

Consumer protection in the banking industry: A comparison of the South African and Nigerian codes of banking practice

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OPSOMMING

Verbruikersbeskerming in die banksektor: 'n Vergelyking tussen die Kodes van Bankpraktyk van Suid-Afrika en Nigerië

Die toename in komplekse finansiële produkte en dienste wat deur banke gelewer word vereis veral sedert die 2008 Wêreldwye Finansiële Krisis 'n groter fokus op verbruikersbeskerming in die banksektor. In hierdie konteks kan vrywillige industriekodes 'n belangrike rol speel om verbruikersbeskerming te verbeter deur in eenvoudige, toeganklike taal verbruikersregte en -verpligtinge uiteen te sit wat andersins dikwels oor 'n aantal tegniese stukke wetgewing versprei is. Volgens die Wêreldbank is die Suid-Afrikaanse Kode van Bankpraktyk 'n gepaste maatstaf waarteen ander sodanige kodes gemeet kan word. Die doel van hierdie bespreking is om die Kodes van Bankpraktyk in Suid-Afrika en Nigerië te vergelyk ten einde te bepaal in watter opsigte die Nigeriese Kode hervorm kan word ten einde meer omvangryke beskerming te verleen aan Nigeriese verbruikers wat gebruik maak van produkte en dienste wat deur banke gebied word.

1 INTRODUCTION

The last few decades have been testament to the tremendous evolution in the scope and complexity of financial services and products offered by banks. This has impacted significantly on the bank-customer relationship and has led to a proliferation of standard-form contracts to govern various aspects of this diverse relationship.¹ Millions of consumers globally make extensive use of a wide variety of banking products and services on a daily basis, giving rise to the need for appropriate levels of consumer protection with regard to these advanced and often complex financial products and services offered by banks. Since the 2008 Global Financial Crisis, the market conduct of banks has come under vigorous scrutiny and the importance of consumer protection in the banking industry has

¹ Ellinger, Lomnicka and Hare *Modern banking law* (2011) 124.

become increasingly topical.² In this regard the G20 has endorsed high-level principles for financial consumer protection in 2011, stating that “all financial consumers should be treated equitably, honestly and fairly” and that special attention should be dedicated to the needs of vulnerable groups.³

Consumer protection in financial services can derive from several sources, such as generic legal texts (for example, civil law codes); indirectly from laws or voluntary standards aimed at market regulation; from specific rules, statutory or voluntary, aimed at protecting consumers in general or specifically aimed at protecting consumers of financial services.⁴ As opposed to laws and other statutory instruments which constitute “hard law”, voluntary standards and codes constitute “soft law” in terms of which consumer protection may be extended.⁵ Codes of practice differ from voluntary standards as they are “more elaborated at the level of professional associations and are more likely to cover entire sectors, often in consultation with state or sectoral regulators”.⁶ Voluntary standards often incorporate the ‘goodwill’ of the market sector, are aimed at avoiding stronger legislation, and incorporate fewer, if any, sanctions beyond de-listing a company from membership of the scheme.⁷ Ramsay⁸ indicates that codes of practice are typically an expression of the industry’s own commitments, not necessarily driven by state compulsion. As a result he is of the opinion that codes may establish levels of best practice which extend beyond legal requirements.⁹

Self-regulation by means of industry codes, as a form of soft law, generally serves to protect the interests of consumers who engage with suppliers in a particular industry.¹⁰ The rapid increase in the range of services and products offered by banks has given rise to the emergence of codes of banking practice as self-regulatory tools in various jurisdictions. These codes are intended to address certain aspects of the bank-customer relationship and to provide a measure of protection to consumers in the banking industry in tandem with consumer protection afforded via legislation, if any. However, not all codes are equal in terms of the measure of consumer protection they afford.¹¹

In South Africa, a Code of Banking Practice which forms one of the most important influences on the modern bank-customer relationship in South Africa¹²

2 South African National Treasury policy document “A safer financial sector to serve South Africa better” (23 February 2011), available at <https://bit.ly/2HNEdDQ> (accessed on 3 May 2018). For a detailed overview of the 2008 Global Financial Crisis, see Mishkin “Over the cliff: From the subprime to the Global Financial Crisis” 2011 *J of Economic Perspectives* 49.

3 *G20 high-level principles of financial consumer protection* (2011), available at <https://bit.ly/2ju3yLg> (accessed on 3 May 2018).

4 Consumers International *In search of good practices in financial consumer protection* (February 2013) 2, available at <https://bit.ly/2wbcNcd> (accessed on 3 May 2018).

5 *Ibid.* It is reported that some countries such as India and Hong Kong, rely exclusively on codes of practice and voluntary standards.

6 *Ibid.*

7 *Ibid.*

8 *Consumer law and policy: Text and materials on regulating consumer markets* (2012) 73.

9 *Ibid.*

10 Pearson “The place of codes of conduct in regulating financial services” 2006 *Griffith LR* 333.

11 Code countries.

12 Du Toit “Reflections on the South African Code of Banking Practice” 2014 *TSAR* 568 (hereafter Du Toit).

was first adopted in 2004. The Code was subsequently revised, taking effect from 1 January 2012, *inter alia* in order to cater for developments regarding products and services in the banking industry which occurred since the 2004 Code took effect.¹³ The South African Code of Banking Practice is a voluntary code ascribed to by all banks that are members of the Banking Association of South Africa (BASA) and sets out the minimum standards for service and conduct that a customer can expect from its bank with regard to the services and products it offers.¹⁴ Notably, the South African Code of Banking Practice has been quoted by the World Bank as a useful reference in benchmarking similar codes.¹⁵

Further on the African continent, consumer protection in the Nigerian banking industry has also gained momentum recently. Prior to 2009, the notion of consumer protection in the banking sector in Nigeria was virtually non-existent.¹⁶ However, in the wake of the 2008 Global Financial Crisis the Central Bank of Nigeria (CBN) embarked on a stringent examination¹⁷ to ascertain why Nigeria was hit so heavily by the Financial Crisis. In the course of that examination the lack of consumer protection in the banking industry was raised.¹⁸ In 2011, in an attempt to increase financial consumer protection, the CBN issued a circular which mandated all deposit-taking banks (Deposit Money Banks, hence DMB) to expand the existing “Automated Teller Machine (ATM) help desks” in those banks to handle all categories of customer complaints.¹⁹ The circular further indicated that banks were to report on a monthly basis on the status of all complaints received.²⁰ The banks further were mandated to disclose information on consumer complaints in their annual reports, the failure of which would attract appropriate sanctions from the CBN.²¹

13 The 2012 Code of Banking Practice is available at www.banking.org.za. The Code was *inter alia* revised to align it with the protection afforded by the Consumer Protection Act 68 of 2008 that came into full operation on 31 March 2011. However, South Africa has recently moved to a Twin Peaks model of financial regulation as set out in the Financial Sector Regulation Act 9 of 2017 (FSRA) with the result that the Consumer Protection Act will no longer apply to financial services – see s 10 FSRA. Instead the newly-established Financial Sector Conduct Authority will oversee conduct of business by financial institutions in terms of the envisaged Conduct of Financial Institutions Act (COFI) which is currently being drafted.

14 SA Code of Banking Practice 3.

15 World Bank *Tanzania diagnostic review of consumer protection and financial literacy* (November 2013) Vol II Comparison with good practices 5.

16 Admittedly, the financial crisis of 2008 led to the creation of the first consumer and financial protection department in the central Bank of Nigeria. See <https://bit.ly/2GVu6ir> (accessed on 27 November 2017).

17 See *Vanguard* 17 December 2013 “CBN pledges to protect consumers of financial goods, services”, available at <https://bit.ly/2rkVr6Z> (accessed on 26 November 2017).

18 Sanusi “The Nigeria banking industry: What went wrong and the way forward” (2010) 4, available at <https://bit.ly/2qvXk59> (accessed on 27 November 2016). Eight issues were identified, including “investor and consumer sophistications”.

19 See Central Bank of Nigeria circular FPR/DIR/CIR/GEN/01/020 of 16 August 2011, available at <https://bit.ly/1U1d03M> (accessed on 8 March 2015). The circular, addressed to all banks, discount houses and other financial institutions, expressed serious concern about the significant increase in the number of complaints the CBN received from customers of financial institutions, especially from the customers of banks in relation to various banking products and services.

20 *Ibid.*

21 *Ibid.*

In accordance with the powers vested in the CBN under the provisions of the Central Bank of Nigeria Act,²² a Consumer and Financial Protection Department (hereafter Consumer Protection Department or CPD) was established within the CBN with the mandate to protect and educate consumers of financial services.²³ The mandate of the CPD entails proactive oversight of the financial market in order to establish responsible business practices and market conduct in the best interest of financial consumers.²⁴ The CPD is also intended to serve as an avenue for redress when consumers have problems with their financial service providers who are regulated by CBN and to create effective consumer awareness through increased financial literacy amongst consumers.²⁵ The CPD accordingly provides impartial resolution of complaints that customers have been unable to resolve satisfactorily with their banks or financial (institutions) service providers.²⁶ However, many consumers of financial products and services are unaware of this dispute resolution service because there is no obligation or rules from the CBN mandating the banks to inform their customers of these processes.²⁷

Fortunately for Nigerian consumers of financial services and products, consumer protection in the Nigerian Banking Industry gained further momentum in 2014 with the introduction of a “Code of Conduct in the Nigerian Banking Industry” from which a Code of Banking Practice was extracted.²⁸ The Nigerian Code of Conduct in the Banking Industry is issued jointly by the CBN and The Chartered Institute of Bankers of Nigeria and endorsed by the Bankers’ Committee.²⁹ This Code, which indicates that it is a “professional code of ethics and business conduct”, is a comprehensive document that *inter alia* addresses the conduct of banks as members of the Chartered Institute of Bankers of Nigeria and of other employees engaged in the banking industry, as well as the conduct of banks in relation to their customers.

The purpose of this contribution is to emphasise the role that industry codes may play in promoting consumer protection in the banking industry. This contribution therefore focuses on a discussion of and a comparison between the salient features of the South African Code of Banking Practice and the Nigerian Code of Banking Practice (as extracted from the Nigerian Code of Conduct in

22 S 57 of the Central Bank of Nigeria Act of 2007 (CBN Act) empowers the CBN to make rules and regulations to guide and control the operation of all financial institutions under its supervision.

23 See CBN press release “CBN creates two new departments to enhance operations” (29 March 2012), available at <https://bit.ly/2HO1ZGt> (accessed on 26 November 2016).

24 See Consumer Protection Department *Consumer Protection Enlightenment Series* (April 2013) 3; *Vanguard* fn 17 above.

25 *Ibid.*

26 See Consumer Protection Department “Annual activity report for 2015”, available at <https://bit.ly/2Ih6J6X> (accessed on 8 September 2017).

27 Although the CBN has issued a number of operating guidelines and circulars in their duty to regulate or supervise banks, none of these operating guidelines mandates or places an obligation on the banks under their purview to inform the consumer. See Uzokwe “The central bank’s role in consumer protection: A possible model for Nigeria”, paper presented at the International Conference on Business, Economics, Management and Marketing, University of Oxford 15–17 August 2016.

28 Code of Conduct in the Nigerian Banking Industry (Professional Code of Ethics and Business Conduct), available at <https://bit.ly/2JSka0N> (accessed on 27 November 2016; hereafter Nigerian Code of Conduct).

29 Nigerian Code of Conduct 1.

the Banking Industry) in order to draw some conclusions on the extent of consumer protection afforded by these codes. Ultimately the aim is to use the South African code to benchmark the newly-introduced Nigerian Code of Banking Practice and to make proposals for reform in order to align the Nigerian code, if and where necessary, with certain good practices contained in the South African code, that will expand the level of consumer protection in the Nigerian banking industry.

2 SOUTH AFRICAN CODE OF BANKING PRACTICE

2.1 Scope of application

The South African Code of Banking Practice applies to “personal” and small business customers. A “personal customer” is “any individual who maintains an account or who receives other services from a bank” and therefore is a natural person.³⁰ A “small business” is a business with a turnover of less than R5 million for the last financial year.³¹ However, even small businesses with an annual turnover of R10 million or less per year may make use of the services of the banking ombudsman, as discussed below.³²

2.2 Binding force

Du Toit states that the South African Code of Banking Practice is much more than an ethical code or mere soft law.³³ Initially the 2004 version of the Code provided that none of the provisions of the Code would be legally binding in any court of law and that the Code’s provisions could not be used to influence the interpretation of the legal relationship between the customer and the bank.³⁴ It was also provided that it would not give rise to a trade custom or tacit contract or otherwise between the customer and the bank.³⁵ Schulze³⁶ has questioned the effectiveness of the above clause as he is of the opinion “that the attempt by the drafters of the Code to exclude the provisions of the Code from the realms of banking practice and trade usages was futile”. To this Du Toit adds that all major South African banks these days subscribe to the Code and attempt to adhere to its provisions, which in itself points to the existence of a trade usage.³⁷

In contrast to the above clause of the 2004 Code, the 2012 Code makes no mention of the binding nature of the Code in a court of law. However, Du Toit remarks that it would be possible to regard some of the provisions of the Code as terms implied into the bank-customer agreement by law (*naturalia*) derived from

30 Cl 12 of the South African Code of Banking Practice.

31 *Ibid.*

32 Ombudsman for Banking Services Terms of Reference para 3.1(b) (31 May 2011), available at <https://bit.ly/2jux2so> (accessed on 4 May 2018), hereinafter Terms of Reference.

33 Du Toit 569.

34 Cl 1 of the 2004 version of the South African Code of Banking Practice.

35 *Ibid.*

36 “The sources of the South African Code of banking law – A twenty-first century perspective part 1” 2002 *SA Merc LJ* 438 456.

37 Du Toit 570. Du Toit suggests that if one accepts that knowledge of the trade usage by a party is not necessarily required, these terms implied by trade usage may safely be classified as *naturalia*. Cf Van der Merwe *et al Contract: General principles* (2016) 277 para 9.137; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531G.

trade usage.³⁸ In his opinion, it is also possible that a trade usage may “harden” into a rule of law as all banks who are members of the Banking Association of South Africa (BASA) should apply and promote the Code to their clients, and accordingly the provisions of the Code might well be regarded “as universally and uniformly observed within the banking industry”.³⁹

2.3 Objectives of the Code

It is stated that the Code will serve as a “guide” for the consumer when he transacts with the bank and will help the consumer to understand his own rights and responsibilities as well as those of the bank in serving him.⁴⁰ The member banks’ commitment to meeting the standards of conduct set out in the Code is expressed, indicating that such bank’s relationship with the customer will be guided by four principles, namely, fairness, transparency, accountability and reliability.⁴¹

The objectives of the Code therefore are⁴² to promote good banking practices by setting minimum standards for the bank when dealing with its customer; increase transparency so that the customer can have a better understanding of what he can reasonably expect of the products and services offered by the bank; promote a fair and open relationship between the customer and the bank; and foster confidence in the banking system.⁴³

2.4 Language

Language as a medium to communicate information is pivotally important from a consumer protection perspective.⁴⁴ It is trite that language is often a barrier to a proper understanding of the nature and implications of financial products and services, especially insofar as less literate consumers are concerned. The Code employs plain and simple language to convey its contents to consumers and to explain the bank and the consumer’s rights and responsibilities pertaining to the matters addressed in the Code. Informal terms such as “you” are used to describe the customer (consumer) and “we” or “us” to describe the bank. The Code

38 Du Toit 570.

39 *Ibid.* He points out that it would not matter if a bank occasionally departs from the Code. He further indicates (572) that even if one were to insist on the requirement that the trade usage must have been long-standing to be recognised by a court of law, many of the provisions from the 2012 Code were taken from, or are similar to, provisions in previous versions and he argues that they therefore may still be regarded as long-established or because a particular usage probably already existed even before its inclusion in any version of the Code.

40 South African Code of Banking Practice 3.

41 *Ibid.*

42 *Idem* 4.

43 Confidence in the banking sector is a key ingredient in the maintenance of financial stability which since the 2008 Global Financial Crisis has become the core objective of financial regulation. See further Bieri “Financial stability, the Basel Process and the new geography of regulation” 2009 *Cambridge J of Regions, Economy and Society* 303; Dobravolskas and Seiranov “Financial stability as goal of the post-Crisis regulatory reforms” 2011 *Business Systems and Economic Reforms* 101; Allen “What is ‘financial stability’? The need for some common language in international financial regulation” 2014 *Georgetown J of Int L* 929.

44 Stoop and Churr “Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008” 2013 *PELJ* 514.

further indicates that the customer may expect the bank to provide him with information in a plain and understandable language format.⁴⁵

2.5 Aspects covered by the Code

The Code is a voluminous and comprehensive document that covers the following topics that are common to the bank-customer relationship: customer entitlements and responsibilities;⁴⁶ key commitments by banks;⁴⁷ access to banking services;⁴⁸ principles of conduct;⁴⁹ confidentiality and privacy; equal treatment; marketing, advertising, promotion, loyalty and rewards programmes; credit insurance; disclosure; charges and fees; interest rates and copies of documents; accounts;⁵⁰ credit;⁵¹ payment services⁵² and dispute resolution.⁵³ It also contains provisions relating to the review of the Code, useful definitions and certain standard terminology.⁵⁴

Du Toit points out that many of the provisions of the Code simply set out the current common law or typical contractual provisions or may be reflected in comparable statutory provisions found *inter alia* in the National Credit Act⁵⁵ or might even reiterate an aspect flowing from the Bill of Rights contained in the Constitution.⁵⁶ However, explaining these rights and obligations in the Code promotes greater consumer protection as many consumers who would otherwise be unaware of their various rights strewn across many pieces of legislation are now able to consult the Code for a consolidated overview of these rights expressed in accessible and comprehensible language.

2.6 Dispute resolution and awards

Effective dispute resolution is crucial to consumer protection as it provides a much-needed platform for redress.⁵⁷ Accordingly disputes regarding matters dealt with in the Code are handled by the Ombudsman for Banking Services if the bank and the customer are not able to find a solution to a dispute themselves.⁵⁸ In the Code the participating banks indicate their acceptance of the

45 South African Code of Banking Practice 4.

46 Cl 3 of the South African Code of Banking Practice.

47 Cl 4.

48 Cl 5.

49 Cl 6.

50 Cl 7.

51 Cl 8.

52 Cl 9.

53 Cl 10.

54 Cl 11–13.

55 34 of 2005.

56 Du Toit 574; Constitution of the Republic of South Africa, 1996.

57 OECD “Consumer dispute resolution and redress in the global marketplace”, available at <https://bit.ly/2wcSR91> (accessed on 3 May 2018).

58 The ombudsman scheme was recognised by the Financial Services Ombud Schemes Council in terms of s 11 of the Financial Services Ombud Schemes Act 37 of 2004. Cf Notification of Recognition of Schemes 2006 BN 120 in GG 29336 of 2006. However, this Act has been repealed and a new ombudsman structure was introduced by the Financial Sector Regulation Act. For a detailed discussion of the role of the Ombudsman for Banking Services, see Maseti “The Ombudsman for Banking Services: Mandate, jurisdiction, interesting case studies and its place within the Twin Peaks model”, paper presented at Annual

jurisdiction of the Ombudsman for Banking Services to mediate, to make binding determinations based on the Code and on the law where appropriate, and to make recommendations in other circumstances including those based on equity.⁵⁹ A determination by the Ombudsman for Banking Services may be made an order of court.⁶⁰ If a bank refuses to abide by a recommendation of the Ombudsman, the Ombudsman may publish the recommendation as well as the relevant bank's refusal to comply. Such publication may cause reputational damage to a bank as it may brand it in the public eye as an institution that disregards consumer rights. Accordingly banks may rather opt to comply with a recommendation by the Ombudsman than be subjected to the "naming and shaming" that follows upon not abiding by rulings of the Ombud.

The Ombud may make a recommendation or determination of up to R2 million, which may include awards for damages and interest or amounts for distress and inconvenience not exceeding R50 000.⁶¹ Important to note from a consumer protection perspective is that the Ombud will also consider fairness in making a ruling with the result that in certain instances consumers may be afforded better redress by the Ombud than they would otherwise get in a court, where the hard law may be against them. Also, the process before the Ombud is informal and inquisitorial as opposed to the adversarial processes of the courts.⁶²

However, a customer of a bank is not obliged to make use of the ombud services and may approach a court if he does not wish to go the ombud-route.⁶³ However, consumers may benefit from referring disputes to the banking ombud because the ombud services are free and the turn-around time for resolution of disputes are quick as opposed to court litigation that is both costly and cumbersome. Approaching the ombud provides a cheap and relatively speedy form of redress – especially to indigent consumers.

3 CODE OF CONDUCT IN THE NIGERIAN BANKING INDUSTRY AND NIGERIAN CODE OF BANKING PRACTICE

3.1 Scope of application

The Code of Conduct in the Nigerian Banking Industry is described on its front page as a "professional code of ethics and business conduct" and is broader than merely a code of banking practice detailing how banks will treat their customers. The Code of Conduct applies to all executive directors, managers, officers, supervisors and bank employees.⁶⁴ As indicated above, a Code of Banking Practice produced by the General Assembly of Bank Chief Executives under the auspices of the Chartered Institute of Bankers of Nigeria has been extracted from Chapter 3 of the more comprehensive Code of Conduct in the Nigerian Banking Industry

Banking Law Conference (ABLU) at the University of Johannesburg, October 2016 as contained in the *ABLU conference bundle* (hereafter Maseti).

59 South African Code of Banking Practice 3.

60 *Ibid.*

61 Terms of Reference paras 1.3(a) and 3.2(a)(ii).

62 Maseti 2.

63 Terms of Reference para 3.2. Even where a complaint has been referred to the ombud it is still open to the customer, prior to a determination by the ombud, to terminate the ombud's handling of the complaint and to approach a court.

64 Para 1.2. of the Code. For a definition of "employee" see para 2 of the Code.

(hereafter Code of Conduct). As set out in the discussion that follows, the Code of Conduct contains provisions pertaining to the bank-customer relationship and that can be said to have a consumer protection dimension, not only in Chapter 3 thereof but also in other parts of the Code. Accordingly these provisions are referred to for purposes of completeness but also eventually to consider whether they should not rather be removed from elsewhere in the Code and incorporated into Chapter 3 from which the Code of Banking Practice has been extracted. Given that the Nigerian Code of Banking Practice has been extracted from the contents of the more comprehensive Code of Conduct but does not capture all of the detailed contained in the Code of Conduct, an overview of the more comprehensive Code is necessary to contextualise the discussion of the Code of Banking Practice. The Code of Banking Practice does not contain a clause setting out its scope of application.

3 2 Binding force

There is no indication in the Code of Conduct or in the Code of Banking Practice whether their provisions have binding force. However, one may argue that the practices captured in the Code of Conduct and subsequently detailed in the Code of Banking Practice represent practices that through usage have become implied terms of the bank-customer relationship in Nigeria and, therefore, will be binding in a court of law.

3 3 Objectives

The preamble to the comprehensive Code of Conduct states that the overall objective of the Code is to ensure “strict adherence to best banking practices and strong commitment to ethical and professional standards in behaviour in the Nigerian banking industry”.⁶⁵ The Code’s objectives are set out in paragraph 3(a)–(j) thereof and insofar as consumer protection is concerned, the Code provides *inter alia* that it will serve as a framework

- (a) to guide members in meeting their obligations toward their customers and improving the standard of service and quality of banking products;⁶⁶
- (b) to maintain the best banking practice and strong commitment to sound ethical and professional standards in the banking industry;⁶⁷ and to
- (c) enable members to provide a policy to adhere to generally accepted principles of honesty, integrity and fairness so as to uphold the mutual trust and public confidence bestowed upon them.⁶⁸

The other objectives listed in paragraph 3 are directed at honesty and fairness of employees in conducting their duties, compliance with legislation and other matters relating to the manner in which employees must conduct their duties.⁶⁹ Therefore, although it is true that consumers are protected by imposing upon bank employees the duty to act honestly and fairly in doing their jobs, an overview of the objectives mentioned in paragraph 3 indicates that the focus of the

⁶⁵ Para 1.1 of the Nigerian Code.

⁶⁶ Para 3(a).

⁶⁷ Para 3(c).

⁶⁸ Para 3(h).

⁶⁹ See para 3(b), (d), (e), (f), (g), (i) and (j).

Code of Conduct is markedly more upon the manner in which bank employees must conduct their duties than on the specific protection of consumers.

3.4 Language

The Nigerian Code of Conduct is written in English and commences with a list of acronyms, definitions and interpretational guidelines. Sentences are relatively short, well-constructed and capable of easy interpretation and therefore one may say that it is written in fairly plain and simple language.

3.5 Aspects covered by the Codes

The Code of Conduct is divided into the following sections: Section 1: Professional code of conduct for individual members; Section 2: Unethical practices/unprofessional conduct for members; Section 3: Banks and their customers; Section 4: Infringements and sanctions; and Section 5: Establishment of the CBIN Investigating Panel and Disciplinary Tribunal.

Some aspects that also have a consumer protection dimension are scattered through Sections 1 and 2 of the Code despite Section 3 being devoted specifically to consumer protection in the context of the bank-customer relationship. For example, Section 1 sets out certain core principles of professional conduct for individual members of the Chartered Institute of Bankers in Nigeria and requires an individual member to conduct himself towards customers and third parties with honesty, integrity, diligence, credibility, transparency, fairness and trust.⁷⁰ It also requires a banker to attain appropriate levels of professional education or certification, training, competence, skill and expertise which clearly is to the benefit of bank customers as it provides assurance that bankers will generally have the level of skills customers would reasonably be entitled to expect from them. This is complemented by the obligation that the Code imposes on a banker to exercise care and caution whilst discharging his duties.⁷¹ The Code also contains a prohibition against false or misleading dissemination of information to a bank customer;⁷² a prohibition against discriminatory conduct; and “verbal *and physical* assaults” on customers.⁷³ It further prohibits the unauthorised intentional or reckless disclosure of confidential information regarding a bank customer or his business.⁷⁴ Conflicts of interest between the interests of a bank and that of its customer are also required to be disclosed to such customer “at the earliest opportunity”.⁷⁵

Section 2 of the Code which contains provisions directed against various instances of unethical and fraudulent conduct by members of the Chartered Institute of Bankers in Nigeria essentially is directed at getting members to comply with high ethical and professional standards of conduct and practice “within and outside the banking industry”. It *inter alia* contains a number of consumer protection provisions such as a prohibition against the unauthorised use of

70 Para 1.1 (i).

71 Para 1.1(v).

72 Para 1.2(i).

73 Own emphasis.

74 Para 1.2(ii). The instances in which such disclosure is permitted are set out in this paragraph and the bank employee is also required to sign a deed of secrecy to ensure compliance with this provision.

75 Para 1.3 (i).

customers' names for certain purposes⁷⁶ and exploiting the ignorance of consumers through excessive charges.⁷⁷ It also prohibits lack of appropriate disclosure in dealing with customers⁷⁸ and prohibits the imposition of undisclosed charges or charges and fees alien to the *Guide to bank charges* on customers' accounts.⁷⁹

Section 3 which is devoted to banks and their customers spans approximately 13 pages and commences by setting out certain broad and generalised principles that govern the relationship between banks and their customers. It mandates banks to set out the standards of good banking practice which they shall follow in their dealings with their customers and other consumers⁸⁰ and requires banks to conduct their business in the best ethical and professional manner consistent with global best practice.⁸¹ Banks are obliged to provide and enforce guidelines to make their staff act ethically and professionally in all their dealings with customers and are required to assist customers to understand the operations, rules, guidelines and regulations as well as products and services and known risks relating to banking operations and services.⁸² They are also to inform their customers of the products and services which are best suited to their needs.⁸³ Banks are moreover required to maintain and sustain public trust and confidence in the banking system to ensure its integrity and security⁸⁴ and, notably, to "always place their customers' interests above all others"⁸⁵ and to "always meet their commitments".⁸⁶ Banks are required to repay depositors at maturity, deliver on their trading contracts and lend on agreed terms and conditions⁸⁷ and timeously disclose commissions.⁸⁸ They are further obliged to bring various communication channels through which information may be conveyed to the attention of their customers,⁸⁹ inform customers of all financial transactions in their accounts,⁹⁰ strictly observe the mandates of their customers,⁹¹ put a whistleblowing policy and framework in place, and sanction employees appropriately for violation of the Code.⁹²

Selected aspects of the bank-customer relationship are subsequently pertinently albeit very briefly addressed, namely, the opening of an account, terms and

76 Para 2.2(b).

77 Para 2.2 (d).

78 Para 2.3(a).

79 Para 2.3(c) and (d).

80 Para 3.1(a).

81 Para 3.1(b).

82 Para 3.1(d)

83 Para 3.1(e).

84 Para 3.1(f). Maintenance of public confidence is essential to the maintenance of financial stability and clearly a stable financial sector is the apex protection that can be afforded to bank customers and other consumers.

85 Para 3.1(h).

86 Para 3.1(i).

87 Para 3.1(j).

88 Para 3.1(m). These commissions are required to be disclosed at the "beginning" which will probably be interpreted to mean that they must be disclosed prior to being charged.

89 Para 3.1(q).

90 Para 3.1(r).

91 Para 3.1(u).

92 Para 3.1(v) and (w). The sanctioning of employees will probably contribute towards consumer protection as the risk of being sanctioned is likely to deter employees from conduct which is prohibited by the Code and which may cause harm to consumers.

conditions, charges and interest payable *by* customers or consumers, interest payable *to* consumers, handling of customer complaints, confidentiality of customer information, status enquiries, marketing services, foreign exchange services and cross-border payment, guarantees and other types of third party securities and inter-bank transactions.⁹³

In the preamble to the Code of Banking Practice it is stated, similar to paragraph 1.1 of the Code of Conduct, that the overall objectives of the Code of Banking Practice are to ensure the highest level of adherence to good banking practice and a strong commitment to high ethical standards in the banker-customer relationship.⁹⁴

The Code of Banking Practice subsequently sets out certain general standards expected of bankers and banking institutions, namely: banks and bankers will operate within the legal framework; they will follow the best professional practice in the global industry; banks will always place their depositors' interest before all other; banks will always meet their commitments; repay depositors at maturity on the agreed terms; meet their trade engagements; meet delivery on their trading contracts at maturity at agreed rates; and will always lend on agreed terms. It is to be noted that the above "standards" also appear in Section 3 of the Code of Conduct under the heading "Governing Principles" and that only selective parts of paragraph 3.1 of the Code of Conduct have been extracted to form the "General Standards" expressed in the Code of Banking Practice.⁹⁵ The latter also mentions aspects that are not strictly of a consumer-protection character. These aspects relate to the resolution of disputes between banks, dealings with respectable parties, not taking any form of gratification for their services, not paying brokerage to members and following best practice in recruiting and employment policies.⁹⁶ It is also stated that bankers should not harass their staff or colleagues and should not conduct marketing that impedes healthy competition.⁹⁷ These matters appear to deal with the ethical conduct of bankers and competition between banks and although it is conceded that it may eventually lead to better service delivery to and better prices for consumers, the appropriateness of placing these provisions in a code of banking practice aimed at the bank-customer relationship *per se* is questionable.

Page 3 of the Nigerian Code of Banking Practice bears the heading "Code of Conduct" and sets out the following "Governing Principles" which, although not replicated verbatim, mirror the governing principles set out in paragraph 3.1(a), (b), (c), (d), (e) and (f) of the Code of Conduct, namely, to set out the standards of good banking practice which banks follow in their dealings with their customers; to provide guidelines for banks to make them act fairly and reasonably in all their dealings with customers and other banks; to cause banks to help customers to understand the operations of their accounts and to give them a good understanding of their banking services including known risks relating to the

93 Para 3.2–3.11.

94 The preamble then refers to the Ethics Committee of the General Assembly of Bank Chief Executives and its functions and powers.

95 The standards only cover the principles set out in para 3.1(g), (h), (i) and (j).

96 These aspects are dealt with in the Nigerian Code of Conduct under para 3.1(k)–(o) of the "Governing Principles".

97 Nigerian Code of Banking Practice 2.

operations; and to maintain confidence in the security and integrity of the banking system.⁹⁸

It is further stated that banks are to provide basic information to customers and that this should generally occur at the time when an account is opened. Bank branches should also make information available to consumers and it is indicated that banks will provide additional information and guidelines about specific services at any time.⁹⁹

The “Governing Principles” are followed by another part of the Code titled “Customers and their Banks” (as opposed to Section 3 of the Code of Conduct that is titled “Banks and their Customers”). This part contains several paragraphs dealing with the following: opening an account;¹⁰⁰ terms and conditions;¹⁰¹ charges and interest payable by customers;¹⁰² interest payable to a customer;¹⁰³ handling customer’s complaints;¹⁰⁴ confidentiality of customer information;¹⁰⁵ status enquiries (banker’s references);¹⁰⁶ marketing of services;¹⁰⁷ foreign exchange services and cross-border payments;¹⁰⁸ guarantees and other forms of third party security;¹⁰⁹ and inter-bank transactions.¹¹⁰

It is to be noted that when comparing section 3 of the Nigerian Code of Conduct with the Nigerian Code of Banking Practice it appears that the Code of Banking Practice addresses the very same topics that appear in paragraph 3.2 to 3.12 of the Code of Conduct, but that it does so in a much more concise manner. To give an example: paragraph 3.2 of the Code of Conduct is titled “Opening an account” and has 5 subparagraphs. Paragraph 2 of the Code of Banking Practice is also titled “Opening an account” but has only 3 paragraphs of which the latter two comprise only one sentence each – thus not dealing with all the issues dealt with under this heading in the more comprehensive Code of Conduct. It appears that the paragraphs in the Code of Conduct that deal with the response to status enquiries from other banks and the putting in place of Know Your Customer (KYC) processes were not replicated – possibly because they deal more with bank processes than aspects of the bank-customer relationship. Paragraph 3 of the Code of Banking Practice is titled “Terms and conditions” and at first glance appears to mirror to some extent the provisions of paragraph 3.2 of the Code of Conduct. However, it should be noted that the Code of Conduct only contains 3 subparagraphs under this heading whereas the Code of Banking Practice, upon

98 In this regard, it is stated that banks must recognise that their systems and technology need to be reliable to protect their customers and themselves. The counterpart of this provision as it appears in the Code of Conduct is stated as “(f) Maintain and sustain public trust and confidence in the banking system to ensure its integrity and security”.

99 Para 1.2 of Nigerian Code of Banking Practice.

100 Para 2.

101 Para 3. This part deals very briefly with the use of simple language, notifications (in general) to customers and notification to close an account as well as statements of account.

102 Para 4.

103 Para 5.

104 Para 6.

105 Para 7.

106 Para 8.

107 Para 9.

108 Para 10.

109 Para 11.

110 Para 12.

closer scrutiny, at least contains one *additional* aspect not dealt with in the Code of Conduct under this heading, namely, the provision that banks will give reasonable notice before closing a consumer's account.¹¹¹

3 6 Dispute resolution and awards

The Code of Conduct does not specifically provide any consumer redress but rather sets out "disciplinary" measures to be taken against members who fail to adhere to the provisions of the Code, dealing separately with individual and corporate members. Matters involving individual members will be dealt with by the Chartered Institute of Bankers of Nigeria Investigating Panel and, where necessary, the Chartered Institute of Bankers of Nigeria Disciplinary Tribunal.¹¹²

The Code of Banking Practice does not deal with dispute resolution in any detail. It merely states in the preamble that matters of ethics will be referred to the Ethics Committee of the General Assembly of Bank Chief Executives. Paragraph 6 of the Code that deals with complaints handling states that each bank will have its own internal procedure for complaint handling and then further provides some brief information in this regard. No mention is made, for example, of the Consumer Protection Department in the CBN.

4 DISCUSSION

4 1 Areas of consumer protection not addressed by the Nigerian Code of Banking Practice

The Nigerian Code of Banking Practice (extracted from section 3 of the more comprehensive Nigerian Code of Conduct in the Banking Industry) addresses certain aspects of the bank-customer relationship but does not address comprehensively all those aspects which one would generally have expected to be addressed in such a code. Particularly it does not deal with vitally important issues such as access to banking and credit or payment services. It also does not deal with equal treatment of consumers, credit insurance, disclosure, interest rates and copies of documents. As is seen in section 4 3 below, although the Nigerian code deals with other aspects such as accounts and marketing to consumers, these

111 It should be noted that para 3.5 of the Nigerian Code of Banking Practice provides that "all terms and conditions should be in line with prevailing laws". Although the Nigerian Code of Conduct does not contain such a specific provision under the Heading "Terms and Conditions to Customers" the words "legally enforceable" in para 3.3(a) of the Nigerian Code of Conduct is probably where para 3.5 of the Nigerian Code of Banking Practice has its origin.

112 Para 4.1 read with para 4.3 of the Nigerian Code. The Code further provides for complaints against members to be addressed in writing to the Registrar or Chief Executive Officer of the Institute, who must acknowledge receipt in writing within 7 days following such receipt and forward a copy of the complaint to the defendant and other relevant parties. The Institute then has to collate the complaint (petition) and also the submissions by the defendant and refer them to the CIBN investigating panel who must then investigate the matter in order to decide whether or not it should be referred to the CIBN Disciplinary Tribunal. Where a matter is referred to the Tribunal, the Panel acts as "prosecutor". The Tribunal must then consider and determine the matter and its determinations are binding on all parties concerned. At all stages before the Panel and Tribunal parties are allowed legal representation but legal representatives are not allowed to appear without their clients being present at the proceedings.

aspects are not addressed in sufficient detail and, as is pointed out, in some instances aspects in this context that are vital are not addressed at all.

4.2 Areas of consumer protection addressed

As appears from the discussion above, the South African and Nigerian codes include a number of common aspects of the bank-customer relationship that both codes address. However, the main difference between the two codes in this regard is the detail with which these common aspects are addressed and the specific features of these aspects that are given attention in the two codes. Although it is conceded that a code should not become cluttered with too much information, a sufficient level of information regarding the rights and obligations mentioned in the code should be provided nevertheless, otherwise the provisions of the code may be incomplete and unclear and will fail in their attempt to inform consumers appropriately of their rights and obligations.

4.3 Level of consumer protection

In order to compare the level of consumer protection with regard to specific transactions between banks and their customers as provided for in the South African and Nigerian codes of banking practice respectively, the manner in which accounts are handled serves as a good example.

The South African Code of Banking Practice deals extensively with accounts over the course of eight paragraphs spanning seven pages, and explains in simple language what the consumer may expect with regard to the opening of an account; switching of a transaction account; closing an account; statements of account; set-off; cards and pins; protecting of accounts; and responsibility for losses. It also indicates to the consumer those instances where he is obliged to take certain steps to obtain appropriate service delivery and protection of certain of his rights.¹¹³

To illustrate the level of consumer protection afforded by the South African code one can have regard to the aspects of the opening of as well as the switching of an account, being the first two paragraphs that appear under the heading "accounts" in paragraph 7. As indicated, these paragraphs are couched in plain language and use the terms "you" (in respect of the customer) and "we" or "us" (in respect of the bank) which heightens the accessibility of the language and provides the consumer with a clear picture regarding the opening and switching of an account and what he may expect regarding the bank's conduct in this context. Paragraph 7.1 which deals with the opening of an account commences by stating that before or at the time of opening an account, the customer will be advised of his rights and obligations relating to that account.¹¹⁴ It is stated specifically that this will include information about the type of account and how and by whom the account may be operated; how funds may be deposited in or withdrawn from the account; the usual time taken for clearing a cheque or a payment instrument credited to the account; any minimum balance requirements and the charges payable if the balance falls below the prescribed minimum; any rights of set-off claimed by the bank and the requirements for closing the account.

¹¹³ Paras 7.1–7.8 of the South African Code of Banking Practice.

¹¹⁴ Para 7.1.

The customer is further advised that the bank is required by law to verify the customer's identity when he seeks to open an account, stating also the reason for this requirement. It is explained that the customer will be requested to provide his bank with the relevant identification and verification documents upon first opening an account with the bank, depending on the nature of the account he wishes to open. It further adds that the bank may also require the customer to update the identification and verification documentation regularly, including when there is a change in his circumstances.¹¹⁵

The customer is also informed in the Code as to what to expect when switching a transaction account to a new bank.¹¹⁶ It is stated that the banks are committed to making it as seamless and easy as possible and reasonable for all personal transaction account customers to switch banks. The Code explains that deposits and loans are individual contracts which the consumer may terminate according to the contractual terms. It warns the consumer that banks compete with each other to attract new transaction account customers and cautions the consumer to compare the individual products, services, fees and charges of various banks. The customer is further advised that a key aspect of switching banks involves transferring debit orders and regular credit payments (for example, salary, grant and pension payments) from the customer's old account to his new account. In this regard it is further stated that although banks are committed to ensuring that this process is smooth, the co-operation of all parties involved (especially debit order originators and salary, income and benefit payers) is required. The consumer therefore is advised of his role in respect of his new bank; his role in respect of his old bank; what he may expect regarding the role of his new bank; and the role of his old bank in the process of switching of accounts.¹¹⁷

With regard to his role in respect of his new bank the Code states that as part of switching accounts from one bank to another, the customer should first open a new account with the new bank and that he may request a "switching guide" from the new bank that will provide him with all the necessary information needed to switch banks. The customer is further advised that he will need to provide the new bank with the appropriate information to transfer debit orders, arrange new stop orders and, if relevant, load his payment beneficiaries. He is also advised that when the new bank informs him of any such third parties as debit order originators that would not accept instructions from the new bank, he must have the account details changed with each party himself. The customer is subsequently told to inform his employer of his new bank account details for his salary to be paid into.¹¹⁸

As regards the customer's role in respect of his old bank, he is advised to give his old bank a clear instruction to close his account and also when this must be done. The customer is further informed to request the old bank to keep the old account open for at least six weeks, in order to ensure that all his transactions have been switched to the new account. In addition he is advised to ensure that there are sufficient funds in the old account to cover any payments that are not

115 An explanation is then also provided of aspects that would constitute a change in circumstances, eg, change of name upon marriage, change of residential address or change in company or close corporation details.

116 Para 7.2.

117 *Ibid.*

118 *Ibid.*

switched in a timely fashion due to the actions of third parties. Also, the customer is told to contact those transaction originators who, for whatever reason, fail to switch account numbers within a reasonable period (for example, within four weeks of notification).¹¹⁹

With respect to the role of his new bank, the consumer is advised that the new bank will provide him with a copy of the terms and conditions of his new account, details of the standard fees and charges and interest rates that apply, together with a point of contact to assist with any queries. The customer is further informed that the new bank may advise him on how to transfer debit order and salary payments, arrange new stop orders and, if relevant, load his payment beneficiaries. He is also informed that his new bank should remind him to include any annual debit orders or stop orders in his switching instructions. The Code further indicates that when the new bank receives a signed debit order or salary redirect form or instruction, the new bank may inform all relevant existing debit order originators of his new account details for future deductions. The customer is advised that the new bank will inform him of anybody such as debit order originators or his employer that would not accept these instructions from the new bank and that in such instances the customer will be responsible to have the account details changed with each party himself.¹²⁰

With regard to the role of the customer's old bank the Code indicates that he may be required to provide his new bank with information of the transactions that he wishes to be switched to the new account. His old bank will then assist him, if requested, by providing the following basic transaction account information within 10 business days of receiving proper instructions from the client regarding the closing of the account: up to three months' statements; a list of stop orders loaded; a list of beneficiaries loaded; and any supplementary or linked cards or accounts which may be affected by the switching. The client is also informed that in order to prevent fraud, his old bank may require positive and verifiable identification from the consumer when the latter instructs it to close his account. Finally the customer is informed that his old bank will ensure that all its internal divisions or subsidiaries act on his instruction to switch his debit orders which the old bank collects to his new account, and that no artificial or unreasonable hurdles or demands are raised to prevent him from switching bank accounts.¹²¹

The Nigerian Code of Banking Practice likewise deals with the opening of an account in paragraph 3.2 which states five things that banks must do. In the first place banks must, as prescribed by the Central Bank of Nigeria under Know your Customer and his Business (KYBC) principles, satisfy themselves about the identity, address and business of the person seeking to open and operate a bank account with them in order to assist in protecting their customers, members of the public and themselves and the banking system against fraud and other misuse of the banking system. Banks are further obliged to provide to prospective customers at the time of opening an account the details of identification requirements and other documents necessary to ensure that minimum KYCB requirements are in place. It is further stated that banks must educate customers on the

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

proper handling and security of cheque books and other security or electronic instruments such as ATM, mobile home or internet banking and other payment channels. Banks must also respond to enquiries from other banks and financial institutions within two weeks of receipt of such request and will put in place the KYCB process and ensure compliance in line with the regulatory requirements.¹²²

It is clear that the provisions relating to accounts in the South African Code of Banking Practice are considerably more comprehensive in nature than the provisions of the Nigerian Code of Banking Practice relating to accounts. The South African code spells out in much more detail and hence more clearly what the customer's entitlements and responsibilities are with regard to various aspects of accounts, ranging from the stage that an account is opened until the closing thereof. Adequate disclosure of information is a vital component of consumer protection and it is evident that the South African consumer is afforded much better protection through sufficient disclosure of information than a consumer who consults the Nigerian code in order to establish his entitlements and responsibilities regarding his account *vis-à-vis* the bank.

5 FINAL REMARKS

In Nigeria and South Africa, as they are developing countries, a large percentage of the population that do business with banks may be regarded as vulnerable consumers lacking adequate levels of financial literacy. In many instances, these consumers do not have sufficient knowledge of the bank-customer relationship and their respective duties and obligations with regard to "simple" matters such as opening or switching a bank account for saving purposes or to have their salary transferred into, not even to mention their predicament when it comes to more complex banking transactions such as those involving electronic funds transfers.

The advantage of dedicating a code of banking practice to an explanation of the rights and obligations of the parties in respect of various general types of transactions that consumers enter into with their banks on a daily basis is that it not only makes clear the standards that the banks regard themselves to be bound to, but it also explains to the consumer in plain accessible language exactly what he may expect the bank to do in a given situation. It also explains what the consumer himself should do in order to protect his interests not only with respect to the bank that he deals with but also with regard to other banks and third parties.

The authors acknowledge the fact that Nigeria has taken positive steps in affording consumers of financial services, specifically in the banking industry, some measure of consumer protection and that it is making progress in this regard. However, the point that this contribution wishes to make is that a code of banking practice is a good place to start the journey of extending greater protection to consumers of banking services as it can be done in a manner that is more accessible to consumers than the formal language generally employed in legislation. It may also enhance consumer protection by grouping aspects together that might otherwise be scattered over various pieces of legislation or be hidden away in the nooks and crannies of the common law, thus making it easier for the consumer to gauge the complete range of his entitlements and responsibilities, for instance relating to the opening and closing of bank accounts. Another advantage

122 Para 3.2(a)–(c).

of codes of banking practice is the ease with which they can be amended and updated as no protracted legislative processes are required. The South African Code of Banking Practice is by no means held out to be perfect but, as pointed out by the World Bank, it is a good benchmarking example.

Given that the consumer protection aspects in the Nigerian Code of Conduct and the Nigerian Code of Banking Practice are not fully aligned and also that there are aspects relating to consumer protection that are contained in other parts of the Code of Conduct than in Section 3 where the bank-customer relationship is addressed, it is suggested that an attempt first be made to locate all the provisions in the Code of Conduct that have a consumer protection nature and thereupon to ensure that these matters are also captured in the Code of Banking Practice. It is further suggested that it might be a worthwhile exercise for the association of bankers in Nigeria to compare their Code of Banking Practice with the South African Code in order to determine gaps in the said code where pertinent aspects relating to the code's scope of application and rights and obligations of banks and customers are left unaddressed. Attention should further be given to the detail in which the aspects mentioned in the Nigerian Code of Banking Practice are addressed in order to ensure that it is comprehensive enough for a consumer to be sufficiently appraised of such rights and obligations. Finally, it is suggested that, in addition to the Consumer Protection Department in the CBN, Nigeria should consider establishing an ombudsman for banking services that can enforce the code of banking practice and operate on terms similar to that of the South African ombud for banking services, including applying fairness as a basis for its decisions.