[Namibia Consumer Credit Policy]

[**Enhancing Market Conduct Regulation and Supervision through Legislation**]

[Research Policy and Statistics]

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Contents

Executive Summary

The regulatory and supervisory framework on contracts covering credit[1] in Namibia is characterized by lack of a robust legislation that is effective in protecting consumers of credit against unfair market conduct. This is because the only credit extension subjected to market conduct supervision, although not with broad-based consumer protection principles is one extended by the banking and microlending institutions. Moreover, credit extended by these institutions is regulated through separate Acts, namely the *Credit Agreements Act, 1980 (Act No.75 of 1980),* the *Usury Act, 1968 (Act No.73 of 1968)*, the *Banking Institutions Act, 1998 (Act No. 2 of 1998)* and *Microlending Act, 2018 (Act No. 7 of 2018).* On the contrary, credit extended by retailers, for example, is not supervised against unfair market conduct, although it is also a financial service instrument, resulting in fragmented regulation and supervision of consumer credit.

In recent years, a shallow and narrow scope of consumer protection on market conduct in the financial sector has stimulated a debate among public policy makers. The debate focused on a need for a broad-based financial consumer protection drive in the country. In this respect, the Minister of Finance under whom the Policy and subsequent Act will fall tasked the two financial sector regulators, (NAMFISA and Bank of Namibia) to enhance supervisory and regulatory oversight functions on credit agreements with natural and juristic persons. The gravity of the problem is amplified by the already high and increasing levels of household debt averaging above 85 percent of disposable income between 2013 and 2018, caused amongst others, by the poor business market conduct such as inadequate due diligence on affordability assessments.

It is therefore in the interest of the public that the envisaged credit law provides a scope and coverage, which is comprehensive, for example, at a minimum, setting out legislative market-entry requirements, wherever necessary, through determined thresholds on licensing and registration[2]. In promoting a fair and equitable access to credit, responsible lending and borrowing practices in the market must be in accordance with international best practice. The international principles[3] are anchored on best practice, which are recommended for inclusion in the bill on consumer credit are as follows:

a) *fair and respectful treatment of clients* - respectful treatment avoiding abusive behaviour in the conduct, e.g., by debt collector;
b) *appropriate product design and suitability* - policies and procedures identifying needs of target market, and controlling risks in value chain;
c) *responsible lending* - comprehensive affordability assessment;
d) *transparency and full disclosure* - principles on communicating terms and conditions, etc.;
e) *responsible pricing* - internal procedure for setting prices;
f) *data protection and privacy* - protects non-public data of the customer; and
g) *mechanisms for complaint resolution* - internal and external complaint handling mechanism.

As such, the purpose of the envisaged consumer credit legislation is to repeal the *Credit Agreements Act, 1980 (Act No. 75 of 1980),* and the *Usury Act, 1968 (Act No. 73 of 1968)*, and relevant consumer

[1]Reference to consumer credit in this policy includes all credit extended be it for investment, business or consumption purposes.

[2]This provision will regulate licensing and registration requirements of service providers. We refer to service providers to cater not only for credit providers but also credit bureaus and debt collectors, for example.

[3]Finkelstein et al (April 2015)

protection provisions applicable to credit in the *Banking Institutions Act, 1998 (Act No.2 of 1998), Microlending Act, 2018 (Act No. 7 of 2018)* and any other law, in order to provide for a reform on consumer credit legislation that achieves an effective broad-based measures overarching the protection of consumers of credit. An overarching law on credit is recommended not only because supervision of the legal framework is easier if there was only one law to refer to but also in order to ensure:

a) certainty as to the law applicable to credit contracts;
b) consistency in the applicable law for different types of institutions; and
c) makes it easier for consumers and credit providers to understand their rights and obligations.

In addition, although there are some differences in the business models and corresponding objectives as articulated in the respective laws, the application of the envisaged market conduct law is also recommended for the retailing credit space and all credit extended under specialized provisions mandated to the following institutions:

a) the Agricultural Bank of Namibia, established by the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003);
b) any building society registered under the Building Societies Act, 1986 (Act No.2 of 1986);
c) the Namibia Development Corporation, established by the Namibia Development Corporation Act, 1993 (Act No.18 of 1993);
d) the National Housing Enterprise, established by the National Housing Enterprise Act, 1993 (Act No.5 of 1993);
e) the Development Bank of Namibia, established by the Development Bank of Namibia Act 2002 (Act No.8 of 2002); and
f) any co-operative [society] registered under the Co-operative [Societies] Act, 1996 (Act No.23 of 1996).

Last, but not least, the policy does not recommend changes in the institutional arrangement whereby the Bank of Namibia and NAMFISA are responsible for the banking and non-banking (inclusive of retailers) oversight functions, respectively. This is premised on an understanding that the arrangement has served the government, and financial sector well, and is in line with international standards. In this respect, the model followed by Namibia is a mirror-image to the model used in similar-size-economies such as Botswana, Mauritius, Seychelles, Jamaica and Ghana where independent separation of prudential and market conduct regulation and supervision oversight functions is not based on the twin peak model. In this instances where a twin peak model is followed, the Central Bank would only focus on banking institutions prudential matters, and not market conduct matters thereof, while another Regulator takes on market conduct responsibilities only for the non-banking institutions. In the case of Namibia, NAMFISA will undertake the prudential and market conduct supervision for non-banking financial institutions, including retailers, and debt collectors, and the Bank of Namibia the same for banking financial institutions. However, on the basis of the provisions in the respective applicable laws, only NAMFISA has express consumer protection objects[4]. While the Bank of Namibia (No. 15) 1997 only has implied objects on market conduct through the references in s.3 on matters such as "a sound monetary, credit and financial system[5]" and s. 36 providing the Bank of Namibia with additional functions and powers under other laws, which may facilitate the making of consumer credit protection standards. However, ideally the Bank of Namibia should have express consumer protection objects to avoid any challenges to its authority.

[4]NAMFISA Bill s.3(1)(e).
[5]Inclusive of the responsibility to sustain the liquidity, solvency and functioning of the same financial system.

1. INTRODUCTION

The Namibia Financial Sector Strategy (NFSS) 2011-2021, aimed at developing the financial sector highlights the importance of consumer protection and improved financial literacy under its key focus area of financial inclusion. There are, however, legislative limitations on the regulatory and supervisory framework governing agreements on consumer credit[6] in the financial sector of Namibia as the current legislation lacks robust provisions on effective consumer protection (i.e., against unfair market practices). This is because the only credit extended under the scope of market conduct supervision, although not broad-based in consumer protection principles, is that extended by the banks and microlenders.

On the contrary, credit extended by retailers, for example, is not supervised against unfair market conduct, although such loans are also financial products. As a result, there is a fragmentation in the regulation and oversight of credit, with limited impact on indebtedness of households and desired market conduct in general. Besides, the current laws[7] do not provide, for example, enough depth on consumer protection principles such as those embracing the seven principles on treatment of customers fairly (e.g., on information disclosure and transparency[8]). As a result, such developments, inevitably has caused a debate among policy makers about how to effectively and efficiently reform the prevailing legislative landscape on credit, which is not only outdated with limited scope of application, but also not enabling protection of consumers against unfair treatment from certain credit providers. Other areas of concern in the on-going debate includes, among others, as articulated in national documents, the high and increasing value of consumer household debt and number of loan defaults. The rising number of loan defaults, for example, could be associated with loan extension done without proper client affordability assessment. In this connection, household debt as a percentage of disposable income has averaged at 96 percent from 2014 to 2018[9]. Non-performing loans for the banking institutions are relatively lower at around 2 percent of the loan book, although it has started rising recently to reach 4 percent, compared to that of the non-banking sector which is above 2 percent[10].

There is, therefore, a need to identify the optimal way of reforming a fragmented[11] market conduct oversight function on credit, currently falling under the mandate of different legislations and institutions[12]. As a result, the primary objective of the policy is to identify:

a) existing legislative gaps in the relevant prevailing laws, and how the gaps should be addressed;
b) optimal institutional set-up suiting Namibia based on experiences from other countries; and
c) clear principles that will guide the drafting of the legislation on consumer credit.

[6] Reference to consumer credit in this policy includes all credit extended be it for investment, business or consumption purposes.
[7] Current legal framework for Namibia is based on the Credit Agreement Act (Act 75 of 1980), and the Usury Act (Act 73 of 1968), and is unfortunately ineffective and inefficient in regulating malpractices in the market, as institutions offering homogenous products are inconsistently supervised with some not even supervised at all such as retailing credit agreements. In addition, the Microlending Act, 2018 has been passed to close some of the legislative gaps.
[8] World Bank Group et al (2017:23-45)
[9] Namibia Financial Stability Report April (2019:19 -Table).
[10] Microlending data is based on the information as at end of the third quarter of 2015, due to limitations in data availability for microlenders, and hence the comparison is as at the end of the third quarter in 2015, which was above 2 percent for NBFIs, and about 1.9 percent for the Banking sector
[11] Banking institutions are regulated by BoN, non-banking institutions are regulated by NAMFISA, telecommunication is under the Communication Regulatory Authority of Namibia, General retailers, wholesalers, utilities and local authorities are not extensively regulated though credit is extended.
[12] For example, banks, micro-lenders and the general retailers, are subject to different laws and supervised by different government agencies or regulatory authorities, and there is no standardized regulation of consumer credit often resulting in consumer experiencing problems due to ineffective enforcement of the existing laws.

It is against such a need that the Minister of Finance under whom the Policy and subsequent Act will fall, tasked NAMFISA and Bank of Namibia in the 2014/15 financial year to draft a legislation on consumer credit, with the aim to enhance the regulatory and supervisory landscape by improving, for example, oversight powers ensuring a sustainable credit portfolio in Namibia.

1.1 Policy Problem Statement

The extent of the prevailing problem is characterized by a rule-based compliance legislative framework that has given rise to a limited scope for the enforcement of the law over the providers of credit and associated services in the market such as debt collectors. The nature of the problem is more pronounced by the limitations of a rule-based regulation and supervision framework in terms of lack of flexibility in addressing emerging market conduct of service providers, such as reckless lending contributing to indebtedness over 80 percent of disposable income. Other undesirable market conduct cases in the banking and non-banking credit market space includes the following examples:

a) **Retailing:**
   1) transparency and disclosure on terms & conditions is lacking;
   2) protracted internal consumer handling processes; and
   3) tied credit facilities hinders freedom of consumer to choose their own credit provider.

b) **Banking:**
   1) information confidentiality not maintained;
   2) unfair black listing of consumers with credit bureaus; and
   3) penalties charges on early settlement of account without notice.

c) **Microlending:**
   1) information confidentiality not maintained;
   2) complaints procedure not in place; and
   3) reckless lending and borrowing.

In this regard, due to the limitations[13] towards flexibility, the objective of this policy is to review provisions underpinning consumer protection principles as provided for under the relevant financial sector laws of Namibia[14]. Further, the review facilitates repealing the relevant financial sector laws on consumer credit in order to embrace flexibility within the tenets of a risk-based approach that is based on the best international principles on consumer protection. This understanding is premised on a statement made during the tabling of the Microlending Bill in 2018, by the Minister of Finance announcing that the intention in the medium term is to have a policy intervention consolidating by repealing[15] relevant consumer protection provisions applicable to credit in the provisions of the Microlending Act, 2018 and Banking Institutions Act, 1998, the Usury Act, 1968 and Credit Agreements Act, 1980 into a consumer credit bill. In addition, the policy provides a review of the scope of the legislative mandate accorded to the financial sector regulators, (Bank of Namibia (BoN) and NAMFISA), in order to determine whether there are limitations to the provisions on credit.

[13]Current legislation is rule based and not principle based, and therefore has limited flexibility to address new market conduct challenges.
[14]Microlending Act (Act No. 7, 2018), Credit Agreements Act (Act No. 75, 1980), and Usury Act (Act No. 73, 1968).
[15]However, it is not clear to what extent the provisions in the Microlending and Banking Institutions Acts can be repealed and this decision has to be determined by the Steering Committee on the Policy.

The above key objectives are discussed within an envisaged risk-based approach, explained further below and not a rule-based approach. This is important to ensure for instance that scarce resources[16] are deployed sufficiently, focusing mainly on significant inherent risks in the present and future. This would prevent risks from escalating, and also to ensure that mitigating actions are taken early.

1.2 Risk-Based Framework

Risk-based approach has been used mainly for ensuring the safety and soundness of the financial system. However, as of the recent times, world-wide, there has been a rise in consumer protection and education initiatives, which has gained momentum after the 2008 financial crisis; highlighting a number of failures related to abusive sales, poor disclosure and misleading adverts. Notable international development involving work on financial consumer protection (FCP) international good practices relevant to consumer credit that of the World Bank[17], G20 High – Level Principles on Financial Consumer Protection[18] (G20 FCP Principles), the Smart Campaign Client Protection Principles[19] (Smart Campaign CPPs), OECD[20] 2011 consumer protection principles[21], IOPS[22] standards[23], IOSCO[24] standards on disclosure requirements, and IAIS[25] standards on business conduct[26] and treating customers fairly[27].

As a result, this has shifted policy intervention internationally towards a market conduct supervision aimed at the conduct of financial service providers towards clients, and is therefore different in terms of the criteria and objectives used to assess risk under prudential supervision. In essence, risk-based supervision (RBS) is a useful guide helping supervisors to focus on areas that carry the greatest risk. This is critical from a policy formulation perspective as it embraces consumer confidence and also ensures an inclusive and competitive market. In this respect, the overarching approach for the new Consumer Credit Act (CC Act) is to have a proportionate risk - based framework, which takes into account the need to limit practices leading to over-indebtedness and other harms in order to build trust in the use of consumer credit, and ultimately contributing to the growth and stability of the financial sector. There is also a need to balance these considerations with the responsibilities of borrowers and the cost of compliance for credit providers.

In order to ensure certainty in the application and interpretation of the law articulating a risk-based supervisory framework, financial institutions (credit providers) and other related financial services providers such as *debt collectors* are required to meet, at a minimum certain requirement (combination of principles and minimum rules). The proponents of the risk-based supervision approach also argue that

[16] Market conduct supervision is not too much involving like prudential supervision as most of the work involves off-site inspection, for example, on compliance procedures towards legislative requirement on disclosure and transparency, price setting etc.

[17] 2017 World Bank Good Practices for Financial Consumer Protection (WB FCP Good Practices) https://openknowledge.worldbank.org/handle/10986/28996.

[18] http://www.fsb.org/2011/11/cos_111104a/ .

[19] https://www.smartcampaign.org/about/smart-microfinance-and-the-client-protection-principles

[20] Organization for Economic Co-operation and Development is an intergovernmental economic organization of countries founded to stimulate economic progress and world trade.

[21] https://www.oecd.org/daf/fin/financial-markets/48892010.pdf

[22] International Organization of Pension Supervisors

[23] The legal framework and supervisory mandate; 2) disclosure and transparency; 3) financial education and awareness; 4) responsible business conduct of pension services providers and their authorised agents; and 5) complaints and redress (IOPS Working Papers on Effective Pensions Supervision, No.27).

[24] International Organization of Securities Commissions is an association of organizations that regulate securities and futures markets.

[25] International Association of Insurance Supervisors is a membership organization of insurance supervisors and regulators.

[26] Conduct of business risk can be described as the risk to customers, insurers, insurance sector or market that arises from insures and/or intermediaries conducting their business in a way that does not ensure fair treatment of customers.

[27] ICP 19 Conduct of Business states that the supervisor sets requirements for the conduct of the business of insurance to ensure customers are treated fairly, both before a contract is entered into and through to the point at which all obligations under a contract have been satisfied.

ease of flexibility in applying the principles, makes it more responsive and effective to deal with new emerging risks in the significant activities.

Inherent to the risk-based approach is that only credit providers above a certain threshold to be determined in a subordinate legislation will be closely supervised while others (smaller credit providers) below such a threshold will occasionally receive oversight scrutiny determining their status. However, all service providers should be licensed and registered as such before operating. Although those credit providers that fall below the threshold will be exempted from close supervision and certain provisions of the Bill (example, having a dedicated complaints desk and compliance officer[28]), they still have to meet certain basic conditions and business conduct and minimum standards that will be prescribed in the Bill.

A risk-based approach to supervision of the CC Act will require careful consideration as usually the approach would require a prioritization methodology which aims at allocating efficiently the supervisory resources taking into account two dimensions of the relevant risks (ie., market and firm risks). In this context, supervisory resources should be allocated according to risk perception in the financial sector (lower risks, less resources; higher risks, more resources). The variables relevant to assessing these risks are in turn numerous, and can be qualitative and quantitative, and depends on the relevant markets/ sectors being supervised and rated for prioritization purposes.

Thus, the Policy is split into four sections covering domestic credit landscape, international experiences and lessons for Namibia as well as the conclusion and recommendations.

2. OVERVIEW OF CREDIT LANDSCAPE IN NAMIBIA

2.1 Types and Purposes

The scope of credit providers in Namibia ranges from commercial banks[29] to non-banking consumer credit providers such as retailers and microlenders, and can be grouped in two categories; one falling within the mandate of either the Bank of Namibia or NAMFISA, and the other not under the mandate of the two regulators. However, the principles articulated in the policy on market conduct can be of use and is therefore recommended also to other credit providers falling outside the mandate of the two financial sector regulators, such as the Development Bank of Namibia, telecommunication providers and Agricultural Bank of Namibia, since such institutions operate under special terms and conditions articulated in their respective legislation.

2.2 Financial Sector Credit Laws

Under the current laws on credit in Namibia, the scope of the enabling legislation (including the just enacted Microlending Act, 2018) is contained in the following Acts and Bills:

a) *Bank of Namibia Act, 1997 (Act No.15 of 1997)* empowers the Bank of Namibia to be responsible for matters concerning money supply, currency and institutions of finance; and to provide for matters incidental thereto.

[28]Although they are exempted they still need to demonstrate how they will handle that because being small does not mean the cannot receive complaints.
[29]Hence, the current credit landscape consists of credit extended for consumption and investment purposes.

b) *Banking Institutions Act, 1998 (Act No.2 of 1998)* empowering supervisory and regulatory powers over banking credit to the Bank of Namibia;
c) *Financial Services Adjudicator Bill 2018* establishes the office of the Adjudicator and corresponding powers and functions of the Office;
d) *Namibia Financial Institutions Supervisory Authority Bill, 2018* empowering supervisory and regulatory powers over microlending credit to the Namibia Financial Institutions Supervisory Authority;
e) *Microlending Act, 2018 (Act No.7, 2018)* provides for legislative provisions on microlending transactions that must be enforced by NAMFISA and complied with by regulated institutions;
f) *Usury Act, 1968 (Act No. 73 of 1968)* providing legislative provisions over finance charges on credit agreements covering retailing, banking, moneylending and microlending[30]; and
g) *Credit Agreements Act, 1980 (Act No.75 of 1980)* providing legislative provisions over terms and conditions on certain credit agreements;
h) *Credit Bureau Regulation:* Provides legislative requirements applicable to all *credit bureaus*, *credit providers*, *data subjects* and all persons who engage in the business of receiving reports of or investigating, among others credit performance information of credit applicants.

3. INTERNATIONAL EXPERIENCE AND LESSONS FOR NAMIBIA

3.1 Consumer Credit Definitions

It is important to define the scope of the law on consumer credit in order to attain a degree of certainty, transparency, clarity and flexibility like in the cases of the United Kingdom, Canada and Australia, where the terms and conditions on credit provisions have been contextualized in their respective statutes (Dlamini 2012:33). By implication, in order to make it simple to understand the context of the meaning requires dissecting the term 'consumer' from 'credit.'

3.1.1 Consumer

According to (Dlamini 2012:33-34) the legal definitions used, for example in the United Kingdom, Canada, Swaziland and Australia is limited to the purpose of the transaction undertaken during an ordinary course of business, which is for consumption and not for business. In the case of South Africa, this limitation is not clear as in the National Credit Act, 2005 (Act No. 34 of 2005) it includes mortgage credit agreements and in the Consumer Protection Act, 2008 (Act No. 68 of 2008) includes a juristic person whose value of assets or annual turnover must be less than a determined threshold. Similarly, in Australia (Competition and Consumer Act of 2010) the threshold is also prescribed by law. On the contrary, in the Credit Agreements, 1980 (Act No. 75 of 1980) the term credit receiver is used and does not provide for the purpose of the contract. On the other hand, in some of the jurisdictions[31], the FCP regulatory framework cover small businesses as they often face the same consumer protection issues challenging individuals, and would therefore require the same basic protection[32].

[30]In addition, the provisions of the Usury Act's provide for a wide scope and does not only deal with finance charges, but also incidentals to money lending and leasing transactions, are regulated under this Act, without registration requirements.
[31]Examples includes aspects of laws and self-regulatory codes in Australia, Ireland, Indonesia, Mexico and South Africa.
[32]World Bank Good Practices for Financial Consumer Protection (2017:4)

In this connection, considering the importance in this policy to adopt a proportionate and risk-based supervisory framework, which reflects the focus towards consumers most likely in need of protection, and likely to face lop-sided bargaining power and information asymmetry issues, as well as limitations in supervisory resources, the new CC Act should not apply to all natural and juristic persons, excluding large corporates. Therefore, a consumer should be defined either as an individual or a small business, and in this context a small business is defined as a micro, small and medium enterprise, which is defined according to the number of full time employees and annual turnover[33].

3.1.2 Credit

The definition of the term "credit" should therefore be limited to the types of credit, which might be taken up by individuals or small businesses, but broad enough to includes all types of credit products. This should include, for example, both secured and unsecured term loans; revolving credit facilities (such as credit cards and overdrafts); finance leases (for instance, relating to motor vehicles) and any form of trade credit. This might be achieved through a definition which focuses on the nature of a credit facility. For example, the Australian National Credit Code (in summary) refers to any arrangement under which payment of a debt is deferred or a person incurs a deferred debt to another, with specific exclusions for interest and certain fees.[34] In the National Credit Act (Act No.34 of 2005) of South Africa, "credit", means a deferral of payment of money owed to a person, or a promise to defer such a payment or to advance such payment to another person.

In Namibia, such definitions (*consumer and credit)* would apply, as there is enough evidence regarding the nature and volume of credit received by consumers meant for private use like those extended by retailing outlets, banks, moneylenders and microlenders, which to a certain extent has become homogenous. However, such level of homogeneity still raises the same types of market conduct issues that existed before homogeneity became apparent.

3.2 Consumer Credit Legislative Rationale

Although the Chicago School of Economics[35] is opposed to a legislative restriction of a free market system, consumers of credit often times are disadvantaged by the market conduct due to market failure to redress irresponsible lending and borrowing. Other justifications for financial consumer protection laws include information asymmetry and imbalances in market power, which in turn can lead to a lack of trust in the financial sector, a failure to achieve financial inclusion goals and lower potential for economic growth. Namibia is no exception, and it is the reason why this policy opts for a legislative restriction towards inherent market conduct ranging, for example from the disclosure of confidential information to reckless lending and borrowing in the consumer credit space of retailers, banks and microlenders. In general, considering the level of financial literacy and reported complaints[36] both in the banking and NBFIs, a number of principles ought to be fulfilled for the purpose of protecting consumers:

a) **Credit contract structure:** "must be in a form of a written contract signed by the debtor and creditor or a written contract signed by the credit provider and constituting an offer to the debtor that is

[33]According to the National Policy on Micro, Small and Medium Enterprises for Namibia (2016-21:11), a micro-enterprise hires up to 10 full time employees and gets up to N$300 000 annual turnover, while a small enterprise hires from 11 up to 30 full time employees and gets an annual turnover between N$300 000 and N$3 million. Medium enterprise employees from 31 to 100 full time employees and makes an annual turnover raging from N$3 million and N$10 million.

[34]Australia National Credit Code, s. 3.

[35]The School argues that a limitation of government interference and legislative regulation in consumer affairs is on the basis that unfair trading practices can be controlled by free and open market interaction of economic agents. For example, the sale of a service/product not satisfying consumers due to the price could easily be dealt with as consumers would simply inform each other to refrain from purchasing the service, and eventually sales will decline.

[36]Complaints are various ranging from finance charges over and above the legislative rates.

accepted by the debtor in accordance with the terms of the offer"[37]. In this respect, a contract must contain, in the case of Namibia[38] also, considering the need to adhere to the principle on *transparency* and *disclosure,* a statement on terms and conditions underpinning the contract[39], inclusive of digital contracts.

Further, the form and expression of the contract must be as required in subordinate legislation, and any alterations thereof and record keeping be treated according to the law. For example, service providers must ensure that certain transparency and disclosure principles are exercised when sharing information used by the consumer to make the right informed decisions about the contract.

b) **Creditor's monetary obligations:** "credit provider should not enter into a credit contract on terms creating a monetary liability prohibited under the law or require or accept payments of an amount in respect of a monetary liability that cannot be imposed under the law"[40]. This principle relates to the treatment of customers fairly, and respectful treatment of clients, which is, with the advent of a law on consumer credit, is fundamental in Namibia in order to deal with related matters in the sector. (this goes without saying)

c) **Creditor's obligations to account**: pertains to various statements of account, and information to be contained therein. In addition, other obligations include, amongst others, matters related to advertising and related conduct. Adverts must comply with prescribed standards in the law such as public notices on the annual percentage rates, inclusive of fees, and charges. This requirement is important in assisting consumers to identify comparative costs of credit offered by creditors.

d) **Fees and charges:** Widespread controls over interest rates are not recommended, except for the current cap on finance charges existing under the microlending space, and consideration might also be given to requiring interest rates to be calculated on a reducing balance basis. Potentially, widespread controls have inherent side-effects including increases in non-interest fees and commissions, reduced price transparency, lower credit supply and loan approval rates for small and risky borrowers, lower number of institutions and reduced branch density, as well as adverse impacts on bank profitability. Controls over fees and charges are also at odds with having a market based on competitive principles supported by appropriate disclosures to consumers. However, in the case of Namibia, excessive finance charges necessitated the introduction of caps on finance charges, and this requirement is still recommended under the microlending credit space.

Although there are concerns over interest rate caps, it would be consistent with international good practices to require interest to be charged on a reducing balance basis (as opposed to a flat basis) and to require that default interest be charged only on the amount in default while the default continues. In Namibia, the enabling subordinate legislation covering microlending credit for the maximum penalty interest charges on defaulting borrowers issued under *section 36 (1)(e) of the Microlending Act, 2018*

[37]Australia National Credit Code, Part 2, Section 14.

[38]Although such provisions are provided for under the relevant legislations, considering the low level of financial literacy and that on the awareness of consumer rights in general, an improvement with additional terms and definitions such as unpaid balance, default rates and annual percentage changes could be included in the envisaged law.

[39] Includes Credit provider's name and amount of credit; annual percentage rate/s, or other rates included (interest rate) and how each is determined; schedule of repayments inclusive of amounts and frequency must be clear; credit fees, charges and default rates; changes affecting interest and credit fees and charges; statements of account and enforcement expenses; mortgage should include description of the property and details of the guarantee, if any; commission; insurance contract; and other information such as any details or warning articulated in a subordinate legislation.

[40]Australia National Consumer Credit Protection Act 2009, Schedule 1, Section 23 (23).

sets out the parameter to be followed. For example, no credit provider should charge a defaulting borrower more than 5 percent per month on the arrear instalment, and the imposition of the penalty interest should not exceed three months. This provision can be extended to cater for the other types of credit.

Some countries impose limitations on specific fees where there is evidence of a market failure justifying such controls, but it is less common to have an overall power to determine the "*reasonableness*" of all consumer credit fees, or to impose a stated cap on a fee. For example, countries such as Australia, Azerbaijan, the European Union, the Philippines, Singapore, South Africa, and the United Kingdom regulate account closing fees; account keeping fees; ATM withdrawal fees; and loan prepayment, early termination fees and enforcement expenses. However, these types of controls have been imposed because of evidence of specific market failures (such as account closure or prepayment fees which limit the ability to switch providers). Some countries also impose controls over fees charged by payday lenders and money lenders (such as Australia and Malaysia). New Zealand is a rare example of a country that prohibits the payment of "*unreasonable*" fees.

In this regards, through a regulation, a provision should be made regarding credit fees and charges that might be charged or prohibited should be determined. For example, if amounts paid by the debtor is more than what is due, the creditor must reimburse the borrower without a penalty. In Namibia, this provision is necessary as part of the fair treatment of customers, and potentially encourages trust and confidence in the domestic market place, where cases are reported that consumers are penalized for early payments[41].

e) **Guarantees:** Sometimes credit contracts are also linked with certain guarantees, and is therefore imperative to have conditional provisions to the extent that it guarantees obligations under the contract[42].In this respect, conditional provisions would include form and content of the guarantee to be signed by the guarantor, disclosure requirements, conditions on withdrawals and extensions of the guarantee, etc.

f) **Changes to obligations**[43]*:* for the sake of instilling certainty, the law must have provisions guiding parties against any material changes that could be effected unilaterally by the credit provider, and must cover all the items in the structure of the credit contract such as on interest rate changes, repayments, and limits on credit. Again this provision, amplifies the fair treatment principle of the TCF, and therefore improves the trust and confidence in the local credit market. Similar requirement on the creditor is provided for under the Microlending Act, 2018 under section 28(a) and (b), stating that any unilateral amendment or variation to the contract is void once the agreement has been finalized unless such amendment reduces the liability of the borrower or is co-signed with the borrower.

Hence, overall market conduct legal provisions embracing fair treatment of customers must be recommended in the entire consumer credit space. The seven principles[44] are further elaborated in detail in the ensuing section below.

[41]Penalty charges for early settlement without notice effected has been reported under the banking sector.
[42]Australia National Consumer Credit Protection Act 2009, Schedule 1, Section 54 (54--62).
[43]Australia National Consumer Credit Protection Act 2009, Schedule 1, Sections 63-72.
[44]Finkelstein et al (April 2015:17).

3.3 Treating Customers Fairly Consumer Protection Principles

The Consumer Credit Policy is underpinned by principles outlined below, which are anchored on global adaption of key principles. According to the World Bank Group et al (2017:7-9), world-wide, in order to provide for consumer confidence in the credit market, it is important that the legal and supervisory framework establishes clear provisions against misconduct in all types of consumer credit agreements and transactions, be it on those offered by NBFIs, banks or other consumer credit providers such as the Agricultural Bank of Namibia and Development Bank of Namibia. The same sentiment is highlighted by Finkelstein et al, (2015:17), emphasizing the following seven (7) financial consumer protection principles as fundamental:

3.3.1 Fair and respectful treatment of clients

This provides a set of requirements stipulating how consumers should be treated with high ethical standards, (fairly, honesty and respect). Service providers should therefore have a mechanism detecting abusive treatment especially during the stage of selling the product and/or when collecting debt that is overdue. Again in Namibia, like in the case of responsible pricing procedures that is lacking, this is not complied with as there are limited provisions requiring the fair treatment of customers. Fair treatment issues should therefore be the subject of specific provisions in the new Act. For example, provisions concerning unfair terms and conditions; fair sales practices and especially a prohibition on misleading and deceptive conduct; liability of the credit provider for the actions of staff and agents; a required cooling – off period; prohibition on discrimination of any type; and a prohibition on unduly limiting a customer's ability to switch providers should be considered. There should be clear restrictions on practices relating to the harassment of debtors too.

3.3.2 Appropriate Product Design and Suitability

This pertains to a requirement that products must (i) be designed to suit a specific target market, guided by a comprehensive knowledge about the needs and financial capability of consumers in that market; and (ii) also be suitable for the needs of individual customers Hence, this can be termed a "product suitability" principle, because it is aimed at ensuring that a particular product is suitable for a specific consumer (even if the product meets any product design requirements and even if it is affordable for the relevant borrower.[45] In general terms, suitability principle usually requires that a financial service provider have policies and procedures to ensure that the financial objectives, needs and capacity of a consumer are considered before providing them with a financial product or service.

In addressing this requirement, service providers should have policies, articulating processes and procedures put in place explaining how inherent product design-risks impacting customers are prudently managed. At a minimum, policies should provide guidance identifying and controlling risks in the value chain (e.g., product development and distribution must be according to the laws). In the case of Namibia, this principle has a lot of challenges especially as the market may not properly determine affordability assessment and inclusivity of products offered to target markets.

3.3.3 Responsible Lending

Such a principle might require that a credit provider should have policies and procedures in place ensuring that consumer credit products can be repaid without substantial hardship. This requires financial

[45] 2017 WB FCP Good Practices, Chapter 1, section C4.

service providers to assess creditworthiness of a customer before extending credit by looking into customer's overall indebtedness based on outstanding debt obligations, expected income over the duration of the service, and then determine whether the amount and terms/conditions of the contract allows the customer to meet the obligation without defaulting. Overall, it is also important to ensure that the product offered will provide value to the customer.

In Namibia, assessment of creditworthiness on the banking sector has been complied through loan to value ratio applied on mortgage, asset liability assessment requirements and the ability to repay, while on the non-banking side, assessments have been poorly complied with by the service providers due to, among other factors, by the practice of collecting debt at payroll level. However, what is lacking is a comprehensive credit profile record system to aid assessment of clients before extending credit. Therefore, the envisaged Consumer Credit legislation should be strengthened not only by the core[46] provisions in the Credit Bureau Regulation (No.103 of 2014), but also with additional compliance requirements split according to sector regulators[47]. This is necessary in order to accord an effective compliance enforcement-co-ordination among the sector regulators.

3.3.4 Disclosure and transparency

This pertains to the format and the manner of disclosure required when communicating the binding terms and conditions in the credit agreements, loan transactions statements, advertising and sales material[48]. On a minimum, disclosure and transparency requirements should discourage credit providers from disguising the true costs of credit, but rather should provide clear and concise disclosures in simple language[49]. This practice would avail consumers with a complete, clear and not misleading information about the terms and conditions for the product supplied in the market. In addition, when standardized, the practice aids consumers to compare terms and conditions offered by different providers, and therefore enabling them to make an informed choice. In Namibia, this is provided for under Part 4 of *the Microlending Act 2018,* but should be extended to cater the banking and retailing consumer credit services, including all types of credit providers even those not regulated.

3.3.5 Data protection and privacy

This principle makes reference to the lawful collection, sharing and usage of a customer's confidential information, which must be guided by the limits established by the law, such as how the data can be collected and retained[50] lawfully, as well as the purpose[51], types of data collected, the access and correction rights. Service providers must have policies and procedures in place ensuring adherence to the requirement on confidentiality, security and integrity of the data. Service providers must be legally liable for the misuse of the customer's information, including any breach in the security of the data and

[46] For example, credit providers extending credit as condition of employment is stated in the policy as one area for exemption.
[47] For example, the Bank of Namibia can continue monitoring compliance of the Banking sector which should then be reported to NAMFISA, while Statutory bodies such as the Development Bank of Namibia, and Agricultural Bank should submit compliance reports to NAMFISA.
[48] This should also look at marketing ethics and satisfactory information provided and in such a way that consumers are not caught up my marketing lingua, e.g. pay only N$500 per month and not highlighting the full cost to consumer.
[49] The disclosure principles include timeliness; accurate and relevant information; key facts statement; consistent and comparable (Finkelstein et al (2015:27)
[50] The minimum period for retaining customer's information should be stated in a regulation and the consumer should be allowed access to such records (World Bank Group et al 2017:46).
[51] Collected and retained data must comply with data privacy and confidentiality requirements limiting, for example the usage, exclusively to the purpose specified at the time data was collected or as allowed by the law (World Bank Group et al 2017:46).

also any misuse by a third party to whom they disclose information. However, if the service provider has put reasonable measures in place, the liability should also be limited.

The purpose of this principle is to effectively protect the client's privacy, for example, by requiring that service providers informs[52] customer in writing about the third party request, types of information required and the purpose. Unless if it is a credit bureau, other third parties should be prohibited from disclosing the shared information unless the required authorization was provided by the credit applicant. This principle is relevant in Namibia considering the level of transgression regarding reported confidential information that has been shared.

3.3.6 Responsible pricing

Responsible pricing provides a set of requirements on how prices (cost of credit, i.e., interest rate, fees and commission) should be set-up, while taking cognizance of the needs of the consumer. Service providers must have internal written procedures on how price setting is determined. All this would require documentation articulating reasons why and how prices should be set-up in order to provide regulators an opportunity to understand rationale for why and how prices have been set by the service provider. In Namibia, this is not complied with to a great extent as there are no provisions requiring pricing procedures to be in place. In this respect, in line with international experiences as articulated above under fees and charges, compliance does not necessarily mean an express of controls or limitations[53].

3.3.7 Mechanism for complaint resolution

This relates to how complaints should be handled by the service provider, (i.e. internal complaints handling process) as well as out-of-court formal dispute resolution mechanisms (i.e. external complaints handling process). Regarding internal complaints handling, every service provider should have functioning structures with policies and procedures guiding how complaints registered by consumers against the service provider must be handled. A credit providers' complaint resolution procedures must be transparent, accessible and free, and also designed to resolve complaints effectively, promptly and justly.[54] Further, the procedures should meet specified minimum standards as to matters such as the maximum time to resolve a complaint and there should be requirements for regular reports to the relevant regulator. In addition, the provision should refer to the need for the consumer to be informed of the availability of any external dispute resolution service (such as the proposed Independent Adjudicator).

3.4 Institutional Arrangement on Regulatory and Supervisory Mandate

Separation of institutional arrangement over prudential and market conduct regulation and supervision is important but does not matter whether one regulator is responsible for both functions or not (World Bank Group et al (2017:13). What really matter is to ensure that the two functions are undertaken separately. In this regard, there are different models based on country situation and to date no specific choice has been identified as more successful. For instance, like in Namibia, in some countries the functions are housed separately in departments under the same Regulator. In this regard, good examples are Botswana, Mauritius, Jamaica and Seychelles where there is an independent split between banking

[52] This is a practical approach such that it should not be verbal must be in writing, and does not mean every time looking for the customer to authorize the sharing of information; rather a standard must be adopted at the point credit agreement is initiated.

[53] See Section 3.2 (d) above dealing with the analysis on international experience on fees and charges.

[54] WB FCP Good Practices, Chapter 1, section E.

market conduct and prudential supervision oversight function under one regulator, separate from non-banking market conduct and prudential supervision oversight function under another regulator. This approach is cost-effective and mostly suitable for small economies like Namibia as specific financial consumer protection regulation and supervision per product or services can easily integrate financial education and literacy efforts[55]. However, it is important to ensure that market conduct is given separate emphasis from that on prudential supervision and regulation.

In Armenia, Brazil, Malawi and Portugal, a multiagency institutional arrangement exist, where the central banks and other regulators with prudential mandate also have a mandate on consumer protection matters arising from banking and NBFIs transactions[56],while in many jurisdictions, the model adopted embraces a general consumer protection law applied to all kinds of products and services. The disadvantage of this model is that the law is not specific, clear and comprehensive enough to provide effective protection to consumers of financial products and services, as the model does not allow resorting to specialized subordinate legislation.

A good practice is a legal framework with provisions dealing specifically with consumer issues in the financial sector and determining in broad terms the institutional mandate on each provision. One approach is an overarching stand-alone legal framework (Canada, Colombia, Mexico and Peru) which provides a broader coverage with a high degree of transparency, flexibility and clarity for the regulators to implement through issuance of specialized subordination legislation, supervision and enforcement[57]. Unlike with the general model, a stand-alone model is effective in avoiding regulatory gaps and conflicting provisions across different laws. Product and service specific laws, such as on credit in Australia, United Kingdom, USA, Ghana, Sierra Leone and RSA, is also effective in achieving a broader coverage and clarity. However, due consideration for the coverage of the law is worth taking into account[58] as lack of coverage can exist in any model.

It is important to note that suitability of any arrangement is determined by circumstantial evidence peculiar to each country, provided though that the technical and operational independence is recognized and proven to be working. Further, another underpinning world experience relates to the capacity constraints, which requires setting out priorities balancing different, but necessary, competing statutory mandates on consumer protection, financial inclusion, curbing financial crimes and financial systems stability.

In Namibia, it is plausible to argue that the prevailing set up has been to a great extent determined by the technical and operational independence, but also considering national priorities, too, such as financial stability and inclusivity. This set-up is in line with experiences elsewhere with similar size of the economy such as in Botswana, Seychelles and Mauritius where the institutional set up is split between banking and non-banking, and not according to prudential and market conduct supervision. In the case of Namibia, the Financial Services Adjudicator[59] enhances the role of the two regulators by ensuring independent oversight on financial complaints. It is also worth mentioning in terms of the current set up between Bank of Namibia and NAMFISA, the following:

[55] Digital Frontier Institute (2019) -Fair Treatment of Customer/agents
[56] World Bank Group et al (2017:10-12)
[57] World Bank Group et al (2017:10)
[58] G20 Financial Consumer Protection principle 1 put emphasis on the coverage.
[59] However, considering the strategic shift towards consumer protection-principle risk-based supervision, it is improbable to continue arguing for the importance of the Adjudicator as financial complaints will be minimized once market conduct is brought to acceptable levels. Consequently, this would make the cost of establishing such an Office not economical.

a) entities are able to deal within a single supervisory body for both prudential and market conduct supervision. This arrangement waives both the explicit (levies) and implicit costs (resources required) on entities and hence on consumers, that otherwise would not be necessary under a single supervisor.
b) developing separate regulatory entities for retail, banking and non-banking sector would be costly for a small economy such as Namibia. This would be in terms of reporting, required resources and possible overlaps between prudential and market conduct activities.
c) clear objectives under prudential and market conduct supervision must be followed through a complementary approach.

Considering a need to identify the optimal way of reforming a fragmented oversight function on consumer credit agreements and transactions under the mandate of different institutions applying different legislative instruments, co-ordination of the oversight function is imperative. Therefore, there should be close consultation and coordination between consumer credit regulators. This is especially important given the potential for differences in the regulatory and supervisory approach, which in turn could create an unequal playing field with potential for a regulatory arbitrage. At a minimum, there should be a comprehensive memorandum of understanding between Bank of Namibia and NAMFISA[60] covering additional issues such as consultation on ongoing supervisory issues; development of regulations, conduct standards and guidelines on common issues; regulatory reforms to consumer credit requirements; and sharing of information about issues regarding systemic complaints and enforcement actions.

Naturally, as provided for under their respective different mandates, this would require reform from the financial sector regulators (Bank of Namibia and NAMFISA)[61] because already they are overseeing the respective sectors, with the exception of the non-financial consumer credit providers. However, on the basis of the provisions in the respective applicable laws and Bills, only NAMFISA will have express consumer protection objects[62]. While the Bank of Namibia (No. 15) 1997 only has implied objects on market conduct through the references in s.3 on matters such as "a sound monetary, credit and financial system[63]" and s. 36 providing the Bank of Namibia with additional functions and powers under other laws, which may facilitate the making of consumer credit protection standards. However, ideally the Bank of Namibia should have express consumer protection objects to avoid any challenges to its authority.

An additional responsibility to regulate and supervise market conduct on consumer credit leverages the already honed experienced and skilled professionals and staff in the two institutions, relatively with minimal costs. On the contrary, setting up a new entity is costly and therefore not economical. This model mimics the one followed in other economies similar to that of Namibia, for example like in Botswana, Ghana, Mauritius, Seychelles, Jamaica, and Indonesia, where the central banks oversees banking matters and another authority is responsible for the non-banking financial sector[64].

[60] Therefore, the memorandum between NAMFISA and Bank of Namibia should be expanded with the stated additional requirements.
[61] As registrars of consumer credit extended by banking and non-banking institutions and intermediaries, respectively.
[62] NAMFISA Bill s.3(1)(e).
[63] Inclusive of the responsibility to sustain the liquidity, solvency and functioning of the same financial system.
[64] According to international experience what matters most is not about institutional separation of prudential from market conduct, but rather the demarcation of prudential and market conduct supervision (World Bank Group et al 2017:8-12). As such, world-wide, jurisdictions choose what fits their circumstances best provided departments do not simultaneously account for both at the same time.

3.5 Licensing and registration

Financial sector laws covering specific types of financial services should have a comprehensive regulatory and supervisory framework providing at a minimum, a coverage setting out legislative requirements on licensing and registration. These are the provisions requiring providers of credit and associated services (e.g., debt collectors and credit bureaus) to be licensed through a process that establishes, for example, the minimum entry requirements. Applicants as potential associated service providers, should demonstrate the ability to meet the required criteria set by law, among others on integrity and competence, including governance on internal controls mitigating, for example, inherent operational risks of a particular business model. This requirement is provided for under relevant laws[65] in Namibia and should be included under the envisaged law on consumer credit. However, it is important that a threshold in light of risk based framework be determined whenever necessary in a subordinate legislation. Another important consideration, which frequently is not well catered for under the law, is the coverage of fast-evolving digital financial services, as the laws are too rigid to accommodate new evolving instruments. It is important therefore to ensure that all service providers are to a great extent possible registered for licensing purposes conditional to a minimum reporting requirement, which could be determined in a subordinate legislation. In addition, it is considered that all entities currently exempted[66] from the Banking Institutions Act, 1998 (Act No.2 of 1998) through S. 2(2), although the provide credit to consumers, should be subjected to the proposed CC Act as an overarching consumer protection law. In addition, in order to avoid regulatory gaps, all providers of traditional line of credit and innovative digital credit must be regulated within the scope of the proposed CC Act.

3.5.1 Credit Regulatory Functions

All credit providers in Namibia will be subjected to the consumer credit policy. However, the manner in which they are regulated will depend on the type of activities carried out. Banks will be supervised by the Bank of Namibia, non-banking financial institutions, (retailers, microlender, debt collectors and credit bureaus) will be under the supervision of NAMFISA, and telecommunications credit providing entities will be supervised by their respective regulatory body; the Communications Regulatory Authority of Namibia. As such, market conduct mandate should be included under their enabling law as recommended under the section on institutional arrangements. On the other hand, other credit providing entities such as the Development Bank of Namibia, and the Agricultural Bank of Namibia, just to mention few will be expected by the financial sector regulators to comply too.

The split between banking and non-banking takes precedence; implying the Governor at the Bank of Namibia and the Chief Executive Officer at NAMFISA are the registrar of consumer credit providers on the banking side and non-banking side (i.e., retailers and microlenders), respectively. Both the Bank of Namibia and NAMFISA shall exercise functions/powers[67] to-

a) register and license applicants for the provision of credit services;
b) regulate activities of consumer credit providers and intermediaries (debt collectors and credit bureaus);
c) promote and support the development of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market for consumers;
d) formulate and co-ordinate measures educating and informing the public (consumers and suppliers) about credit, on consumer rights and obligations, and its social and economic effects;

[65]Banking Institutions Act, (Act No. 2 of 1998) and Microlending Act, 2018
[66]For example, statutory based banks such as the Agriculture Bank of Namibia and the Post Office Savings Bank. Building and co-operatives are also exempt.
[67]Inclusive of delegation of powers and duties to other officers that is not primary.

e) monitor and report to the Minister of Finance three months after end of the financial year about-
    1) market conduct, availability of credit, and prevailing consumer credit prices;
    2) credit industry structure and trends, including market segmentation; and
    3) consumer indebtedness levels, incidences, social effects; and any other related matters; and
f) undertake compliance inspections within a risk-based framework and enforcement of the powers accorded to the Minister in accordance with the law inclusive of ensuring there is adequate compensation, and redress arrangement in case of contraventions.

In terms of the rest of the entities not supervised as above by two financial regulators, the expectation is that they will be supervised by their respective regulators in terms of credit provisions and be subjected to the same principles advocated by this policy.

3.5.2 *Registration and Licensing*

In carrying out the outlined functions and powers above, the registrar should develop a framework on registration and licensing in order to obtain, for example, the basic governance information from such providers including specific controls mitigating inherent risks (World Bank Group et al 2017:9). Notable examples include risks emanating from market conduct, fraud and money laundering activities. It is for this reason that the legal framework should include provisions establishing responsibilities, powers and accountability of the supervisory/overseeing authority responsible for implementation of the law.

The framework to be prescribed in subordinate legislation should include a statement on how the register will be updated and availed to the public for inspection. The registrar may make available an electronic copy of the credit register to the public through the website. With this disclosure requirement, it is important for quality assurances to be ascertained by attaching offences relating to the content and format of the documents lodged with the registrar. For example, a person commits an offence if the person omits, or authorizes the omission of a material matter from the document, and knows that without the matter, the document is materially misleading[68]. Similar provisions are provided for under section 41 (a-b) of the Microlending Act, 2018 whereby it is an offence if a person willfully provides misleading information. In addition, others could include requirements through a subordinate legislation setting out thresholds as to who should be supervised regularly or occasionally in light of a risk based supervision framework. Moreover, when exempted from certain provisions in the Bill, the principles governing the business conduct (e.g., prevention of over-indebtedness, disclosure and transparency, data protection) still should be made compulsory. In this regard, the exemption criteria could mainly be determined by the risk appetite of the credit provider as reflected by the risk profile of the business model. This determination could potentially consider the number of customers forming the portfolio and average amounts of credit, which both determines the overall size of the portfolio. In addition, this determination for the exemption is also premised on risk based approach. However, such a determination would require careful consideration as the approach runs a risk of an active oversight avoidance, whereby credit providers would artificially lower their operations just below the qualifying determined threshold. Further this could exacerbate money laundering activities.

[68]Australian Consumer Credit Protection Act 2009 (Section 225-229).

Despite having all these issues in mind, the aim should always be to meet the objectives of the Bill at the lowest possible regulatory and supervisory costs and effort for credit and service providers. In any case NAMFISA is guided by a principle of cost recovery and not profit-making in the levy structure, and any levy will be based on the funding model guided by this principle of cost recovery.

3.5.3 Administration

With regard to the administration of the application fee for registration, the fees will be payable to the respective regulator. Other administrative responsibility includes management of the levies[69] payable annually to the respective regulators. In this respect, a threshold determining clearly which sectors should fall under which respective sector regulator is recommended under the new dispensation. This approach would aid in terms of co-ordination of information and to avoid an arbitrage in regulatory and supervisory enforcement.

3.5.4 Enforcement

It will be important for relevant regulators to have, and use, consumer protection specific powers.[70] The aim one should be to ensure that the enforcement powers create a credible threat of enforcement. In particular, the supervisor should have a wide range of civil and administrative enforcement powers, and consumer – protection specific supervision and enforcement powers. Relevant powers could include, at least, power to require suspension or modification of advertising material and to order refunds to customers (such as for unauthorized fees or underpayment or overcharging of interest) and powers to impose or seek fines which are a reflection of the seriousness of the relevant offences.

3.6 Current Legislative Gaps

Transposing the seven principles on consumer protection against each financial sector enabling law of Namibia illustrates regulatory concerning areas on market conduct. This is demonstrated in the table below, where the scope of each respective law is assessed against the relevant corresponding consumer protection principles.

Table: Legislative Gaps on Consumer Protection Principles

Enabling Sector Laws	Consumer Protection Principles
1. *Bank of Namibia Act, 1997 (Act No.15 of 1997)*	Broad provisions provided under the object covering implicitly all the principles. Section 3(a)-(e)
2. *Banking Institutions Act, 1998 (Act No.2 of 1998)*	Only refers to the prohibition of unfair terms
3. *Credit Agreements Act, 1980 (Act No.75 of 1980)*	Only partially relates to Principles on transparency, responsible pricing and fair and respectful treatment of clients.
4. *Financial Services Adjudicator Bill 2018 (Bill No.10 of 2018)*	Broadly relate to mechanism for complaints handling resolutions
5. *Microlending Act, 2018 (No.7 of 2018)*	Partially covering all the principles except No.1 which is completely not covered. So, all the principles should be enhanced.
6. *Namibia Financial Institutions Supervisory Authority Bill, 2018 (Bill No. 11 of 2018)*	Broad provisions provided under the object covering implicitly all the principles. Section 3(1) -(2)
7. *Usury Act, 1968 (Act No. 73 of 1968)*	Yes on Principle No. 4, but need to demonstrate a need for pricing procedures.

[69] In Namibia, levies are a source of funds and forms part of the funding model catering for the operations of the regulator, and is determined in a Regulation based on the running costs.

[70] WB FCP Good Practices, Chapter 1, section A4.

The legislative gaps in the laws also imply that reported transgressions would continue unabated unless if addressed through the proposed consumer protection principles.

3.7 Envisaged Consumer Credit legislation: Scope and Limitations

As articulated above, the overall objective aims at introducing a law on consumer credit in Namibia that conforms to *Articles 95* and *101* of the Constitution and all the relevant laws promoting fair and equitable access to credit. In this respect, the lending practices in the market for credit must be in accordance with international best principles on fair treatment of consumers. As such, the purpose of the envisaged consumer credit legislation is to provide for consolidation and reforming the law on credit by repealing the *Credit Agreements Act, 1980 (Act No. 75 of 1980),* the *Usury Act, 1968 (Act No. 73 of 1968),* and relevant consumer protection provisions applicable to credit in the *Banking Institutions Act, 1998 (Act No. 2 of 1998), Microlending Act, 2018 (Act No. 7 of 2018)* and any other law, in order to provide for an overarching law on consumer credit.

The proposal that these provisions should no longer apply is made in the interests of providing and ensuring: (i) certainty as to the law applicable to credit contracts: (ii) ensuring consistency in the applicable law for different types of institutions; and (iii) interests of making it easier for consumers to understand their rights and obligations and for industry to understand what their obligations are and to comply with them. Supervision of the consumer credit legal framework should also be easier if there was only one law to refer to.

The provisions of the envisaged law will apply to both natural and juristic persons[71] resident in Namibia, formed or carrying on credit extension business in Namibia. In addition, the scope of provisions would include any person providing a service while acting as an intermediary[72] (debt collectors). In its application, the law does not intend to exclude or limit the concurrent operation of any law of the State, unless if there is a direct interpretation inconsistency between the laws; a case in which a regulation should deal with such cases such that there is no interpretation inconsistency[73]. Adopting the same principle for Namibia is necessary to avoid, for example, contradictory interpretations of legal provisions.

In addition, although there are some differences in the business models, and corresponding objectives as provided for under different laws, the application of the envisaged law should be extended to cover all consumer credit providers mandated by statutes such as the *Agricultural Bank of Namibia*; *building societies*; the *Namibia Development Corporation*; the *National Housing Enterprise*; the *Development Bank of Namibia*; and any co-operative society[74]. In this respect, the extended coverage would ensure that each debtor's agreement with the above mentioned institutions conforms to a fair treatment of consumers at each stage of the credit agreement's life cycle.

[71]Includes partnership, and is interpreted as if were a person, and any contravention of the Act by the partnership or trustee would be taken to have been carried out by each member of the trustee or partnership (National Consumer Credit Protection Act, 2009 Section 14).
[72]This applies example when the person for purpose of securing credit acts between the consumers whether directly or not and the credit provider wholly or partially.
[73]National Consumer Credit Protection Act of Australia (Act 134 of 2009 amended: Section 29 page 34).
[74]Established by the Agricultural Bank of Namibia Act, 2003 (Act 5 of 2003), Building Societies Act, 1986 (Act 2 of 1986), Namibia Development Corporation Act, 1993 (Act 18 of 1993), National Housing Enterprise Act, 1993 (Act 5 of 1993), Development Bank of Namibia Act 2002 (Act 8 of 2002), Co-operative [Societies] Act, 1996 (Act 23 of 1996), respectively.

It is important to distinguish the types of credit contracts to which the provisions of the law would apply and not apply. Regarding the former, the provisions hold if the debtor is a natural or juristic person[75] and amount extended is for any type of credit.

On a related matter, the provisions of the law should also apply to a conditional selling (credit-related tied credit or insurance contract) connected to consumer credit contract, prescribed in subordinate legislation. Important provisions, which must be encouraged in this case, includes prohibiting the creditor to expect the debtor to take out a prearranged credit facility or insurance cover between the creditor and a particular credit provider or insurer. This may harm the credit rights of the consumer.

Regarding the commission paid by the debtor in connection with the consumer credit insurance, the total amount or value should be determined in a subordinate legislation whether capped or not. In the case of Australia, the legislated value does not exceed at least 20 percent of the premium. In Namibia, the determined commission on credit-related tied insurance contract should not differ from other types of commissions paid out for other types of products, as is the case in the Financial Institutions Markets Bill subordinate legislation[76] to avoid inconsistency in the principles applied. In this case, the determination of commission in the standard is limited to monetary terms only, and not payment in kind. The latter could compromise on fair contract terms as intermediaries might focus more on the volumes of the sales instead of embracing fair treatment to consumers.

In addition, it is necessary for the provisions to apply to all transactions or acts under the contract whether they still take place in Namibia or when the creditor has ceased to carry on a business in Namibia. The provisions of the new Act would apply as long as the relevant consumer was resident in Namibia at the time the credit contract was entered into. This provision would be helpful in cases where foreign residents in Namibia secure credit as natural or juristic persons or where the creditor has left the country, but still has a group of debtors. On the contrary, certain agreed transactions like it is in Australia[77] is encouraged to be exempted in Namibia, and are as follows:

a) **Credit without express prior agreement:** such as an overdrawn account, without prior agreed overdraft facility. On the contrary, the provisions would apply if the finance charge is of a nature prescribed by the subordinate legislation or higher than requirement amount.
b) **Insurance premium by instalments:** should not apply unless it insures the obligations of the debtor under the credit contract. This is what is provided for under Section 63 of the Banking Institutions Act, Act No.2 of 1998. Section 23(3) of the Microlending Act, 2018 prohibits tied insurance, as no borrower is obliged to acquire insurance from the credit provider, and therefore must only be enforced, and extended to the banking sector.
c) **Trustees of Estates:** the extension of credit to a beneficiary or prospective beneficiary of a deceased's estate, is excluded from the provisions of the law. As in Australia, the same approach is advisable in Namibia, as transactions of this nature are common and does not meet the guiding principle of '*in the course of business'* because trustees are not usually in the business of extending credit but do so on a once-off basis or irregular.

[75]Only SMEs and not corporates as SMEs face consumer protection issues faced by individual consumers.
[76]Insurance Standard No 2.9 on amount of commission that may be paid to an insurance broker or agent.
[77] Australia National Consumer Credit Protection Act 2009, Schedule 1, National Credit Code Section 6(1-12).

d) **Employee loans:** credit is exempted when provided to an employee by an employer. The most important reason for exemption is that such type of credit is provided on more favorable terms to the employee than an ordinary credit provider would grant to other debtors. Again, this does not meet the principle of '*in the course of business*.'

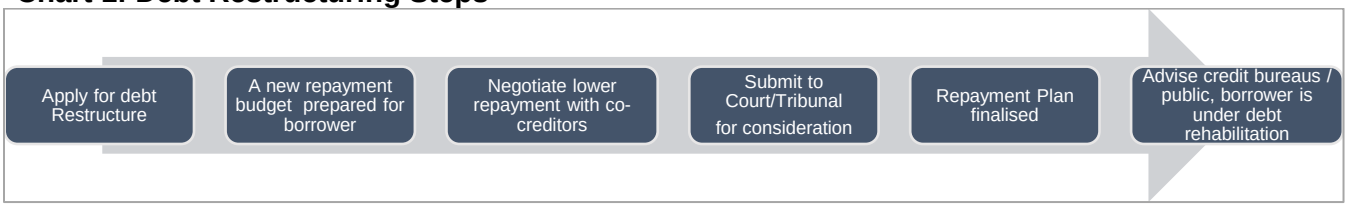
3.8 Debt collection service

Another aspect of responsible lending pertains to debt collection in terms of ensuring that consumers who fall behind in payments do not suffer from improper or deceptive collection processes. For example, in the USA, the *Fair Debt Collection Practices Act*[78] *(effective 1978, as amended)* was designed not only to prevent abusive, deceptive, and unfair debt collection practices in the market, but also to protect reputable debt collectors from unfair competition[79]. Unfair debt collection should be addressed in Namibia, and such intermediaries must meet minimum certain requirements (fit and proper, integrity, honest and financial soundness). It must be stated as a legal requirement that credit providers are responsible for any harassment of debtors which occurs in breach of the new Act and regardless of whether the conduct is by an employee or an outsourced service provider.

3.9 Debt Rescheduling

As a complementary measure redressing non-performing loans, debt counselling,[80] with a possibility of debt rescheduling determined by certain parameters, is practiced in some jurisdictions (see steps in Chart 1). Debt re-scheduling affords the consumers an opportunity to pay a manageable monthly instalment, while the creditor avoids incurring legal litigation costs. However, it is important to note that rescheduling is not for free as the consumer incurs additional costs and fees.

Chart 1: Debt Restructuring Steps



While debt counselling services in South Africa have recorded numerous successes, there has been some challenges experienced such as a shortage of competent debt counselors required to handle increased numbers seeking counseling[81]. Other challenges include misinterpretation of debt counseling's main objectives, sometimes construed to be a holiday on debt repayment.

Nevertheless, this provision as illustrated above will serve the market better and alleviate burden on consumers, who could end up in such a situation due to lack of literacy. However, in this connection, it is imperative in Namibia on the on-set to enforce assessment for affordability and not to encourage debt

[78] The Act applies to everyone who collects consumer debts for someone else, including attorneys who collect debts, and is only for the collection of debt incurred by consumers mainly for personal, family or household purposes. It does not apply for the collection of corporate debt or debt owed for business or agricultural purposes.
[79] This provision is necessary, but should not contravene associated provisions in the Competition Act, 2002.
[80] Debt counseling is a service rendered to consumers who are experiencing debt-related problems and are having difficulty making their current monthly payment by providing them with budget advice, support and mediation with credit providers.
[81] Roestoff m et al 2009:249

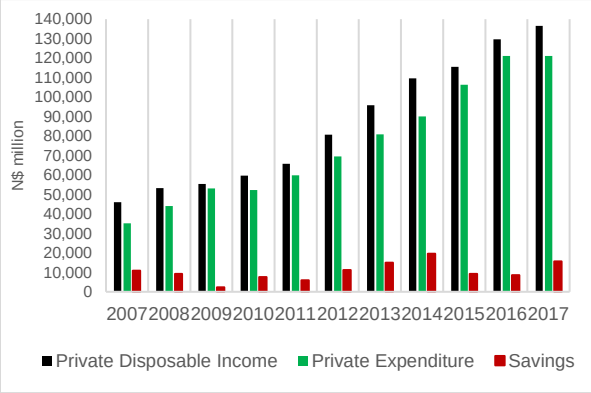
rescheduling to avoid reckless lending and borrowing[82]. Besides, debt counselling could compromise on the main objectives of the reform on credit transactions ensuring the establishment of clear legal and supervisory framework against misconduct such as misleading marketing, unfair terms and conditions.

In addition, debt counselling aimed at re-scheduling should be discouraged in Namibia considering the regulatory and supervisory mandate for the financial sector regulators, as well as the declining trend in savings, and high poverty levels in the country. With regard to the mandate of the financial sector regulators, ensuring that the financial system of the country is resilient to risks while maintaining inclusivity, debt rescheduling, technically is a leading indicator for over-indebtedness reflecting a high possibility for a stressed financial system, and 'junk credit status'. Consequently, compromising on the mandate for the financial sector regulators such as the promotion of financial stability and others.

Consideration could also be given to including provisions requiring credit providers to respond promptly to applications for a review of credit contracts on the basis of hardship, without committing credit providers to a specific response. These provisions would be in addition to an overarching obligation to treat consumers fairly. However, inclusion of broad provisions concerning debt counselling and rescheduling is likely to be very controversial; would require the inclusion of complex issues; may require the creation of a new institution to provide relevant services.

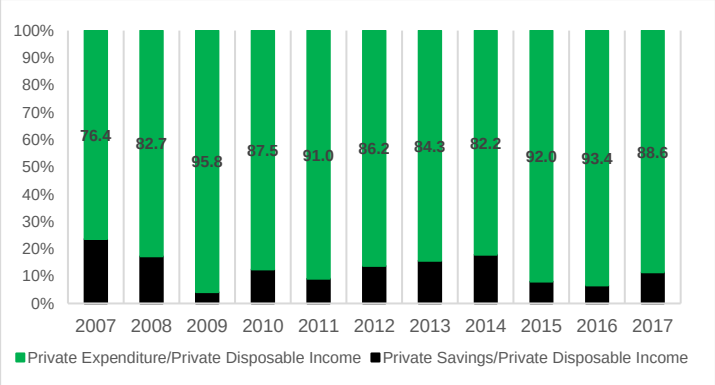
With regard to the trends in the savings and poverty in Namibia, shown in Charts 2 and 3, below, the value of *savings* is derived from the difference between *net disposable income* and *final consumption expenditure*. This implies that the more a population consumes its national income, the less the amount of income is left available to allocate for *savings* and ultimately *investments,* and consequently for future generation and production. Taking income allocation proportions into account reveals that the allocation of the national income in Namibia is lopsided towards consumption at 87.3 percent and only 12.7 percent is allocated for savings (Chart 3).

Chart 2: Private Disposable Income, Expenditure & Savings.



Source: Namibia Statistics Office, National Accounts 2017

Chart 3: Private Expenditure & Savings



Source: Namibia Statistics Office, National Accounts 2017

[82] This is contentious and need further debate considering the Namibian credit landscape. Why not just strictly enforce an effective affordability check mechanism. Having this provision introduces a conflict of interest in the enforcement of the law, and is therefore best to avoid having this provision as subsequently could result in undesirable effects due to irresponsible lending. Rather the mediation should be limited to resolving disputes and not rescheduling if we are to promote a sustainable credit landscape. For example, how would you ensure borrowers just default by not paying what is due so that the terms can be altered? Quite doubtful whether this is meant for Namibian market. We need to interpret our legal mandate carefully so that we do not mean protecting those who did not listen to adhere to affordability requirements.

The lopsided allocation of national income into current consumption is worrisome and debt-rescheduling would worsen this trend as this facility compromises responsible lending and borrowing, which aims at ensuring, for example, that the expenses of low income segment of the population is not consuming more than their income, ultimately helping to build up savings[83] to benefit both the current and future generations, and hence the need to ensure responsible borrowing rather than postponement of debt.

It is therefore important that the consumer credit policy places emphasis on responsible lending and borrowing to ensure not only that a sustainable consumption pattern is promoted for the current and future generation, but also the build-up of savings for the future needs. In this respect, responsible lending indoctrinates certain principles, which must apply to all providers of credit in relation to the credit contract be it the credit provider or intermediary. The principles are mainly focusing on informing consumers of credit better and also preventing consumers from concluding unsuitable credit contracts. The principles are as follows:

a) licensee must have a credit guide[84], which must be given to the consumer;
b) licensee should disclose and provide a quote setting out the maximum amount the consumer is required to pay; and
c) licensee should make an assessment about whether a consumer can afford the credit or not by verifying the consumer's financial status and credit contract should not be concluded if not suitable for the consumer.

4. CONCLUSIONS AND RECOMMENDATIONS

Consumer credit agreements and transactions in Namibia has a number of challenges, which must be dealt with by giving powers and functions to the Central Bank and NAMFISA. The main challenge is a lack of a legislative framework embracing international best principles on treatment of customers fairly in the credit market. With a population faced with little understanding about their consumer rights and knowledge about financial products and services, and implications thereof, the situation remains precarious and more imperative now than before considering the high level of household debt. In this respect, policy makers should consider adopting international consumer protection principles as outlined in this policy.

Other recommended considerations relate to the following:

a) alignment with international definitions and terms by separating where necessary distinguishing provisions on terms and conditions for credit as in certain cases credit would be sourced from institutions with specific mandate (such as the Agricultural Bank of Namibia and Development Bank of Namibia) offering credit at relatively lower interest rates not related to those charged by commercial banks, retailers and microlenders;
b) as part of the monitoring and enforcement drive adoption of a comprehensive regulatory and supervisory framework requiring service providers inclusive of debt collectors to among others register and license their services, and comply with off and on-sight inspections. Such requirements on intermediaries are a responsibility of all credit providers using debtor collectors;
c) institutional arrangement achieving through close collaboration aimed, amongst others, at achieving a harmonized, legal and supervisory approach;

[83] According to the National Accounts (2017) between 2007 and 2017, for example, food, beverages and tobacco accounted for about 30 percent of the items in the consumption basket, much higher than the categories health and education which each accounted for only 6 percent.
[84] Credit guide provides information about the licensee and obligations under the Act.

d) current provisions issued pertaining, for example, to the fit and proper registration requirements on directors, auditors and principal officers be maintained especially for the credit and service providers;
e) Microlending Act, 2018 (Act No. 7 of 2018 and enabling subordinate legislation be improved with principles on fair treatment of consumers, and
f) also be expanded to cover credit extended by retailers and commercial banks.

With regard to the comprehensive expansion of the scope on supervision premised on the principles of treating customers fairly, below are the good areas for consideration.

a) **enhancement of supervisory standards**: internal operational procedures should be enhanced by having in place manuals guiding on-site and off-site market conduct inspection;
b) **comprehensive coverage:** is required to avoid regulatory arbitrate when determining exemptions from certain provisions of the Bill as that could facilitate money laundering activities towards credit extension businesses.
c) **Registration**: is important to ensure that service providers are to a great extent possible registered for licensing purposes; and
d) **Disclosure format**: although section 24(1) (6) of the Microlending Act, 2018 provides for the disclosure, a standardized format of disclosure is encouraged for adoption.

All credit and service providers will be subjected to all the provisions on consumer protection principles and market conduct. This will avail a comprehensive protection to the consumers of credit. Further, informing consumers of credit better and also preventing consumers from concluding unsuitable credit contracts is fundamental in the envisaged legislation. In this respect, a credit guide outlining how credit decision are made according to the law cannot be over-emphasized in enforcement.

It is, however important that a consultative process be considered to ensure a collective understanding of the provisions in the policy, and envisaged law, which will be operationalized by issuance of certain set of subordinate legislation. In this respect, the regulators will be empowered to promulgate standards while the Minister of Finance promulgates regulations in carrying out the purposes and objectives of the Act, and to prevent evasions thereof. This must include but not limited to subordinate legislation on licensing requirements, thresholds, treatment of customers fairly principles, and infringement notices for transgression.

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