments by service providers.[183] There was rapid customer uptake due to a ubiquitous distribution network at the grassroots level, trusted brands, and relatively low-cost transactions in comparison to existing money transfer methods.[184] Given the success of M-pesa, m-payments' potential in furthering financial inclusion has become more tangible.

Despite its success, M-pesa highlighted a gap in the regulation of payment services in Kenya.[185] It became clear that a modern payment services law was required.[186] Consequently, the National Payment Systems Regulations (NPSRs) was passed in 2014. The NPSRs introduced new regulatory rules for the payment sector and identified the CBK as the primary supervisory authority for payment service providers (PSP).[187] The NPSRs set out basic e-money rules and require interested firms to apply for

[183] Ibid 6.
[184] B Muthiora, 'Enabling Mobile Money Policies in Kenya Fostering a Digital Financial Revolution' (2015) <https://www.gsmaintelligence.com/research/?file=0899b64241eef71ea0141e2f80fdb690&download> accessed 10 January 2017, p6.
[185] Alliance for Financial Inclusion, 'Enabling Mobile Money Transfer: The Central Bank of Kenya's treatment of M-Pesa' (2010) <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/09/enablingmobilemoneytransfer92.pdf> accessed 2 December 2016, p6.
[186] Ibid.
[187] Regulation 30 NPSRs.

authorization/ registration.[188] MNOs may be designated as payment service providers[189] or e-money issuers.[190]

There are certain provisions in the NPSRs aimed at protecting customers. These provisions are supported by the CBK's Prudential Guidelines on Consumer Protection (PGCP) which contain enforceable rules issued under the Banking Act 1999 (as amended).[191] It applies to institutions licensed under the Banking Act. Sectoral efforts are complemented by provisions in the Kenyan Consumer Protection Act (KCPA) 2012. These are discussed subsequently.

3.3.1. PROVISION OF INFORMATION

3.3.1.1. MANDATORY DISCLOSURE

The NPSRs and PGCP contain mandatory disclosure requirements applying to m-payments. The NPSRs apply to all PSPs whether licensed as financial institutions (FIs) or non-FIs. The NPSRs provide minimum requirements for a mandatory disclosure regime. Firms are mandated to provide-

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[188] Regulation 4. A firm issuing e-money on a small-scale may apply for registration as a small e-money issuer. and will be exempt from complying with some provisions in the NPSRs; Regulation 46(1) & (2).

[189] S.2 of the National Payment System Act 2011 defines a "payment service provider" as -

"i. a person, company or organisation acting as provider in relation to sending, receiving, storing or processing of payments or the provision of other services in relation to payment services through any electronic system;
ii. a person, company or organisation which owns, possesses, operates, manages or controls a public switched network for the provision of payment services; or
iii. any other person, company or organisation that processes or stores data on behalf of such payment service providers or users of such payment services"

[190] This is a payment service provider authorized to issue e-money under the NPSRs; Regulation 2.

[191] S.33(4).

> "…a clear and understandable description of the services which it offers and the rates, terms, conditions and charges for such services and shall publish such information and display it prominently at all points of service…." [192]

Disclosure statements are to be issued to consumers free of charge[193] upon their request.[194] Ongoing disclosure requirements are also mandated to ensure that customers can identify and track individual transactions carried out on their account.[195] PSPs must notify their customers and the CBK of any material changes to information displayed.[196]

The PGCP which applies to only FIs contains similar provisions. It requires that where a consumer has decided to purchase a product/service, an FI must–

> "provide the consumer with general information or a summary of the main features of the product or service including the interest rate, charges, fees or other financial obligation relating to the product or service"[197]

Like the NPSRs, the PGCP requires that consumers are given a copy of the applicable terms and conditions.[198] Consumers are entitled to further information on any additional charges, fees, or interests that will be payable if they terminate the contract

[192] Regulation 35(1)(a).
[193] Regulation 35(6).
[194] Regulation 35(7).
[195] Regulation 35(3) & (4).
[196] Regulation 35(1)(c).
[197] Paragraph 3.2.3(b)(i). The Kenya Information and Consumer Protection Regulation issued by the CAK mandate information disclosures on applicable rates, terms and conditions of services offered. <https://www.centralbank.go.ke/images/docs/legislation/Prudential%20Guidelines-January%202013.pdf> accessed 20 November 2016.
[198] Paragraph 3.2.3(b)(ii).

early.[199] The PGCP also mandates that consumers be notified[200] of any proposed changes to the terms and conditions of services[201] they subscribe to.[202] The PGCP goes further than the NPSRs by requiring that FIs provide their customers with a "key facts" document on a product if requested or if the nature of the transaction necessitates.[203] The PGCP also requires that firms disclose the name and contacts of its regulator. This is to ensure that consumers can contact the regulator where the firm fails to meet its regulatory responsibilities.[204]

Furthermore, the PGCP requires that-

> "where a consumer is unable to understand English and Swahili, provide an oral explanation in a language the consumer understands. The institution may also arrange for a written translation of the information into the language the consumer understands should the nature of the transaction require such a translation and as may be mutually agreed upon by the institution and the consumer"[205]

Additionally, it provides that where consumers are unable to understand written information, oral explanations should be used.[206] These provisions are significant in assisting uneducated consumers. Disclosures are meaningless if the consumer cannot make sense of the information.[207] Thus, making necessary

[199] Paragraph 3.2.3(b)(iii).
[200] The mode of notification shall be agreed at the time of establishing the relationship. Paragraph 3.2.9.
[201] The Kenyan Competition Act 2010 (as amended) also prohibits financial institutions from imposing unilateral fees and charges if they are not brought to the attention of the consumer prior to the provision of a service/product. S.56(3) & (4).
[202] This must be done at least 30 days prior to implementing such changes. Paragraph 3.2.7(a).
[203] Paragraph 3.4.3(i)
[204] Paragraph 3.4.1.
[205] Paragraph 3.4.2(i)(e).
[206] Paragraph 3.4.2(1)(f).
[207] D Cayne, M Trebilcock, 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 U. Toronto L.J 396, 406.

allowances by encouraging translated disclosure documents and oral explanations may help with supporting disadvantaged consumers. However, this does not guarantee better decision-making because it is possible to understand the language and words spoken but not the significance of terms used in specialized financial transactions.[208] What this suggests is that although these efforts are important in assisting consumers, they will need to be complemented by financial literacy initiatives that help consumers better appreciate the significance of the disclosed information.

There are also disclosure requirements in the Kenya Information and Communications (Consumer Protection) Regulations (KICRs) 2010 which apply to MNOs.[209] With respect to m-payments, it appears that the NPSRs provide the minimum disclosure obligations applying uniformly to all PSPs. Additional disclosure requirements in the PGCP and KICRs apply depending on the status of the provider. Thus, a bank would also need to satisfy the obligations in the PGCP while an MNO would need to satisfy the KICRs. This disparity suggests that some consumers will enjoy better disclosures in comparison to others. As shown above, the PGCP contains requirements for oral disclosures to support uneducated consumers. There is no comparable provision in the

[208] For this reason, the regulatory approach in countries like the UK requires that terms are articulated in a way that allows consumers to make informed choices. Hence, the UK looks beyond the substance and presentation of terms alone but also concerns itself with the significance/effect of terms used. See sections 3.4.3.1.1 and 3.4.3.1.2.
[209] See Regulation 20.

NPSRs and KICRs. Thus, only m-payment consumers dealing with FIs will benefit from oral disclosures.

The PGCP requires that "consumer research should be conducted to help determine and improve the effectiveness of disclosure requirements."[210] This is significant because insights from research can assist in evaluating current regulatory policies. Moreover, the literature suggests that there can be disparities between how effective a policy seems on paper and how effective it is when applied to real life situations.[211] A good illustration of this is evident in the report of a consumer protection diagnostic study conducted in Kenya.[212] The report shows that prior to the passing of the NPSRs, M-pesa was reported to have had transparent pricing schedules with price tariffs being published and made available to users.[213] This pricing schedule adopted a tiered fee model where users were charged according to the monetary value of a transaction. This model was adopted to ensure that the service would be affordable.[214]

Despite efforts made in disclosing the pricing schedule, Flaming et al report that owing to literacy and numeracy concerns, some consumers did not fully understand the tariffs.[215] Consequently, most customers made transactions in the lower tariff tiers and did

[210] Para 3.4.1(v)
[211] See R Pound, 'Law in the Books and Law in Action' (1910) 44 ALR 12.
[212] M Flaming, A Owino, K McKee et al, 'Consumer Protection Diagnostic Study Kenya' (2011) <http://s3-eu-central-1.amazonaws.com/fsd-circle/wp-content/uploads/2015/08/30095758/11-02-22_Consumer_diagnostic_study.pdf> accessed 13 November 2016, pp.12-13.
[213] Ibid.
[214] IFC (n 180) p5.
[215] Ibid.

not transact in other tariff tiers they considered more complex.[216] Thus, although M-pesa focused on transparent tariff disclosures to assist with decision-making, it led to confusion and indirectly limited the choices open to less literate persons who could only transact on less complex tariffs.

This experience reinforces certain points highlighted in chapter two.[217] First, as Weatherill points out, for several reasons it is possible that consumers will not process information correctly.[218] In the context of M-pesa, the reason suggested by the consumer study was lack of education. Second, commentators like Cayne and Trebilcock argue that consumers react differently to information and only those that are psychologically and intellectually equipped to apply the information provided can benefit from disclosures.[219] The consumer report confirms this as it was those consumers who were intellectually handicapped that had a problem understanding the price schedule. Third, the M-pesa experience confirms that information overload and complexity can create undesirable results.[220] Rather than the desired goal of aiding decision-making, some consumers avoided transactions on tariff tiers they could not understand. All these points confirm, as argued in chapter two, that while disclosures

[216] Ibid.
[217] See section 2.5.3.
[218] G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) J.L & S 349, pp.355-357.
[219] Cayne and Trebilcock (n 207) 406.
[220] Better Regulation Executive & National Consumer Council, 'Warning: Too much Information Can Harm' (2007) <http://www.eurofinas.org/uploads/documents/policies/NCB-BRE-Report.pdf> accessed 29 July 2015; O Ben-Shahar, C Schneider, 'The Failure of Mandated Disclosure' (2011) 159 U.Penn.L.Rev. 647.

are important in providing the "raw material upon which rational purchasing decisions depend"[221] it is not always sufficient on its own. For this reason, efforts in improving disclosures will need to be supported by other consumer policy tools that address its limitations.

3.3.1.2. CONSUMER EDUCATION

Kenya's financial education regime involves a blend of public-private partnerships and traditional regulatory initiatives. The CBK, in collaboration with the Kenyan Financial Sector Deepening Trust (FSD),[222] is in the process of developing a National Strategy for Financial Education.[223] To this end, a platform was established known as the Financial Education and Protection Program (FEPP). The FEPP comprises public bodies and private stakeholders[224] and was formed to drive the implementation of financial education and consumer protection initiatives.[225] The Governor of the CBK is the "official champion" of the FEPP while the FSD provides secretariat support.[226]

The FSD supports a pilot project[227] to convey financial literacy messages through a TV soap opera dubbed "Makutano

[221] Cayne and Trebilcock (n 207).
[222] The FSD programme was established in 2005 to support the development of financial markets in Kenya and expand access to financial services. The programme works in partnership with the financial services industry and operates as an independent trust. <http://fsdkenya.org/about-us/> accessed 13 November 2016.
[223] F Messy, C Monticone, 'The Status of Financial Education in Africa' (2012) <http://dx.doi.org/10.1787/5k94cqqx90wl-en> accessed 10 December 2016, p33.
[224] Members include the Central Bank, various Ministries, the FSD, Non-governmental Organisations, financial institutions, and other private sector companies; ibid.
[225] Flaming et al (n 212) 28.
[226] Ibid 1.
[227] Which is partially funded by the UK DFID's Financial Education Fund; Messy & Monticone (n 223) 34.

Junction."[228] At the end of episodes conveying financial literacy messages, the audience may send a text message requesting a leaflet containing information discussed in the episode.[229] The leaflets address issues of budgeting, saving, investments and debt management.[230] Where banking services have been referenced in an episode, the leaflets also include an application enabling consumers to sign up with the bank involved.[231]

While this is an innovative way to provide information, one criticism is that the approach may be interpreted as indirect marketing. It is possible that financial institutions may provide sponsorship support or pay for advertising coverage of their services on the show. In such cases, information on their products may be included or given some prominence on the show. This situation will prevent information from being relayed in an unbiased manner. Consumers may, thus, be swayed to deal with the providers receiving more publicity even though there are others who will better serve their needs.

Apart from its collaborative efforts with the FSD, the CBK also takes independent initiatives to encourage financial education. For instance, the PGCP requires FIs to educate their customers through mechanisms such as posting frequently asked questions on their websites, using brochures and organising public awareness campaigns.[232] They are also encouraged to maintain

[228] Flaming et al (n 212) 28.
[229] Messy & Monticone (n 223) 34.
[230] ibid
[231] Ibid.
[232] Para 3.2.3(c).

call centres with competent staff attending to customer queries.[233] The strategies encouraged under the PGCP have been the most popular methods for disseminating information on m-payments.

M-pesa's history points to the role targeted education initiatives play in encouraging the uptake of m-payments. Prior to introducing M-pesa, it is reported that many Kenyans were already familiar with using a mobile phone for basic operations like making voice calls and sending text messages.[234] During the pilot phase, however, it became clear that using a mobile phone for financial transactions was alien to a large percentage of the populace, particularly those in rural areas with low financial literacy rates.[235] Safaricom[236] decided to organise training and refresher sessions to familiarise trial participants with the service. Armed with the knowledge that there was an education gap, Safaricom allocated a part of its marketing budget towards educating consumers. It organised awareness promotions, road shows and consumer education campaigns in the rural areas.[237] Brochures with clear instructions and illustrations were also distributed to ensure customers could understand how M-pesa worked.[238]

Safaricom's approach meant that within a short time, a large percentage of the population became conversant with the workings of M-pesa. Perhaps this may explain why there have

[233] Ibid.
[234] IFC (n 180) 19.
[235] Ibid.
[236] This is the MNO behind M-pesa.
[237] IFC (n 180) 19.
[238] Ibid.

been no education initiatives emanating from the CBK and targeted at m-payments. It is possible that this issue has been taken for granted because of M-pesa's success. This is more so because, by the time a full regulatory regime was put in place,[239] M-pesa was already an established service. Although the education initiatives emanated from industry, Safaricom's strategy emphasises that engaging the demand side through targeted consumer education may play an important role in encouraging the adoption of m-payments.

M-pesa's experience raises the question as to which stakeholder is best placed to provide targeted financial education for innovative financial products. Safaricom used M-pesa's pilot phase to educate trial participants and to gather data that informed its consumer education strategy. It may not be pragmatic for regulators to make such commitments to a specific product because of the limited resources at their disposal. Nonetheless, regulators may be better placed to provide general financial education which provides the foundation for targeted initiatives. There is an argument that industry may be better positioned to educate consumers on specific innovative products. This is because they will likely have more expertise with the product having been involved in developing it.

[239] The passing of the National Payment System Act 2011 and the NPSRs heralded the beginning of full regulatory oversight over the Kenyan payment industry including m-payments.

However, leaving targeted financial education as the sole responsibility of industry can be precarious. This is because industry may not always be motivated to invest in providing financial education since information is a public good.[240] Firms may rely on their competitors who provide similar products to take the lead in educating consumers thereby causing a free rider problem. To prevent this, a collaborative approach may be adopted. This approach will see a financial literacy regime mandating industry to take the lead with educating consumers on specific innovative products. Industry's efforts will, however, be under the scrutiny of regulators. This collaborative approach will not bar regulators from developing targeted financial literacy initiatives, it will only require that institutions seeking to introduce new products make concerted efforts towards educating intended consumers.

3.3.2. CANCELLATION RIGHTS AND COOLING-OFF PERIODS

The NPSRs are silent on cooling-off periods and cancellation rights. The PGCP contains a section marked "cooling-off periods."[241] It provides that prior to contracting, an institution shall -

> "inform the consumer of his right to take some time to think over the proposed transaction before signing the contract or committing himself to take the product or use the service."[242]

[240] See section 2.5 for a discussion on public goods.
[241] Paragraph 3.2.6.
[242] Paragraph 3.2.6 (a)(ii).

It further states that the institution shall "request the consumer to confirm whether he needs some time to reconsider the proposed transaction."[243] While these provisions ensure that consumers have some time to contemplate before entering a transaction, it does not provide the same opportunities where a transaction has been completed. Thus, these provisions appear to be pre-contractual efforts aimed at preventing pressure sales rather than true post-contractual cooling-off periods allowing consumers to cancel contracts without consequences. This point is further buttressed by examining the KCPA.

Part IV of the KCPA also provides for cooling-off periods with attendant cancellation rights. However, these only apply to specific contracts[244] and not payment services contract. A comparison may, however, be drawn between the wordings of the KCPA and the PGCP. For instance, with respect to timeshare agreements, the KCPA provides that-

> "A consumer may, without any reason, cancel a timeshare agreement at any time from the date of entering into the agreement until ten days after receiving the written copy of the agreement."[245]

It is clear from the wording that the KCPA envisages the right to act after a transaction is finalised as opposed to the opportunity to contemplate before completing a transaction as provided in the PGCP. As with Canada, one may interpret the KCPA's regime as suggesting that if the underlying transaction supported by m-

[243] Ibid.
[244] e.g. timeshares and personal development contracts.
[245] S.23(1).

payments is one for which cooling-off periods apply under the KCPA, then a consumer may take advantage of it. However, this interpretation cannot be stretched to include contracts dealing with the subscription of the service itself. Thus, it appears that clarity is needed on how cooling-off periods apply to direct subscription for m-payment services.

3.3.3. REGULATING BUSINESS PRACTICES

Provisions in the KCPA and PGCP contribute towards regulating business practices in the financial sector. It is expected that the current regime will extend to m-payments.

One of the aims of the KCPA is to promote fair and ethical business practices.[246] it is also dedicated to –

> "protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct."[247]

To this end, the KCPA states that "no person shall engage in an unfair practice."[248] It further provides that "a person who performs an act referred to in sections 12, 13 and 14 shall be deemed to be engaging in an unfair practice."[249] The sections mentioned, i.e., sections 12, 13 and 14 cover three broad categories namely, the use of false, misleading and deceptive representations,[250] the use

[246] S.3(4)(c).
[247] S.3(4)(d) KCPA.
[248] S.15(1).
[249] S.15(2).
[250] S.12.

of unconscionable representations[251] and the adoption of practices which allow a supplier to pressure a consumer into renegotiating the terms of a consumer transaction.[252] Hence, the KCPA provides three broad categories of activity which are considered unfair.

The KCPA does not explain the meaning of the term "unfair" and it does not provide a test or criteria to guide in the determination of unfairness. Rather the KCPA lists examples of factors that could be considered when determining if a practice falls within the first two categories[253] of unfair practices. These are discussed in more detail in section 3.3.3.2.

One may argue that the scope of the KCPA's provisions on unfair practices is limited. This is because unfair practices take a variety of forms which go beyond the categories identified. While one does not expect a statue to list every form of unfair practice, the use of broad definitions and/or standards of fairness allows its reach to extend beyond specific practices listed in the statute. Thus, it is argued that the absence of a broad definition/standard for evaluating unfairness limits the scope of the KCPA's provisions.

Furthermore, the scope of the third category is arguably inadequate. The KCPA provides that-

> "It is an unfair practice for a person to use his, her or its custody or control of a consumer's goods to pressure the consumer into renegotiating the terms of a consumer transaction"

[251] S.13
[252] S.14
[253] i.e. the use of false, misleading and deceptive representations and the use of unconscionable representations.

The section only mentions "goods" and if narrowly construed, it may be interpreted to exclude "services" under which m-payments fall.[254] However, what is most significant is that the section only targets conduct that pressures a consumer to renegotiate the terms of a completed transaction. It invariably ignores similar unfair conduct which may be used to pressure the consumer to enter into the agreement in the first place. It also ignores conduct that may affect how such agreement is enforced to the detriment of a consumer.

Improper pressure could be caused by duress, undue influence, harassment and other unconscionable behaviours. The section does not explicitly identify the targeted conducts. Drawing inferences is also difficult as the KCPA does not provide any examples or factors that may be considered in concluding that a consumer has been pressured to renegotiate the terms of a transaction.

In the financial sector, the PGCP states that the relationship between FIs and their customers shall be guided by certain principles one of which is fairness.[255] In promoting their services, the PGCP states that an institution shall not-

> "engage in unfair, deceptive, oppressive or aggressive practices such as threatening,

[254] In interpreting statutes in some common law jurisdictions, the express mention of a thing excludes all others not mentioned. This is embodied in the Latin maxim *'expressio unius est exclusio alterius'* meaning that to express one thing is to exclude the other.
[255] The other principles include reliability, transparency, equity and responsiveness. Paragraph 3.1(ii)

> intimidating, being violent towards, abusing, being non-responsive or humiliating a consumer" [256]

Furthermore, firms must not "exert undue influence or duress on a consumer to enter into a transaction."[257] The PGCP does go a step ahead of the KCPA by identifying the unconscionable practices that will be considered unfair. However, like the KCPA, the PGCP does not provide any definition of fairness. It also does not clarify what criteria will be used to determine if a practice is "deceptive" "oppressive" or "aggressive" neither does it provide guidance for determining if a firm has engaged the use of undue influence or duress.

Where consumers have been subjected to unfair practices, the KCPA provides that-

> "Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages." [258]

Where rescission is impossible, a consumer may recover any difference by which the amount paid under the contract exceeds the value of the goods or services. The consumer may also recover damages in addition or as an alternative. [259] The PGCP does not provide direct remedies for the consumer. The CBK imposes administrative sanctions on non-compliant FIs on the basis that

[256] Paragraph 3.2.1(c)(i).
[257] Paragraph 3.2.1(c)(vi).
[258] S.16(1) KCPA.
[259] S.16(2) KCPA

they are contravening the Bank Act and not on the basis of providing remedies to consumers.[260]

3.3.3.1. CONTRACT TERMS

3.3.3.1.1. STANDARD TERM CONTRACTS AND FAIRNESS

There is no independent regulatory regime for contract terms in Kenya. However, the unfair practices regime can accommodate the regulation of contract terms. For instance, under the KCPA, one factor for determining whether a representation is unconscionable is if the representations are made with the knowledge that the contract terms are so "adverse to the consumer as to be inequitable."[261] Similarly, in prohibiting unfair practices, the PGCP directs firms not to include unconscionable or unreasonable terms in their agreements with consumers.[262] The NPSRs are silent on the regulation of contract terms.

While the use of unreasonable and inequitable terms is prohibited by the KCPA and PGCP, both instruments contain no guidance for detecting defaulting terms. As noted in section 3.3.3, since the KCPA provides no definition/standards for determining fairness, it is difficult to predict what criteria will be used to determine whether a term is "so adverse to the consumer as to be inequitable." The same problem applies to the PGCP as there are no criteria for establishing that a term is "unconscionable" or

[260] Part VI PGCP.
[261] S.13(2)(f) KCPA.
[262] Paragraph 3.2.1(c)(v).

"unreasonable." This lack of certainty suggests that clarification may only be made when disputes arise. This is not ideal as regulatory certainty ensures that parties are aware of what standards they are held to and the consequences that follow for falling short. Regulatory subjects should be able to judge the law's reaction to their conduct when making a choice between legal and illegal acts.[263] Moreover, uncertainty leads to increased costs as there are higher chances of litigation.[264]

3.3.3.1.2. TRANSPARENCY

Although there is no regime dedicated to regulating contract terms, there are provisions in the PGCP which can be interpreted as encouraging transparency. The PGCP broadly states that the relationship between an institution and its customers shall be based on transparency.[265] Although it does not define transparency, it dedicates some provisions to explaining what is expected of a firm with regards to upholding this principle.

Para 3.4.2(i)(a) of the PGCP states that institutions must-

> "ensure that any information given to a consumer on among other things benefits, prices, risks and the terms and conditions; whether in writing, electronically or orally is fair, clear and transparent"

[263] I MacNeil, 'Uncertainty in Commercial Law' (2009) 13(1) ELR 68, 69; See also R Goode, 'The Philosophy and Concepts of Commercial Law' (1988) 14 Monash LR 135.
[264] MacNeil (n 263) 72.
[265] Paragraph 3.1(ii).

Firms are to ensure that such information is easily comprehensible so that consumers can make informed choices.[266] Furthermore, firms are required not to-

> "disguise, diminish, obscure or conceal a material fact or warning through, among others, use of small prints which cannot be read easily, describing the material fact or warning in complex language, use of voluminous documents or omitting a material fact or warning"[267]

The information contained in advertising and marketing material is also expected to be written in simple language and in legible fonts that can be easily read.[268] However, these provisions are general and are not specifically framed to apply to contract terms. Hence it is unclear what role transparency will play in the regulation of contract terms used in m-payments.

3.3.3.2. FALSE AND MISLEADING INFORMATION

The bulk of the provisions controlling false and misleading information are contained in the KCPA. The KCPA applies generally and extends to m-payments. In regulating the use of false and misleading information, the KCPA recognises two categories namely false representations which could be misleading or deceptive[269] and unconscionable representations.[270] As noted in section 3.3.3, the use of representations falling under either

[266] Paragraph 3.4.2(i)(b).
[267] Paragraph 3.2.1(c)(vii).
[268] Paragraph 3.4.8(b).
[269] S.12; Where a person has in good faith published and distributed such representations in the ordinary course of business, they will not be guilty of non-compliance; s.15(3).
[270] S.13.

category is deemed to be an unfair practice. The distinction between both categories is a fine one. The false representation category appears to focus on representations which deal with the characteristics and quality of a service as well as the identity of the provider. Unconscionable representations on the other hand focus on representations which seek to take advantage of the consumer's personal limitations or bargaining power.

With respect to false representations, the KCPA provides examples of targeted statements. The most relevant to m-payments will include the use of false, misleading or deceptive representations which suggest that a transaction involves or does not involve rights, remedies or obligations.[271] Others include representations which suggest that a service has a claimed approval or sponsorship and representations which use exaggeration, innuendo or ambiguity so as to conceal a material fact or which fail to state a material fact with the intention to deceive.[272] One thing to note is that in introducing the examples of false misrepresentations, the KCPA states that the examples are "without limiting the generality of what constitutes a false, misleading or deceptive representation"[273] The broad wording suggests that the list is not exhaustive. This introduces the flexibility that will be useful for future enforcement. The only problem lies in the KCPA's failure to provide a clear standard of fairness.

[271] S.12(2)(m).
[272] S.12(2)(n).
[273] S.12(2).

With respect to unconscionable representations, the KCPA states that in determining if a representation falls within the category, certain facts known[274] to the maker of the statement must be taken into account.[275] For instance, a representation may be unconscionable where it is made by a person who ought to know that-

> "the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors."[276]

While this provision does not deal with the falsity of a representation, it serves to provide some protection for vulnerable consumers who suppliers know may be misled due to the factors listed. This provision indirectly recognises that all consumers have a differing capacity to process information and that a true statement may still be capable of misleading a consumer owing to certain limitations. As will be seen in section 3.4.3, making allowances to protect vulnerable consumers is common practice in other jurisdictions.

Other examples of unconscionable representations listed in the KCPA include statements of opinion that a maker knows are misleading and will be likely relied on by the consumer to his detriment.[277] Unconscionable representations may also be inferred

[274] Or ought to be known.
[275] S.13(2). As with false representations, the KCPA also uses wide wordings to introduce the examples of factors that may be considered.
[276] S.13(2(a).
[277] S.13(2(g).

where the price grossly exceeds the price at which similar services are offered[278] or where the consumer is placed under undue pressure to enter into the transaction.[279] The remedies available to the consumer under the KCPA are the same ones applicable to general unfair practices discussed in section 3.3.3.

The PGCP and NPSRs also contain supporting provisions aimed at preventing the use of false and misleading information. For instance, the PGCP mandates FIs to ensure that advertising and promotional materials are fair, clear and not misleading.[280] Similarly, the NPSRs require PSPs to ensure that their adverts are precise, easily understood[281] and not misleading to consumers.[282]

3.3.4. ALLOCATION OF LIABILITY

The NPSRs contain general liability rules for payment services which apply to m-payments. These rules are technologically neutral in the sense that they are not drafted to apply to specific payment instruments but instead apply to PSPs. PSPs are defined broadly under the Kenyan National Payment System Act (NPSA) 2011 and easily incorporate traditional FIs like banks and non-FIs like MNOs.[283]

[278] S.13(2)(b).
[279] S.13(2(h).
[280] Paragraph 3.4.8
[281] Regulation 37(a).
[282] Regulation 37(b).
[283] See s.2 NPSA.

With regards to unauthorised transactions, the NPSRs provide that-

> "A payment service provider shall be liable for payment transactions performed without the knowledge of the customer:
>
> Provided that such liability may be contractually excluded in circumstances where the payment service provider—
>
> (a) proves an element of fault on the side of the customer in the use of the service; or
>
> (b) demonstrates at first glance that the payment instruction was carried out by the legitimate customer."[284]

Thus, although PSPs are generally liable for unauthorised transactions, the NPSRs permit the contractual exclusion of liability in two circumstances. While the first circumstance dealing with fault on the side of the customer is relatively clear, the second circumstance is slightly confusing. PSPs can limit their liability if they are able to show that at "first glance" that the payment was carried out by a legitimate customer. The NPSRs do not explain how providers may demonstrate legitimacy at "first glance." One may argue that in the absence of any report of fraud, most transactions emanating from a customer's account qualify to be treated as legitimate "at first glance." The intent behind the provision appears vague and may introduce uncertainty that will be clarified by future enforcement.

Unauthorised transactions occur due to several reasons such as theft and loss of a payment instrument. The NPSRs do not contain

[284] Regulation 28(5).

provisions acknowledging these possibilities and, thus, do not clarify whether PSPs remain liable if theft or loss of a payment instrument or device occurs and they are not notified.[285] Hence, if for example, a mobile phone is stolen and used for unauthorised transactions, it is unclear whether a PSP will remain liable if the consumer does not notify them of the theft.

The NPSRs permit PSPs to appoint agents to carry out some functions on their behalf.[286] The NPSRs confirm that "a payment service provider is liable to its customers for the conduct of its agents, performed within the scope of the agency agreement."[287] Consequently, it prohibits PSPs from excluding their liability under the agency agreement.[288] This provision was considered necessary owing to Safaricom's stance with M-pesa. Prior to passing the NPSRs, Safaricom asserted that it would not be responsible for the acts of its agents.[289] This worried observers who feared that this would set a worrying precedent which would place consumers in a disadvantaged position.[290] Thus, the NPSRs' position sought to address this issue.

With regards to non-executed/improperly executed payment transactions, the NPSRs provide that -

> "A payment service provider shall, where it is liable under this Regulation for non-execution or defective

[285] The PGCP requires that firms provide telephone lines through which consumers may report the loss/theft of payment instruments or suspicious transactions. However, these provisions apply with regards to protecting the account of a consumer and not the allocation of liability; Paragraph 3.3.4(b).
[286] S.14(3)(a).
[287] S.14(4).
[288] S.14(5).
[289] Flaming et al (n 212) pp9 & 13.
[290] Ibid.

> execution of an electronic retail transfer, without undue delay, restore the debited payment account to the state in which it would have been had the defective transaction not taken place, including a refund of the charges imposed."[291]

Although it is quite clear that the consumer will be entitled to a refund in such circumstances, the NPSRs do not clarify what falls within the scope of "defective execution." Nonetheless, other provisions in the same section of the NPSRs suggest that "defective execution" will cover situations where the full amount instructed to be transferred is not paid or where improper charges have been deducted.[292] Since a right to refund is involved, it would have been more helpful for the NPSRs to clearly and exhaustively spell out the scope of circumstances considered as "defective execution."

3.3.5. DISPUTE RESOLUTION

Kenya's dispute resolution regime encourages the use of internal redress mechanisms established by firms and other available ADR procedures. With respect to internal redress mechanisms, the NPSRs and PGCP mandate firms to set these up. The NPSRs require that PSPs shall-

> "within a period of six months after commencing the provision of payment services, establish a customer care system within which its customers can make inquiries and complaints concerning its services…"[293]

[291] Regulation 28(4).
[292] S.28(2).
[293] S.38(a).

Prior to establishing this customer care system, PSPs are mandated to provide adequate means for customers to file complaints.[294] By making this a compulsory requirement for commencing business, PSPs are forced to ensure that complaints handling procedures are given priority.

These internal mechanisms are available free of charge and must be disclosed to the consumer.[295] Thus, the NPSRs require that at the point of service, customers must be informed of the name of the PSP and the contact medium for accessing its customer care.[296] Disclosed information must be provided in an easily comprehensible manner.[297]

Complaints should be made within 15 days "from the date of occurrence."[298] On receipt of a complaint, a PSP is expected to advise the customer-

> "(a) of the expected actions and timing for investigation and resolution of the complaint; and
>
> (b) if the payment service provider regards the complaint as frivolous or vexatious."[299]

If the customer is dissatisfied with the advice given, the NPSRs indicate that the customer "shall have further recourse in accordance with these Regulations and the Consumer Protection

[294] Regulation 38(b).
[295] Regulation 39(7).
[296] Regulation 35(2).
[297] Regulation 38(d).
[298] Although the NPSRs do not specify what event the "occurrence" refers to, it is reasonable to infer that it refers to the occurrence of the event/transaction that is the cause of the dispute in question. Regulation 39(1).
[299] Regulation 39(3)

Act, 2012."[300] The NPSRs also permit customers to approach the CBK where dissatisfied with the handling of a complaint.[301] In the absence of a financial ombudsman service, it appears the NPSRs expect the CBK to indirectly take up this role. However, there is some doubt about how the CBK can effectively handle consumer-business disputes in addition to its core responsibilities.[302]

The NPSRs give a 30-day mandatory time frame for resolving all disputes received. The use of a mandatory time frame may ensure that firms give priority to dealing with complaints received. Within the period allocated for resolving complaints, the NPSRs require that mechanisms[303] are put in place to ensure consumers can monitor the progress of the complaint.[304]

One weakness with the NPSRs' regime is that there is no mechanism ensuring that PSPs comply with the dispute resolution provisions. For instance, it does not include reporting requirements mandating PSPs to disclose how they are meeting their responsibilities. The NPSRs do not also include mechanisms that assist in detecting systemic problems from the complaints data. If mandatory reports are made to the regulator, they may be able to identify patterns enabling them to draw necessary inferences. As argued in section 3.2.5, a statutory ombudsman

[300] Regulation 39(4)
[301] Regulation 40(5).
[302] On the CBK website <https://www.centralbank.go.ke/> there is a section dedicated to explaining its "core functions," consumer protection and dispute resolution are not included on its list.
[303] The regulations suggest the use of complaint reference numbers or other identifiers to facilitate timely and accurate responses to inquiries by consumers. See Regulation 39 (7)(3) NPSRs.
[304] Regulation 39(7).

can be particularly useful in this regard because it serves as a central point for complaints, making it easier to identify systemic issues.

Where payment disputes involve MNOs, consumers may in addition to the NPSRs' regime, rely on the redress procedures contained in the KICRs issued by the Communications Authority of Kenya (CAK).[305] In the case of payments services offered by banks, their customers may also rely on the dispute resolution processes under the PGCP. The provisions in the PGCP are similar to those in the NPSRs. Firms are expected to establish internal redress procedures[306] which must be communicated to consumers.[307] Unlike the NPSRs, the PGCP includes a mechanism to encourage compliance. It provides that-

> "When assessing the track record of an institution in investigating and determining complaints, the Central Bank of Kenya will have regard to the quality and fairness of the institution's investigations and determinations and to the clarity of its written communications to complainants."[308]

The PGCP also includes a mechanism for identifying systemic issues. it requires that-

> "Institutions shall put in place arrangements to ensure that, in handling complaints, it identifies and remedies any recurring or systemic problems by:
>
> (a) Analyzing the causes of individual complaints in order to identify any failings in processes, products or services and staff; and

[305] See Regulations 7-11 of the KICRs.
[306] Para 4.1.
[307] Para 4.2; Para 4.3(1)(d).
[308] Para 4.3(II) PGCP.

(b) Correcting any such failings."[309]

The PGCP places the responsibility on FIs to correct identified systemic problems. However, there is no procedure for ensuring that this duty is performed or that the remedial actions adopted are appropriate. It is argued that this duty ought to be closely supervised by the CBK. Where systemic issues are caused by an FI's practices, there is no guarantee that these issues will be remedied in the absence of independent supervision and sanctions.

For instance, consumer complaints may be linked to unfair advertising practices by banks which misleads consumers into subscribing to inappropriate m-payment services. While consumers suffer detriment from poor decision making induced by the misleading information, banks increase their revenue from unfair behaviour. Customers may lodge several complaints about this which would ordinarily point an unbiased third party to the underlying problem. However, since the banks are the source of the problem and benefit from it, it is unlikely that they will correct their practices unless regulatory sanctions are foreseeable.

The Kenyan Constitution 2010 encourages courts to consider the use of "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms"[310] The KCPA also aims to promote

[309] Para 4.6.
[310] S.159(2)(c).

consumer welfare by "providing consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions."[311] While encouraging the use of ADR, the KCPA also confirms that a consumer's assent to ADR cannot be used to prevent them from accessing other redress options. The KCPA states that –

> Any term or acknowledgement in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act."[312]

Where parties, however, agree to arbitration and submit to the process, the outcome is binding[313]

There is currently no financial ombudsman service although a draft Financial Services Authority Bill 2016 seeks to create one.[314] If the bill is successful, m-payments users will have access to the service as its mandate covers financial products including facilities through which a person can make non-cash payments.[315] In the absence of a statutory ombudsman, the private sector fills the gap. A non-profit platform known as the Dispute Resolution Centre (DRC)[316] is available to assist consumers to settle complaints using ADR. The Kenya Bankers Association has also collaborated with the

[311] S.3(4)(g).
[312] S.88(1).
[313] S.88(3).
[314] Part XI
[315] A mobile device would be a facility in this context; S.3(1)(c).
[316] It was founded in 1997 and provides consultancy and training services to the public and private sectors; <http://www.disputeresolutionkenya.org/profile.htm> accessed 30 November 2016.

privately-run Strathmore Dispute Resolution Centre to provide a mediation pilot project that caters to banking-related disputes.[317]

Consumer organisations also assist consumers in resolving conflicts. The Consumer Information Network of Kenya (CIN), for example, assists consumers seeking recourse from service providers.[318] The CIN's procedure involves first trying to understand the nature of the complaint to determine if any rights have been breached.[319] If a breach is established, the CIN contacts the service provider to obtain their view on the matter. If the matter cannot be settled at this stage, the CIN proceeds to contact the regulator.[320] However, the CIN is not empowered to bring independent actions on behalf of consumers[321] where ADR attempts fail. This is a significant setback because empowering consumer bodies to bring representative actions may force service providers to show more commitment towards the CIN's ADR efforts. Additionally, collective actions by groups such as the CIN will help with addressing issues related to the cost of individual litigation.[322]

[317] <http://www.strathmore.edu/sdrc/what-we-do/past-projects> accessed 22 June 2017.
[318] Another active association is the Consumer Federation of Kenya (COFEK). One of COFEK's subsidiary, the Monetary Institutions Watch (MIWA) focuses on consumer protection and dispute resolution in the financial sector; S Aywa, 'Consumer Protection in the Financial Services Sector in Kenya' <http://www.academia.edu/7264338/Consumer_Protection_in_the_Financial_Services_Sector_in_Kenya> accessed 30 November 2016, pp.5-6.
[319] Flaming et al (n 212) 28.
[320] Ibid.
[321] Ibid.
[322] R Van den Bergh, L Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101377> accessed 6 December 2016.

3.3.6. FINANCIAL INCLUSION

The Kenyan Government's Vision 2030[323] states that it envisages a broader financial sector that would contribute to improving the livelihood of Kenyans.[324] In achieving its financial inclusion objectives, the CBK has focused mostly on licensing lower-tier depository institutions that need lower capital requirements and operating costs in comparison to conventional banks.[325] This is to incentivise the provision of low-cost services that are accessible to low-income consumers.[326]

The introduction and popularity of mobile technology was perceived as another opportunity to increase financial access. M-pesa's success is partly a testament to collaborative efforts between the CBK and the private sector.[327] M-pesa has assisted in doubling the users of non-bank FIs, thus, contributing to financial inclusion.[328] Statistics also support this conclusion. Prior to the launch of M-pesa in 2007, only 26% of Kenya's population were banked as at 2006. By 2013, this figure had increased to 67%.[329]

[323] This is a long-term development blueprint aiming to transform Kenya into a globally competitive nation. <http://www.vision2030.go.ke/index.php/vision> accessed 2 December 2016.
[324] Muthiora (n 184) 3.
[325] <https://www.centralbank.go.ke/uploads/399346751_2015%20Annual%20Report.pdf> accessed 12 December 2016, p11.
[326] Ibid.
[327] Muthiora (n 184) 3
[328] Figures have more than doubled from 7.5% in 2006 to 17.9% in 2009; <http://fsdkenya.org/publication/the-2009-fsd-annual-report/> accessed 16 November 2016.
[329] Muthiora (n 184) 3.

When M-pesa was introduced, the CBK was primarily concerned about three issues.[330] First, it was concerned about the legal status of M-pesa: it needed to decide if it would be appropriate to classify it as a banking business or not. Second, it was concerned about any potential money laundering risks it could introduce. Third, it sought to understand the operational risks associated with the service. Following legal advice, the CBK reached several conclusions that informed its regulatory stance towards M-pesa.[331] First, it decided that M-pesa was not a banking service as defined under the Banking Act. This was because the cash exchanged for electronic value was not repaid on demand and effectively remained in the control of the customer.[332] Second, it concluded that there was no credit risk for customers or Safaricom[333] because M-pesa agents were required to make an upfront deposit of cash in an M-pesa account held by a local bank.[334]

In addition, the CBK established that customer funds were not lent in the pursuit of other business, interest or income. There was also no intermediation[335] as all funds were held in a trust account and could not be accessed by Safaricom to fund its business.[336] Fourth, it found that Consult Hyperion[337] had developed the M-pesa

[330] AFI (n 185) 4.
[331] Ibid.
[332] AFI (n 185) 4.
[333] Safaricom is the MNO behind the service.
[334] AFI (n 277) 4.
[335] Intermediation involves the process where banks take in funds from a depositor at low-interest rates and lend them out at higher interest rates to make some profit. Intermediation is a core part of the banking business. <http://www.businessdictionary.com/definition/financial-intermediation.html> accessed 26 November 2016.
[336] AFI (n 185) 4.
[337] Consult Hyperion is a technical consultancy specialising in secure electronic transactions. <http://www.chyp.com/> accessed 29 November 2015.

product with AML measures in mind. There were functions to allow for the generation of electronic trails and suspicious transaction monitoring. Transaction caps were also set on individual and aggregate daily transactions and international remittances. [338]

Finally, the CBK concluded that M-pesa's operational risk was minimised as there was end-to-end encryption of the SIM card to ensure security and live back-up. There were also reporting and monitoring mechanisms that ensured that the CBK could request information concerning the firm's audit trail, AML procedures, liquidity management and clearing/settlement.[339] The service had also passed all of Consult Hyperion's tests for operational capacity.[340]

Consultations with the CAK, which is Safaricom's primary regulator, revealed that the CAK considered M-pesa to be a value-added service that Safaricom was licensed to offer.[341] Based on these findings, the CBK concluded that M-pesa had adequate controls in core areas that could affect financial stability.[342] M-pesa was, therefore, not regulated as a financial service.

Some commentators attribute M-pesa's success to this flexible "hands off" regulatory approach.[343] It appears that there is some merit in this view when Kenya's experience is compared to the

[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] AFI (n 185) 6.
[342] The CBK released a public statement in 2009 outlining their position on M-pesa., Ibid 7.
[343] Ibid; E Eraker, C Hector, C Hoofnagle, 'Mobile Payments: The Challenge of Protecting Consumers and Innovation' (2011) 10 P & S LR 212, 216.

experience in other jurisdictions like India. The Reserve Bank of India (RBI) initially preferred a strictly bank-led model in the provision of m-payment services. This position was criticised because it did not encourage uptake of the service by the unbanked due to stringent regulations. Additionally, predominant m-payment models used required internet connections which was expensive and required a basic know-how of its operations.

Consequently, the RBI altered its regulatory stand. In 2014, it released the Licensing Guidelines to facilitate the licensing of Payment Banks (PBs).[344] The RBI stated that the primary objective of allowing these PBs is to further financial inclusion. The PBs are expected to provide small savings accounts and payment/remittance services to migrant workers, low-income households and small businesses. They will also enable high volume, low-value transactions in deposits and payments through the use of secured technology. MNOs are amongst the classes of persons eligible to apply for PB licenses. Thus, PBs provide the opportunity for non-banking firms to participate in the provision of m-payment services.

It is still too early to determine if the new regime will significantly improve financial inclusion in India. However, if important successes are recorded, it might lend credence to the view that a strict bank-led approach which shuts out MNOs may prove

[344] Reserve Bank of India, 'Guidelines for Licensing of Payments Banks' <https://rbi.org.in/scripts/bs_viewcontent.aspx?Id=2900> Accessed 27 November 2016.

problematic.[345] It will also lend credence to the argument that more regulatory flexibility may encourage more viable m-payments services in the countries that need them the most.

In addition to Kenya's "hands off" regulatory approach, it is argued that M-pesa also succeeded because Kenya already had a workable national identification system. This helped to lessen the KYC requirements needed to open an account.[346] KYC covers the processes involved in identifying and verifying a customer's identity in order to reduce the cases of money laundering and fraud. However, the literature suggests that the implementation of KYC procedures can further alienate people who do not have the required documentation.[347] As discussed in section 2.10.1, many people find themselves financially excluded in developing countries because there are under-developed national identification systems which prevent them from fully satisfying KYC requirements. By implementing a workable national identification system in Kenya, M-pesa customers faced fewer barriers in satisfying the KYC requirements needed to open an account and were, thus, able to access the service.

[345] MMAI & GSMA (n 181) p7; see also Q Le, 'Partnership between banks and mobile operators –Making it work' in J Osikena (ed), *The Financial Revolution in Africa* (Foreign Policy Centre 2012) 22.
[346] This also helped to mitigate the ML & TF risks; C Alexandre, M Almazan, 'From Cash to electronic money: Enabling new business models to promote financial inclusion and financial integrity' in Osikena (n 344) 12.
[347] L De Koker, 'Aligning Anti-Money Laundering, Combatting of Financing of Terror and Financial Inclusion' (2011) 18 (4) JFC 361; L De Koker, 'Money Laundering Control and Suppression of Financing of Terrorism: Some Thoughts on the Impact of Customer Due Diligence on Financial Exclusion' (2006) 13(1) JFC 26.

PART 3

3.4. THE UNITED KINGDOM

Recently, an m-payment service called "PayM" was launched in the UK.[348] The service was developed with the collaboration of several banks and building societies.[349] As a Member State of the European Union (EU),[350] the UK has transposed several EU Directives which provide important protections for financial services consumers.[351] Consequently, the UK has an existing consumer protection regime which may be extended to m-payments.

Apart from its detailed consumer statutes,[352] two other statutes; the Payment Services Regulations (PSRs) 2009[353] and the E-money Regulations (EMRs) 2011[354] are significant[355] in the regulation of m-payments. This is because they create institutions whose definitions adequately cover m-payment providers.[356] To understand the regulatory regime applying to m-payments, it is

[348] <http://www.paym.co.uk/> accessed 30 November 2016; Barclays' Pingit and Zapp were forerunners of the PayM service. Consult Hyperion, 'The Future of Payments: How payments will evolve in the UK in the coming years' <http://www.paymentsuk.org.uk/sites/default/files/The%20Future%20of%20Payments%20Aug%2015_0.pdf> accessed 27 October 2016, p5.

[349] For the list of banks and building societies involved see <http://www.paym.co.uk/get-paym/> accessed 30 2016.

[350] Following the referendum held on 23rd June 2016, the UK will be exiting the EU in the near future.

[351] E.g. the Consumer Rights Directive (2011/83/EC), Directive on Unfair Terms in Consumer Contracts (93/13/EC),

[352] Consumer Credit Act 1974, the Consumer Protection from Unfair Trading Regulations 2008, the Consumer Rights Act 2015.

[353] Transposing the EU Payment Services Directive (2007/64/EC). This directive has been replaced by the revised Directive on Payment Services (PSD2) 2015 which will be transposed into local legislation in 2017.

[354] Transposing the 2nd E-Money Directive of the European Parliament 2009/110/EC.

[355] For a list of other relevant legislation, see 'The FCA's role under the Electronic Money Regulations' ('EMR Approach Document') <https://www.fca.org.uk/publication/archive/emoney-approach.pdf> accessed 22 May 2015, p60; The FCA's role under the Payment Services Regulations 2009 ('PSR Approach Document') <https://www.fca.org.uk/publication/archive/payment-services-approach.pdf> accessed 22 May 2015, pp.58- 60.

[356] The EMRs create E-money institutions (s.2 EMRs) while the PSRs create Payment Service Institutions (s.2 PSRs).

necessary to take a combined reading of both regulations and the relevant provisions of consumer protection statutes.

In the UK, the issuance of e-money alone does not constitute a payment service.[357] However, where the issuance of e-money is coupled with the provision of a platform facilitating payment transactions, then the e-money institution (EMI) is involved in the provision of payment services.[358] Where EMIs elect to also provide payment services, the payment services part of their business is subject to the PSRs.[359] EMIs that have been registered/authorised under the EMRs may provide payment services without having to undergo separate registration/authorisation procedures under the PSRs.[360] M-payments fit within the scope of both the PSRs and EMRs. While mobile money falls within the definition of e-money, payment transactions facilitated using mobile money fall under the PSRs.

3.4.1. PROVISION OF INFORMATION

3.4.1.1. MANDATORY DISCLOSURE

One survey carried out by the then Financial Services Authority (FSA)[361] identified information asymmetries as contributing to financial market failures in the UK. This justified a move from self-

[357] Addleshaw Goddard LLP, 'Developments in payment services regulation' (2014) 117 COB 1, 12.
[358] Ibid.
[359] EMR Approach Document p87.
[360] PSR Approach Document p4. Payment services covered are listed in Part 1, Schedule 1 of the PSRs.
[361] The FSA's powers have been inherited by two regulators; the Financial Conduct Authority and the Prudential Regulation Authority.

regulation[362] towards regulatory initiatives tackling information asymmetries.[363] Effective disclosures thus stand out as a principal policy objective in the financial services sector.

While several pieces of legislation impose disclosure requirements on FIs, the most relevant obligations for m-payments are found in the PSRs.[364] The PSRs' conduct of business requirements place detailed disclosure obligations on all PSPs[365] and will extend to m-payments.[366] The information obligations depend on the nature of the contract between parties. The PSRs identify two categories of payment contracts: framework contracts and single payment transactions. Framework contracts are contracts covering the future execution of individual and successive payment transactions where there is an on-going relationship between the PSP and the consumer.[367] Single payment transactions represent "one-off" transactions where no on-going relationship exists between the PSP and consumer.[368]

For both categories, PSPs are required to disclose certain information to consumers before and after the execution of

[362] FSA, 'Regulating retail banking conduct of business' (2008) <http://www.fsa.gov.uk/pubs/cp/cp08_19.pdf> accessed 25 October 2015.
[363] For example, the FSA developed a mandatory key facts statement in the form of initial disclosure documents applicable to financial products. World Bank, 'Good Practices for Financial Consumer Protection' (2012) <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Good_Practices_for_Financial_CP.pdf> accessed 12 October 2015, p17.
[364] Disclosure obligations in the Financial Services (Distance Marketing) Regulations 2004 may also be relevant to m-payments.
[365] Part 5 PSRs; Some parties are permitted to exclude certain parts of the information obligations, this is known as the "corporate opt-out." It does not apply to a consumer, micro-enterprise or a charity with an annual income of less than £1 million; Regulation 33(4).
[366] M-payment providers will assume the role of PSPs for the purposes of the PSRs.
[367] Regulations 40-46 & Schedule 4.
[368] See Regulations 36 -38 & Schedule 4.

payment transactions. Disclosure requirements for framework contracts are very detailed.[369] Prior to entering such contracts, consumers must be informed about the PSP,[370] the payment service,[371] applicable charges, interest and exchange rates.[372] Consumers must also be informed about how communication will be maintained,[373] the safeguards for keeping payment instruments safe, applicable liability rules, corrective measures like refunds and the conditions attached.[374] The rules regarding changes to and termination of the contract are also to be provided.[375] Importantly, PSPs must disclose information on redress. This includes the laws applicable to the contract, the competent court that can hear disputes that arise, the availability of out-of-court settlement procedures and how they may be accessed.[376]

For single payment transactions, consumers must be informed of the charges and exchange rate (where applicable) before completing payment transactions.[377] Disclosures will also include the maximum time for executing payments and a unique identifier to ensure that the payment order is executed properly.[378] Furthermore, PSPs are required to disclose such information contained in Schedule Four[379] which is relevant to the transaction

[369] Schedule 4.
[370] Including their name, address and contact details, and regulator. Paragraph 1, Schedule 4.
[371] Paragraph 2.
[372] Paragraph 3.
[373] Paragraph 4.
[374] Paragraph 5.
[375] Paragraph 6.
[376] Paragraph 7.
[377] Regulation 36(2).
[378] Regulation 36(2)(a).
[379] i.e. information disclosed in framework contracts.

in question.[380] Disclosed information must be contained in a contract made available to the customer.[381] After executing the transaction, PSPs must also provide the consumer with a reference enabling the payee to identify the payment transaction and the payer.[382]

For low-value transactions under which many m-payments transactions will fall, the PSRs also contain specific disclosure requirements.[383] Minimum disclosures must include information on the way the payment instrument can be used, the charges and liability rules applicable and where information contained in Schedule Four may be accessed.[384]

One easily notices that the breadth of disclosures under the PSRs varies with each category of contract. The explanation for this points to the differing nature of payment transactions. Disclosure requirements for single payment transactions are understandably minimal since they are one-off transactions. Hence the disclosures only provide the information needed to perform and identify that specific transaction. This is in comparison to framework contracts where there is an ongoing relationship between the parties. With these contracts, several payment transactions will be carried out over a longer period of time and it is reasonable that disclosure obligations are broader.

[380] Regulation 36(2)(e).
[381] Regulation 36(1).
[382] Regulation 38.
[383] Regulation 35.
[384] Regulation 35(2).

For single payment contracts and low-value transactions with minimal economic impact, it may not be pragmatic to provide very detailed disclosures before a transaction is completed. However, the PSRs balance out this approach by requiring that PSPs disclose where more detailed information can be accessed in the case of low-value transactions. For single payment transactions, this balance is maintained by requiring broader disclosures where relevant to the transaction. This flexibility ensures that disclosures are appropriate to the transactions involved. This is important because it may not be reasonable to demand that the same amount of resources is dedicated to fulfilling disclosure obligations for transactions with varying impact.

The PSRs also require that these disclosures are provided free of charge.[385] Disclosures must be provided in an easily accessible manner[386] and in an "easily understandable language and in a clear and comprehensible form"[387] Additionally, the PSRs encourage some flexibility in the language of disclosures. Hence, disclosures must be made available in "English or in the language agreed by the parties."[388]

The mandatory disclosure requirements for payment services in the UK are very comprehensive. However, as noted in section 2.5.3.1, due to behavioural limitations, caution must be exercised as there are no guarantees that disclosures will lead to better

[385] Regulation 48(1). Charges may, however, apply in situations outlined in regulation 48(2).
[386] Regulation 47(1)(a).
[387] Regulation 47(1)(c).
[388] Regulation 47(1)(d).

outcomes. To ensure that the findings of behavioural economics are incorporated into policy-making, the UK set up Behavioural Insights Team ("the Nudge Unit").[389] It is expected that the Nudge Unit's work will contribute towards improving the outcomes of regulatory responses such as information disclosures.

3.4.1.2. CONSUMER EDUCATION

The Financial Services and Markets Act (FSMA) 2000[390] required that a consumer education body be established with the mandate of educating the public on financial products, dealings and associated risks.[391] This led to the creation of the Consumer Financial Education Body (CFEB)[392] now known as the Money Advice Service (MAS).

Amongst other things, the MAS is charged with enhancing public understanding of financial matters.[393] It promotes awareness on the benefits of financial planning and the benefits and risks associated with financial products.[394] The MAS is also charged with

[389] Although it was formed in partnership with the Cabinet Office, it is independent of the UK government. <https://www.gov.uk/government/organisations/behavioural-insights-team> accessed 20 November 2017. The unit's focus is an example of "libertarian paternalism" which is discussed briefly in section 2.4. The phrase is coined from the work of Sunstein and Thaler in *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008) <http://www.telegraph.co.uk/news/politics/9853384/Inside-the-Coalitions-controversial-Nudge-Unit.html> accessed 28 October 2016. See also CR Sunstein, 'Nudging: A Very Short Guide' <https://dash.harvard.edu/bitstream/handle/1/16205305/shortguide9_22.pdf?sequence=4> accessed 22 July 2016, p2.
[390] (As amended).
[391] ss.1 & 2 Financial Services Act 2010 insert a new s.6A.
[392] See s.3S (3) ibid.
[393] See s.6A and Schedule 1A FSMA.
[394] N Willmott, P McGowan, M Ghusn et al, 'Equipping the modern regulator: Assessing the new regulatory powers under the Financial Services Act 2012' (2010) 78 COB 1, 18.

publishing educational materials and providing advice to the public on financial matters.[395] Other bodies like the UK's Citizens Advice[396] assist in providing advice and educating consumers where appropriate. It is envisaged that these bodies will assist key regulators i.e. Financial Conduct Authority (FCA), the Payment Systems Regulator (PSR) and the Phone-paid Services Authority in educating consumers on the use and risks attached to m-payments.

Although the FCA has carried out a thematic review of m-payments in the UK,[397] there is no specific education initiative dedicated to m-payments. This may be due to the same reason identified in Canada[398] which suggests that owing to the nascent stage of adoption, targeted education initiatives may not be a priority. Moreover, unlike Kenya, m-payments will have to compete with more established payment methods in the UK so it is not certain if it will be embraced as quickly.

One commentator suggests that low adoption may be due to perceived security concerns associated with the service.[399] A 2016

[395] Ibid.
[396] It is a government-funded body that provides free confidential advice to consumers who need it. <http://www.citizensadvice.org.uk/index/aboutus/what_we_do_how_we_help.htm> accessed 9 December 2015.
[397] See the FCA, 'Thematic Review: Mobile Banking and Payments' (2014); FCA, 'Mobile Banking and Payment: Supporting an Innovative and Secure Market' (2013) <https://www.fca.org.uk/publications/thematic-reviews/tr14-15-%E2%80%93-mobile-banking-and-payments> accessed 3 February 2016
[398] Section 3.2.1.2.
[399] B Fisher, 'Trust and security remain big issues for mobile payments' (*The Telegraph*, 7 March 2017) <http://www.telegraph.co.uk/connect/better-business/trust-and-security-big-issues-mobile-payments/> accessed 13 July 201'

consumer study confirms this.[400] Fisher, however, believes that these concerns can be addressed by using consumer education.[401] Consumer education will give factual information about the real risks associated with the service and how they may be dealt with. It is possible that this will give more consumers the confidence to adopt m-payments in the UK. Thus, one may argue that targeted education initiatives can go a long way in encouraging adoption.

3.4.2. CANCELLATION RIGHTS AND COOLING-OFF PERIODS

Although the PSRs are silent on cancellation and cooling-off periods, m-payment users benefit from the provisions in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (CCRs) 2013[402] and the Financial Services (Distance Marketing) Regulations (FSRs) 2004 depending on the transaction involved.

The FSRs apply to financial services contracts entered at a distance.[403] It will apply to m-payments because under the FSRs the term "financial service" means "any service of a banking, credit, insurance, personal pension, investment or payment

[400] Total System Services (TSYS), '2016 UK M-payment and P2P Payment: Consumer Study" <http://www.tsys.com/Assets/TSYS/downloads/rs_2016-uk-m-payment-and-p2p-payment-consumer-study.pdf> accessed 13 July 2017
[401] Fisher (n 399).
[402] Implementing the Consumer Rights Directive (2011/83/EU). It revokes the Distance Selling Regulations 2000 and the Off Premises (Doorstep) Regulations 2004.
[403] i.e. where the buyer and seller are not physically present and rely on distance communication to conclude the contract; Regulation 2.

nature."[404] Thus, the FSRs will be relevant to the actual subscription to m-payment services completed over a distance and provided by a financial service supplier. The FSRs mandate a 14-day cooling-off period which runs from when the contract is concluded.[405] This cancellation period is extended where disclosure obligations are not complied with.[406] The FSRs confirm that "cancelling the contract has the effect of terminating the contract at the time at which the notice of cancellation is given."[407]

The CCRs also provide cooling-off periods for distance/off-premises consumer contracts. Sales contracts concluded through a mobile device fall under the scope of the CCRs.[408] The CCRs provide that-

> "a consumer may cancel a distance or off-premises contract at any time during the cancellation period without giving any reason, and without incurring any liability…."[409]

The consumer must notify the trader of their decision to cancel.[410] Successful cancellation ends the obligations of the parties to perform the contract.[411]

The CCRs also apply to contracts for the supply of digital content not provided on a tangible medium. These provisions would apply

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[404] Regulation 2.
[405] Regulation 10.
[406] Regulations 10(2) & (3).
[407] Regulation 9(2).
[408] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429300/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf> accessed 25 November 2016, p6.
[409] This is subject to exceptions listed in Regulation 29(1).
[410] Regulation 32.
[411] S.33.

to digital content such as games, ringtones and music purchased via m-payment applications. In such cases, the cancellation period closes 14 days after the contract is entered into.[412] Under such contracts, traders are not expected to supply digital content within the cooling-off period unless the consumer expressly consents.[413] Where they consent, they must also acknowledge that the right to cancel will be lost.[414]

For other contracts under the CCRs, the cooling-off period is standardised to a 14-days period after the conclusion of a contract.[415] One notable thing about the CCRs is that a consumer's right to cancel is preserved where they are not informed of this right by the trader.[416] Thus, the CCRs' standard cooling-off period may be extended to 12 months[417] where the seller fails to inform the consumer of the right to cancel.[418] Therefore, as Loos puts it, if a right of withdrawal is not communicated to the consumer, this implies that the cooling-off period "never starts to run and therefore does not end."[419]

It is argued that this provision is significant for several reasons. First, it provides an incentive which forces traders to comply with the disclosure requirements under the CCRs. One concern traders

[412] Regulation 30(1)(b).
[413] Regulation 37(1).
[414] Regulation 37(1)(a) & (b).
[415] Regulation 30.
[416] Regulation 31(1).
[417] i.e. 12 months from the end of the standard 14 days cooling-off period; Regulation 31(3).
[418] Regulation 31.
[419] M Loos, "Rights of Withdrawal" in GG Howells, R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers 2009) p.251; *Heininger v Bayerische Hypo-und Vereinsbank AG*, Case C-481/99. ECR (2001) I-09945.

have is that they are never certain that a transaction is completely finalised until the cooling-off period elapses. It is assumed that traders will avoid situations which would warrant the extension of existing cooling-off periods. Thus, traders will be motivated to disclose cancellation rights to consumers so that the applicable cooling-off period is not extended.

Additionally, the preservation of cancellation rights where disclosures are not made protects the consumer's interests. As seen in section 2.6, cooling-off periods are meaningless if consumers are not aware of them. By preserving the right to cancel for a significant period of time, the CCRs indirectly encourage compliance with disclosure obligations. Although the FSRs do not use the same words, the effect of the provisions extending cooling-off periods, where disclosure obligations are not complied with, is similar. This is because part of the information which must be disclosed includes cancellation rights.[420] However, the difference is that the FSRs assume that disclosure obligations will be subsequently complied with and, therefore, only extend the cancellation period to 14 days from the date of compliance. The CCRs' approach is preferred as the threat of a significantly longer extension period may be more effective.

[420] Regulations 7(1), 8(1) and paragraph 13, Schedule 1.

3.4.3. REGULATING BUSINESS PRACTICES

M-payments are subject to the existing regime regulating commercial practices in the UK.[421] The leading statute regulating commercial practices is the Consumer Protection from Unfair Trading Regulations (CPUTRs) 2008.[422] The CPUTRs place a general ban on unfair commercial practices.[423] The CPUTRs further explain that-

> "A commercial practice is unfair if—
>
> (a)it contravenes the requirements of professional diligence; and
>
> (b)it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product."[424]

This broad clause provides an indication of what "unfair" signifies in the context of the CPUTRs. Abbamonte also explains that it ensures that the statute is "future proof" because it acts as a "safety net to catch any current or future practices" not presently categorised under the CPUTRs.[425] Consequently, if it can be shown that a commercial practice violates the requirements of professional diligence[426] and materially alters the economic behaviour of an average consumer with regards to a product then it would be caught within the CPUTRs' scope.

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[421] PSR Approach Document (n 352) Para 8.10.
[422] Transposing Directive 2005/29/EC.
[423] Regulation 3(1).
[424] Regulation 3(3).
[425] GB Abbamonte, 'The Unfair Commercial Practices Directive and its General Prohibition' in S Weatherill, U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Bloomsbury Publishing 2007) 20-21.
[426] Abbamonte notes that professional diligence is similar to the common law concept of duty of care, Ibid 22.

Apart from the general ban on unfair practices, the CPUTRs also targets specific practices. Commercial practices will also be considered unfair where they qualify as a misleading action[427] or omission.[428] These practices are further discussed in section 3.4.3.2. The CPUTRs also prohibit aggressive commercial practices. Regulation 7 provides that-

> "A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances[429]—
>
> (a)it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
>
> (b)it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise."

The CPUTRs single out aggressive practices such as harassment, coercion and undue influence which are familiar vitiating factors in the regulation of contracts under common law. While the CPUTRs briefly explain that harassment will "include the use of physical force,"[430] the CPUTRs give a more comprehensive explanation of undue influence which involves-

> "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision."[431]

[427] Regulations 3(4)(a) & 5.
[428] Regulations 3(4) (b) & 6.
[429] See Regulation 7(2) for the list of factors taken into account when determining if a breach has occurred.
[430] Regulation 7(3)(a).
[431] Regulation 7(3)(b).

No attempt is made to define harassment or coercion.[432] By failing to define these terms, it is unclear whether they will be given the same interpretation held at common law or in statutory instruments such as the Protection from Harassment Act (PHA) 1997. Ryder et al argue that in the absence of definitions, these words "must be taken to have their usual meaning."[433] While this seems reasonable, one difficulty with this position is that the phrase "usual meaning" can itself be problematic. Take for instance the case of harassment, its usual meaning could include a basic Oxford dictionary interpretation explaining it to be "aggressive pressure or intimidation." It could also imply the interpretation under the PHA which requires a course of conduct, i.e., at least two incidents must have occurred.[434] Perhaps a clearer definition of these practices would have been helpful to avoid any confusion.

In describing aggressive commercial practices, the CPUTRs emphasise that such practice must be one that significantly (or is likely to) impairs the average consumer's freedom of choice. Similarly, in defining undue influence, the CPUTRs require that the exploitation must be one that significantly limits the consumer's ability to make an informed decision. As one may notice, the wordings of the provisions adopt the phrases "significantly

[432] The CPUTRs, however, include a list of factors that a court may take into consideration when determining if a practice involves the use of harassment, coercion or undue influence; Regulation 7(2).
[433] N Ryder, M Griffiths, L Singh, *Commercial Law: Principles and Policy* (Cambridge University Press 2012) 376.
[434] S.7(3); *Ferguson v British Gas Trading Ltd* [2009] ECWA Civ 46.

impairs" and "significantly limits." This deliberate choice of words appears to suggest that a higher threshold of interference and impact is required to label a practice aggressive. This view is shared by Ryder et al who reason that where the impact is slight, it is likely that no breach will be found.[435]

The CPUTRs also blacklists certain commercial practices which are considered unfair in all circumstances.[436] Hence, no case-by-case assessment is needed to prove a lack of professional diligence or a material distortion of decision making.[437] These blacklisted practices are not expected to be assessed since there is a presumption that they are contrary to the requirements of professional diligence and will materially distort consumer decision-making.[438]

Throughout the CPUTRs, reference is made to the "average consumer" and though no definition is given, the CPUTRs provide some insight as to what the reference connotes. It explains that the average consumer is "reasonably well informed, reasonably observant and circumspect."[439] The "average consumer" is a hypothetical person[440] serving as an objective benchmark for determining the effect of a commercial practice under scrutiny. Thus, the CPUTRs provide that –

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[435] N Ryder et al (n 433) 376.
[436] Regulation 3(4)(d); Schedule 1.
[437] M Namyslowska, 'The Blacklist of Unfair Commercial Practices: The Black Sheep, Red Herring or White Elephant of the Unfair Commercial Practices Directive?' in W Van Boom, A Garde, O Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge 2016) 67.
[438] Ibid.
[439] Regulation 2(2).
[440] E MacIntyre, *Business Law* (8th edn, Pearson 2016) 661.

> "In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect."[441]

It also provides that-

> "In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group."[442]

Perhaps recognising that the circumstances of consumers differ and that the average consumer benchmark would be unfair if applied in all cases, the CPUTRs apply a different standard in certain situations.[443] It explains that-

> "In determining the effect of a commercial practice on the average consumer—
>
> (a)where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and
>
> (b)where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group."[444]

---

[441] Regulation 2(2).
[442] Regulation 2(4).
[443] Department for Business, Innovation and Skills, 'Guidance on the Consumer (Amendment) Protection Regulations' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409334/bis-14-1030-misleading-and-aggressive-selling-rights-consumer-protection-amendment-regulations-2014-guidance.pdf> accessed 9 June 2016, p9.
[444] Regulation 2(5). This is without prejudice to legitimate trade puffs; Regulation 2(6).

These provisions, particularly the average consumer benchmark, have been the subject of intellectual discourse. The benchmark has been criticised by some writers.[445] For instance, Duivenvoorde criticises the benchmark for perpetuating the assumption that average consumers are rational and behave similarly thereby passing this off as "standard consumer behaviour."[446] Because consumers differ, Duivenvoorde concludes that it is difficult to work with a benchmark that focuses on how consumers should behave and not how they actually behave.[447] These points raised are valid particularly as discussions in section 2.2.2 emphasised the limitations of consumer rationality. However, it is argued that although the average consumer benchmark is not perfect, it provides a useful normative reference which aids in assessing the effect of commercial practices.

One cannot fault Duivenvoorde's contention that consumers do not behave the same, however, there is an argument that the CPUTRs actually take this into consideration. This view is held for two reasons. First, the recognition of consumers who are vulnerable owing to factors such as physical and mental infirmity, age or credulity is an acknowledgement that adjustments will need to be

[445] P Cartwright, 'The Consumer Image within EU Law' in C Twigg-Flesner (ed) *Research Handbook on EU Consumer and Contract Law* (Elgar 2016) 199; BB Duivenvoorde, 'The Average Consumer Benchmark from a Behavioural Perspective' in BB Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2009) 159; C Poncibò, R Incardona, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 JCP 21; L Waddington, 'Vulnerable and Confused: The protection of "vulnerable" consumers under EU law' (2013) 38(6) ELR 757; H Schebesta, KP Purnhagen, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in CJEU's Case Law? Reflections on Teekanne' (2016/03) Wageningen Working Paper Law and Governance.
[446] Duivenvoorde, (n 445) 159.
[447] Ibid 161.

made in appropriate circumstances. Second, the reference to the average members of a particular group, as opposed to a static standard, can be interpreted as another attempt to include some flexibility in the use of the average consumer benchmark.

The CPUTRs adopt the use of regulatory offences to deal with non-compliance. Hence-

> "A trader is guilty of an offence if—
>
> (a)he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence … and
>
> (b)the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product…."[448]

Similar to the regulatory offences created under the CCA,[449] the offence requires proof of knowledge or recklessness on the part of the trader. This suggests that criminal sanctions are reserved for cases where the trader has engaged in the practice knowingly or recklessly.[450] Although a trader lacking intent will escape criminal sanctions, they may be subject to an enforcement order sought from the court by the enforcing authority.[451] The order would

[448] Regulation 8.
[449] Section 3.2.3.2.
[450] Regulation 8(2) explains that where a trader engages in a commercial practice without regard as to whether that practice contravenes the requirements of professional diligence then the trader will be deemed to be reckless. It would not matter whether the trader had reason to believe that the practice might contravene the requirements. However, Cartwright points out that this provision may prove confusing where a trader considers whether a practice contravenes the requirements of professional diligence but reaches the conclusion that it does not. Although there has been some subjective recklessness in not realizing that there is a risk and taking it, Cartwright argues the trader has not been reckless in the context of Regulation 8(2) because he did not fail to have regard for the risk; See P Cartwright, 'Unfair Commercial Practices and the Future of Criminal Law' (2010) 7 JBL 618, 624-625.
[451] Enforcement orders are brought under the Enterprise Act 2002. A practice which is unfair will amount to a "Community infringement" within the context of the Act; Regulation 27 CPUTRs, S.218A Enterprise Act. These traders may also be subject to private actions instituted by consumers following the Consumer Protection (Amendment) Regulations 2014.

direct the trader to discontinue the practice. This approach allows for proportionate responses in situations where a trader lacks moral fault.

Another category of regulatory offences sanctions traders indulging in blacklisted practices or any practice that falls within the specified categories of misleading omissions and actions or aggressive commercial practices.[452] These offences apply on a strict liability basis subject to a due diligence defence.[453] This approach is similar to the CCA's old regime. Criticism of this approach was discussed in section 3.2.3.2. However, it is important to reiterate that solely relying on criminal prosecution may be too expensive in terms of time and money. Unlike the Regulation 8 offence outlined above, the trader's intention is not put into consideration. The major problem with this as outlined by Cartwright[454] and Macrory[455] is that this may lead to disproportionate responses where fault is lacking.

Bodies corporate can also commit the offences highlighted. The CPUTRs provide that-

> "Where an offence under these Regulations committed by a body corporate is proved—
>
> (a)to have been committed with the consent or connivance of an officer of the body, or
>
> (b)to be attributable to any neglect on his part,

[452] Regulations 9-12.
[453] Regulation 17. There is also an innocent publication of advertisement defence under Regulation 18.
[454] Cartwright, 'Crime, Punishment and Consumer Protection.' (n 64) 8.
[455] Macrory, (n 62) para 1.14.

> the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly."[456]

For the purposes of the CPUTRs, the term "officer" includes a director, manager, secretary or other similar officer.[457] Persons purporting to act in the listed roles will also be deemed officers.[458] At first glance, this provision appears uncontroversial. However, the complexities come to fore when one considers that the Regulation 8 offence requires mens rea. Since companies cannot think or act as humans do, an unfair practice committed by the company will in most cases be committed by an individual connected to the company. Under English law, where mens rea is required to prove an offence involving a company, the doctrine of identification is often invoked.[459] This doctrine allows the intent of senior officers of the company to be attributed to the company itself.[460] Since these offices are presumed to be the "directing mind and will" of the company, their intent is attributed to the company. However, this doctrine may make the enforcement of the CPUTRs challenging because, as Cartwright points out, it may be difficult to find a senior officer of the company with the required intent.[461]

[456] Regulation 15(1).
[457] Regulation 15(2)(a).
[458] Regulation 15(2)(b).
[459] *Tesco Supermarkets v Nattrass* (1972) AC 153.
[460] *Tesco*, ibid, suggests that the term "senior officer" is construed narrowly and will only cover 'superior' officers such as the managing director and the board of directors. The officers mentioned in Regulation 15(2)(a) fit within this category. However, there are cases suggesting that courts may be flexible in construing the term in order to give effect to the purpose of a statute. See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.
[461] Cartwright (n 448) 628.

The CPUTRs are enforced by public authorities and previously gave consumers no independent civil rights to redress.[462] This position changed following amendments to the CPUTRs.[463] Currently, where consumers have been subject to unfair commercial practices,[464] they have the right to unwind a contract and get a refund,[465] seek a discount in respect of past or future payments due under the contract[466] or to seek damages.[467] Enjoyment of these remedies is subject to certain conditions. First, the type of transaction involved must be one covered by the CPUTRs. Transactions covered include those involving a consumer who enters into a contract with a trader for the sale or supply of a product by the trader. It also includes transactions where the consumer enters into a contract with a trader to sell goods to the trader or where the consumer makes a payment to a trader for the supply of a product.[468] Second, the trader must engage in a prohibited practice in relation to the product, or digital content.[469] The third condition is that the prohibited practice must be a significant factor in the consumer's decision to enter into the

[462] The Office of Fair Trading was the lead enforcer and its powers under the CPUTRs have now been inherited by the Competitions and Markets Authority (CMA).
[463] The Consumer Protection (Amendment) Regulations 2014.
[464] i.e. misleading actions and aggressive commercial practices; Regulation 27B (1). Misleading omissions are not covered. Thus, although they remain an offence under the CPUTRs, consumers have no private remedy against the trader. This is because omissions are more uncertain in scope and English law has never provided redress in these circumstances. However, this narrow limitation only applies where the trader has omitted material information but the overall presentation of the product/service is not misleading. In most situations, omitting material information would create a misleading overall presentation, and, therefore, count as a misleading action. Department for Business, Innovation and Skills (n 443) p5.
[465] Regulation 27E.
[466] Regulation 27I.
[467] Regulation 27J.
[468] Regulation 27A(2).
[469] 27A(4).

contract or make the payment.[470] A consumer with a right to redress under the regulations may bring a civil claim to enforce that right.[471]

For the standard remedies (i.e. a right to unwind a contract and a right to a discount), the consumer need not demonstrate any loss or prove that the trader acted dishonestly, recklessly or negligently. [472] This is because the standard remedies operate on a strict liability basis. Thus, as long as the trader's actions are misleading or aggressive, the remedies will apply.[473] However, to be awarded damages, consumers must give evidence of actual losses.[474] Traders can also plead the due diligence defence. This means that a trader will not be liable for damages if they took reasonable care to avoid committing the prohibited practice.[475]

The impact of the new consumer remedies may be better appreciated in context. As earlier noted, prior to the amendments, only public authorities could enforce the CPUTRs. This denied consumers direct private remedies under the CPUTRS for losses suffered.[476] There was clearly a need to balance private and public enforcement of the CPUTRs which is reflected in the amendments. The amendments find favour with academic views which suggest that private enforcement may be the most effective mechanism

[470] Regulation 27A(6).
[471] Regulation 27K(1).
[472] BIS (n 614) p11.
[473] Ibid.
[474] The contract law test of remoteness requires that these losses must arise naturally from the unconscionable act or be reasonably foreseeable. Department for Business, Innovation and Skills (n 443) p11-12
[475] Regulation 27J(5)(b).
[476] Consumers could, however, sue at common law for certain practices like duress, misrepresentation.

for ensuring that consumers get adequate compensation.[477] Nevertheless, many writers do not fail to point out the dangers that could occur with private law enforcement of consumer policy. For instance, with respect to private enforcement by individuals, Cartwright[478] argues that this approach may be less than efficient as it is dependent on the individual knowing his rights and having the required resources to enforce it.

Private and public enforcement have their respective strengths and weaknesses and the best outcomes may be achieved by combining both approaches in a complementary way.[479] With the amendments introducing the new consumer rights, one may argue that the CPUTRs' approach represents a move towards balancing the use of both enforcement styles.

3.4.3.1. CONTRACT TERMS

3.4.3.1.1. STANDARD TERM CONTRACTS AND FAIRNESS

Unlike Canada and Kenya, the UK has an independent regime regulating contract terms. This regime finds expression in the Consumer Rights Act (CRA) 2015.[480] The CRA applies generally

[477] A Hamilton, D Henry, 'Bricks, beer and Shoes: Indirect Purchaser Standing in the European Union and the United States' 2012 5(3) GCLR. 111; G Downie, M Charrier, "UK and EU developments in Collective Action Regimes for Competition Law Breaches" ECLR. 2014, 35(8), 369-379; Granting compensation is not only restricted to courts in the UK but has also become part of the enforcement process under the UK Regulatory Enforcement and Sanctions Act 2008. It has in effect included a compensation function within its public regulatory enforcement system. C Hodges, "From Class Actions to Collective Redress: A Revolution in approach to Compensation" (2009) 28(1) CJQ 41, 63.
[478] Cartwright "Consumer Protection in Financial Services (n 75) 15-16.
[479] Weber describes this as "optimal mixes" F Weber, *The Law and Economics of Enforcing European Law* (Ashgate Publishing 2014) 8.
[480] The CRA implements Directive 2011/83/EC. It replaces the Unfair Contract Terms in Consumer Contracts Regulations (UTCCRs) 1999.

and will benefit m-payment users. Under the CRA, an unfair contract term is not binding on a consumer.[481] A term is unfair where-

> "...contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[482]

This provision introduces a fairness test which comprises of three main elements. The first element requires that the terms must be contrary to good faith. The second emphasises that there must be significant imbalance in the rights and obligations applicable to both parties. The third element requires that this imbalance must be one that is to the detriment of the consumer. These elements are assessed together[483] and are evaluated in the context of the contract as a whole and all the circumstances in which the contract is entered into.[484]

The UK Supreme Court (UKSC) has explained that the requirement of good faith is one of 'fair and open dealing.'[485] The requirement is given a wide interpretation as it relates to the substance of terms as well as the way they are expressed.[486] Thus, fair and

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[481] S.62(2); the contract will continue, so far as is practicable, to be binding in all other respects. S.67.
[482] S.62(4); the CRA covers both negotiated and non-negotiated terms.
[483] Competition and Markets Authority, 'Unfair Contract Terms Guidance: Guidance on the Unfair terms provisions in the Consumer Rights Act 2015' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> accessed 4 February 2016, paragraph 2.10.
[484] Paragraph 2.18 CMA (n 481).
[485] Per Lord Bingham in *Director General of Fair Trading v First National Bank Plc*. [2001] UKHL 52, paragraph 17.
[486] Per Lord Bingham ibid; see *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11) EU:C:2013:164, paragraphs 44, 45, 69; Paragraph 2.23 CMA (n 481)

open dealing suggests that terms should be "expressed fully, clearly and legibly, containing no concealed pitfalls or traps."[487] Appropriate prominence should be given to terms which can operate to the consumer's disadvantage."[488] This also suggests that in drafting and using contract terms, a trader 'should not, whether deliberately or unconsciously, take advantage'[489] of the consumers' circumstances to their detriment.[490]

Consumers are often in a weaker bargaining position, especially where standard form contracts are adopted. Hence the fairness test is also concerned with the rights and obligations under the contract. Where a term tilts the balance of the contract significantly in the trader's favour, it will suggest that there is a significant imbalance.[491] For instance, if a term in an m-payment contract allocates risks to consumers which are beyond their control and which the PSP is better-placed to insure against, it may be challenged on the basis that there is a significant imbalance in the obligations.

The CJEU has noted, with approval from the UKSC, that such imbalance must arise "contrary to the requirements of good faith" and this will depend on-

> "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably

[487] Per Lord Bingham (n 485) paragraph 17.
[488] Ibid.
[489] ibid.
[490] Paragraph 2.23 CMA (n 483).
[491] Per Lord Bingham (n 485) para 17; See *West v Ian Finlay and Associates* [2014] EWCA Civ 316.

> assume that the consumer would have agreed to such a term in individual contract negotiations."[492]

In deciding if a term is one that the consumer would have agreed to, certain factors are taken into consideration. These include-

> "whether such contractual terms are common, that is to say they are used regularly in legal relations in similar contracts, or are surprising, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection."[493]

The imbalance must be to the detriment of the consumer, hence Lord Bingham emphasized that "a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address."[494] In assessing detriment, the CMA[495] notes that although an imbalance must be practically significant, a finding of unfairness does not require proof that a term has already caused actual harm.[496] Hence a term may be open to challenge if it could be used in a way that would cause consumer detriment.[497]

It is submitted that the broad fairness test introduces a degree of flexibility that is consistent with the general objective of protecting

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[492] *Aziz* (n 486) paragraph 69; *ParkingEye Ltd v Beavis* [2015] UKSC 67, paragraph 105.
[493] Per Advocate General Kokott in *Aziz* (n 486) quoted with approval in *ParkingEye* (ibid) paragraph 106.
[494] Para 17, *First National Bank* (n 485)
[495] The CMA is a lead enforcer of the unfair terms provisions in the CRA.
[496] Paragraph 2.19 CMA (n 483).
[497] CMA, 'Unfair Contract Terms Explained' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf> accessed 10 July 2017, paragraph 27.

consumers. The elements making up the test are clear[498] and collectively emphasise that a "supplier should not, whether deliberately or unconsciously, take advantage of the consumer."[499] By focusing on both the making and substance of the contract, the scope of the fairness test is also all-encompassing. Importantly, terms are evaluated in the context of the contract as a whole and the circumstances in which it was entered. This ensures that the regime can adequately address the mischief being tackled.

Furthermore, the CRA blacklists certain terms considered unfair in all circumstances.[500] Thus, if any of the blacklisted terms are used, they will be automatically considered unfair without any need to determine if they satisfy the fairness test. The use of blacklists is often considered as the "last resort of a consumer regulator"[501] and is sometimes criticised on the basis that they are "arbitrary, inflexible and open to abuse."[502] However, blacklists may be justified where they allow authorities meet regulatory outcomes with relatively high certainty.[503]

The CRA also contains an indicative non-exhaustive grey list of terms that may be regarded as unfair.[504] Unlike the blacklist, these terms are not automatically unfair but are regarded with suspicion.

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[498] Lord Bingham stated that "the language used in expressing the test, is, in my opinion, clear and not reasonably capable of differing interpretations." *First National Bank* (n 485) paragraph 17.
[499] Ibid.
[500] For example, terms which seek to exclude or restrict liability for death or personal injury resulting from negligence. S.65(1); see also ss.63(6) & (7), 31, 47, 57.
[501] G Howells (n 218) 366.
[502] L McMurtry, 'Consumer Credit Act Mortgages: Unfair terms, time orders and judicial discretion' (2010) 2 JBL 107, 116.
[503] OECD, *Policy Guidance on Resource Efficiency* (OECD Publishing 2016) p47. See, for instance, recital 17 of the Unfair Commercial Practices Directive 2005/29/EC.
[504] S.63 and Part 1 of Schedule 2.

They are subject to the fairness test. The forerunner to the CRA's parent Directive[505] initially proposed for the terms on the grey list to be incorporated into a blacklist. This proposal was criticised for infringing on the freedom of contract.[506] This criticism brought to fore the tension between balancing competing regulatory interests which is discussed subsequently.

It is important to note that the fairness test does not extend to a contract term if it-

> "a) it specifies the main subject matter of the contract, or
>
> (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it." [507]

The legislative history shows that the original proposals for the Unfair Contract Terms Directive did not include this exception.[508] This drew a lot of criticisms from academics[509] who believed that the effect of the proposals had far-reaching consequences on the freedom of contract.[510] The exception was subsequently included and represents a -

> "compromise between two conflicting regulatory ideologies that obtained at the time in the

[505] Directive 93/13/EEC.
[506] See Lord Walker's Judgment in *Office of Fair Trading v Abbey National Plc* (2009) UKSC 6; M Schillig, 'Directive 93/13 and the "price term exemption: A Comparative analysis in the light of the "market for lemons" Rationale' (2011) 60(4) ICLQ 933, 934
[507] s.73 also exempts terms which reflect mandatory statutory/regulatory provisions and the provisions/principles of international conventions.
[508] I.e. the Unfair Terms Directive (n 505); this was the forerunner of the Consumer Rights Directive (n 402). See P Duffy, "Unfair Contract Terms and the EC Directive" (1993) JBL 67 for a discussion on the legislative history of Directive 93/13/EEC.
[509] See notable criticisms in HE Brandner, P Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28(3) CMLR 647.
[510] See Lord Walker's comments in *Abbey National Plc* (n 506) paragraph 6.

> Commission and the Council, respectively; the consumer rights approach trying to ensure a 'good' bargain for consumers, and the free markets and competition approach relying on the corrective forces of the market"[511]

Hence, this exception, as well as the inclusion of the grey list, represented one of the many compromises aimed at "balancing the need for consumer protection against the residual freedom of contract."[512]

While this exception appears straightforward, its application may not always be so. This was evident in *Office of Fair Trading v Abbey National Plc.*[513] This was a test case seeking to determine if charges for unauthorised overdrafts were exempt from the fairness test since they could be classified as price terms. The Court of Appeal held that the exemption would only apply to price terms that formed part of the essential bargain between the parties. Since the overdraft charges were ancillary payment obligations of a contingent nature, which would not be incurred in the normal performance of the contract, they could not enjoy the exemption.[514] The UKSC, on the other hand, held that the exemption would apply to "any monetary price or remuneration payable under the contract."[515] Since the charges were "monetary consideration for the package of banking services,"[516] they would be exempt from the fairness test.

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[511] Schillig (n 506) 934; A Arora, 'Unfair Contract Terms and Unauthorised Bank Charges: A Banking Lawyer's Perspective' (2012) JBL, 1, 44, 57.
[512] Lord Walker, *Abbey National Plc* (n 506) paragraph 6.
[513] (n 506).
[514] See paragraphs 93-112 of the Court of Appeal's decision. [2009] EWCA Civ 116.
[515] Per Lord Walker, *Abbey National Plc* (n 506) paragraph 41.
[516] Ibid, paragraph 47.

This exemption only applies if the term is transparent[517] and prominent.[518] "Transparency" suggests that a term must be expressed in "plain and intelligible language and it is legible." This is discussed further in section 3.4.3.1.2. In a similar vein, prominence suggests that a term must be "brought to the consumer's attention in such a way that an average consumer would be aware."[519] The CRA adopts the familiar benchmark of the average consumer used under the CPUTRs.[520] Like the CPUTRs, the average consumer under the CRA is one who is "reasonably well-informed, observant and circumspect."[521] Unlike the CPUTRs however, the CRA makes no mention of adjustments to this standard in specific situations. Thus, it is unclear whether the peculiarities of vulnerable consumers will be taken into consideration when evaluating a trader's efforts at bringing terms to the attention of consumers.

Although the CRA specifies that a term must be brought to the consumer's attention, it does not explain how this requirement may be satisfied. The CMA provides some guidance by explaining a term will be considered prominent if is-

> "brought to the consumer's attention in a way that is practically effective. Steps taken to achieve this should ensure that the average consumer can understand and appreciate all the essential features of the bargain before making a purchase, so as to be

[517] S.64(3).
[518] S.64(4). The requirement for prominence was not contained under the UTCCRs which only required that for the core terms to be exempted, they needed to be expressed in "plain intelligible language" - see Regulation 6(2) UTCCRs.
[519] S.64(4).
[520] See discussions in section 3.4.3.
[521] Regulation 64(5).

> able to compare it meaningfully with other available bargains."[522]

The CMA further clarifies that –

> "prominence is not merely about highlighting terms visually in the contract document. In determining whether a term is sufficiently prominent, regard will need to be given to a number of factors – including whether the term itself is onerous, what a reasonable consumer would expect, how other contract terms are presented and what information has been given to the consumer before entering the contract. If a term could come as a surprise to the consumer, it will require more effort to ensure its prominence compared to other terms"[523]

Although the final interpretation lies with the courts,[524] the CMA's guidance is helpful and may influence the courts' assessment. Going by the CMA's statements, m-payment providers must make concerted efforts towards highlighting core terms for the exemptions to apply. Their efforts must be "practically effective" in ensuring that consumers can appreciate the essential features of the bargain.

In enforcing the regime, the CRA contains some important provisions. First, it imposes a duty on courts to evaluate the fairness of terms used even if none of the parties raises the issue. Courts are to carry out this evaluation provided there is sufficient legal and factual material to enable them to do so.[525] This provision aligns the UK's regime with the broader EU approach to regulating

[522] CMA (n 497) Paragraph 19.
[523] Paragraph 20 ibid.
[524] Courts are not bound by guidance documents released by regulators, see *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch), paragraph 54.
[525] S.71(2) & (3); A Samuels, 'The Consumer Rights Act 2015' (2016) 3 JBL 159, 177; *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* (C-243/08)

contract terms. The Court of Justice of the EU argues that "effective protection of the consumer may be attained only if the national court acknowledges that it has the power to evaluate terms of this kind of its own motion."[526] Thus, this provision will ensure more vigilance in the regulation of contract terms since an evaluation will be carried out even if the consumer fails to raise an objection. This is significant as consumers may not raise objections because they are unaware that they are subject to unfair terms.[527]

Second, regulators[528] can pre-emptively challenge the use of unfair terms. Thus, they can act even in the absence of a complaint.[529] It is believed that pre-emptive challenges can effectively aid in preventing the use of such terms.[530] It is also a helpful strategy that may contribute to changing general contracting practice.[531] Where the regulator finds that contract terms contravene the CRA, it may apply for an injunction against parties who use or recommend such terms or similar ones.[532] Alternatively, the regulator may accept an undertaking from a trader against whom an injunction is sought.[533]

The CRA also provides for private enforcement. Thus, a consumer may take independent action where he is subject to an unfair

[526] Ibid.
[527] *Mostaza Claro v Centro Movil Milenium SL* (C-168/05) EU:C:2006:675; *Oceano Grupo Editorial SA v Quintero* (C-240/98) EU:C:2000:346
[528] The CRA recognises a list of agencies and consumer bodies which may act as regulators. Some of these include the CMA, FCA and the Consumers' Association; Schedule 3, para 8(1).
[529] Paragraph 3(6) Schedule 3, s.70 CRA. This is subject to informing the CMA-Paragraph 4, Schedule 3 CRA.
[530] Lord Steyn in *First National Bank* (n 485) paragraph 33.
[531] Ibid.
[532] S.70, Schedule 3 CRA.
[533] Paragraphs 6(1) & (2) Schedule 3, CRA.

term.[534] Certain consumer organisations are also designated as regulators for the purposes of the CRA.[535] Hence the Consumers Association may apply for an injunction to preclude the continued use of unfair contract terms in the interest of the public.[536] The designation of a consumer body as a regulator under the CMA may be significant for reasons discussed in section 3.2.3. For instance, Ayres and Braithwaite argue that the involvement of consumer organisations in enforcement will help to address fears that regulatory capture will leave industry malpractices unchecked.[537] Furthermore, the high cost of individual enforcement suggests that representative actions by consumer organisations may be more pragmatic.[538]

Apart from the general rules in the CRA, the EMRs and PSRs contain some provisions addressing specific contract terms used in payment services. Additionally, the FCA clarifies the effect of some of these provisions in the guidance documents accompanying both regulations. For example, the EMRs permit the redemption of e-money at par value upon the request of a consumer.[539] The terms of redemption are to be disclosed to consumers before they are bound by the contract.[540] In clarifying this provision, the FCA states that a contract term charging

[534] S.79 & Schedule 7 CRA; CMA (n 483) paragraph 6.18.
[535] Schedule 3, paragraph 8(1)(k).
[536] Under Part 8 of the Enterprise Act 2002, certain bodies may be recognised and given the additional power to enforce consumer legislation.
[537] Ayres and Braithwaite (n 80) pp.441 & 449; see also R Axelrod, 'An Evolutionary Approach to Norms' (1986) 80 APSR 1094.
[538] G Howells, S Weatherill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 17.
[539] Regulation 39(b)(i) & (ii).
[540] Regulation 40.

redemption fees must be clear and prominent in the contract and should only reflect valid redemption-related costs.[541] Any term with provisions to the contrary will be challenged as an unfair term.

Thus, a term which limits the consumer's right to redeem after a specified period will be unacceptable.[542] The same goes for a term which charges fees that are not proportionate to the cost incurred by the e-money issuer.[543] Applying this to m-payments, it is possible that consumers may be issued e-money which they can store in electronic m-payment wallets. At their request, the PSP is obliged to redeem the consumers' transactions and unspent funds. If a term of the PSP's standard form contract charges disproportionate redemption fees or indicates that a request for redemption must be made within less than six years after the termination of a payment services contract,[544] that term could be challenged as an unfair term.

3.4.3.1.2. TRANSPARENCY

The CRA requires that a written term must be transparent. A term is transparent if it is expressed in "plain and intelligible language and it is legible."[545] The CMA states that transparency is both a requirement on its own and a fundamental part of fairness.[546] The

[541] Paragraph 8.11 EMR Approach Document.
[542] Regulation 43 permits refusals to redeem where requests are made more than 6 years after the termination of a contract.
[543] Ibid.
[544] See Regulation 43.
[545] Ss.64(3) and 68; See C Willett, 'The Functions of Transparency in regulating Contract Terms: UK and Australian approaches' (2011) 60(2) ICLQ 355 for a robust discussion on transparency.
[546] CMA (n 483) paragraph 2.4.

transparency requirement reinforces the obligation of fair and open dealing embodied in the requirement of good faith.[547] This implies that terms should be articulated in a way that puts consumers in a position to make informed choices.[548]

The CMA stresses that although transparency is important, it is not sufficient on its own to legitimise an otherwise unfair term.[549] This is because good faith relates not only to the substance of terms but also to the way they are expressed and used.[550] This confirms that the regime focuses on both the object/effect of contract terms as well as their form.[551]

As stated in section 3.4.3.1.1, a determination of fairness will be carried out in the context of the contract as a whole and all the circumstances in which the contract is entered into.[552] If it can be shown that the lack of transparency has caused a significant imbalance to the detriment of the consumer, then it may be successfully challenged.[553] This suggests that failing the transparency test does not necessarily imply that a term is unenforceable independently of the overall fairness test.[554] The CMA has also stated that if a regulator considers that a term is not transparent, it can take enforcement action in the same way as if

[547] Ibid.
[548] Ibid paragraph 2.46.
[549] CMA (n 497) paragraph 22.
[550] CMA (n 497) paragraph 28.
[551] Ibid para 5.14.5; see Willet (n 545) 384.
[552] CMA (n 483) Paragraph 2.18.
[553] L Poro, 'Unfair Commercial Practices in Financial Services: Is the EU Legal Framework Sufficient to Protect Consumers?' (2014) 29(7) JIBLR 422, 423; Unfair Terms Guidance' (n 481) paragraph 2.6.
[554] CMA (n 495) Paragraph 38.

that term had breached the fairness requirement.[555] Hence, regulators may be able to seek injunctive relief with respect to the use of terms in a non-transparent manner.

Finally, where a term is transparent but capable of several interpretations, the meaning most favourable to the consumer will prevail.[556] This provision reflects the common law approach of interpreting ambiguous terms strictly against the drafter.[557] The CMA has stated that this rule is intended to benefit only consumers in disputes with businesses. It will not be a defence for firms facing regulatory action.[558] This is in line with the CRA's main focus of protecting consumer interests.

3.4.3.2. FALSE AND MISLEADING INFORMATION

To regulate the use of false and misleading information, the CPUTRs criminalise two categories of practices namely "misleading actions" and "misleading omissions." While the former deals more with the active use of false information, the latter deals with the omission of material information. As highlighted in section 3.4.3, both are classified as unfair practices.

A commercial activity may qualify as a misleading action if it fulfils the conditions listed in two circumstances. In the first circumstance, a commercial activity is misleading if-

[555] CMA (n 483) paragraph 2.5.
[556] Section 68(1).
[557] This is known as the *contra proferentem* rule.
[558] CMA (n 497) Paragraph 38.

> "(a)if it contains false information and is therefore untruthful … or if it or its overall presentation in any way deceives or is likely to deceive the average consumer … even if the information is factually correct; and
>
> (b)it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."[559]

The information in question must be with regards to specific issues set out in the CPUTRs.[560] The use of "and" in this provision shows that both conditions must be satisfied. Hence if the information is false but does not affect the transactional decision of an average consumer then it is not a misleading action. This approach can be justified on the basis that one aim of prohibiting misleading actions is to ensure that consumers can make independent informed decisions. If a consumer's decision-making has not been influenced or is not likely to be influenced by the information called into question, it is only sensible that the trader is not liable for the offence.

However, it is important to note that the phrase `'transactional decision" is given a flexible interpretation by the CPUTRs. It means-

> "…any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—
>
> (a)whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or

[559] Regulation 5(2).
[560] Such as the existence/nature of the product, the price/manner in which it will be calculated, the consumers' rights and risks he may face. See Regulation 5(4) for a full list.

(b)whether, how and on what terms to exercise a contractual right in relation to a product."

Thus, a transactional decision will be interpreted broadly and will go beyond the decision to purchase a product or to refrain from doing so. It will cover a range of pre-purchase and post-purchase decisions made by the consumer with respect to a product.[561] As with most areas of commercial activity, this wide interpretation has implications for m-payment providers. For instance, if an m-payments provider puts out false marketing information about the nature of the m-payment service offered, the provider will contravene the CPUTRs if the information affects a transactional decision made by a consumer. Going by the wide interpretation of "transactional decision," the service provider may be liable even where the consumer has not actually subscribed to the service.

Furthermore, the CPUTRs are concerned not only with the content of the information but its overall presentation. This is significant in light of the findings of behavioural economics.[562] As discussed in section 2.2.2, consumers can be affected by the way information is framed and presented. Hence, it is reasonable that the CPUTRs scrutinizes the overall presentation of information.

In the second circumstance, a commercial activity is also misleading action if-

[561] EU Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (2016) <http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf> accessed 20 September 2017, p37.
[562] Ibid p58.

"a)it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor; or

(b)it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if—

(i)the trader indicates in a commercial practice that he is bound by that code of conduct, and

(ii)the commitment is firm and capable of being verified and is not aspirational,

and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances"[563]

As with the first category of misleading actions, the emphasis is placed on the effect such practices have on the transactional decisions of consumers. For instance, an m-payment provider will contravene these provisions if they put out false information on the service which induces consumers to make a transactional decision on the basis that the statement is true. Additionally, where an m-payment provider subscribes to an industry code which is firm and capable of being verified, they must comply with the commitments of that code.[564] This approach reflects marketing realities where consumers may be swayed to transact with particular traders because they are associated with a well-known and respected industry code. It is, thus, reasonable to require that traders comply with the code/standards they have claimed to be affiliated with.

[563] Regulation 5(3)(b).
[564] Regulation 4 also prohibits a code owner from promoting unfair commercial practices in a code of conduct.

Although non-compliance with a code is potentially a misleading action, it does not attract criminal sanctions. Rather it is enforced using an injunction.[565] However, it is unclear why this exception is made. Although an injunction will force a trader to comply with the code's commitments, it is submitted that this should not stop them from facing criminal sanctions as well. Like all other occurrences of misleading actions, the reference to a code can influence the transactional decision of a consumer and as such it seems more sensible for practices with a similar effect to be sanctioned in the same way. One argument which may justify this exception is that an injunctive relief remedies the situation negating the need for criminal sanctions which are expensive. However, this same argument can be used to justify civil sanctions for other misleading actions such as where a product is marketed in a way that causes confusion with another competitor's product.[566]

As already stated, misleading omissions are also prohibited. Unless apparent from the context, a commercial practice is a misleading omission if it omits or hides material information, provides material information in a way that is unclear, unintelligible, ambiguous or untimely, or fails to identify its commercial intent.[567] To qualify, such practices must also result in the average consumer taking a transactional decision he would not

[565] Regulation 9; Office of Fair Trading, 'Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive' (May 2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf> accessed 12 May 2015, paragraph 11.15. This guidance has been adopted by the CMA.
[566] This breaches regulation 5(3)(a). In such a case, the consumer can maintain an action in misrepresentation while the competitor may rely on the tort of passing off.
[567] Regulation 6.

have taken otherwise.[568] In deciding if a practice qualifies as a misleading omission, the CPUTRs provide a list of factors that a court will take into account.[569] These factors include-

> "(a)all the features and circumstances of the commercial practice;
>
> (b)the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
>
> (c)where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means."[570]

A few points may be made about these provisions. First, the CPUTRs emphasize that the nature of the information in question must be "material." The CPUTRs explain that material information covers "the information which the average consumer needs,[571] according to the context, to take an informed transactional decision."[572] This is in harmony with other provisions of the CPUTRs which confirm that the regulations aim to ensure that consumers can make informed decisions without external interference.

Second, it is clear that that the main concern here lies with omitting or hiding material information or presenting it in an ambiguous manner. In contrast to positive informational

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[568] Ibid.
[569] Where a commercial practice is an invitation to purchase, the CPUTRs provides a list of what it would consider as material information in Regulation 6(4)(a)-(f).
[570] Regulation 6(2).
[571] The courts have emphasised the importance of the word "needs" and have interpreted it very narrowly. See *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 (Ch), para 74.
[572] Material information also includes any information required under European Union Law. Regulation 6(3).

responses such as mandatory disclosures, prohibiting the use of false information is classified as a negative informational response.[573] Cartwright explains that while positive informational responses oblige firms to disclose specific information, negative informational responses compel them not to omit information which an average consumer would rely on to make an informed decision.[574]

This is significant because mandatory disclosure regimes may unwittingly fail to include certain matters that can influence a consumer's decision making. This leaves a loophole which will be exploited by unscrupulous traders who will prefer to keep silent. In such situations, although morally questionable, the traders break no law because they have complied with the mandatory disclosure requirements. Negative informational responses help to address this gap. It is submitted that a combination of both responses will be more appropriate since both ends of the information spectrum are targeted. Traders will, therefore, be under a positive obligation to disclose vital information under a mandatory disclosure regime. They will also be under a negative obligation not to omit important information under the regime prohibiting misleading omissions.

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[573] P Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation* (Financial Services Research Forum, 2011) 29.
[574] Ibid; *See Office of Fair Trading v Purely Creative Ltd* (n 569); *Secretary of State for Business Innovation & Skills ("SoS") v. PLT Anti-Marketing Limited* ("PLT") [2015] EWCA Civ 76.

As seen in section 3.4.3, engaging in misleading actions or omissions is a strict liability offence with limited defences.[575] But as our discussions show, these offences are only committed if they impair a consumer's decision making. This suggests that an evaluation must be made on the impact of such practices on consumer decision-making. The OECD suggests that in making such evaluations, authorities will have the task of determining the message actually received by consumers and the importance they attach to it.[576] One way to ensure that this task is carried out consistently is to adopt an objective reference point against which information shared or omitted by traders can be evaluated. This is where the average consumer standard proves to be relatively useful.

English law does not impose liability for trade puffs[577] and the CPUTRs follow this tradition. Thus, in determining the effect of a commercial practice on the average consumer, cognisance will be given to "the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally."[578] Ramsay explains that this is justified because trade puffs are often too vague and subjective to represent any factual claim and it is not expected that a reasonable person would take them seriously.[579] However, there is literature suggesting that the enforcement attitude towards trade puffs may not be optimal

[575] Regulations 9 & 10.
[576] Ibid.
[577] *British Airways Plc v Ryanair* (2001) ETMR 2.
[578] Regulation 2(6); *Purely Creative Ltd* (n 571).
[579] Ramsay (n 74) 137.

because, in many cases, consumers believe the "false facts that puffing speech implies" which can significantly alter "consumption preferences."[580] There is some truth to the concerns raised because behavioural biases can affect how consumers process information including those that appear false. Nevertheless, it is submitted that imposing liability for trade puffs may lead to the overregulation of business speech. While it would be desirable to ensure that consumers can make informed decisions, it is also necessary to create a balance in regulatory interventions.

3.4.4. ALLOCATION OF LIABILITY

At first, it may appear that applicable liability rules are dependent on the statutes regulating the funding sources of m-payment transactions. For instance, credit and debit cards are subject to differing regimes under UK law which indirectly impact m-payments. Where an m-payment transaction is funded by a credit card, the consumer may enjoy the rights available under the Consumer Credit Act 1974. Section 75 of the Act allows the credit cardholder to hold the credit card issuer and the merchant jointly and severally liable for any breach of contract or misrepresentation.[581]

[580] DA Hoffman, 'The Best Puffery Article Ever' (2006) 91 Iowa LR 1395, 1438-1439.
[581] This only applies to transactions with a value above £100 but below £30,000. It also extends to transactions made with an overseas company using a UK-issued credit card.

There is no equivalent protection for debit card holders.[582] Debit card holders and credit card holders who do not satisfy the section 75 conditions will need to rely on chargeback procedures in certain circumstances. As noted in section 3.2.4, the liability rules applying to card transactions are often very specific to the payment instrument and may be unclear when needed to be applied to m-payment transactions. On this basis, one may be tempted to conclude that the confusing liability regime observed in Canada also represents the situation in the UK.

However, this conclusion may not be entirely true. This is because, despite the varying regimes applying to different funding sources, the PSRs provide certain rules which apply uniformly to all payment transactions. For instance, the PSRs provide that-

> "where an executed payment transaction was not authorised…the payment service provider must immediately—
>
> (a)refund the amount of the unauthorised payment transaction to the payer; and
>
> (b)where applicable, restore the debited payment account to the state it would have been in had the unauthorised payment transaction not taken place."[583]

Thus, with respect to unauthorised transactions, this provision may circumvent the problems associated with the varying liability rules applicable to payment cards. This is more so because the provision is not specific to any payment instrument but rather

[582] Card Networks like Visa and Mastercard provide voluntary protections to users faced with the non-delivery goods; NM Peretz, 'The Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in The European Union' (2008) 16 Mich.St.J.Int'l L. 573, 610.
[583] Regulation 61.

targets the payment transaction itself. One may argue that the provision creates a minimum set of rules applying to unauthorised payments thereby providing uniform protection for all m-payment users irrespective of the funding source used. This does not affect the application of more favourable liability rules associated with the underlying funding source.

There are other notable features of the liability regime under the PSRs. For instance, the PSRs' liability regime for unauthorised transactions is linked to the mandatory disclosure regime. The PSRs provide that, where relevant, PSPs are required to disclose what steps a consumer must take to keep a payment instrument safe.[584] PSPs must also disclose-

> "how and within what period of time the payment service user is to notify the payment service provider of any unauthorised or incorrectly executed payment transaction"[585]

PSPs are further mandated to-

> "ensure that appropriate means are available at all times to enable the payment service user to notify the payment service provider in accordance with regulation 57(1)(b) …"[586]

Regulation 57(1)(b) obliges a consumer to-

> "notify the payment service provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument."

[584] Paragraph 5(a) Schedule 4.
[585] Paragraph 5(d) Schedule 4.
[586] Regulation 58(1)(c).

This is an important obligation as the consumer is entitled to redress for unauthorised transactions "only if it notifies the payment service provider without undue delay."[587] Except where the consumer has acted fraudulently, he will also not be liable for losses arising after the PSP has been notified of the loss, theft or misappropriation of a device.[588] However, the PSRs introduce an important exception to this rule. Where the PSP has failed to disclose how it may be notified of an unauthorised transaction, then the consumer is entitled to redress even where they fail to notify the PSP.[589] Thus, the notification requirement which is tied to the disclosure regime plays a central role in the liability regime.

The liability regime further connects a PSP's disclosure obligations and the security responsibilities placed on the consumer. On receiving a payment instrument, a consumer is obliged to take "all reasonable steps to keep its personalised security features safe."[590] As noted above, PSPs are also mandated to inform consumers of the steps they may take to keep such instruments safe.[591] A consumer will be liable for all losses where an unauthorised transaction occurs because the consumer has with "intent or gross negligence"[592] failed to comply with the security responsibilities placed on him.[593]

[587] Regulation 59(1).
[588] Regulation 62(3).
[589] Regulation 59(2).
[590] Regulation 57(2).
[591] Paragraph 5(a), Schedule 4.
[592] In the absence of intent or gross negligence, the consumer's liability is limited to £50 prior to a notification being made; Regulation 62(1).
[593] Regulation 62(2)(b).

This provision seems fair as it targets consumers who have contributed to their losses through serious intentional or negligent failure to keep their payment instruments secure. However, the severe implication of a consumer's actions being labelled as grossly negligent, for instance, suggests that targeted disclosures and education initiatives on good security practices will be useful. This confirms arguments that disclosures will be significant in m-payments because they will help to increase consumer awareness of the risks involved[594] and their responsibilities regarding the secure use of their devices.[595]

The PSRs further provides that if a personal identification number (PIN) or password is sent to the consumer, any risk involved in sending it will remain with the PSP. If these details are intercepted before they reach the consumer, the PSP will bear any losses arising from their misuse.[596] This provision is reasonable as a consumer who has not received the security details cannot be expected to bear the losses arising from their misuse. A term suggesting a contrary allocation of risk will contravene the CRA's test of fairness as its effect is to indirectly make the consumer the insurer for losses the business ought to bear. The CMA confirms that-

> "A contract may be considered unbalanced if it contains a term imposing on the consumer a risk that the trader is better

[594] Ibid.
[595] 'Recommendations for the Security of Mobile Payments Draft Document for Public Consultation"<http://www.ecb.europa.eu/paym/cons/pdf/131120/recommendationsforthesecurityofmobilepaymentsdraftpc201311en.pdf> accessed 7 November 2014, p14.
[596] Regulation 58 PSRs; PSR Approach document p75.

able to bear. A risk lies more appropriately with the trader if, for instance:

- it is within their control;
- it is a risk the consumer cannot be expected to know about; or
- the trader can insure against it more cheaply than the consumer."[597]

However, the CMA notes that if a risk is transferred to a consumer on the basis that they are better positioned to control it or that insurance is available at reasonable cost, such information needs to be disclosed to them. Consumers must also be informed of what steps may be taken to minimise such risks.[598]

Despite these clear rules, there are some transactions supported by m-payments which fall outside the scope of the PSRs. An example is the purchase of digital content.[599] In such cases, liability regimes may be dependent on the contracts entered with MNOs. Consumers may, however, place some limited reliance on provisions in the CRA and the Code of Practice (PRS Code) issued by the Phone-paid Services Authority,[600] the regulator for premium rate services (PRS).[601]

The CRA nullifies exclusion clauses seeking to limit a trader's liability where the digital content is not as described, is not of satisfactory quality or is not fit for a particular purpose.[602] The

[597] CMA (n 483) paragraph 5.31.1.
[598] CMA (n 483) paragraph 5.31.5.
[599] Part 2, Schedule 2, PSRs.
[600] Also known as PhonepayPlus; This Code is made pursuant to s.120 of the Communications Act 2003.
[601] These are value-added goods or services that consumers can purchase by charging the cost to their phone bill or pre-paid phone accounts. Examples include donating to charity by text, online games and TV voting. https://publications.parliament.uk/pa/cm201314/cmselect/cmbis/697/697vw35.htm accessed 20 July 2017.
[602] S.47(1).

CRA, however, contains no provisions on issues such as unauthorised transactions. Although the PRS Code provides that that "PRS must not be of a nature which encourages unauthorised use by non-bill payers,"[603] it does not contain any rules on how liability will be apportioned if there is unauthorised use.

3.4.5. DISPUTE RESOLUTION

PSPs are expected to set up internal redress processes to deal with consumer disputes. These processes, as well as the availability of the Financial Ombudsman Service (FOS), must be disclosed to the consumer.[604] These disclosures are important because the EMRs reiterate that the FOS will not handle complaints unless a firm has had the opportunity to consider it first.[605]

PSPs are also subject to the Dispute Resolution Complaints Sourcebook (DISP) contained in the FCA Handbook.[606] The DISP places similar obligations on PSPs.[607] Firms are required to set up "effective and transparent procedures for the reasonable and prompt handling of complaints"[608] free of charge.[609] In disclosing these mechanisms to consumers, PSPs must clarify-

> "(1) how the respondent fulfils its obligation to handle and seek to resolve relevant complaints; and
>
> (2) (where the complaint falls within the jurisdiction of the Financial Ombudsman Service) that, if the complaint is not resolved, the complainant may be

[603] Paragraph 2.3.5.
[604] Regulations 36(2)(e) and 40 PSRs, paragraph 7(b) Schedule 4 PSRs.
[605] EMR Approach Document p86.
[606] See p2 (introduction), DISP 1.1.10A R & DISP 1.1. 10C R.
[607] DISP 1.2.1R.
[608] DISP 1.1.3R.
[609] DISP 1.3.1A R.

> entitled to refer it to the Financial Ombudsman Service."[610]

When setting up these internal procedures, firms are required to-

> "ensure that lessons learned as a result of determinations by the Ombudsman are effectively applied in future complaint handling for example by:
>
> (1) relaying a determination by the Ombudsman to the individuals in the respondent who handled the complaint and using it in their training and development;
>
> (2) analysing any patterns in determinations by the Ombudsman concerning complaints received by the respondent and using this in training and development of the individuals dealing with complaints in the respondent; and
>
> (3) analysing guidance produced by the FCA, other relevant regulators and the Financial Ombudsman Service and communicating it to the individuals dealing with complaints in the respondent."[611]

This is a significant provision as it obliges firms to keep abreast with the determinations of the FOS and guidance emanating from regulators. This ensures that they can update their internal redress procedures to reflect current best practices. The requirement to incorporate new information into their training and development programmes should also help to ensure that staff charged with resolving consumer complaints are competent and knowledgeable.

Furthermore, the DISP requires firms to-

> "put in place appropriate management controls and take reasonable steps to ensure that in handling complaints it identifies and remedies any recurring or systemic problems, for example, by:

[610] DISP 1.2.3.G.
[611] DISP 1.3.2A G.

> (1) analysing the causes of individual complaints so as to identify root causes common to types of complaint;
>
> (2) considering whether such root causes may also affect other processes or products, including those not directly complained of; and
>
> (3) correcting, where reasonable to do so, such root causes."[612]

This is reminiscent of the obligation under Kenya's PGCP that required firms to "put in place arrangements to ensure that, in handling complaints, it identifies and remedies any recurring or systemic problems."[613] This provision was criticised in section 3.3.5 for the non-inclusion of supervisory mechanisms to ensure that firms act appropriately. Although the duty in the DISP is similar, there are two key differences from the Kenyan regime.

First, unlike the PGCP, the DISP provides guidance on how firms may discharge these functions. The DISP explains that firms can discharge these functions by collecting management information on the causes of complaints, the products/services they relate to and how the complaints were resolved.[614] The DISP also encourages regular reporting of recurring or systemic problems to senior personnel.[615] Firms must keep records of the analysis and decisions taken by senior personnel in response to management information on the root causes of complaints.[616]

[612] DISP 1.3.3R.
[613] Paragraph 4.8 PGCP.
[614] DISP 1.3.3.B G(1).
[615] DISP 1.3.3.B G(6).
[616] DISP 1.3.3.B G(7).

Second, the existence of the FOS helps to ensure that if firms do not take reasonable steps to identify and remedy recurring problems, this can be picked up by the FOS. Discussions on the Kenyan approach pointed out that the lack of supervision would allow systemic problems to remain unresolved. It is submitted that the FOS plays an indirect supervisory function because consumers dissatisfied with internal procedures can approach the FOS. This means that the FOS can spot systemic or recurrent issues that firms have failed to identify. Kenya lacks a statutory ombudsman service, thus there is no 'safety net' where firms fail to identify recurrent problems.

The DISP contains provisions on forwarding complaints which may be useful in m-payments. It requires that-

> "A respondent[617] that has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in a complaint may forward the complaint, or the relevant part of it, in writing to that other respondent, provided it:
>
> (1) does so promptly;
>
> (2) informs the complainant promptly in a final response of why the complaint has been forwarded by it to the other respondent, and of the other respondent's contact details; and
>
> (3) where jointly responsible for the fault alleged in the complaint, it complies with its own obligations under this chapter in respect of that part of the complaint it has not forwarded."[618]

[617] i.e. the firm receiving the complaint.
[618] DISP 1.1.7R.

This provision may be helpful in m-payments because of the numerous parties involved. Rather than having a situation where all parties avoid responsibility for consumer complaints, this provision obliges firms to consider each complaint and to deal with issues falling within their responsibility. For issues outside their responsibility, they are required to forward it to the party they believe is better positioned to handle it.

Where appropriate, m-payment consumers may also enjoy access to the Financial Ombudsman Service (FOS). The FOS is a statutory dispute resolution service established under the Financial Services and Markets Act (FSMA) 2000[619] and operationally independent of the FCA. The FOS resolves claims between consumers[620] and FIs which do not surpass a monetary limit of £150,000.[621] The use of the service is free to consumers and is financed by a levy imposed on the financial services industry.[622]

The FOS adopts minimum formality and bases its findings "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case"[623] This allows for flexibility in determining complaints received. As Afghan explains, this flexibility suggests that the ombudsman can ignore legal

[619] See s.225 FSMA; EMR Approach Document p87.
[620] This covers individuals, micro-enterprises, small charities and trusts.
[621] <http://www.financial-ombudsman.org.uk/publications/technical_notes/compensation.html#maximumlimit > accessed 8 June 2017.
[622] S. 234 FSMA. Industry funding of the FOS has been challenged and rejected; see *Financial Ombudsman Service Ltd v Heather Moor & Edgecomb Ltd* [2008] EWCA Civ 643.
[623] S.228(2) FSMA.

technicalities which would have been strictly followed in court.[624] By the same token, the flexibility also allows the ombudsman to conclude that it would be wrong to depart from the strict legal position.[625]

Because of this flexibility, the FOS has been criticized for reaching inconsistent determinations. In its defence, Afghan explains that, to a certain extent, these inconsistencies are unavoidable since the FOS is required to determine each case based on an assessment of what is fair and reasonable.[626]

Where the consumer notifies the FOS that they accept its findings, it becomes binding on both parties and is final.[627] Once binding, the findings also become enforceable in court.[628] However, if the consumer rejects the ombudsman's findings,[629] they are free to pursue that matter further in court. This approach favours the consumers and ensures that their right to redress is not restricted.

The FOS has compulsory jurisdiction over financial service firms, payment service providers and e-money issuers with UK establishments.[630] The jurisdiction of the FOS is acknowledged under the PSRs and EMRs and it is clear that m-payment disputes

[624] SK Afghan, 'Commercial Financial Dispute Resolution Platform: A Palliation or Panacea for Consumers of Financial Services?' (2017) 32(5) JIBLR 200, 209.
[625] Ibid.
[626] Ibid 210.
[627] S.228(5); see *Clark v In Focus Asset Management & Tax Solutions* [2014] EWCA Civ 118.
[628] PE Morris, 'The Financial Ombudsman Service and the Hunt Review: Continuing evolution in Dispute Resolution' (2008) 8 JBL 785, 789.
[629] S.228(6) FSMA provides that if by a specified date, the consumer fails to notify the ombudsman of his acceptance or rejection of the determination then it is presumed that he has rejected it.
[630] S.226 FSMA; chapter 2 Dispute Resolution Complaints Sourcebook (DISP) of the FCA Handbook.

will fall under its jurisdiction.[631] This ensures that m-payment consumers enjoy uniform access to the FOS irrespective of the underlying funding source and status of the PSP.

The UK dispute resolution regime also provides mechanisms which can assist with the cross-border resolution of payments disputes. For example, the UK European Consumer Centre provides free advice to consumers in cross-border disputes with other EU Traders.[632] This initiative is part of a wider network of European Consumer Centres (ECC-Net).[633] The FOS is also a member of the Financial Dispute Resolution Network (FIN-NET). FIN-NET helps consumers in the European Economic Area resolve cross-border disputes out of court.[634] It is believed that this will be a viable platform for facilitating cross-border disputes that may arise in the provision of m-payments.[635]

ODR is also expected to gain grounds in the UK. Apart from the ODR Regulation[636] which supports the use of ODR in the EU,[637] the ODR platform[638] has also been developed by the European Commission. Currently, UK consumers can access this platform. The platform is an online tool that allows consumers to lodge

[631] EMR Approach Document p89.
[632] <http://www.ukecc.net/> accessed 13 December 2014.
[633] <http://ec.europa.eu/consumers/ecc/index_en.htm> accessed 13 December 2014.
[634] <http://ec.europa.eu/internal_market/fin-net/index_en.htm> accessed 13 December 2014.
[635] EMR Approach Document p90.
[636] Regulation (EU) No 524/2013.
[637] EU Legislation favours the utilisation of ODR mechanisms, e.g., the Directive on Electronic Commerce (Directive 2000/31/EC) Art.17, the Directive on certain aspects of Mediation in Civil and Commercial Matters (Directive 2008/52/EC) Recitals 8 and 9; JC Betancourt, E Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the way forward?" (2013) 79(3) Arbitration 256, 257.
[638]<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage> accessed 23 November 2016.

complaints against traders where goods/services are purchased online. Submitted complaints are resolved by approved ADR providers.[639] This will be useful for m-payment users who purchase goods/services from other Member States. It will also be convenient in reducing costs as parties will not need to be physically present to resolve disputes.

3.4.6. FINANCIAL INCLUSION

Financial inclusion became an increasingly prominent policy priority in the UK in the late 1990s.[640] Key policy initiatives undertaken to encourage inclusion include the setting up of the Social Exclusion Unit in 1999, the introduction of the Post Office Card Account and basic bank accounts in 2003/2004 and the establishment of the Financial Inclusion Task Force in 2005.[641] There are several statutory bodies and government departments involved in the financial inclusion strategy[642] but the HM Treasury plays a lead role. It has the responsibility of determining financial inclusion priorities and coordinating the delivery of set objectives.[643]

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[639] <http://www.ukecc.net/consumer-topics/online-dispute-resolution.cfm> accessed 23 November 2016.

[640] K Rowlingson, S McKay, 'Financial Inclusion Annual Monitoring Report' (2013) <http://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/CHASM/annual-reports/financial-inclusion-monitoring-report-2016.pdf> accessed 13 January 2017, p5.

[641] The task force lasted from 2005- 2011; ibid 9.

[642] The Cabinet Office Department for Work and Pensions (DWP); the Legal Services Commission (LSC); the Office of Fair Trading (OFT); Department for Business, Enterprise and Regulatory Reform (BERR); Department for Innovation, Universities and Skills (DIUS); and Ministry of Justice (MoJ). See L Mitton, 'Financial inclusion in the UK: Review of policy and practice' (2008) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.487.9430&rep=rep1&type=pdf> accessed 23 January 2017, p13.

[643] Ibid.

With regards to m-payments and as noted already, a service called "Paym" was launched. The service was marketed as a convenient alternative payment platform and not a solution to financial exclusion. This may be because there are already existing initiatives such as the Post Office Card Account and credit-builder prepaid cards[644] specifically targeted at financially excluded persons. Moreover, Paym has not generated much buzz and this may be because the UK already has established payment methods. The widespread use of contactless cards particularly leads Tiltcomb to conclude that-

> "many consumers have failed to see the benefit of using the equivalent technology with a phone. Adoption of mobile payment services has been higher in some other countries where contactless cards are less common."[645]

This may confirm the position held in section 3.2.6 that m-payments will not attract the same attention in some developed countries as it does in many developing countries. Although mobile penetration is high in developed countries,[646] the presence of better-developed payment systems suggests that m-payments will only represent an additional payment platform which will have to compete with more established ones.

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[644] Credit-builder prepaid cards work as both a credit and debit card subject to a small monthly fee. The advantage of these cards is that no credit checks are carried out and no proof of income is required. <https://www.moneysupermarket.com/prepaid-cards/credit-building/> accessed 19 July 2017.

[645] J Titcomb 'Mobile Payments Struggle to make Impact on Contactless Card Use' http://www.telegraph.co.uk/technology/2017/04/14/mobile-payments-struggle-make-impact-contactless-card-use/ accessed 14 July 2017.

[646] According to OFCOM, as at 2016, 93% of adults own or personally use a mobile phone in the UK while 71% use a smartphone. <https://www.ofcom.org.uk/about-ofcom/latest/media/facts> accessed 19 July 2017.

In 2015, a report prepared by the Financial Inclusion Commission (FIC)[647] raised interesting points on the effect of technology on financial inclusion. While noting that technology "offers a huge opportunity to provide more tailored, flexible banking services that give people more control over their money,"[648] the FIC observes that-

> "The move toward digital financial services risks creating yet another barrier for those already excluded. Technology clearly offers an opportunity to provide flexible, tailored financial services. But these changes will not reach everyone. For those who cannot or choose not to manage their money this way, other services must remain available." Technology may not be for everyone because of the sophisticated use of data, many people do not have access to online services owing to a lack of affordability or of digital skills, low connectivity, illness or disability."[649]

It concludes that "while there are great benefits to online access for some potentially vulnerable consumers and it can be a force for greater inclusion, those benefits are not evenly spread."[650] The FIC, thus, calls on "regulators to ensure payment mechanisms are responsive to the needs of all consumers."[651] These observations raise important points with respect to consumers who may be further disadvantaged by the move towards digital financial

[647] The Commission describes itself as 'an independent body of experts and parliamentarians who came together to put financial inclusion back on the political agenda ahead of the 2015 General Election.' <http://www.financialinclusioncommission.org.uk/pdfs/fic_report_2015.pdf> accessed 19 July 2017; p1.
[648] Ibid, p28.
[649] Ibid, p16.
[650] Ibid, p48.
[651] <http://www.financialinclusioncommission.org.uk/pdfs/fic_report_2015.pdf> accessed 19 July 2017, p5.

services. There are consumers who by reason of age, knowledge[652] and costs[653] will prefer not to use these services. This is not a point that is given much attention when innovative services like m-payments are discussed.

The FIC emphasises that "other services must remain available" for those who cannot or who are unwilling to embrace changing technology. This will ensure that the different needs of consumers are taken into consideration. It is submitted that although this recommendation is appropriate, it also demonstrates the striking difference in opportunities available to consumers in developed and many developing countries. The FIC rightly assumes that there are other alternatives available to consumers who cannot or who do not wish to use digital financial services and they are right, at least within the context of the UK. But the same cannot be said of many other countries with less developed "other services." Perhaps one reason for over-emphasising the positive aspects of m-payments adoption may be because there are little or no options available to those who are financially excluded. This confirms the dire situation for excluded persons in these developing countries.

[652] This does not suggest illiteracy but points to the fact that many digital financial services require some knowledge of how smartphones and applications work.
[653] These services will mostly require the use of smartphones which will require that consumers purchase data.

PART 4

3.5. CONCLUSION

This chapter discussed the approaches to financial consumer protection in selected jurisdictions highlighting specific provisions applying to m-payments. Kenya's initial response to M-pesa was a "watch and learn" regulatory approach[654] that allowed non-bank entities to take the lead in providing the service. Full regulatory intervention only came after the service was firmly established. Despite this, some consumer issues still remain in need of attention. The current UK and Canadian approach involve the extension of existing regulations to m-payments. Although both have comprehensive consumer protection regimes, the UK's regime appears better-suited to respond to innovative payment methods. This might be because the provisions of the PSRs and EMRs are technologically neutral while the relevant consumer statutes are drafted broadly. These regimes, however, remain untested as m-payments remain at a nascent stage in these jurisdictions. The next chapter will consider the current consumer protection regime applicable to m-payments in Nigeria.

[654] J Malala, 'Consumer Protection for Mobile Payments in Kenya: An Examination of the Fragmented Legislation and The Complexities It Presents for Mobile Payments' [KBA Centre for Research on Financial Markets and Policy Working Paper Series] 2013 <http://www.kba.co.ke/downloads/Working%20Paper%20WPS-07-13.pdf> accessed 23 January 2017, p34.

CHAPTER 4 – THE REGULATION OF CONSUMER ISSUES IN MOBILE PAYMENTS: NIGERIA

4.1. INTRODUCTION

Currently, consumer protection in financial services in Nigeria is "governed by a mix of the law relating to contract, agency, tort, and restitution and ad-hoc rules and guidelines issued by the central bank."[1] This fragmentation is reflected in the regulation of m-payments; hence several bodies have jurisdiction over consumer protection in m-payments. Nigeria operates a federal system in which financial services and telecommunications are regulated at the federal level.[2] Banks and certain FIs[3] are regulated by the Central Bank of Nigeria (CBN) while telecommunication services are regulated by the Nigerian Communication Commission (NCC).

Recently the CBN released a Consumer Protection Framework (CPF). Though unenforceable, the administrative document recommends the minimum standards for financial consumer protection and is expected to "lead to the development of various regulatory/supervisory instruments…"[4] Consumer protection in the telecommunications industry is governed by guidelines issued by

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[1] K Ajayi et al, 'The Forbidden Apple and its Impact on Man' <http://www.cbn.gov.ng/icps2013/papers/Legal%20And%20Regulatory%20Framework%20In%20E-payment%20Environment%20-%20Final%20Revised-%2011%2009%202013.pdf> accessed 12 February 2016, p13.

[2] Paragraphs 6 & 46, Part 1, Schedule 2 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[3] E.g. Bureaux-de-Change, Development Finance Institutions, Primary Mortgage Institutions and Finance Companies. <https://www.cbn.gov.ng/AboutCBN/Dir-FSS.asp#ofid> accessed 20 March 2017.

[4] <https://www.cbn.gov.ng/Out/2016/CFPD/Consumer%20Protection%20Framework%20(Final).pdf> accessed 27 February 2017.

the NCC. The most direct consumer statute of general application is the Consumer Protection Council Act (CPCA) 1992. The CPCA creates the Consumer Protection Council (CPC) with the mandate to oversee the general consumer protection regime. Consequently, jurisdiction over consumer protection in m-payments is shared between the CBN, NCC and CPC.

With a population of over 170 million, statistics reveal that 70% of Nigerians have access[5] to mobile phones[6] while only about 44% of adults are able to access an account with an FI.[7] Believing that m-payments could assist with improving financial inclusion, the CBN considered it necessary to create "an enabling regulatory environment as a policy path towards achieving availability, acceptance, and usage of mobile payments services in Nigeria."[8] To this end, it released key policy documents. In 2009, it introduced a Regulatory Framework ("the M-payments Framework") with the broad objective of providing an enabling environment for m-payment services.[9] In 2014, the CBN also released draft Guidelines on Mobile Payment Services ("The M-

[5] In this context, "access" means ownership or access to a mobile device without ownership. GSMA Intelligence, 'Country Overview – Nigeria' <http://draft-content.gsmaintelligence.com/AR/assets/4161587/GSMA_M4D_Impact_Country_Overview_Nigeria.pdf> accessed 12 February 2016.

[6] Mobile penetration on a unique subscriber basis is much lower at 30%. This suggests that while there is high access to mobile phones, individual ownership percentages remain low. Ibid.

[7] As at 2014; <http://datatopics.worldbank.org/financialinclusion/country/nigeria> accessed 28 January 2017.

[8] The Regulatory Framework for Mobile Payments in Nigeria, <http://www.cenbank.org/OUT/CIRCULARS/BOD/2009/REGULATORY%20FRAMEWORK%20%20FOR%20MOBILE%20PAYMENTS%20SERVICES%20IN%20NIGERIA.PDF> accessed 3 February 2016, p3.

[9] s.1.1.

payment Guidelines) to further clarify the m-payments regulatory regime.[10]

This chapter focuses on the consumer protection framework currently available to m-payment users in Nigeria. The primary focus is on the protections available under the M-payments Framework and M-payment Guidelines. The scope of the enquiry will also extend to other consumer protection rules in relevant instruments released by the CBN and NCC and those contained under the CPCA.

[10] <http://www.cenbank.org/out/2014/bpsd/exposure%20draft%20guidelines%20on%20mobile%20payments%20services%20in%20nigeria%20.pdf> accessed 3 February 2016.

4.2. PROVISION OF INFORMATION

4.2.1. MANDATORY DISCLOSURE

The M-payments Framework and M-payment Guidelines are silent on the disclosures required to be made to m-payment consumers. Other primary statutes applying to banks[11] do not also contain detailed disclosure requirements.[12] The CBN has stated that it will issue general guidelines setting the minimum disclosure requirements for financial products and services.[13] The guidelines are expected to encourage disclosures on fees/charges, penalties, interests, payment and termination modalities.[14] Presently, no guidelines have been issued.

In the telecommunications industry, under which MNOs are regulated, the Consumer Code of Practice Regulations (CCPRs) 2007[15] contain more specific disclosure requirements. Under the CCPRs, MNOs must provide information on the tariffs and terms and conditions for services offered when requested by the consumer. MNOs are also obliged to provide information concerning any compensation, refund or other arrangements which may apply when contracted quality service levels are not met.[16] Consumers must also be informed of available dispute

[11] The Central Bank Act 2007 and the Banks and Other Financial Institutions Act (BOFIA) 1991(as amended).
[12] The only reference to disclosure in the BOFIA relates to the disclosure of lending and deposit interest rates, s.23(1).
[13] Paragraph 2.3.1(2) CPF. Currently, disclosures are based on existing policy guidelines, if any, that cover a financial transaction and general contractual provisions. What the CBN proposes is to provide a generalised policy document that provides minimum uniform disclosure requirements in financial services.
[14] Ibid.
[15] This is a subsidiary legislation issued by the NCC under the Nigerian Communications Act 2003.
[16] Clause 8.

resolution procedures.[17] These disclosures should be readily available in print and electronic format free of charge.

Enforcement of these disclosure obligations is yet to be seen and the regime has been criticised because it ties the provision of information to specific requests made by consumers.[18] Making disclosures contingent on a consumer's request may not be appropriate because many consumers may be unaware of their right to request information. If consumers make no requests, it suggests that they will have no information about the basic terms of the service they are subscribing to. This defeats the purpose of disclosures which is to ensure that consumers have access to the information required to make informed decisions. A better approach, as observed in the countries examined in chapter three, is to mandate that disclosures be automatically made prior to contracting.

Although the disclosure requirements under the CCPRs are more detailed than what is obtainable in the financial services sector, it is of no consequence to m-payment consumers. This is because the current M-payments Framework excludes MNOs from being licensed mobile money operators.[19] Hence, they cannot

[17] Ibid.
[18] Consumer Awareness Organisation: 'Research Report on the State of Consumer Protection In Nigeria' <http://www.consumersinternational.org/media/1532727/consumer-protection-in-nigeria-research-report-eng.pdf> accessed 20 May 2016, p38.
[19] A "licensed money operator" would be the equivalent of a payment services provider under the PSRs. Two models are recognised by the Guidelines on Mobile Money Services- they are the Bank-led model and the Non-bank led model. The bank led model allows a bank or a consortium of banks to deliver banking services leveraging on the mobile payments system. The Non-bank model allows corporate organisations excluding MNOs to deliver mobile money services.

independently provide m-payment services and the primary contractual relationship will not lie between them and the consumer. Since a bank-led model is preferred by the CBN, it suggests that the disclosures which affect consumers will be those emanating from the financial services industry. Thus, it is important that the CBN clarifies what mandatory disclosure obligations apply to m-payments.

4.2.2. CONSUMER EDUCATION

Recognising that "it is only when the vast majority of the Nigerian population is financially literate that they can participate in the formal financial system,"[20] the CBN[21] developed a National Financial Literacy Framework (NFLF) in 2013.[22] The NFLF articulates a multi-stakeholder approach[23] to the delivery of financial education. There are also plans to establish a coordinating committee in the Consumer Protection Department of the CBN (CPD) which will serve as the National Secretariat for Financial Literacy.[24]

<http://www.cenbank.org/out/2015/bpsd/guidelines%20on%20mobile%20money%20services%20in%20nigeria.pdf> accessed 8 February 2016, paragraph 5.0.

[20] <http://www.cenbank.org/Devfin/finliteracy.asp> accessed 16 February 2016.

[21] Apart from the CBN, the Consumer Protection Council (CPC) is also charged with implementing initiatives which support consumer education. The CPC's mandate is general and is not exclusive to any sector; s.2(e) CPC Act.

[22] To foster overall economic growth, the NFLF aims to promote the National financial inclusion policy by encouraging financial literacy. CBN (n 20).

[23] This suggests that the CBN favours a collaborative approach with key stakeholders to drive its financial literacy policies.

[24] Financial Literacy Framework (Draft) <http://www.cenbank.org/out/2012/circulars/fpr/financial%20literacy%20framework-draft.%20circular.pdf> accessed 10 February 2016, p12.

The NFLF identifies different consumer classes[25] and acknowledges there is no one-size-fits-all strategy for improving financial literacy. The consumer classes identified include "children, youth, undergraduates, educated Nigerians outside the school system, the uneducated/illiterate population." Flowing from this, the CBN has stated in the CPF that it will collaborate with relevant stakeholders[26] to develop financial education initiatives that fit the different types of consumers.[27]

Mass sensitization workshops[28] and media awareness campaigns have been employed to further the NFLF objectives. The CBN also intends to develop a communication strategy for financial education which will use different media platforms to roll out financial education programs.[29] The CBN also proposes to provide educational materials in local languages.[30] This is necessary to assist less literate consumers.

The financial literacy initiatives proposed in the NFLF and CPF are generalised and there are no current efforts targeted at m-payment consumers. Nevertheless, a few comments may be made about the CBN's notions of consumer education. First, the CBN explains that one reason informing its push for financial literacy is to encourage the "shift of financial management risks from

[25] Ibid p9. Similar provisions are also contained in the CPF (n 4).
[26] The CPF does not mention who these stakeholders are.
[27] Paragraph 2.4.2.
[28] These refer to public workshops organised to disseminate information. In rural areas, these are often conducted in local languages making them quite effective in reaching out to less literate persons.
[29] E.g. TV appearances, radio programmes and print media; Paragraph 2.4.3(3).
[30] NFLF (n 24) 11.

governments to individuals."[31] The CPF also imputes the duty of "knowledge and understanding" on the consumer.[32] It requires that consumers "endeavour to obtain accurate information from credible sources and make comparison before subscribing to financial products and services."[33] Based on information obtained, consumers are expected to "negotiate beneficial terms to ensure that financial products and services suit the consumers' need."[34] Considering the level of illiteracy in Nigeria, these expectations appear unrealistic. This is more so as available m-payment services are offered on standard terms with little or no chance of negotiation. This approach is also reminiscent of previous discussions on "responsibilisation," where consumer education is seen as an attempt to reconstruct the consumer as a regulatory subject.[35] The CBN risks falling into the trap highlighted by Williams[36] where in adopting financial literacy objectives, regulators reverse the idea of market failure posing a risk to consumer welfare by focusing instead on the risk of consumer failure threatening the proper functioning of financial markets.

With regards to new payment methods such as m-payments, the CBN's stance is also concerning. For example, the CBN argues that although many Nigerians are not literate, there is a high level of

[31] CBN (n 20).
[32] Paragraph 3.2(1).
[33] Paragraph 3.2(1)(b).
[34] Para 3.2(1)(d).
[35] See section 2.5.3.2.; I Ramsay, 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation' 28 Sydney LRev 9 (2006) 13,13; J Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (2003) PL 63, 85-6.
[36] T Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services' (2007) 29 Law & Pol'y 226, 243.

numeracy which will ensure that they can use alternative payment platforms.[37] The CBN has failed to recognise that numeracy[38] cannot (and should not) be equated with financial literacy. Discussions in section 2.5.3.2 are relevant to this point. Numeracy alone will be insufficient as financial services require some form of specialised knowledge. As argued in section 2.5.2, although basic literacy/numerical skills provide the foundation on which financial literacy is developed,[39] they cannot replace more specialised financial literacy education.[40]

4.3. CANCELLATION RIGHTS AND COOLING-OFF PERIODS

The M-payments Framework, the CPF and the CPCA are silent on cooling-off periods. The closest attempt at addressing this has been a statement credited to the CBN stating that–

> "…You have a right to select from the range of products and services made available by your bank at competitive prices. This means that as a customer, you can, at all times, decide on the product or service to accept/purchase and the ones to decline. It is wrong for a bank to restrict your choices or compel you to accept/purchase products or services that are ill-suited for your needs. Where you are not satisfied with your bank's service delivery on any product or service, *you have the right to end the contract or even the banking*

[37] CBN: 'Cashless FAQs' <http://www.cenbank.org/cashless/Cash-Less%20FAQs.pdf> accessed 20 February 2016.
[38] The Oxford dictionary defines it as 'the ability to understand and work with numbers.'
[39] P Cartwright, *Banks, Consumers and Regulation* (Bloomsbury Publishing 2004) 59-60.
[40] CD Dick, LM Jaroszek, 'Knowing What not to do: Financial Literacy and Consumer Credit Choices' (2013) <https://www.fdic.gov/news/conferences/consumersymposium/2013/Papers/Jaroszek.pdf> accessed 15 July 2015, p21.

> *relationship provided all outstanding commitments are settled by the customer*…."[41]

Although phrased in mandatory terms, this is a mere policy statement that cannot be enforced. Therefore, it appears that the availability of cooling-off periods in m-payments will depend on contractual provisions. If cooling-off periods are not included in the contracts offered by m-payment providers, it means that consumers will not have any further opportunity to search out information which can help them re-evaluate a transaction. The lack of a cooling-off period is worsened by an almost non-existent mandatory disclosure regime. Hence consumers are placed in a difficult situation where they are not assured of information prior to contracting and are also not assured of any cancellation rights should they access more information during the cooling-off period.

4.4. REGULATING BUSINESS PRACTICES

There are no specific statutes regulating commercial practices in the financial services sector. The M-payments Framework is also silent on the issue. However, the CPD lists one of its core concerns as the promotion of market conduct and development. It emphasises that it aims to promote -

> "the entrenchment of fair and responsible business conduct amongst financial service providers as well as the existence of a consultation and feedback mechanism to periodically determine the extent of consumer satisfaction"[42]

[41] Emphasis added; <http://www.cenbank.org/Supervision/cpdconedu.asp> accessed 3 March 2016.
[42] <http://www.cenbank.org/Out/2014/CFPD/CPD_FAQs.pdf> accessed 20 February 2016.

The CPF also encourages responsible business conduct when communicating with consumers particularly when providing financial advice, and promoting products/services.[43] Banks are expected to give clear information on products and services they offer, ensuring that they suit the needs of consumers.[44] They are also required to assess the consumer's ability to fulfil the terms and conditions attached to a product/service and advise appropriately.[45] To ensure that these responsible practices are adopted, the CBN adopts mechanisms such as examining records of pre-contractual deliberations with customers as well as mystery shopping.[46]

The CPF further requires that financial institutions treat consumers-

> "with utmost respect and shall never engage in practices such as threats, intimidation, humiliation, misrepresentation, deception or unfair inducements."[47]

However, none of these terms is defined in the CPF. Nor does it not provide any insight as to how a contract would be affected if it is proved that consumers have been subjected to the highlighted practices.

In the absence of an enforceable regime regulating business practices, consumers will have to rely on common law remedies.

[43] Paragraph 2.2.
[44] Paragraph 2.2.2(10(a) & (b).
[45] Paragraph 2.2.2 (1)(c).
[46] Paragraph 2.2.2(3).
[47] Paragraph 2.5.2(2).

Where appropriate, consumers may sue to rescind contracts that have been induced by some inequitable practice such as misrepresentation, duress or undue influence.[48] However, relying on common law remedies requires that consumers approach the civil courts. This may not be cost-effective in m-payments where transaction values are often small. The consequence could be that many consumers will choose not to pursue independent actions leaving widespread detriment to continue unchecked.[49] It also suggests that there will be no regime compelling firms to re-evaluate their commercial practices. Hence, owing to the cost of litigation, the chances of consumers suing will remain slim and firms will have no incentive to adopt fairer practices.

4.4.1. CONTRACT TERMS

4.4.1.1 STANDARD TERM CONTRACTS AND FAIRNESS

At the federal level, no statute regulates contract terms in Nigeria. Only a few states in the federation have passed laws seeking to regulate the use of exclusion and limitation clauses.[50] The M-payment Framework is also silent on the use of contract terms.

[48] A consumer will have to sue for damages where rescission is impossible.

[49] AA Leff, 'Unconscionability and the Crowd: Consumers and the Common Law Tradition' (1970) 31 U.Pitt. L.Rev. 349, 356-7

[50] For example, s.190 of Anambra state's Contract Law 1991 provides that '…nothing in the foregoing shall be construed as to enable a party guilty of fundamental breach of contract, or breach of a fundamental term to rely upon an exemption clause so as to escape liability.' in *International Messengers Nigeria (Ltd) v Pegofor Industries*. (2005) 15 NWLR (Pt 947) 1, the appellants failed to perform their part of a contract which required them to transport the respondent's faulty machinery to Italy for repairs. When sued for breach of contract, they sought to rely on an exclusion clause. This was rejected by the court as being contrary to s.190 of Anambra State's Contract Law. This position has been rejected in other jurisdictions such as the UK, see *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C 827.

However, the CPF provides that "contract terms shall be considered unfair where there is a significant imbalance in one party's rights and obligations to the detriment of the other."[51] It does not define what unfair means, neither does it provide any criteria that may be used to make a determination of fairness. The provision does not precisely refer to the consumer as it refers to "one party" suggesting that the party providing the standard form may also be the affected party.[52]

The CPF also lists seven situations "amongst others" in which contract terms will be considered unfair.[53] These include terms limiting the liability of a bank in the event of total or partial non-performance of contractual obligations, or those excluding a bank's liability where it is negligent; clauses binding a consumer while the corresponding obligation of the operator is conditional; termination or alteration of clauses without the consent of the consumer or reasonable notice to the consumer; clauses limiting the operators' obligation with respect to liabilities/commitments undertaken by their agents; clauses giving the operator the possibility of transferring his rights and obligations under the contract, where this may reduce the rights of the consumers, without their agreement and clauses excluding or limiting the right of the consumer to take legal action should infraction occur.[54]

[51] Paragraph 2.5.3(1)(a).
[52] See further discussions in section 5.4.1.1.
[53] Paragraph 2.5.3(1).
[54] Paragraph 2.5.3 (1).

The CPF fails to define the criteria for identifying terms not listed which fall "amongst others." It also places the responsibility of reporting unfair contract terms on consumers and other stakeholders.[55] With significant illiteracy levels in Nigeria, this might not be effective in deterring their use as many consumers may be unable to identify unfair terms.

Additionally, the CPF provides that "contract terms that conflict with regulations are null and void ab initio."[56] The CPF does not elaborate on what these regulations are neither does it expatiate on the process for nullifying the terms since the CPF itself cannot be enforced by consumers. Because the CPF is not an enforceable instrument, its provisions do not provide any practical improvement to a consumer's position.

In the absence of enforceable statutory protection, consumers may rely on contract law remedies to avoid unfair terms.[57] However, Nigerian case law reveals an inconsistent approach to dealing with unfair terms. Although there is no direct case law authority on financial services, it is expected that the current judicial approach to contract terms generally will extend to those used in financial services. In *Boshalli v. Allied Commercial Exporters Ltd,*[58] it was held that an exclusion clause could not avail

[55] Paragraph 2.5.3(3).
[56] Paragraph 2.5.3(2).
[57] Alternatively, they may argue that the unfair term is not incorporated into the contract and, therefore, inapplicable as was often argued in the UK before the passing of the Unfair Contract Terms Act 1977. See *Olley v Malborough Court Ltd* [1949] 1 KB 532; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163; *Chapleton v Barry Urban DC* [1940] 1 KB 532.
[58] (1961) All NLR (part 4) 917. This position is similar to Denning LJ's in *Karsales (Harrow) v Wallis* [1956] 1 W.L.R. 936.

a party in breach of a fundamental term of a contract. The precedent set in this decision informed the liberal stand taken by Nigerian courts where exclusion clauses were in issue.[59] However, the Nigerian Supreme Court was influenced by the English decision in *Photo Production Limited v. Securior Transport*.[60] Following this decision, the *obiter dictum* of the Supreme Court in subsequent cases[61] suggests a willingness to deviate from its earlier liberal position. The Supreme Court's new stance has been criticised as representing a setback for consumer protection as the courts seem to have ignored the absence of a regulatory framework for contract terms.[62] In a more recent case *Eagle Super Pack (Nig) Ltd v. A.C.B Ltd,*[63] the Supreme Court appeared to suggest that it would return to its earlier stance embodied in *Boshalli*.[64] This uncertainty shows that it is fairly difficult to predict how the courts may interpret a sweeping exclusion clause and by extension unfair terms in a financial services consumer contract.[65]

Currently, wide exemption clauses are freely used by businesses. Some banks offering m-payments adopt widely-worded limitation

[59] See *Ogwu v Leventis Motors* (1963) NNLR 115; *Niger Insurance v Abed Brothers* (1976) NCLR 37; *Polymera Industries Ltd v Societe Recharges Etudes Applications Plastiques* (1964) LLR 176; *C.F.A.O v Animotu* (1966) 1 ALR Commercial 289. These decisions suggest that an exemption clause would only apply where a party was performing a contract in its essential respects. A fundamental breach of contract would deprive a party of the benefits of an exclusion clause.
[60] (n 49).
[61] *Akinsanya v U.B.A* (1986) 4 NWLR (Pt 35) 273; *A.G Bendel & Ors V UBA* (1986) 4 NWLR (Pt 37) 547; *Narumal & Sons v Niger Benue Transport Co.* (1989) 2 NWLR (Pt 106) 520
[62] AO Oyewunmi, AO Sanni, 'Challenges for the Development of Unfair Contract Terms Law in Nigeria' <http://www.austlii.edu.au/au/journals/UWALawRw/2013/6.pdf> accessed 11 March 2016, p86.
[63] (2006) 19 NWLR (Pt 1013) 20.
[64] Oyewunmi & Sanni (n 62) 97.
[65] There will also be a problem with precisely deciding what terms are fundamental.

clauses. For example, one provider's terms and conditions read that -

> "13.3 GTBank will not be responsible for any claim unless caused by wilful default attributable to GTBank. GTBank specifically disclaims all liability for any damage or losses including, without limitation, direct, indirect, consequential, special, incidental or punitive damages deemed or alleged to have resulted from or caused but not limited to-
>
> 13.3.1 Transactions made to unintended recipients or payments made in incorrect amounts due to the input of incorrect information by you.
>
> 13.3.2 Transactions made from your account by an unauthorised third party who passes all identity and verification checks.
>
> 13.3.3 Any fraud, deception or misrepresentation by any GTBank mobile money participant, whether or not the participant has been verified.
>
> 13.3.4 Any damages resulting from the recipient's decision not to accept or record a transaction made by you through the GTBank Mobile Money System.
>
> 13.3.5 Failure of any telecommunications or data transmission system other than GTBank Mobile Money system…."[66]

As has been seen in chapter two, consumers may not give much attention to (or even bother to read) these terms in the fine print.[67] The significant implications of these terms highlight the need for legislative intervention. Currently, there seems to be little hope for this. In 2010, a Consumer Contracts (Regulation of Unfair Terms)

[66] Guaranty Trust Bank Plc (GTBank) Mobile Money Application Form (Terms & conditions) <http://www.gtbank.com/images/documents/individuals/mobile%20money%20application%20form.pdf> accessed 25 March 2016.
[67] Section 2.7.1.2.

Bill was presented in the National Assembly[68] but it did not get the required support to be passed into law.[69]

4.4.1.2. TRANSPARENCY

The CBN has stated that it will issue guidelines requiring that contractual language is clear and precise.[70] Information will need to be communicated in plain and simple language[71] and contractual documents must be in legible fonts. Where technical terms are used, banks are expected to explain their meaning to the understanding of the customer.[72] The CBN neither states what mechanisms will be put in place to ensure compliance with these guidelines nor does it state the effect on non-compliance.

In the telecommunications industry, the CCPRs[73] mandate MNOs to offer consumers complete, accurate, and up-to-date information on their services in simple and clear language. Before entering any contract, consumers are also to be provided with a complete description of the service in clear and plain language, avoiding unnecessary technical terms.[74] The Consumer Awareness Organisation, however, reports that this provision is not observed in practice. Service providers do not provide any such description of service terms and consumers are not also in the habit of asking.[75] Nevertheless, because the primary customer relationship

[68] Nigeria's Parliament.
[69] Oyewunmi & Sanni (n 62) 106.
[70] Paragraph 2.3.1(2) CPF.
[71] Paragraph 2.3.1(3) ibid.
[72] Paragraph 2.3.1(4), this is an uphill task as the phrase "to the understanding of the consumer" is subjective.
[73] Unlike the CPF, this is subsidiary legislation.
[74] Clause 8.
[75] COA (n 18) 39.

in m-payments will be with banks, the provisions of the CCPRs may not have a significant impact on improving the position of an m-payment's consumer.

4.4.2. FALSE AND MISLEADING INFORMATION

Although the M-payments Framework is silent on this issue, the CPF requires that –

> "Financial Institutions must be factual and clear in all communication (including advertisements) with consumers. Communications/advertisements on financial products and services must at a minimum:
>
> a) Not be misleading;
>
> b) Be clear and explicitly state the features of the products/services as approved;
>
> c) Not seek to misrepresent or exaggerate the benefits of the products/services"[76]

While the provision appears straightforward, its scope is not entirely clear. For instance, the CPF does not define what the term 'misleading' connotes. Unlike the UK CPUTRs, it does not provide any criteria that may be used in determining if a firm's communication is misleading. Furthermore, it does not specify if it is the nature/presentation of the information that is being targeted and/or the effect it has on consumers.

Recourse may be made to the CPCA which applies to all businesses. The CPCA provides that-

> "Any person who issues or aids in issuing any wrong advertisement about a consumer item, is guilty of an

[76] Paragraph 2.3.3 (1); The CPF also states that sales promotions are expected to provide factual information that does not mislead consumers, Paragraph 2.2.5.

> offence and liable on conviction to a fine of N=50,000 or to imprisonment of five years or to both such fine and imprisonment."[77]

The offence is one of strict liability and the only defence available covers the innocent publication of such adverts by an advertiser.[78] For a section creating a strict liability offence, the provision is vague about the ingredients of the offence. It fails to define what qualifies as "wrong advertisement" and it provides no guideline illustrating the kind of advertisements targeted. Thus, it is unclear, for instance, if trade puffs would qualify as wrongful advertisement. Even if the section was clear as to what wrongful advertisement connotes, it would still be criticised for relying solely on criminal sanctions. As argued in section 3.2.3.2, this would lead to disproportionate responses in less serious incidents of non-compliance.

Another relevant statute is the CPC's Consumer Protection (Sales Promotion) Regulation 2005. The Regulation applies generally and requires that all sales promotions[79] must be "legal, decent and honest."[80] It provides that in supervising the use of sales promotion, the CPC will ensure that promotions are –

> "Not designed to abuse consumers' trust or exploit their lack of knowledge or experience or mislead by

[77] Ss.11 & 12(b) CPCA.
[78] The Publisher/advertiser will, however, be liable if they refuse, at the request of the CPC, to furnish the name and address of the party requiring the dissemination of such misleading information, S.20.
[79] 'Sales Promotion' means a promotion marketing technique, which involves providing a range of direct or indirect additional benefits usually on a temporary basis, designed to make goods, products or services more attractive to purchasers, Regulation 12.
[80] Regulation 7(2)(a).

> inaccuracy, ambiguity, exaggeration, omission or otherwise."[81]

While part of the provision focuses on misleading effects brought about by an omission, or inaccuracy in a sales promotion, it also makes reference to the abuse of a consumer's trust, knowledge or lack of experience. The latter is reminiscent of Kenya's regulation of unconscionable representations which focuses on the possibility of exploitation even where a representation is not false.[82] Provisions such as these can serve to protect vulnerable consumers who traders know will be misled even where a representation is factual. This approach may compel suppliers to consider the different categories of targeted consumers when information is shared through sales promotion. Finally, the provision makes reference to "exaggeration" but it is unclear if trade puffs are caught within this category. It is assumed that they are not because trade puffs are permitted under Nigerian contract law.[83]

Another statute which may be significant on a general level is the Advertising Practitioners (Registration, Etc.) Act (APA) 1988. The APA establishes the Advertising Council[84] and the Advertising Standards Panel (ASP)[85] which is charged with ensuring that advertisements conform to the prevailing laws and codes of ethics

[81] Regulation 7(2)(c).
[82] See section 3.3.3.2.
[83] *Carlill v Carbolic Smokeball Co* (1893) 1 QB 256 is accepted authority under Nigerian contract law.
[84] With the general mandate to control the practice and profession of advertising. S.1 APA.
[85] The CPC is a member of the Panel.

of the advertising profession.[86] The Advertising Council's Vetting Guidelines[87] for proposed advertisements requires that only "decent, honest and truthful adverts" would be approved for use by the ASP.[88]

Adverts relating to financial services[89] and telecommunications fall under the head of items mandated to be vetted.[90] The Vetting Guidelines also require that -

> "...Advertisements shall not contain any description, claim or illustration which, directly or by implication convey an erroneous or misleading impression about the product or service advertised or about its suitability for the purpose recommended…"[91]

Non-complying parties are subject to a fine. This penalty, however, applies only to direct media practitioners (media house, advertising practitioner or agency)[92] and not to the entity on whose behalf an advertisement is made. Consumers also have no direct recourse to challenge misleading or false material under the APA. Hence, the APA may not be effective in preventing the use of misleading information in m-payments.

As is the case with questionable commercial practices discussed in section 4.4, in the absence of direct enforceable rights, m-

[86] S.23.
[87] This is a policy document.
[88] Advertising Practitioners' Council of Nigeria: Vetting Guidelines (2012) P.4. Vetting is the process of submitting and seeking clearance for proposed advertisement materials from the Advertising Standards Panel (ASP). <http://www.apcon.gov.ng/index.php/2014-08-25-23-53-03/vetting-of-advertisements> accessed 25 March 2017.
[89] Financial statements are exempted.
[90] P.5 Vetting Guidelines.
[91] P.8 ibid.
[92] P.9 ibid.

payment consumers may need to rely on common law remedies for misrepresentation.

4.5. ALLOCATION OF LIABILITY

The M-payments Framework does not set out detailed rules on how risks may be allocated in m-payments. However, it contains a few notable provisions. For instance, it provides that in the event of transaction failure, immediate reversal shall be automatic.[93] However, it is silent on the revocability/reversibility of an m-payment transaction in other situations, particularly where unauthorised transactions have occurred.

The CPF goes a little further than the M-payments Framework. For instance, it states that-

> "Financial institutions shall promptly refund customers for actual amounts lost due to fraud with interest at the CBN prescribed rate unless it can be proved that loss occurred as a result of customer's negligence or through fraudulent behaviour." [94]

Financial institutions are also expected to develop a "Customer Compensation Policy to address various category of complaints which may arise due to service failures." [95] It is instructive to note that CPF requires that-

> "The Customer Compensation Policy shall be in line with guidelines issued by the CBN and shall contain provisions for probable infractions such as:
>
> a) Unauthorized or erroneous debits;

[93] S.4.1.6.
[94] Paragraph 2.6.1 (5).
[95] Paragraph 2.7.3(1).

b) Excess charges; and

c) Financial loss to consumers due to staff negligence/fraudulent activities."[96]

Unlike the M-payments Framework, the CPF's provisions suggest a clearer approach with regards to unauthorised transactions. It appears that except where the consumer is negligent or fraudulent, they will be entitled to refunds for an unauthorised transaction. One unclear point with this provision, however, is whether the fault element targeted is gross or simple negligence. It is submitted that gross negligence would be the more appropriate fault element because of the grave implications of a finding of negligence on the consumer's right to refund. Nonetheless, the express requirement for a customer compensation policy that covers unauthorised/erroneous transactions as well as losses arising from the fault of the firm suggests more commitment towards dealing with risk allocation than the M-payments Framework does. However, the biggest setback lies in the fact that CPF is not an enforceable statutory instrument.[97]

In the absence of clear statutorily-backed liability rules, consumers will be subject to private law rules based on contract. This may not encourage certainty and predictability of rights.

[96] Paragraph 2.7.3 (2).
[97] One argument would be that since there is an expectation for a consumer compensation policy, then these provisions may be incorporated as a term of the contract.

Moreover, consumers are subjected to an unequal contractual setting where risk-shifting will likely be to their disadvantage.

4.6. DISPUTE RESOLUTION

M-payment consumers can take advantage of the internal redress mechanisms offered by banks. The CBN requires that banks set up internal procedures to address consumer complaints. In 2011, a circular was issued by the CBN requiring banks to act as the first point of call for aggrieved customers.[98] This requirement is confirmed under the CPF which emphasises that banks should provide multiple channels[99] for consumers to lodge complaints.[100] Banks are also expected to adopt clear procedures and timelines for receiving and resolving complaints.[101] Information on these procedures is to be disclosed to consumers free of charge.[102]

To ensure that these mechanisms are implemented effectively, the CBN requires certain commitments from banks. First, the CPF states that the supervision of internal redress procedures ought to be undertaken by a "relatively senior management staff."[103] Although the CBN does not specify which officers qualify as such, it is assumed that this will involve persons directly involved in policy development and decision making in the bank. Requiring

[98] <https://www.cbn.gov.ng/OUT/2011/CIRCULARS/FPR/CIRCULAR%20ON%20ESTABLISHMENT%20OF%20CONSUMER%20HELP%20DESK.PDF> accessed 16 January 2017.
[99] Both electronic and non-electronic.
[100] Paragraph 2.7.1(1).
[101] Paragraph 2.7.2.
[102] Paragraph 2.7.1(2).
[103] Paragraph 2.7.1(3).

their involvement could ensure that the redress procedures are given appropriate attention by senior management.

Second, the CBN states that there will be periodic audits on the availability and adequacy of the dispute resolution channels set up.[104] Banks are also mandated to submit monthly reports to the CBN on complaints received, those resolved and unresolved. A banks' annual report must also include disclosures on consumer complaints.[105] Imposing periodic audits and reporting requirements provide some form of oversight which may compel banks to take their responsibilities seriously.

Banks are expected to resolve disputes within 14 days of receiving a complaint. The CBN circular requires that firms forward complaints that they are unable to resolve within this time frame to the CBN.[106] Where consumers are dissatisfied with the outcome of internal procedures, they may approach the Consumer Protection Department of the CBN free of charge.[107] This is reminiscent of the Kenyan NPSRs which permit dissatisfied consumers to approach the CBK.[108] One explanation for this similar procedure is that in both countries there is no financial service ombudsman. Hence, in the interim, the central banks as lead

[104] Paragraph 2.7.1(5).
[105] 'Consumer Protection and Education in the Financial Industry in Nigeria' <http://www.fsrcc.gov.ng/files/CONSUMER%20PROTECTION%20IN%20THE%20FINANCIAL%20SYSTEM%20IN%20NIGERIA.pdf> accessed 2 March 2016.
[106] This is to be submitted with evidence of all actions taken in the attempt to resolve the dispute. Ibid.
[107] The Department reports that as at June 2014, it received about 3,973 complaints from financial services consumers. <http://www.cenbank.org/Out/2014/CFPD/CPD_FAQs.pdf> accessed 20 February 2016.
[108] See section 3.3.5.

regulators in the financial sector are obliged to take on the additional responsibility of addressing unsettled disputes. As noted in section 3.3.5, this design is not optimal as these regulators may focus more on their core prudential regulatory duties leaving the dispute resolution function to suffer.

Nevertheless, it will be fair to state that the CBN sponsored the Nigerian Financial Ombudsman Bill before the National Assembly in 2010. The legislature has, however, failed to pass this Bill into law. Pending the establishment of a financial ombudsman service, the CBN will continue to shoulder the responsibility of providing an alternative platform for aggrieved consumers.

The CBN has called for Memorandums of Understanding (MOUs) between FIs, non-FIs and law enforcement agencies to encourage collaboration in the dispute resolution process. The CBN expects that these MOUs will clarify the roles and responsibilities of parties, the recourse in the event of non-resolution and the escalation path along the various parties involved.[109] Although the use of MOUs in this context aims to encourage stakeholder cooperation in resolving disputes, it does not create an alternative dispute resolution platform that consumers may directly access.

Alternatively, an m-payment user may use the ADR procedures available to all consumers under the CPCA. One of the functions of the CPC is to provide speedy redress to consumer complaints

[109] Paragraph 2.7.4.

through negotiations, mediation and conciliations.[110] Thus, the CPC is empowered to receive, investigate and act on consumer complaints.[111] The CPC which operates at the federal level is assisted in carrying out its functions by State Committees (SCs) at the state level.

The SCs are empowered to receive complaints and inquire into the causes and circumstances of losses suffered by a consumer.[112] They are authorized to negotiate with the parties involved and where possible to reach a settlement.[113] The SCs are subject to the control of the CPC and where they believe a consumer deserves compensation, they are to recommend[114] such payment to the CPC.[115]

Aggrieved consumers are expected to make complaints in writing through the SCs.[116] Where a complaint is made against any institution, the SC may require the management of such institution to inquire into the complaint and report back to the SC.[117] Upon the receipt of such report, the SC may take such action as is appropriate in the circumstance. Where the investigation of a consumer's claims confirms a violation or loss suffered due to unconscionable practices, the consumer may, in addition to the

[110] S.2(a).
[111] S.4 (1).
[112] S.5(a).
[113] S.5(b).
[114] Orders made under the Act may be enforced in court through the office of the Attorney General; S.16.
[115] S.8(b).
[116] Illiterates and other physically challenged consumers are permitted to have their complaints put in writing by the clerk or another official of the SC. See s.6(1) & (2).
[117] S.7.

redress available under the CPCA, proceed to court to seek compensation or restitution.[118]

Where investigations reveal that a person is carrying on business in a manner detrimental to a consumer's interest, the CPC or SC are empowered to "use [their] best endeavours to obtain from him a satisfactory written assurance that he will refrain from a continuation of that course of conduct…."[119] Where this option fails, they may notify the Attorney General who shall commence cause proceedings in court against the offending party.[120] The court is empowered to make orders demanding that the offending party refrain from such detrimental conduct.[121] Where a trader has been sued under the CPCA, the court can make an order for compensation to be paid to the aggrieved consumer.[122]

One criticism of the CPCA's procedure is that its complex bureaucratic nature may put off aggrieved consumers. Consumers will have to go through SC procedures, await a recommendation to the CPC and may still have to approach the courts if dissatisfied with the outcome. An m-payment consumer whose dispute arises from a low-value transaction may find this process cumbersome preferring not to take action. Even where a resolute consumer approaches the court, compensation is determined based on the means of the defaulting party and not the injury or loss suffered

[118] It appears that the right to approach the court is subject to prior investigation and approval by the CPC, s.8.
[119] S.10(1).
[120] S.10.
[121] S.10(3).
[122] S.13(1).

by the consumer.[123] This puts the consumer at a huge disadvantage as they may receive no compensation if the defaulting party claims to be indigent.

4.7. FINANCIAL INCLUSION

The CBN made a commitment in 2011 referred to as the "Maya Declaration" with the aim of reducing the number of financially excluded Nigerians. To achieve this, a National Financial Inclusion Strategy (NFIS) was launched in 2012.[124] A Financial Inclusion Secretariat was also established to oversee the implementation of the NFIS.[125]

The NFIS' efforts are significant because they lay a foundation for more appropriate policy responses. Thus, for instance, the NFIS identifies five barriers as being the primary causes of financial exclusion in Nigeria. These include income, physical access, financial literacy, affordability, and eligibility for formal banking services.[126] In light of these identified barriers, the CBN has acknowledged four factors it considers significant in its financial inclusion agenda.[127] These include the ease of access to financial products/services, the use of a broad range of financial

[123] S.13(2); J Nwobike, 'Legal Regime for the Protection of Consumers of Financial Services in Nigeria' <http://www.jnclawfirm.com/articles/LEGAL%20REGIME%20FOR%20THE%20PROTECTION%20OF%20CONSUMERS%20OF%20FINANACIAL%20SERVICES%20IN%20NIGERIA..pdf> accessed 15 February 2016, p28.
[124] 'National Financial Inclusion Strategy' <http://www.cbn.gov.ng/Out/2013/CCD/NFIS.pdf> accessed 26 March 2017.
[125] Ibid, p.x
[126] This mostly relates to the cumbersome documentation required to fulfil KYC checks. Ibid, p20.
[127] Ibid p1.

products/services, the designing of financial products/services according to consumer need and the affordability of these services.[128]

To signify commitment towards encouraging financial inclusion, the CPF introduces a concept of "fair treatment" to ensure that all consumers are granted access to financial products/services without discrimination.[129] This approach is necessary as financial institutions are sometimes reluctant to serve vulnerable customers which further alienates them from the formal financial system.

One positive effect of the NFIS is that the CBN became interested in increasing access to payment services. The NFIS stated that it aims for Nigerians with access to payment services to increase from 21.6% in 2010 to 70% in 2020.[130] Thus, it is no surprise that m-payments feature prominently on the CBN's financial inclusion agenda. There is, however, some irony in the fact that the CBN has excluded MNOs from independently providing m-payments. MNOs are only expected to provide the telecommunications infrastructure for the use of banks.[131] This is due to the fear that permitting MNOs to provide m-payments directly may expose the financial system to unnecessary systemic risks. However, relying on a bank-centred approach amplifies the origin of the problem in the first place which is that a significant population have no access to bank accounts and other banking services.

[128] Ibid.
[129] Para 2.5 CPF.
[130] NFIS (n 124) p24.
[131] Paragraph 2.1 M-payments Framework.

As stated earlier, statistics show that more Nigerians have mobile devices in comparison to bank accounts.[132] If banks solely take the lead role in driving the m-payment market, it is argued that m-payments may not bring any significant gains to excluded persons. This is because this approach indirectly makes a bank account a prerequisite for m-payments and in effect shuts the door on consumers already excluded. Additionally, if MNOs cannot take lead roles side by side with banks, they may not have sufficient incentives to drive the market.

As we have seen, Kenya permits MNOs to directly provide m-payments. Its successful platform, M-pesa, is an MNO-led initiative. This contrasts with a less successful m-payments market launch in India where regulators supported a cautious bank-led approach. While it is recognised that the sanctity of the financial system is paramount, a balancing act must be carried out to ensure that other key policy objectives are met. As stated in section 2.10.1, a country has more control over its financial system when a majority of transactions are brought within formal regulated sectors. A model that excludes MNOs and prevents them from using their leverage to drive the m-payments market indirectly keeps the most vulnerable people out of the formal financial sector.

[132] See section 4.1.

4.8. CONCLUSION

Throughout this chapter, we have seen that there is no consumer statute applying exclusively to Nigerian financial services users. The most direct consumer statute is the CPCA. However, the CPCA is outdated and cannot deal with the complexities characteristic of financial services and modern e-commerce.[133]

The M-payments Framework seeks to introduce a regulatory structure for m-payments. This is supported by the CPF which sets out the minimum standards for financial consumer protection. While the M-payments Framework is clear on certain issues, such as the recognised business model permitted by the CBN, it ignores the consumer side of the m-payments process. Like the M-payments Framework, the CPF is an administrative document. Both documents are not enforceable statutory instruments which leaves much to be desired. Thus, it appears that m-payment consumers do not have any real enforceable regime protecting their interests. Flowing from this observation, the next chapter puts forward certain recommendations that should be considered by Nigerian authorities in addressing the shortcomings observed in this chapter.

[133] K Ekwueme, 'The Cashless Payment System: Adequacy of the Regulatory Framework' (2012) Nigerian Law Digest. 41, 43.

CHAPTER 5 - RECOMMENDATIONS AND CONCLUSIONS

PART 1

5.1. SUMMARY

The ubiquitous nature of mobile devices coupled with a promise of speed and convenience makes m-payments an attractive service. In some jurisdictions with high mobile penetration but poor access to financial services, m-payments are potentially transformative. However, m-payments also raise certain concerns with regards to consumer protection. In response to these concerns, this thesis adopted a typology of consumer policy tools which could be used to address them. This typology guided the enquiry into how selected jurisdictions address the consumer issues in m-payments. One key observation from the review is that in most cases, each of the countries operates some form of regulatory regime covering the consumer issues highlighted. The differences often lie in how comprehensive these regimes are. Overall, these discussions sought to address the first research objective of this thesis.[1]

Having done this, the thesis proceeded to investigate the current consumer protection framework for m-payments in Nigeria. This is in line with the second research objective of this thesis.[2] As emphasised in chapter one, this thesis seeks to identify the

[1] See Figure 1, section 1.1.2.
[2] see Figure 2 ibid.

regulatory best practices which Nigerian authorities can emulate from reviewed jurisdictions. To address this fully, the second part of this chapter provides some recommendations for Nigerian regulators. These recommendations are intended to address the shortcomings observed in the Nigerian regime. They reflect some of the best practices observed in the jurisdictions reviewed as well as those supported in the wider academic literature. Concluding remarks and suggestions for further research are highlighted in the third part of this chapter.

PART 2 - RECOMMENDATIONS

5.2. PROVISION OF INFORMATION

5.2.1. MANDATORY DISCLOSURE

Discussions in section 4.2.1 highlight the absence of a mandatory disclosure regime for m-payments in Nigeria. A mandatory disclosure regime will be necessary to lower consumer costs by easing the comparison between alternative products.[3] This will create a positive externality because standardised information can make consumer decision-making less difficult.[4] For consumers to enjoy these benefits, it is submitted that a clear statutorily-backed mandatory disclosure regime will need to be designed. This regime

[3] D Llewellyn, 'The Economic Rationale for Financial Regulation' (FSA Occasional Paper Series 1, 1999) <https://www.fep.up.pt/disciplinas/pgaf924/PGAF/Texto_2_David_Llewellyn.pdf> accessed 21 July 2016, p33.
[4] Ibid.

will introduce some uniformity in disclosures adopted in the m-payments industry.[5] Uniformity is crucial as it makes it easier for consumers to compare and choose the best service that suits their needs.[6] This will consequently assist in reducing search and switching costs.

In developing this regime, Nigerian regulators will need to consider a few broad issues. First, they will need to agree on what kind of statutory intervention is most appropriate. Second, they will need to select the minimum required content that must be disclosed across the industry. Third, regulators will need to reflect on how the designed regime can be of benefit to uneducated consumers who make up a significant percentage of the population. Finally, regulators will need to contemplate how these disclosures can be tailored to fit m-payments.

On the first issue, regulators may choose to include the mandatory disclosure requirements applying to m-payments within a general consumer statute. Alternatively, they may choose to include them in a more specific statute dealing with payment transactions such as the UK's PSRs. The latter is preferred because it allows for a more nuanced response. Since Nigeria already has an exclusive M-payments Framework, it is submitted that the Framework is amended to include mandatory disclosure requirements. To make

[5] S Lumpkin, 'Consumer Protection and Financial Innovation: A few Basic Propositions' (2010) 1 OECD Journal: Financial Market Trends 117, 138.
[6] S Trites, C Gibney, B Levesque, 'Mobile Payments and Consumer Protection in Canada' (Research Division, Financial Consumer Agency Of Canada) 2013 <http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/FCAC_Mobile_Payments_Consumer_Protection_accessible_EN.pdf> p27, accessed 7 April 2016.

the disclosure regime effective, it will also be necessary to ensure that the M-payments Framework is upgraded from being a mere policy document to an enforceable legal instrument.

In deciding the minimum disclosures to be mandated across the board, it is submitted that disclosures should include the basic information necessary for a consumer to appreciate the nature of the service being offered. Flowing from the practices observed in the jurisdictions reviewed, the basic disclosures should include a description of the service offered, the date from which the service is available for use, the price and total cost of the service,[7] the charges that may apply or the method that may be used to determine such charges. It should also cover the potential penalties and risks, available complaints/redress procedures and termination modalities. Where cooling-off periods apply, this should also be included.

Regulators will also need to decide the stage(s) of the contractual process at which these disclosures will be made. It is submitted that the proposed disclosure regime ought to cover the pre- and post-contractual stage. Accordingly, the M-payments Framework will need to differentiate between the kind of information that must be disclosed before and after a contract is concluded. It may also be helpful for certain disclosures to be accessible to the consumer before they make initial contact with the provider. It is recommended that the minimum disclosures highlighted in the

[7] This will cover the cost of subscribing (if any), data and/or SMS charges and any additional service charges that may apply.

preceding paragraph be available on the website and offices of service providers. This will allow consumers to compare services before making initial contact with desired providers. After initial contact is made with an intention to contract, it is recommended that the same information is disclosed again to the consumer. This should ensure that they have a second chance at evaluating the appropriateness of the service.

After the contract is signed, ongoing disclosures should also be mandated. Consumers ought to be informed of any changes in the terms agreed and the nature of the services provided. Informed decision-making goes beyond the initial decision to contract, it also covers subsequent decisions to continue with a contract. Where a change in the agreed terms substantially conflicts with the commercial expectations of the consumer or jeopardizes their financial position, it will be reasonable for them to discontinue the contractual relationship. Thus, ongoing disclosures can assist consumers in re-evaluating their decisions.

Ongoing disclosures should also include important information on transactions performed by the consumer. At a minimum, these will include identifying information for each transaction such as a payment reference, transaction value, payee identity, account balance and where possible, updates on the transaction status. These disclosures can help consumers keep track of their transactions which could assist in identifying illegal charges and/or unauthorised transactions.

Nigerian regulators may also consider making comparison tools available. This may include setting up a page on the CBN's website which focuses on highlighting the key features and contract terms of competing m-payment services. The website should also include audio and video services in local languages to cater to consumers who are unable to read. The CBN may also produce information booklets in English and local languages which service providers will be mandated to make available to consumers when requested. These efforts will make it easier and cheaper for consumers to compare services.

Nigerian authorities will also need to decide if the nature of the underlying contract between the m-payment user and services provider will affect the scope of disclosures mandated. Nigerian authorities may look to the practice under the UK PSRs. As seen in section 3.4.1.1, under the PSRs, disclosure requirements depend on whether the contract involves an ongoing relationship (framework contract) or a one-off single payment transaction.[8] This approach was considered reasonable because it may not be pragmatic to require the same breadth of disclosures for transactions with varying economic impact. While framework contracts are subject to the most comprehensive disclosure requirements, the basic disclosures in one-off and low-value transactions are supplemented by clear references to where further information could be found. It is submitted that this kind

[8] See Part 5 PSRs.

of differentiation should be adopted under the M-payments Framework because it allows for efficiency.

In summary, it is suggested that apart from requiring specific disclosures at different stages of the contractual process, the M-payment framework should go further by drawing a distinction between disclosures required under an ongoing relationship and a one-off payment transaction. It is important to reiterate that these suggestions do not detract from the need to disclose the suggested minimum information irrespective of the type of contract or the contractual value involved.

Disclosures are only meaningful if the intended recipient can appreciate the information being provided. Thus, the proposed disclosure regime will need to be designed in a way that caters to consumers who are not literate in the official language (English). One way of addressing this would be to mandate disclosures in local languages. However, this may not be the most cost-effective option because there are over 500 local languages spoken in Nigeria.[9] One way to circumvent this issue would be to adopt the use of "pidgin English"[10] which is widely spoken. However, the difficulty with pidgin is that there is no standardisation in the way it is written. Nonetheless, voice or speech-based disclosures in pidgin may be a more appropriate option. This will involve

[9] <http://www.rogerblench.info/Language/Africa/Nigeria/Atlas%20of%20Nigerian%20Languages-%20ed%20III.pdf> accessed 23 February 2017. Some languages are classified as "major languages" based on the significant population of its speakers. These include regional languages such as Hausa, Igbo, and Yoruba <https://www.ethnologue.com/country/ng/status> accessed 23 February 2017.

[10] This is a grammatically simplified form of English widely spoken in Nigeria.

providing dedicated phone-lines that explain disclosures in pidgin to customers who prefer this option.

To implement this, it should be required that at the initial point of contact, consumers should be asked their preferred format for disclosures. Where a consumer elects to have disclosures in pidgin, they should be referred to the appropriate staff trained to handle such requests. To ensure compliance, it should be required that proof of compliance with this procedure be documented. This requirement will not be completely alien in Nigeria as it could be compared to existing requirements for signatures made by those who are illiterate.[11] Where illiterate consumers are required to sign a document under Nigerian law, section two of the Illiterates Protection Act 1915[12] provides that:

> "Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement-
>
> (a)that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions; and
>
> (b)if the letter or document purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed, it was read over and

[11] The meaning of this term is subjective. In one case - *PZ. & Co. Ltd. v. Gusau and Kantoma* (1961) 1 NRNLR 242, the High Court explained that an "illiterate" means a person who is not literate in the language used in the document/transaction in question. In an earlier case - *SCOA Zaria V. Okon*, (1960) NRNLR 34, SCN, the Supreme Court highlighted the subjective nature of the term explaining that while a person may be sufficiently literate to read the content of a document and sign it, the person may still be classified as an illiterate if they do not sufficiently understand the meaning and effect of the document signed.

[12] (As amended). The Act applies to Nigeria's capital but has been adopted into state law by all 36 states in the Federation.

> explained to that illiterate person, and that the signature or mark was made by such person."

Non-compliance with this provision allows the illiterate consumer to avoid a contract by pleading non est factum.[13] Following the model provided by this approach, where an illiterate consumer has requested disclosures in local languages, service providers and their agents should be required to append their names to the contract as proof that the consumer has only signed after appropriate disclosures have been made. While this may increase costs, it ensures that more vulnerable consumers are given a real chance of appreciating the information disclosed.

However, one concern is whether this approach will be appropriate for lengthy contractual documents. To address this, it may be pragmatic to require that these disclosures focus on the most significant terms of the contract. What will be considered as the most significant terms will be determined by legislators. Nevertheless, it is suggested that at a minimum, the most significant terms should include all terms which have the capacity to alter the legal position of the consumer. This will cover basic information on the rights and obligations of parties under the contract, applicable fees, security and privacy policies, dispute resolution and termination procedures.

[13] Meaning "it is not my deed." Under common law, a contractual party may seek to denounce a written agreement that they have signed on the basis that they were mistaken as to its content.

Apart from ensuring that the content and manner in which disclosures are made are appropriate, Nigerian regulators will also need to consider other issues peculiar to m-payments. Canada's thematic review highlights that disclosure frameworks are often not designed to address the inherent limitations of mobile devices such as small screens and limited storage capacity.[14] Keeping these limitations in mind, Nigerian regulators ought to encourage pragmatic practices that support efficient disclosures. For instance, providers may be encouraged to adopt the use of summary boxes with key-facts and a link to more detailed information. Persons with internet facilities[15] can access further information linked to the summary document. To cater to persons without internet facilities or who are uneducated, the summary provisions should refer to toll-free numbers through which requests could be made for oral explanations and paper copies of more detailed information.

Currently, Nigerian banks are permitted to offer m-payment services to existing customers. The proposed disclosure regime ought to ensure that these existing customers can enjoy appropriate disclosures when offered additional services like m-payments. One way of addressing this is by adopting the approach under the Canadian NOBRs.[16] Under the NOBRs, disclosure

[14] See section 3.2.1.1.
[15] The NCC estimates that as at December 2016, there were about 91,880,032 active subscribers for data (internet) services. <http://www.ncc.gov.ng/stakeholder/statistics-reports/industry-overview#view-graphs-tables-5> accessed 23 February 2017.
[16] See section 3.2.1.1.

obligations are pre-requisites for obtaining a consumer's consent for new financial products/services offered by an FI. In embracing this approach, the M-payments Framework should require that banks offering m-payment services to existing customers make mandatory disclosures before providing such services. These disclosures should be a pre-requisite to valid consumer consent for additional services.

It is submitted that the more detailed specifics of the disclosure regime ought to be based on convincing empirical evidence. To make its efforts focused and responsive, the CBN should adopt the practice in the UK and Canada where thematic reviews and market studies are carried out to inform the direction of regulatory intervention.[17] These market studies will involve a review of existing disclosure practices which can serve as a useful source of information. Scott and Black point out that such existing disclosures may be a helpful aid for regulators to identify discrepancies between the substance of business claims and their actual performance.[18] Information gathered will inform any future disclosure requirements mandated.

Another way of keeping in touch with market realities is by drawing on the findings of behavioural science.[19] To complement this, Nigerian authorities should set up a department with the mandate of incorporating the findings of behavioural sciences into policy

[17] See S Trites et al (n 6); FCA, "Mobile Banking and Payments" (2014); FCA, "Mobile Banking and Payment: Supporting an Innovative and Secure Market" (2013).
[18] C Scott, J Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths 2000) 375.
[19] See section 2.2.2.

responses. This approach has been adopted in the UK where a behavioural insights unit has been established.[20] It is submitted that responses to consumer issues in m-payments (as with any other form of regulatory intervention) will benefit from the insights provided by behavioural sciences.

While disclosures ideally empower consumers to make better decisions, Nigerian regulators must remain realistic about its limitations. Discussions in section 2.2.2 highlighted the limits of consumer rationality which suggests that even where mandatory disclosures apply, they may be inadequate in fully protecting consumers. Kenya's experience with M-pesa as detailed in section 3.3.1.1 is particularly instructive. Academic literature also confirms that disclosure regimes can only benefit consumers who are psychologically and intellectually equipped to apply the information provided.[21]

This leads to the conclusion that disclosures alone may be inadequate in fully protecting consumers. This is not to say that some forms of information disclosures such as warnings will not be significant in helping consumers make more informed decisions. However, Nigerian regulators must consider these limitations when determining how much reliance should be placed on disclosure regimes. Thus, it will be reasonable to develop other

[20] <http://www.behaviouralinsights.co.uk/about-us/> accessed 16 August 2016.
[21] D Cayne, M Trebilcock, 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 U. Toronto LJ 396 at 406 cited in P Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (Financial Services Research Forum 2011) <https://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper78.pdf> accessed 13 February 2016, p23.

complementary regulatory initiatives that will assist in presenting a well-rounded response to consumer protection in m-payments.[22]

5.2.2. CONSUMER EDUCATION

Howells notes that information disclosures are only useful if their significance can be understood and acted upon.[23] Hence, disclosure regimes may record more success if consumers are intellectually equipped to appreciate information disclosed. This can be achieved by adopting well-designed literacy initiatives. As seen in section 4.2.2, Nigeria has taken a step in the right direction by adopting a national strategy on financial consumer education. While commendable, Nigerian regulators must not ignore the fact that consumers require basic literacy[24] and numerical skills as a foundation[25] for more specialised consumer financial education.[26] Thus, efforts at improving financial education will need to be complemented by initiatives improving general literacy levels.

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[22] O Ben-Shahar, C Schneider, 'The Failure of Mandated Disclosure' (2011) 159 U.Penn.L.Rev. 647; G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 J Law & Soc'y 349.

[23] Howells (n 22) 358.

[24] The OECD defines literacy as "the capacity to understand, use and reflect critically on written information, the capacity to reason mathematically and use mathematical concepts, procedures and tools to explain and predict situations, and the capacity to think scientifically and to draw evidence-based conclusions." OECD, 'The Case for Promoting Universal Basic Skills' in OECD, *Universal Basic Skills: What Countries Stand to Gain* (OECD Publishing Paris 2015) <http://hanushek.stanford.edu/sites/default/files/publications/Universal_Basic_Skills_WEF.pdf> accessed 12 June 2016, p21.

[25] P Cartwright, *Banks, Consumers and Regulation* (Bloomsbury Publishing 2004) 59-60.

[26] OECD (n 24) p21; Cartwright (n 25) 59-60; CD Dick, LM Jaroszek, 'Knowing What not to do: Financial Literacy and Consumer Credit Choices' (2013) <https://www.fdic.gov/news/conferences/consumersymposium/2013/Papers/Jaroszek.pdf> accessed 15 July 2015, p21.

Apart from general financial education, it is submitted that Nigerian consumers will also benefit from specific initiatives educating them on the use of innovative services such as m-payments. These efforts will be important since consumer education complements other regulatory initiatives such as disclosure.[27] Disclosures in m-payment services may be better appreciated and acted on by consumers if they have some knowledge of the service. For instance, a consumer who is aware that third parties can access their mobile payment applications through malicious software may pay more attention to disclosures on how liability for unauthorised transactions will be apportioned.

Considering similarities in socio-economic conditions, Nigeria may look to Kenya's approach in adopting literacy campaigns tailored to the needs of the populace. One interesting method adopted by Kenya is the use of TV soap operas to achieve its financial consumer education goals. As seen in section 3.3.1.2, at the end of the episodes which convey financial literacy messages, the audience may send a text message requesting a leaflet containing the information discussed.[28] Where banking services have been discussed in the particular episode, the leaflets also include an application allowing the consumers to sign up with the specific bank involved.[29] One benefit of this approach is that it can help raise consumer awareness on the services featured. However, it

[27] T Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services' (2007) 29 Law & Pol'y 226, 227.
[28] F Messy, C Monticone, 'The Status of Financial Education in Africa' (2012) <http://dx.doi.org/10.1787/5k94cqgx90wl-en> accessed 27 November 2015, p34.
[29] Ibid.

was criticised because it could be interpreted as indirect marketing which would not guarantee that all information discussed are unbiased.

Because of the concerns associated with marketing,[30] a modified strategy should be adopted by Nigerian regulators. This strategy would see the use of radio and television programmes neutrally sponsored by the CBN which focus on raising consumer awareness of m-payments. These programmes should include information on the use, benefits and currents risks attached to adopting these services. It should also highlight available service providers and may discuss how they compare against each other. Information on where consumers may access additional information and sign up for a particular service should also be included.

Where these programmes are delivered in local languages on the radio particularly,[31] it will be easier to reach larger audiences especially the uneducated populace and those disadvantaged due to language barriers. While radio shows will be of immense benefit to uneducated users, m-payment information packages in different languages can also be used to assist better-educated users who can read. These packages may be distributed free of charge to persons who require further information on the service. A dedicated website or page on the CBN website should also

[30] This ranges from issues relating to misleading advertising to competition law concerns where programmes may choose to market certain services to the exclusion of others.

[31] Radio is the dominant news platform in Nigeria. Statistics show that 83.4% of Nigerian households have a working radio while 7 in 10 Nigerians across all demographic groups listen to the radio weekly for news. <https://www.bbg.gov/wp-content/media/2014/05/Nigeria-research-brief.pdf> accessed 19 August 2016.

contain key information, frequently asked questions and demonstration videos in official and local languages educating consumers on m-payments.

It is submitted that one way of ensuring that proposed education initiatives are appropriate is by conducting studies among current users. This will ensure that the CBN is aware of what specific themes need to be addressed. This suggestion is informed by Safaricom's experience with the launch of M-pesa. As highlighted in section 3.3.1.2, Safaricom included consumer education initiatives in its marketing strategy based on empirical evidence of education gaps observed from its pilot launch. It is believed that the CBN's initiatives will be better placed in context if they are able to gather information on current knowledge gaps and areas of confusion. Moreover, this position is supported by the approach in the other jurisdictions reviewed which suggests that regulators rely on market studies and thematic reviews to inform the direction of their policies.[32]

To make significant progress, it is submitted that the CBN needs to reconsider its regulatory stance on certain matters affecting consumer financial education. As discussed in section 4.2.2, the CBN appears to be convinced that numeracy levels are sufficient in themselves to support the use of innovative payment methods like m-payments. This contradicts studies which suggest that

[32] In the UK, for instance, studies play an important role in focusing the direction of consumer education priorities; 'UK: Developing a Revised Strategy for Financial Capability in "Advancing National Strategies for Financial education" 2013 (OECD; G-20 Russian Presidency) <http://www.oecd.org/finance/financial-education/G20_OECD_NSFinancialEducation.pdf> accessed 5 August 2016.

financial literacy may not be substituted by general education or numeracy.[33] This is because financial literacy covers concepts different from those covered by basic education or pure mathematical skills.[34] Financial literacy is more specialised and is expected to enable consumers to have an "appropriate perspective on the financial system."[35]

The CBN also assumes that based on disclosures made, consumers will be able to "display mental alertness and probe deeply into features of financial products and services." This may suggest a belief that disclosures alone will fully equip a consumer, whether literate or not, to make appropriate decisions in adopting and using m-payments. However, as highlighted in section 5.2.1, there are arguments that disclosures may only benefit consumers who are intellectually and psychologically empowered.[36]

Additionally, the CBN explains that one of the rationales informing its push for financial literacy is the "shift of financial management risks from governments to individuals."[37] Consumers are thus required to "endeavour to obtain accurate information from credible sources and make comparison before subscribing to financial products and services."[38] Considering the literacy levels in Nigeria, one may argue that these expectations appear over-ambitious and unrealistic. The CBN's approach reiterates Ramsay's

[33] Jaroszek & Dick (n 26) pp21 & 23.
[34] Ibid 15,18.
[35] Cartwright (n 25) 59.
[36] Cayne and Trebilcock (n 21).
[37] <http://www.cenbank.org/Devfin/finliteracy.asp> accessed 16 February 2016.
[38] Para 3.2(1).

observation that education goals within contemporary consumer policy tend to view consumers as regulatory subjects.[39] In this context, consumer education is seen as an attempt to reconstruct the consumer as a regulatory subject, thus making the consumer a subject of regulation rather than a beneficiary.[40]

It is inevitable that consumers will assume certain responsibilities when using m-payments. At the very least, they will be responsible for searching out and comparing information on available m-payment services. They will also bear the responsibility of keeping their devices and personal security details safe. Consumers will become aware of some of these responsibilities through disclosures and literacy initiatives. However, the point being made is that Nigerian regulators will need to rethink their stance by acknowledging abundant research exposing the limits of consumer rationality.[41] For one, Nigerian regulators should bear in mind that what consumers are able to learn and what they do with knowledge acquired is dependent on their intrinsic psychological attributes which result in varying outcomes.[42] Additionally, Nigerian regulators will need to ensure that their financial literacy objectives do not reverse the idea of

[39] I Ramsay, 'Consumer Law, Regulatory Capitalism and the "New Learning" in Regulation' (2006) 28 Sydney LR 9,13; J Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (2003) PL 63, pp.85-86.
[40] Williams (n 27*)* 232.
[41] C Jolls, CR Sunstein, R Thaler, 'A Behavioural Approach to Law and Economics' (1998) 50 Stan.LR 147; V Mak, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (TISCO Working Paper Series on Banking, Finance and Services, No.03/2012. 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2077539> accessed 11 August 2016.
[42] D De Meza, B Irlenbusch, D Reyniers, 'Financial Capability: A Behavioural Economics Perspective (2008) <https://www.fca.org.uk/publication/research/fsa-crpr69.pdf> accessed 4 August 2016.

market failure posing a risk to consumer welfare by focusing instead on the risk of consumer failure threatening the proper functioning of financial markets.[43]

5.3. CANCELLATION RIGHTS AND COOLING-OFF PERIODS

Cooling-off periods are important because they give consumers the opportunity to seek out additional information during the statutory time allowed.[44] During this period, consumers may cancel concluded contracts if they are not optimal.[45] Cooling-off periods may be set out in contracts or mandated by statutes. Discussions in section 4.3 show that cooling-off periods are currently determined by private contract in Nigeria which puts consumers in a disadvantaged position. In the absence of mandatory cooling-off periods, it is unlikely that businesses will include them in standard form contracts since they tilt in favour of the consumer.

Because cooling-off periods are a deviation from the norm of *pacta sunt servanda,*[46] they may not be willingly welcomed by businesses since they introduce uncertainties to otherwise concluded transactions. On the one hand, businesses will prefer that once a contract is completed, the other party should be unable

[43] Williams (n 27) 243.
[44] I Ramsay, *Consumer Law and Policy* (3rd edn, Hart Publishing 2012) 102.
[45] Ramsay ibid, pp102 & 209.
[46] Latin for "promises must be kept."

to cancel it.[47] On the other hand, consumers will prefer an additional opportunity to re-evaluate transactional decisions and to seek out more information. This conflict of interest suggests that a neutral stakeholder/mechanism will be needed to maintain a balance in the contractual process.

If cooling-off periods are solely determined by contracts, then businesses are conferred with the responsibility of balancing these competing interests. As an "interested party," with a stronger bargaining position, businesses will likely prefer not to include cooling-off periods in their standard term contracts. This puts the consumer at a disadvantage and it is thus argued that the Nigerian regime needs a neutral balancing mechanism.

It is submitted that mandatory statutory cooling-off periods are preferred to voluntary ones based on contract. It is argued that statutory intervention will be more appropriate in ensuring that cooling-off periods are available on a fair and consistent basis in m-payments. This will be best achieved by including express provisions guaranteeing a cooling-off period in the M-payments Framework.

Although all the countries reviewed in chapter three embrace statutory cooling-off periods, their approaches have different effects on m-payments. For instance, the KCPA and most provincial consumer statutes in Canada provide statutory cooling-

[47] A Duggan, I Ramsay, "Front-End Strategies for Improving Consumer Access to Justice" in MJ Trebilcock, L Sossin, A Duggan, *Middle Income Access to Justice* (University of Toronto Press, 2012) p.112.

off periods that only apply to specific consumer transactions. The transactions covered often do not directly involve payment services. Thus, it was argued in sections 3.2.2 and 3.3.2 that a possible interpretation of these regimes is that although consumers may not enjoy cooling-off periods for subscribing to the m-payment service itself, they will enjoy this right where m-payments are used to complete eligible contracts under the relevant laws.

The approach in the UK is more straightforward. As shown in section 3.4.2, the cooling-off periods under the FSRs will apply directly to m-payment services which have been subscribed to at a distance. The CCRs, on the other hand, will cover specific consumer transactions which can be completed with m-payments. The UK's approach is preferred as it ensures that cooling-off periods will cover consumer contracts completed through m-payments and also the direct subscription to the service itself.

Academic commentary suggests that cooling-off periods will only be beneficial to consumers if they are informed about them.[48] Of all the countries reviewed, only the UK adopts mechanisms compelling businesses to inform consumers of this right. Cancellation rights are closely tied to mandatory disclosures in the UK, hence, the CCRs extend the standard cooling-off period if a supplier fails to inform the consumer of the right to cancel.[49] In

[48] J Sovern, 'Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures' (2013-2014) 75 U. Pitt. L.Rev. 333, 356-8.
[49] Regulation 31.

section 3.4.2, it was argued that this approach provides an incentive compelling suppliers to comply with the disclosure requirements under the CCRs. Since traders prefer that concluded contracts become binding as soon as possible, they will be motivated to disclose cooling-off periods to prevent any imposed extensions.

It is submitted that the M-payments Framework should adopt a similar approach. Hence, apart from mandating a cooling-off period for m-payment transactions, the standard period should be extended where a service provider fails to make appropriate disclosures. This will compel service providers to take the disclosure requirements seriously thus ensuring that consumers will be informed of applicable cooling-off periods so that they can take advantage of it.

it is believed that cooling-off periods will be useful in Nigeria considering the significantly low literacy levels.[50] Many consumers depend on word-of-mouth advice on products purchased. With non-existent service and product review websites, the extra opportunity to gather information informally is important. Additionally, cooling-off periods will allow Nigerian consumers cancel transactions that may otherwise put them in a difficult financial position. For Nigerians with a steady source of income, a

[50] As at 2010, adult literacy rates were estimated to be at 56.9%, suggesting that almost half of the adult populace were not literate; UNESCO High-Level International Round Table on Literacy, 'Reaching the 2015 Literacy Target: Delivering on the promise (Action Plan: Nigeria)' (2012) <http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/ED/pdf/Nigeria.pdf> accessed 10 September 2016.

few regretted purchases may have no significant impact on their financial standing. However, for less fortunate consumers, being deprived of the opportunity to re-evaluate and cancel transactions may prove financially disastrous. This concern is confirmed by Cartwright who points out that the principal contributor to some forms of vulnerability is poverty.[51] Cartwright explains that the consequences of wrong financial choices impact particularly on certain consumers because they can ill-afford to make such mistakes."[52]

Cartwright further contends that poverty is a constant justification for consumer law.[53] Therefore, in this context, mandating cooling-off periods for Nigerian consumers may also be justified from a non-economic standpoint. As discussions in section 2.3 revealed, regulatory intervention can sometimes be justified on the basis that vulnerable consumers need to be protected. In this context, cooling-off periods can contribute to protecting consumers who are vulnerable owing to reasons such as poverty and illiteracy.

5.4. REGULATING BUSINESS PRACTICES

Insisting on fair commercial practices ensures that consumer decision making is not influenced to their detriment and that

[51] Cartwright (n 21) p.27.
[52] Described as "impact vulnerability" Cartwright (n 21) p.27; Financial Conduct Authority, 'Consumer Vulnerability' (2015) <https://www.fca.org.uk/your-fca/documents/occasional-papers/occasional-paper-8> accessed 10 September 2016, p18.
[53] Cartwright (n 21) p.27.

businesses are incentivised to behave appropriately.[54] While all the countries reviewed have some regulatory rules addressing business practices, noticeable differences lie in the extensiveness of these regimes. The UK stands out as having the most comprehensive one.

There is no statutory regime regulating business practices in Nigeria and consumers can only rely on the contract law remedies that address inequitable business practices. This is far from ideal as access to these remedies largely depend on litigation which is expensive. Moreover, depending on litigation as a corrective measure may not change general business behaviour. This is because the significant illiteracy rate in Nigeria suggests that many consumers will be unaware that they have been subjected to unfair practices and will, therefore, take no steps to challenge it. If Nigerian authorities wish to provide incentives compelling businesses to trade conscientiously, they will need to design an enforceable framework that provides clear guidance on the practices that are acceptable and those that are not.

It is submitted that a statutory regime will be the most appropriate response. Leff presents a convincing argument which forms the basis for this submission. Leff contends that-

> "… the problem is …. with the common-law tradition itself when sought to be used to regulate the quality of transactions on a case-by-case basis, each one of which is economically trivial (so that you need free legal help for the consumer, and the seller can almost

[54] G Howells, HW Micklitz, T Wilhelmsson, 'Towards a Better Understanding of Unfair Commercial Practices' (2009) 51(2) Int. JLM 69, 71.

> always avoid nasty precedent by an early surrender or settlement), and each one of which depends upon several doses of "the total context of the fact situation" and "copious examination of the manifestations of the parties and the surrounding circumstances followed by a balancing effort … One cannot think of a more expensive and frustrating course than to seek to regulate goods or "contract" quality through repeated lawsuits against inventive "wrongdoers. Wouldn't it be better … to …pass a statute that deals with … a wide panoply of quasi-crooked marketing devices, … and tuck in, along with private causes of action for the victims, an administrative enforcement arm to police these repetitive nasty practices … Isn't there some economy of scale in that approach? Remember, the idea is to change as many nasty forms and practices as possible … Wouldn't more be changed by explicit positive law, administratively interpreted and enforced, than by the feed-back from easily distinguishable, easily stallable, exceedingly expensive cases?"[55]

Leff's arguments lend credence to the position held in the preceding paragraph. It will not be ideal to leave the regulation of business practices to repeated lawsuits hence a statutory response is a more pragmatic approach.

Unsurprisingly, all the countries reviewed in chapter three have statutory regimes regulating business practices. As opposed to enacting a new statute, it is recommended that the existing CPCA be amended to include provisions addressing business practices. Ideally, one part of the CPCA should be dedicated to this. The trend in some countries like the UK is to consolidate consumer laws as far as possible in a single text. This was, in fact, one of the main

[55] AA Leff, 'Unconscionability and the Crowd: Consumers and the Common Law Tradition' (1970) 31 U.Pitt. L.Rev. 349, 356-7.

objectives of the CRA.[56] Thus, it is believed that including the proposed statutory enactments in the CPCA will reduce the fragmentation of consumer laws thereby improving accessibility and clarity in the general consumer protection regime.

Furthermore, including the statutory provisions in the CPCA as opposed to a sectoral enactment will create more uniformity in the regulation of business practices across sectors. As with all consumers, m-payments users will benefit from this general regulatory framework. To avoid any confusion, the M-payments Framework should acknowledge the CPCA's application to m-payment transactions. This is the approach in the UK where the guidance documents accompanying the PSRs expressly confirm the application of existing consumer statutes to electronic payments services.[57]

The content of the proposed enactment will need to be designed in a way that supports the broad objective of encouraging conscientious business behaviour. As a starting point, the CPCA should include a general provision prohibiting all unfair commercial practices. In placing this prohibition, the CPCA will need to clarify what 'unfair business practice' connotes within the context of the legislation. This is important in order to avoid ambiguity which can frustrate compliance and enforcement. In jurisdictions reviewed, the approach to clarifying the meaning of unfair practices differs.

[56] L Conway, "Consumer Rights Act 2015" Briefing Paper Number CBP6588 (2017) <http://researchbriefings.files.parliament.uk/documents/SN06588/SN06588.pdf> accessed 29 June 2017, p5; Paragraph 5 CRA Explanatory note.
[57] The FCA's role under the Payment Services Regulations 2009 ('PSR Approach Document') Para 8.10.

In Canada and Kenya, no precise description of unfair practices is given rather the regime's regulatory target is explained through references to examples of acts that are prohibited or factors that must be evaluated. The UK adopts a slightly different approach. The CPUTRs define unfair commercial practices by providing a broad fairness test[58] as well as highlighting specific categories of behaviour that are targeted.

The UK's approach is preferred because of the broad fairness standard adopted in the CPUTRs. Apart from providing a safety net for consumers, broad standards allow for flexible enforcement. This is because it will ensure that unconscionable practices not envisioned at the time of drafting will still fall within the reach of the law.[59]

For broad standards to have a more successful impact, Scott and Black argue that they must focus on both the situation at the inception of a transaction and its subsequent performance.[60] This will ensure that the regime guarantees that parties can freely contract under fair circumstances and that inequality in bargaining power will not be exploited.[61] Thus in adopting a broad standard, the CPCA should clearly state that its scope extends to the different stages in the formation and performance of a contract. Support for this view is found in the UK. The guidance

[58] See Regulation 3.
[59] See G Abbamonte, 'The Unfair Commercial Practices Directive and its General Prohibition' in S Weatherill, U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart 2007) p11.
[60] C Scott, J Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths 2000) 99
[61] C Elliott, F Quinn, *Contract Law* (Pearson Education, 2007) 4.

accompanying the CPUTRs suggests that the scope of the regulations applies to acts/omissions which have occurred before, during or after a commercial transaction.[62]

In formulating the broad fairness standard that will apply under the CPCA, it will be important to take Nigeria's socio-economic realities into account. Nigerian legislators can draw some inspiration from provisions in Alberta's FTA. Under the FTA it is an unfair practice to take advantage of a consumer because of their inability to understand the character, nature, language or effect of a transaction or any matter related to it.[63] It is suggested that the CPCA includes similar considerations in the broad test it adopts. Hence a key component of the fairness test should include an evaluation of whether the practice in question takes advantage of a consumer's vulnerability such as illiteracy or the inability to understand a particular language.

Furthermore, in applying this broad test, it would be helpful for the CPCA to adopt an objective reference point that will assist courts in evaluating the effect of a disputed commercial practice. The use of a benchmark encourages an objective evaluation of a practice that is brought into question. To ensure that the use of the objective benchmark does not lead to absurd results, the CPCA should adopt some reasonable flexibility which acknowledges the different types of Nigerian consumers. This is the approach

[62] Guidance on the Consumer Protection from Unfair Trading Regulations (2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf> accessed 10 August 2016, pp.10 & 14.
[63] S.6(2)(b) FTA See similar provisions in s.8(3)(b) of the BPCPA 2004, s.3(2) Manitoba BPA.

adopted in the UK. The CPUTRs adopt the average consumer benchmark which represents a hypothetical person who is "reasonably well informed, reasonably observant and circumspect."[64] However, the application of this benchmark is not static as the CPUTRs apply a slightly modified standard in certain situations. Thus, as seen in section 3.4.3, the CPUTRs make adjustments to this standard where a business practice is directed at a particular group. In such cases, a reference to the average consumer shall be read as referring to the average member of that group.

The CPUTRs also make allowances for consumers who may be vulnerable owing to factors such as physical and mental infirmity, age or credulity. Where the disputed practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer is interpreted as referring to the average member of that group. It is believed that adopting a similar approach in the CPCA will ensure that the application of the objective standard recognises that the circumstances of Nigerian consumers differ. This will be helpful in protecting consumers who are vulnerable due to factors such as illiteracy, language barriers, etc.

Furthermore, as is the case under the CPUTRs, the CPCA should blacklist identified commercial practices that will be considered unfair in all circumstances. A blacklist can be justified in situations

[64] Regulation 2(2).

where such a response helps in reaching targeted regulatory outcomes. In this context, the regulatory objective is to protect consumers from the detrimental effect of unfair commercial practices. Hence, it will be a waste of enforcement resources to subject clearly inequitable business practices to the unfairness test when it is certain that the result of the evaluation will lead to a definite finding of unfairness. Thus, it is argued that in such situations it is pragmatic to blacklist practices which cannot be justified in any circumstance.

Apart from a blacklist, the CPCA may choose to target broad categories of unconscionable behaviour. The amendments may build on current provisions in the CPF. The CPF requires that firms treat consumers with "utmost respect" [65] and that they should not engage in practices such as "threats, intimidation, humiliation, misrepresentation, deception or unfair inducements."[66] Although the CPF provides no definition or context against which these terms may be understood, it is believed that these practices will be easily classified as unfair commercial practices.

The practices highlighted by the CPF are also reminiscent of the practices prohibited under the CPUTRs. The CPUTRs prohibit firms from engaging in aggressive commercial practices such as harassment, coercion or undue influence which may or are likely to significantly impair the average consumer's freedom of choice

[65] Para 2.5.2(2) Ibid.
[66] Para 2.5.2(2) Ibid.

or conduct in relation to a product.[67] In prohibiting specific practices, it will be helpful for Nigerian lawmakers to provide a definition or context against which these practices may be evaluated. This will ensure that there is no confusion as to the scope of application since many of these practices have established meanings under common law.

The proposed amendments to the CPCA will be inconsequential if no strong enforcement mechanism(s) is put in place. In this respect, the first issue that the CPCA will need to address is how non-compliance with the proposed regime will be dealt with. The UK adopts the use of regulatory offences to deal with non-compliance but the offences operate slightly differently. With regards to the Regulation 8 offence, criminal sanctions apply only where a firm has acted intentionally or recklessly. With regards to the other offences under the CPUTRs[68] such as the use of aggressive commercial practices, criminal sanctions are applied on a strict liability basis subject to a due diligence defence. A trader's intention is not taken into consideration.

The approach under the Regulation 8 offence is preferred. The main argument is that it may be more reasonable to reserve criminal sanctions for the most serious forms of non-compliance.[69] Failing to do this may result in a situation where sanctions are disproportionate especially where a trader lacks moral fault.[70] On

[67] S.7(1) CPUTRs.
[68] See Regulations 9-12.
[69] A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 250.
[70] P Cartwright, 'Crime, Punishment and Consumer Protection.' (2007) J.C.P 1,9; RB Macrory, `Regulatory Justice: Making Sanctions Effective' (2006)

this basis, it is recommended that the CPCA reserves criminal sanctions for the most serious cases of non-compliance while allowing for administrative sanctions to be applied in less serious cases where a trader has no moral fault.

To meet its regulatory objectives, the CPCA will need to recognise a public enforcing agency that will enforce these provisions. This agency must be empowered to access a wide range of enforcement tools to ensure that its regulatory responses are adequate. This is line with arguments provided by Ayres and Braithwaite which emphasise that firms will be more willing to comply if there are clear sanctions available to regulators which can be escalated where appropriate.[71]

Rather than creating a completely different agency, it is submitted that it will be more pragmatic to expand the powers of the CPC. Since the CPC is already the primary agency charged with enforcing the CPCA, it is reasonable to empower it to oversee the proposed amendments. It is believed that apart from avoiding costs which will be incurred in setting up a new agency, strengthening the CPC's mandate portrays a serious commitment towards consumer policy. This position is further buttressed by arguments which suggest that dispersing consumer protection among multiple agencies could limit a particular agency's incentive

<http://webarchive.nationalarchives.gov.uk/20070305105024/http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/penalties/index.asp> accessed 10 June 2017, para 1.14.

[71] I Ayres, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 5-6.

to develop expertise in the area.[72] Since the CPC's mandate specifically centres on consumer protection, it is more reasonable to expand their already focused mandate rather than create a competing agency.

Moreover, expanding the CPC's powers may also reduce the danger of regulatory arbitrage which can occur where different agencies deal with overlapping issues. Levitin argues that this may set off a "race-to-the-bottom among regulators competing for regulatory turf."[73] These observations are significant when one considers that multiple parties are involved in providing m-payments. Each party is subject to a different regulator[74] and rather than have regulators competing to oversee the same issue, it is arguably better for the CPC to act as the lead regulator where consumer issues are involved.

Public enforcement of the proposed regime will be significant in sending out a clear message that should encourage firms to re-evaluate their business practices. As is the case in Manitoba, it is desirable that the CPC should be able to bring actions on behalf of consumers affected by an unfair commercial practice.[75] Academic literature[76] lends some support to this approach particularly where

[72] AJ Levitin, 'The Consumer Financial Protection Agency' (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1447082 > accessed 21 July 2017, p5.
[73] Ibid.
[74] E.g. the banks are supervised by the CBN while the MNOs are supervised by the NCC.
[75] s.24(1)(a) Manitoba BPA.
[76] OECD, 'Recommendation on Consumer Dispute Resolution and Redress' (2007) <https://www.oecd.org/sti/consumer/38960101.pdf> accessed 11 February 2017, p11; G Howells, S Weatherill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 601; There is also research raising a number of concerns about this method of protecting

individual actions would be costly.[77] It may also be more appropriate where the CPC has identified serious issues in a particular market.

Owing to several factors such as limited resources, it may be helpful for the CPC's efforts to be complemented by consumer organisations. Alberta, for instance, empowers consumer organisations to sue on behalf of consumers.[78] As noted in section 3.2.3, consumer organisations can step in where public agencies are unable to act.[79] Actions by consumer organisations will be relevant to m-payments where a large number of small-scale losses caused by one provider may be symptomatic of a bigger problem that requires the attention of policymakers.[80] However, these issues may go unnoticed as it may be unrealistic to expect all consumers affected to pursue redress.[81] Thus, consumer organisations can take up these cases and will likely attract the desired publicity which will draw regulatory attention to these issues.[82]

Despite the important role of public agencies and consumer organisations in enforcement, it is important that consumers are

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consumers, see J Peysner, A Nurse, *Representative Actions and Restorative Justice* (BERR 2008) 39; I Ramsay (n 44) 43.

[77] R Cranston, *Consumers and the Law* (2nd edn, Weidenfeld and Nicolson 1989) 25 cited in P Cartwright, 'Consumer Protection in Financial Services: Putting the Law in Context' in P Cartwright (ed.), *Consumer Protection in Financial Services* (Kluwer Law Int'l 1999) 16.

[78] s.17.

[79] Inability to act may be for several reasons such as lack of resources (funds, time and expert personnel), regulatory capture and changing political tide.

[80] Howells and Weatherill (n 76) 48.

[81] Ibid.

[82] This argument does not ignore the fact that in certain cases these groups may become compromised and may not be truly representative of consumer interests. Ramsay (n 44) 109.

able to maintain independent actions against non-complying firms. Independent private enforcement may sometimes be more effective where consumers have suffered actual detriment and are in need of direct compensation. In all the countries reviewed in chapter three, consumers are guaranteed independent redress rights where they have been subjected to unfair business practices. Under the CPUTRs, consumers have the right to unwind a contract[83] and get a refund,[84] seek a discount in respect of past or future payments due under the contract[85] or to seek damages.[86] Under the KCPA, consumers can rescind an agreement induced by unfair practices and sue for damages.[87] The Act also allows for exemplary and punitive damages to be awarded against persons engaging in unfair practices.[88]

The importance of this balance is emphasised in the UK experience where public enforcement was initially the main enforcement option. As discussed in section 3.4.3, amendments to the CPUTRs introduced key consumer rights where certain provisions of the CPUTRs are breached.[89] Thus, it is submitted that the CPCA should provide for private enforcement rights for consumers. Where possible consumers should be able to rescind a contract induced by an unfair practice. Damages and refunds should also be

[83] Regulation 27E(3) &(4).
[84] Regulation 27E.
[85] Regulation 27I.
[86] Regulation 27J.
[87] s.16.
[88] S.16(9)
[89] Part 4A of the Consumer Protection (Amendment) Regulations 2014.

available to the consumer subject to any reasonable conditions imposed by the CPCA.

5.4.1. CONTRACT TERMS

5.4.1.1. STANDARD TERM CONTRACTS AND FAIRNESS

Standard form contracts will likely be adopted across the m-payments industry in Nigeria[90] because they reduce the cost[91] of negotiating individual contracts.[92] However, it is important to recall that these contracts highlight the stronger bargaining power held by suppliers.[93] Without the opportunity to negotiate terms, these contracts put consumers in a position where they may have liabilities imposed on them that sellers do not wish to bear.[94] Thus, as discussions in section 2.7.1.2 suggest, concerns relating to unequal bargaining power and information asymmetries often justify the regulation of contract terms.

All the countries reviewed in chapter three adopt some form of regulatory rules covering the use of contract terms. As is expected, there are differences in approach. In Canada and Kenya, the regulation of contract terms is subsumed under the wider regulation of business practices. The UK, on the other hand, regulates contract terms directly through dedicated provisions in

[90] Many Nigerian banks offering m-payments already adopt these contracts. Reference was made to sample provisions from standard term contracts currently used by one bank in section 4.4.1.
[91] In both time and money.
[92] MJ Trebilcock, *The Limits of Freedom of Contract* (Harvard University press 1997) 119; Howells and Weatherill, (n 76) 77.
[93] F Kessler, 'Contracts of Adhesion: Some thoughts about Freedom of Contract' (1943) 43 Columbia L.Rev 629.
[94] Ibid.

the CRA. Discussions in section 4.4.1.1 reveal that there is currently no regulatory framework addressing the use of contract terms in Nigeria. Some provisions encouraging the use of fair terms are found in the CPF but as previously stated, the CPF is not an enforceable instrument.

Thus, Nigerian consumers can only rely on limited contract law remedies if they wish to avoid unfair terms. This leaves much to be desired as it means that terms adopted by firms are not subject to regulatory scrutiny. Where unfair terms are adopted, they may only be challenged through litigation. Considering the high costs of litigation in Nigeria, this suggests that many unfair terms will likely remain unchallenged. Consequently, Nigeria needs a general regime regulating contract terms which will benefit all consumers including those using m-payments.

The first issue that will need to be resolved is what regulatory approach will be most effective in dealing with contract terms. It is submitted that the UK's regime is preferable. Although theoretically, the use of unfair terms is an example of an unfair business practice,[95] it is argued that it will be better to adopt a direct independent regime to regulate contract terms. It is believed that this approach will ensure that regulatory efforts are detailed, focused and clear. This is because there is a danger that lumping the regulation of contract terms with the wider regulation

[95] In the EU, there is a tendency to draw a distinction between the two as unfair terms are regarded as a contract law matter. Thus, the UCPD excludes its application to contract law. S Orlando, 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice' (2011) 7(1) ERCL 25, 27.

of business practices may lead to a situation where contract terms regulation is not given adequate attention.

As opposed to enacting a new statute, the CPCA should be amended to include specific provisions dedicated to the regulation of unfair contract terms. Ideally, a specific part of the statute should be devoted to addressing these matters. Amendments to the CPCA is preferred for the same reasons highlighted in section 5.4.

Legislators will also need to determine the scope of the regime. It is submitted that the scope should extend to both negotiated and non-negotiated terms as is the case under the CRA. With non-negotiated terms, regulation of contract terms is often easier to justify on the basis that these terms are offered on a take it or leave it basis. With individually negotiated terms, it is often assumed that parties may be better placed to protect their interests. This may not always be the case where significant power imbalances exist. If the regulation of contract terms seeks to address the unequal bargaining power between contracting parties, it is submitted that there is no reason to justify the exclusion of individually negotiated terms from regulatory scrutiny.

In defining its scope, it is submitted that the proposed unfair terms regime should clarify that it primarily seeks to protect the interest of consumers. This will avoid any potential confusion as to its application. As seen section 4.4.1.1, the current CPF explains that

"contract terms shall be considered unfair where there is a significant imbalance in one party's rights and obligations *to the detriment of the other."*[96] It is submitted that this provision is poorly drafted and may be subject to different interpretations. For instance, it may suggest, hypothetically, that a service provider can seek to avoid a term in his standard term contract if it is believed that such term is to their detriment. This will create an absurd result as it will be illogical for a party that has prepared a standard term contract to seek to avoid it by claiming that a term is detrimental. To avoid ambiguities, it is submitted that the amendments to the CPCA be drafted in a clear manner that categorically limits its application to parties acting as consumers in a transaction.

With regards to the substantive provisions, the CPCA should explicitly provide that an unfair term will not be binding on a consumer. To avoid confusion in the interpretation and enforcement of the regime, the CPCA will need to clarify what "unfair" connotes within the context of the Act. Nigerian authorities should ensure that any definition or test adopted introduces broad standards which can be applied flexibly to address the mischief targeted. These broad standards will also ensure that the law can flexibly respond to changing practices not contemplated at the time of enactment.

[96] Emphasis added. Contrast with s.62(4) of the CRA which provides that "a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract *to the detriment of the consumer*." (emphasis added).

The CRA's approach is a useful example. The CRA's definition of unfairness introduces a wide test which allows for flexibility. Under the CRA, unfairness comprises of three broad elements. The first element requires that the terms must be contrary to good faith. The second element emphasises that there must be a significant imbalance in the rights and obligations applicable to both parties. The third element emphasizes that this imbalance is one that is to the detriment of the consumer. These elements are assessed together and are evaluated in the context of the contract as a whole and all the circumstances in which it is entered.[97]

It is suggested that Nigerian lawmakers should take a similar approach. This is because the CRA's broad approach allows for the flexible regulation of contract terms in a way that is consistent with the general objective of protecting consumers. The elements making up the fairness test are relatively clear[98] emphasising that a "supplier should not, whether deliberately or unconsciously, take advantage of the consumer."[99] By insisting that terms are evaluated in the context of the contract as a whole and the circumstances in which it was entered, the fairness test adopts a comprehensive approach which focuses on both the making and

[97] CMA, 'Unfair Contract Terms Guidance: Guidance on the Unfair terms provisions in the Consumer Rights Act 2015' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> accessed 4 February 2016, Paragraph 2.18.

[98] With respect to the fairness test, Lord Bingham stated that "the language used in expressing the test, … is in my opinion clear and not reasonably capable of differing interpretations." see *Director General of Fair Trading v First National Bank Plc*. [2001] UKHL 52, Paragraph 17.

[99] Ibid.

substance of the contract. This ensures that the regime can adequately address the targeted mischief.

In adopting a broad fairness test, Nigerian lawmakers will need to decide if this test will apply to all terms in a contract. As discussed in section 3.4.3.1.1, the CRA excludes terms that deal with the price and main subject matter of the contract. This exemption is traced to objections that an absence of such exemption would be a great affront to the freedom of contract.[100] For the sake of balancing competing regulatory interests in commercial transactions, it appears sensible to exempt core terms from the fairness test. However, such an exemption should be qualified as is the case under the CRA. Thus, if Nigerian authorities choose to adopt a core terms exemption, they should clearly include conditions that ensure that this exemption is not abused. For instance, the exemptions under the CRA will only apply if the terms are prominent and transparent.

The broad test adopted by the CPCA should also be complemented by a grey list of terms which raises a presumption of unfairness. This approach is favoured under the CRA.[101] The content of this grey list should reflect examples of suspicious terms currently used in Nigerian consumer markets. Parties seeking to use such terms will have the burden of rebutting the presumption of unfairness. The main advantage of this approach is that it creates a level of

[100] HE Brandner, P Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 (3) Common Market Law Review 647. See section 3.4.3.1.1 for a detailed discussion on this.
[101] Schedule 2 CRA.

certainty.[102] Although the use of a grey list has been criticised for being rather inflexible[103] in dealing with unanticipated situations, it is argued that this criticism is addressed by the breadth of the fairness test. The fairness test proposed should be flexible enough to cover terms that may be drafted disingenuously to avoid contravening terms specifically listed.

Despite the concerns that listing specific terms may lead to inflexibility, there are some situations in which the outright prohibition of certain terms will be in order. The CRA, for instance, blacklists certain terms which are considered unfair in all circumstances. Unlike the terms on the grey list, blacklisted terms are not subject to the fairness test since they are prohibited outright. This should be reserved for terms which cannot be justified on any basis because their effect negatively affects the consumer's interests and/or deprives them of important contractual/statutory rights.

The OECD indicates that policy responses targeted at controlling unfair terms will only be meaningful if there are effective monitoring and enforcement mechanisms in place.[104] Hence, an effective enforcement mechanism is required to support the proposed regime. Twigg-Flesner suggests that one way of ensuring effective enforcement is to entrust a public agency with

[102] B Keirsbilck, 'Limits of Consumer Law in Europe' in E Claes, W Devroe (eds), *Facing the limits of the Law* (Springer 2009) 86; Part 1, Schedule 2 CRA.
[103] Ibid 97.
[104] The OECD Consumer Policy Toolkit <http://www.oecd-ilibrary.org/governance/consumer-policy-toolkit_9789264079663-en> accessed 23 March 2017, p99.

the authority to monitor consumer contracts and to take legal actions challenging offending terms.[105] The UK adopts this approach and it is suggested that Nigeria adopts the same.

Since the unfair terms regime is expected to apply generally to all sectors, it is suggested that Nigerian authorities should amend the CPCA in order to empower the CPC to act as the lead enforcer of the unfair terms regime. For the reasons highlighted in section 5.4, this option is preferred to the creation of a new agency. Practice in other jurisdictions also supports this suggestion. For instance, with regards to contract terms regulation, the enforcement mandate of the UK's CMA covers all sectors.

To cater to the financial services sector specifically, the CPCA should recognise the CBN as a regulator with respect to the unfair terms provisions. This will ensure that the CBN will be empowered to scrutinize contract terms adopted in the m-payments. This approach finds support in the CRA where the FCA is recognised as a regulator with regards to the contract terms regime.[106] To ensure that regulatory efforts remain coordinated, other recognised regulators are required to notify the CMA of the enforcement actions being taken. A similar approach should be adopted under the CPCA to ensure coordinated regulatory efforts between the CPC and other regulators like the CBN.

[105] C Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law reform in English law' in L DiMatteo, M Hogg, *Comparative Contract Law: British and American Perspectives* (OUP 2015) 434.
[106] See Schedule 3, paragraph 8(1)(d) CRA.

Academic literature supports the submission that the CPC will be more effective in enforcing the regime if a wide range of enforcement tools are made available to it under the CPCA.[107] One important enforcement power given to regulators under the CRA is the authority to pre-emptively challenge unfair terms. As Lord Steyn points out, this approach can prove important in preventing the use of such terms and encouraging a change in business behaviour.[108] The CPCA should empower the CPC similarly. This will guarantee that it can carry out its supervisory functions appropriately. Where the CPC finds that unfair contract terms are in use, it should be able to compel the firm to discontinue the use of such terms through the use of administrative orders. In more serious cases, the CPC should be empowered to seek injunctive relief from civil courts.

Empowering the CPC to take pre-emptive action also aligns the enforcement approach with Nigeria's social realities. One major criticism of the sparse provisions dealing with contract terms in the unenforceable CPF is that it vaguely places the responsibility of reporting unfair contract terms on consumers and other 'stakeholders". This may not deter businesses from using unfair terms because many consumers are ignorant owing to significant levels of illiteracy. This reflects observations made by writers like Cartwright[109] who point out that private enforcement by individuals may be less than efficient as it is dependent on the

[107] OECD Policy Toolkit (n 104) 105; Ayres & Braithwaite (n 71) 5-6, 36.
[108] *First National Bank Plc*. (n 98) paragraph 33.
[109] P Cartwright, 'Consumer Protection in Financial Services' (n 77) pp15-16.

individual knowing their rights and having the required resources to enforce it which may not always be the case. Pre-emptive actions by the CPC will, therefore, be helpful in protecting the interests of a vast majority of consumers who may be unaware that they have been subjected to unfair terms or who may be incapable of acting.

Furthermore, the CRA imposes a statutory duty on courts to evaluate unfair terms even if none of the parties raises the issue. Courts are charged to carry out this evaluation provided there is sufficient legal and factual material to enable them to do so.[110] As noted in section 3.4.3.1.1, this provision is considered significant because it provides an additional layer of vigilance in the use of contract terms. As with the pre-emptive actions by the CPC, adopting a similar approach under the CPCA will be important in the Nigerian context where due to ignorance or low literacy many consumers may be unaware that they have been subjected to unfair terms.

The CPCA should provide consumers with an independent right to challenge unfair terms. As earlier stated, where successfully challenged, such terms should not be binding on a consumer. Because of the socio-economic realities in Nigeria coupled with low literacy rates, it is unlikely that individual challenges will be very

[110] s.71(2) & (3); A Samuels, 'The Consumer Rights Act 2015' (2016) 3 JBL 159, 177; see the 2009 decision of the Court of Justice of the European Union in *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* (C-243/08)

popular. Moreover, Schillig[111] points out that individual consumers may be discouraged from challenging unfair terms because the costs of initiating the procedure may outweigh its benefits when the amounts at stake are small. This is worsened by the fact that the trader is aware that the expected costs of the unfair terms being challenged by a few consumers may be outweighed by the total gains generated by the acceptance of such terms by a multitude of consumers. This leads Schillig to conclude that in addition to permitting the individual objection to such terms, it is important that measures are put in place which ensure that independent third parties can challenge their use.[112]

In many jurisdictions, consumer organisations often take up the role of the third parties Schillig envisages. The UK, for instance, incorporates consumer groups in the enforcement of the contract terms regime. Under the CRA, Consumers Association is recognised as a regulator.[113] Thus, the Consumers Association may apply for an injunction against a defaulting firm. The CPCA may draw some inspiration from this approach. Empowering certified consumer associations to take part in the enforcement process may prove helpful in encouraging private enforcement. As these associations are often closer to consumers, they may be more effective at gathering information on consumer complaints and acting on them. They may also ensure that consumer interests

[111] M Schillig, 'Inequality of Bargaining Power versus Market for Lemons: Legal Paradigm Change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms' (2008) 33(3) EL.Rev 336, 342.
[112] Ibid.
[113] See Schedule 3, paragraph 8(1)(k) CRA.

are protected in situations where public enforcers are unable or unwilling to act.

Finally, it is recognised that in more specialised transactions such as m-payments, it may be necessary to clarify and contextualize the application of the proposed unfair terms regime. It is submitted that regulatory guidance documents can play an important role in this respect. This is a widely used approach in the UK. For instance, with regard to specific provisions on redemption of e-money under the EMRs and the performance of security obligations placed on consumers under the PSRs, the FCA's guidance documents provide much-needed clarity on the kind of terms that may raise suspicion.[114] The CBN should follow a similar approach with m-payments. It should periodically release guidance documents which clearly articulate its enforcement policy and which clarify how general regulatory requirements apply to more specialised transactions.

5.4.1.2. TRANSPARENCY

A key part of regulating the contract terms involves a requirement of enhanced transparency.[115] Transparency in this sense improves fair and open dealing by requiring that contract terms are drafted in simple language and that those terms with significant implications are brought to the attention of the consumer. In some way, transparency is linked to disclosure regulation. This is

[114] See discussions in section 3.4.3.1.1.
[115] Howells & Weatherill (n 76) 25.

because both regulatory responses broadly aim to improve a consumer's awareness of relevant information affecting their interests in a proposed transaction.

All the countries reviewed encourage the use of transparent terms, however, the UK stands out as the only one which codifies this requirement. In the guidance accompanying the CRA, the CMA further clarifies the role transparency plays in the regulation of fair terms in the UK.[116] It confirms that transparency is both a requirement on its own and a fundamental part of fairness.[117] The transparency requirement reinforces the obligation to adopt fair practices in the use of contract terms.[118]

It is submitted that a transparency requirement is included in the CPCA. Thus, the provisions mandating the use of fair terms should be complemented by a requirement that contract terms should be legible and articulated in plain language which can be easily understood. Where the term in question has a significant impact on the consumers' rights it should be given appropriate prominence.[119] Within the Nigerian context, this requirement of transparency should be tailored to fit local realities. Hence to protect less literate consumers and those unable to speak English, the transparency requirement should emphasise that terms should be articulated in a language or form that the intending consumer understands. Thus, for instance, in cases where a consumer is

[116] Sees section 3.4.3.1.2 for further discussion.
[117] CMA (n 97) paragraph 2.4.
[118] Ibid.
[119] Ibid, paragraph 2.58.

unable to read, transparency should mean that service providers have the responsibility of ensuring that significant terms are orally explained in a language that the consumer understands. If such allowances are not included, it will mean that the regulatory objective of ensuring that consumers can make informed decisions will be defeated.

Apart from mandating that transparent terms are adopted, the CPCA will also need to clarify what role transparency plays in the overall regulation of contract terms. It should clarify whether transparency will play a legitimising function on its own or whether it will form part of the wider considerations for determining if the use of a contract term is fair. It is submitted that the CMA's position should be codified in the CPCA. The CMA confirms that although transparency is important, it is not sufficient on its own to legitimise an otherwise unfair term.[120] This is because good faith focuses on the object/effect of contract terms and not only on their form.[121]

The CMA's position is further buttressed by Willett who argues that transparency should not be capable of legitimising unfair terms because consumers are still unlikely to read terms even when they are transparent.[122] It is believed that adopting the CMA's approach in Nigeria will be pragmatic because the obvious limitations of

[120] CMA, "Unfair Contract Terms Explained" (July 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf> accessed 10 July 2017, paragraph 22.
[121] Ibid paragraph 5.14.5. C Willett, 'The Functions of Transparency in regulating Contract Terms: UK and Australian approaches' (2011) 60(2) ICLQ 355, 384.
[122] Willett (n 121) 358.

consumer rationality, illiteracy and language barriers make it inappropriate for a term to be legitimised solely because it is transparent.

The CPCA will also need to clarify how a failure to meet the transparency requirement affects the validity of a term. In resolving this, the CPCA should once again consider the CMA's position on this. The CMA suggests that failing the transparency test does not necessarily imply that a term is unenforceable independently of the overall fairness test.[123] However, any standard term which does not comply with the transparency requirement can be challenged if it is imbalanced to the detriment of the consumer.[124] It is argued that the CMA's position is reasonable because transparency should not be evaluated in isolation. Rather, it is an important part of the broader fairness test which considers all circumstances to determine if there is a significant imbalance in parties' rights to the detriment of the consumer. Thus, where a contract term is subjected to the fairness test, if it is found to have caused no significant imbalance, it is argued that a lack of transparency alone should not defeat the enforcement of that term.

Although the transparency requirement will encourage firms to draft contract terms in plain language, where any ambiguity arises, it should be resolved in favour of the consumer. This

[123] CMA, (n 120) Paragraph 38.
[124] L Poro, 'Unfair Commercial Practices in Financial Services: Is the EU Legal Framework Sufficient to Protect Consumers?' (2014) 29(7) JIBLR 422, 423; Unfair Terms Guidance' (n 97) pp.19 & 32.

embodies the *contra proferentem* rule of construction adopted at common law. This rule has been codified under the CRA and it is suggested that the same should be done in the CPCA. Although the *contra proferentem* rule is recognised under Nigerian contract law, its codification will reiterate its application to consumer contracts.

5.4.2. FALSE AND MISLEADING INFORMATION

Firms provide information to consumers in several ways. This may take the form of mandatory disclosures and/or marketing and advertising communications. Consumers will likely rely on these pieces of information when making decisions.[125] Hence, regulatory authorities will need to pay attention to the content of the information being put out by businesses. To prevent the manipulation of consumer decision-making, it is important that authorities prohibit the use of false and misleading information.

Canada and the UK have comprehensive regimes addressing this issue. In both countries, this issue is tackled under the regulatory regime controlling business practices. However, they adopt different approaches to achieve similar aims. For instance, although both regimes aim to capture a wide variety of communications, this is achieved in slightly different ways. On the one hand, Canada's CCA targets "representations" which may be broadly interpreted to cover a wide range of statements. On the other hand, the UK's CPUTRs targets a broad category of conduct

[125] OECD Toolkit (n 104) 35.

in the form of misleading actions. This is backed by an extensive test ensuring that the regime applies to any false statement which can affect the transactional decision of the average consumer. The CPUTRs go a step further than Canada by also targeting statements whose overall presentation may deceive or is likely to deceive the average consumer even if the information is factually correct. In light of the findings of behavioural science discussed in section 2.2.2, this approach is significant.

Nigeria lacks a comprehensive regime deterring the use of false and misleading information. There is one provision in the CPCA which criminalises the use of 'wrong' advertisements,[126] however, it does not clarify what "wrong" connotes in the context. The scope of the provision is also limited as it only focuses on a specific type of communication (i.e. advertisements). Thus, it is believed that the CPCA will need to be amended to include more detailed provisions regulating the information put out by firms. This regime should apply generally ensuring that it can be easily extended to all business participants in the m-payments market.

To ensure that the proposed regime is clearly understood, it must clearly articulate its focus. First, it is recommended that the primary focus of the regime should rest on the effect that information communicated to consumers has on their transactional decisions. Like the CPUTRs, this will ensure that the regime has a broad reach which allows for flexible enforcement.

[126] ss.11, s.12(b) CPCA.

Hence, if the CPCA focuses on the effect on decision-making, then its scope will easily cover false and misleading information as well as factual information presented in a manner designed to deceive consumers.

Relatedly, the CPCA will need to clarify that it only targets information which is capable of affecting a consumer's transactional decisions. This will help in filtering the statements that will be subject to scrutiny. Thus, the CPCA should provide a clear explanation of what kind of information will be considered material within the context of the regime. Reference may be made to the CPUTRs which explain that material information covers such information "which the average consumer needs, according to the context, to take an informed transactional decision. It is argued that this is a sensible definition as it reflects the broader regulatory aims of ensuring that consumers are able to make informed decisions.

Third, it is submitted that it will be appropriate for the CPCA to expressly exclude legitimate trade puffs from its focus. Trade puffs are recognised under Nigerian law and as argued in section 3.4.3.2, failing to exclude them will lead to the overregulation of business speech. This is because trade puffs often involve vague and incredulous statements that no reasonable person is expected to take seriously.[127]

[127] Ramsay (n 44) 137.

The CPUTRs also go further than the CCA by targeting misleading omissions where material information is omitted, hidden or provided in a way that is unclear. Thus, the UK adopts positive informational responses by mandating certain disclosures as well negative informational responses which prohibit the use of false information.[128] As noted in section 3.4.3.2, both responses complement each other as they cover both ends of the information spectrum. It is submitted that the CPCA include a similar provision. Where firms are under a positive obligation to disclose certain information as well as a negative obligation not to omit material information, consumers are placed at an advantage. This is because regulatory coverage of both ends of the information spectrum ensures that consumers have access to the appropriate information required to make informed decisions.

Since not all deceptive information involves fraud or outright lies, Nigerian authorities will have the task of determining the message actually received by consumers and what importance they attach to it.[129] This is not an easy task as consumers are bound to construe things differently. Thus, it is important that mechanisms are put in place to ensure that the information in question is assessed objectively. Under the CPUTRs, the average consumer standard is central to evaluating the effect of commercial practices. This standard also applies where practices suspected to be misleading actions or omissions are in question. In section

[128] Cartwright (n 21) 29.
[129] OECD Toolkit (n 103) 37.

5.2.3, it was recommended that the CPCA adopts an objective reference point which should be applied with the flexibility that recognises the different classes of Nigerian consumers. It is submitted that the same objective reference point is adopted in evaluating the effect of information communicated to consumers.

To ensure that the application of this objective standard is more appropriate in the context, it is suggested that the CPCA should include factors that regulatory authorities may consider in determining the effect of information communicated to consumers. These factors should take Nigeria's socio-economic conditions into consideration. Hence, the factors should include references to specific limitations Nigerian consumers may face such as illiteracy and language barriers. Thus, one condition could be that courts will be obliged to consider whether a firm providing information knew or ought to have known that the intending recipient was disadvantaged due to the inability to understand the language of communication. A similar provision is found under the KCPA. The KCPA provides that a representation may be unconscionable where it is made by a person who ought to know that "the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors."[130] It is believed that requiring that similar factors are taken into

[130] S.13(2(a).

consideration will ensure the evaluative process recognises Nigeria's socio-economic realities.

Furthermore, the CPCA will need to sanction firms that use false and/or misleading information as well those that omit material information. Both Canada and the UK adopt the use of regulatory offences to deal with non-compliance. However, their approach slightly differs in certain respects. The CCA only provides for criminal sanctions where a firm has acted intentionally or recklessly in providing false and misleading representations. Where the required mens rea is missing, non-complying parties are subject to civil sanctions. The UK's approach is quite different. For misleading actions and omissions, the CPUTRs' criminal sanctions operate on a strict liability basis subject to a due diligence offence. In these cases, the trader's intention is not taken into consideration.

The problem with the UK's strict liability offence is that firms may be penalised even where they lack mens rea.[131] This is because the sanctions regime does not distinguish between varying degrees of culpability.[132] Canada's system is preferred because it is believed that it will allow for more proportionate regulatory responses. As argued in section 3.2.3.2, criminal sanctions will be more appropriate in the most serious cases of non-compliance. Where fault is lacking, criminal sanctions may be too severe.[133]

[131] Cartwright (n 77) 10.
[132] Ibid.
[133] See discussions in section 3.5.3.

Moreover, there is also an argument that regulators may be more willing to take enforcement action under a regime permitting civil sanctions.[134] This could be for several reasons. First, enforcing criminal sanctions can be time and resource intensive for all parties involved.[135] With access to limited resources, an enforcing authority may thus be reluctant to take action. Second, owing to fewer formalities with administrative sanctions,[136] civil sanctions will support a relatively quick response. Third, administrative penalties are not subject to the same procedural limitations as regulatory offences, hence there is a fairer chance that an enforcement action will be successful.[137]

In light of this considerations, it is recommended that the CPCA draws a distinction between the sanctions that will be applied for intentional and unintentional cases of non-compliance. Criminal sanctions should be reserved for serious cases where firms have acted intentionally or recklessly. Enforcing authorities should be able to rely on administrative sanctions to deal with less serious cases. This will ensure that regulatory responses are appropriate to the degree of non-compliance.

Finally, since the regulatory regime controlling the use of false and misleading information broadly falls under the regulation of

[134] Cartwright (n 77) 16.
[135] Macrory (n 70) para 1.30
[136] This will include penalties imposed by regulators which do not involve the court, although a right to appeal outcomes to court is maintained; P Hampton, `Reducing Administrative Burdens: Effective Inspection and Enforcement' (2005) <http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/prebud_pbr04_hampton.htm> accessed 10 June 2017, paragraph 2.82.
[137] Cartwright (n 77) 16.

business practices, it is believed that enforcement powers should rest with the CPC as this will allow for a coordinated approach to enforcement.

5.5. ALLOCATION OF LIABILITY

Liability regimes are a contentious issue in m-payments because of the numerous parties involved and the different funding sources that may be used. This is particularly evident from the review of Canada.[138] This naturally leads to discussions on what ought to be the appropriate focus of a liability regime for m-payments. There is an argument that the central focus should emphasise uniformity in risk allocation rules. For instance, Hillebrand strongly argues that basic consumer protections in payment systems should not be dependent on the payment method or the means of processing.[139]

There is some merit in this view as it is attractive to have standardized rules applying to all consumers irrespective of the payment method chosen. However, it is argued that liability regimes in m-payments should concentrate more on certainty rather than uniformity. It may not be pragmatic to insist on uniform rules where the nature of the relationship underlying a payment instrument differs significantly. This argument is hinged on the observation of more established payment methods which

[138] Section 3.2.4.
[139] G Hillebrand, 'Before the Grand Rethinking: Five Things to do Today with Payments Law and Ten Principles to guide New Payments Products and New Payments Law' (2008) 83 Chi-Kent L.Rev 769, 810.

reveals that uniformity does not always exist. For instance, credit and debit cards are subject to differing contractual arrangements and this is reflected in differing risk allocation rules.

It is submitted that some of the economic goals for risk allocation will be better served by a focus on certainty rather than uniformity. For instance, Ebers contends that one of the economic goals for liability rules is to incentivize parties who influence the size of the expected loss to ensure they take care.[140] Thus, liability is often placed on the party that is best able to bear the risk in question.[141] To achieve the economic goal that Ebers refers to, clarity on applicable liability rules is vital. For instance, clarity enables parties to take out appropriate insurance covers for risks they have elected to bear.[142] From this perspective, clear rules governing the allocation of risks help with increasing the efficiency of a market.[143]

To achieve the level of clarity required, it is suggested that disclosures will play a vital role. As is the style under the PSRS, the M-payments Framework should establish a direct link between mandatory disclosures and risk allocation rules. If certainty is to be achieved, parties, particularly consumers, must be informed of applicable liability rules. Consequently, it is submitted that the M-payments Framework should mandate that service providers

[140] M Ebers (ed), *European Perspectives on Producer's Liability* (Walter de Gruyter 2009) 142.
[141] This is often the person with the least bearing costs who can easily acquire insurance; F Weber, *The Law and Economics of Enforcing European Law* (Ashgate Publishing 2014) 34.
[142] See S Shavell, 'On Liability and Insurance' for a detailed discussion. <http://www.law.harvard.edu/faculty/shavell/pdf/13_Bell_J_Econ_120.pdf> accessed 25 May 2015.
[143] RD Cooter, EL Rubin, 'A Theory of Loss Allocation for Consumer Payment' (1987) 66 Texas L.Rev 6370,6370.

disclose applicable risk allocation rules at the time of contracting. This will ensure that consumers are aware of the risks they are agreeing to bear.

The content of the risk allocation rules to be disclosed is another key issue to be resolved by the M-payments Framework. The M-payments Framework is almost silent on the allocation of risks and the CPF which addresses certain issues is unenforceable. Although some risk allocation rules may be set in contracts, it is recommended that certain core rules be codified under the M-payments Framework. Inspiration could be drawn from the PSRs and NPSRs which contain several risk allocation rules that provide a baseline of protection for all payment consumers. In one sense, addressing these key matters in the M-payments Framework can encourage certainty while introducing some level of uniformity in risk allocation. Additionally, setting mandatory rules under an enforceable framework can help to address the unequal bargaining power between contracting parties. If these rules are not set, providers who offer standard form contracts are bound to include risk allocation rules that tilt the contract in their favour.

The M-payments Framework will need to clarify the risks and losses that each party will be responsible for. At a minimum, the Framework should contain rules on the allocation of liability where there are unauthorised transactions. Unauthorised transactions have been singled out because–

> "payment services are at their core a contractual arrangement where the provider and client are in a

> debtor-creditor relationship. Being a debt, the key terms are that the provider must repay the debt to the client, or make payments as directed by the client, up to the value of the client's balance plus any agreed overdraft."[144]

The core of this contractual arrangement rests on the performance of the authorised instructions given to a provider by a customer. Hence it is submitted that this issue needs to be directly addressed by the M-payments Framework.

Based on the nature of obligations under a payment services contract, Bollen submits that best practices support a situation where consumers are only bound by transactions authorised by them.[145] Because authorisation is a central issue, the M-payments Framework will need to clarify what "unauthorised" connotes within the context of m-payments. This is relevant because "unauthorised" could cover straight-forward situations where a consumer's payment account has been illegally accessed by a third party without any fault of the consumer. "Unauthorised" may also cover more complex situations where a consumer's gross negligence in securing their authentication details has led to illegal access. The NPSRs and PSRs address both situations. Under both statutes, a consumer is not liable for unauthorised transactions that have occurred without their fault. However, the presence of

[144] R Bollen, 'A Discussion of Best Practices in the Regulation of Payment Services: Part 2' (2010) 25(9) JIBLR 429, 435.
[145] Ibid, 436.

fault[146] negates the general rule. It is suggested that the M-payments Framework embraces this approach.

As discussed in section 3.4.4, the practice in the UK is that where consumers have not contributed to unauthorised access, their losses are often capped. However, for losses to be capped, there is often a requirement that such suspicious transactions are reported on time. To ensure that reports can be made, the UK places an obligation on PSPs to disclose and maintain channels through which such reports can be made. In a logical approach that compels providers to act accordingly, the PSRs provide that where PSPs fail to disclose or maintain such channels, the consumer will not be liable even if they have made no report. It is submitted that the M-payments Framework should adopt a similar approach.

Consumer fault which attracts liability often relates to a neglect of their obligation to maintain the security of their personalised authentication details. This shows that there is a link between risk allocation rules and the disclosure of consumer responsibilities. Again, the PSRs provide a useful approach. As seen in section 3.4.4, PSPs are mandated to inform consumers of the security obligations that they have contracted to bear. Thus, disclosures cover how consumers may keep their personalised authentication details safe. Where these matters are disclosed appropriately, they help in ensuring that consumers can make necessary adjustments

[146] E.g. gross negligence and/or fraud.

to their security practices. Hence, if they fail to diligently meet these obligations, they will be liable for unauthorised transactions traced to their carelessness. Thus, the M-payments Framework should require the security obligations placed on consumers are clearly disclosed. Where these disclosures are not made, it is submitted that the service provider should bear the loss of unauthorised transactions except where the consumer has been fraudulent.

It is not realistic to expect that all risk allocation rules will be set under the M-payments Framework. As earlier stated, some of these rules will be set under the contracts entered. One popular method for determining contractual risk allocation is the adoption of exclusion/limitation of liability clauses. As seen in section 4.4.1.1, for instance, there is evidence that widely drafted limitation clauses are in use in Nigeria. Since a country's consumer protection regime is expected to apply holistically, it is suggested that the use of exclusion clauses in m-payments will be better regulated under the proposed unfair terms regime discussed in section 5.4.1.1. Accordingly, the use of exclusion clauses must be restricted to such circumstances as is considered fair within the context of the proposed statute. This is the approach adopted in the UK. Rather than duplicating legislative efforts and creating several regulatory rules governing the use of contract terms in different sectors, it is argued that a harmonised approach is preferable. This underscores the importance of ensuring that the

unfair terms statute is neutrally-worded and flexible enough to apply in varying sectors.

5.6. DISPUTE RESOLUTION

The ability to file complaints and obtain redress is considered an important aspect of consumer protection.[147] Wrbka points out that apart from having a deterrent effect on businesses, efficient redress frameworks also increase consumer trust, satisfaction and confidence in authorities.[148] This is because consumers are assured that their claims will be enforced.[149] Since m-payments is a relatively new service, it is believed that the availability of redress frameworks will help in boosting consumer confidence. Nigerian authorities will, therefore, need to ensure that m-payment consumers can access affordable, fair and expeditious complaints handling processes.

All the countries reviewed require PSPs to set up internal redress mechanisms. These mechanisms are important as they are often the first port of call when consumers have complaints. If these mechanisms are efficient, they help in reducing the cost of dispute resolution. Hence, it is necessary that Nigerian m-payment service providers are obliged to set up efficient internal redress mechanisms. It is recommended that Nigerian regulators include

[147] OECD Toolkit (n 104) 99; UN Guidelines for Consumer Protection (as expanded in 1999) <http://www.un.org/esa/sustdev/publications/consumption_en.pdf> accessed 10 October 2017, para 32; Howells & Weatherill (n 76) 603.
[148] S Wrbka, 'European Consumer Protection Law, Quo Vadis? - Thoughts on the Compensatory Collective Redress Debate' in S Wrbka, S Van Uytsel et al (eds), *Collective Actions: Enhancing Access to Justice and reconciling Multi-Layer Interests* (Cambridge University Press 2012) 32.
[149] Ibid 37.

this as a condition for granting m-payment licenses. Thus, where applications are made for a licence, intending providers should be required to submit specific details of the internal redress procedures that will be available to consumers. It is believed that this approach will ensure that dispute resolution procedures are given adequate attention at the business development stage.

Firms should also be mandated to appoint designated internal dispute resolution officer(s) at the commencement of operations. This officer will be charged with overseeing the dispute resolution policy of the firm. Designating a particular officer with this responsibility may ensure that proper attention is devoted to implementing these internal resolution procedures.

For redress mechanisms to serve their purpose, it is desirable that information on available dispute resolution mechanisms be publicised.[150] Consumers ought to be informed of the dispute resolution procedures available and the process for initiating a complaint. Information given should also cover the expected costs and duration of the procedures, the possible outcomes, avenues for appeal and the binding status (or otherwise) of the outcome.[151] Houghton points out that it might be practically impossible for consumers to have all these pieces of information at once.[152] Therefore, it is important that consumers are informed of where they can get further information and advice when needed.[153] Thus,

[150] The UN Guidelines on Consumer Protection (n 147) paragraph 34.
[151] OECD (n 76).
[152] P Houghton, C Warner et al, 'Consumer Law Review- Call for Evidence" Consultation Response by Which?' (July 30, 2008) 29.
[153] Ibid.

it is suggested that providers are mandated to disclose the contact details of the designated dispute resolution office or officer(s) that may be contacted for further information. Disclosures should also include a summary of other procedures available to consumers if they are dissatisfied with the outcome of internal procedures.

Authorities will need to decide what role individualised internal redress procedures play within the broader dispute resolution regime. In Kenya and the UK, for instance, there is a direct link between these internal procedures and wider regulatory objectives. Hence, both jurisdictions require that these internal procedures are designed in a way that enables FIs to identify and remedy any recurring and/or systemic problems. The UK DISP goes a step further by providing helpful guidelines on how firms may deal with this responsibility.[154] For instance, firms are advised to collect and analyse information on disputes received to identify root causes of problems and to remedy them. It is submitted that including similar requirements in the M-payments Framework will help to ensure that dispute resolution processes are not carried out in an isolated manner. This approach can assist with gathering information about any systemic issues arising in the adoption of m-payments. Dispute resolution data can also point to key issues which should prompt the internal re-modelling of business practices and in more significant cases outright regulatory intervention.

[154] See section 3.4.5.

Internal mechanisms may not always succeed at resolving m-payment disputes that arise. Hence it is important that Nigerian consumers can access external dispute resolution avenues. In Canada and the UK, statutory ADR platforms are available to consumers. The structure of these platforms slightly differs in both countries. The Canadian Bank Act creates the ExCBs as external ADR platforms. all FRFIs are mandated to register with an ExCB. Two financial ombudsmen services are currently registered (OBSI and ACBO) as ExCBs. There are some shortcomings with Canada's approach.[155] First, the findings of these ombudsman services are non-binding which suggests that court action will become inevitable in many cases. Second, their jurisdiction is limited to FRFIs who voluntarily subscribe to the service and will not extend to other non-FRFIs providing m-payments. This indicates that m-payment consumers who are not served by FRFIs will be unable to enjoy these services. On the other hand, the UK 's statutorily-backed FOS has a wider mandate. Its compulsory jurisdiction overs financial service firms, payment service providers and e-money issuers with UK establishments. Unlike the ExCBs, the findings of the FOS are binding where accepted by the consumer.

Discussions in section 4.6 reveal that Nigeria currently lacks established external ADR platforms exclusive to financial services consumers. The only current external option for financial services consumers is the Consumer Protection Department of the CBN.[156]

[155] See section 3.2.5.
[156] <https://www.cbn.gov.ng/AboutCBN/Dir-FSS.asp#cpd> accessed 3 February 2017.

This office was created due to unsuccessful legislative attempts at setting up a financial ombudsman service. As argued in section 4.6, this situation is far from ideal because it is preferable for consumer disputes to be handled by an institution independent of the CBN with a defined statutory mandate.

Hence, it is submitted that m-payment consumers will benefit from the establishment of an independent financial ombudsman service. The UK model is preferred for several reasons. First, it is believed that a statutorily-backed financial ombudsman service will give consumers more choices outside the cumbersome formal court system in Nigeria. An ombudsman operationally independent of the CBN will also ensure that priority is given to effective disputes resolution in the financial sector.

As opposed to multiple ombudsmen platforms as is the practice in Canada, it is argued that a single ombudsman service may allow for more uniformity and consistency in resolving disputes. Furthermore, a single service may be better positioned to identify systemic problems deduced from complaints. It is predicted that it would be easier to identify patterns and draw necessary inferences where there is a central service evaluating a holistic picture of submitted complaints. Thus, the proposed ombudsman service can play a key role in notifying authorities of any issues that have a regulatory significance in m-payments.[157]

[157] In the UK, the FOS is expected to notify the FCA of issues that have regulatory significance; EMR Approach Document, p87.

Consumers should be able to access the proposed service free of charge. As is the practice in the UK and Canada, the service should be funded by a levy on industry. The compulsory jurisdiction of the service should also be drafted in wide terms similar to that of the FOS. Hence the service's jurisdiction should extend beyond traditional financial institutions and should generally cover institutions providing payment services. This will ensure that m-payment consumers served by non-FIs can access the service.

Firms should also be required to disclose the availability of the ombudsman service. To encourage consumers to embrace the service, it is important that its decisions are binding and enforceable in court. Nigerian authorities should also seek to replicate the FOS's consumer-friendly rules. For instance, although the determinations of the FOS are binding on businesses and enforceable in court, consumers retain the right to reject the determination of the ombudsman and to further pursue the matter in court.[158] It is believed that incorporating a similar provision will protect consumer interests since they are able to pursue additional remedies if dissatisfied with the ombudsman's findings.

One uniform requirement in Canada and the UK is that parties are required to exhaust all internal dispute resolution mechanisms before approaching the ombudsman. While this requirement will encourage parties to seek out available internal procedures, it may lead to situations where businesses deliberately stall proceedings

[158] PE Morris, 'The Financial Ombudsman Service and the Hunt Review: Continuing evolution in dispute resolution' (2008) 8 JBL 785, 789.

to frustrate a consumer's access to the ombudsman.[159] Hence, it is recommended that Nigerian authorities adopt this requirement with a little modification. They should permit the ombudsman to hear a case where the consumer can show sufficient evidence of reasonable attempts at exhausting internal procedures. To prevent the abuse of this exception, what will serve as "sufficient evidence" and "reasonable attempts" should be based on objective standards set by the ombudsman.

Furthermore, Nigerian regulators will need to consider what role collective ADR will play in the dispute resolution regime. There is a growing interest in encouraging collective ADR in several jurisdictions. Proponents emphasize that collective ADR procedures will counter the disadvantages associated with individualised and collective procedures in formal court systems.[160] Collective ADR is expected to be comparatively less expensive, faster and more confidential.[161] Importantly, Hodges finds that ADR procedures are generally better at maintaining relationships between parties as they are less aggressive and more consensual than litigation.[162]

Currently, the civil procedure rules in some states in Nigeria encourage the formal adoption of ADR through the establishment of Multi-Door Courts (MDCs). These MDCs are under the civil

[159] See Cartwright (n 76) 60.
[160] C Hodges, 'Current Discussions on Consumer Redress: Collective Redress And ADR' Annual Conference on European Consumer Law (2011) <https://www.law.ox.ac.uk/sites/files/oxlaw/here_2_2.pdf> accessed 21 January 2017, p10.
[161] Ibid.
[162] Ibid.

jurisdiction of high courts. They are based on Sander's novel idea of an institutionalised system called a "comprehensive justice centre" which combines ADR with the litigation process.[163] Ajigboye[164] explains that in this model, the court will offer disputants on arrival at its registry an annexed ADR option as part of the options for resolution of disputes. It is submitted that regulators may take advantage of these existing MDCs to encourage collective ADR.[165] For these collective procedures to impactful, it will be necessary to affirm the binding nature of decisions reached. Akeredolu,[166] argues that this may be the best way of lending credibility to the scheme and assuring users that the procedures will not be in vain.

Collective ADR will be significant in m-payments where transaction values will likely be small. When disputes arise, consumers may be discouraged from seeking redress because the small amounts involved may not be worth the costs that will be incurred. What this suggests is that in many cases individual losses may be small but the m-payment providers in aggregate may have caused

[163] Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse (Transcript) (2008) 5(3) U. St. Thomas LJ 665, 670 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265221> accessed 22 August 2016.
[164] O Ajigboye, 'The Concept of Multi-Door Courthouse in Nigeria: Rethinking Frank Sander's Concept' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525677> accessed 20 August 2016, p4.
[165] It will be necessary to amend current civil procedure to recognise the use of collective ADR in these MDCs.
[166] A Akeredolu, 'Institutionalising Alternative Dispute Resolution in the Public Dispute Resolution Spectra in Nigeria through Law: The Lagos Multi-Door Court House Approach' (2015) 12(1) US-China L.Rev 104,108.

significant detriment.[167] Collective redress may thus be the most cost-friendly alternative in such situations.

As with collective procedures in the formal court system, collective ADR could also assist in reducing the chances of variations in outcomes which are prevalent in individualised processes.[168] They may also have an effective deterrent effect on business because of the publicity they attract and the significant number of people involved.[169] In addition, these procedures might have a positive psychological effect on consumers and may provide the incentive needed for the formation and/or continuation of consumer groups.[170] These are important considerations that should convince Nigerian authorities to support the use of collective ADR procedures.

The UK and Canada support arrangements which allow relevant regulators and consumer bodies to bring representative actions on behalf of consumers. This approach could be extended to collective ADR. For instance, the CPC, which is the primary consumer agency, should be able to represent consumers at collective ADR proceedings. Granting both the CPC and consumer bodies such authority is significant as it will make the presentation of consumer complaints more coordinated and it will create an alternative for

[167] Howells & Weatherill (n 76) 17.
[168] L Friedman, 'Access to Justice: Social and Historical Context' in M Cappelletti, J Weisner (eds), *Access to Justice: Promising Institutions* (A Giuffre 1978) cited in I Ramsay, 'Consumer Redress and Access to Justice' in CEF Rickett, TGW Telfer, *International Perspectives on Consumer Access to Justice* (Cambridge University Press 2003) 30.
[169] Scott & Black (n 18) 120.
[170] Ibid 121.

consumers who are unable to afford individualised redress procedures.

5.7. FINANCIAL INCLUSION

While the CBN recognises that m-payments can assist in improving inclusion, discussions in section 4.8 noted that a bank-led model is preferred by the CBN. The comparison of the Kenyan and Indian approaches discussed in section 3.3.6 leads to the submission that the CBN will need to reconsider what m-payment model is most suitable for achieving its financial inclusion objectives.

Similar to the CBN, the RBI initially preferred a strictly bank-led model in the provision of m-payment services. This approach was criticised as it did not yield much uptake of the service by the unbanked.[171] In response, the RBI altered its regulatory stance and permitted the licensing of PBs.[172] This provided the leeway needed for non-banking firms such as MNOs to participate fully in the provision of m-payments.

PBs may provide small savings accounts and payment/remittance services to migrant workers, low income households and small businesses. Although they cannot offer credit, they may serve as agents to distribute credit, insurance and mutual funds on behalf

[171] Mobile Money Association of India (MMAI), the GSM Association (GSMA), 'Mobile Money: The Opportunity for India' (2013) <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/12/MMAI-GSMA-on-Mobile-Money-in-India-for-RBI-Financial-Inclusion-Committee_Dec13.pdf> accessed 12 December 2015, p13.

[172] RBI: Guidelines for Licensing of Payments Banks <https://rbi.org.in/scripts/bs_viewcontent.aspx?Id=2900> accessed 23 November 2016, p3.

of recognised financial service providers.[173] The offering of additional services by PBs reflects the RBI's belief that a superior model for m-payments is one that allows for additional banking services as anything less would not be viable in the long run.[174] Thus, the PBs appear to be a compromise between the bank-led and MNO-led model. The RBI still got its way in ensuring that additional banking services supported m-payments but compromised by permitting MNOs to be eligible for payment bank licenses.

In contrast to India's initial approach, the CBK took a liberal position permitting MNOs to fully participate in providing m-payments. MNOs leveraged on their technology, ubiquitous distribution networks and partnerships with banks to provide payment services to the unbanked population.[175] The CBK did not also issue overly prescriptive requirements that discouraged their investment.[176] There was rapid customer uptake due in large part to a ubiquitous distribution network at the grassroots level, trusted brands, and relatively low-cost transactions in comparison to existing money transfer methods.[177]

[173] S.4 ibid.
[174] 'M-Banking in India - Regulations and Rationale' Address by Dr KC Chakrabarty, Deputy Governor, RBI at International Banking Summit on Regulation of Cross-Border Mobile Payments and Regional Financial Integration at Mumbai on March 29, 2012. <http://www.bis.org/review/r120330f.pdf> accessed 13 July 2014.
[175] ibid 5.
[176] ibid 6.
[177] B Muthiora, 'Enabling Mobile Money Policies in Kenya Fostering a Digital Financial Revolution' (2015) <https://www.gsmaintelligence.com/research/?file=0899b64241eef71ea0141e2f80fdb690&download> accessed January 26, 2017, p246.

Nigeria has taken a conservative stand similar to India's initial approach. The CBN precludes MNOs from taking a lead stand in offering m-payments. MNOs are only expected to provide the telecommunications infrastructure for the use of providers.[178] This is due to concerns that MNOs may expose the financial system to unnecessary systemic risks. There is, however, some contradiction in excluding MNOs from directly providing m-payments. This is because relying strictly on a bank-led approach suggests an unprogressive movement in circles. In the first place, one of the reasons for financial exclusion is that a significant percentage of the population has no access to banking services. Addressing this problem by introducing a solution that is dependent on sole bank involvement only leads back to the origin of the problem.

Statistics suggest that Nigerians have more mobile devices than bank accounts.[179] If banks solely take the lead role in driving the m-payments market, it is argued that m-payments may not bring any significant gains to excluded persons. This approach indirectly makes a direct relationship with a bank a prerequisite for m-payments which in effect shuts out already excluded consumers. Additionally, if MNOs cannot take lead roles side by side with banks, they may not have sufficient incentives to invest in the market.

[178] Paragraph 2.1 M-payments Framework.
[179] GSMA Intelligence: 'Country Overview – Nigeria' <http://draft-content.gsmaintelligence.com/AR/assets/4161587/GSMA_M4D_Impact_Country_Overview_Nigeria.pdf> accessed 12 February 2016.

In jurisdictions with successful m-payments launches like Kenya, MNOs were allowed to play a lead role in the market. This contrasts with less successful launches in jurisdictions like India where regulators took a more cautious bank-centric approach. While it is recognised that the sanctity of the financial system is paramount, a balancing act must be done to ensure that other key policy objectives are met. This position finds support in De Koker's[180] arguments that a country has more control over its financial system when most transactions are brought within formal regulated sectors. A model that excludes MNOs and prevents them from using their leverage to drive the market indirectly keeps a significant number of persons outside the formal financial sector.

Considering the foregoing, it is submitted that the CBN should adopt a more liberal approach as this may be more appropriate in the early stages of regulating m-payments. Regulation in phases may be helpful in kick-starting investment and adoption. As was done in Kenya, the CBN's initial approach should focus on leaving the platform open for business institutions willing to invest, whether they are banks or MNOs. Minimum regulatory rules can be inserted at this stage to cover core issues like disclosures, allocation of liability, dispute resolution and protection of consumer funds. It is believed that innovation and competition will be encouraged if a level playing ground is provided in this initial

[180] L De Koker, 'Aligning Anti- Money Laundering, Combatting of Financing of Terror and Financial Inclusion' (2011) 18(4) JFC 361, 363.

stage. This will be easily maintained if no institutions/business models are given preference over others.

In the long run, it is anticipated that competing providers i.e. banks and MNOs may choose to voluntarily collaborate as this may make the most economic sense for them. Both will be able to leverage on their strengths, e.g., experience in settling payments on the part of banks and ubiquity and extensive reach of services on the part of MNOs. Ultimately, a collaboration will possibly be the most useful model but it is submitted that such a collaboration should be based on voluntary terms between participants and not one mandatorily required by regulators.

Creating niche institutions such as India's PBs is another option. However, it is argued that with the additional functions imposed, MNOs may still be discouraged from getting involved. This is not to suggest that the idea behind making additional banking services available in addition to m-payment is not significant. However, it is submitted that this may be achieved differently by Nigerian regulators through a progressive phased approach that relies on collaboration between banks and MNOs.

The first phase would be the opening of a regular m-payment account with an MNO using basic verification procedures (simplified KYC).[181] The already existing Subscriber Identity Module (SIM) card registration and bio-data cataloguing used will

[181] See section 2.10.2 (n 475) for an explanation of this concept.

be sufficient at this stage.[182] The second phase would then be qualifying (based on the existing account with the MNO) to open a basic account with a collaborating bank. This account will then make the customer eligible for additional services of the type that PBs offer in India. More verification checks will be required as account functionalities increase. It is argued that this may be more pragmatic as there will be no need to create niche institutions, and participants will retain their core competencies. Regulators will also retain control over institutions and transactions within their traditional regulatory purview. Importantly, excluded consumers will have access to the financial system in a gradual phased style that allows them to familiarise with the formal system.

PART 3

5.8. CONCLUSION

This thesis has examined the existing consumer protection frameworks that benefit m-payment consumers in selected jurisdictions. Core consumer policy tools identified in chapter two served as the reference points for analysis. The thesis highlighted areas of convergence and divergence in the countries' responses to consumer issues in m-payments. While some reviewed

[182] for a consumer to enjoy most m-payment services in Nigeria they must possess a mobile phone number. Nigeria operates a mandatory SIM registration scheme where consumers are mandated to register their SIM and phone numbers or risk deactivation from mobile networks. In registering their SIM and phone numbers, consumers are required to verify their identity by providing biometric information and other personal information to MNOs.

countries focus on extending existing regulations to m-payments, others are in the process of creating new regulatory frameworks to support m-payments.

The UK and Canada fall into the first category. This is unsurprising as these countries already have robust consumer protection frameworks. They thus favour the extension of these regimes to m-payments. However, there remain grey areas, particularly with the allocation of liability, that will require the modification of existing frameworks. These grey areas are less pronounced in the UK and this may be explained by the presence of technologically-neutral instruments like the PSRs which create institutions whose definitions adequately cover m-payment providers.

Kenya and Nigeria fall into the second category. Kenya's experience is significant as no specific laws applied to m-payments until it had gained traction. While m-payments were introduced in 2007 in Kenya, enactments covering consumer issues were passed after. For instance, the Consumer Protection Act was passed in 2012, the E-money Regulations in 2013, and the NPSR in 2014. Nigeria, on the other hand, introduced an M-payments Framework before the launch of any m-payment platform.

Generally, the countries reviewed operate some form of regulatory regime covering the consumer issues highlighted. The differences often lie in how comprehensive the applicable regimes are. The result of the research done, however, shows that in most cases, the Nigerian regulatory regime lags behind. This suggests that m-

payment consumers do not have a sufficiently broad consumer protection framework to rely on. Accordingly, the thesis argues that there is a need to address identified shortcomings through statutory and institutional responses discussed in Part two of this chapter.

The recommendations have been specific to Nigeria for reasons stated in section 1.1.3 of the thesis. As earlier noted, a review of existing literature on m-payments shows a paucity of studies covering developing countries in the West African region. Nigeria represents the largest mobile market in the West African region[183] and remains one of the biggest economies in Africa.[184] By filling the knowledge gap on the region, this thesis will make a major contribution to the important body of knowledge on m-payments regulation in developing countries. It is also hoped that the research findings will have a positive impact by making a case for law reform in developing countries based on convincing critique and evidence.

The scope of the thesis is, however, limited to doctrinal research. It is believed that further empirical research will provide illuminating information on key issues. Particular interest remains in investigating the implications of Kenya's success with M-pesa. Considering that M-pesa gained traction despite the absence of strong consumer protection laws, one wonders what influence a

[183] GSMA, 'The Mobile Economy: Sub-Saharan Africa' (2014) 20 <http://www.gsmamobileeconomyafrica.com/GSMA_ME_SubSaharanAfrica_Web_Singles.pdf> accessed 3 April 2016.

[184] __<http://www.africaranking.com/largest-economies-in-africa/> accessed 15 March 2017.

strong consumer protection regime has on the adoption of innovative financial services like m-payments. One is tempted to argue that the Kenyan experience is an exception and that a weak consumer protection regime may play a major role in discouraging the uptake of m-payments. This is, however, speculative and it is believed that empirical research will more shed light on this issue. Additionally, it would be enlightening to investigate the specific areas of consumer protection regulation considered most significant by m-payment users. Empirical data will allow policymakers to better appreciate the key consumer concerns linked to the adoption of innovative financial services.

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