

## **The new UN Guideline on CP for financial consumer protection**

The revised UNGCP were adopted by the General Assembly of the United Nations in December 2015, and launched at the first meeting of the Intergovernmental Group of Experts on Consumer Protection Law and Policy under the auspices of UNCTAD in Geneva in October 2016. The Guidelines were first adopted in 1985. They were revised in 1999 at which point there were significant inclusions around the theme of sustainable development. The 2015 Guidelines include a new section on financial services. They also include new sections on Business Practices and Electronic Commerce. In addition to setting out substantive standards, they also establish the grounds for international cooperation. There is a newly established Intergovernmental Expert Group on Consumer Protection Law and Policy within the existing UNCTAD framework to facilitate an annual discussion of the Guidelines, their implementation, voluntary peer review, capacity building and to undertake research. The new work program is the legal and institutional framework for consumer protection, and e-commerce. It is within this context that the paper discusses the substantive Guidelines for Financial Services.

2016 IAFICO Conference

New Development and Challenges for Financial Consumer Protection

# Implications of Digitalization

November 4, 2016

Takaaki HATTORI

*\* Views expressed in this presentation are those of the speaker, and are not those of the FSA or any other institution.*

# Outline

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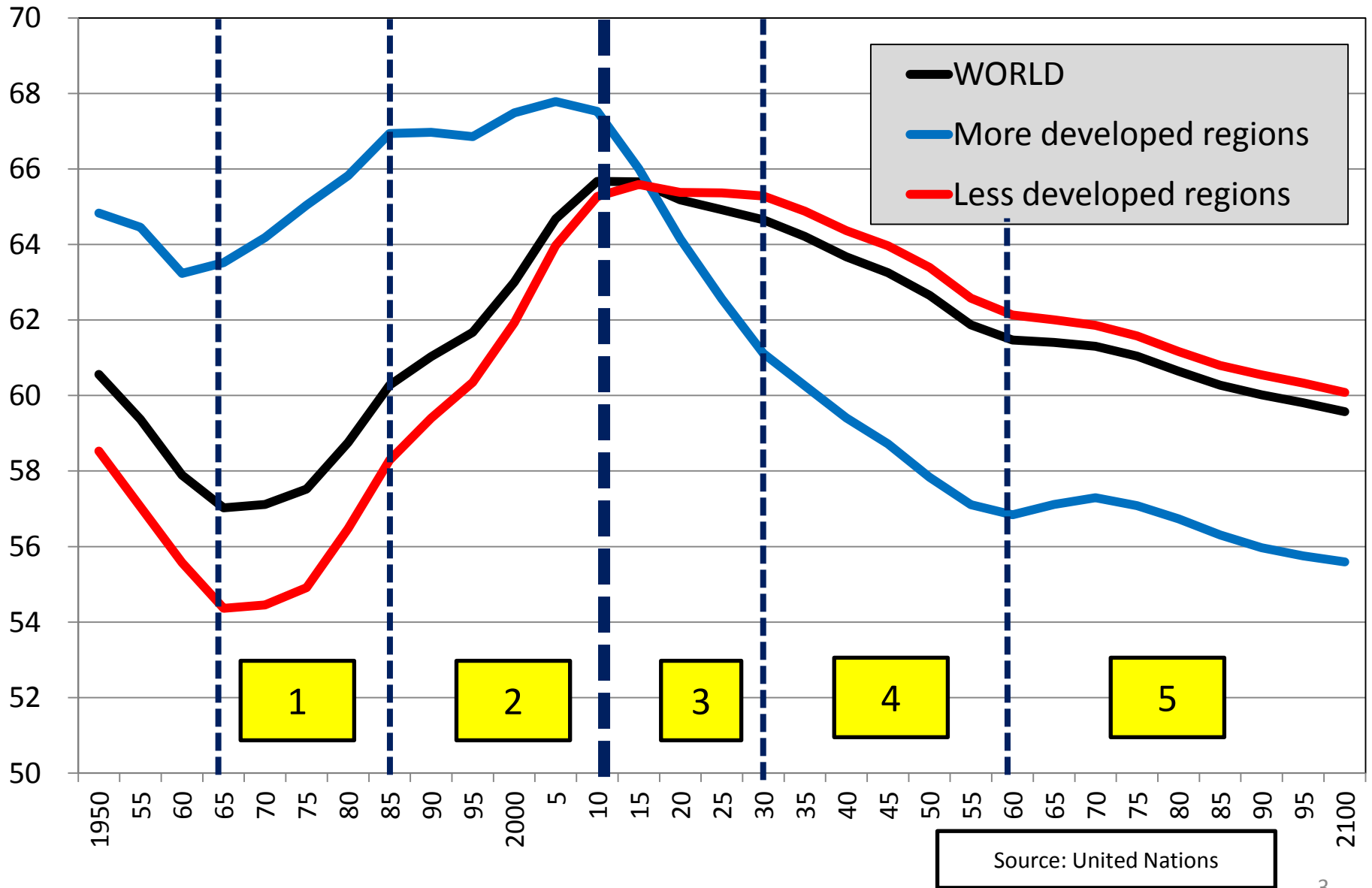
## 1. Financial Inclusion

- 1) Importance on Global Economic Growth
- 2) G20 (Group of 20 )
- 3) GLOPAC (Global Financial Partnership Center)

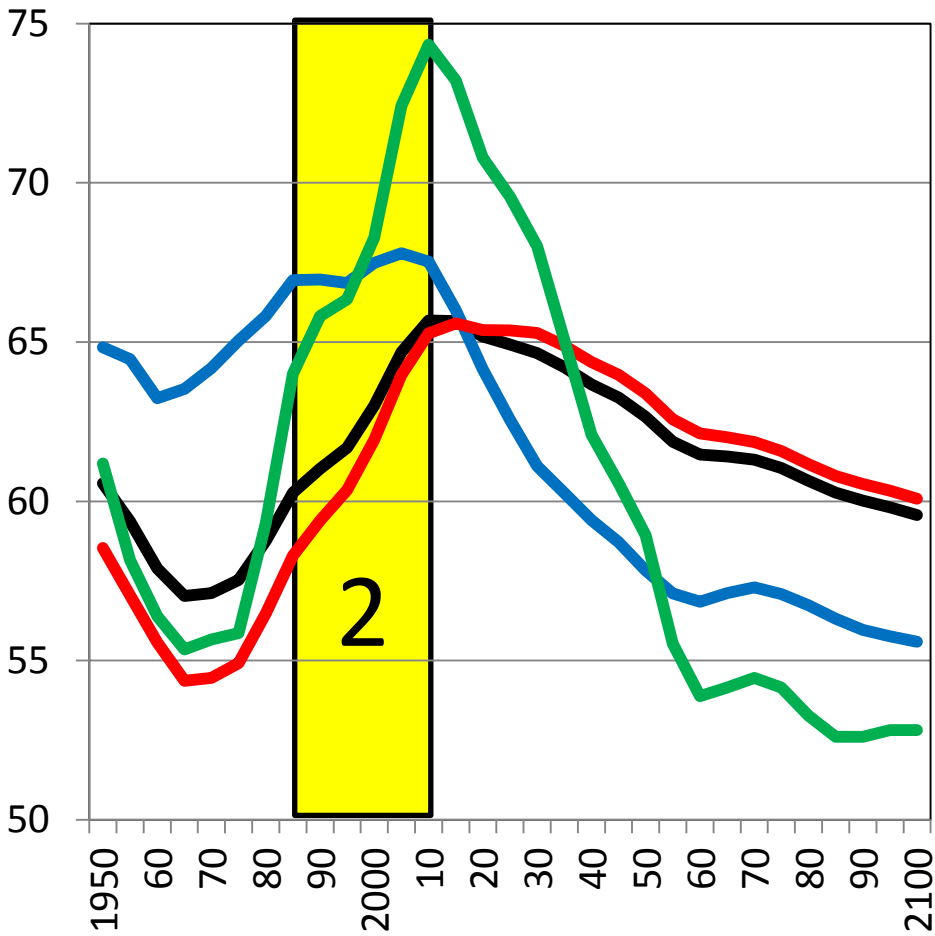
## 2. Financial Consumer, Equipped with a Computer

- 1) FinCoNet (International Financial Consumer Protection Organization )
- 2) Cross Border Transactions by Consumer
- 3) Future Possibility

# Percentage of working-age population(15 – 64) to total



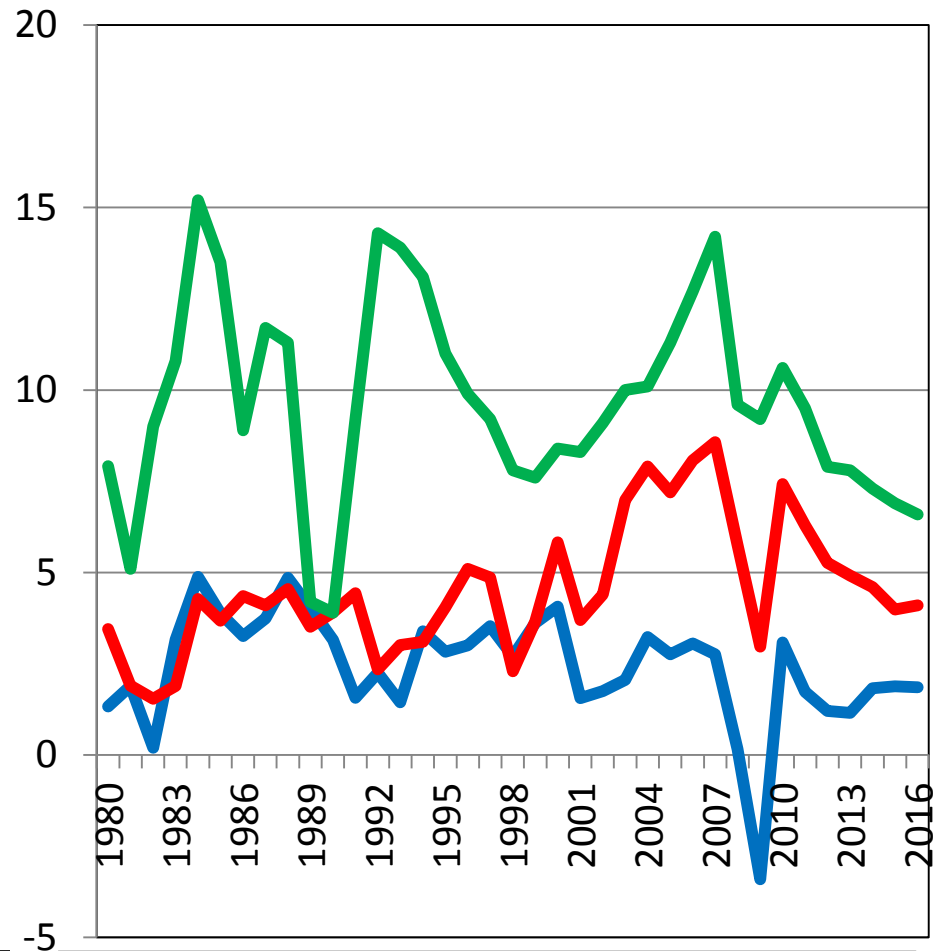
Percentage of working-age population (15 – 64) to total population



— WORLD
 — More developed regions
 — Less developed regions
 — China

Source: United Nations

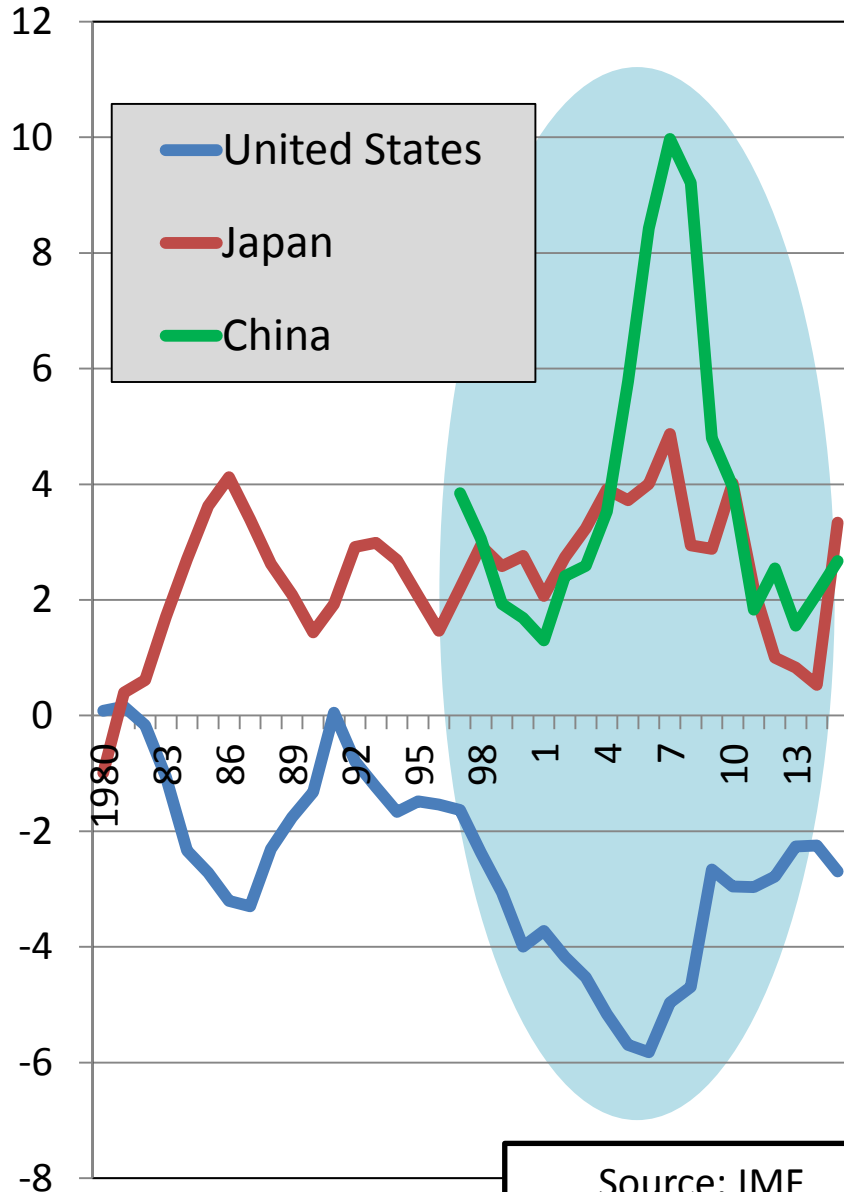
Gross domestic product (constant prices, Percent change)



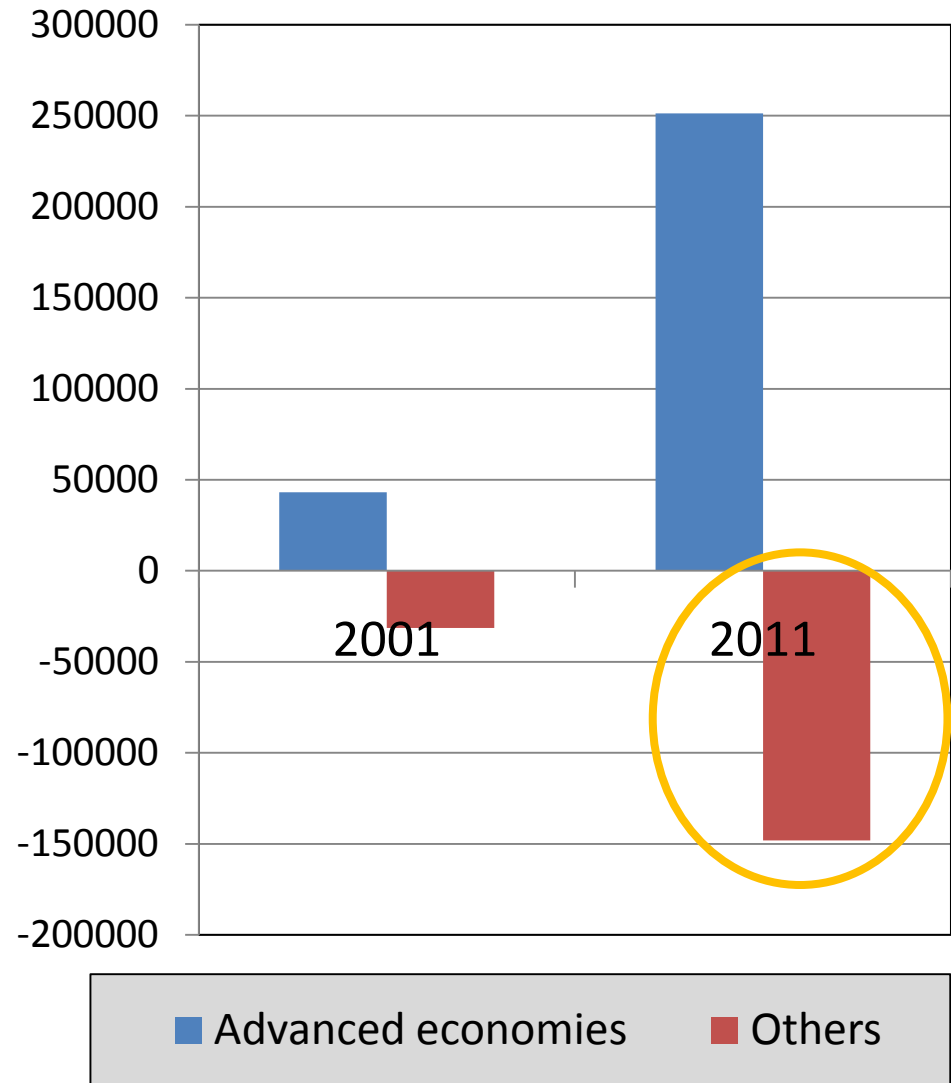
— Advanced economies
 — Emerging market and developing economies
 — China

Source: IMF

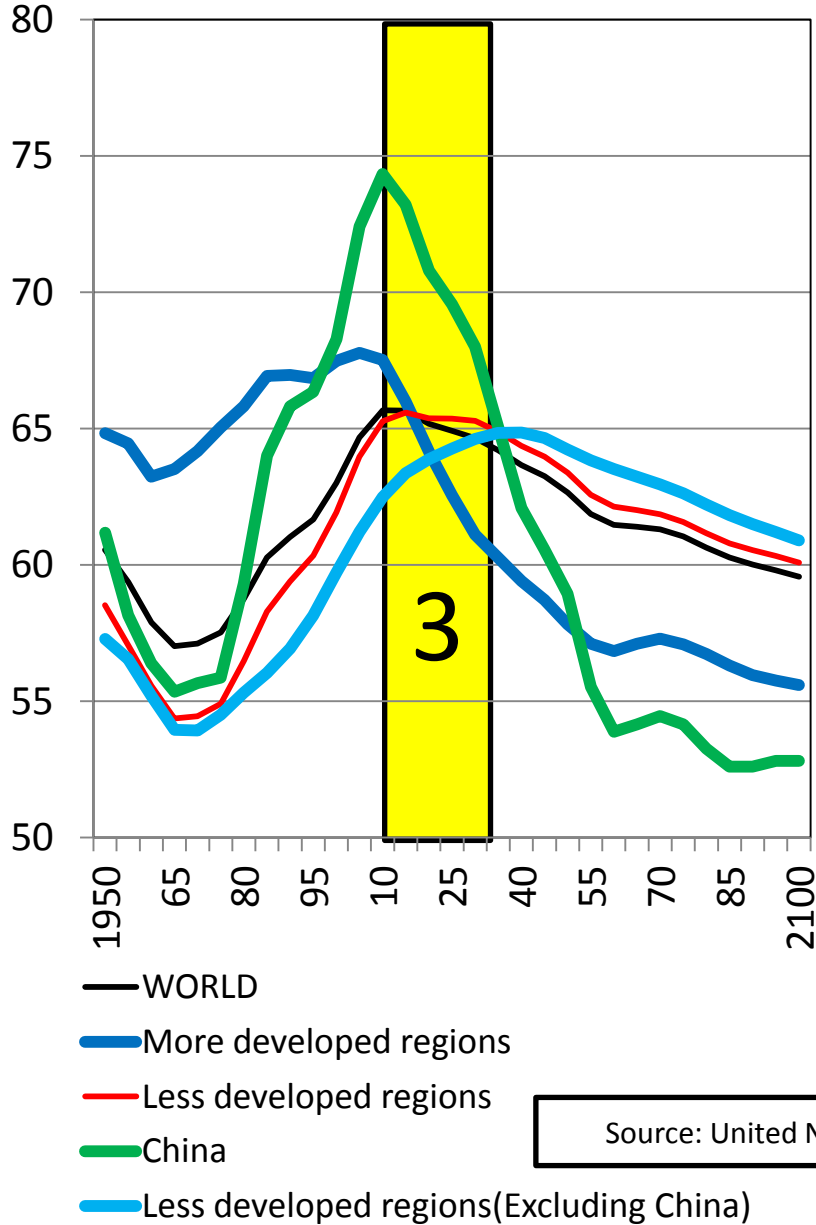
Current account balance (percent of GDP)



Trade balance of China (Million US\$)

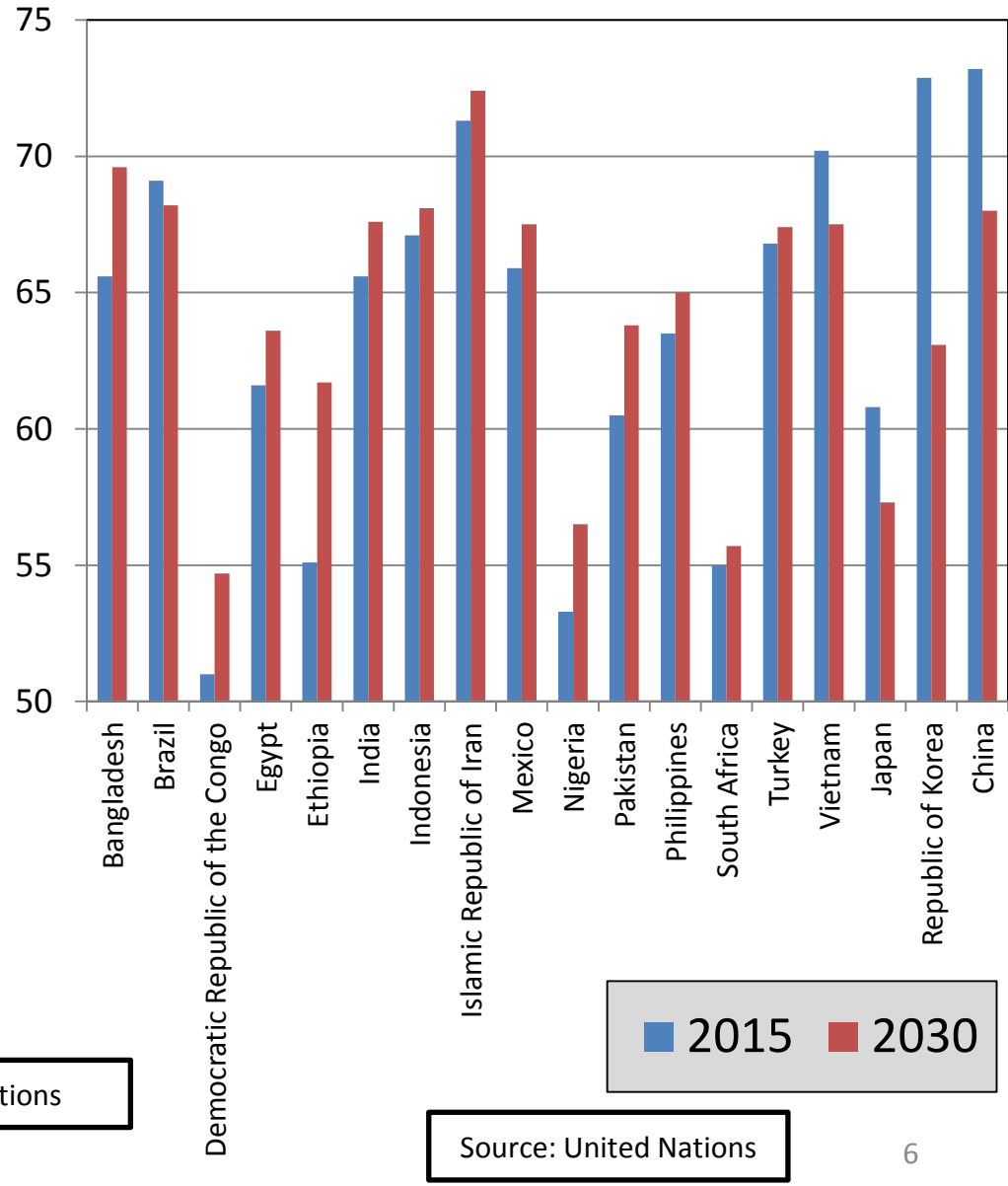


Percentage of working-age population (15 – 64) to total population

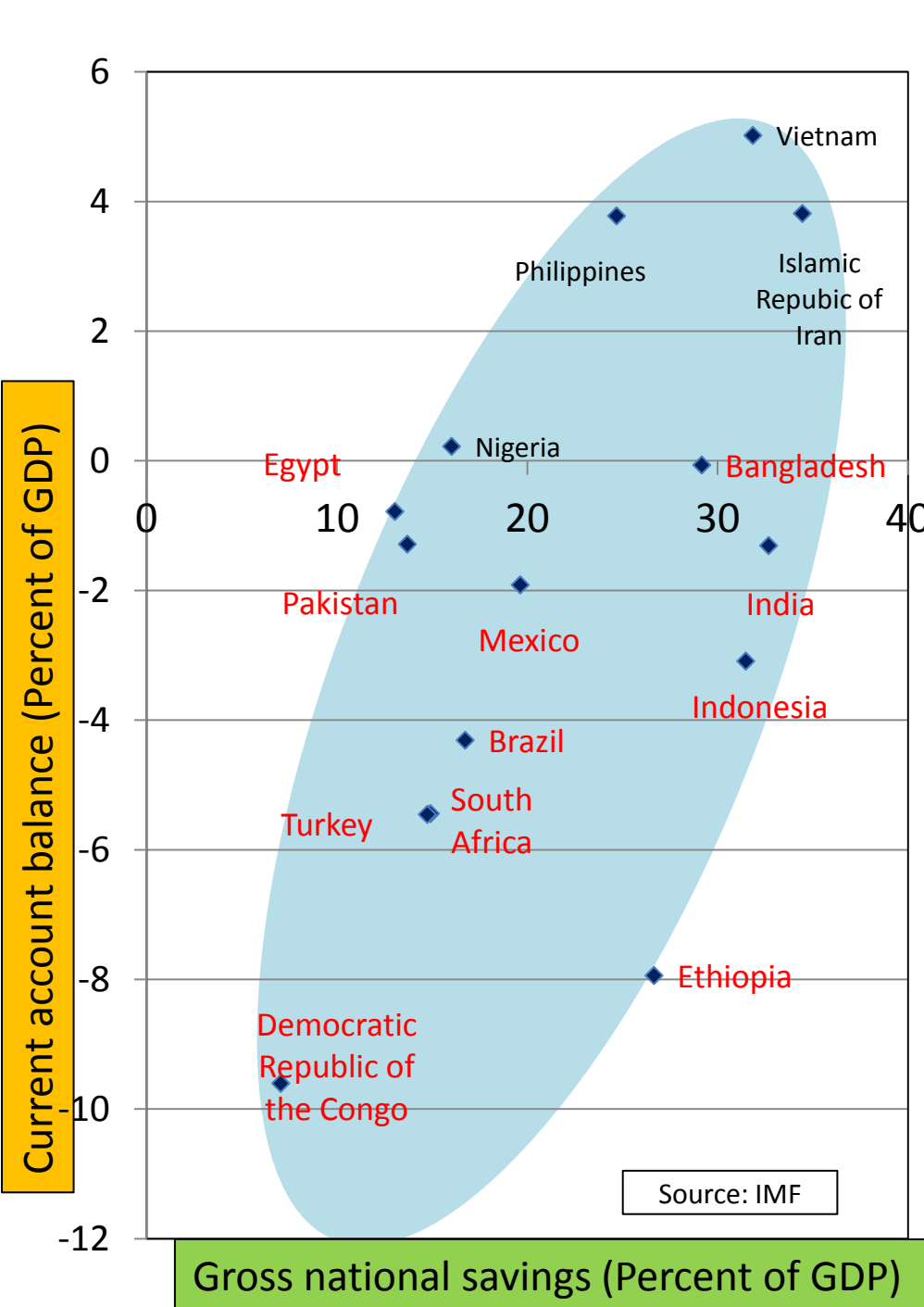


Source: United Nations

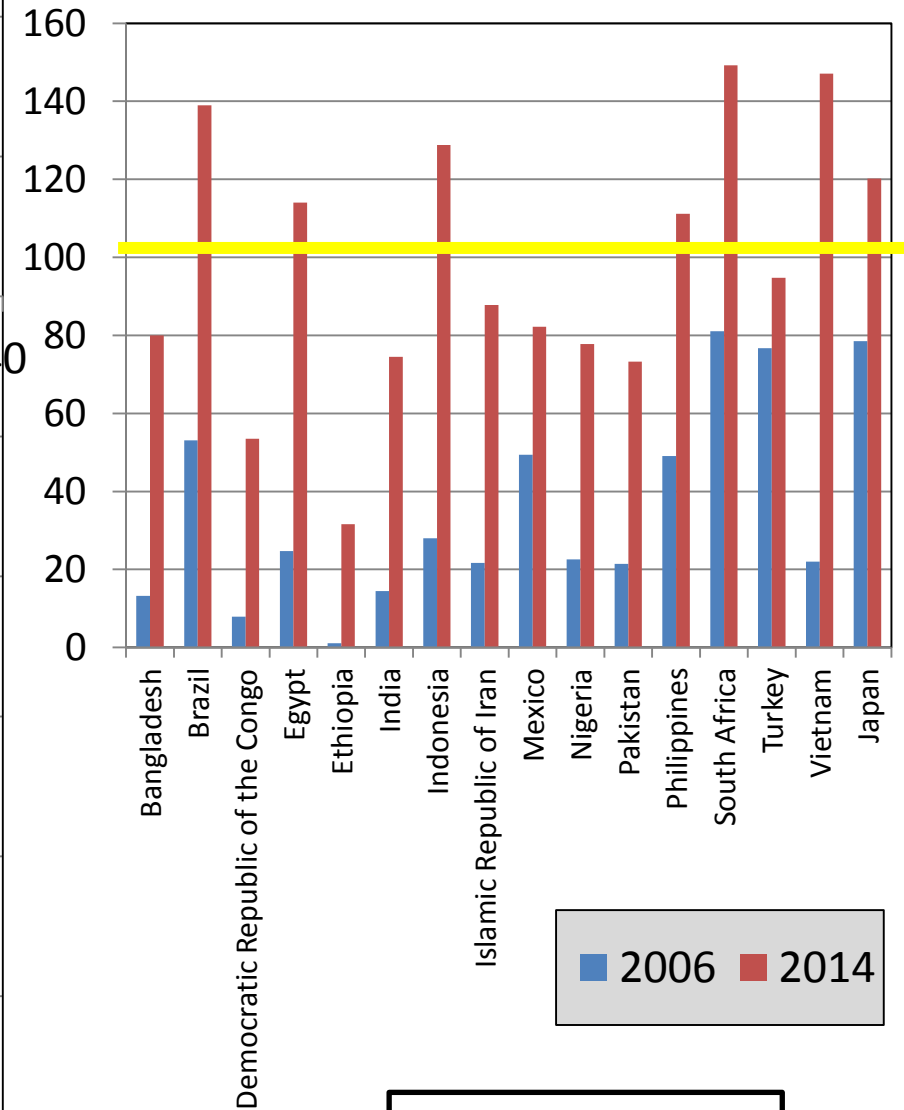
Percentage of working-age population (15 – 64) to total population



Source: United Nations



**Mobile cellular subscriptions (per 100 people)**





## ○ G20 Leasers' Communique Hangzhou Summit (4-5 September 2016)

We endorse the G20 High-level Principles for Digital Financial Inclusion, the updated version of the G20 Financial Inclusion Indicators and the Implementation Framework of the G20 Action Plan on SME Financing. We encourage countries to consider these principles in devising their broader financial inclusion plans, particularly in the area of digital financial inclusion, and to take concrete actions to accelerate progress on all people's access to finance.

## ○ G20 High-Level Principles for Digital Financial Inclusion

- Principle 1 Promote a Digital Approach to Financial Inclusion
- 2 Balance Innovation and Risk to Achieve Digital Financial Inclusion
- 3 Provide an Enabling and Proportionate Legal and Regulatory Framework for Digital Financial Inclusion
- 4 Expand the Digital Financial Services Infrastructure Ecosystem
- 5 Establish Responsible Digital Financial Practices to Protect Consumers
- 6 Strengthen Digital and Financial Literacy and Awareness
- 7 Facilitate Customer Identification for Digital Financial Services
- 8 Track Digital Financial Inclusion Progress

## Principle 5 Establish Responsible Digital Financial Practices to Protect Consumers

Establish a comprehensive approach to consumer and data protection that focuses on issues of specific relevance to digital financial services.

## Principle 6 Strengthen Digital and Financial Literacy and Awareness

Support and evaluate programs that enhance digital and financial literacy in light of the unique characteristics, advantages, and risks of digital financial services and channels.

Source: GPF

# Global Financial Partnership Center of JFSA (GLOPAC)

## ➤ Main Objectives of GLOPAC

- to address the issues related to the global financial markets,
- to effectively conduct financial sector technical assistance for infrastructure development,
- to further strengthen cooperative relationships with financial authorities around the world.

## ➤ The Launch of GLOPAC

- April 1<sup>st</sup>, 2014 Financial Services Agency of Japan (FSA) established the AFPAC  
(the Asian Financial Partnership Center)
- April 1<sup>st</sup>, 2016 FSA, Japan, reorganized AFPAC and established GLOPAC  
(the Global Financial Partnership Center)

# Global Financial Partnership Center of JFSA (GLOPAC)

## ➤ How GLOPAC pursue its objectives?

- Fellowship Program (2 – 3 months program in Japan)

## ➤ About Fellowship Program

As “Visiting Fellows”, participants can take training and research programs tailored to their areas of interest.

- Participants: financial regulators and supervisors around the world

## ➤ Achievements (as of Nov.2016)

- 65 officials from 19 jurisdictions (Banking: 33 officials - Securities: 15 officials - Insurance: 17officials)

- Jurisdictions represented

Asia (58 officials): Cambodia, India, Indonesia, Laos, Malaysia, Mongolia, Myanmar  
Philippines, Sri Lanka, Thailand, Uzbekistan and Vietnam

Middle East, Africa and Latin America (7 officials): Botswana, Brazil, Dubai, Iran,  
Mexico, Peru and Uganda

# Global Financial Partnership Center of JFSA (GLOPAC)

## Introduction of GLOPAC Fellowship Program (Sample)

### Orientation

- First Presentation
- Japanese Lessons
- Discussion with Senior officers

### General & Basic Lectures

- Seminar on Banking Supervision
- Study Tour to Regional Office
- Training course on supervision of financial sector etc

### Focused Session

- Lectures / Training Sessions from FSA officers
- Visits to Financial Institutions, Relevant Organizations
- Preparing Report and Presentation etc

### Final Presentation

Customized sessions are arranged at relevant divisions of FSA or organizations, focusing on respective areas of interest

## 2. Financial Consumer, Equipped with a Computer

### (1) FinCoNet

- The International Financial Consumer Protection Organization (FinCoNet) was established in 2003 as an informal network of financial consumer protection regulators and supervisors to discuss consumer protection issues of common interest. It is recognized by the Financial Stability Board (FSB) and Group of 20 (G20).
- In November 2013, FinCoNet was formalised as a new international organisation of financial consumer protection supervisory authorities.

- The goal of FinCoNet is to promote sound market conduct and enhance financial consumer protection through efficient and effective financial market conduct supervision, with a focus on banking and credit.
- FinCoNet members see the Organization as a valuable forum for sharing information on supervisory tools and best practices for consumer protection regulators in financial services. By sharing best practices and by promoting fair and transparent market practices, FinCoNet aims to strengthen consumer confidence and reduce systemic consumer risk.

Source: FinCoNet report on online and mobile payments: Supervisory challenges to mitigate security risks

## Members

Australia: [Australian Securities and Investments Commission](#)

Brazil: [Central Bank of Brazil](#)

Canada: [Financial Consumer Agency of Canada](#)

China: [People's Bank of China](#)

France: [Central Bank of France](#)

Germany: [Federal Financial Supervisory Authority \(BaFin\)](#)

Indonesia: [Financial Services Authority](#)

Ireland: [Central Bank of Ireland](#)

Italy: [Central Bank of Italy](#)

Japan: [Financial Services Agency](#)

Korea: [Financial Services Commission](#)

Luxembourg: [Financial Sector Surveillance Commission](#)

Mauritius: [Bank of Mauritius](#)

Netherlands: [Netherlands Authority for the Financial Markets](#)

Norway: [Financial Supervisory Authority](#)

Portugal: [Central Bank of Portugal](#)

Saudi Arabia: [Saudi Arabian Monetary Agency](#)

South Africa: [Financial Services Board](#)

Spain: [Central Bank of Spain](#)

United Kingdom: [Financial Conduct Authority](#)



# 2016 FinCoNet Annual General Meeting

## 15-17 November 2016, Jakarta, Indonesia

The first (morning) session on day one of the Annual General Meeting (15 November 2016) will be a closed session for FinCoNet members only.

In the following open sessions on day one, the Chairman of the Indonesia Financial Services Authority will deliver a keynote address entitled 'Building National Strategic on Consumer Financial Protection in Indonesia'.

Participants will then have the opportunity to engage in a roundtable blue sky session focused on forward looking supervisory risks, trends and priorities.

Day two, 16 November 2016, will start with an update from the FinCoNet Member from Japan on Cross-Border Transactions.

The rest of the day will be dedicated to the work of the FinCoNet Standing Committees and two workshops.

Workshop I will focus on the important topic of Digitalisation of High Cost Lending,

while Workshop II will discuss Practices and tools required to Support Risk Based Supervision in a Digital Age.

## [FinCoNet/OJK International Seminar on Financial Consumer Protection:](#)

The Seminar to be held on [day three](#), 17 November 2016, and co-hosted by FinCoNet and the Indonesia Financial Services Authority will address the topic of '[Fast Innovation and Development of Fintech: Striking a Balance Between Financial Inclusion and Consumer Protection](#)'.

The [first session](#) of the Seminar will include interventions on the [supervisory overview of fintech](#). [Potential opportunities and risks; challenges in supervision; current and futures policies and supervision and regulation](#). [ADR mechanisms](#) will also be explored and a [case study on customer protection or complaints in fintech](#), [customer needs and behaviour changes](#) will be presented.

The [second session](#) of the Seminar will provide an [industry overview](#), touching on issues such as [statistics and the development of fintech](#) in Indonesia and other countries; opportunities and challenges as well as recommendations.

The evolution of digital transactions in banking and capital markets and the anticipated growth of fintech will also be addressed and some recommendations made.

## FinCoNet Report on “Online and Mobile Payments : Supervisory challenges to mitigate security risk”

This Report, analyses how the growth of online and mobile payment services can bring new risks and advantages to consumers as well as new challenges to financial supervisors while also supporting effective financial inclusion, especially in developing countries.

However these developments also present threats to consumer protection due to the emergence of new risks, in particular security risks, potentially. exposing consumers to incidents of fraud, deceptive practices and lack of reliability of devices and infrastructure.

## FinCoNet Report on “Online and Mobile Payments : Supervisory challenges to mitigate security risk”

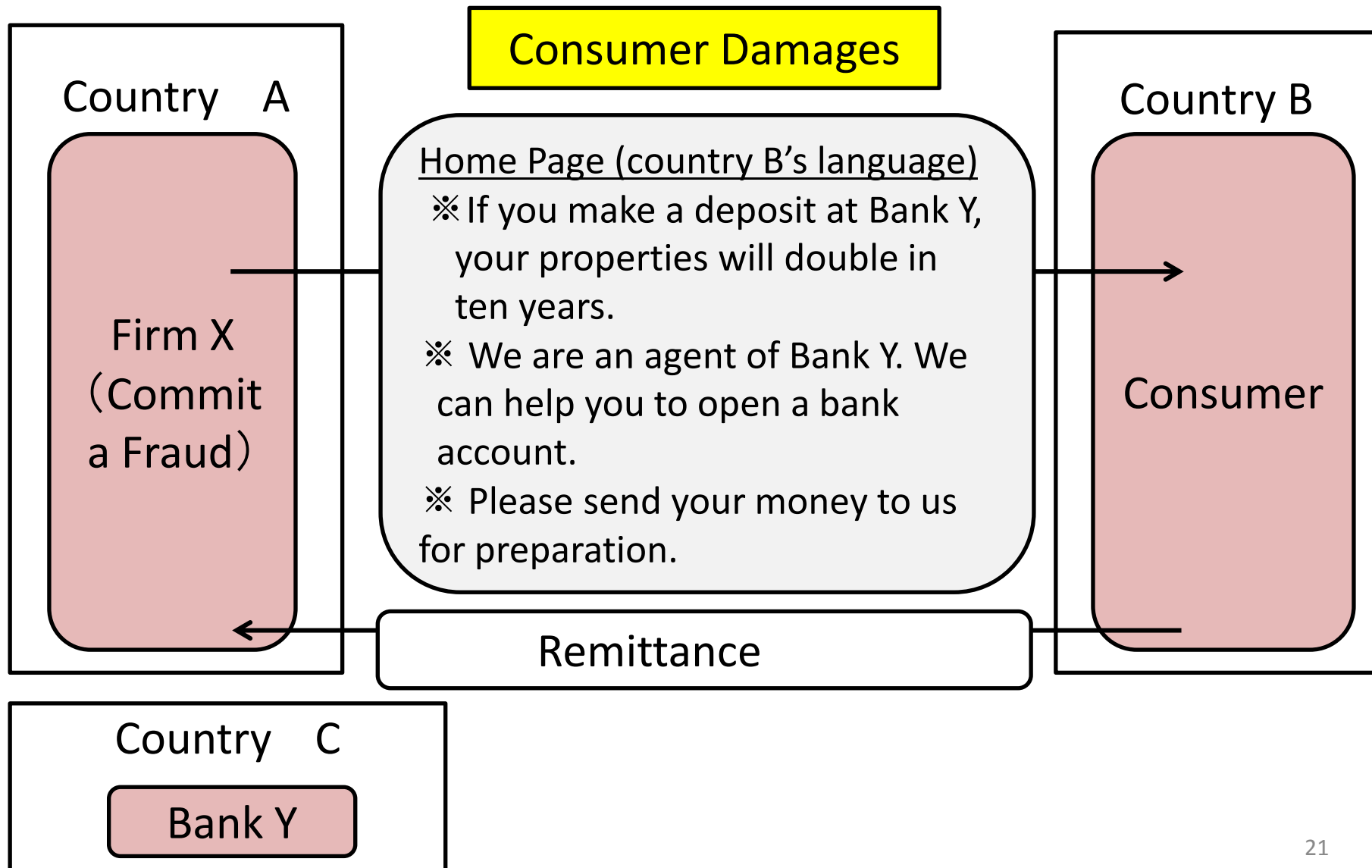
The report identifies a number of areas for further work to enable supervisory authorities to deal with various risks associated with online and mobile payments.

These include the standardisation of the categorisation of online and mobile payment services; the collection of statistical data and other relevant information surrounding the development and use of innovative payment services and on the most frequent security incidents at both the domestic and international level; and an assessment of the different supervisory frameworks of digital payments that exist among FinCoNet members are some of the areas highlighted in this report for further work.

Also identified are a number of conduct of business challenges in relation to the supervision of online and mobile payments going forward. The findings of this report will be disseminated amongst FinCoNet members and other interested parties in an effort to inform work in this area going forward.

## 2. Financial Consumer, Equipped with a Computer

### (2) Cross Border Transactions by Consumer



# Why overseas scammers target Australians ?

(Source : Home Page of Australian Securities and Investment Commission)

Many scams come from companies based overseas. These scammers target Australians because ASIC does not have international jurisdiction to investigate and prosecute them.

However, ASIC can notify the regulator in the scammer's country so that the regulator may pursue these illegal activities.

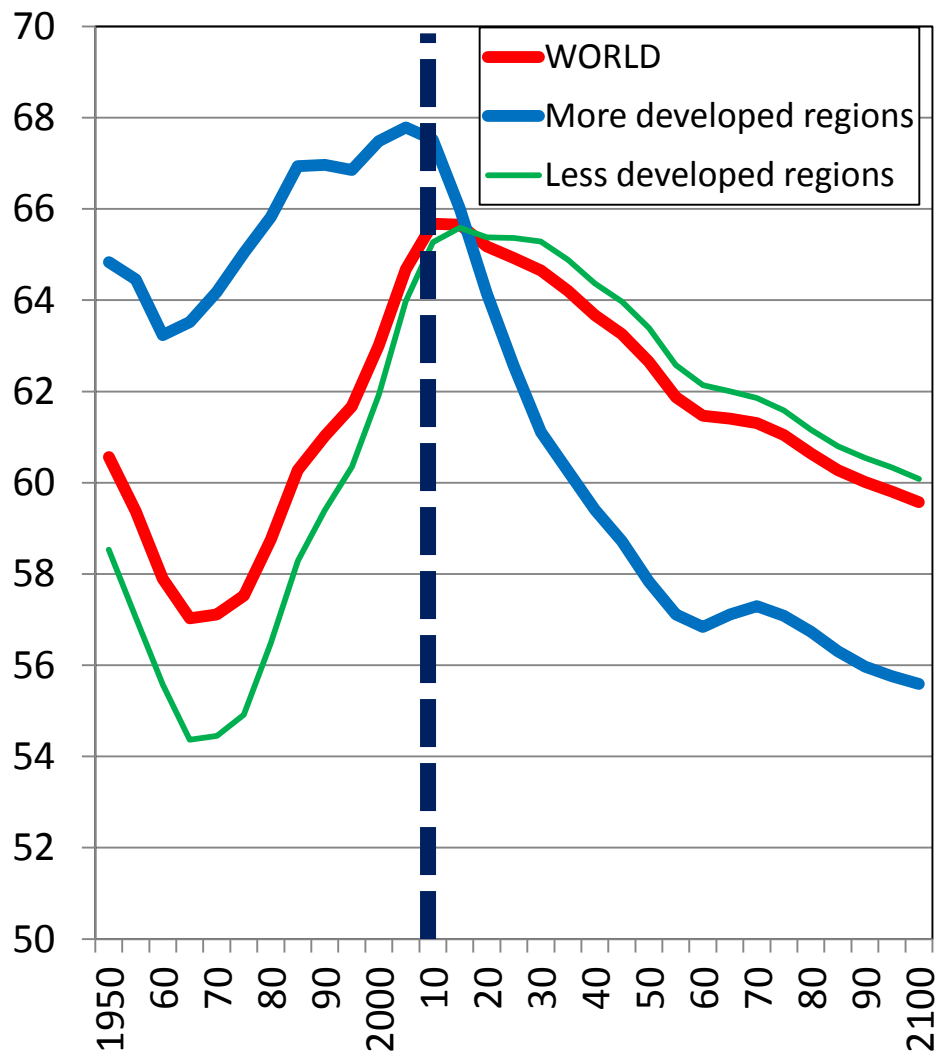
If you have received a call or email from someone you don't know offering you a great investment opportunity or a loan, be very wary. The caller may be a scammer trying to take your money. Scams come from companies operating overseas and Australia. Australians lose millions of dollars every year to scams and you do not want to be the next victim.

Protect yourself by checking this list of companies and individuals that are not licensed by ASIC. If the company that called you is on this list, do not deal with them.

## 2. Financial Consumer, Equipped with a Computer

### (3) Future Possibility

Percentage of working-age population(15 – 64) to total



Productivity improvement

Digitalization

Digital market

Consumer protection & education

Enhancement of consumer

Value creation by consumer



# The Recent “Fundamental” Reform of General Consumer Law in the UK and its Impact on Financial Consumers

**2016 Global Forum for Financial Consumers  
Seoul, November 2016**

**Professor James Devenney**  
McCann FitzGerald Chair in International Law and  
Business, UCD Sutherland School of Law



# Background



- In recent years the UK has enacted “**fundamental**” reform of **general** Consumer Law;
- In particular the **Consumer Rights Act 2015** (CRA 2015) was enacted **on 26th March 2015** after an epic passage through Parliament and, before its introduction into Parliament, a huge consultation process;
- This paper considers the impact of these reforms of **general** Consumer Law in the UK on financial consumers;
- We shall also see how a Supreme Court case involving consumers and **unauthorised overdrafts** was one of the drivers to reform of general Consumer Law in the UK...

# Background: Work of the Law Commission



It has been a **busy period for Consumer Law in the UK** with (for example):

- The Law Commission's 2005 work on *Unfair Terms in Contracts* (Law Com No 292);
- The Law Commission's 2009 work on *Consumer Remedies for Faulty Goods* (Law Com 317);
- The Law Commission's March 2012 report on *Consumer Redress for Aggressive and Misleading Practices* (Law Com No 332);

# Background: Work of the Law Commission



- The Law Commission’s 2012 *Issues Paper Unfair Terms in Consumer Contracts: a new approach?*

**“We think the current law on which terms are exempt from review under the UTCCR is unacceptably uncertain.** This advantages well resourced, large organisations which can pay for sophisticated legal advice. It disadvantages smaller traders and individual consumers.” (para 8.11, emphasis added)

This stemmed from Regulation 6(2) of the (then) Unfair Terms in Consumer Contracts Regulations 1999 and particularly the interpretation of that provision by the Supreme Court in *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6...

# Background: Work of the Law Commission



“(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall **not** relate—

- (a) to the definition of the main subject matter of the contract, or
- (b) to **the adequacy of the price or remuneration, as against the goods or services supplied in exchange.**” (former Regulation 6(2))

# Background: *Office of Fair Trading v. Abbey National Plc*



- The backdrop to *Office of Fair Trading v. Abbey National Plc*, was a significant amount of public concern in the UK about the **charges levied by banks on personal account holders in respect of unauthorised overdrafts** (and similar charges);
- This linked to the system of largely “**free-if-in-credit**” **personal banking in the UK...**

# Background: *Office of Fair Trading v. Abbey National Plc*



“The banks accept that the system of “free-if-in-credit” banking prevalent in this country **involves a significant cross-subsidy (amounting to about 30% of the banks' total revenue stream from current account customers) provided by those customers who regularly incur charges for unauthorised overdrafts (a cohort, we were told, of the order of 12 million people) to those customers (a cohort of about 42 million people)** who are in the fortunate position of never (or very rarely) incurring such charges. Banks in other European countries adopt different forms of cross-subsidy; French banks, for instance, concentrate their charges on processing standing orders and debit card transactions.” (*Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6 at [1] *per* Lord Walker)

# Background: *Office of Fair Trading v. Abbey National Plc*



- In early 2007 the Office of Fair Trading commenced an investigation into such charges;
- It quickly transpired that a key issue related to whether or not **Regulation 6(2) circumscribed any claim that the charges were unfair** for the purposes of the Regulations;



# Background: *Office of Fair Trading v. Abbey National Plc*



- Ultimately the Office of Fair Trading issued proceedings, against (and with the agreement of) various banks and building societies (“the banks”), focusing on the correct interpretation of Regulation 6(2);
- At first instance, Andrew Smith J. held that the relevant terms were **not** protected by Regulation 6(2) from being characterised as unfair under the Regulations; in particular the learned Judge, focusing on the wording of Regulation 6(2), felt that the charges were **not paid in exchange for any services**;

# Background: *Office of Fair Trading v. Abbey National Plc*



- The Court of Appeal dismissed the appeal although their reasoning did not entirely match the reasoning of the learned Judge. Essentially the Court of Appeal, taking its lead from *Director General of Fair Trading v. First National Bank plc*, made a distinction between **core and ancillary terms**, only the former of which come within Regulation 6(2); and held that the charges in question were ancillary terms and, hence, not covered by Regulation 6(2);
- Nevertheless a further **appeal by the banks was subsequently allowed by the Supreme Court**, the immediate aftermath of which was that the Office of Fair Trading decided not to pursue its investigation into such terms under the Regulations.

# Background: *Office of Fair Trading v. Abbey National Plc*



**“Charges for unauthorised overdrafts are monetary consideration for the package of banking services supplied to personal current account customers. They are an important part of the banks’ charging structure, amounting to over 30 per cent of their revenue stream from all personal current account customers. The facts that the charges are contingent, and that the majority of customers do not incur them, are irrelevant. On the view that I take of the construction of Regulation 6(2), the fairness of the charges would be exempt from review in point of appropriateness under Regulation 6(2)(b) even if fewer customers paid them, and they formed a smaller part of the banks’ revenue stream.”** (*Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6 at [47] *per* Lord Walker)

# Background: *Office of Fair Trading v. Abbey National Plc*



- The Supreme Court ruled on the Abbey appeal in the immediate aftermath of the banking crisis;
- We may wonder whether or not a (perhaps perceived) vulnerability on the part of banks (and the associated impact on the economy) in any way impacted (not necessarily illegitimately) on the Supreme Court's ruling in *Abbey*...

# Background: *Office of Fair Trading v. Abbey National Plc*



“...many thousands of individual claims in the county courts, many brought by litigants in person with the assistance of on-line forms and advice. All or virtually all of these proceedings have been stayed to await the outcome of these proceedings...the banks having earned **£2.56 billion from relevant charges in 2006** (against £4.1 billion in net interest earned on accounts in credit) and to over 12 million customers who had incurred relevant charges in that year.. They are an important part of the banks' charging structure, **amounting to over 30% of their revenue stream from all personal current account customers.**” (*Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6 at [17], [36] and [47] *per* Lord Walker)

Cf. *Office of Fair Trading v. Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch);

# Background: *Office of Fair Trading v. Abbey National Plc*



“We think that the words of the judgment may be lulling some businesses into a false sense of security. **There are other ways to interpret the judgment – and it could be overturned by the Court of Justice of the European Union (CJEU). The German Federal Supreme Court takes a different view on the UTD and has reviewed ancillary bank charges for fairness...**In a world of price comparison websites, there is increasing pressure on traders to advertise low headline prices, whilst earning their profits through other charges. Given this potential undermining of competition, the law should provide effective tools to prevent abuse...The current uncertainty has the potential to damage businesses as well as consumers.” (Law Commission, *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* (2013) at S.11ff)

# Background: Related Reforms



The CRA 2015 is also part of a package of reforms to Consumer Law at both national and EU level, for example:

- Consumer Rights (Payment Surcharges) Regulations 2012 (cf. Regulation 5(2)(d));
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CC(ICAC) 2013) [[link to Consumer Rights Directive 2011/83/EU](#) and note Regulation 6]; and
- Consumer Protection (Amendment) Regulations 2014 (CPAR 2014).

# Consumer Case Law



For example, Supreme Court decisions in:

- *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 (unfair relationships in consumer credit contracts);
- *ParkingEye Ltd v Beavis* [2015] UKSC 67 (on the penalty rule).



# Background: Future Reforms?



Law Commission, *Consumer Prepayments on Retailer Insolvency* ((2015) Consultation Paper No. 221) p1:

**“Consumers often pay for goods and services in advance of receiving them.** This is common practice for a range of products - from flights and theatre tickets to football season tickets and magazine subscriptions. Many furniture retailers rely on receiving deposits to place orders with suppliers. Holiday companies and hotels need the security of payment in advance to ensure consumers do not cancel at the last minute...the gift card...market in the United Kingdom was valued at £5.4 billion...”

# Background: Future Reforms?



**“If the company that has taken the prepayment becomes insolvent, consumers risk losing their money. Insolvency law does not give consumers any special protection.** Along with trade suppliers, landlords, HMRC and others, consumers are unsecured creditors who will not receive anything until secured creditors (such as banks and investment funds) and preferential creditors (such as employees) have been paid. This does not mean that consumers always lose out. There is a wide variety of ways in which consumers may be protected - through industry-specific schemes, through protections provided to those who pay with credit and debit cards...However, such protection is patchy and cannot always be relied on.”

# Background: Future Reforms?



“The report sets out five recommendations which would improve consumers’ position on insolvency:

- **Regulating Christmas and similar savings schemes**, which pose a particular risk to vulnerable consumers.
- Introducing a general power for Government to require prepayment protection in sectors which pose a particular risk to consumers.
- Giving consumers **more information about obtaining a refund through their debit or credit card issuer**.
- Making a limited change to the **insolvency hierarchy**, to give a preference to the most vulnerable category of prepaying consumers.
- Making changes to the rules on when consumers acquire ownership of goods.” (Law Commission website, July 2016)

# Background: Future Reforms?



“The **Bills of Sale Acts** are archaic Victorian statutes, which are wholly unsuited for modern credit arrangements such as logbook loans. They should be repealed in their entirety...The Law Commission **recommends a new Goods Mortgages Act** to:

- Provide appropriate protection to borrowers, so that vehicles are not seized too readily;
- Protect innocent purchasers who buy vehicles without realising that they are subject to a bill of sale;
- Save £2m of costs caused by unnecessary registration and red tape; and
- Remove unnecessary restrictions on secured lending to small businesses.” (Law Commission, *Bills of Sale: A summary of the Law Commission's recommendations to reform the law of logbook loans and of other loans secured on goods* (Law Com No 369 (Summary), September 2016))

# Consumer Protection Policy



“Consumer law and consumer regulation are **ostensibly** aimed at providing consumers with protection from, and rights against, producers and suppliers of goods and services. But how necessary are those measures? To what extent are consumers disadvantaged? And how should we see the consumer, and, more fundamentally, consumption itself?...The problems that consumers face in the market are not the same for all consumers and can fall most heavily on vulnerable consumers...” (C. Scott & J. Black, *Cranston’s Consumers and the Law* (3rd edn., Butterworths, London, 2000) pp.1-4)

# Consumer Protection Policy



“[EU] consumer law is based on a different understanding of the consumer and the role of consumer policy than national consumer law. [EU] consumer law sees the importance of the consumer in terms of promoting the **integrity of the market**: a market which depends on consumer confidence in cross-border transactions. National consumer law is based on other, **more social, policy imperatives...**”

# Consumer Protection Policy



“...whether redistributive, social justice or contract freedom-based. National policy-makers have [traditionally?] not promoted consumer protection out of concern with the “integrity of the market” but have sought to distinguish between the weak and the strong. [EU] consumer policy is quite different and demarcation differs.” (B. Heiderhoff & M. Kenny, ‘The Commission’s 2007 Green Paper on the Consumer Acquis: deliberate deliberation?’ [2007] *ELR* 740 at 742)

# Consumer Protection Policy & Information



The provision of information to consumers is a cornerstone of recent reforms in the UK and this is linked to a market driven view of consumer protection:



# Consumer Protection Policy & Information



**“Simplifying and reforming consumer law should make markets work more effectively and drive economic growth. It is widely recognised that well-functioning competitive markets encourage growth by creating incentives for firms to become more efficient and innovative to compete for customers. Markets can only be fully competitive if consumers are active and confident, meaning that they are willing to challenge firms to provide a better deal, switch between suppliers, and take up new products.”** (Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.9)

# Dynamic Relationship with EU Consumer Law



- The foregoing also highlights the (hitherto!) dynamic relationship between EU and national consumer laws;
- Briefly note that the reforms in the CRA 2015 (and related reforms) were introduced whilst work about the future of **general Consumer Law** at EU level were ongoing (although, of course, that may be less significant following Brexit)...

# Dynamic Relationship with EU Consumer Law



- For example, in 2009 there was the publication of C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, Munich, 2009):

“The following volumes contain the results of the work of the Study Group on a European Civil Code...and the Research Group on Existing EC Private Law... **Nearly two hundred and fifty people of different generations collaborated in the research groups over a period of more than twenty five years.** They have reflected important areas of private law...The perspective is thoroughly European and...[m]odel rules, with comments and notes, bring together rules derived largely from the legal systems of the Member States and the over-arching Community law.” (p.1)

# Dynamic Relationship with EU Consumer Law



- The (D)CFR was published in six volumes, spanning ten ‘books’ and includes provisions on:
  - general contract law (Books II & III);
  - specific contracts such as sales contracts (Book IV, Part A) and contracts relating to **personal security** (Book IV, Part G);
  - non-contractual obligations (Book VI);
  - unjustified enrichment (Book VII); and
  - trusts (Book X).

# Dynamic Relationship with EU Consumer Law



- Subsequently a controversial EU Commission *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses* (COM(2010)348 final) was published;
- Thereafter there was a EU Commission proposal for a Common European Sales Law:

# Dynamic Relationship with EU Consumer Law



“On October 11th 2011, the European Commission **proposed an optional Common European Sales Law** will help break down these barriers and give consumers more choice and a high level of protection. It will facilitate trade by offering a single set of rules for cross-border contracts in all 27 EU countries. If traders offer their products on the basis of the Common European Sales law, consumers would have the option of choosing a user-friendly European contract with a high level of protection with just one click of a mouse...” (Press Release IP/11/1175)

# Dynamic Relationship with EU Consumer Law



- Much narrower than (D)CFR;

**“The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments.” (Article 6)**

# Dynamic Relationship with EU Consumer Law



“The proposal for an optional Common European Sales Law...was backed today by a large majority (19 votes for, 3 against and 2 abstentions) in the leading European Parliament committee on this proposal, the **Committee for Legal Affairs (JURI)**...The European Parliament's Legal Affairs Committee **is backing the adoption of an optional instrument limited to distance contracts, notably online contracts.**” (European Commission, MEMO/13/792, 17/09/2013)



# Dynamic Relationship with EU Consumer Law



“The proposal for an optional European Sales Law...was backed today by a majority (416 votes for, 159 against and 65 abstentions) in the **European Parliament**...Today’s plenary vote...follows a positive opinion on the initiative from the Legal Affairs (JURI) Committee (MEMO/13/792) **limiting the European Sales Law to distance contracts, notably online contracts**...the proposed Regulation will now have to be adopted by the Council of Ministers using the "ordinary legislative procedure" (co-decision).” (European Commission, MEMO/14/137 26/02/2014)

# Dynamic Relationship with EU Consumer Law



However, on 16th December 2014 the EU Commission withdrew the proposed CESL from their 2015 work programme...

# Dynamic Relationship with EU Consumer Law



“The Commission will propose: 1. rules to make cross-border e-commerce easier. **This includes harmonised EU rules on contracts and consumer protection when you buy online: whether it is physical goods like shoes or furniture; or digital content like e-books or apps.** Consumers are set to benefit from a wider range of rights and offers, while businesses will more easily sell to other EU countries...” (A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen, 6th May 2015 (IP/15/4919))

# Dynamic Relationship with EU Consumer Law



**“The Commission today adopted two proposals: one on the supply of digital content (e.g. streaming music) and one on the online sale of goods (e.g. buying clothes online). The two proposals will tackle the main obstacles to cross-border e-commerce in the EU: legal fragmentation in the area of consumer contract law and resulting high costs for businesses – especially SMEs- and low consumer trust when buying online from another country.”** (Press release, IP/15/6264)

# December 2015, Two New Proposals



Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain aspects concerning contracts for the online and other distance sales of goods (COM/2015/0635 final):

“This Directive lays down certain requirements concerning distance sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of these remedies.”  
(Article 1)

# December 2015, Two New Proposals



“Member States shall **not maintain or introduce provisions diverging** from those laid down in this Directive including more or less stringent provisions to ensure a different level of consumer protection.”  
(Article 3)

# December 2015, Two New Proposals



“This Directive shall **not apply** to distance contracts for the provision of services. However, in case of sales contracts providing both for the sale of goods and the provision of services, this Directive shall apply to the part relating to the sale of goods” (Article 1(2))

# December 2015, Two New Proposals



Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain aspects concerning contracts for the supply of digital content (COM/2015/0634 final):

“This Directive lays down certain requirements concerning contracts for the supply of digital content to consumers, in particular rules on conformity of digital content with the contract, remedies in case of the lack of such conformity and the modalities for the exercise of those remedies as well as on modification and termination of such contracts.”  
(Article 1)



# December 2015, Two New Proposals



“Member States **shall not maintain or introduce provisions diverging** from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.”  
(Article 4)

# Background: Related Reforms



CRA 2015 is part of a package of reforms to Consumer Law at both national and EU level, for example:

- Consumer Rights (Payment Surcharges) Regulations 2012 (cf. Regulation 5(2)(d));
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CC(ICAC) 2013) [[link to Consumer Rights Directive 2011/83/EU and note Regulation 6](#)]; and
- **Consumer Protection (Amendment) Regulations 2014 (CPAR 2014).**

# Unfair Commercial Practices Directive



- The Unfair Commercial Practices Directive (Directive 2005/29/EC) was largely transposed in the UK by the **Consumer Protection from Unfair Trading Regulations 2008 (CPUTR 2008)**;
- The CPUTR, which replaced 23 earlier enactments, closely follow the wording of the Directive.

# A Commercial Practice: Meaning



Regulation 2: ““commercial practice” means **any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader**, which is directly connected with the promotion, sale or supply of a **product** to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product...”

# A Commercial Practice: Meaning



Regulation 2: ““product” means—

- (a) goods,
- (b) a service,
- (c) digital content,
- (d) immoveable property,
- (e) rights or obligations, or
- (f) a product of the kind mentioned in paragraphs (1A) and (1B)...

# An Unfair Commercial Practice: Meaning



Regulation 3(3) “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.”

# An Unfair Commercial Practice: Meaning



“(4) A commercial practice is **unfair** if—

- (a) it is a **misleading action** under the provisions of regulation 5;
- (b) it is a **misleading omission** under the provisions of regulation 6;
- (c) it is **aggressive** under the provisions of regulation 7; or
- (d) it is **listed in Schedule 1.**”

# An Unfair Commercial Practice: Meaning



Examples from Schedule 1:

**“Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.”**



# An Unfair Commercial Practice: Meaning



Examples from Schedule 1:

“Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, **or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.**”

# An Unfair Commercial Practice: Meaning



*CMA, UK higher education providers – advice on consumer protection law: Helping you comply with your obligations, (12 March 2015) para 6.7ff:*

“You should ensure that your **complaint handling processes are fair**. You may risk infringing the CPRs by engaging in unlawful practices in relation to the handling of student complaints, for example:

(a) if you **fail to adequately respond to and address student complaints** this could fall below the standards of ‘professional diligence’ expected in the sector...;”

# An Unfair Commercial Practice: Meaning



“(b) if you **mislead students** about their rights under the contract (such as their right to have the educational service carried out with reasonable care and skill), or how they can exercise these rights (for example, giving them misleading information indicating they may not be able to complain to a third party) there could be a misleading action or misleading omission under the CPRs; or

(c) if you **place barriers** in the way of students exercising their rights under the contract (such as ignoring legitimate complaints), or pressure them not to bring complaints this could be an aggressive practice under the CPRs.”

# Unfair Commercial Practices: Scope



- Under the CPUTR 2008 a “consumer” was initially defined as: “any individual who in relation to a commercial practice is acting for purposes which are outside his business” (Regulation 2);
- Subsequently amended to read: “...an individual acting for purposes that are **wholly or mainly outside** that individual's business”;
- *R v. X Ltd* [2013] EWCA Crim 818 – Court of Appeal considering whether **isolated** incidents can be unfair commercial practices.
- In terms of sanctions/enforcement...

# Unfair Commercial Practices: Enforcement



**“Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to community competition rules and the national provisions implementing them...” (Directive 2005/29/EC, Recital (9))**

# Unfair Commercial Practices: Enforcement



The CPUFR 2008 **originally** relied on a dual system of enforcement consisting of:

- (1) Criminal sanctions; and
- (2) Administrative sanctions (see now the Consumer Rights Act 2015, Schedule 5).

# Unfair Commercial Practices: Private Enforcement



Originally the CPUTR 2008 did **not** give consumers specific rights of private redress.

“An agreement shall **not** be void or unenforceable by reason only of a breach of these Regulations.” (CPUTR 2008, Regulation 29 (original version))

# CPUTR 2008 and a Patchwork of Private Enforcement



“The Regulations concern public enforcement rather than private redress. They do not give consumers the right to start civil actions to obtain compensation or other remedies. Instead, consumers must rely on **existing private law doctrines**, such as the law of misrepresentation and duress.” (Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii (referring to the original Regulations))



# CPUTR 2008 and a Patchwork of Private Enforcement: Misrepresentation



A consumer who has been subject to a misleading action or omission under the CPUTR 2008 might be able to **fashion a private remedy from the general law of misrepresentation** (rescission and possibly damages).

“This is problematic: the law of misrepresentation is **complex and uncertain...**” (Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii)

# CPUTR 2008: Enforcement and Calls for Reform



**“In 2009, Consumer Focus called for a private right of redress for all consumers who suffered loss through a breach of the Regulations.** They pointed out that scams are all too common but relatively few prosecutions are brought. They thought that enforcement would be more effective if public authorities and consumers “worked in tandem”, using both private and public enforcement sanctions.” (Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii)

# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014)



- CPAR 2014 inserted a **new Part 4A** into CPUTR 2008 giving consumers **particular private rights of redress in relation to the CPUTR 2008**;
- Part of the significant overhaul of consumer law in the UK;
- Unfortunately the CPAR 2014 is **not a model of clarity in drafting**.

# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014)



“The new rights **do not** apply to financial services, defined as a regulated activity within section 22 of the Financial Services and Markets Act 2000. Therefore pensions, mortgages, insurance and banking are also not covered by the new Regulations. These areas are already highly regulated, and applying the new rights could lead to confusion and inconsistency.” (Department for Business, Innovation & Skills, *Guidance on the Consumer Protection (Amendment) Regulations 2014*, August 2014)

Cf. s.49 CRA 2015!

# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014)



See Regulation 27D although there are a number of complex exceptions (see s.27D(2)).

# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014): Overview



- Consumer given private redress rights in relation to **misleading actions and aggressive practices** but not specifically misleading omissions (CPUTR, Regulation 27B);
- Generally, and **subject to rules on double recovery**, operate in addition to existing possibilities for private redress under the general law (see CPUTR, Regulation 27L but cf. Misrepresentation Act 1967 s.2(4));
- The remedies are the **unwinding of a contract, a discount and damages**.

# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014): Application



3 Conditions (Regulation 27A):

“(2) The **first condition** is that—

(a) **the consumer enters into a contract with a trader for the sale or supply of a product by the trader** (a “business to consumer contract”),

(b) the consumer enters into a contract with a trader for the sale of goods to the trader (a “consumer to business contract”), **or**

(c) the consumer makes a payment to a trader for the supply of a product (a “consumer payment”).”

# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014): Application



“The **second condition** is that—

(a) the trader engages in a **prohibited practice** in relation to the product, or

(b) in a case where a consumer enters into a business to consumer contract for goods or digital content—

(i) a **producer engages in a prohibited practice in relation to the goods or digital content**, and

(ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it.”



# Consumer Protection (Amendment) Regulations 2014 (CPAR 2014): Application



“(6) The **third condition** is that the prohibited practice is a **significant factor in the consumer's decision to enter into the contract** or make the payment.”

# CPAR 2014: Unwinding the Contract



- Contained in CPUTR 2008 Regulations 27E-H. **Regulations 27E-F deal with business to consumer contracts** (see above: “a contract with a trader for the sale or supply of a product by the trader”);
- Under 27E(1) “A consumer has the right to unwind in respect of a business to consumer contract if the consumer indicates to the trader that the consumer rejects the product, and does so—
  - (a) within the relevant period [90 days], and
  - (b) at a time when the product is capable of being rejected.”

# CPAR 2014: Unwinding the Contract



27E(8): “For the purposes of paragraph (1)(b), a product remains capable of being rejected only if—

- (a) the goods have not been fully consumed,
- (b) the service has not been fully performed,
- (c) the digital content has not been fully consumed,
- (d) the lease has not expired, or
- (e) the right has not been fully exercised...”

# CPAR 2014: Unwinding the Contract



Regulation 27F(1): “Where a consumer has the right to unwind in respect of a business to consumer contract—

(a) the **contract comes to an end** so that the consumer and the trader are released from their obligations under it,

(b) the trader has a **duty to give the consumer a refund (subject as follows)**, and

(c) if the contract was wholly or partly for the sale or supply of goods the **consumer must make the goods available for collection by the trader.**”

# CPAR 2014: Unwinding the Contract



Consumer generally not required to account for use of product (cf. Regulation 27F(7) in relation to, for example, continuous contracts such as some utility contracts).

**“We believe that in most cases, requiring an allowance for use would remove the simplicity and usefulness of the remedy.** Any over-compensation would be limited because the complaint must be made within three months. Given that the trader has acted in a misleading or aggressive way, this is not wholly inappropriate.” (Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 8.91)

# CPAR 2014: Unwinding the Contract



Regulations 27G and 27H deal respectively with the unwinding of a consumer to business contract and a consumer payment.

# CPAR 2014: Discount



Regulation 27L(1): “A consumer has the right to a discount in respect of a business to consumer contract if—

(a) the consumer has made one or more payments for the product to the trader or one or more payments under the contract have not been made, and

(b) the consumer has **not** exercised the right to unwind in respect of the contract.”

# CPAR 2014: Discount



Regulation 27L (4) “Subject to paragraph (6), the relevant percentage is as follows—

- (a) if the prohibited practice is more than **minor**, it is 25%,
- (b) if the prohibited practice is **significant**, it is 50%,
- (c) if the prohibited practice is **serious**, it is 75%, and
- (d) if the prohibited practice is **very serious**, it is 100%.”

Regulation 27L(6) concerns products where the contract price exceeds £5,000.



# CPAR 2014: Damages



Regulation 27J (1): “Subject as follows, a consumer has the right to damages if the consumer—

(a) has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or

(b) has **suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place.**”

# CPAR 2014: Damages



“(3) The right to be paid damages for financial loss does **not** include the right to be paid damages in respect of the difference between the market price of a product and the amount payable for it under a contract.

(4) The right to be paid damages under this regulation is a right to be paid only damages in respect of loss that was **reasonably foreseeable** at the time of the prohibited practice”.

# CPAR 2014: Damages



Unlike the other remedies, there is a **due diligence defence** (s27J(5)(b): “the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice”).

# CPAR 2014: Concluding Remarks



- As a result of the CPAR 2014 the UK now has specific private law remedies for some unfair commercial practices (although note the general, although complex, exclusion of financial services);
- Yet these remedies, which largely operate alongside remedies under the general law, have **added complexity** to this area of consumer law;
- **There are also continuing issues around the ability and willingness of consumers to make full use of such remedies as well as issues of consumer education.**

# Consumer Rights Act 2015 (CRA 2015)



# Aims CRA 2015



The aims of the CRA 2015 were:

- to **streamline** consumer rights;
- to **clarify** aspects of consumer law (cf. *Salt v. Stratstone Specialist Limited* [2015] EWCA Civ 745 at [49] *per* Roth J.);
- to **modernise consumer law**, particularly for the digital age;
- to **deregulate for businesses**; and
- to **selectively enhance consumer protection** in the UK.

# CRA 2015, Part 1 and Part 2



- For present purposes our focus is on Part 1 and, to a greater extent, Part 2 of the CRA 2015;
- Most of the provisions we shall consider came into force on **1st October 2015**.

# Definition of a Consumer



“...for the purposes of consumer protection law, the term ‘consumer’ [often] has a narrower meaning which is based on the capacity in which the consumer and the supplier of the goods or services supplied have acted...[and] statutes which purport to protect consumer interests contain relevant, but limited definitions.” (D. Oughton & J. Lowry, *Consumer Law*, (Blackstone Press, 1997) p. 1)



# Policy Objective: Definitions of Consumers



**“...One of the policy objectives is to align, as far as possible, the definitions of certain key terms across the Act and other consumer law...to facilitate easier interpretation and clearer application of the law. These terms are “trader,” “consumer,” “goods” and “digital content”.” (Consumer Rights Act 2015: Explanatory Notes at [34])**

# Consumer Rights Act 2015: Definitions



- Parts 1 and 2 of the Consumer Rights Act 2015 apply to contracts between a **consumer and a trader** (see s.1 and s.61), with those terms being defined in s.2.
- A ‘**consumer**’ “means an individual acting for purposes that are **wholly or mainly** outside that individual’s trade, business, craft or profession.”
- Thus, for these purposes, a company cannot be a consumer.
- A ‘**trader**’ is defined as “...a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf”.
- This definition is significant in relation to contracts of guarantee provided by non-professional guarantors...

# Consumer Rights Act 2015 :

## Definitions



- Previously there was some **debate** as to whether or not the Unfair Terms in Consumer Contracts Regulations 1999 (now repealed by the CRA 2015) applied to surety transactions.
- The Regulations implemented the EC Council Directive on Unfair Terms in Consumer Contracts and were concerned with “unfair terms in contracts concluded between a **seller or a supplier** and a **consumer**.”
- Seller/supplier was defined as, “any natural or legal person who ... is acting for purposes relating to his trade, business or profession ...” whereas a consumer was defined as, “any natural person who ... is acting for purposes which are outside his trade, business or profession.”

# Consumer Rights Act 2015: Definitions



- The Regulations thus contemplated the **reverse scenario** to that typically operating in non-professional suretyship transactions.
- More specifically, whilst the non-professional surety is typically acting for purposes outside his/her trade, business or profession (and, therefore, might be seen as a “consumer” in such transactions), **he/she supplies the service**.
- In contrast, the creditor, as beneficiary of the agreement, is usually acting in the course of a business (and, therefore, might have been seen under Reg.3 as a “seller or supplier” in such transactions).

# Consumer Rights Act 2015 :

## Definitions



- In *Bank of Scotland v. Singh* (QBD, unreported, 17th June 2005) H.H. Judge Kershaw Q.C, on a literal approach to provisions, answered the question in the negative.
- His view has subsequently been described as “compelling” (*Manches LLP v Freer* [2006] EWHC 991) and “convincing” (*Williamson v Governor of the Bank of Scotland* [2006] EWHC 1289).

# Consumer Rights Act 2015: Definitions



- Compare *Barclays Bank Plc v. Kufner* [2008] EWHC 2319 (Comm) where on a more ‘European’ approach to the provisions, it was held that they did apply to contracts of suretyship (expressly disagreeing with *Bank of Scotland v. Singh*).
- The unfair terms provisions in the CRA 2015 (Part 2) clearly apply to guarantees given by non-professional sureties which, on one view, increases the level of consumer protection.
- However, we should sound a note of caution...

# Consumer Rights Act 2015: Definitions



“The problem... raised by the present appeals is of comparatively recent origin. It arises out of the substantial growth in home ownership over the last 30 or 40 years... More than two-thirds of householders in the United Kingdom now own their own homes. **For most home-owning couples, their homes are their most valuable asset. They must surely be free, if they so wish, to use this asset as a means of raising money, whether for the purpose of the husband’s business or for any other purpose...**” (*Royal Bank of Scotland v Etridge* (No 2) [2001] UKHL 44 at [34]-[35] *per* Lord Nicholls)

# Consumer Rights Act 2015: Definitions



**“Bank finance is in fact by far the most important source of external capital for small businesses with fewer than ten employees. These businesses comprise about 95 per cent of all businesses in the country, responsible for nearly one-third of all employment... If the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife’s signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign. Otherwise banks will not be willing to lend money on the security of a jointly owned house or flat.”**



# Consumer Rights Act 2015: Definitions



- Yet the application of the Regulations to surety transactions may significantly alter the balance of interests between the surety and the creditor.
- Increasing the level of protection vis-à-vis sureties or increasing the duties incumbent upon financial institutions may produce **unintended consequences**: resulting in suretyship transactions **becoming less attractive to banks and triggering a narrowing in access to credit**.

# Consumer Rights Act 2015: Definitions



G. Andrews and R. Millett, *The Law of Guarantees*, 4th edn (London: Sweet & Maxwell, 2005) argued (at p.85) that “ ... if the regulations are applied to bank guarantees, it will be seen that there is considerable scope for an interventionist judiciary to redress the balance between creditor and surety significantly”.

# Part 1 of the CRA 2015: Introduction



- Our focus will be on Part 2 of the CRA 2015 but it will be helpful to outline, briefly, the key reforms in Part 1 relevant to our discussions...

# Consolidation in Part 1 of the CRA 2015



- Part 1, Chapter 2 consolidates some of the law on the supply of goods.
- Chapter 2 applies to:

S.3(1) “This Chapter applies to a contract for a trader to **supply goods to a consumer**.

(2) It applies only if the contract is one of these (defined for the purposes of this Part in sections 5 to 8)—

- (a) a sales contract;
- (b) a contract for the hire of goods;
- (c) a **hire-purchase agreement**;
- (d) a contract for transfer of goods.”

# Consolidation in Part 1 of CRA 2015



For example:

S.9: “(1) Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.”

# Consolidation in Part 1 of the CRA 2015



Note also s.12:

“(2) Where regulation 9, 10 or 13 of the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)** required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule 1 or 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract.”

# Consolidation in Part 1 CRA 2015



Note also s.14:

“(1) This section applies to a contract to supply goods by reference to a **model of the goods** that is seen or examined by the consumer before entering into the contract. (2) Every contract to which this section applies is to be treated as including a term that the goods will match the model except to the extent that any differences between the model and the goods are brought to the consumer's attention before the consumer enters into the contract.”

# Consolidation in Part 1 of the CRA 2015



Two notable features of the overall approach of the Consumer Rights Act 2015 in this regard:

- First, there is a subtle shift away from the language of an implied term to merely “including a term” in the relevant contract.
- Presumably this shift was made on the ground that the new language is clearer to consumers although it is difficult to envisage that this will have any more than a marginal gain in this respect.



# Consolidation in Part 1 of the CRA 2015



- Secondly, and more importantly, unlike under, for example, the Sale of Goods Act 1979 such terms are **not** classified as conditions or warranties with the associated impact on available remedies.
- Instead, as we shall see below, the Consumer Rights Act 2015 expressly sets out the remedies for breach of these statutory terms.
- At one level this, as was the intention, simplifies this area of law: there is no need for businesses or consumers to understand the significance of the distinction between conditions and warranties.
- Yet any such gains need to be set against the complexity of the (partial) remedial framework under the Act.

# Enforcement



S.19(3) “If the goods do not conform to the contract because of a breach of any of the terms described in sections **9, 10, 11, 13 and 14**, or if they do not conform to the contract under section 16, the consumer's rights (and the provisions about them and when they are available) are—

- (a) the short-term right to reject (sections 20 and 22) [essentially 30 days];
- (b) the right to repair or replacement (section 23); and
- (c) the right to a price reduction or the final right to reject (sections 20 and 24). [(b) and (c) operate in a hierarchical fashion]”

# Enforcement



S.19(9): “This Chapter does **not** prevent the consumer seeking other remedies—

(a) for a breach of a term that this Chapter requires to be treated as included in the contract,

(b) on the grounds that, under section 15 or 16, goods do not conform to the contract, or

(c) for a breach of a requirement stated in the contract.”

# Digital Content and the CRA 2015 (Part 1, Chapter 3)



S.33(1) “This Chapter applies to a **contract for a trader to supply digital content to a consumer**, if it is supplied or to be supplied for a **price** paid by the consumer.

(2) This Chapter also applies to a contract for a trader to supply digital content to a consumer, if—

it is supplied **free** with goods or services or other digital content for which the consumer pays a price, and

it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content.” (s.33)

# Digital Content and the CRA 2015 (Part 1, Chapter 3)



For example:

S.34: “(1) Every contract to supply digital content is to be treated as including a term that the **quality of the digital content is satisfactory.**”

# Enforcement



S.42(2) “If the digital content does not conform to the contract, the consumer's rights (and the provisions about them and when they are available) are—

- (a) the right to repair or replacement (see section 43);
- (b) the right to a price reduction (see section 44).”

# Enforcement



S.42(6) “This Chapter does **not** prevent the consumer seeking other remedies for a breach of a term to which any of subsections (2), (4) or (5) applies, instead of or in addition to a remedy referred to there (but not so as to recover twice for the same loss).”

# Digital Content and the CRA 2015



There has been some discussion around impact on smart motor insurance apps...



# Digital Content and the CRA 2015



There was some doubt as to whether **computer software** would be covered by, for example, the Sale of Goods Act 1979...

# Digital Content and the CRA 2015



“Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be “goods” within the meaning of the Sale of Goods Act, and the defective instructions would result in a breach of the implied terms in section 14...”

# Digital Content and the CRA 2015



**“If this is correct, I can see no logical reason why it should not also be correct in relation to a computer disc onto which a program designed and intended to instruct or enable a computer to achieve particular functions has been encoded. If the disc is sold or hired by the computer manufacturer, but the program is defective, in my opinion there would prima facie be a breach of the terms as to quality and fitness for purpose implied by the Sale of Goods Act or the Act of 1982.”** (*St Albans City and DC v International Computers Ltd* [1997] F.S.R. 251 at 265 *per* Sir Iain Glidewell)

# Digital Content and the CRA 2015



“The first point to note is that these observations were clearly **obiter**. The second is that, whatever the perception may have been in 1996, **there is no logic** in making the status of software as goods (or not) turn on the medium by which they were delivered or installed, as noted above.” (*Software Incubator Limited v Computer Associates UK Limited* [2016] EWHC 1587 (QB) at [52] per HHJ Waksman QC (sitting as a Judge of the High Court))

# Part 1 of the CRA 2015 and the Provision of Services



Chapter 4 of Part 1 of the CRA 2015 applies to **contracts for traders to supply services to consumers** (note s.48(5) and also wider regulatory context);

# Part 1 of the CRA 2015 and the Provision of Services



s.49(1) CRA 2015 provides: “Every contract to supply a service is to be treated as including a term that the trader must perform the service with **reasonable care and skill**”;

This resonates with the pre-CRA 2015 law (Sale and Supply of Goods Act 1982, s.13).

# Significance of CRA 2015 on Provision of Services



## Further Terms of Contract:

50(1) : “Every contract to supply a service is to be treated as including as a term of the contract **anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if—**

- (a) it is taken into account by the consumer when deciding to enter into the contract, or
- (b) it is taken into account by the consumer when making any decision about the service after entering into the contract.”

# Significance of CRA 2015 on Provision of Services



S.50: “(3) Without prejudice to subsection (1), any information provided by the trader in accordance with regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) is to be treated as included as a term of the contract.”



# Significance of CRA 2015 on Provision of Services



## Additional Remedies:

S.54: “(1) The consumer's rights under this section and sections 55 and 56 do **not** affect any rights that the contract provides for, if those are not inconsistent.

(2) In this section and section 55 a reference to a service conforming to a contract is a reference to—

(a) the service being performed in accordance with section 49, or

(b) the service conforming to a term that section 50 requires to be treated as included in the contract and that relates to the performance of the service.”

# Significance of CRA 2015 on Provision of Services



## **Additional Remedies:**

“(3) If the service does not conform to the contract, the consumer's rights (and the provisions about them and when they are available) are—

- (a) the right to require repeat performance (see section 55);
- (b) the right to a price reduction (see section 56).”

# Significance of CRA 2015 on Provision of Services



## Additional Remedies:

S.55(1): “The right to require **repeat performance** is a right to require the trader to perform the service again, to the extent necessary to complete its performance in conformity with the contract.”

S.56(1): “The right to a **price reduction** is the right to require the trader to reduce the price to the consumer by an appropriate amount (including the right to receive a refund for anything already paid above the reduced amount).”

# Significance of CRA 2015 on Provision of Services



## Non-Exclusion:

S.57(1): “A term of a contract to supply services is not binding on the consumer to the extent that it would **exclude** the trader's liability arising under section 49 (service to be performed with reasonable care and skill).

(2) Subject to section 50(2), a term of a contract to supply services is not binding on the consumer to the extent that it would **exclude** the trader's liability arising under section 50 (information about trader or service to be binding).

(3) A term of a contract to supply services is not binding on the consumer to the extent that it would **restrict** the trader's liability arising under any of sections 49 and 50 and, where they apply, sections 51 and 52 (reasonable price and reasonable time), if it would prevent the consumer in an appropriate case from recovering the price paid or the value of any other consideration. (If it would not prevent the consumer from doing so, Part 2 (unfair terms) may apply.)”

# The Regulation of Unfair Terms under Part 2 of the CRA 2015



# The Regulation of Unfair Terms: Background



Before a term alleged to be ‘unfair’ can be relied upon, as a matter of Contract Law, three hurdles must be overcome:

- The clause must be shown to have been part of the contract (on which see notes on terms, particularly **incorporation** of terms);
- The clause must be shown to cover the liability in question (the **construction** test);
- The clause must not be rendered unenforceable by the **Unfair Contract Terms Act 1977**, the **Unfair Terms in Consumer Contracts Regulations 1999** or the **Consumer Rights Act 2015**.

# CRA 2015 and Unfair Terms Regulation



“3. As the law currently stands, there are two major pieces of legislation dealing with unfair contract terms. The Unfair Contract Terms Act 1977 sets out the traditional UK approach, while the Unfair Terms in Consumer Contracts Regulations 1999 implement the 1993 EU Directive. **The two laws contain inconsistent and overlapping provisions, using different language and concepts to produce similar but not identical effects.** A law that affects ordinary people in their everyday lives had been made unnecessarily complicated and difficult.” (*Unfair Terms in Contracts*, 2005, Law Com No 292, Scot Law Com, No 199, Cm 6464)

# CRA 2015 and Unfair Terms Regulation



- The CRA 2015 seeks to consolidate the regulation of unfair terms in consumer contracts;
- In broad terms, the CRA 2015 provides that (i) **consumer contracts are to be taken out of the scope of the Unfair Contract Terms Act 1977** and that (ii) the **Unfair Terms in Consumer Contracts Regulations 1999 are revoked** (see Schedule 4 but subject to transitional provisions).



# Unfair Terms: Key Date



- Key date is **1 October 2015** (see Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015/1630);
- If the contract was entered into **before** this date, it is essentially necessary to consider UCTA 1977 (before amended by the CRA 2015) and the UTCCR 1999;
- If the contract was entered into **after** this date, it is necessary to consider the CRA 2015 in relation to consumers.

# Structure of New Unfair Terms Regime



- The provisions on ‘unfair terms’ are largely, although not entirely, contained in **Part 2 of the CRA 2015**;
- Part 1 of the CRA 2015 also includes some specific provisions on unfair terms **such as**:

# Structure of New Unfair Terms Regime



- s.31 (“[a] term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under... (d) section 12 (other pre-contract information included in contract)”);
- s.57 (see above).

# Application of New Unfair Terms Regime



- **Some contracts are generally excluded from the ambit of Part 2 of the CRA 2015 (e.g. contracts of employment (s.61(2)));**
- **Similarly some types of contractual term are excluded from being assessed for fairness under Part 2 of the CRA 2015, notably:**

# Application of New Unfair Terms Regime



S.64: “(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the **main subject matter of the contract** [cf. terms which define risk in an insurance context], 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.**

(2) Subsection (1) excludes a term from an assessment under section 62 **only if it is transparent and prominent.**”

# Application of New Unfair Terms Regime



Conformity with EU Law?

“...in these circumstances English courts should seek to give effect to the interpretation and guidance of the Court of Justice of the EU in their application of s.64(1)(b) of the 2015 Act following the principle of the conforming interpretation of UK legislation implementing EU directives, though the difficulty in doing so would be whether the English court would consider this “possible” given the wording of s.64(1)(b) and its background in the Law Commissions' earlier Advice.” (H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-368)

# Application of New Unfair Terms Regime



Section 62(1) provides that an unfair term will **not be binding on a consumer.**

# Enforcement Under New Unfair Terms Regime



- The CRA 2015 adopts a **dual approach** to enforcement:
- **Private Enforcement:** by a consumer (indeed under s.71 a Court may be required to consider whether or not a particular term is unfair even where the issue has not been raised by the parties);
- **Public Enforcement:** Schedule 3 provides the Competition and Markets Authority and other regulators with various enforcement powers in relation to Part 2.



# Meaning of Unfairness Under New Regime



The test for ‘unfairness’ is contained in Section 62(4) and significantly it is **not limited to non-negotiated terms** as under the UTCCR 1999:

“(4) 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.”

# Meaning of Unfairness Under New Regime



“Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. **It looks to good standards of commercial morality and practice.**”

*(Director General of Fair Trading v. First National Bank plc [2002] UKHL 52 at [17] per Lord Bingham)*

# Application of New Unfair Terms Regime



“The fairness test thus includes the following main elements: significant imbalance to the detriment of the consumer and good faith. It must, however, be emphasised that the overall requirement is a unitary one – the question is whether a term is unfair... **A rigid approach to assessing fairness, involving an artificial exercise broken into separate parts, is not appropriate.**” (CMA, *Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (July 2015) para. 2.10)

# Application of New Unfair Terms Regime



**“In order to achieve the openness required by good faith, terms should be ‘expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously’ to the consumer.** Consumers should not be assumed necessarily to be able themselves to identify (particularly in longer contracts) terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention.” (CMA, *Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (July 2015) para. 2.22)

# Application of New Unfair Terms Regime



S.68(1): “A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is **transparent.**”

# Application of New Unfair Terms Regime



S.69(1): “If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.”

# Application of New Unfair Terms Regime



**“...openness is not enough on its own, since good faith relates to the content of terms as well as the way they are expressed. Fair dealing has been authoritatively said to require that, in drafting and using contract terms, a trader ‘should not, whether deliberately or unconsciously, take advantage’ of the consumers’ circumstances to their detriment...The CMA considers the CJEU’s approach demonstrates that businesses need, in formulating their contract terms, not just to resist the temptation to take advantage, but actively to take the legitimate interests of the consumer into account.”**  
*(CMA, Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015 (July 2015) para. 2.23ff)*

# Application of New Unfair Terms Regime



Part 1 of Schedule 2 contains an “indicative and non-exhaustive” list of terms which might be regarded as unfair:

“A term which has the object or effect of **inappropriately excluding or limiting the legal rights of the consumer** in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations”;



# Application of New Unfair Terms Regime



**“A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract”;**

**“A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract”;**

# Application of New Unfair Terms Regime



**“A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract”;**

**“A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract **after** the consumer has become bound by it”;**

# Application of New Unfair Terms Regime



“A term which has the object or effect of **limiting** the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.”

# Consumer Rights Act 2015



Under section 71 a Court may be required to consider whether or not a particular term is unfair **even where** the issue has not been raised by the parties.

# Application of New Unfair Terms Regime



*Peabody Trust Governors v. Reeve* [2009] L. & T.R. 6 (variation clause challenged):

“In order to satisfy the requirements of the 1999 Regulations [now CRA 2015], any such unilateral variation clause would need at a minimum to take full and proper account of the commonsense guidelines set out by the Office of Fair Trading [now CMA] for tenancy agreements.”

# Thank You!



# Questions?



2016 GFFC Session A:  
New development and Challenge  
for Financial Consumer Protection  
**Discussion**

Sungsook Kim(Keimyung University)

Nov. 4th, 2016



# Introduction

- Financial Consumer Protection Policy has developed on the world, even if slowly.
- In Korea, the proposal of Financial Consumer Protection Law was pre-announced legislation again. Therefore, we can get a very helpful ideas from Professor Person's Presentation.

# Questions

- Presentation 1
  - At a glance, they seem similar. What is the difference among OECD's, World Bank's, and UBFCP.
  - Which principles or matters do you think will be stressed in the future for developing the financial consumer protection? In the world or in Australia.
  - Would you describe the Framework of Australian Financial Consumer Protection Institutions, which contribute to develop the Korean regulatory Institution.

# International Guidelines for Financial Consumer Protection

| G20 (OECD, 2011.11)  | WORLD BANK(2012,6)                          | UNGCP(2015.12)   |
|--|---|--|
| Legal, regulatory and supervisory Framework  | Financial Consumer Protection Institutions  | Financial Consumer Protection Regulatory and enforcement policies  |
| Role of Oversight Bodies   | Disclosure and Sales Practices              | Oversight Bodies with the necessary authority and resources to carry out their mission   |
| Equitable and Fair Treatment of Consumers  | Customer Account handling and Maintenance   | Appropriate Controls and Insurance Mechanisms to protect consumer assets, including deposits   |
| Disclosure and Transparency  | Privacy and Data Protection                 | Improved Financial Education Strategies that promote financial literacy  |
| Financial Education and Awareness  | Dispute Resolution Mechanism                | Fair Treatment and Proper Disclosure   |
| Responsible Business Conduct of Financial Services Providers and Authorized Agents | Guarantee and Compensation Schemes          | Responsible Business Conduct by Financial Services Providers and Authorized Agents, including Responsible Lending and the Sale of Products that are suitable to the Consumer's needs and means |
| Protection of Consumer Assets against Fraud and Misuse                             | Financial Literacy and Consumer Empowerment | Appropriate Controls to Protect Consumer Financial Data, including from fraud and abuse  |
| Protection of Consumer Data and Privacy  | Competition                                 | A Regulatory Framework that promotes cost efficiency and transparency for remittances, as well as remedies if transfer fails   |
| Complaints Handling and Redress  |   |  |
| Competition  |   |  |

- Presentation 3

- The presentation show recent and fundamental reform for general consumer protection. Especially the discussion of Unfair Terms regime is impressive and have contribution to develop the Korean law.
- Can CRA 2015 and CPAR2014 be applied to Financial Services? If so, are there some measures applied to financial services for consumer protection in the UK?
- Are there conflicts between MCA and FCA?